# QUINQUENNIAL DIGEST (1941–1945)

#### Volume I.



BY

R. NARAYANAS WAMI IYER, B.A., B.L. (Advocate, High Court, Madras)

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#### ABBREVIATIONS EXPLAINED.

#### Reports.

All or A.	Indian Law Reports, Allahabad Series.
All or A.  I.L.R. (1941) All.	• •
A.L.J	Allahabad Law Journal.
A.L.W	Allahabad Law Weekly.
A.W.R	Allahabad Weekly Reporter.
A.W.R	Allahabad Criminal Gases.
A.I.R. 1941 All. or 1941 A	All India Reporter, 1941 Allahabad.
A.M.L.J	Ajmer-Merwara Law Journal.
Bom. or B,	
I.L.R. (1941) Bom	Indian Law Reports, Bombay Series.
Bom.L.R.	Bombay Law Reporter.
A.I.R. 1941 Bom. or 1941 Bom	All India Reporter, 1941 Bombay.
Bur. L. T.	Burma Law Times.
Bur.L.J.	Burma Law Journal.
Bur.IT	TO The second se
Cal or C	•
Cal. or C. I.L.R. (1941) 1 & 2 Cal.	Indian Law Reports, Calcutta Series.
CII	Coloute Law Invest
G.L.J	
Cr.L.J.	Criminal Law Journal.
G.W.N.	Calcutta Weekly Notes.
Comp. C.	Company Cases.
Comp. C.  A.I.R. 1941 Cal. or 1941 Cal  C.L.T.  A.I.R. 1941 F.C.	All India Reporter, 1941 Calcutta.
C.L.T.	Cuttack Law Times.
A.I.R. 1941 F.C	All India Reporter, 1941 Federal Court.
Fed. L. J	Federal Law Journal.
F. L. R	Federal Law Reports.
I. A	Law Reports, Indian Appeals.
A.I.R. 1941 P.C.	All India Reporter, 1941 Privy Council.
I. A	Indian Cases.
T CYL VS	
4.1.R.	Income-tax Reports.
RPC - PRC - PA - PR - RC	Income-tax Reports.  Indian Rulings Privy Council, Federal Council
R.P.C.; R.F.G.; R.A.; R.B.; R.C.	
R.P.C.; R.F.G.; R.A.; R.B.; R.C R.M.; R.N.; R.O.; R.P.; R.R	.; R.S All., Bom., Cal., Lah., Mad., Nag., Oud
R.M.; R.N.; R.O.; R.P.; R.R	.; R.S All., Bom., Cal., Lah., Mad., Nag., Oud Pat., Rang., Sind.
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ARREVIATIONS E	$\mathbb{X}P$	LA	II	ŒD.
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				Oudh Law Reports.
O.L.R.	,		• •	Oudh Weekly Notes.
. O.W.N		• •	• •	
				Punjab Record.
				Punjab Law Reporter.
P.L.R		• •		Indian Law Reports, Patna Series
Pat. or P			• •	mulan nav record, rame corres
P.W.R				Punjab Weekly Reporter.
1.44.17	That am your Dat			All India Reporter, 1941 Patna.
A.I.K. 1941	Pat. or 1941 Pat.	• •		Patna Law Journal.
Pat.L.J.		• •	• •	
Pat.L.T				Patna Law Times.
				Patna Weekly Notes.
P.W.N		• •		All India Reporter, 1941 Peshawar.
A.I.R. 1941	Pesh	• •		
R. or Rang.				Indian Law Reports, Rangoon Series.
				Rangoon Law Reports.
1941 Rang.I	J.K	• •		All India Reporter, 1941 Rangoon.
A.I.K. 1941	Rang. or 1941 Ra	ing.	• •	All Illian regionery roofs remaind
R.D.				Revenue Decisions.
O # 10				Sind Law Reporter.
3.L.X	or 1	. ''		All India Reporter, 1941 Sind.
A.I.K. 1941	Sind or 1941 Sind	ι	• •	
U.B.R.				Upper Burma Rulings.

#### Other Abbreviations.

Appl.		Applied.	Disc.	 Discussed. Dissented from.	P.G. Ref. or R	• •	Privy Council. Referred.
Appr.		Approved.	Diss.				
Comm.		Commented.	Doubt.	 Doubted.	Rel.		Relied.
Cons.		Considered.	Expl.	 Explained.	Rev.		Revenue.
Cr.		Criminal.	FoÎl.	 Followed.	S.B.		Special Bench.
Dist. or D.	• •	Distinguished.	F.B.	 Full Bench.	•		-

A

В

Bail, 10g. Abadi, 1. Abandonment, 3. Abatement, 4. Abkari, 4. Agriculturists, 4. Accomplice, 4. Account Books, 4. Accounts, 4. Acquiescence, 6. Administration, 7. Administrator, 8. Administrator General's Act. 9. Admissions, q. 30 Advancement, 10. Adverse Pessession, 10-35. Advocate, 35. Agency, 35. Agency Rules, 35. Agra Pre-emption Act (1922), 35. Agra Tenancy Act (1901), 38. Agra Tenancy Act (1926), 40, Agriculturists' Loans Act (1884), 91. Al-medabad Municipal Code, 92. Ahmedabad Share and Stock Brokers' Association Bengal Land Revenue Sales Act (1998), 230. Rules, 92. Aimer Land Revenue Regulation (1877), 92. Ajmer Laws Regulation (1877), 93. Ajmer Municipal Regulation (1925), 93. Ajmer Regulation, (1914), 94. Ajmer Talukdar's Loan Regulation (1911), 94. Allahabad High Court Rules (Civ.), 95. Allahahad High Court Rules (Cr.), 95. Alluvion and Diluvion, 95. Amendment, 96. Appeal, 96-115. Appropriation, 115. Arbitration, 115. Arbitration Act (1899), 128. Arbitration Act (1940), 130-149. Arms Act (1878), 149. Army Act (English Act) (1879), 153. Army Act (1911), 153. Army Rules, 154. Arrest, 154. Assam Agricultural Income-tax Act, (1939), 155. Assam Bijni Succession Act (1931), 157. Assam Debt Conciliation Act (1936), 15 Assam Land and Revenue Regulation (1886), 158. Assam Local Rates Regulation (1879), 159. Assam Money Lenders Act (1934), 159. Assam Municipal Act, (1923), 159. Assam Pure Food Act (1932), 161.
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     Act (1941), 411.
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Bihar (and Orissa) Local Fund Audit Act (1925),
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#### ABADI.

and proprietor of a mauza alleged that the suit house was given to the ancestors of the defendants for the purpose of administering to the spiritual needs of the people of the locality and that they were wrongfully constructing a temple on it and prayed for possession, when it was found that the plaintiff failed to prove the case set up by him and that the defendants never acknowledged the plaintiff's title and that they had been holding the house for a considerably long time and far in excess of the statutory period,

Held:-that the defendants had acquired a title to the house by adverse possession. (Bennett and Agarival, II) IOBAL HUSSAIN v. SHANKAR DAYAL. 18 Luck. 155=200 I.C. 744=15 R.O. 43=1942 R.D. 548=1942 O.W.N. 351=1942 A.W.R. (C.C.) 234=1942 O.A. 255= A.I.R. 1942 Oudh 427.

-Position of agricultural tenant.

The tenants of an agricultural village are in no better position than licensees. (Verma, Plowden and Sinha, JJ.) HAFIZ MAHOMED V. SHIAM LAL. I.L.R. (1944) All. 619=1944 A.L. J. 321=1944 A. W.R. (H.C.) 206=1944 O.A. (H.C.) 206=1944 A,L.W. 397=A.I.R. 1944 All. 177 (F.B.).

-Rights in house in village abadi.

A riyaya in a village abadi is entitled to retain possession of his house appurtenant to his tenancy until he is either ejected from his holding or he abandons the village. But if the house is not appurtenant to the holding, the person who has built the house, has only a right of residence in it so long as the house does not of residence in a solong as the house does not fall down or the tenant does not abandon the holding. (Yorke and Ghulam Hasan, JJ.) KHAGGA v. HUMMA. 195 I.C. 381=14 R.O. 76=1941 A.L. W. 673=1941 O.L.R. 579=1941 O.A. 555=1941 R.D. 492=1941 A-W.R. (Rev.) 537=341 O.W.R. 322=A I.B. 1941 O.W.R. (Rev.) 537= 1941 O.W.N. 823 = A.I.R. 1941 Oudh 449.

·Town or agricultural village—Test.

Where the District Gazetteer describes a certain area as a town and also states that there is a bazaar carrying on a flourishing trade in grain, a police station, a post office and that it is administered under Act X of 1856, and that houses are assessed to taxation and other documents indicate that there was an inn in the place and that out of a total number of 374 houses only 49 belonged to agriculturists and the rest to persons following other professions, the place is persons following other professions, the place is a town and not an agricultural village. (Bennett and Agarwal JJ.) IQBAL HUSAIN v. SHANKAR DAYAL. 18 Luck 155=200 I.C. 744=15 R. O. 43=1942 R.D. 548=1942 O.W., 351=1942 A.W. R. (C.C.) 234=1942 O.A. 255=A.I.R. 1942 Oudh 427.

ABANDONMENT.

-Of issue: See Appeal.

-Of plea. See PRACTICE.

Of holding. See (1) AGRA TENANCY ACT (1926) S. 107.
(2) C. P. TENANCY ACT

(I of 1920) S 35.

(3) BENGAL TENANCY ACT. (4) LANDLORD AND TEN-ANT.

-Absence of recorded co-tenant for number of years-Presumption, if any.

#### ACCOUNTS.

Where a person is recorded, as a co-tenant and claims to be still so recorded, abandorment cannot be presumed from his absence from the village for a number of years. (Shi ren, S. M.)
INAYAT ALI 71 (CHHOTI 1941 R.D. 722=1941
O.A. (Supp.) 620=1941 A.W.R. (Rev.) 680= 1941 A.L.J (Supp ) 123.

-What will amount to--Molten wax escaping into river -Attempt to salvage given up by owner-Open dealing in salvaged wax by public at large-No protest by owner- Assertion of rights by owner after six weeks-Estoppel

Where molten wax escaped from the refirery of a company as a result of fire and found its way into the river and numerous creeks and the company after a futile attempt at salvaging gave it up and kept quiet for some time and in the meanwhile private individuals who had salvaged portions of the wax sold it openly to others without any protest from the company who were aware of such sales and who did not even then assert their title to the wax so sold but six weeks after the fire, published a notice to the general public that they were the owners of all the wax so salvaged and that people dealing in it did so at their peril, in a suit by the company against a purchaser of such wax, for its recovery or alternatively its value, held. that the company had abandoned the wax and that it became first the property of nobody and then the property of the first person to reduce it to possession, and that as the company had stood by and allowed purchases and sales of the wax in question without asserting their title, they had made the public believe that they had no further interest in the wax and to act upon that belief and hence the company was estopped from setting up title to the wax. (Roberts, C.I., and Blagden, J.) TAN SOON LIV. BURMA OIL CO., LIV. 1941 Rang. LR. 153=194 1.C. 887=14 RR. 11=A.I. R. 1941 Rang. 166.

#### ABATEMENT.

Of Appeal and suits. See C. P Cone, O. 22. -Of Criminal Case—Death of complainant— Effect. See CRIMINAL TRIAL-ABATEMENT. A.I.R. 1943 Pat. 379.

Of rent. See Landlord and tenant. T. P. ACT-LEASE.

AGRA TENANCY ACT. BENGAL TENANCY ACT. BIHAR TENANCY ACT.

ABKARI: See (1) BOMBAY ABKARI ACT. (2) MADRAS ABKARI ACT.

AGRICULTURISTS—Relief of.

See (1) BOMBAY AGRICULTURAL DEBTORS' RE-LIEF ACT.

(2) DEKHAN AGRICULTURISTS' RELIEF ACT.
(3) MADRAS AGRICULTURISTS RELIEF ACT.

(4) U. P AGRICULTURISTS' REI IFF ACT. ACCOMPLICE See CR. P. CODE S. 337. ACCOUNT BOOKS-Entries in-Evidence.

See EVIDENCE ACT, S. 34. ACCOUNTS.

See also - Debtor and Creditor. HINDU LAW-JOINT FAMILY. LIMITATION ACT, S. 19, MORTGAGE. PARTNERSHIP. PRINCIPAL AND AGENT. STAMP ACT.

ACCOUNTS.

TRUSTS.

WILL -EXECUTORS.

Accounts stated, See also Limitation Act

Accounts stated—Fresh cause of action - Items barred by limitation—Re-opening of.

Where the entry in the accounts between the parties show that the account between the parties had been settled, it ffords a fresh cause of action and it is immeterial that some of the items were barred by time. The Court need not see whether any portion of the amount found due and admitted by the defendant was legally due to the plaintiff or not. The account stated is binding on the parties and it cannot be reopened on any ground except fraud or mistake (Aparwal and Madeley, II) Planty Lal. 7. Managed Prasan 199 I.C 698-1942 R.D. 320=14 R.O. 514=1942 A.W.R. (C.C.) 109-1942 O.W.N. 157=1942 O.A. 88=A I.R. 1942 Oudh 311.

——Accounts stated—Origin and discharge of liability to account—Stated or settled account and account stated or settled—Distinction.

The right in A to an account by B is established when facts are alleged and proved by A that Bis an accounting party and that B has not accounted at all or properly. But the obligation on the part of B is prima facie discharged if he alleges and proves either (1) that accounts have been rendered or taken and stated or settled or (2) that he has received X and has accounted for X. Stated or settled account means something different from an account stated or settled which would, by agreement based on consideration found between A and B an implied promise to pay. There is a broad difference between the position where an account is rendered and where an account is stated or settled. In the former case the accounting party must support it in the Court. In the latter case the other party is bound unless it can be opened. An account rendered may be turned into an account stated or settled if it is not challenged for such a time that an acceptance of the implied. [Right to open the account discussed.] (Stone, C.J. and Bose, J.) RADHIKA PRASAD v. NAND KUMAR. 217 I.C. 39=17 R. N 86=I.L.R. 1944 Nag. 63=1942 N.L.J. 355=A. IR. 1944 Nag. 7.

——Accounts stated—Re-opening of—Grounds—Burden of proof.

An account stated may be re-opened on any ground—for instance, fraud or mistake—which would justify setting aside any other agreement. In the particular circumstances of each case, the parties are entitled to show that the account stated should be re-opened on the ground, of fraud or mistake—the question of onus depending on the nature of relationship between the parties and the surrounding circumstances which are established in the case. (Manohar Lall and Chatterji, J.J.) JAIGOBIND PRASAD SAHU v. MT. HURIA. 20 Pat. 130—196 I.C. 220—14 R.P. 183—8 B.R. 8—A.I.R. 1941 Pat. 433.

"Dharma khata" - Meaning - Presump-

It must be presumed that the 'dharma khata' is no more than a separate "charity account" which usually exists in the account books of

#### ACQUIESCENCE.

Hindu commercial trading firms and to which a part of the income is credited from time to time, when it is not shown when it was started, by whom and for what particular purpose or purposes, and there is nothing to show that the family had divested itself of its ownership of the moneys in the find. The amount outstanding in the account is not dedicated to charity in the sense that it ceases to be the property of the firm. (Tek Chand and Beckett, II) RAM Kishan v. OM PARKASH 197 I.C. 481—14 R.L. 241—43 P.L.R. 489—A.I.R. 1941 Lah. 347.

—Opening balance—If shoul! be ignored Where accounts are to be taken in respect of a partnership, the opening balance on the day of the commencement of the period of accounting is just as much part of the account as any other entry, and provided they arree with the closing hal nee, ought to be taken into consideration. (Davies.) RAM PAL v. BHAG CHAND SONI. 1940 A.M. L.J. 125.

-Right to-When arises.

It is well settled that a person is not entitled to an accounting from another unless a right to account arises. Such a right can arise between an agent and his principal, or between a mortgagee in possession and his mortgagors, and in certain other cases (Base, I.) RANWARHAL GURLY, RAIKISHORF GUPLI I.LR (1945) Nag. 820=1945 N.L. I. 563=A I.R. 1946 Nag 21.

#### -Settled accounts-Reopening-Grounds.

When parties settle accounts the presumption ought to be that they have settled the accounts with their eyes open and that they knew what the accounts contained and then decided what the settlement ought to be. A party who wishes to reopen a settled account has therefore to make out a very strong case on the ground either of fraud or of substantial mistake of both parties. Mere unreasonableness of some items is no ground for reopening accounts. (Grille, C. I and Puranik I.) BAJRANGLALT ANANDULAL. I L.R. (1944) Nag. 101=217 I C. 277=17 R.N. 100=1944 N.L.J. 99=A.I.R. 1944 Nag. 124.

-Suit for-When lies.

The proposition that a suit for accounts can only be brought by a principal against his agent, or by one partner against another partner or by a cestui que trust against his trustee is too narrow to be acceptable. The correct position is that the plaintiff must satisfy the Court that either because of a particular trade usage, or of the peculiar relations between the parties the defendant is an accounting party or it is not possible for him to get any relief except by calling upon the defendant to render account to him, and if he does that the suit for accounts would lie. (Teja Singh, J.) DIWAN CHAND SANT RAM v. BHAGAT RAM. 47 P.L.R. 407.

ACQUIESCENCE.

See also EVIDENCE ACT, S. 115. ESTOPPEL.

Doctrine of Availability - Conditions-Building on another's land.

Acquiescence which will deprive a man of his legal rights must amount to fraud, and a man is not to be deprived of his legal right unless he has acted in such a way as would make it fraudulent

Mortgage.
Partners.
Possession—Nature of,
Possession of Mutwalli.
Possession under invalid title.
Ouestion of.

Acquisition of title—Auction purchaser— Right to tack on his period of possession to that of the judgment-debtors.

An auction-purchaser only gets whatever title his judgment debtor may have hid. Where the judgment debtor never had anything more than an immature title which was assailed and therefore, as it were, came under suspension before it did ever mature, then the auction-purchaser can be in no better position than his judgment-debtor was at the date of the decree or the date of the actual dispossession. As only possession has to be considered in a question as to adverse possession, the auction-purchaser's possession in continuation of a suspended possession can be of no benefit to him. (Verma and Yorke, IJ.) NAND LAL v. SUNDER LAL. I.L.R. (1943. All. 892=211 I.C. 44=16 R.A. 204=1943 A.L.J. 485 2)=1943 O.A. (H.C.) 236=1943 A.W.R. (H.C.) 236=1943 A.L.W. 547=1943 O.W.N. (H.C.) 323=A.I.R. 1944 All. 17.

——Acquisition of title—Discharging rain water from roof over neighbour's land—Title to that land—If acquired.

Discharging rain water from one's roof over a neighbour's land may at best give rise to a right of easement, but cannot create title to that land by adverse possession, for, such enjoyment of the land is quite consistent, with recognition of the real owner's title to the land. Adverse possession, as is well-established, pre-supposes an assertive enjoyment of a right of property to the exclusion or in denial of the title of the real owner: in other words, the acts of possession or enjoyment by or on behalf of the adverse possessor must be of an unequivocal character referable only to a claim of right. (Biswas, J.) MAHINDRA NATH GUIN v. SURAJMAL. 45 C.W.N. 17.

-Acquisition of title—Equity of redemption
-Acts that would constitute adverse possession

Adverse possession of the equity of redemption must be referable to some acts, or dealings with the equity of redemption as distinct from the subject-matter of the mortgage. Mere assertion in judicial proceedings of a title which is unfounded at the date when it is made cannot support a plea of prescriptive acquisition. (Kaul and Misra, JJ.) Kodi Lal v. Ahmad Hasan. 20 Luck. 356=1945 O.A. (C.C.) 121=1945 A.W. R. (C.C.) 121=1943 A.L.W. (C.C.) 116=1945 O. W.N. 123=A.I.R. 1945 Oudh 200.

Acquisition of title—Estate held under rules of Government as inalienable and impartible and passing to successor unencumbered by debts or charges—Alienation by holder—Validity—Alienee in possession for over 12 years—Effect—Adverse possession—Successor—If bound by adverse possession against predecessor. See

#### ADVERSE POSSESSION.

Limitation Act, Art. 134-6, 44 Bom. L.R 146, —Acquisition of attle—beacta drag and inaginite body—Non-occutar property—Gest of long possession by members of a farticular caste.

Where possession of a fluctuating and in lefinite body goes back to time manemona, or 'so har as the memory of man funneto', a legal ofigin can always be found for such possession, and it can be protected and maintained. But apart from such ancient possession and incorporation and trust and like cases, the law in limits does not allow such a body to own and hold scal property; nor does the law a low such a body to acquire property by more prescription and adverse possession. In the case of property on the face of it not of a secular nature and which is a subject of religious use where the possess sion of it by members of a caste ages tack to time immemorial, their posse, sum must be presumed to have a legal origin and must be respected though it may not be possible in a particular case to find the nature and the extent of this possession. (Bajpar ona Par 13.) Outn-DRA CHANDRA SINGH C. BULANT RAW. I.L.R. (1942) All. 1=198 I.C. 82-14 R.A. 201 1941 A. W.R. (Rev.) 1016 (2)=1941 A.L.W. 1014 1941 A.L.J. 688=A.I.R. 1942 All. 1.

——Acquisition of title—Ilindu lady in possession of property on husband's disappearance—Nature of estate—If adverse to her husband.

Where a Himan lady acquires by prescription title to immovable property on the assertion that she had been possessing it as a Himan widow, on the disappearance of her husband, that property does not become her stridhan, and on her death it would be inherited, mut by her heirs but by the heirs of her husband. She, in claiming the widow's estate, does not cherish any animus to exclude her husband. The wife's possession on disappearance of her husband is accordingly possession not adverse to her husband. (Mitter, Khundkhar and Pal, II.) BIBHABATI DEVI V. RAMENDRA NARAYAN KOY. 202 I.C. 551=15 R.C. 355=47 C.W.N. 92 A.I.R. 1942 Cal. 498 (S.B.).

Acquisition of title—Law of limitation even before 1877 conferred title on adverse possessor. RAJNANDINI DEVI 2. MANMATAFAL, [see U.D. 1906—40 Vol. I, Col. 3211] A.I.R. 1941 Cal. 223.

----Acquisition of title—Person exercising easement right—Cannot acquire title to the land by adverse possession

A person who exercises a right as an easement over the land of another cannot acquire title to the land by adverse possession. (Fasl Ali. C.J., and Chatterji, J.) TRADERS AND MINERS LTD., v. DHIRENDRA NATH. 23 Pat. 115 A.I.R. 1944 Pat. 261.

If possession is acquired by a person under an invalid title and he continues in possession for over the statutory period, the title becomes an unassailable one. Where in a suit for rent the defendant sets up an adverse title and it is decided that he is not a tenant of the plaintiff and the suit is dismissed, the defendant's title beomes adverse to the plaintiff capable of being

perfected by possession for the requisite period. (Agarwal 1) RAM CHARAN SINGH v. CHUNI LAL .95 I C. 10. = .4 R O. 57=1941 O.L R. 545=1941 O.A. 555=1941 A W R. (Rev.) 604=1941 R D. 559=1941 O W.N. 843=A.I.R. 1941 Ouda 454.

Acquisition of title-Projecting cornice over neighbour's land-Title to that land-If acquired.

In order to constitute agverse possession, there must be effective exclusion of the real owner from the property, and as a rule, the extent of such exclusion is the measure of the right which is acquired by adver a possession. By projecting a connice over a neighbour's land for the statutory period and under conditions which would permit a title to grow by prescription, it may be thus possible to acquire a right by adverse possession, but it will be merely a right to maintain the projection. The possession will in fact be merely of the space covered by the cornice, and the prescriptive right arising in consequence will, therefore, be limited to this space only So far as the land beneath, or so far even as the column of air below the cornice or the superincumbent air above it is concerned, there will be no occupation, and consequently no ouster of the real owner. Ouster from the cornice-space will not necessarily operate as ouster from anything beyond it, either above or below. (Biswas, I) Mahindra Nath Guin v. Surajmal. 45 C.W.N. 17.

——Acquistion of title—Right to collect rent of land—Assignee of—If can acquire title by Prescription and adverse possession.

A transfer of a right to collect tent of immovable property is a transfer of an interest in immovable property. It is not a more personal right but a soft of jagir, and the transferce of such a right can acquire title by prescription and adverse possession (Harries C. J. and Moredith, J.) Padmakumari T. Kanda Padhano, 195 I.C. 203=14 R.P. 91=7 Cut.L.T. 14-22 P.L.T. 1514=7 B.R. 881=1941 P.W. 33=A.I.R. 1941 Pat. 219.

A tresp-sser is a person who takes over property to the exclusion and without the permission of the real owner and means to hold it as his own overtly indicating this intention to the world in such a manner that it should be a notice to the real owner that his title to the property is denied. The posse-sion is adverse so that by the eihux of time it would ripen into title. (Mir Ahmad, J.) Habidur Rahman Khan v. Malto-Med Zaman. 212 f C. 193=16 R. Pesh. 76=A I R. 1944 Pesh. 12.

——Acquisition of title—Trespasser's title— Scope and extent,

Any title which a trespasser may acquire is strictly limited to what he has actually possessed. Hence in the case of a tre-passer on the possession of a part he cannot found a presumption of possession without title, can have no constructive possession below the limits of his actual possession. If the premises form a connected and unbroken entirety there may be a presumption of constructive possession even in favour of a trespasser. (Niyogi, J.) Nago Rao v. Jackshwar. I.L.R. (1943) Nag. 725—211 I.C.

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266=16 R.N. 187=1942 N.L.J. 375=A.I.R. 1944 Nag. 20.

Acquisition of title—Trustees—Possession under void trust deed—Effect—Acquisition of title for trust—Right of trustees to retain pro-

perty for themselves.

Trustees in possession under a void deed of trust can acquire a good title by adverse possession as against the settlor and those claiming under him: that is to say, trustees acquire a possessory title against those claiming under the trust resulting from the invalidity of the charitable trust, since a claim under such resulting trust is a claim adverse to the deed. But trustices who enter into possession of property ostensibly on trusts subsequently ascertained to be void cannot retain the property for themselves when the claim of the settlor and his heirs has become statute barred. (Beaumont, C. J., and Kania, J.) FAZL HUSSEIN SHARAFALLY v. MAHOMEDALLY ABBULALLY. I.L.R. (1943) Bom. 495=210 I.C. 183=16 R.B. 179=45 Bom. L.R. 614=A.I.R. 1943 Bom. 366.

Acquisition of title—Trust—Failure of trust for uncertainty—Trustees holding property and using it for charitable and religious purposes for over 12 years—Effect—Possession—If adverse to heirs at-law.

Where trustees treat property as dedicated property and use it as such for charitable and religious purposes for more than twelve years, such retention of property by the trustees on behalf of the charity in spite of the failure of the charity for vagueness and uncertainty, is not a possession in trust for the heirs-at-law, but a possession for the charity and adverse to the heirs-at-law; and the trustees after the lapse of 12 years acquire a title for the charity by adverse possession. (Tyabji. J.) IAJI ISHAK MOOSA v. FAIZ MAHOMED SULTAN. I.L.R. (1943) Kar. 166211 I.C. 540=16 R.S. 189=AI.R. 1943 Sind 134.

--- Acquisition of title—Trust property held by Hindu father and son-Father trustee in respect of property Possession of son adversely for twelve years-Effect—Title—If acquired.

If two persons are in joint enjoyment of property belonging to another adversely to the latter but one or them is disabled by his fiduciary relationship to the owner (e.g., being a trustee) from acquiring any interest in the property by adverse possession, the other who is under no such disability can acquire title to the property to the extent or his enjoyment. The fact that the two persons happen to be members of a joint Hindu family owning other properties as a unit with no defined shares therein (e.g., father who is a trustee and his son) can make no difference to the application of this principle. The adverse possession of the son will not be affected by the filluciary disability attaching to the father in his capacity as trustee, and there would be nothing to preventhis acquiring title by adverse possession to a half-share in the property. (Patanjali Sastri, J.) ANJANEYA SASTRI v. RAJAGOPALA CHETTIAR. 204 I.C. 131=1942 M.W.N. 548= 55 L.W. 509=A.I.R. 1942 Mad. 699=15 R.M. 702==: 1942) 2 M.L.J. 187.

of a trespasser. (Niyogi, I.) Nago Rao v. Trustee repudiating trust and treating property as IAGESHWAR. I.L.R. (1943). Nag. 726=211 I.C., joint family property—Trustee and son desting

be said that the possession of the co-owner claiming adverse possession creates a title by prescription. (Ghulam Hasan. 1.) USUF HASAN v. RAUNAQ ALI. 203 I.C. 391=15 R.O. 205=1942 O.W.N. 522=1942 A.W.R. (C.C.) 324 (3)=1942 O.A. 438=A.I.R. 1943 Oudh 54.

Co-owners—Proof of ouster—Necessity.
Unless there is a proof of ouster or clear denial of title of a co-owner, the possession heid, by the other co-heirs must be deemed to be on behalf and for benefit of all. (Niyogi J.)
-GULABCHANDSAO V. BASHIRUIDIN. I L.R. (1941)
Nag. 244—195 I.C. 44—14 R.N. 28—1941 N.L.J.
127—A.I.R. 1941 Nag. 141.

Co-sharer—Building by co-sharer on joint land—If ouster of other co-sharers.

The mere fact that a co-sharer has built extensively on a portion of joint land cannot amount to an ouster of the other co-sharers. Almand J.C.) MIAN SHARIFF GULL v. SALU GUL. 196 I.C. 444=14 R. Pesh. 30=A.I.R. 1941 Pesh. 65.

Co-sharers—co-sharer in possession of specific portion of joint property by arrungement—If must give up possession—Evidence Act S. 116.

A co-sharer may certainly acquire title by adverse possession as against another co-sharer in respect of joint property. If a co-sharer in possession of joint property declares openly that he is possessing it not as a co-sharer but in his own right by virtue of a title hostile to that of the other co-sharers, he must be taken to be in possession not as a co-sharer but in possession adversely to his co-sharers. The position of a co-sharer is not analogous to that of a tenant or licensee. He does not come into possession by virtue of any contract or license whereby he has bound himself to restore possession on the termination of the contract or the withdrawal of the license. He possesses the property independently of any such obligation and therefore he is not estopped from asserting an independent title. co-sharer who is in possession of a specific portion of the joint property by an amicable arrangement need not therefore first give up his possession before he can acquire title by adverse possession. (Sen and Blank, JJ.) HARENURA CHANDRA v. SASIBALA. 49 C.W.N. 751.

A co-sharer cannot claim adverse possession against another co sharer by merely mortgaging the house in which he possessed a share. (Mir Ahmad, J.) Mt. Zuru v. Mahomed Ayub. 205 I.C. 603=15 R. Pesh. 99=A.I.R. 1943 Pesh. 17.

The mere fact that a co-sharer has mortgaged the joint property is not sufficient to show that he was repudiating the title of the other co-sharers. Such mortgage will be subject to the adjustment of the shares of the parties at the time of partition. To amount to an ouster the user must not only be exclusive but it must be proved that the fact was known to the other co-sharers. (Bhide, I.) Khuda Bakhsh v. Ata Mohammad. 201 I.C. 159=15 R.L. 33=44 P.L. R. 133=A.I.R. 1942 Lah. 135.

sion by some.

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In the case or shandal land jointly lowned by all the village proprectors, excusive possession by one or two color acers, however long, cannot confer any title on them. To acquire title by prescription trey must provision overt act or acts amounting to the on-te, of the rest of the proprietory body. (Ten Chana and Din Maho, med J.) Jawana Sing v. Jagush Sing, 195 1 C. 244=14 R.L. 49=43 P.L.R. 41 (4.1.R. 1941 Lah. 144.

Uninterrupted sole possession of one continued of a part of joint property cannot, suthout more amount to ouster of the others. It is only when a co-sharer in assertion of a hostile title does a hostile overtaet that the statute occurs to run against the other co-sharers (Tek Chend and Beckett, JJ.) Griviam Namic, Umir Carlier, 197 I.C. 609: 14 R.L. 263:=43 P.L.R. 337 A.I. R. 1941 Lah. 307.

Co-tenants - Limits to the rule that possession of one is not adverse against the other—Joint possesssion if offends rule as to extlusive possession.

The rule that in the case of co-tenants the possession of one is not adverse against the other does not apply where the person claiming to be in adverse possession is a stranger. The mere fact that the property is joint would not offend against the rule that the possession ought to be exclusive. (Mathur, J.) Fater Chander. Chemba Lal. 1943 A.L.W. 150.

dan families with lady members-l'roof of exclusion.

Although the possession of one co-tenant is not deemed adverse to the other community the existence of the relation of co-tenants does not preclude one co-ten int from establishing an adverse possession in fact as against the other co-tenants. Much stronger evulence is required to show an adverse possession held by a tenant-in-common than by a stranger A co-tenant will not be permitted to claim the protection of the statute of limitation unless it clearly appears that he has repudiated the title of his cotenant and is holding adversely to him; it must further be established that the fact of adverse holding was brought home to the co-owner, or there must be outward acts of exclusive ownership of such a nature as to give notice to the cotenant that an adverse possession and disseisin are intended to be asserted. Mere possession, however exclusive or long continued, if silent, cannot give one co tenant in possession title as against the other co-tenant. In the case of Mahomedan families the practice is common of leaving to the males the whole management of the family property including their (the women's) share and being content not to demand what they are entitled to receive but to receive such maintenance or care as the males choose to give them. In that state of fact it does not prove a custom of exclusion that women are in fact excluded. Nor does it suffice to prove ouster. One can no more prove ouster

than one can prove custom to exclude by merely showing that in fact the women have been content to be looked after and have not inquired and have not been told what is being done by the males as regards the shares. (Stare, C. J. and Bose, J.) Fardosejahan bigum c Kazi Sha jiuudin I.L.R. (1942) Nag. 781—201 I.C. 325—15 R.N. 40—1942 N.L.J. 251—A.I.R. 1942 Nag. 75.

——Dispossession--What amounts to--Person having right to collect rent of samindari-When ousled from possession.

A person who has been collecting rents from the tenants in a zumindary camo be said to be ousted from possession unless and until a cloud of such person for recovery of rent has railed. He can assert his possession only by recovery of rents and until he has added to recover tend it cannot be said that he has been ousted from possession. (Harries C.J. and Meredith, J.) PADMAKUMARI V. NANDA PADHANO, 195 I C. 203 = 14 R.P. 91=7 Cut. L.T. 14=7 B.R. 881=22 P. L.T. 514=1941 P.W.N. 33=A I.R. 1941 Pat. 219.

--- Essentials.

Possession must be adequate in continuity publicity and extent to be adverse to the owner. It is not necessary that the adverse possession should be brought to the knowledge of the owner; it is sufficient if it is overtand without any attempt at concealment. (Broomfield and Macklin, JI) PRABHAKAR BHASKAR V. KRISHNA. RAO MOROBA. 203 I C. 443=15 R.B. 236=44 Bom. L R. 718=A.I.R. 1942 Bom. 317.

—Essentials—Actual knowledge of real owner—If essential—keal o ner absent from British India not voluntarily but under sentence of transportation—Relevancy

Possession, to be adverse, need not be known by the real owner to be adverse as long as it is open and capable of being known by the parties interested in the property. The fact that the real owner was absent from British India and that his absence was not voluntary but enforced, under a sentence of transportation, is not a ground of exemption from limitation, and would not prevent the starting of adverse possession. (Abdur Rahman, I) Kuppuswami Namuur, Kuppuswami Namuur, Humuswami Namuur, Ly, 502—200. I.C. 239±15. R.M. 21:±A.I.R. 1941 Mad. 16:5 (1941) 2 W.L.J. 255.

——Essentials—Actual knowledge of rightful owner—Necessity—elets which would change nature of permissive possession or that held in fiduciary capacity.

Adverse possession need not be shown to have been brought to the knowledge of the rightful owner, but this rule can apply only to one who is a complete stranger. Ordinarily ignorance on the part of the true owner of his right or of its infringement does not prevent the operation of the statute but when one is in possession which is either permissive or held in a fiduciary capacity, one cannot by a mere secret and undisclosed wish alter the character of one's possession so as to get time running in one's own favour. (Nivogi, J.) NAGO RAO v. JAGESHWAR. LLR. 1943 Nag. 726—211 I.C. 265—16 R.N. 187—1942, N.L. J. 375.—A.I.R. 1944 Nag. 20.

#### ADVERSE POSSESSION.

-- -- Essentials -- Continuity of possession-Proof required.

To constitute adverse possession, the possession must be actual, open, unmercupted, notorious, exclusive and continuous. When such possession is continued for 12 years, it confers an isuefeasible title upon the possessor. In order to prove the communance of possession it is not necessary to prove an actual b dily continuous possession. Possession may be continuou even though the actual acis of posicission are at considerable intervals, flow many acts of possession will lead to the inference of continuity of a ssession would depend upon the nature of the subject possessed. The will itself may be sufficient it manifested in a cappropriate environment of facts. Where the land in possession of a trespassor is capable of yielding only two crops a year and its flooding curring the ramy season does not interfere in any ay with the raising of these two cr. p , it cannot be held that his possession is not continuous throughout the year (Nasim Alli and Pal, II.) HEMANIA KUMARI DERI C. MIDNAPORI, ZIMIN-HARY CO., LID. I L.R. (1941) 2 Cal. 298=45 C. W.M. 782 201 I.C. 134 .. 15 R.C. 135 A.I R. 1942 Cal. 233.

----Essentials--If should be brought to the knowledge of the owner.

It is not required that to constitute adverse possession it must have been brought to the knowledge of the owner of the property. It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought if he exercises due vigilance to be aware of what is happening. If the rights have been openly usurped, it cannot be pleaded that the fact was not brought to the notice of the owner. (Niogi, I.) RASHUBAR PRAIM T. BALOG SHIGCHARAN, I.L.R. (1941) Prag 691: 1198 I.C. 345: 14 R.N. 2174:1941 N. L.J. 407. A I.R. 1941 Nag 311.

—Es carials Mortgage Sale by mortgagor without knowledge of mortgagee-Vendee taking possession—Possession not adverse to mortgagee under English mortgage, IASRAO FAOOJI v. SUGABAL [See Q.D. 1936-40 Vol. 1, Col. 3212.1 191 I.C. 483.

· -----I.s centials - Onus -- Temporary acts--- If can constitute.

In determining the question whether possession was hostile and notorious so as to charge the real owner with notice of the adverse claim, the nature, the situation and the user of the property must be considered. Acts of temporary and thinsy character like the use of the place for playing, cooking on occasions and keeping cattle and hens do not destroy the title of the exact. (Yorke and Ghulam Hasan, Jl.) IQBAL ALL V. HUMAYUN QADAR. 194 I.C. 50=13 R.O. 515=1941 O.L.R. 374=1941 O.N. 537=1941 O.A. 320=1941 A.W.R. (Rev.) 289=A.I.R. 1941 Oudh 436.

Essentials Publicity-Knowledge of true owner-If necessary

In order to constitute adverse possession it has to be established that the possession of the defendant was in denial of the plaintiff's right and that it was adequate in continuity, in publicity and in extent. It is not however, necessary

to principle and authority to imply constructive possession of the trespasser (claimont) through the rightful owner as his tenant while the land is submerged so as to enable the trespasser as a wrong-doer to obtain title by adverse possession. For submergence to interfere with continuous adverse possession it is not necessary to show that the submergence is of such a nature as to interfere with the usual agricultural operations in the neighbourhood. It is enough if the submergence prevents such use as the possessor would normally have but for the flooding and sub-mergence. On the dispossession of the tres-passer by vis major of floods, the constructive possession is in the true owner; in other words the land after submersion becomes derelict, and so long as it remains submerged, no title can be acquired against the true owner. The submeracquired against the true owner. sion interrupts the continuity of the possession of the trespasser, when it deprives the trespasser of the use and occupation of that land as agricultural land during the months of submersion. He cannot be then said to be in effective possession of that land during that time; the possession of the true owner revives, and the tresposser gets no title by adverse possession. (Harries, C. J. and Manchar Lall, J.) SECRETARY OF STATE FOR INPIA v. RAM BACHAN LAL. 20 Pat. 497=195 1.C. 746=14 R P. 151=7 B.R. 969=22 Pat. L.T. 35=A.I. R. 1941 Pat. 422.

——Interruption—Suit by decree-holder under O. 21 R. 63. C. P. Code—Effect on adverse possession of successful claimant—Running of time—If arrested.

An order of attachment does not interrupt the possession of a person holding adversely to the true owner, but the filing of a suit for a declaration of the right to attach property against the person in possession does. A decree holder whose attachment has been raised is given by the statute the right to institute a suit for a declarasion of his right to attach, and the declaration must have regard to the rights of the parties est the date of the institution of the suit. It would be a negation of the right given by O 21. R. 63. C. P. Code, to hold that, when the suit has been filed in time, the person wrongly in possession of the property can get a title by adverse possession after the institution of the suit. The institution of the suit arrests the running of time in favour of the person in possession and when the suit is filed before the expiry of 12 years from the date of the adverse possession, the court would be entitled to declare by its decree the rights of the parties at the date of the suit. (Leach, C.I. and Daties at the date of the sun. (Leach, C.J. ana Lakshmana Rao. J.) Fatima Bibi v. Haji Mahomed Usman, I.L.R. (1943) Mad. 696=1943 M.W.N 170=56 LW. 132 (2)=212 I C. 27=16 R.M. 476=A.I.R. 1943 Mad. 425=(1943) 1 M.L.J. 212.

----Interruption-Symbolical delivery of possession-Effect.

The delivery of symbolical possession even erroneously operates as actual possession against the judgment debtor and his representatives. Where there is a tenant of the judgment-debtor who is bound by a decree for possession and the peon executing the process for delivery, erroneously delivers possession under O. 21, R. 36. C. P. Code, instead of under R. 35, leaving the tenant

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in possession, such irregular delivery operates to break the adverse possession of the judement-debtor. (Meredith and Sinha, J.). Krishna Prasad Singhtt. Advanath Ghank 22 Pat, 513=216 I C 111=11 B.R. 97=17 R.P. 115=A I.R. 1944 Pat, 77.

—Interruption—Symbolical possession in pursuance of purchase at rent sale -- If interrupts possession of trespasser.

The plaintiff (a purchaser at a rent sale), having obtained a sale certificate obtained symbolical delivery of possession though he was entitled to get actual possession of the property purchased after removal of the defendant who had all along been living in a building in the 1-lding purchased by the plaintiff. In a suit by the plaintiff for possession within 12 years of the symbolical delivery, the defendant pleaded that the suit was barred and that she had been in possession adversely for over 12 years before suit and that the symbolical delivery did not interrupt her adverse possession

Held, that the taking of symbolical possession did interfere with the possession of the defendant and that the latter could therefore start her adverse possession only from the date of the symbolical delivery. (Kuppuscamy Ayar, I.) SATHAPPA CHETTI T THAYYANAY KI AMMAL 1942 M W N 543=55 L W. 548=204 I.C 382=15 R.M. 750=A.I.R. 1942 Mad. 698-(1942) 2 M.L.J. 305.

Landlord and tenant—Acquisition of rentfree title—Assertion of hostille title—If to be brought to notice of landlord.

Assuming that a tenant can acquire a rent free title to land adversely to the landlord by asserting a hostile title, he can acquire an adverse title if his assertion has been brought to the notice of the landlord. (Harries. C.J. and Fazl. Al., J.) CHINTI KAHARIN V. FRIPA SHANKAR WALKAT, 194 I.C. 300=13 R.P. 698=7 B.R. 750=1941 P.W N. 513=A.I.R. 1941 Pat. 488.

\_\_\_\_Landlord and tenant - Claim to higher status-Tenant if can set up.

A landlord who allows a tenant to assert the validity of an invalid lease for the statutory period may be debarred from subsequently questioning the right of the tenant to hold under the lease. The principle is that in such a case, the person coming into possession under a lease which is invalid or void as against the person seeking to eject him becomes a trespasser, and as such, after the expiry of the statutory period, he acquires by prescription the limited right under the lease, whether it he a lease for a term or a lease in perpetuity. But where there is no question of the tenant holding under an invalid or void lease and the possession of the tenant originates in lawful title it is doubtful whether he could set up a claim to a higher status as tenant by right of adverse possession. (Biswas, J.) Seratul Hoque v. Dwijandra Mohan Sen. 192 I C. 751=13 R C. 345=45 C.W.N. 240=

—Landlord and tenant—Interest of permanent tenant—Acquisition of—Non permanent tenancy created before T.P. Act transfered to land lord's knowledge—Transferee in possession for over 12 years.

Where a non-permanent tenancy was created before the T. P. Act and was, therefore, not transferable, the transfer of the tenancy to the knowledge of the landlord and the relinquishment of possession in favour of the transferce would amount to forfeiture or abandonnier to the tenancy, and the possession of the transferce would be adverse. The transferce would acquire the limited interest of a permanent tenant by adverse possession for more than 12 years. (Nasim Ali and Pal, II.) | JOGENDRA KRISHNA C. (Subashini I L R. (1941) 2 Cal. 44=74 C L.), 145=197 I C. 376=14 R C. 351=45 C.W.N. 590=A.I.R. 1941 Cal. 541.

——Landlord and tenant—Landlord serving notice to quit—Subsequent acceptance of rent from tenant for over 12 years—Adverse title to remain in land—If acquired by tenant.

Where a landlord who serves a notice to quit on his tenant, accepts rent from him for a period of more than 12 years, the tenant cannot, in a subsequent ejectment suit plead that he has acquired the right to remain in occupation of the land by adverse possession. (Sheurer, J.) CHAGGANLAL MARWART v INDRA KEOT. 194 I.C 459=13 R.P. 723=7 B.R. 775=A.I.R. 1941 Pat. 495.

—Landlord and tenant—Permanent tenancy—Permanent lease in valid for want of registration—Possession under—Conduct showing possession as permanent tenant or mirasdar—Effect—Acquisition of permanent tenancy. See Registration Act, S. 49. Proviso. 44 Bom. L.R. 534,—Landlord and tenant—Permanent tenancy Lease creating permanent tenancy wiregistered—Admissibility to show nature of possession—Tenant holding land for 12 years under lease and

Tenant holding land for 12 years under lease and paying rent to landlord—Acquisition of permanent right.

A limited interest in immovable property Caube acquired by adverse possession. Where a document such as a lease deed purporting to create or Confer a permanent tenure is invalid for want of registration or otherwise, and the lessee has been holding the land for a period of twelve years in assertion of a permanent right, he would certainly acquire a right by adverse possession, especially when it is shown that the landlord has been receiving rent from him. The lease, though inadmissible in evidence, can be looked into and relied on for the purpose of ascertaining the nature of possession of the claimant lessee (Nagesvara Iyer and Subramanya Aiyar, II.) Huchanna v. Venkatappa. 20 Mys. L. J. 224-146 Mys. H.C.R, 660.

-Landlord and tenant-Possession of tenant-When may become adverse.

The General rule is that the possession of the tenant is that of his landlord. To enable him to hold adversely to his landlord it is necessary for him to renounce the idea of holding as tenant and to set up and assert an exclusive right in himself. It is further essential that the landlord should have actual notice of the tenant's claim, or that the tenant's acts of ownership should be of such an open, notorious and hostile character that the landlord must have known of it. (Syed Nasim Ali and Rau. II.) Sambhu Nath Bhakat v. Sree Sree Sridhar Thakur. 73 C.L.J. 76.

#### ADVERSE POSSESSION.

—Landlord and tenant—Tenancy at will or from month to month—Disclaimer of title by tenant—Effect—Subsequent possession by tenant—I<sub>1</sub> adverse,

In the case of a tenancy at will or from month to month, when the tenant disclaims the title of the landford by atterning to another, there is a cessation of the tenancy and the landford has the right to immediate possession and can eject the tenant. Possession of the tenant thereafter is bostile and adverse to the landford. (Penkataramana Rao, C.J. and Singararchi Mudahar, J.) MARUBEVE GOWPA v. LAKSHMIAH. 50 Mys. H.C.R. 20.

Landlord and tenant—Tenancy for life—Successors in possession not paying rent—Adverse possession—Title by If acquired. See Lease—Construction. 45 Bom.L.R 194.

Where there is no other overt act which would go to show denial of the rights of the tenants mere payment of rent of a portion of the holding by another can hardly be regarded as an overt act asserting adverse possession. (Shirreft, J.M.) Maharaji e. Jacatpat Sinch. 1941 A. W.R. (Rev.) 754 (1) ... 1941 O.A. (Supp.) 675 (1) ... 1941 P.D. 739 (2).

-Landlord and tenant-Tenant-If can prescribe against landlord and resist ejectment.

A person in possession as tenant paying rent cannot prescribe against his landlord; and the fact that a tenant has been in possession for over 20 years would not enable him to acquire a title against his landlord under the Limitation Act and to claim that he is not liable to ejectment. (Brough and Sinha, II.) DARBARI LAL MUDIV. RANGEGANJ COAL ASSOCIATION. ITD. 22 Pat. 554—25 P.L.T. 120=A.I.R. 1944 Pat. 30.

I andlord and tenint—Tenant in possession of landlord's land not included in tenancy for over 12 years and including it in site of permanent house built on tenancy land—Acquistion of title as permanent tenant—Limitation Act, Art. 142.

Where a tenant is shown to have been in possession of a plot of land belonging to his landlord for over twelve years and to have included it in the site of his permanent house which he had built upon the land included in his tenancy, he must be held to have acquired a title to that land by adverse possession as appertaining to his permanent tenarcy, and the Landlord is deharred under Art. 142 of the Limitation Act from recovering khas possession of that plot of land; but he is not harred from bringing a suit for fixing a rent and for recovery of arrears of rent for three years. The tenant's possession is only in the character of a tenant and is not adverse to the landlord in the character of a landlord. (Brough, L.) BALDER IN THAKURU, foci SAHU. 9 Cut.L.T. 57=212 I.C. 273=16. R.P. 267=10 B R. 486=A.I.R. 1944 Pat. 109.

Landlord and tenant—Tenant settled on lind under unregistered pattu—Possession of If adverse.

Where a tenant is settled on land under a patta which is invalid for want of registration, here

Where a non-permanent tenancy was created before the T. 2. Act and was, therefore, not transferable, the transfer of the tenancy to the knowledge of the handlord and the relinquishement of possession in favour of the transferce would amount to forfeiture or abandonment of the tenancy, and the possession of the transferce would be adverse. The transferce would be adverse. The transferce would acquire the limited interest of a permonent tenant by adverse possession for more than 12 years. (Nasim Ali and Pal. J.) | Jogennera Krishna v. Subashini I L R. (1941) 2 Cal. 44-74 C.L.], 145=197 I C. 376-14 R.C. 351-45 C.W.N. 590=A.I.R. 1941 Cal. 541.

—Landlord and tenant—Landlord servina | notice to quit—Subsequent acceptance of rent from tenant for over 12 years—Adverse title to remain in land—If acquired by tenant.

Where a landlord who serves a notice to quit on his tenant, accepts rent from him for a period of more than 12 years, the tenant counct, in a subsequent ejectment suit plead that he has acquired the right to remain in occupation of the land by adverse possession. (Shearer, J.) Chaggantat Marwall v Indra Krot. 194 LC 459=13 R.P. 723=7 B.R. 775=:A.I.R. 1941 Pat. 495.

—Landlord and tenant—Permanent tenancy—Permanent lease invalid for want of registration—Possession under—Conduct showing possession as permanent tenant or mirasdar—Effect—Acquisition of permanent tenancy. See Registration Act, S. 49. Proviso. 44 Bom. L.R. 534,

Landlord and tenant — Permanent tenancy Lease creating permanent tenancy unregistered — Admissibility to show nature of possession—Tenant holding land for 12 years under lease and paying rent to landlord—Acquisition of permanent right.

A limited interest in immovable property can be acquired by adverse possession. Where a document such as a lease de d purporting to create or confer a permanent tenure is invalid for want of registration or otherwise, and the lessee has been holding the land for a period of twelve years in assertion of a permanent right, he would certainly acquire a right by adverse possession, especially when it is shown that the landlord has been receiving rent from him. The lease, though inadmissible in evidence, can be looked into and relied on for the purpose of ascertaining the nature of possession of the claimant lessee (Nagesvara Iyer and Subramanya Aiyar, II.) HUCHANNA v. VENKATAPPA. 20 Mys. L. J. 224:246 Mys. H.C.R, 660.

-Landlord ond tenant-Possession of tenant-IVhen may become adverse.

The General rule is that the possession of the tenant is that of his landlord. To enable him to hold adversely to his landlord it is necessary for him to renounce the idea of holding as tenant and to set up and assert an exclusive right in himself. It is further essential that the landlord should have actual notice of the tenant's claim, or that the tenant's acts of ownership should be of such an open, notorious and hostile character that the landlord must have known of it. (Syed Nasim Ali and Rau. II.) Sambhu Nath Bhakat v. Sree Sree Sridhar Thakur. 73 C.L.J. 76.

#### ADVERSE POSSESSION.

—Landlord and tenant—Tenancy at will or from month to month—Disclaimer of litle by tenant—Effect—Subsequent possession by tenant—I<sub>1</sub> adverse,

In the case of a tenancy at will or from month to month, when the tenant disclaims the title of the landford by attorning to another, there is a cessation of the tenancy and the landford has the right to immediate possession and can eject the tenant. Possession of the tenant thereafter is boothe and adverse to the landford. (Penkataramana Rao, C.J. and Sungaraschu Modahar, I.) MARCHARE GOWDA V. LAKSHMIAH. 50 Mys. H.C.R. 20.

Landlord and tenant—Tenancy for life—Successors in possession not paying tent—Adverse possession—Title by If acquired. See Land Constantion. 45 Bom.L.R 194.

——I and lord and tenant—Tenancy right— Overt. 1ct Mere payment of rent of part of holdins.

Where there is no other overt act which would go to show denial of the rights of the tenants mere payment of tent of a portion of the holding by another can hardly be regarded as an overt act asserting adverse possession. (Shirrell, J.M.) Maharah "Lagarent Singh, 1941 A. W.R. (Rev.) 754 (1) 1941 O.A. (Supp.) 675 (1) 1941 R.D. 739 (2).

——Landlord and tenant-Tenant-If can prescribe against landlord and resist ejectment.

A person in possession as tenant paying rent cannot prescribe against his landlord; and the fact that a tenant has been in possession for over 20 years would not enable him to acquire a title against his landlord under the Limitation Act and to claim that he is not liable to ejectment. (Brough and Sinha, JL.) DARBARI LAI MURE. PAREMANT COAL ASSOCIATION. 1 Th. 22 Pat. 554725 P.L.T. 120=A.I.R. 1944 Pat. 30.

I and lord and ten int-Tenant in possession of landlord's land not included in tenancy for over 12 years and including it in site of permanent house built on tenancy land-Acquistion of title as permanent tenant-Limitation Act, Art. 142.

Where a tenant is shown to have been in possession of a plot of hund belonging to his landlord for over twelve years and to have included it in the site of his permanent house which he had built upon the laid included in his tenancy, he must be held to have acquired a title to that land by adverse possession as appertaining to his permanent tenancy, and the hadderd is deharred under Art. 142 of the Limitation Act from recovering khas possession of that plot of land; but he is not barred from bringing a suit for fixing a rent and for recovery of arrears of rent for three years. The tenant's possession is only in the character of a tenant and is not adverse to the landlord in the character of a haddord. (Brough, J.) BALDER IN THAKUR v. JOH SABU. 9 Cut.L.T. 57=212 I.C. 273=16. R.P. 267=10 B.R. 486=A.I.R. 1944 Pat. 109.

I and lord and tenant—Tenant settled on lind under unregistered patta—Possession of—If adverse.

Where a tenant is settled on land under a patta which is invalid for want of registration has

Character of —Death or abdication of mahant—
If alters character of possession. See Hindu
LAW—Religious Endowment—Math. 22 Pat.
133.

The question of Mot a pure question of fact. The question of adverse possession cannot be said to be a pure question of fact. It is a question of inference trom the admitted and proved facts of each case. (Plowden and Suha, JJ.) CHANDRA BALI PATHAK v. BHAGWAN PRASAD PANDE. I.L.R. (1944) All. 533=1944 A.W.R. (H.C.) 242=1944 O.A. 2(H.C.) 242=1944 A.L.W. 583=1944 A.L.J. 344. ADVOCATE.

See (1) LEGAL PRACTITIONER.

(2) BAR COUNCILS ACT.

AGENCY.

See (1) CONTRACT ACT (CHAPTER X, Ss. 182-238).

(2) PRINCIPAL AND AGENT.

AGENCY RULES, R. 49 — "Decree" — Order refusing application to rehear appeal decreed exparte— Appealability.

An order refusing an application to rehear an appeal, decreed ex parte is appealable under R. 49 of the Agency Rules. For the purpose of the Agency Rules the order is a "decree" and hence an appeal would lie to the High Court-under R. 49, assuming that the Civil Procedure Code is not applicable in such a case. (Chatterji and Meredith, JJ.) Guranna v. Kshetri Mohanty. 23 Pat. 442=25 Pat. L.T. 116=1944 P.W.N. 485=10 Cut. L.T. 51=A.I.R. 1944 Pat. 297.

AGRA PRE-EMPTION ACT (XI OF 1922), Ss. 1 (3) and 19—Sale of property situated fartly within and partly outside a municipality—Applicability of Act to property within municipality—Pre-emptor's right how affected.

Where out of the property sold a portion is found to be situated within the limits of a municipality and the rest of the area sold is outside the limits, the Agra Pre-emption Act has no application in view of the provisions of sub-Cl. (3) of S. 1 of that Act to such portion of the property sold as is within the municipal limits. In the case of a claim to pre-empt such a sale, the dismissal of the pre-emptor's claim with reference to the area within the municipal limits would disentitle him to a decree with respect to the area outside those limits by reason of the provisions of S. 19 of the Act. (Iqbal Ahmad, C.J. and Braund, J.) SHER SINGH v. KISHORE LAL. I.L.R. (1945) All. 210=1945 A.L.W. 65=1945 O.W.N. (H.C.) 65=A.I.R. 1945 All. 237.

S. 4—Co-sharer — Mahomedan who has made a wakf alal-aulad — Cannot maintain suit for pre-emption. Banwari Ram v. Mahomed Yar Khan. [see Q. D. 1936-40 Vol. I, Col. 3213.] I.L.R. (1941) All. 74—194 I.C. 72—13 R.A. 469—A.I.R. 1941 All. 49.

Property in possession of prior transferees without little-Vendee to bear expenses for retestery of possession—Maintainability of suit for pre-emption.

Where after the reversion opened, the reversionary heir sells for a definite sum of money the entire property of the last holder which was

#### AGRAPRE-EMPTION ACT. (1922)

in the possession of prior transferees without title and for the recovery of which the vendee was to bear the expenses, the transaction amounts to a sale as defined in S. 51. Transfer of Property Act, for a definite and ascertained sum and as such a sait for pre-emption in respect of the transaction is maintainable. (Iqbal Ahmad. C.J. Ismail and Dar, J.J.) Jagar Prassav. Deconath Singh. I.L.R. (1942) All. 169-198 I.C. 257-14 R.A. 272-1942 O.A. (Supp.) 56-1942 R.D. 67-1942 A.W.R. (H.C.) 1-1942 A.L.W. 1-1942 A.L.J. 1-A.I.R. 1942 All. 71 (F.B.).

defence to suit for pre-emption.

In view of the definition of 'co-sharer' in S. 4 (1) of the Agra Pre-emption Act, a benami, transaction can be set up in detence in a suit for pre-emption. (Allsop. J.) SAIDUN-NISSA v. MOHAMMED YUSUF. I.L.R. (1945) All. 300=1945 A.L.J. 126 (1)=1945 O.W.N. (H.C.) 107=1945 A.L.W. 114 (2)=1945 A.W.R. (H.C.) 73(1).

——S. 4 (1)—Suit for pre-emption—Conditions necessary—Vendee becoming co-sharer by virtue of an exchange—Deprivation of that property during pendency of pre-emption suit—Right of pre-emption cannot be exercised. ALIMULLAH V. MAHOMED K.HALIL [see Q.D. 1936-'40. Vol. 1, Col. 3213.] 191 I.C. 385=13 R.A. 258.

——S. 14—Estoppel against assertion of right of pre-emption—Notice to co-sharers by person through whom sale was arranged.

The failure of a co-sharer to pay attention to a notice issued to all the co-sharers by a person through whom the sale was arranged, asking them whether they wished to purchase the property in question, is no ground for estopping him from exercising his right of pre-emption. Nor could it justify the inference that the co-sharer had received his right to pre-empt the property, If the vendees wished to bind the co-sharers, they ought to have given them the proper statutory notice under S. 14 of the Agra Pre-emption Act. (Allsop. J.) NATHOO v. Horl Lal. I.L.R. (1945) All. 294—1945 O.W.N.(H.C.) 108—1945 A.L.W. 115—1945 A.W.R. (H.C.) 76—1945 A.L.J. 129—A.I.R. 1945 All. 196.

S. 14-Notice-Proper form of.

It is for the pre-emptor receiving notice to make enquiries as to the details of the consideration. It is not necessary to send a draft of the proposed transfer or of all details of the consideration in the notice. (Allsop and Hamilton. JJ.) LIAQUAT KHAN v. ABDUL MAJID. KHAN. I.L.R. (1944) All, 519=219 I.C. 411=1944 A.L.J. 354=1944 A.W. (H.C.) 234=1944 A.W. (H.C.) 234=1944 A.W. 535=1944 O.W.N. (H.C.) 218=A.I.R. 1944 All, 284.

The only way in which a person could be estopped from asserting a right of pre-emption is set out in Ss. 14 and 15, Agra Pre-emption Act. The principle underlying the extinction of the right has been extended to certain cases in which instead of a written notice and a written refusal there has been a refusal by word of mouth or in some such way. But it is not permissible to

#### AGRA PRE-EMPTION ACT. (1922)

extend this principle any further and hold that even in the absence of express or explicit refusal that must be inferred from the conduct of a certain person. (Mathur, J.) BHAIRO BU SINGH v. BHAGWATI SINGH. 1943 A.L.W. 370. Bux

-S. 14—Right to pre-empt—Does not arise

unless sale is effected.

The right of pre-emption would arise at the date of the sale and a subsequent desire on the part of the vendors to enforce their ex-proprietory rights would not affect the issue. (Allsop Majid Khan, I.L.R. (1944) All. 519=219 I.C. 411=1944 A.L.J. 354=1944 A.W.R. (H.C.) 234=1944 Q.A. (H.C.) 234=1944 A.L.W. 535=1944 O.W.N (H.C.) 218=A.I.R. 1944 All. 284.

-S. 15. Proviso—When applicable.

The intention of the Proviso to S. 15 of the Arga Pre-emption Act is that a co-sharer should not be introduced without the knowledge of the possible pre-emptors. There is nothing in the proviso to suggest that the right of pre-emption will subsist if all the prospective vendees are not the ultimate purchasers. (Allsop and Hamilton. II.) Liaguar Khan v. About Majid Khan. I.L.R. (1944) All. 519 = 219 I.C. 411 = 1944 A.L.J 354=1944 A.W.R. (H.C.) 234=1944 O.A (H. C.) 234=1944 A.L.W. 535=1944 O W.N. (H.C.) 218=A.I.R. 1944 All. 254.

-Ss. 16 and 12-Plaintiff included as cosharer in different subdivision by an imperfect

partition prior to decree—zifect.

Where as a result of an imperfect partition during the pendency of a suit for pre-emption, the vendor and the vendee are included in the same patti but the plaintiff becomes a co-sharer in another sub-division, the suit for pre-emption has to be disinissed. ((Allsop, J.) Ganna Singh. v. Kundan Singh. I.L.R. (1945) Ali. 421 = 1945 Q.W.N. (H.C.) 107 (1)=1945 A.L.W. 114 (1)=1945 A.W.R. (H.C.) 93=A.I.R. 1945 All. 205.

S. 19-'Decree'-Meaning of - Cardinal

date for determining rights of parties. The mere fact that the decree of the trial

Court was set aside by the first appellate Court and the case was remanded to the trial Court did not destroy the plaintiff's right of pre-emption. The loss of interest subsequent to any decree for pre-emption cannot affect pre-emptor's The cardinal date for the determination of rights of parties is the date of the original decree of the trial Court, (Iqbal Ahmad, C.J., and Dar, J.) Surendra Bahadur Singh 2. and Dar, J.) SURENDRA BAHADUR SINGH v. RAJENDRA BAHADUR SINGH. I.L.R (1942) All. 165=199 I.C. 469=1942 R.D. 177=14 R.A. 382 =1942 A.L.J. 45=1942 O.W.N. 61=1942 A.L. W. 54=1942 O.A. (Supp.) 61 (1)=1942 A.W.R. (H.C.) 35=A.I.R. 1942 All. 128.

-S. 19—Effect—Dismissal of claim to preempt on sale covering property situate partly within and partly outside Municipal limits so far as property within the municipal limit is concerned. See AGRA PRE-EMPTION ACT, Ss. 1 (3) AND 19. I.L.R. (1945) All. 210.

-S. 19 and U.P. Land Revenue Act, S. 131-Suit for partition-Effect of partition proceedings-Loss of right subsequent to decree by trial Court — Effect — Partition proceedings when complete. Jairaj Singh v. Har Narain Singh.

#### AGRA TENANCY ACT. (II OF 1901)

[see Q. D. 1936-40 Vol. I, Col. 54.] 191 I.C. 759 =12 R.A. 270.

-Ss, 21 and 15-Extinguishment of rights of co-plaintiff-Effect on other plaintiffs' right.

If a person entitled to pre-empt is a co-plaintiff with another who had such rights under S. 12 but had lost them under S. 15 of the Agra Preemption Act, his rights also are extinguished. (Allsop and Hamilton, JJ.) LIAQUAT KHAN v. ABBUL MAJIB KHAN. I.L.R. (1944) All. 519=219 I.C. 411=1944 A.L.J. 354=1944 A.W.R. (H.C.) 234=1944 O.A. (H.C.) 234=1944 A.L. W. 535=1944 O.W.N. (H.C.) 218=A.I.R. 1944 All. 284.

-S. 21—Scope and applicability—Effect of some of the plaintiffs losing the right during

pendency of suit.

S. 21 of the Agra Pre-emption Act is confined in its operation to facts existing on the date of the institution of the suit and not to facts that may come into existence after that date. In other words, the question whether any of the plaintiffs had or had not a right of pre-emption must be determined by reference to the state of affairs existing on the date of the institution of the suit and not by reference to subsequent events. If all the plaintiffs in a pre-emption suit have a right to exercise the right of pre-emption on the date that the suit is filed, the mere fact that some of the plaintiffs lose that right during the pendency of the suit cannot adversely affect the rights of the remaining plaintiffs. In this connection it should be remembered that S. 21 is in the nature of a penal section and as such must be strictly construed. In view of S. 19 of the Act no relief could be given to those plaintiffs who have lost their right during the course of the suit. But as regards those plaintiffs who had the right both on the date of the suit and on the date of the decree they are unaffected and are entitled to a decree. (Iqbal Ahmad, C. I. and Dar. I,) RAMESHWAR v. SHEO SHANKER. IL.R. (1943) All. 493-207 I.C. 411=16 R.A. 43=1943 O.A. (H.C.) 68=1943 A.L J. 157=1943 A.L.W. 271 =1943 O.W.N (H.C.)173=1943 A.W.R. (H.C.) 68=A.1 R. 1943 All. 196.

-S. 24 and C.P. Code, O. 20. R. 14-Decree for pre-emption-Right of vendee to rents and

profits till date of deposit.

As the rights of the pre-emptor in the property accrues only on deposit of the purchase money as directed by the pre-emption decree, the vendee is entitled to the rents and profits of the property for the period prior to the date of such deposit. (Dur and Malik, J.) HARISH (HANDER W. BHAGWAN DASS. I.L.R. (1944) All. 499=218 I C. 139=1944 A.L. J 375=1944 O.A. (H.C.) 227(1)=1944 O.W.N. (H.C.) 144=1944 A.W.R. (H.C.) 227 (1)=A.J.R. 1944 A. 255.

AGRA TENANCY ACT (II of 1901). S. 11— Occupancy Rights—Acquisition of Mortgogee in long and continuous possession, before and ofter death of tenant-Payment of rent to landlors

direct-Effect.

Where a mortgagee of a holding had been in long and continuous possession, before and after the death of the tenant and had been paying rent direct to the land holder, and was treated as tenant he must be held to have acquired occupacy rights before the Act of 1926, (Shirreff, 1927)

#### AGRA TENANCY ACT. (II OF 1901)

Under Agra Tenancy Act, 1901, the zamindar was not precluded from giving rights corresponding to those of an occupancy tenant and was liable to be held bound by the terms of his agreement in that respect. But the tenant would still be recorded as a non-occupancy tenant and not as an occupancy tenant. (Itarper, S. M. and Sathe, J. M.) GANGA PRASAD v. NANHE. 1941 R.D. 266=1941 A.W.R. (Rev.) 277=1941 O.A. (Supp.) 226=1941 A.L.J. (Supp.) 85.

S. 11 and Agra Tenancy Act, (III of 1926) S. 16—Partnership—Occupancy rights——Acquisition—Competency—Test.

Where the partners do not regard themselves as a number of partners cultivating as partners and co-tenants under the Act, but regard themselves as an association engaged in the business of cultivating not in any personal capacity but as shareholders in a business, holding their shares on basis of 'anna' shares calculated on the capital of each partner, they cannot acquire occupancy rights. (Darling, S. M. and Bomford, J.M.) MACKINNON v. SAMPAT KUMAR SINHA. 1941R. D. 678.

S. 11—Seven year's lease—Test—Presumption—Exclusion of period from computation under S. 11—Circumstances negativing.

Though there may be some ground for assuming that a tenant had agreed to hold under a 7 years' lease in the case of leases executed early in the year, the same thing cannot be said in respect of leases executed later in the year in the absence of clear evidence to that effect. Hence in the case of a lease executed after the commencement of the agricultural year where there is no evidence apart from the recital in the lease to show that the tenant had agreed either before or at the commencement of the agricultural year to hold the land on a 7 years' lease, it is not a lease for a term of not less than 7 years and therefore the period of such lease could not be excluded from computation under S. 11. Agra Tenancy Act. (Sathe, J. M.) Sheo Prasad v. Sunder Singh. 1942 O.A. (Supp.) 484=1942 O.W.N. (B.R.)

S. 22—Congenital deafness and dumbness— If a disqualification to succession.

Under the old Rent Act of 1881 inheritance was according to personal law. Congenital and incurable deafness and dumbness would have been a har to succession then. But after the Act of 1901, such a person can succeed to a holding under S. 22 of the Act. (Shirreff, S. M) MISRI LAL 2. NANHOO. 1941 A.W.R. (Rev). 795 (1)=1941 C.A. (Supp.) 706=1941 R.D. 692.

S. 22 (c)—Applicability—Death of cotenant—Succession—Deceased, joint with one only of the brothers if affects question.

Succession will be governed by the law in force at the time of the death of the tenant. A tenant is taken in his individual capacity under the Tenancy Act and even when a co-tenant dies during the currency of Act of 1901, succession must follow according to S. 22 of that Act and all the remaining brothers would succeed to his

#### AGRA TENANCY ACT. (III OF 1926)

share. It is immaterial that the deceased formed a joint family with one only of them. (Pible, I, M. and Ross, A.M.) BACHCHU STAINT V. RAGHUNATH SINGH. 1944 R.D. 179 (2)=1944 A.W.R' (Rev.) 98 (2).

National State of Sta

A mortgage of occupancy plots is voidable under S. 31 of the Agra Tenancy Act of 1901 and not void ab initio. Hence such a mortgagee has a perfect title to sue against representatives of his mortgagor who have taken wrongful possession of the plot from him. (Suthe, J. M.) JHURRAOO V. RAM KUNWAR. 1941 A.W.R. (Rev.) 560 (1)=1941 R.D. 585 (2)=1941 O.A. (Supp.) 491 (1).

——(III OF 1926)—Service of notice of ejectment—Several defendants—Technical defect as regards service on one—If can be condoned.

Where in certain execution proceedings five of the defendants who were brothers were duly served and the sixth who was the widow of the sixth brother refused to receive the notice but the process-server failed to affix a copy of the notice to the widow's house, held that the interest of the widow of the sixth brother was fully and duly represented and that the technical defect in service of notice could be certainly condoned, the service having been otherwise duly proved. (Harper, S. M. and Sathe, J. M.) BHARAT SINGH v. DHARAM PAL, 1941 A.W.R (Rev.) 262=1941 O.A. (Supp) 211=1941 R.D. 113.

S. 3 (2)—'Land'—Use of land for purposes other than agriculture for which it was let—If and when it ceases to be 'land'.

A tenant's holding does not cease to be 'land' under the Agra Tenancy Act merely because he uses it for other than agricultural purposes. But if a tenant sublets his land to a sub-tenant for other than agricultural purposes, the land would not be 'land' under the Act in a dispute between the tenant and his sub-tenant though it would be 'land' so far as a dispute between the zamindar and the tenant is concerned. (Shirreft, J. M. and Sathe, J.M.) SAKHAWAT ALI v. MAHBOOB ALL 1942 O.W.N. (B.R.) 79=1942 O.A. (Supp.) 46=1942 R.D. 111=1942 A.W.R. (Rev.) 46.

——Ss. 3 (2), (11) and 12-Plot held by fixed rate tenant—Nature of—Building on it, when justified.

The plot with a fixed rate tenant is 'land' as defined in S. 3 (2) of the Agra Tenancy Act and he is not entitled to make any construction on it which would not qualify as an 'improvement' within the meaning of S. 3 (11) of the Act and unless it is satisfied that test would amount to an actionable invasion of the landbolder's right. (Collister, Bajpai and Braund, JJ.) SHANTI SARUP DAS v. ASHARFI SINGH, I.L.R. (1941) All. 250=192 I.C. 496=13 R.A. 327=1941 Al.W. 18=1941 O.A. (Supp.) 34=1941 A.W.R. (H.C.), 34=1940 A.L.J. 906=1941 A.W.R. (Rev.) 45=1941 O.W.N. 12=A.I.R. 1941 All. 61 (F.B.).

S. 3 (3)—Rent—Zaid<sup>1</sup> mustalba—If legal rent. See U. P. Tenancy Act, S. 3 (18) and Agra Tenancy Act, S. 3 (3), 1941 R.D. 265,

#### AGRA TENANCY ACT (III OF 1926)

-Ss. 3 (4) and 226-Savar-Income derived by holding land for purpose of brick kiln-If can be taken into account in suit under S. 226.

The words for the like at the end of sub-S. (4) of S. 3 of the Agra Tenancy Act have to be interpreted as covering only such rights as are ejusdem generis or akin to the rights previously described. The right of a co-sharer to receive a certain income in respect of land which he holds for the purpose of a brick kiln is not akin to the rights described under the head of 'Sayar' sub S. (4) of S. 3. Such an income cannot be taken into consideration in a suit under S. 226 of taken into consideration in a suit under 5. 220 of the Agra Tenancy Act. (Yorke. J.) RAM DAS v. ATA HUSSAIN. 1941 A.L.J. 558=1941 R.D. 840=1941 O.A. (Supp.) 745=1941 A.W.R. (Rev.) 840=197. I.C. 851=14. R.A. 255=1941 A.L.W. 892=A I.R. 1941 All. 397.

S 3 (15) and United Provinces Tenancy Act (1939), S. 3 (6) -Grove-Existence of trees and open spaces-Cultivation possible-Character of land-Determination-Factors to be taken into consideration.

Where there were half a dozen small selfgrown trees in the northern two-thirds portion of a plot and that part was not cultivated but the existence of the trees and the shade did not prevent cultivation in the southern portion, was held that the character of the land must be determined by considering the plot as a whole and not piecemeal and considered by that standard such plot was not groveland. (Shirreff. S.M.) RAGHUNATH SAHAI v. RASHID AHMAD KHAN. 1942 O.W.N. (B.R.) 131 = 1942 A.W.R. (Rev.) 146 (3)=1942 O.A. (Supp) 166 (3)= 1942 R.D. 197.

-S. 3 (15)—Grove land—Land planted with Bel trees.

Bel trees come within the term 'trees' and lands planted with them could constitute a grove under the Agra Tenancy Act if they satisfied the other conditions laid down in S. 3 (15) of that Act. (Sathe, S.M. and Ross, A.M.) SIRAJ HUSAIN KHAN v. MIR MOHAMMAD ITUSAIN. 1944 R.D. 422=1944 A.W.R. (Rev.) 210 (2).

—S. 3 (15) and Expln. 11, United Provinces Tenaney Act (1939), S. 3 (6)—Grove—Plot containing Bel trees near the boundary and guavas, pomegranates and plantains in the rest of the area.

Where a plot contains 36 Bel trees standing on or near the houndary, the rest of the area being covered with guavas, pomegranates and plantains, it does not make it groveland under the definition in S. 3 (15) of the Agra Tenancy Act read with the second explanation. It may become groveland under the definition in the U.P. (Shirreff, Tenancy Act. S.M.) RAGHUNATH SAHAI v. RASHID AHMAD KHAN, 1942 R. D. 197=1942 O.W.N. (B.R.) 131=1942 A.WR. (Rev) 146 (3)=1942 O.A. (Supp. (166 (3).

-S. 4 (d)—Entry as khudkasht for 1333-F— Plot in fact lying fallow for that year-Effect.

An entry as khudkasht for a year is not incorrect simply because the plot was fallow for a particular year. As regards 1333-F the law merely requires that the record should be as khudkasht and not that it should be actually cultivated. (Harper, S. M.) Surjo v. Umrao. percente lite by Sir holder, judgment debices

AGRA TENANCY ACT (III OF 1926)

1941 A. W. R. (Rev.) 26 = 1941 R. D. 35=1941 O. A. (Supp) 165.

-S. 4 (d)—Mortgagor cultivating land as thekadar-Cultivation if as 'landlord'.

Where a mortgagor cultivates the land mortgaged as a thekadar the cultivation is not as landlord and the land does not become his sir. (Harper S.M.) Surjov. Umrao. 1941 A.W.R. (Rev) 26=1941 R, D. 35=1941 O.A. (Supp)165.

----S. 4 (d)-Sir-Requirement as to being recorded as the khudkasht of the landlord'-Strict construction—Necessity.

The requirement in S. 4 (d) of the Agra Tenancy Act that the land should be recorded as the khudkasht of the 'landlord' is to be construed strictly and hence when land is not so recorded one of the chief conditions of the definition is not fulfilled and the land cannot be said to be sir' under S. 4 (d). (Shirreff, S. M.) Deoki Kunwar v. Kesri. 1942 R. D. 266=1942 O.W.N. (B. R.) 200=1942 A. W. R. (Rev) 148 (2)=1942 O. A. (Supp.) 168 (2).

-Ss. 6 and 14-Ex-proprietary rights-Failure to claim by a co-sharer on sale of share of joint sir-Effect.

When one out of several joint sir holders transfers his property without claiming any exproprietary rights, the holding becomes the sir of the remaining sir holders. (Sathe, J. M.) Gordhana v. Birbal. 1942 O.W.N. (B. R.) 67=1942 R.D. 99=1942 A.W.R. (Rev.) 171 (1)=1942 O.A. (Supp.) 191 (1).

-S. 7-Joint sir holdings-Effect of transfer of some plots by some proprietors on the rights of others.

Where some of the proprietors having joint sir holdings transfers some specific plots to athird person, if it can be shown that the remaining proprietor has agreed in fact to the division of the transfer of certain specific plots to the vendee by the vendors then he would be precluded from claiming the whole holding as his sir. But in the absence of such a consent, the mere fact that the vendors have transferred certain specific plots to the vendee cannot extinguish the rights of the remaining proprietors in the plot so transferred unless the remaining proprietor's right to get back possession is extinguished by limitation. (Shirreff, J.M. and Sathe, A.M.) RAPIQ AHMAD v. MITTAR SEN. 1941 O.A. (Supp.) 895-1941 A.W. R. (Rev.) 1102.

-Ss. 12 and 22-Fixed-rate tenant-Position and rights of.

A fixed-rate tenant is in a privileged position. He has rights approximating to the rights of an owner; but his rights are not absolute inasmuch as thelandholder retains the rights of proprietary reversion. In other words, notwithstanding, such dominion as a fixed-rate tenant has over his holding, the land holder remains the proprietor. (Collister, Bajpai and Braund, JJ.) SHANTI SARUP I)AS v. ASHARPISINGH. I.L.R. (1941) All. 250 =192 I.C. 496=13 R.A. 327=1941. A.L.W. 18= 1941 O.A. (Supp.) 34=1941 A.W.R. (H.C.) 34 =1940 A.L.J. 906=1941 A.W.R. (Rev.) 45 =1941 O.W.N. 12=A.I R. 1941 All. 61 (F.B.) -.. S. 14 and T. P. Act, S. 52-Femily Lift

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Effect—Subsequent sale in execution of that property—Rights of parties.

The effect of S. 52. T P. Act, is by no means that a transfer pendentelite is entirely void. In the case of a family alienation by a gift by the judgment debtor of his zamindari property including sir lands, no exproprietary rights are created and the donees become not only proprietors but sir holders, subject only to the rights of the decree holder. They become ex-proprietary tenants in the sir land after sale in execution of the decree (Yorke, J.) RAGHUBIR V. RAGHUBIR SARAN. 1942 O. W.N. 87=1942 A.L.W 62=1942 R.D. 158.

——S 14—Joint sir—Sale of proprietary interest by one—Subsequent sale by another—Acquisition of ex-proprietary right.

Where two brothers held certain plots as their sir and one of them sells his proprietary interest and the other becomes the sole sir holder and when he in his turn sells his sir interest he alone acquires an ex-proprietary title, (Harper, S.M.) WYIELLE PHILLIPS V. STANLEY PHILLIPS. 1941 A. W.R. (Rev.) 512=1941 R.D. 536=1941 O.A. (Supp) 471.

Ss. 14 and 15—Surrender of ex-proprietary rights—When becomes effective—Agreement to surrender on date of transfer of proprietary rights, but sanction under S. 15 granted subsequently—Rights of parties in the intervening period.

Ex-proprietary rights are not extinguished till the sanction required by S. 15 of the Agra Tenancy Act is obtained. Hence, where there is on the date of the transfer of proprietary rights an agreement to surrender the ex-proprietary rights, but the necessary sanction under S. 15 is obtained only some months later, the ex-proprietary rights are not extinguished till that date. for there is no provision in the Tenancy Act as to the sanction dating back to the date of the agreement. In such a case, the tenant of sir becomes a sub-tenant of the ex-proprietary tenant when there is a transfer and such rights become extinguished on sanction to surrender being obtained and thereafter he becomes a trespasser unable to take advantage of S. 29 of the Tenancy Act of 1939. (Malik, J) DIN DAYAL 7.

QADAM SINGH. 1945 A.L.W. 331 = 1945 O.W.N. (H.C.) 284 = 1945 A.W.R (H.C.) 225 = 1945 A.L.J. 503=A.I.B. 1946 All. 54.

The conditions of the year on which the partition papers are to be based should determine the question whether ex-proprietary rights have arisen or not. (Harper, S.M. and Sathe, J.M.) PAL SINGH v. SHANKER BUX SINGH. 1941 R.D. 1137=1941 O.A. (Supp.) 927=1941 A.W.R. (Rev.) 1158.

#### S. 15—Scope and applicability.

The Agra Tenancy Act introduced in S. 15 a restriction on the waiver of ex-proprietary rights. The restriction applies however to agreement executed within six months of a transfer. Where a partition made by an arbitrator was accepted by all parties by an agreement by which they all relinquished their rights to ex-proprietary right, and which was executed more than six years before the transfer of proprietary rights took place after the confirmation of partition, held that ex-proprietary rights were given up. (Shir-

#### AGRA TENANCY ACT (III OF 1926)

reff, J.M) RAM SUBHAG RAM v. RAMLAKHAN. 1941 A.W.R. (Rev.) 509 (1)=1941 R.D. 535=1941 O.A. (Supp.) 468 (1).

——S. 15, Proviso — Applicability — Conditions— Simultaneous acreement followed by its withdrawal and application under S. 36, Land Revenue Act.

The law as laid down in the proviso to S. 15 of the Agra Tenancy Act only contemplates a simultaneous agreement to waive ex-proprietary rights—and when there is such an agreement the law is satisfied; hence a subsequent withdrawal of that and an application under S. 36 of the Land Revenue Act cannot take it away from the proviso to S. 15. (Rate. I. II) JAINANDAN MISRA 7. BASDEO MISRA. 1945 R.D. 415 = 1945 A. W.R. (Rev.) 201.

— . 15. last Proviso and S. 3 (1)—Scare and applicability—Purchaser of equity of redemption from a sir holder if can become sir holder by redeeming mortgage.

The purpose of the last proviso to S. 15 of the Agra Tenancy Act was to enable the mortgagor to regain sir and not to enable a third party to become a sir holder. The purchaser of the equity of redemption cannot become a sir holder. So S. 3 (1) has no meaning with reference to the proviso to S. 15 of the Agra Tenancy Act heacuse there is something repugnant in the subject or context namely that the mortgagor's successors by purchase can never have sir rights (Ross, A.M.) Attrite Sen v. Teja. 1944 R.D. 129=1944 AW.R. (Rev.) 66.

——S. 15 (2)—Privilege under if confined to rendor only—Vender resiling from surrender—Vendee if can enforce fulfilment of surrender.

Vendee if can enforce fulfilment of surrender. The privilege of applying for surrender is conferred by S. 15 (2); Agra Tenancy Act on the vendor only. When his application is rejected and an appeal by him is requested to be also rejected no right is conferred on the vender to enforce the fulfilment of the surrender. (Shirreff S.M. and Sathe J.M.) RIRKU 7. PARMATMA SARAN. 1942 O.W N. (E.R.) 235 (2)=1942 O.A. (Supp.) 162 (2)=1942 A.W R (Rev.) 142 (2).

S. 15 (2) Requirements of.

What S. 15. (2) requires is that the mortgage should not refer to sir in general but wholly to specific plots. (Harper, S.M. and Sathe, J.M.) NIADER W. KANHAIVA 1941 R.D. 257=1941 O.A. (Supp.) 199=1941 A.W.R. (Rev.) 250=1941 A.L.J. (Supp.) 53.

The meaning of the proviso to S. 15 (5) of the Agra Tenancy Act is that the mortgaged property must consist solely of Sir. It must be a specific area of Sir and of Sir only. Hence it can have no application where the mortgage is of both Sir and non-Sir plots. (Acton. A. M. and Ross. J. M.) BHANPAL SINGH v. BIJAIPAL SINGH. 1945 A.W.R. (Rev.) 189 = 1945 B.D. 392.

S. 16-See also Agra Tenancy Act (II of 1901), S. 11.

S. 17—Applicability — Admission of cotenants to existing tenancy

Where a co-tenant is admitted to an already existing tenancy the provisions of S. 17 of the Agra Tenancy Act does not apply. (Sathe, A.M). Nanhi 7. Gopi Chand. 1942 O.W.N. (B.R.) (22) (2)=1842 O.A. (Supp.) 15=1842 A.W.R. (Rev) 15=1942 R.D., 38 (2).

#### AGRA TENANCY ACT, (III OF 1926.)

-S. 17-Occupancy rights, in plots forming part of statutory holding-If could be conferred.

Where the plots form part of a statutory holding, occupancy rights could not be conferred in respect of those plots. (Shirreff, J.M.) Pha-GOO RAM v. Unit NARAIN SINGH. 1941 A W.R. (Rev.) 589 (2)=1941 R.D. 533=1941 O.A. (Supp) 543.

-S. 17-Occupancy rights-Power of cosharer to confer.

A co-sharer cannot confer occupancy rights without the consent of the other co-sharers and a widow with limited rights cannot confer such rights without the consent of the reversioners or of the District Judge, (Sathe, S.M.) RAGHU-BANS KUNWAR v. M ANRAKHAN SINGH. 1943 R. D. 173=1943 A.W.R. (Rev.) 91

-S. 18—Application under—Absence of verification before Court-Effect.

Where an application under S. 18, Agra Tenancy Act, is not verified before Court as required by that section, if it has not resulted in any material injustice to the parties should be condoned under S. 99, C.P. Code. (Sathe, J.M.) MIR IBRAHIM 7. SUBHAN KHAN, 1942 O.A. (Supp.) 373 (1)=1942 A.W.R. (Rev.) 347 (1)= 1942 O.W.N. (B.R.) 563=1942 R.D. 691.

S. 296. U. P. Tenancy Act. See U. P. TENANCY ACT, S. 296 AND AGRA TENANCY ACT, S. 18. 1941 A.W.R. (Rev.) 972.

-S. 18-Order in proceedings under-Second abbeal.

In proceedings under S. 18 for the record of occupancy rights there is no second appeal. (Sathe. J.M.) MIR IBRAHIM TV. STIBHAN KHAN. 1942 O.A. (Supp ) 373 (1)=1942 A.W.R. (Rev) 347 (1)=1942 O.W.N. (B.R.) 563=1942 R.D. 691.

Ss. 18 and 19—Proceedings under—S. 296 of U. P. Tenancy Act, if applies to. See U. P. TENANCY ACT, S. 296. 1941 A.W.R. (Rev.) 929. -S. 19-Admission to tenancy-Acceptance

of rent for six years.

Where there has been an acceptance of rent for six years and the regular management of the estate is not proved, it is right to infer that the tenant was not holding without consent. (Shirreff, J.M.) KAMLAKAR SINGH v. THENGAL 1942 O.A. (Supp.) 44 (1)=1942 O.W N. (BR) 38 (1) =1942 A.W.R. (Rev.) 44 (1)=1942 R.D. 54 (1). -S. 19-Statutory tenancy-Claim as to

Heirs holding over after expiry of lease-New lease in favour of mother of the heirs-Validity.

Where on the death of a lessee his heirs continued in possession and held over after the expiry of the lease and after the Tenancy Act, 1926. came into force and a lease was executed thereafter in favour of the mother of the heirs, held that the heirs had acquired certain rights by holding on after the expiry of their father's lease, and it was not open to the zamindar to enter into a new contract over their heads ignoring their rights. (Harper, S.M.) Husain Banu 71. Nathua. 1941 R D. 262=1941 A.W.R. (Rev.) 346=1941 O.A. (Supp.) 260.

- Ss. 19, 40 and 41—Statutory tenant—Terant under deed prior to Act of 1926, conferring 537.(1)=1942.A.W.R. (Rev.) 511 (1)

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occupancy rights—Acquisition of lands—Section applicable. RADHA PRASAD SHASTRI v. DIRVODHAN SINGH. I see Q.D. 1936-40 Vol. I. Col. 3215.] 1941 A.W.R. (Rev.) 100=1941 O.A. (Supp.) 88.

-S. 19, Third proviso, cl. (b)—Applicability —Land in river bed.

Where the land in question is situated in the hed of a river and the rent is varying from year to year, according to the actual area cultivated every year the land cannot be held to be one under stable cultivation and it is covered by cl. (b) of the third proviso to S. 19 of the Agra Tenancy Act under which no statutory rights accrue in respect of such lands. (Harper, S. M. and Sathe, J.M.) LAKSHMI SAHAI v. BASDEO DUBEY. 1941 A.W.R. (Rev.) 504=1941 O.A. (Supp.) 463=1941 R.D. 581.

-S. 20 (2). Proviso 1 (b)—Scape and effect of-Right of heir of statutory tenant to slump remission-Admission of such heir, if constitutes nere tenancy.

Under proviso (1) (b) to S. 20 (2) of the Agra Tenancy Act the zamindar is given a period of 3 years for filing a suit for ejectment against the heir of a statutory tenant after the period of 5 years allowed to him under S. 20 (2) is over. It is after this period of 3 years is over that the right of the zamindar to sue for the heir's ejectment is extinguished and then the heir becomes a statutory tenant in his own rights under S. 19 (b) of the Agra Tenancy Act and till then he is entitled to the slump remission enjoyed by the deceased tenant.

Per Harper, S.M.—The admission to tenancy of the heir of a statutory tenant does not amount to a new contract of tenancy within the intention of the revision scheme. (Harper, S.M. and Sathe, I.M.) TAIST RAM T. T.AKSTIMT SHANKAR, 1941 R.D. 584=1941 O.A. (Supp.) 575 (2).

-S. 20. Proviso (b)—Applicability—Ejectment proceedings not legal.

The reference to electment proceedings in proviso (b) of S. 20, Agra Tenancy Act, refers to logal proceedings and legal ejectment. Where there is no legal proceeding and no legal ejectment, the proviso (b) to S. 20 has no applica-tion. (Harper, S.M. and Shirreff, I.M.) Dup-HAT V. BINDESHARI. 1941 A.W.R. (Rev.) 1093= 1941 O.A. (Supp.) 886.

S. 22-Permanent lessee of fixed-rate tenancy-Rights.

A permanent lease purporting to transfer all the rights of a fixed-rate tenant, including the right to eject the sitting tenants is quite valid. And the lessee can exercise all the rights including the right to eject the sub-tenants. (Shirreff. J. M) PAMDUTT RAT 7 ABDUL AZZZ KWAN. 1941 A.W.R. (Rev.) 834 (1)=1941 R.D. 757= 1941 O.A. (Supp.) 739 (1).

-Ss. 23 (1) and 34 (1)—Sale of grove by exproprietary tenant - Validity.

Under the law as it stood prior to the U. P. Tenancy Act of 1939, ex-proprietary rights did arise in sir land even though it was occupied by a grove. When there is a sale of grove by an exproprietary tenant it is void under S. 34 (1) of the Acra Tenancy Act. (Sathe, S. M.) CHANDARA PRASAD 7. KALI CHARAN. 1942 O.A. (Supp.) AGRA TENANCY ACT, (III OF 1926).

Ss. 23 (2) (b) and 44—Co-tenant admitted by widow, life tenant—Status after widow's death.

Where a person is admitted as co-tenant by the widow in possession as a life tenant, he can only acquire the rights of a co-tenant during her lifetime, and after her death he becomes a trespasser. (Sathe. J. M.) IDRIS v. MAULA BAKSH. 1941 A.W.R. (Rev.) 809=1941 R.D. 735=1941 O.A. (Supp.) 720.

Ss. 23 (2) (b) and 44—Tenant with life interest admitting co-tenant—Status of such co-tenant—Death of life tenant—Co-tenant's liability to ejectment.

Where a stranger is admitted as a partner in an existing holding the rights of the tenant cannot be thereby enhanced in any way. Therefore when a widow with a life interest only in a holding admits a co-tenant with the consent of the landholder, she does so only for the duration of her own tenancy rights (ie) for her lifetime or up to the date of her remarriage. She could not transfer one iota more than the interest she herself held. On the termination of her tenancy rights by death, the new comer cannot assert any rights of his own as he came in the holding only as a partner or co-tenant of the existing tenant and not on account of his admission as a tenant in his own right and hence he can be ejected as a trespasser. (Harper, S.M. and Sathe J.M.) LAXMI CHAND W. HANDU. 1941 O.A. (Supp.). 95=1941 A.W. R. (Rev.) 107=1941. R.D. 33.

——S. 23 (2) (b). Proviso—Recognition contemplated by—Admission of consent to transfer by lambardar—If amounts to recognition. See U. P. Tenancy Act. S. 33 (2) (c) And Agra Tenancy Act., S. 23 (2) (b) Proviso. 1941 R.O. 286.

S. 23 (2) (b), Proviso—Scope and object of The proviso to S. 23 (2) (b) of the Agra Tenancy Act (corresponding to S. 33 (2) (c) of the U.P. Tenancy Act) explains what is meant by a co-tenant in connection with the clause which renders it legal for a tenant to release or transfer his interest in favour of a co-tenant. It was probably intended to cover all legal aspects of co-tenancy but it is not quite exhaustive as a definition, for cases may arise in which a person becomes a co-tenant by estoppel. (Shirreff, S,M) LACHHMI NARAIN v. RAM DEI. 1942 O.W.N. (B.R.) 315=1942 R.D. 404=1942 A.W.R. (Rev.) 276 (1)=1942 O.A. (Supp.) 302 (1).

5.24—Chela—Lease of agricultural holding conferring heritable rights—Representative of lessor, if can question chela's right to succession.

With or without a will a chela is not an heir to an agricultural holding under the Agra Tenancy Act. But where a lease purports to confer heritable rights, the lessor's representative is estopped from denying that a chela who succeeds as the heir to the deceased lessee, is a tenant in succession to the deceased lessee. This does not conflict with the principle that estoppel cannot operate against law for there is no express provision of law that a person who is not an heir under the Agra Tenancy Act but whom the landholder agrees to treat as an heir and admit to the tenancy, can be ejected as a non-occupancy tenant. (Shirreff, J.M.) Bhairo Kumar Prasad v. Markande Gir. 1941 A.W.R. (Rev.) 811=1941 O.A. (Supp.) 748=1941 R.D. 891.

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S. 24—Chela—Right to succeed guru under S. 24—If can also claim by blood relationship.

A chela is not entitled to succeed his guru under S. 24 of the Agra Tenancy Act. But there is nothing to prevent him from claiming by reason of blood relationship. (Sathe, J. M.) Gurcharan Prasad v. Bikrama Ram Sant. 1942 A.W R. (Rev.) 122 (2)=1942 R D. 255=1942 O.W.N. (B.R.) 189=1942 O.A (Supp.) 139 (2).

—S. 24—Co-sharing—Clear proof of—Necessity.

Where a person claims to succeed to an occupancy holding on the ground that he is the nearest co-sharing collateral, there must be clear proof of the fact of co-sharing. Where the proof consisted of the statements of three witnesses who merely stated in general terms that the cultivation was joint, it is not sufficient to prove cosharing. (Harper, S. M. and Sathe, J. M.) SHIAM LAL v. JUMMAN. 1940 R.D. 600=1941 A.W.R. (Rev.) 91=1941 O.A. (Supp.) 79.

Where during the minority of a tenant his uncle who was also his nearest collateral manages the holding, pays rent to the zamindar directly and shares the balance of profits with the minor, on the death of such a tenant, the uncle does not become a trespasser but is the nearest co-sharing collateral of the deceased tenant entitled to succeed him. (Harper, S.M.) RANJIT SINGH v. MUNNA KHAN. 1940 R D. 607 (2)=1941 A.W.R. (Rev.) 93 (2)=1941 O.A. (Supp) 81 (2).

S. 24—Co-sharing—Existence or otherwise, if a pure question of law—Onus—What would constitute co-sharing.

A question whether co-sharing in cultivation is established or not is not solely a question of law. It raises both a question of fact and a question of law, whether the facts found constitute co-sharing in law and the onus is on those who rely on it. Co-sharing is not established by vague statements of witnesses that the person concerned lived and shared in cultivation with the tenant. There must be evidence of definite acts constituting co-sharing. (Dible, S. M.) SHAMRATHI KUNWARI v. ABHAIRAJ. 1945 B.D. 257 = 1945 A. W.R. (Rev.) 139.

S. 24—Co-sharing in cultivation by collateral—Absence of pooling of resources—When and when not countable against claim to succession.

The absence of proof of pooling of resources with the deceased by the co-sharer claiming to succeed though may not be counted against him if as a matter of fact he had no agricultural resources of his own which he could have pooled, would prevent him from succeeding where it is shown that he did have such resources and did not pool them with those of the deceased. (Sathe, J.M.) DEO SARAN PANDEY v. RAM KISHAN MAL. 1942 O.W.N. (B.R.) 307=1942 R.D. 396=1942 A.W. R. (Rev.) 262 (1)=1942 O.A. (Supp.) 288 (1).

——S. 24—Co-sharing—Joint living with deceased —Joint cultivation—Sufficiency.

Where the collaterals Concerned have been living with the deceased tenant as a member of a joint family there could be no separate resources to be pooled together and the joint cultivation must be held to fall within the category of cosharing according to law. (Sathe, J.M.) VIEHUTI NARAIN SINGH v. CHHAKURI SINGH

AGRA TENANCY ACT, (III OF 1926). 1942 O.W.N. (B.R. 155=1942 O.A. (Supp.) 125=1942 R.D. 221=1942 A.W.R. (Rev.) 108.

S. 24—Co-sharing—One of the heldings in possession of third party in lieu of interest—Joint helding in respect of others—Presumption of co-sharing, if can arise.

Where a holding is in the possession of a third party in lieu of interest, a claimant, cannot succeed to it on the basis of co-sharing. Co-sharing in cultivation might be presumed from the fact of the last owner living jointly with the claimant and cultivating other holdings also jointly with him. But where co-sharing was physically impossible owing to the mortgage no such presumption can be drawn. (Shirreff S.M. and Sathe J.M.) Chunni Lat. v. Santu Chamar. 1942 R.D. 717=1942 O.A. (Supp.) 403=1942 O.W. N. (B.R.) 589=1942 A.W.R. (Rev.) 377.

\_\_\_\_\_S. 24—Co-sharing—Pooling of resources— Limits to the rule.

Pooling of resources is one of the criteria and not the sole criterion which goes to prove whether a person had co-shared in cultivation or not. Where therefore a claimant had no resources of his own which he could pool with those of the deceased but still actively took part in the cultivation of the latter's holding in all other respects he could not be held not to have co-shared simply because he had no agricultural stock or implements which he could pool with those of the deceased. (Sathe, J.M.) BHAGWATI PRASAD SINGH v. SHEO SHANKAR. 1941 A.W.R. (Rev.) 509 (2)=1941 R.D. 481=1941 O.A. (Supp.) 468 (2).

\_\_\_\_\_S. 24—Co-sharing—Pooling of resources— Necessity.

Pooling of resources where there are any resources to be pooled is an essential condition for proving co-sharing. (Sathe, A. M.) NANAK CHAND v. MOHAN SINGH. 1941 A.W.R. (Rev.) 1128 (2)=1941 O.A. (Supp.) 909 (2).

No co-sharing in the legal sense can be presumed in the case of a collateral having agricultural stock of his own unless there is evidence to show that his stock was pooled with that of the deceased in the cultivation of the plot in question (Sathe. S.M.) NANAK CHAND v. CHIRANJI. 1943 A.W.R. (Rev.) 332 (1)=1943 R.D. 560.

——S. 24—Co-sharing — Requisites—Existence of agricultural resources—Necessity of proving pooling.

Ss. 24 and 25—Co-tenants—Relation between-Succession on the death of one—Law applicable.

Co-tenants in a holding are tenants in comon and not joint tenants and when one of such co-tenants dies, succession is governed by Ss. 24 and 25 of the Agra Tenancy Act and the corresponding sections in the new Act. A joint helding does not go to the survivors only by the right of survivorship. (Shirreff, SM. and Sathe, JM) RAGEUBIR V. LAKEI, 1842 A.W.R (Rev.) 188=

AGRA TENANCY ACT (III OF 1926). 1942 O.W.N. (B.R.) 308=1942 O.A. (Supp.) 208=1942 R.D. 397.

S.24—Heir not succeeding under—Liability for arrears of rent owed by deceased—Enforceability of decree.

The heir of a deceased tenant is liable for arrears of rent owed by the latter even if the former did not succeed to the holding under S. 24 of the Agra Tenancy Act. Any decree that may be obtained will be executable under S. 52. C. P. Code. (Shirreff, J. M. and Sathe. A. M.) Duni Chander, Magsood. 1942 O.W.N. (BR.) 20 (1)=1942 O.M. (Supp.) 17 (1)=1942 A.W. R. (Rev.) 17 (1)=1942 R.D. 36 (1).

Where there are four brothers of a statutory tenant surviving on the death of the widow, even if three of them are found to have lived separate from the statutory tenant and only one remained joint with bim, succession is governed strictly by S. 24 of the Agra Tenancy Act which gives all brothers an equal right. S. 26 specifically excludes any claim on the basis of co-tenancy except when there is no other heir under S. 24. (Harper, S.M. and Shirreff, J.M.) Dubnat v. Bindeshri. 1941 O.A. (Supp.) 886=1941 A.W. R. (Rev.)\*1093.

\_\_\_\_\_S. 24, Class (vii)—Nearest collateral— Crucial point of time.

Under S. 24, Class (vii), Agra Tenancy Act, the rights of the collaterals arises for the first time when the widow dies or remarries. When succession opens in such a case, the question to be examined is whether the claimant is at that time the nearest of all the surviving collateral male relatives of the decensed male tenant and whether he had co-shared in the cultivation of the holding at the time of the death of the deceased male tenant. (Harper, S.M. and Sathe, J.M.) Siaram v. Balisso. 1941 R.D. 233=1941 O.A. (Supp.) 205=1941 A.W.R. (Rev.) 256=1941 A.L.J. (Supp.) 58.

- S. 24—Widow of occupancy tenant—Re-marriage of—Rights of succession under S. 24—If affected by any recognition by the zemindar.

On re-marriage the tenancy rights of the widow of an occupancy tenant terminate and no recognition by the zamindar can overrule any rights of succession acquired under S, 24 of the Agra Tenancy Act. (Harper, S. M. and Sathe, J.M.) CHONNI V. JAMNA. 1940 R.D. 624=1941 A.W.R. (Rev.) 429=1941 R.D. 663 (2).

Ss. 24 and 35 (1) (a) Widow of occupancy tenani-Re-marriage-Terminates her rights. Sangram 7. KPSHO'DAS. [sec Q.D. 1936—40 Vol. 1. Col. 3216]. 1941 A L.J. (Supp) 12=1941 R.D. 118.

S. 25 and U. P. Tenancy Act (1939), Ss. 36 and 37—Scope and applicability of S. 25—Hindu daughter having life interest in occupancy holding—Succession on her death when Tenancy Act of 1926 was in furce.

The two sub-clauses to S. 25 of the Agra Tenancy Act governed all cases of female tenants: one clause governed those with an absolute right and the other clause governed those with a limited right. Females of Mahor

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medan families having absolute estates would come under S. 25 (2) and their inheritance would descend to their sons. Females of Hindu families having only life interests would come under S. 25(1) and their succession would go to the heirs of the last male tenants. Hence, where on the death of a Hindu occupancy tenant, his daughter inherits the holding under the Rent Act of 18°1 and dies at a time when the Agra Tenancy Act of 1926 was in force, her son could succeed to the holding only if he proved co-sharing with the last male tenant. (Harper S.M.)
MANGE v. MANI 1941 R D. 163=1941 O.W.N. 469=1941 A.W.R. (Rev.) 342=1941 O.A. (Supp.) 256.

-S. 25-Widow inheriting holding, remarrying -Reflect-Right of sons by second marriage to inherit

Where a widow inheriting a holding remarries, her rights are automatically extinguished from the date of remarriage. But if she is allowed to cultivate the holding as before she acquires fresh rights in her own right, if the zamindar knew of the remarriage and her sons by the second marriage are entitled to inherit those rights under S. 25 (2) of the Agra Tenancy Act. (Shirreff, S.M. and Sathe, J.M.) HARNATH 7. SUNDER BIBL 1942 R.D. 732=1942 A.W.R. (Rev.) 398=1942 O.A. (Supp.) 424=1942 (Rev.) 398=1942 O.A. (Supp.) 424=1942 O.W.N. (B.R.) 604. —S 25 (1) and (2)—Ahir widow inheriting holding and re-marrying when Act X/I of 1881 was

in force—Law governing succession on her death after

Tenancy Act of 1926.

Where a widow of the caste of Ahirs, in which remarriage is permitted by custom, inherits a holding from her husband and re-marries when Act XII of 1881 was in force and remains in possession till her death after Agra Tenancy Act of 1926 had come into force, succession to the holding would be governed by S. 25 (1) and not by S. 25 (2) of the Agra Tenancy Act. (Sathe, I.M.) RAGHUNATH SINGH v. SHIAM LAL. 1942 A.W.R. (Rev) 500=1942 O.A. (Supp.) 526=1942 O.W.N. (B.R.) 752.

S. 25 (2)—Applicability—Death of widow whose name was entered by way of consolation—Effect.

Where a widow who according to the personal law is not an heir to her husband in the presence of sons, happens to be only a sleeping partner in the holding and whose name is entered by wav of consolation dies, succession is not governed by S. 25 (2) of the Agra Tenancy Act. On her death her name should be expunged and no rights can pass to her daughter's sons, from her. (Sathe, A.M.) CHAIT RAM v. JASWANT SINGH. 1941 O.A. (Supp.) 739 (2)=1941 A.W.R. (Rev.) 834 (2)=1941 R.D. 896.

-Ss. 25 (2) (b) and 26-Succession to occupancy holding—Husband if can succeed to wife succeeding her father prior to 1901.

Where a daughter succeeds her father's rights as a co-tenant in an occupancy holding prior to 1901, it is under the personal law and her right is only to a limited estate and it ceases on her death. Hence though she might die after 1926 the position would not be changed and her interest would pass by survivorship to the other co-tenants under S. 26. Agra Tenancy Act and her husband cannot inherit it under S. 25 (2) (b) (Shirreff, S.M. and Sathe, J.M.) SURAJBHAN v. JAGANNATH.

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1942 R.D. 366=1942 O.A. (Supp.) 171 (2)= 1942 O.W.N. (B.R.) 277=1942 A.WR (Rev.) 151 (2).

-S. 26-Acquisition of holding, if for joint family-Onus-- Evidence of payment of rent and posses-

sion of part of land-Value,

The burden of proving that a holding has been acquired for the whole joint family lies under S. 26, Agra Tenancy Act, on the party which asserts jointness and not on the party in whose name alone the holding is shown in the papers. Mere possession of the land in dispute and payment of rent direct to zamindar do not constitute conclusive evidence that the holding is joint, (Shirreff, J.M. and Sathe, AM) NAWATA v., KEWAI. 1941 R.D. 1125=1941 O.A. (Supp.) 931=1941 A.W.R. (Rev.) 1162.

-S. 26—Co-sharing—Requisites,

A how of 12 or 13 years reading in a school is not likely to be of any material assistance in agricultural operations and hence he is incapable of co-sharing in cultivation. The requisite as to pooling of resources is necessary. The removal of the condition as to co-sharing in the new Act is no ground for giving reprospective effect to that view when that Act itself does not authorise that. (Harber, S.M. and Sathe J.M.) BHOLA SINGH V. TAGDISH NARATN SINGH. 1941 A W.R. (Rev) 269=1941 O A. (Supp.) 218=1941 R.D. 290=1941 A.L.J. (Supp.) 65.

-S. 32-Effect of surrender on subtenancy-Rights of new lessee.

When a tenant in chief surrenders with the termination of his rights, the rights of the subtenant terminate under S. 32 of the Agra Tenancy Act. The new lessee becomes the landholder so far as the actual cultivation is concerned and is thus entitled to exercise his option as to whether the interest of the sub-tenant should be maintained or not. If he decides that he should not be maintained the former sub-tenant becomes a trespasser. His status remains the same irrespective of whether the lease conferred on the new lessee the rights of a non-occupancy tenant or any Superior tenancy rights, (Harper, S.M.)
MANGRU v. SAHDEL 1942 O.A. (Supp.) 205:-1942 A.W.R (Rev) 186=1942 O.W.N. (B.R.) 539.

-S. 32 (1), Proviso-Sub-tenant allowed to continue after exfinguishment of interest of tenunt in chief-Effect .

According to the proviso to sub-sec. (1) to S. 32 of the Agra Tenancy Act when the interests of the tenant in chief is extinguished and the landlord allows the Sub-tenant to continue then all covenants previously binding and enforceable as between the tenant and sub-tenant thereupon become binding and enforceable as between the landholder and sub-tenant. His liability to pay the same rent which he was paying continues. (Shirreff, S.M., and Sathe, J.M.) KHUSHIYALI v. MUHEMA. 1942 O.A. (Supp.) 35-1942 A.W.R. (Rev.) 35=1942 O.W.N. (B.R.) 45=1942 R.D.

-S. 32 (3)—Surrender of chief tenancy—Subsistence of sub-tenancy—Lease of tenancy in chief-If can be made only after expiry of sub-tenancy.

When at the time of a surrender by the tenant in chief the land is in possession of a sub-tenant entitled to retain possession of it, it is unnecessary for the zamindar to wait until the sub-tenancy

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rights of the sub-tenant expire before leasing out the tenancy in chief. (Shirreff. J.M. and Sathe, A.M.) KALLAN V. IHANDOO. 1941 O.A. (Supp.) 955 (2) =1941 A.W.R. (Rev.) 1207.

——S. 35 (f)—Dispossession of ex-proprietary tenant by a co-sharer—Extinguishment of rights—Period.

Where one of the co-sharers dispossesses an ex-proprietary tenant and is in possession from 1342-F., it is not enough to extinguish the exproprietary rights of the tenant who has a period of 12 years within which to sue for the ejectment of the co-sharer and he is hence entitled to have his name retained as an ex-proprietary tenant in the khatauni. (Shirreff, S. M. and Sathe, J. M.) Mywa Ram v. Dunga Das. 1942 O.W. N. (B.R.) 691=1942 O.A. (Supp.) 483.

——S. 35 (1) (f)—Extinguishment of rights under—Onus.

To establish a case of an extinguishment of tenant's rights under S. 35 (1) (1) of the Agra Tenancy Act, it is for the plaintiff to show that the defendant has been out of possession for so long that he has lost his rights under the section. (Sathe, A M) SATIK v MAUJI LAL. 1041 A W. R (Rev) 923 (2)=1941 O A. (Supp.) 797 (2)=1941 R D. 814.

——S. 36 and U.P. Tenancy Act (1939) S. 46— Tenant with non-occupancy rights—Acquisition of mortgagee rights—Termination of mortgage— Status of tenant.

Where the question was whether a tenant with non-occupancy rights under the Act of 1901 whose rights terminated by the acquisition of mortgagee rights became a trespasser when the mortgage terminated, held:

Per Harper, S. M.—That the tenants' rights were in abeyance and under the new Act he became a tenant again but with statutory rights.

Per Shirreff, J. M.—That the mortgage must be regarded as terminating the tenancy which existed merely as a tenancy from year to year. (Harper, S. M. and Shirreff, J. M.) JACDISH NARAIN SEWAK PANDEY T. KALI CHARAN MAM. 1941 R D 665—1941 O.A. (Supp.) 613—1941 A. W.R. (Rev.) 673.

—S. 37—Division of holding—Plea of a prior division of certain plots and prayer for their exclusion—Procedure to be followed.

When the representatives of one of the two tenants having occupancy rights in a holding sue for equal division but the other tenant pleads a prior division of certain plots and claims exclusive tenancy therein and equal division in the rest, to allow such a claim would make the division unequal and hence the whole holding should be divided half and half. (Shirreff, J.M) TAMESHAR AHIR v. LAL BEHARI AHIR. 1941 A.W.R (Rev.) 568=1941 O.A. (Supp.) 499.

——Ss 37 and 44—Partition decree under

Ss 37 and 44—Partition decree under S. 37—Effect on rights of parties in divided shares—Decree, if capable of execution—Party in possession of the share of another after decree—If can be ejected under S. 44—Proper remedy.

The rights of the respective parties of a case under S. 37 of the Agra Tenancy Act do not cease in the divided shares until actual separation takes place on the spot in pursuance of the decrement. Therefore, if the parties do not obtain

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separate possession in accordance with the decree by mutual arrangement, the aggrieved and should take out execution to have the S. 37 decree party can proceedings executed through Court. Until the parties obtain separate possession either by mutual arrangement or through Court in purarrangement or through Court in pursuance of a decree under S. 37, the rights of both the parties in the whole holding continue unaffected and till then they cannot be deemed to he trespassers in respect of plots in their possession, though it might belong to the share of another under the decree, and against such persons a suit under S. 44 of the Tenancy Act does not lie. The only remedy open to a person who cannot take out execution of a decree under S. 37, owing to limitation is to have his share partitioned under S: 49 of the U. P. Tenancy Act, corresponding to S. 37 of the old Act, as the cause of action under that section is a continuing one. (Harper, S.M. and Sathe. J.M.) From v. Bhagein, 1941 R.D. 37—1941 A.W.R. (Rev.) 160=1941 O A (Supr.) 112.

S. 37—Private partition—Subsequent suit for division of holdines—All holdings, if should be included. See U. P. Tenancy Act. S. 49 and Agra Tenancy Act. S. 37 1941 R D 501 (2).

S 37 and Sch IV. Group B Serial No.1—Suit for division of groves forming tenants' holdings on which rent is not assessed—Maintainability.

Though rent has not been assessed on groves forming tenants. boldings a suit for their division would lie under S. 37, Agra Tenancy Act. It is true that in Sch IV, Group B, Serial No. 1 the court-fee which has got to be paid in a suit under S. 37 has a reference to the rent payable on the bolding but that does not mean that a holding on which no rent has been assessed and which is bila bagani cannot be matter of partition under S. 37. It only refers to the payment of court-fee and does not in any way exclude any property from the operation of S. 37 which otherwise comes within the express words of S. 37 simply because no rent in fact has been assessed. (Bajpai and Dar. II) FAM SUNDER V. LAL MOHAMMAD. 1943 A.L.W. 153.

There is nothing in law against joint holders of a tenaucy effecting a private partition, but only it must be satisfactorily proved. If agreement to divide the holding is clear and definite and is intended to provide a permanent division and has been acquiesced in by the zamindar, it cannot be challenged afterwards. (Hurper, S.M. and Shirreft, J.M.). DWARKA v. MANGHAR. 1941 A.W.R. (Rev.) 500::1941 R.D. 524=1941 O.A. (Supp.) 459.

Ss. 37 and 121—Suit number S. 37—Division

——Ss. 37 and 121—Suit under S. 37—Division—Rights of parties—One of the parties admitting co-tenant with consent of Zamindar—Right of the other to suc under S. 121.

Where one of two co-tenants brings a suit under S. 37 of the Agra Tenancy Act for division of the holding and the holding is divided but without the consent of the zamindar the responsibility for the rent of whole of the holding remains joint and the rights of both parties continue in both portions of the holding even after the division. Hence, if one of them later on

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admits another as his co-tenant with the consent of the zamindar, the other has every right to sue under S. 121 for the declaration of his rights as the act of the other admitting a new co-tenant affects his rights. (Sathe. J. M.) PAN KUNWARI v. BALJOR TEWARI. 1941 R.D 66=1941 A.W.R. (Rev.) 248=1941 O.A. (Supp.) 197.

S. 37, Proviso-Formal division of holding-Landholder being some of the co-tinants--Necessity for

agreement in writing.

There could have been no final division of a holding between co-tenants when Act III of 1926 was in force unless the landholder had agreed thereto in writing as required by S. 37 of that Act. Though the landlord might have been some of the co-tenants, nonetheless the proviso required the agreement to be in writing. (Sathe, S.M. and Dible, J.M.) JUGAL KISHORE RAI v. Bansi Kohar. 1945 A.W.R. (Rev.) 54 = 1945 R. D. 104.

proved lines—Absence of land to be given in exchange-Money compensation-II'hen justified.

Where in the case of an acquisition of land for purposes of better farming, it is found that there is no land in the same village to be given in exchange and the applicant holds joint sir and khudkasht in a neighbouring village with another who could not be legally compelled to part with his share in any of the joint sir or khudkasht, and where the tenants are not resident in the village in suit and will retain a considerable amount of cultivated land in the village in suit as well as in the neighbouring village in which they reside, the acquisition of their land on cash compensation is not unreasonable. (Shirreff, J. M.) BIJAI BAHADUR SINGH v. ISLAM AHMAD. 1941 O.A. (Supp.) 605 (2)=1941 R. D. 660=1941 A. W. R. (Rev.) 665.

S. 41 and U.P. Tenancy Act (1939), S. 54 -Refusal to acquire-Proper reason-Reason-ableness of the application-Test.

The reasonableness of the application for

acquisition has to be judged from the grounds on which the zamindar desires the acquisition of the land in question and not from the consequences which the acquisition will entail to the tenant, such as his being left with very little other land for his maintenance which is not a ground for refusal to acquire under S. 41 of the Act. (Harper, S. M. and Sathe, J. M.) UMAKANT PANDE v. KANDHAIYA LAL. 1942 O.A. (Supp) 226 (2)=1942 O.W.N. (B.R.) 522=1942 A.W.R. (Rev.) 200 (2).

-S. 41 (1) (e) and U. P. Tenancy Act
b). S. 54—Construction—Acquisition for (1939).building houses to be let within Municipal limits

-If can be made.

The phrase 'necessary for the management or development of the estate' occurring in S. 41 (1) (e) of the Agra Tenancy Act does not qualify the words 'building houses' occurring in the beginning of that sub-clause and hence land can be acquired for building houses within Municipal limits even if those houses are meant for being let out or for personal occupation. (Harper, S. M. and Sathe, J.M.) UMAKANT PANDE v, KANDH-AIYA LAL. 1942 O.A. (Supp.) 226 (2)=1942 O.W.N. (B.R.) 522=1942 A.W.R. (Rev.) 200 (2). -S. 4 (1) (e)—Construction—Purpose of acquisition.

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The qualification of sub. Cl. (c) to Cl. (1) of S. 41 of the Agra Tenancy Act to the effect that the purpose must be for the management or development of the estate does not apply to the term 'houses' in that sub-section for if it did term houses in that sub-section for It and there would be no need to repeat the words 'other buildings.' (Harper, S.M. and Sathe, J.M.) MOHAN LALT. MANGAT. 1942 O A. (Supp.) 226 (1)=1942 A W.R. (Rev.) 200 (1)=1942 O.W.N. (B.R.) 521.

-S. 44 and U.P. Tenancy Act. S. 180-Damages on ejectment—Necessity -- Limit to the discretion of Court.

According to S. 44 of the Agra Tenancy Act. the trespasser shall be liable to pay damages and discretion is given to the Court to decree those damages up to four times the annual rental. Hence normally some damages should be allotted, but the amount only is left to the discretion to the Court. (*Harper, S.M. and Sathe, J.M.*)
PIRTHI SINGH V. MADAN LAL. 1941 R.D. 170=
1941 O.W.N. 508=1941 A.W.R. (Rev.) 340= 1941 O.A. (Supp.) 254.
——S. 44 and U. P. Tenancy Act, S. 180—

Damages on ejectment—Necessity.
Per Harfer, S.M.—S. 44 of the Agra Tenancy Act says that the trespasser shall be liable to pay damages. The amount is at the discretion of

the Court.

Per Sathe, J.M.—It is not mandatory under S. 44 of the Tenancy Act to award damages in every case where ejectment is decreed. It would he wrong however to refuse damages for inadequate or no reasons. For, in that case a subsequent suit for damages on the part of the plaintiff is barred. (Harper, S.M. and Sathe, J.M.) Sher Singh v. Mahendra Pratar. 1941 R.D. 177=1941 A.W.R. (Rev.) 341=1941 O.A.

(Supp.) 255.
S. 44—Date of trespass—Tenant-in-chief acquiescing in the possession and later treating it

as trespuss.

Where a tenant-in-chief acquiesces in the possession of another for some time and then treats him as trespasser, it cannot be said as a general proposition that the other person becomes a trespasser from the time the tenant-in-chief treats him as trespasser. (Shirreff, S.M.) Summer v. Ram Prasad. 1942 A.W.R. (Rev.) 124—1942 O A. (Supp.) 141—1942 O W.N. (B.R.) 222—1942 R.D. 288.

-S. 44-Dccree under-Nature of-Limita-

tion applicable.

A decree under S. 44 of the Agra Tenancy Act is not a money decree and the limitation for such a decree is therefore one year under serial 5 of group F of the 4th Schedule of the Agra Tenancy Act. (Shirreff, S.M. and Sathe, IM) RAM LAL SINGH v. MOAZZAM ALI. 1942 O.A. (Supp.) 170=1942 R.D. 391=1942 O.W.N. (B.R.) 302=1942 A.W.R. (Rev.) 150.

S. 44—Ejectment and immediate reinstatement-If effects a break in the tenancy-Tenant,

if a trespasser.

Where a tenant is ejected but is reinstated immediately thereafter, the ejectment does not constitute a break in his tenancy and his possession does not become that of a trespasser. (Harper. S.M.) NAUBAT SINCH v. SAHEB SINGH. 1941 O.W.N. 255=1941 R D. 86-1941 A.W.R. (Rev.) 266=1941 O.A. (Supp.) 215,

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-Ss. 44 and 99 -Ejectment of tenant by one of the landholders-Proper remedy of ejected tenant.

Even if one of the landholders ejects a tenant the remedy of the latter would be to sue under S. 99 of the Agra Tenancy Act and not under S. 44. (Mathur, J.) RAM BUX v. BACHAN SINGH. 1943 A.L.W. 283.

S. 44-Lambardar's right to eject cosharer-Terms of wajib-ul-ars, if can affect.

The terms of a wijib-ul-arz cannot prevail against the common and statutory right of the lambardar to sue for the ejectment of a cosharer who takes possession of a plot against his will in an unlivided lambardari mahal. (Sathe, A.M.) Fasi Ulla v. Wasi Ulla. 1941 R.D. 819=1941 O.A. (Supp.) 741=1941 A.W.R. (Rev.) 836.

Widow of fixed rate tenant given certain plots in

a compromise with the reversioner.

Where certain plots were given to the widow of a fixed rate tenant for her maintenance under a compromise with the reversioner and she is to pay the rent, she is the tenant and being the tenant she is entiled to be regarded as landholder for the purpose of a suit under S. 44 of the Agra Tenancy Act. (Shirreff, J.M.) MATI CHAUBEY v. MANKI. 1942 O.A. (Supp.) 29 (2)=1942 A.W.R. (Rev.) 29 (2).

-S. 44-Lease of theka land to sons of thekadar-Termination of theka-Does not render the lessees liable to ejectment as trespassers. AJODHYA NATH v. ROSHAN LAL. [see Q. D. 1936-40 Vol I. Col 3218]. 1941 A.W.R. (Rev.) 61=1941 O.A. (Supp.) 48.

-S. 44—Liability to ejectment—Co-tenant admitted by life-tenant with landholder's consent-Death of life tenant. See AGRA TENANCY Act, Ss. 23 (2) AND 44. 1941 A.W.R. (Rev.) 107.

Former grove-holder replanting grove after allowing land to remain banjar-Scope and appli-

cability of S. 44.

The presumption raised by S. 197. Agra Tenancy Act, that the grove-holder holds land in respect of which he is grove-holder as a nonoccupancy tenant under a lease the term of which will expire when the land ceases to be groveland contemplates that after the grove has been cut and removed the grove-holder continues to be in possession of the land and cultivates the same. Where he is not in cultivation and the land is lying banjar and later on is planted with trees without the landholder's permission he cannot resist a suit under S. 44 on the ground that he was a non-occupancy tenant. Further, S. 44 does not necessarily apply to a rank trespasser. If the possession of the other party was without consent of the landholder S. 44 would apply. (Mothur, J.) Sheo Nandan Lal v. Manno Lal. 1943 A.L.W. 69=1943 R.D. 254. —S. 44 and U. P. Tenancy Act (1939) S.

180—Liability to ejectment—Lessees under ficti-tious permanent lease by widow—Civil Court declaring lease to be without consideration-Ejectment of lessee—Limitation—Starting point.

Where a permanent lease executed by a Hindu widow has been declared by a Civil Court to be

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one without consideration in a suit by the reversioners, the lessees are trespassers and liable to ejectment. The period of limitation would run not from the date of the lease but from the date of the widow's death. (Harper, S. M. and Shirreff, J.M.) BHIRGU NATH PANDE v. KAWAL PATTI KUAR. 1941 R.D. 873.

-S. 44—Liability to ejectment—Tenants of sir on disallowance of claim of ex-proprietary,

rights-Their status.

Where ex-proprietary rights are claimed by the owner and disallowed on the ground that it was made too late, the tenants become nonoccupancy tenants of khalsaland from the date of the disallowance of the claim for ex-proprietary rights and are not trespassers who could be ejected under S. 41 of the Penancy Act. (Shirreff, S.M. and Sathe, J. M.) Sita Ram v. Bankateshwar Tewari. 1941 A.W.R. (Rev). 786=1941 O.A. (Supp.) 697=1941 A.L.J (Supp.) 126-1941 R.D. 810.

-S. 44 and C. P. Code, O. 21, Rr. 89 and 100-Liability to ejectment under S. 44-Person not party to decree, in possession-Formal delivery of possession to decree-holder-Person in possession if bound to apply under O. 21, R. 89, C.

P.Code.

Where immovable property is sold in execution of a decree and a person who is not a party to the suit and against whom no decree has been passed is in possession of that immovable property and formal possession is given to the decree-holder, two courses are open to the person in possession. He can either give up possession in accordance with the formal order in which case he would have a right to object under R. 100 of O. 21, C. P. Code, or he might refuse to comply with the formal order of dispossession and continue to remain in possession in whice case he will have committed no offence as he is unaffected by the decree and he is not liable to ejectment under S. 44 of the Agra Tenancy Act. He was not bound to have applied O 21, R. 89. (Harper, S.M. and Sathe J.M.) Anand Prasad v. Raghubir Tewari. 1941 O.A. (Supp.) 93=1941 A W.R. (Rev.) 105=1941 A. L. J. (Supp.) 33=1941 R.D. 238=1941 O.W.N. 492.

-S.44-Liability to ejectment under-Tenant of six-Ex-proprietary rights not claimed in proceedings under S. 36, U. P. Land Revenue Act.

Where in proceedings under S. 36 of the U.P. Land Revenue Act ex-proprietary rights are not claimed, the tenant of sir becomes the non-occcupancy tenant of khalsa land from the date of the termination of such proceedings and a suit under S. 44, Agra Tenancy Act, to eject such a tenant as a trespasser is misconceived. He could not be ejected as a trespasser. (Sathe J.M.) SAMUN SINGH v. FAUJDAR LONIA. 1942 R.D. 371 =1942 O.A. (Supp.) 172=1942 O.W.N.(B.R.) 282=1942 A.W.R. (Rev.) 152.

-Ss. 44 and 99-New tenant-If bound by judicial orders passed on old tenant's application -Ejectment of new tenant-Proper remedy.

A new tenant who takes land vacated by a former tanant does so at his own risk and subject to any orders which may be passed byta Judicial Court in favour of the former tanks.

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Hence where a tenant was ejected and a new tenant let into possession and the former tenant applied for review and succeeded in seiting aside the ejectment order and obtained formal dakhal dehani he can sue the new tenant for ejectment under S. 44 of the Tenancy Act and it is not open to the new tenant to plead that they were put into possession by the Zamindar and that the suit should have been filed under S. 99 of the Agra Tenancy Act (Hurper, S.M. and Sathe, J.M.) KHUSHALI v. GOVIND. 1941 A.W.R. (Rev.) 493=1941 R.D. 485=1941 O.A. (Supp.) 452.

-S. 44 -Occupancy lease of specific sir plots -Liability of lessee to ejectment.

In the case of an occupany lease by a sir holder of sufficient plots, it is the conferment of occupancy right and not the admission to tenancy which is invalid. In such a case the landlord cannot repudiate the detendant's admission to the holding as a tenant and so the latter could not be ejected as a trespasser. But it the lease was legally null and void there would be no estoppel against the landlord, pleading the invalidity of the lease. (Shirreff, J.M.) RAM LAGAN SINGH v. SARJU. 1941 A.W.R. (Rev.) 559=1941 O.A. (Supp.) 490=1941 R.D. 534. —S. 44 and United Provinces Tenancy

Act (XVII of 1939), S. 29 (a)—Pendency of suit under S. 44 when new Act came into force-Defendant jound to be non-occupancy tenant— Plaintiff if entitled to any relief—Kights of defen-

dant.

Where the defendant in a suit brought under S. 44, Agra Tenancy Act is found to be a nonoccupancy tenant and the suit is pending when the new Act came into force, the plaintiff not having taken any proceedings against the defendant as non-occupancy tenant, is not entitled to relief against him as such under that Act. It also follows that when the U.P. Tenancy Act came into force, the defendant, who had been non-occupancy tenant, became a hereditary tenant under S. 29 (a) of the U.P. Tenancy Act, when no longer liable to ejectment as non-occupancy tenant. (Shirreff, S.M.) RAGHUNANDAN SINGH v. NATHU. 1942 A.W.R. (Rev.) 405— 1942 O.A. (Supp.) 431—1942 O.W.N. (B.R.) 491.

share acting as sole landholder-Ejectment of ex-proprietor-Suit to eject subsequent trespasser

If defective under S. 206. Where a purchaser of Zamindari share acts for a long time as the sole landholder and also gets the ex-proprietary tenant ejected under S. 79 of the Agra Tenancy Act, he can sue alone to eject another as a trespasser who takes possession of the land on the plea that another co-sharer had settled it with him. Such a suit is not defective under S. 266, for the plaintiff must be considered to be the sole land-holder even in respect of the trespassers. (Shirreff, J.M. and Sathe, A.M.) MUNNA LAL v. MULAIM SINGH. 1941 A.W.R. (Rev.) 813 (2)=1941 O.A. (Supp.) 737 (2)=1941 R.D. 834.

-Ss. 44 and 99-Relative applicability. While dispossession by even one or some of the recorded co-sharers in a patti brings the case under S. 44 of the Agra Tenancy Act, before a

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case can come under S. 99 of the Act, it must be proved that the dispossession was the act of all the recorded co-sharers entitled to collect rent from the tenant and not of some only of them. (Harper, S.M. and Sathe, J.M.) Gort Chamar v. Hadhuban Chamar. 1941 A.W.R. (Rev.) 104 =1941 O.A. (Sapp.) 92 =1941 R.D. 39.

-Ss. 44 and 99 -Relative applicability-Realisation of rent by Lamindar from sub-tenant after death of tenant-upect on rights of chief

tenant's successor.

Where certain sub-tenants become the subtenants of the successor of the chief tenant and the Zamindar realises rent from them directly, it cannot have the effect of either extinguishing the chief tenant's rights or of making the possession of the sub-tenants as one through the Lammdar, so as to bring the case under S. 99 of the Agra Tenancy Act. Even if the sub-tenants begin to exercise adverse possession from the date of the death of the chief tenant, their status remains only that of trespassers and the period of limitation for the successor of the chief tenant to file a suit for their ejectment is 12 years under S. 44 of the Act. (Sathe, A. M.) SALIK v. MAUJI LAL. 1941 A.W.R. (Rev.) 923 (2)= 1941 O.A. (Supp.) 797 (2)==1941 R.D. 814.

-Ss. 44 and 99-Remedy of dispossessed

Where the dispossession of a tenant is by a process of law, even if it was by traud, his remedy is under S. 99 of the Agra Tenancy Act. (Shirreff, J.M.) RAM ASKEY v. NOOR MAHOMED. 1941 A.W.R. (Rev.) 513 (1)=1941 R.D. 550 (1)=1940 O.A. 472 (1).

-S. 44 and U. P. Tenancy Act, S. 180-Right to sue to eject trespasser-Person in possession of

grove land though not as grove holder.

Where a person in possession of grove land is treated only as some kind of tenant, but is not a grove-holder, it does not sateguard him when ne takes his stand as a landholder possessing specific rights under the Tenancy Act and seeks to utilize the provisions given to a landholder in seeking a remedy against those who encroached upon his rights. (Harper, S.M.) GULZARI v. MEWA RAM. 1941 R.D. 172=1941 O.W.N. 462=1941 A.W.R. (Rev.) 339=1941 O.A. (Supp.) 253.

S. 44-Right to sue under-Collecting cosharer in divided patti, if can sue to eject another co-sharer.

A collecting co-sharer in a divided patti could sue for the ejectment of another co-sharer who had taken possession of tenant's land without his permission. (Shirreff, S.M. and Saihe, J.M.)
OUDH NARAIN v. SARDAR. 1942 O.A. (Supp.)
103=1942 O.W.N. (B.R.) 127=1942 R.D. 193= 1942 A.W.R. (Rev.) 90=1942 A.L.J. (Supp.)

-S. 44—Right to sue under—Death of occupancy tenant-Lands cultivated a khudhasht by the cosharers—Suit by one to eject trespasser on plot in his khudahashi-Maintainability.

The mere fact that a plot lies in the khudkhast of a co-sharer does not establish him as the landholder thereof. Where on the death of an occupancy tenant, various co-sharers took possession of the various plots comprised in the holding and cultivated them as khudkasht that

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would not entitle one of them alone to suc for ejectment of a trespasser in the absence of proof that the division of the holding was otherwise than a mere matter of convenience among the cosharers or that in the allotment of certain plots to the plaintiff, the rights of the co-parcenary body were permanently waived. (rlarper, S.S.). Piran Koer v. Dallu. 1940 R.D. 623=1941 Piran Koer v. 433=1941 R.D. 460=1941 U.A. (Supp.) 559.

S. 44-Right to suc under-Lambardar collect-

ing rent, if can sue alone.

In an undivided lambardari mahal rents are not only paid to the lambardar but they are also payable to him on behalf of all the other cosharers, in the absence of any custom or usage to the contrary. In such cases each individual cosharer is not, while the lambardar is the landholder vis-a-vis the tenants and other occupiers of land. The right to file a suit for arrears of rent and ejectment therefore vests in such mahals on the lambardar who can exercise it on behalf of the whole co-parcenary body even against individual co-sharers. (Harper, S.M. and Sathe, J.M.) TEJ SINGH v. KHEM CHAND. 1941 A.W.R. (Rev.) 180=1941 O.A. (Supp.) 124=1941 A.L.J. (Supp.) 40=1941 R.D. 110. S. 44 and U. P. Tenancy Act (1939), S. 180-Kight to sue under-Lambardar if can sue to eject co-sharer taking unauthorised possession of plots

included in an ex-proprietary holding.

If a tenant in chief does not choose to take action against a person who has committed trespass against him, it is still open to the Zamindar to take action against the trespasser on his own account if he considers that the trespass committed against his tenant is likely to affect his (the Zamindar's) constructive possession over the land. Hence where a co-sharer in a Mahal takes unauthorized possession or plots included in an ex-proprietary holding, it is open to the lambardar to sue to eject him even if the tenants do not take any steps in the matter. (Shirreff, S.M. and Sathe, J.M.) BAHADUR SINGH v. SHER SINGH, 1942 O.W.N. (B.R.) 321=1942 A.W.R. (Rev.) 208=1942 O.A. (Supp.) 234=1942 R.D.

410. S. 44—Right to sue under—Landholder— Widow of fixed rate tenant in possession of plots allotted for maintenance under compromise with reversoners—

Trespasser, if can object to her status.

Where a widow of a fixed rate tenant under a compromise with the reversioners is in possession of certain plots given to her for her maintenance and has to pay the rent herself in respect of them, she is a tenant and as such being regarded as a landholder for the purpose of a suit under S. 44, Agra Tenancy Act, when the compromise is not objected to by the zamindar, a trespasser cannot question it and deny the right of the widow to file the suit. (Shirreff, J.M.) MOTI CHAUBEY v. MST. MANKI. 1942 O.W.N. (B.R.) 98 (2)=1942 R.D. 130 (2).

S. 44-Right to sue under-Lessee of land poss-

ession of which was with a trespasser.

A lease given by a Zamindar to another is not invalid merely because actual possession of the plot in question was with a trespasser. The lease is a valid one and the lessee acquires tenancy rights under it and is entitled to sue for the ejectment of the trespasser. (Shirreff S.M.

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and Sathe, J.M.) 1NDERJIT V. CHEDU. 1942 O.A. (Supp.) 39 (1)=1942 A.W.R. (Rev.) 39 (1)=1942 O.W.N. (B.R.) 88=1942 R.D. 120.

In the absence of clear proof of any private partition, a mortgage with possession of specific plots becomes invalid and such a mortgagee cannot sue to eject any of the representatives of the original proprietors as trespassers when they happen to take possession on an abandonment or surrender. (Shurrell, J.M.) Deo Narain Singh v. Gaya Prasad Singh. 1941 A.W.R. (Rev.) 557 = 1941 O.A. (Supp) 488 (2)=1941 R.D. 669.

sue for ejectment of trespasser when tenant does not

choose to suc.

It the tenant does not choose to take action against a person who commits trespass against him, it is still open to the zamindar to take action against the trespasser on his own account if he considers that the trespass committed against his tenant is likely to affect his (zamindar's) constructive possession over the land. (Shirrell', S. M. and Sathe, J.M.) Oudh Narain v. Sardar. 1942 O.A. (Supp.) 103=1942 O.W.N. (B.R.) 127=1942 A.W.R. (Rev.) 90=1942 R.D. 193=1942 A.L.J. (Supp.) 30.

S. 44-517 holder-11 'landholder' under S. 44. RAMPAT SINGH V. NAGESHAR SINGH. [see Q.D. 1936'40 Vol. 1 Col. 3219.] I.L.R. (1940)

Alı. 678.

Ss. 44 and 107—Suit against trespasser—Latter cannot plead that holding has been abandoned. Sameel Kunwar v. Usman, [see Q. D. 1930-'40 Vol. 1 Col. 5221] 1941 A.L.J. (Supp.) 16—S. 44—Suit for ejectment—Plea of admission to tonancy—Entry in Khatuuri as tenant of seven years standing—Presumption if any—Liability to ejectment.

Where in a suit for ejectment under S.44 of the Agra Tenancy Act, the defendant pleaded that he had been admitted to the tenancy and produced no evidence apart from an entry in the 1349 khatauni showing him as a tenant of seven years standing and certain rent receipts which did not show that the payment was in respect of the holding but there was evidence to show that the defendant was a sub-tenant of the holding and was holding on after the abandonment of the holding by the former tenant.

Held, that the entry in the Khatauni was consistent with the evidence and did not raise any presumption as to existence of a contract of tenancy and that the defendant was liable to ejectment. (Shirreff. J. M.) MAHANGI CHAMAR v. KESHO PRASAD PANDEY. 1941 R.D. 865=1941 O.A. (Supp.) 744=1941 A.W.R (Rev.) 839.

S44—Suit to eject sub-tenants as trespassers—Starting point of limitation—Collector in possession of holding. See U. P. Tenancy Act (1939). S. 180 And Agra Tenancy Act, S. 44. 1941 R.D. 240.

S. 44 and Evidence Act, S. 114—Suit to eject as trespassers—Defendants in possession after ejectment under S. 86—Plea of execution proceedings being fictitious—Onus—Presumption as to legal proceedings.

Where a zamindar filed a suit under S. 44 of the Agra Tenancy Act to eject as trespassers the heirs of a statutory tenant who continued to main in possession even after ejectment under S.

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86 of the Tenancy Act and the defendants pleaded that the ejectment proceedings were fictions.

Held that the burden of proving that the proceedings in ejectment were fictitions lay on the defendants, that all legal proceedings must be presumed to have been taken with due care and in accordance with the provisions of law until the contrary was proved and that in the absence of any evidence to the contrary the order of ejectment and the dakhal dihani must be accepted as genuine and to have been correctly carried out and that the defendants were trespassers liable to ejectment. (Harper, S.M. and Sathe J.M.) BASHIR AHMAD KHAN v. MARKANDE, 1941 R.O. 198=1941 A.W.R. (Rev.) 350=1941 O.A. (Supp.) 264.

S. 44-Suit under-Contract of tenancy-

Desirability of framing issue as to factum.

In suits under S. 44. Agra Tenancy Act, it would be better to have an issue as to the exis-tence or otherwise of a contract of tenancy, properly framed. (Shirreff, J.M.) GOVIND RAO v. ALMIKURMI. 1941 A.W.R. (Rev.) 556 (2)= 1941 **O**.A. (Supp.) 487 (2)=1941 R.D. 675 (1)

-S. 44—Suit under—Maintainability—Party in possession of share of another after decree under S. 37. See Agra Tenancy Act, Ss. 37 and 44. 1941 R.D. 37.

-S. 44-Suit under-Onus-Disp\*ted entries in patwari papers-Value.

In suits under S. 44, Agra Tenancy Act, the burden of proving that the land in dispute settled with the defendant is on the party who sets up such a defence. Entries in the patwari which have been in dispute ever since they were made, cannot constitute sufficient evidence for discharging the burden of prool. (Shirreff, J.M. and Sathe, A.M.) Asa RAM v. NIADER. 1941 R.D. 1111=1941 O.A. (Supp.) 945 (1)=1941 A. W.R. (Rev.) 1194 (1).

-S. 44—Suit under-Plea in defence of adtenancy-Onus-Presumption mission to

tenancy, if justified.

Where in a suit under S. 44 of the Agra Tenancy Act the defendant pleads an admission to tenancy, it is for him to prove the contract which he asserts. From the mere fact alone of the plaintiff being a small Zamindar, it should not be inferred that he would not have allowed the defendant to remain in possession for a long time but for a contract of tenancy. (Harper, S. M. and Shirreff, J.M.) RAM DASS v. RASIAWAN LONIA. 1941 A.W.R. (Rev.) 508=1941 R.D. 546 (1)=1941 O.A. (Supp.) 467.

-S. 44-Suit under-Plea in defence of being tenant in chief-Onus-Marafat entry, if can

create title.

Where the defendant in a suit under S. 44 of the Agra Tenancy Act claims that he is the tenant in chief, the burden of proving his title lies on him. The mere existence of a marufat entry cannot create title and is totally inadequate to prove the title set up. (Shirreff S.M. and Sathe, J.M.) JOET AHIR v. TIMAL AHIR. 1942 R.D. 308=1942 O.W.N. (B.R.) 242=1942 A.W. R. (Rev.) 243 (2)=1942 O.A. (Supp.) 269 (2). S. 44—Suit under—Plea of adverse possession—Starting point—Formal dakhal dihani not followed by actual physical dispossession-Effect.

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A formal dakhal dihani even though it may not be followed by an actual physical dispossession extinguishes all the rights of the defendant. Hence, if the latter continues to remain in possession a fresh cause of action arises. Where a tenant though ejected under the provisions of the Agra Tenancy Act of 1901 continued in possession and a fresh suit was filed for his ejectment under S. 44 of the Tenancy Act of 1926 and decreed and the zamindar given a formal dakhal dilani but the tenant still continued in possession and a fresh suit was filed again under S. 44 and the defendant pleaded adverse possession from. the date of his ejectment under the old Tenancy Act.

Held, that adverse possession started only from the date of the formal dakhal dihani obtained by the zamindar in his first suit under S. 44 of the Act of 1926. (Harper, S. M. and Sathe, J. M.) VIBHUII NARAIN SINGII v. KAN-DHIYA, 1941 R.D. 26=1941 A.W.R. (Rev.) 103 =1941 O.A. (Supp.) 91=1941 A.L.J. (Supp.)

-S. 44-Suit under-Plea of ex-proprietary tenancy-Absence of evidence-Reliance on judg-

ment not deciding question.

The judgment in an arrears of rent suit against certain alleged ex-proprietary tenants dismissing it on the ground that defendants were either sir or khudkasht holders of the land in dispute cannot be used as an authority for holding in a subsequent suit under S. 44 of the Agra Tenancy Act against the same defendants, that they are ex-proprietors of the land in dispute in the absence of evidence to show how and when they became ex-proprietary tenants, (Sathe. J. M.) MEGH SINGH v. LALA RAM. 1942 A.W.R. (Rev.) 55 (2)=1942 O.W.N. (B.R.) 116=1942 O.A. (Supp.) 55 (2)=1942 R.D. 148.

-S. 44-Suit under-Plea of limitation in

defence—Facts to be proved.
In a suit under S. 44 of the Agra Tenancy Act, before the defendant could plead limitation he has to show that he was in possession of the holding for at least 12 years to the knowledge of the plaintiff. (Suihe, J.M.) BANSU v. RAMA-DHANI, 1941 O.A. (Supp.) 443=1941. A.W.R. (Rev.) 484=1941 R.D. 582.

——Ss. 44 and 99—Suit under S. 44—If can be decreed under S. 99. See AGRA TENANCY ACT, Ss. 192, 44 AND 99. 1941 R.D. 317=1941 A,W.R. (Rev.) 358.

-S. 44-Suit under-Stay of proceedings Act, if applies. See U. P. STAY OF PROCEEDINGS ACT AND AGRA TENANCY ACT. S. 44. 1940 R.D. 622.

-S. 44—Suit under—Tenant in adverse possission for over 12 years-Effect.

A tenant in adverse possession for over 12 years cannot be sued under S. 44, Agra Tenancy Act. (Harper, S.M. and Sathe, J.M.) BISHNATE SINGH v. RAGHUNATH SINGH. 1941 A. W.R. (Rev.) 454=1941 O.A. (Supp.) 386=1941 R.D. 414.

-S. 44—Suit under—Who can bring—Tenant. when can sue

A suit under S. 44 of the Agra Tenancy Ac, must be brought by a landholder. The latter term includes a tenant who can sue a trespasser

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for ejectment. (Harper, S. M. and Shirreff, J.M.) TUFANI v. DEOKALI. 1941 O A. (Supp.) 808 (2) =1941 A.W.R. (Rev.) 934(2)=1941 R.D. 916=1941 A.L.J. (Supp.) 124.

——Ss. 44 and 99—Termination of right of tenant in chief—Date—Applicability of S. 99—Condition necessary—Freating suit under S. 44 as one under S. 99.

A tenant in chief cannot lose his right merely because the zamindar has begun to treat a trespasser whom he had not put into possession as the tenant in chief. The time for a suit to eject such a tenant runs from the date the zamindar recognizes the trespasser as a tenant. Every litigious claim made by a defendant that he is holding the particular land from the zamindar does not render S. 99, applicable to the case. Before a case can fall under the section it must be shown that the claim to hold the land from the Zamindar is a bona fide one. A suit under S. 44 can be treated as one under S. 99. (Shurreff, S. AND M. Sathe, J.M.) Puttoo Lal v. Hira Lal. 1942 O.A. (Supp.) 52=1942 A.W.R. (Rev.) 52=1942 O.W.N. (B.R.) 150=1942 R.D. 216.

Starting point of limitation under-Transferee obtaining effective possession after titigation against other fraudulent transferees—Dejendant let into possession by latter—Suit to eject him.

Where a transferee of proprietary right had to file civil suit against subsequent fraudulent transferees to obtain effective possession, the starting point of limitation for a suit for ejectment of defendants who were let into possession by the fraudulent transferees would be the date when effective possession was obtained by the plaintiff and it is also that date from which the defendant's occupation would be deemed to be unauthorized by the landholder. (Dible J. M.) KARIYA BHARATH v. SRI KISHAN SAHI. 1943 R.D. 177=1943 A.W.R. (Rev.) 199 (1).

—S. 50—Applicability—Document stating particular sum as legal rent which was being paid and asking for correction—Tenant if estopped from denying that the amount stated was not the actual rent—Effect of admission in the document—Document, if an agreement to enhance rent.

Where a document merely began by reciting that the legal rent which the tenant had been paying and which the Zamindar had been collecting was Rs. 75 although only Rs. 37 was shown in the Patwari's papers and ended up with a prayer that the correct figure of rent might be entered in the Patwari's papers and was signed by both the Zamindar and the tenant:

Held (i), that the document was nothing more than an application containing two admissions by the parties (1) as to the legal rent and (2) as to its having been paid to the Zamindar in the past; (ii) that where there was nothing to show that the admission operated as an estoppel against the tenant, it was open to him to prove that the legal rent was only Rs. 37 notwithstanding his admission to the contrary; (iii) that the admission of the parties contained in the document that the legal rent was Rs. 78 had no evidential value under S. 21 of the Evidence Act, for what is the egal rent is a point of law and any figure said to

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be the legal rent by the parties could not become the legal rent merely for that reason and even if the Zamindar actually collected more than the legal rent it did not become legal rent and the difference between the two figures remained Zaid Matalba and was not recoverable by process of law; and (iv) that the document could not be taken to be an agreement for enhancement of rent. (Sathe, J. M.) PARCHAND BIR SINGH v. GAYA. 1942 R.D. 363=1942 O.A. (Supp.) 176=1942 O.W.N. (B.R.) 274=1942 A. L.J. (Supp.) 32=1942 A.W.R. (Rev.) 156.

S. 50.-Enhancement — Agreement not registered—Effect. See U. P. Tenancy Act, S. 98 and Agra Tenancy Act, S. 50. 1941 R.D. 265.

S. 54—Suit under-Pendency when new act came into force—If can be decided under S. 114 of the new Act. See U. P. Tenancy Acr, Ss. 296 And 114 and Agra Tenancy Acr S. 54. 1942 A.W.R. (Rev.) 271.

S. 54 (a)—Abatement of rent—Rasis of calculation.

Per Harper S.M.—There are no provisions and no rules framed by Government to say how abatements are to be made under S. 54 (a) of the Agra Tenancy Act. The policy of the Act by the introduction of roster rates clearly was to encourage the use of these rates and it is not illegal to place reliance on rates arrived at as a result of a special inquiry, for the purposes of abatement. Courts should have up-to-date rates to guide them and the rent should not be abated proportionately to the fall in prices. This however is not the same thing as to say that all rents must be reduced to the absolute valuation. Special reasons for not doing so exist in individual cases and the law in the Tenancy Act both previously and now permits Courts to take account of them.

Per Sathe, I.M.—In suits filed under S. 54 (a) of the Agra Tenancy Act, the abatement should ordinarily be based on the fall in prices though it need not necessarily be exactly proportionate to it. The reduced expenses of cultivation should be taken into account and the new rent should be checked by comparing it with the rent arrived at by applying the standard fair and equitable rates. (Harper S. M. and Sathe J.M.) KASHIPAT TEWARI & BIHARI. 1940 R. 1. 570=1941 A.W.R. (Rev.) 83=1941 O.A. (Supp.) 71.

S. 60-Right to commutation-If affected by variation of produce from year to year.

sentered in the Patwari's papers and was signed by both the Zamindar and the tenant:

Held (i), that the document was nothing more than an application containing two admissions by he parties (I) as to the legal rent and (2) as to shaving been paid to the Zamindar in the past; (Supp.) 621 (2)=1941 A.W.R. (Rev.) 681 (2).

--- S. 69-Applicability-Sub-tenants.

S. 69 of the Agra Tenancy Act does not apply to enhancement of a sub-tenant's rent. Hence a registered instrument is not necessary for the purpose and can be made by an oral agreement. (Suthe, A.M.) HARI GOPAL v. AYUB ALI. 1941. O.A. (Supp.) 963 (2)=1941 A.W.R. (Res.) 1215 (2).

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S. 80—Ejectment after period of grace— Deposit a couple of hours after ejectment— Refusal to receive deposit—If irregular or illegal.

Where after the notice under S.80 Agra Tenancy Act, was served and after the expiry of the period of grace an order for ejectment is passed and a couple of hours later the judgment debtor brings the money into Court and asks permission to deposit and it is refused there is nothing irregular or Ilegal in the procedure to justify interference in revision. (Shirreff, J.M. and Sathe, A.M.) SHIAM LAL v. RAJ KUMAR SINGH. 1941 O.A. (Supp.) 817=1941 A.W.R. (Rev.) 973.

S. 80 and U. P. Tenancy Act (1939), S. 181-Execution of order under-Notice-Necessity.

The law does not require notice to be given by the court before the execution of an order under S. 30 Agra Tenancy Act or S. 1.41 of the U.P. Tenancy Act. But notice would be necessary under O. 21, R. 22 if the order is executed more than a year after its date. (Shirreff, S.M. and Sathe J.M.) MAHADEO v. SHEO PRASAD. 1942 O.A. (Supp.) 440=1942 A.W.R. (Rev.) 414=1942 O.W.N. (B.R.) 657.

S. 80-Notice under-Formal defect in service-Judgment-debtor aware of proceedings-Effect.

A formal defect in the service of notice will not matter, if as a matter of fact the judgment lebtor had knowledge of the proceedings. (Shirreff, J.M. and Sathe, A.M.) SURYAPAL SINGH v. ADRAM. 1941 O.A. (Supp.) 792=1941 A.W.R. (Rev.) 918=1941 R.D. 935.

S. 80—Review of order under—Ground of absence of notice to one of the co-tenants—Availability—Service on others—Presumption.

An application for review by one of a number of co-tenants should usually be refused, even if there is some doubt about the due service of notice on the tenant seeking review, when one or more of the co-tenants has on receipt of due notice had an opportunity of showing cause why he and his co-tenants shoud not be ejected. (Shirreff, S M. and Sathe J.M.) John Mul v. Chhidda. 1942 O.W.N. (B.R.) 182 (2)=1942 R.D. 248 (2) 1942 A.W.R. (Rev.) 169 (2)=1942 O.A. (Supp.) 189 (2).

S. 80 (2)—Ejectment, technically before expiry of 15 days—Defect, if can be taken advantage of by judgment-debtor who failed to pay arrears after two years.

Though an ejectment just before the expiry of the 15 days is technically irregular, the judgment debtor who for 2 years thereafter does not pay the arrears of rent, cannot take advantage of the technical defect and claim to have the ejectment set aside. (Braund, J.) RATIRAM v. NIADERMAL. 194 I.C. 640=14 R.A. 4=1941 O.W.N. 546 (2) = 1941 A.W.R. (Rev.) 308=1941 O.A. (Supp.) 238=1941 A.L.J. 230=1941 R.D. 462=1941 A.L.W. 397 (2)=1941 A.W.R. (H.C.) 130=A.I.R. 1941 All. 215.

S. 80 (3)—Extension against provisions of—Illness and other domestic difficulties of the tenant—If justifying circumstances. See U. P. TENANCY ACT S. 170 (5) AND AGRA TENANCY ACT, S. 80 (3), 1941 R.D. 336 (1).

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——S. 80 (3)—Extensions of time under—Inadequacy—Revision—Grounds. See U. P. Tenancy Acr, S. 170 (5) and Agra Tenancy Acr, S. 8) (3). 1941 R.D. 342.

—S. 81—Application under—Claim for prior arrears not included—Fresh suit for—Bar of O. 2, R. 2. See C. P. Code, O. 2, R. 2 and Agra Fenancy Acr, S. 81. 1942 O.W.N. 140.

——Ss. 81 and 93—Notice under—Failure of tenant to appear —Application for possession after new Act—Proper procedure. See U. P. TENANCY ACT. S. 296 AND AGRA TENANCY ACT, Ss. 81 AND 93. 1942 A.W.R. (Rev.) 59.

——S. 82—Compromise of suit under—Ejectment on failure to pay costs before a date fixed— Execution of decree, on default of payment—If barred.

Where a suit under S. 82 of the Agra Tenancy Act is compromised and a provision is made that on failure to pay the costs before a particular date the defendants would be ejected, the decree embodying the compromise could be executed on default in payment of costs. The executing Court cannot go behind the decree, and the compromise is neither unlawful nor does it contain any provision in the nature of penalty. (Shirreff, S.M. and Sathe, J.M.) BANWARI LAL V. PUTTU LAL. 1942 O.W.N. (B.R.) 31=1942 O. A. (Supp.) 116.

Ss. 82 and 83 and U. P. Tenancy Act, Ss. 296 and 171—Suit under S. 82 of Agra Tenancy Act disposed of under S. 171 of U. P. Tenancy Act—Tenant if entitled to benefit of S. 83 of the Agra Tenancy Act.

The benefit of S. 83 of the Agra Tenancy Act would not be available to a tenant in the case of a suit filed under S. 82 of that Act but disposed of under S. 171 of the U. P. Tenancy Act. (Shirreff, S.M. and Sathe, J.M.) Abbul Rahman v. Harish Chandra. 1942 R.D. 441=1942 A. W.R. (Rev.) 201 (2)=1942 O.A. (Supp.) 227 (2)=1942 O.W.N. (B.R.) 352.

Ss. 85 and 84—Applicability—Fixed rate tenant.

The words 'notwithstanding anything contained in this section' in sub-S. (3) of S. 85 of the Agra Tenancy Act makes it quite clear that what was meant by the Legislature was that while the landlord was at liberty under S. 84 of the Act to sue for a decree for ejectment such as is referred to in Cls. (1) and (2) of S. 85, he might also add a prayer in his suit under S. 84 for one of the reliefs mentioned in the sub-clauses to Cl. (3) or he might sue exclusively under S. 84 for one of such reliefs or for a combination of them. The words 'in this section' show clearly that Cl. (3) of S. 85 is referable to S. 84 equally with Cls. (1) and (2). A fixed rate tenant having been specifically exempted from ejectment by S. 84, it is obvious that the provision in S. 85 which allows a land-holder to sue for injunction, etc., in lieu of or in addition to suing for ejectment, can have no application whatsoever to a fixed rate tenant. (Collister, Bajpai and Braund, JJ.) SHANTI SARUP DAS v. ASHARFI SINGH. I.L.R. (1941) All 250=192 I.C. 496=13 R.A. 327=

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1941 A.L.W. 18=1941 O.A. (Supp.) 34=1941 A.W.R. (H.C.) 34=1940 A.L.J. 906=1941 A.W.R. (Rev.) 45=1941 O.W.N. 12=A.I.R. 1941 All. 61 (£.B.).

——S. 86—Application under—If can be converted into suit under S. 207. See AGRA TENANCY ACT, Ss. 207 AND 86 AND C. P. CODE, S. 99. 1941 A.W.K. (Rev.) 5.

——S. 86—Suit under—Plea in defence of permanent lease—Lease jound to be by one only of the praintiffs—Order of ejectment conditional on return of nazarana—Propriety.

Where in a suit under S. 86 of the Agra Tenancy Act, the defendant pleads a permanent lease in defence and it is found that the lease was by one only of the plaintiffs, an order making whole decree of ejectment conditional on the return of the nazurina paid is not proper, inas much as it will be unfair to the plaintiff who had neither granted the lease nor received the nazurina. (Shirreff, S.M. and Sathe, J.M.) KHURSHED HUSAIN v. MOHAN KEWAT. 1941 A.W.R. (Rev.) 800=1941 O.A. (Supp.) 711=1941 R.D. 729.

Ss. 95 and 264-Scope and applicability.

S. 95 of the Agra Tenancy Act does not refer to a decree given under the provisions of that Act. It refers to a decree or order executed under the provisions of that Act. Whether an ejectment decree is given in a Revenue Court or in a Civil Court it is executed under the same legal procedure. If given in a Revenue Court S. 2.4 of the Agra Tenancy Act provides that the provisions of Civil Procedure Code apply. (Harper, S.M.) Tondiv Dhappua. 1941 O.A. (Supp.) 784=1941 A.W.R. (Rev.) 910=1941 R.D. 894.

S. 99—Applicability. See Agra Tenancy Act, Ss. 44 and 49—Relative applicability. 1941 A.W.R. (kev.) 104.

S. 99—Applicability—Conditions. See AGRA TENANCY ACT, Ss. 44 AND 99. 1942 A.W.R. (Rev.) 52.

S. 99-Applicability-Mere plea of holding under samindar if enough.

Any litigious allegation that the defendant is holding land through the zamindar is not enough to bring a case within the mischief of S. 99 of the Agra Tenancy Act. Before that section can apply it must be shown that the plea is a bona fide and real one and that the defendant does not possess a derivative title from the landholder. (Shirreff, J.M. and Sathe, A.M.) KALLAN v. JHANDOO. 1941 O.A. (Supp.) 955 (2)=1941 A. W.R. (Rev.) 1207.

Ss. 99, 121 and 230—Applicability—Suit for possession of occupancy plots—Absence of plea of claim of tenancy or claim through land-holder—Cognizability by Civil Court.

Where in a suit for possession of certain occupancy plots alleged to have been transferred during the plaintiff's minority and which was not binding on him, the defendant never claims to be a tenant of any sort or kind, nor does he make any allegation by virtue of which he could be said to be claiming through the landholder or a per-

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son claiming as landholder Ss. 99 and 121 of the Agra Tenancy Act do not apply. As the suit does not come within the fourth Schedule of the Act S. 230 is inapplicable. Such a suit is cognizable by the Civil Court (Verma, I.) Kapildeo Ahir v. Sarat Kurmi. I.L.R. 1943 All 857=210 I.C 314=16 R.A 175=1943 A.L.J. 480=1943 A.L.W. 524=1943 O.W.N. (H.C.) 308=1943 O.A. (H.C.) 216=1943 A.W.R. (H.C.) 216=A.I.R. 1943 All. 378.

S. 99—Competency to sue under—Person declared to be not in possession in proceedings under S. 115, Cr. P. Code—Plaintiff asserting to be still in possession.

A suit under S. 99, Agra Tenancy Act by a person who has been declared to be not in possession in proceedings under S. 145, Cr. P. Code is competent even thou, h he might still assert that he has been and is in possession all along. (Happer S.M.) Tara Chandr. Narrin Singh. 1942 A. W.R. (Rev.) 86 (1)=1942 O.A. (Supp.) 122.

\_\_\_\_ S. 99-Dispossession-Removal of crops-If amounts to.

A removal of crops by itself does not constitute dispossession. (\*\athc. J.M.) JAMILUDDIN v. CH-HOTTO. 1941 R.D 317=1941 O.A. (Supp.) 272=1940 A.W.R. (Rev.) 358=1941 A.L.J. (Supp.) 72.

——S. 99—Ejectment set aside on review—Land settled with sub-tenant in the interval—Remedy of former tenant.

Where after a tenant is ejected, the ejectment is set aside on review but in the meanwhile the land is settled by the Zamindar with the former sub-tenant, the only remedy which the old occuppancy tenant has for obtaining back the land from the new tenant who was his former sub-tenant is to sue under S. 99 of the Agra Tenancy Act within six months of his being restored to possession after the setting aside of the ejectment order. If he fails to do that the possession of the new tenant cannot be thereafter disturbed. (Sathe, J. M.) Andul, Farah v. Palar Bind. 1942 R.D. 389=1942 O.A. (Supp.) 175=1942 O.W.N. (B.R.) 300=1942 A.W.R. (Rev.) 155.

See Agra Tenancy Act, Ss. 44 and 99, 1941 A. W.R. (Rev.) 513 (1).

----S. 99-Suit under-Awarding of damages not claimed-Legality.

Where in a suit under S. 99 of the Agra Tenancy Act damages are claimed only for the period up to the filing of the suit, the Court is not justified in awarding damages for any subsequent period. (Shirreff, S.M. and Salhe, J.M.) MAITHILL SHARAN GUPTA v. RAM DAYAL. 1942 OA. (Supp.) 71=1942 O.W.N. (BR.) 112=1942 A.W.R. (Rev.) 65=1942 R.D. 144.

S. 99—Suit under—Maintainability—Lease and subequent sale of six plots to lessee—Vendor If can sue under S. 99.

Where there has been a lease of sir plots and the lessee had been put in possession and there is a subsequent sale of the same sir plots to the same lessee and the vendor specifically, agrees to the vendees remaining in possession. AGRA TENANCY ACT. (III OF 1926).

there is no illegal dispossession of the vendor and hence a suit under S. 99 of the Agra Tenancy Act by the vendor against the vendee must fail. (Harper, S.M.) BALWANT v. GULZAR. 1941 O.A. (Supp.) 607=1941 R.D. 661=1941 A.W.R. (Rev.) 667.

The duty of proving that his suit under S. 99. Agra Tenancy Act, is not barred by limitation lies on the plaintiff. (Harper, S.M.) TARA CHAND V. NARAIN SINGH. 1942 O.A. Supp.) 122 = 1942 A.W.R. (Rev.) 85 (1).

——S. 99—Suit under—Proof of contract of tenancy—Sufficiency.

The production of receipts for payment in respect of life tenancy and the entry in the patwari papers that the plaintiffs are tenants with six years' period, is not sufficient to prove a contract of tenancy between the plaintiffs and the zamindar. (Sathe, J.M.) SURENDRA MAN MISIR V. INDRAJIT PRATAP BAHADUR SAHI. 1941 A.W. R. (Rev.) 792=1941 O.A. (Supp.) 703=1941 R.D. 725.

ability—All co-tenants not joining—Holding though divided not consented to by landholder.

A suit by some only of the co-tenants of a holding under S. 99 of the Agra Tenancy Act to recover possession is not maintainable even though there might have been a division of the holding in a case under S. 37 of the Act, when such division has not been consented to in writing by the landholder. (Harper, S.M. and Shirreff, J. M.) Suraj Bali Singh v. Kamla Lal. 1941 R. D. 588=1941 A.W.R. (Rev.) 572=1941 O.A. (Supp.) 540.

S. 99 and U. P. Tenancy Act (1939), S. 183—Suit under S. 99 of the Agra Tenancy Act filed on 30th June, 1939—Limitation—Law govern-

Where a suit is filed under S. 99 of the Agra Tenancy Act on the 30th June, 1939, the period of limitation governing it would be six months under the Agra Tenancy Act and not three years under U.P. Tenancy Act. Hence if the plaintiff is not proved to have been in possession within six months prior to the filing of the suit, his claim would be barred. (Harper, S.M. and Shirreff, J.M.) RAM KISHORE SINGH v. MEVA LAL. 1941 O.A. (Supp.) 824=1941 A.W.R. (Rev.) 980=1942 O.W.N. (B.R.) 130=1942 R. D. 196.

S. 99 and U. P. Tenancy Act. (1939)
S. 183—Suit under S. 99 of the Agra Tenancy Act—Maintainability in Revenue Court—Land occupied by buildings at the time of suit.

Where the land is agricultural land at the time when the dispossession is alleged to have taken place which is the ground of action for a suit under S. 99 of the Agra Tenancy Act, even if it is occupied by buildings at the time of the institution of the suit, the suit would nevertheless be maintainable in the Revenue Courts. (Shirreff, S.M.) AFTAHUDDIN KHAN v. SARDAR. 1941 A.W.R. (Rev.) 589 (1)=1941 R.D. 498 (1)=1941 O.A. (Supp.) 558 (1).

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---- S. 99 (1) Proviso-Applicability-Person not liable to ejectment by cirtue of other Acts.

Per Harper, S.M. (Sathe, J.M. dissenting).—The proviso to S. 99 (1) of the Agra Tenancy Act refers to a person who is liable to an ejectment order during the year under the wording of S. 86 of the Act and is not affected by any subsequent or other Act independent of 'this' Act such as the Stay Act or the U. P. Encumbered Estates Act. (Harper, S.M. and Sathe, J.M.) NIADER V. KANHAIYA. 1941 R.D. 257=1941 O. A. (Supp.) 199=1941 A.W.R. (Rev.) 250=1941 A.L.J. (Supp.) 53.

——S. 99 (1), Proviso and U.P. Tenancy Act (1939), S. 296—Sun for restoration of possession by non-occupancy tenant of six land—Decree in November 1939—Effect of U.P. Stay of Proceedings Act, S. 1 (2)—U.P. Tenancy Act coming into force after decree and before appeal—Effect of.

Where a suit by a non-occupancy tenant of sir land for restoration of possession under S. 99 of the Agra Tenancy Act was decreed on 21st November, 1939 and upiteld in appeal, held, on second appeal (i) that with reference to the particular case the current agricultural year ended on 30th June, 1940 and that as the Stay of Proceedings Act came into force on 21st September 1937 and its application could not extend beyond 21st March, 1940, the tenant was liable to ejectment between 1st April, 1940 and 30th June, 1940, (ii) that the fact that the Agra Tenancy Act was not in force after 21st March, 1940 and also when the first appeal came on for hearing was of no consequence and the proviso to S. 99 (1) of the Agra Tenancy Act applied and that the plaintiff was not entitled to a decree for possession. (Harper, S.M. and Sathe, J. M.) BABU RAM v. BIDHI. 1941 R.D. 261=1941 A.W.R. (Rev.) 275=1941 O.A. (Supp.) 224=1941 A.L. J. (Supp.) 62.

——Ss. 103 and 107—Surrender in favour of one of the co-sharers—Not legal—Responsibility for rent—Would cease only when landlord takes possession under S. 107 (4) MANGAL CHAND v. RASOOL BUX. [see Q. D. 1930-'40 Vol. 1, Col. 3223]. 1941 A.L.J. (Supp.) 3.

S. 103 and U. P. Tenancy Act. S. 82—Surrender—Limits to the rule requiring delivery of actual possession—Representation of minor.

The dictum that no surrender is valid unless actual possession is delivered applies only to those cases where the tenants surrendering the holding are in physical possession themselves. A constructive possession cannot impair the validity of a surrender and this possession ceases from the date on which the oral or written surrender takes place. Where all the tenants of an occupancy holding surrender, a step-brother can represent his minor brother unless their interests are adverse. (Shirreff, S. M. and Saihe, J.M.) SATYADEO CHAUBE v. KESHO CHAUBE. 1942 R.D. 716=1942 A.W.R. (Rev.) 397=1942 O.W.N. (B.R.) 588=1942 O.A. (Supp.) 423.

——S. 103—Surrender — Validity—Surrender not in favour of all co-sharers—Actual surrender taking place—Effect.

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Per Shirreff, J.M.—Where there is an actual surrender the fact that the deed is in favour of some only of the landholders cannot affect the fact that the holding was relinquished in accordance with the deed and as such tenant's rights are extinguished by such surrender.

Per Sathe. A.M.—If the surrender is not in favour of all the co-sharers the tenancy right must be held to be subsisting and not extinguished. (Shirreff, J.M. and Sathe, A.M.) CHAMPU v. RACHUBIR SINGH. 1941 O.A. (Supp.) 958=1941 A.W.R. (Rev.) 1210.

——S. 107-Abandonment — Presumption— Criteria.

In certain circumstances the tenant is liable to be presumed to have abandoned his holding on the expiry of that period for which he could sublet. The criteria in such cases are that the tenant in chief must have ceased to cultivate the holding, executed no written sub-lease, left in charge some one who could not have inherited the holding and there is no agreement in writing by the landlord to the arrangement. (Harper, S.M.) GIRDHARI V. GANGA PRASAD. 1941 R.D. 449=1941 O.A. (Supp.) 445=1941 A.W.R. (Rev.) 486 (2).

S.107—Abandonment—Presumption—Subsequent possession—Nature of See U. P. TENANCY ACT, S. 87 AND AGRA TENANCY ACT, S. 107. 1941 R.D. 285.

----S. 107-Abandonment-Sub-tenant, if can sue for declaration based on.

Though a trespasser cannot in a suit for ejectment plead abandonment, but it is only open to the zamindar to plead it, yet where a lambardar supports a sub-tenant in the plea, he can sue for a declaration of title based on abandonment. (Harper, S.M.) Girdhart v. Ganga Prasad. 1941 R.D. 449=1941 O.A. (Supp.) 445=1941 A.W.R. (Rev.) 486 (2).

——S. 107 and U. P. TenancyAct, S. 87— Abandonment—Unnecessary finding as to abandonment of cultivation—If operates as res judicata— Making arrangement for cultivation during absence— If negatives abandonment.

Where in a prior case decided on the ground that there was no relationship of landlord and tenant between the plaintiff and defendant there was an unnecessary finding that the plaintiff had 'abandoned the cultivation', Fleld that it did not operate as res judicata in a subsequent suit on a question of abandonment. Where a tenant makes arrangements for cultivation during his absence there is no abandonment in the legal sense of the word (Shirreff, J. M.) MOHIB ALI V. BUCHUNU. 1941 A.W.R. (Rev.) 566=1941 R.D. 501 (1)=1941 O.A. (Supp.) 497.

S. 107—Plea of abandonment—Who can invoke. A plea of abandon ment can be invoked or by by the zamindar and not by the recorded subtenants. (Flarper, S. M.) GAJADHAR SINGH 2. VIDYA RAM, 1941 O A. (Supp.) 445 (1)=1941 A W.R. (Rev.) 486 (1)=1941 R.D. 517.

S. 107—Plea of abandonment—Who can invide.

The provisions of S. 107, Agra Tenancy Act regarding abandonment can only be invoked by letting—the zamindar and not by the recorded sub-tenants.

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If the zamindar does not choose to resume a holding, the sub-tenant cannot urge that he has become the tenant in chief on the ground that the holding has been abandoned by the recorded chief tenant. (Harper, S.M. and Sathe, J.M.) TULSI CHAMAR v. CHHEDI AHIR. 1941 A.W.R. (Rev.) 99=1941 O.A. (Supp.) 87=1941 R.D. 40=1941 A.L.J (Supp.) 32.

—Ss. 107, 44 and 99—Non payment of rent—One of the co-sharers alone cannot take possession on the plea of abandonment—Correct procedure—Effect of not following it. SAHDEI KUNWAR V. USMAN. [see Q.D. 1936—'40 Vol. I Col. 3223]. 1941 A.L.J. (Supp.) 16.

——S. 107—Tenant leaving village and trying cultivation elsewhere—Another taking fields and paying arrays according to arrangement—Return of tenant and permitting of rarangement to continue—Creation of sub-tenancy or abandonment.

Where owing to difficulties as regards rent a tenant leaves the village and seeks cultivation in another village and a third person takes his fields and agrees to pay the arrears and continues to do so for three years when the former tenant returns and he allows the arrangement to continue further, the arrangement is more of the nature of a sub-tenancy and there cannot be said to have been an abandonment by the tenant. (Shirreff, S.M. and Sathe. J.M.) MATHWARI v. NARAIN. 1942 O.A (Supp.) 67=1942 A.W.R. (Rev.) 61=1942 O.W.N. (B.R.) 213=1942 R.D. 279.

——S. 107 (1)—Written notice—Necessity—Land holder aware of arrangement

If the landholder is aware of the arrangement the written notice under S. 107 (1) of the Agr=Tenancy Act is not indispensable. (Shirreff, S. M.) LILAWATI TO CHAOLI. 1942 A.W.R. (Rev.) 120=1942 R.D. 265=1942 O.W.N. (B.R.) 199=1942 O.A. (Supp.) 137.

----S. 107 (2) -Applicability.

Where it has not been shown that a person left the village after leaving the holding in the charge of a person on whom the holding would have devolved in the case of the death of the former it cannot be said that the latter has inherited the holding from the former under S. 107 (2) of the Agra Tenaney Act. (Sathe, J.M.) BANSU v. RAMADHANI. 1941 O A. (Supp.) 443=1941 A. W.R. (Rev.) 484=1941 R.D. 582.

S. 107 (3) and (4)—Abandonment—Presumption—When arises—Disappearance from village Property left with one on whom it would not devolve—Payment of rent direct by sub-tenant.

Where an occupancy tenant disappears from the village, and there is no proof of a written sub-lease, and the property is left in charge of one on whom it would not devolve and the sub-tenant has been paying rent direct to the land-lord, a presumption of abandonment of the holding arises and the occupancy rights are extinguished. (Harper, S.M. and Shirreff, J.M.) SETALU AHIR v. PARSAD AHIR, 1941 R.D. 862=1941 A.W.R. (Rev.) 1071=1941 O.A. (Supp.) 869 (2).

S. 107 (3)—Knowledge of samindar as to subletting—If dispenses with the necessity for whitem consent.

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the Agra Tenancy Act and the Board connot give any relief. (Harper S.M. and Sathe J.M.) KISHORE SINGH v. GANGA BISHUN. 1941 O A. (Supp.) 387=1941 R.D 419=1941 A. W. R. (Rev.) 455=1941 A.L.J. (Supp.) 94.

——S. 248—Decision on objection that executing Court was debarred from executing decree—Appealability.

Where before the executing Court an objection is raised that that Court was debarred by law from executing the particular decree sought to be executed, the decision of that Court on that objection is in substance a decision of a question arising under S. 47, C.P. Code and therefore an order against which an appeal is maintainable under the provisions of S. 248 of the Agra Tenancy Act. (Yorke, I.) Tunda v. Makhan Lal. 1943 A.L.W. 321.

-----S. 249 and C. P. Code (1908). S. 105-Order of remand-Remedy against-Scope of S. 249-If inconsistent with latter part of S. 105, C. P. Code.

The Agra Tenancy Act does not provide for an appeal to High Court from an order of remand passed by a District Judge. But in a second appeal that might be preferred from the ultimate decree of the District Judge, the propriety or otherwise of the order of remand could be agitated. S. 249 of the Agra Tenancy Act is not inconsistent with that portion of S. 105, C.P. Code, which permits such a procedure. (Iqbal Ahmad, C.J. and Dar, J.) RAO RANI v. CULAB RANI, I.L.R. 1942 All. 810=205 I.C. 249=15 R.A. 397=1942 A.W.R. (H.C.) 221=1942 A.L. W. 475=1942 A.L.J. 446=1942 O.A. (Supp.) 530 (2)=A.I.R. 1942 All. 351.

——S. 250 and C.P. Code, O. 47—Review application to the Board—Compliance with O. 47, if necessary.

Compliance with O. 47, C.P. Code, though necessary for S. 251 of the Agra Tenancy Act, has no bearing in the case of a review application under S 250 of the Act. (Harper, S.M. and Sathe, J.M.) CHUNNI v. JAMNA. 1940 R.D. 624=1941 A.W.R. (Rev.) 429=1941 R.D. 663 (2).

\_\_\_\_\_S. 251—Review of ejectment order—Good grounds for.

The facts that the person ejected is in actual possession and that he had paid the decretal amount in the case in which ejectment took place are not good grounds for reviewing an order of ejectment. (Shirreff, S.M. and Sathe, J.M.) RAMKRISHAN v. SHANKAR LAL. 1942 A.W.R. (Rev.) 127=1942 R.D. 263=1942 O.W.N. (B.R.) 197=1942 O.A. (Supp.) 144.

S. 252—Revision—Competency—Case not 'decided'. See U.P. TENANCY ACT, S. 275 AND AGRA TENANCY ACT, S. 252. 1941 A.W.R. (Rev.) 183.

S. 252—Revision — Competency — Order santioning restoration.

Though an order rejecting a restoration application is appealable under O. 43, R. 1, C.P. Code, an order sanctioning restoration is not appealable and can only be revised by the Board under its

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revisionary powers. (Shirreff, J.M. and Sathe, J.M.) Deep Chand v. Ram Narain. 1941 O. A. (Supp.) 316=1941 A.W.R. 972=1941 R.D. 943.

S. 252-Revision-Consideration of questions of fact.

Objections relating to questions of fact are not considered in revisions which are confined only to legal defects or defects relating to jurisdiction by S. 252 of the Agra Tenancy Act. (Shirreff, J.M. and Sathe, A.M.) MURLI DHAR v. PURAMBAR LAL. 1941 O.A. (Supp.) [820=1941 A.W.R. (Rev.) 976-1941 R.D. 945.

----S. 252—Revision—Obvious mistake.

Where a Court in setting aside an exparted decree directs the payment of a certain sum as costs to the opposite party, it cannot be said that it has acted in the exercise of its jurisdiction illegally or with material irregularity inasmuch as it presumably was aware of the actual costs involved by the postponement and knew the circumstances of the parties. Such an order cannot be interfered with in rivision. (*Ilarper, S. M. and Salhe, J.M.*) Tikam Singh v. Sahib Singh 1940 R.D. 586=1941 A.W.R. (Rev.) 60 = 1941 O.A. (Supp.) 47.

----S. 253—High Court—Powers of, in revision. See C. P. CODE, S. 115 AND AGRA TENANCY ACT, S. 253. 1941 A.W.R. (H.C.) 130.

S. 265—Lease by lambardar- Péndency of partition proceedings—Validity of lease.

Where only partition proceedings have been confirmed and the subsequent proceedings for the carrying out of the partition still remain to be done, a lambardar grants a lease on economic rent, it is not invalid as the lambardar was still responsible for the administration of the estate and it cannot be said that he has acted contrary to his duties as lambardar. (Harper, S.M. and Sathe, J.M.) ASEY V. SHIB LAI. 1940 R.D. 587 = 1941 A.W.R. (Rev.) 89=1941 O.A. (Supp.) 77.

S. 265-Right of lambardar to sue for rent—Absence of share in patti-Undivided mahal-Meaning—Proof of distraint for two years—If proves title or establishes custom to distrain.

A lambardar cannot sue for rents in a patti in which he has no share—Ordinarily the term undivided mahal' in S. 365 of the Agra Tenancy Act would mean a mahal in which there had not been imperfect partition. But where the division in a particular case is even more complete and effective and the revenue free holders are not cosharers in the mahal and where the co-sharers with the lambardar as their representative have no proprietary interest in a particular plot and no responsibility for revenue with regard to it, the lambardar cannot sue for rent in respect of it. The fact that the lambardar had twice suc-

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cessfully distrained in two years cannot prove his title to do so or even to establish a custom. (Shirreff, S.M. and Sathe, J.M.) KHAZUR v. HAR PRASAD. 1942 A.W.R. (Rev.) 121=1942 O.A. (Supp.) 138=1942 O.W.N. (B.R.) 225=1942 R.D. 291.

-S. 266-Applicability-Co tenants.

S. 266 of the Agra Tenancy Act applies to the case of co-tenants also and not merely to costantes in proprietary rights. (Harter, S.M. and Shirreff, J.M.) Suraj Bali Singh v. Kamla Lal. 1941 R.D. 588=1941 A.W.R. (Rev.) 572=1941 O.A. (Supp.) 540.

Sharer alone—Proof of separate collection— Effect. See U. P. Tenancy Acr, Ss. 245 AND 240 AND AGRA TENANCY ACT, Ss. 265 AND 206. 1941 R.D. 326.

alone to sue for profits.

Per Sathe, J.M.—A suit by one only of two joint mortgages for arrears of profits is bad under S. 266 of the Agra Tenancy Act. (Shirre J., S.M. and Sathe, J.M.) SHITAL PRASAD v. ASA RAM. 1942 A.W.R. (Rev.) 372=1942 O.W.N. (B.R.) 509=1942 O.A. (Supp.) 399.

Where a person is shown to be the sole collecting co-sharer he is the agent acting on behalf of the co-sharers and hence he is entitled to sue alone for the ejectment of a trespasser. (Harper, S.M.) BHAGWAN SINGH v. BAJRANG BALI. 1941 R.D. 27=1941 A.W.R. (Rev.) 176=1941 O.A. (Supp.) 120.

S. 266—Suit by some co-sharers only—Plaintiffs alone interested in the khudkasht rights sought to be protected—Absence of other co-sharers not fatal to suit. RAMPAT SINGH T. NAGESHAR SINGH. [see Q.1) 1936—'40 Vol. 1 Col. 3226.] I.L.R. (1940) All 678.

S. 266 (1)—Right to file a suit under—Co-sharer permitted to hold himself out as sole landholder of khalsa land.

Even in Khalsa land if the co-sharers permit one of the co-sharers to hold himself out as the sole landholder of any particular holding, or holdings he must be treated as an agent on behalf of all the others in respect of that holding or holdings and in that capacity would be entitled to file suits by himself under S. 206 (1) of the Agra Tenancy Act. (Sathe, J.M.) RAM LAKHAN PANDEY v. JAGDEO AHIR. 1942 O.W.N. (B.R.) 285=1942 O.A. (Supp.) 198 (1)=1942 R.D. 374=1942 A.W.R. (Rev.) 178 (1).

# S. 270-Intervener-Right of appeal.

Per Shirreff, J.M.—An intervener who has been added in an arrears of rent suit as a defendant at his own request has no right of appeal.

Per Sathe, J.M.—Though ordinarily an intervener has no right of appeal, if the decree actually passed directly affects him, he should have a right of appeal. (Shirreff, J.M. and Sathe, J.M.) SAKHAWAT ALI v. MAHBOOB ALI. 1942 O.W.N. (B.R.) 79=1942 O.A. (Supp.) 46=1942 A.W.R. (Rev.) 46=1942 R.D. 111.

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S. 270 -Payment to third party-Good faith-Test.

The payment to a third party pleaded in a suit for arrears of rent, cannot be in good faith if the tenants had not been making the alleged payments to such third party up to the date of filing of suit. (Shirreff, S.M. and Sathe, J.M.) CHIMMAN LALV. SUKHA. 1942 O.W. N. (B.R.) 141=1942 O.A. (Supp.) 129=1942 R.D. 207=1942 A.W.R. (Rev.) 112.

--- S. 270- Plea of payment in 'good faith'-Sastainability-Circumstances. See U. P. Tenancy Act, S. 247, and Agra Tenancy Act, S. 270, 1941 R D 296 (2),

... S. 270 and U. P. Tenancy Act, S. 247—i'lea of payment to third party in defence to suit for arrears of rent—Impleading of such third party-Necessity-Mandatory character of S. 270.

Where in a sait for arrears of rent the tenant pleads in defence payment to a third party from whom he took the land then it is imperative that such party should be added as a party to the suit and the sait decided thereafter. The provisions of S. 270 of Agra Tenancy Act which require the addition are mandatory. (Shirreff, S. M. and Sathe, J.M.) BINDESHWARI PRASAD v. ALLAH DIYA. 1942 R.D. 203=1942 O.W.N. (B.R.) 137=1942 A.W.R. (Rev.) 162 (2)=1942 O.A. (Supp.) 182 (2).

S. 271—Right of appeal—Forum—Determination—New Act coming into force before filing of appeal.

The right of appeal is governed by the date of the institution of suit and not by the date of the filing of the appeal. Everything that follows on the institution of a suit, is governed by the date of the institution, unless there is any contrary provision many new enactment coming into force thereafter. Hence when an application under S. 240, Agra Tenancy Act, is dismissed after U. P. Tenancy Act came into force, the appeal against the order of dismissal lies to the Board under S. 248 (4) of the Agra Tenancy Act and not to the Commissioner under S. 271 of the U. P. Tenancy Act. (Harper, S. M. and Sathe, J. M.) KANAK SINGH v. MUHBUB ALI KHAM. 1941 O.W. N. 254= 1941 A.W.R. (Rev.) 184=1941 O.A. (Supp.) 128=1941 R.D. 81=1941 A.L.J. (Supp.) 51.

-----S. 270—Scope of Assistant Collector's powers—Question of profrietary right—If can be decided by him.

S. 270, Agra Tenancy Act deals with the procedure to be adopted and the proof to be submitted when a land-holder sues a tenant for arrears of rent or a tenant contests a distraint against a landholder. If the status of the parties is admitted an Assistant Collector is not due to go beyond the question of payment in good faith etc. But it is also open to the defendant to plead that the plaintiff is not entitled to sue. In such a case the question of proprietary right has to be decided in the Court of the Assistant Collector. (Harper S. M. and Sathe, J. M.) ROSHAN LAL v. RAM CHARRN LAL, 1941 O. A. (Supp.) 888-1941.

# AGRA TENANCY ACT, (III OF 1926).

Submission to Civil Court—Power of Civil Court to refer that issue to arotration.

A Civil Court to which an issue, on the question of proprietary right has been submitted under S. 271 (1) of the Agra Tenancy Act, has jurisdiction to refer that issue to arbitration under S. I of Second Schedule to the C. P. Code and the finding based upon that award in the arbitration proceedings is a valid finding. (Thom, C. J., Ganga Nath and Braund, JJ.) MAHA RAM 7. HARBANS, I.L.R. (1941) All. 193=193 I. C. 17=13 R.A. 380=1941 A.L.J. 63=1941 R.D. 135=1941 O.W.N. 393=1941 A.L.W. 282=1941 A.W.R. (H.C.) 25=1941 O.A. (Supp.) 25=1941 A.W.R. (Rev.) 36=A.I.R. 1941 All. 101 (F.B.)

—S. 271 (4) and U. P. Tenancy Act, S. 286 (4)—Difference between. See U.P. Tenancy Act. S. 286 (4) and Agra Tenancy Act, S. 271 (4). 1941 R.D. 693 (2).

Ch. 13—Applicability—Theka by a licensee Ch. 13 of the Agra Tenancy Act does not at all apply to a theka given by one not a proprietor but a licensee. (Harper, S.M. and Sathe. A.M.) ROSHAN LAL V. RAM CHARAN LAL. 1941 O.A. (Supp.) 888=1941A.W.R. (Rev.) 1095.

——Sch. II List II Serial 10—Claim for land revenue as a deduction in profits suit—If a claim by way of set-off. See. AGRA TENANCY ACT, S. 222 AND SCH. II LIST II, SERIAL 10. 1941 R.D. 377.

----Sch. II, List II, Item 10-Set off in respect of excess payment in prior years-Availability.

In view of item 10 in list II in Sch. II to Agra Tenancy Act no set-off can be allowed in respect of excess payment made by the tenant in previous years. (Harper, S.M. and Sathe. J.M.) PUTTOO LAL v. BANSIDHAR. 1941 O.A. (Supp.) 384 (1)=1941 A.W R. (Rev.) 452 (1)=1941 R.D. 418 (1).

—Sch. IV, Group F. Serial Nos. 3 and 5—Decree declaring proper rent and the costs to be paid—Is declaratory primarily and only subsidiarily for costs—Limitation is one year. Mohabbe Ali Khan v. Chhotey. [see Q.D. 1936—'40 Vol. I Col. 3227.] 1941 A.L.J. (Supp.) 5.

—Sch. IV, Group F, Serial Nos. 3 and 5— Execution for costs in decree for division— Limitation—Nature of decree.

Where after a division was carried out in pursuance of a decree for it, the costs portion of it is executed, the limitation is 3 years under Serial No. 3 of Group F of the IV Schedule to the Agra Tenancy Act and not one year under Serial No. 5. The decree is a money decree at that stage for there was nothing left to execute but the money part of the decree. (Shirreff, I. M.) NARAIN LAL v. SHIVCHARAN SINGH. 1941 A.W.R. (Rev.) 766=1941 O.A. (Supp.) 675 (2)=1941 R. D. 758.

Sch. IV. Gr. F Serial No. 5—Revival of prior execution application—Test. See LIMITATION ACT. ART. 182 AND AGRA TENANCY ACT, SCH. IV, GR. F SERIAL NO. 5. 1942 R. D. 699.

AGRICULTURISTS LOANS ACT (XII OF 1884). S. 5 and Land

AJMER LAND REV. REGN (1877).

S. 7. (1) (c)—Recovery uniter—Difference between—Provision of Berar L: Revenue Code applicable to recovery under former Act.

It cannot be disputed that the amount recoverableunder the Agriculturists' Loans Act, in contradistinction to a sum recoverable under the Land Improvement Loans Act, is a sum recoverable not as a land revenue but as an arrear of land revenue. Such a sum recoverable under the Act as applied to Berar is recoverable under S. 141 (d) and not under S 141 (c) of the Berar Land Revenue Code. In the case of a sale for such a recovery what is transferred is not the holding free of all encumbrances but nothing more than the right, title and interest of the defaulter. Hence in a suit under S. 45 of the Berar, Alienated Villages Tenancy Law against the tenant and such a purchaser, for the recovery of arrears of rent and cesses, the latter is liable to pay it, for he stands only in the position of the defaulter (Grille. J.) MAHADEO AMBADAS v. TRIMBAK KASHINATH. I.L.R. (1942) Nag 88=199 I.C. 51=14 R.N. 268=1942 N.L.J. 56=A.I.R 1942 Nag. 50.

AHMEDABAD MUNICIPAL CODE, B. 380—Construction—"Imported"—Meaning of-Goods manufactured within municipality taken outside for facilitating transport and brought into municipality—Terminal tax—If leviable.

The word "import" in R. 380 of the Ahmedabad Municipal Code must be given its ordinary meaning, that is, to bring something within the municipal limits from a place without its boundaries, irrespective of the consideration as to whether the goods were manufactured within the municipal limits, how long they were outside those limits and for what purpose. "Import" cannot be construed as meaning that no terminal tax is to be levied on goods at the time of their import within the municipal limits if they are merely in the process of transit from the place of manufacture within the municipal limits. (Wadia and Rajadhyaksha, J.) MAGANLAE BHAGWANDAS v. AHMEDABAD MUNICIPALITY. LI.R. (1945) Bom. 132-219 LC 436-47 Bom. L.B. 100-A.I.R. 1945 Bom. 251.

AHMEDABAD SHARE AND STOCK BROKERS' ASSOCIATION BULES, R. 117 (b)—Applicability and construction—Conduct of member dealing with another as constituent—Power of Board to deal with.

Under R. 117 (b) of the Ahmedabad Share and Stock Brokers' Association Rules, which provides that "the Board may order a member who fails to meet an obligation to a member or non-member arising out of a stock exchange transaction to be declared a defaulter" if the Board find an obligation binding on a member, whether to another member or to a non-member, arising out of a stock exchange transaction, then they can act on the rule. There is nothing whatever in the rule to show that the member must have incurred the obligation as a broker. The Board has power to deal with a member even when he deals as a constituent and not as a broker. (Beaumont, CJ. and Wassoodew, J.) Lalbhai fulchand v. Ahmedabad Share and Stock Brokers association. I.L.R. (1943) Bom, 197=207 I.C. 263=16 R.B. 22=45 Bom. L.R. 226=A.I.R. 1943 Bom, 180.

AGRICULTURISTS LOANS ACT (XII OF TION (II OF 1877), Ss. 25 and 119—Deci1884), S. 5 and Land Improvement Loans Actaion under S. 25—If can be chollenged by civil suit-

### IMER LAND REV. REGN. (1877.)

Under S, 25 of the Ajmer Land Revenue gulation the Chief Commissioner is empowered decide who is to hold land in lieu of maintenance ainst any Istimrardar where the applicant is a ember of his family. Not only under this ction is the decision conclusive, but S. 119 of me Regulation is an express bar to the instituno of a suit on the subject in any Civil Court davies.) Bakhtawar Singh v. Chander Singh 41 A.M.L.J. 1.

——Ss. 31 to 36-Effect of-Occupancy tenancy ior to Act, if affected-Occupancy tenancy, if alienation.

The Bhum Regulations have no retrospective ect and hence any alienation made or occurncy tenancy granted prior to the Regulations Il continue to be valid. The grant of a perment occupancy tenancy amounts to an alienan. (Davies.) Ganga Nath Singh v. Sheo arain. 1940 A.M.L.J. 88.

### -S. 119-Bar of Civil Court's jurisdiction.

In revenue matters Civil Courts are precluded om interfering by S. 119 of the Ajmer Land and venue Regulation. (Davies, J.C.) RAMA v. R DASTGIR CHILLA. 1943 A.M.L.J. 69
[MER LAWS REGULATION (III OF

77), S. 8—Benami transaction—If can affect e-emption.

Right of pre-emption is a personal matter which not possibly be the subject of an assignment 1 hence it would be entirely against the spirit the law of pre-emption to allow a benami nsaction to have any legal force in this contion. (Davies.) AFSAR-UN-NISSA v. ABDULLIM. 1941 A.M L.J. 65.

—S. 8—Sale of several plots—Partial preption, when permissible.

Where the plots of land sold are not contiguous stial pre-emption may be allowed. (Davies.) LA BUX v. VISHUN CHANDRA. 1944 A.M.L.J. 6.

MER MUNICIPAL REGULATION 125), Ss. 93, 94 Proviso and 234—Recovery amount sought under S. 234—Forum of appeal inst order—Appeal beyond time—Permisility.

in amount sought to be recovered under S. 234 the Ajmer Municipal Regulation is originally overable under S. 222 as a tax. Against an ler of taxation an appeal lies to the Commissioner. Where an appeal in such a case is prered to the Commissioner after the period of itation owing to a mistaken choice of a diffent forum, the proviso to S. 94 would permit h an appeal if the appellate officer is satisfied there was sufficient cause for the delay. wies.) Municipal Committee, Ajmer v. peror. 1942 A.M.L.J. 16.

—Ss. 176 and 234—Nature of fee charged for age of building materials on municipal street—verability by summary process under S. 234.

: is clear from the terms of S. 176 of the Ajmer nicipal Regulations that the amount charged for the age of building materials on municipal street is not at all but is a fee. Hence it is recoverable by mary process under the provisions of S. 234 of the

# AJMER TALUKD'S LOAN REGN. (1911)

Regulations. (Davies.) MUNICIPAL COMMITTEE, AJMER v. SHIAM SUNDAR. 1945 A.M.L.J. 3.

——S. 233—Failure to give notice under— Effect—Setting aside order of dismissal on appeal —Further appeal, if lies. See C.P. Code, O. 43 R. 1 (U) and O. 7. R. 11 (D) and AJMER MUNI-CIPAL REGULATION, S. 233. 1942 A.M.L. J. 13.

AJMER REGULATION (III OF 1914), S. 22 (2)

Requirements prior to application under—Duty of
Collector—Form of application.

Before making an application under S, 22 (2) of Ajmer Regulation III of 1914, the Collector must make some sort of enquiry to satisfy himself that a trul Court has passed a decree or order contrary to the provisions of that Regulation. S, 22 (2) does not contemplate a mechanical application as soon as some private party makes a motion to the Collector about it. The expression "when it appears to the Collector" is significant. S, 22 (2) contemplates a formal application by the Collator. A mere endorsement at the foot of a private party's application forwarding the said application to the District Judge for favour of necessary action cannot amount to an application, to fall under S, 22 (2), has got to be of such a nature as to amount to an appeal under the Civil Procedure Code. (Vyas.) LAL CHAND v. THE COLLECTOR. 1945 A.M.L.J. 56.

### AJMER TALUKDAR'S LOAN REGULA-TION (II of 1911)—Attached funds paid into Court prior to notification—Disposal—Procedure.

There is no provision in the Talukdar's Loan Regulation as to what should be done with sums of money which reach the hands of Civil Courts by way of attachment and payments after the date of the notification. Return of the money to the person to whom a loan is to be made through the Commissioner is the only course open. (Davies.) Gokal Prashad v. Ali Rasul. 1941 A.M.L.J. 101.

Bs. 6, 7 and 18—Disability contemplated by S. 7—Pater of commencement and termination

Mortgage in the interval—Liability of executant or his legal representatives.

The starting of the disability contemplated in S. 7 of the Ajmer Taluqdar's Loan Regulation of 1911 is not the date of the Taluqdar's application to the Commissioner under S. 3 of the Regulation, nor the date of the Chief Commissioner's order to the Commissioner under S. 5 but it is the date of the notice issued under sub-S. (1) of S. 6. Similarly, at the other end, the date of cessation of the disability would be the date on which the Commissioner would issue a notification under S. 18 on being satisfied that the taluqdar concerned had already become freed from indebtedness. Hence a mortgage executed during the subsistence of the disability is void ah initio and cannot create any liability either as regards the executant or his legal representatives. (Vyin.) Panmal Kanwar v. Lachman Singhil. 1945 A.M.L.J. 29.

3. 7 Mortgage by istimrardar's son-Liability created by.

Where a mortgage is executed by the son of an istimrardar, the fact that he had no right, title or interest in respect of the properties at the date of the mortgage does not mean that there is no personal liability so far as he is concerned for the mortgaged property. Not having an interest line the properties he

# ALLAHABAD HIGH COURT RULES.

could not create a liability on them. (Vyus.) PANMAL KANWAR v. LACHMAN SINGHJI. 1945 A M L.J. 29.

ALLAHABAD HIGH COURT RULES, General (Civil), Ch. XXI, Rr. 22 and 23—Contentious lingation—Test.

Rr. 22 and 23 of Ch. XXI of the General Rules (Civil of the Allahabad High Court draw a distinction between contested and uncontested litigation and make it depend upon whether there has been a decision on the merits after contest.' A decision as to the amount of Court-fee payable, is not a decision on the merits' although it may give rise to some measure of contest. (Braund, J.) Shiva Shankar Lat Sharma v. Ramil Lat. 195 I.C. 781=14 R.A. 81=1941 A.U. J. 290=1941 A.W.R. (Rev.) 405=1941 O.A. (Supp.) 331=1941 R.D. 312=1941 A.W.R. (H.C.) 166=1941 A.L.W. 428=A.I.R. 1941 All. 285.

——(CRIMINAL), Chap. II R. 1—Fresh vakalatnama, in appeal—If necessary.

Once a vakalatnama has been filed in the trial Court, it holds good for such Courts as the pleader has a certificate for, provided that the vakalatnama authorises him to appear there on behalf of his client. (Hamilton, J.) EMPEROR. v. CHHAJJU. I.L.R. 1941 All. 633=197. I.C 497=43 Cr.L.J. 173=14. R.A. 206=1941 A.L.J. 344=1941 A.Cr.C. 145=1941 A.L.W. 653=1941 A.WR. (H.C.) 246=1941 O.A. (Supp.) 599=A.I.R. 1941 All. 336.

ALLUVION AND DILUVION. See also BENGAL ALLUVION AND DILUVION ACT. (IX of 1847) and Bengal Alluvion and Diluvion Regulation (XI of 1825).

dual." Accretion formed in one season-If "gradual."

Where an accretion has been formed in one season and one season only the process of accretion cannot be described as gradual. (King, J.) Subramania Alyar v. Province of Madras. 203 I.C. 271=1942 M.W.N. 633=A.I.R. 1942 Mad. 660=(1942) 2 M.L.J. 223.

——Dhardhura—Custom applying irrespective of change of course of river being either gradual or sudden—Reasonableness—Enforceability.

A custom of dhardhura which applies irrespective of the change of the course of the river being either gradual of sudden, is not unreasonable and hence could be recognized and enforced by Courts. (Allsop and Verma, JI.) RADHEY SHYAM v. RAM DHAN LAL. 1942 A.L. J. 661=1942 A.L.W. 629=205 I.C. 505=15 R.A. 425=A.I.R. 1943 All 68.

Diaraland—Submersion—Raiyat without occupancy right failing to pay rent—Effect—Forfeiture of rights—Claim to tenancy on re-appearance of land—Sustainability. See BIHAR TENANCY ACT, S. 180. 24 Pat. 444.

Entry after alluvion—Requisites to be proved.

Per Sathe, A.M.—Before any land can be entered after its alluvion as the property of its former owners its identity on the other side of the river must be established. Such identity can be satisfactorily established only by justaposition and superimposition of maps of villages on AND 11.

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both sides of the river. (Shirrey, J.M. and Sathe, A.M.) AVADHISHI PRATAP SINGH v. PASHUPAT PRATAP SINGH. 1941 O.A. (Supp.) 951=1941 A.W.R. (Rev.: 1200.

Lankas in tital and navigable river-Right to-Re-formed land-Right of previous owner-Crown's right to owner ship of river-bed-Rule.

The Crown's ownership of the bed of a river will be presumed if the river is either tidal or navigable. In deciding the question of navigability of a river in case of a dispute as to a lanka in an estate the navigability should be decided with reference to the conditions prevailing at the time of the grant. Where the river is shown to have been then navigable, the fact that the volume of water flowing in the stream has since diminished as the result of an artificial erection of dam works and that it has thereby been rendered not navigable during certain parts of the year will be immaterial. Where the process of formation of a lanka in a navigable or tidal river consists ordinarily in the rise of sand-bank owing to the shifting of the riverbed by floods, the planting of the sand-bank with reeds the interception of silt by reeds grown on the sand and the gradual formation of cultivable hand which would be considerably above the water level at all seasons except during high floods, there can be no question of any completed title by lateral accretion to the land to which the sand-bank is attached, until the soil has been deposited so as to raise the bank above the ordinary level of the water. If, however, the sand-bank is a reformation of land formerly owned and washed away, the owner can be presumed to retain his title in the site of the land formerly occupied by him, and when it reappears, even though the re-formation is incomplete, he would be entitled to a declaration of his right thereto, provided the re-formation is identifiable with the original land and there has been no abandonment of his right therein. (Wadsworth and Patanials Sastri, JJ.) PROVINCE OF MADRAS D. JAGANNADHA RAJU. I.L.R. (1945), Mad. 420= (1945) 2 M.L. J. 27 AMENDMENT.

——Of pleadings. See C.P. Code, S. 152. C.P. Code, O. 6, R. 17. ——Of decree. See (1) C.P. Code S. 152. (2) Decree.

#### APPEAL.

Abandonment of issue in trial Court-Later ruling on the point-Point if can be raised in appeal.

Where in the trial Court an issue is not pressed by the counsel and subsequent to that there is an authoritative decision on the point, the party is not bound by the admission of his counsel in the trial Court and can raise the point in appeal. (Yorke, J.) ASIA BEGAM v. BAGHUBAR DAYAL. 192 I.C. 327=13 R.O. 352=1941 A.W.R. (C.C.) 13=1940 O.W.N, 1249=1940 O.A. 1210=1941 O.L.R, 113=A.I.R. 1941 Oudh 203.

—Abandoned plea, if can be raised.

Where a plea was not only not raised in the Court below but was expressly abundoned cannot be raised in appeal. (Madeley, J.) GANGA GULAM v. Sheo MANGAL BAJFAI. 18 Luck. 632=15 R.O. 308=204 I.C. 237=1942 A.W.R. (C.C.) 356(3)=1942 O.A. 588=1942 O.W.N. 725=A.I.R. 1943 Oudh 83

Abatement. See C. P. Code, O. 22 Rr. 4, 9

——Abatement—Suit against several persons including minors—Decision against plaintiff—Appeal by plaintiff without impleading minor defendants—Abatement.

Where a suit against certain persons some of whom are minors is decided against the plaintiff and the plaintiff appeals without impleading the minor defendants the appeal does not abate if plaintiff is satisfied with a decree against the minor defendants. (Agarwala, J.) SHAONANDAN GOPE v. SHAHDEO KHATIK. 1911.C. 597=13 R.P. 332=7 B.R. 235=A.I.R. 1940 Pat. 671.

----Appeal in regard to auction sale--Auctionpurchaser-Necessary party.

The auction-purchaser is a necessary party in any appeal in respect of the sale in which he was the purchaser. (Sathe, S.M.) Zahber Hasan v. Mujtaba Husain. 1943 A.W.R. (Rev.) 185 (1) =1943 R.D. 303 (1).

——Appellate Court—Appreciation of oral evidence—Weight to be attached.

The appreciation of oral evidence by the trial Judge is no doubt entitled to great weight by the appellate Court, but that appreciation must be tested by the other proved facts in the case, especially if the evidence is substantially corroborated by those facts. (Divatia and Macklin, JJ.) Secretary of State v. Chiman Lal Jannadas. IL.R. (1942) Bom. 357-201 I.C. 420=15 R.B. 76=44 Bom. L.R. 295=A.I.R. 1942 Bom. 161.

--- Appellate Court-Findings of fact not drawn from demeanour of witnesses.

Where the findings as regards facts have been drawn from "argumentative "inferences" from the testimony, oral and documentary, produced by a witness, and depend upon "the weight of evidence" and "the inherent probabilities of the story," and not on the credibility induced by his "whole demeanour in the witness box," or "the manner in which he answers questions", the trial court is in no better position than the Court of Appeal in discovering the truth. (Sir Madhavan Natr.) AL. VR. St. VIRAPPA CHETTIAR v. PEMIAKARUPAN CHETTIAR. 1945 M.W.N. 322=47 Bom. L.R. 608=49 C.W.N. 211=A I.R. 1945 P.C. 35=(1945) 1 M.L. J. 136 (P C.).

Appellate Court—Interference-Assessment of damages by trial Court. See TORT-DAMAGES. (1945) 2 M.L.J. 257 (P.C).

—Appellate Court—Powers of—Interference with correct order on technical ground. See United Provinces Encumbered Estates Act, S. 46—Exercise of discretion, 1943 R.D. 152.

Appellate Court-Powers of-Production of evidence.

Where an Appellate Court had the Originals of documents produced before it to satisfy itself as to the correctness of the copies which alone were produced in the lower Court, it was so entitled to allow the production of such evidence and it in no way prejudiced the other party who could not make a grievance of it on appeal. (Allsop and Hamilton, J.J.) RAM KALL v. PYARE LAL. 1943 A.W.R. (H.C.) 52=206 I.C. 415=15 RA 521=1943 A.L.W. 183=1943 O.A. (H.C.) 52=1943 O.W.N. (H.C.) 101=1943 A.L.J. 93=A.I.R. 1943 All. 183.

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----Appellate Court-Power to set up new cise inconsistent with plea in tral Court-Remind of suit for trial of new case-Propriety.

An appellate Court has no power to set up a new case for a party, which is inconsistent with hits pleas in the trial Court and to send back the suit for trial of the new case that it has set up. Such a procedure would cause irreparable injury to the other party. (Abdul Ghani and Subrahmanya Aiyar, J.J.) BASKARIAH v CHENNABASAPPA. 20 Mys. L.J. 17. 46 Mys. H.C.R. 539.

-\_\_\_ Appellate Court-Procedure when in doubt.

When an appellate Court is in doubt as to the correctness of the lower Court's order, the order of the trial Court should be maintained. (Shirreff, S.M. and Sathe, J.M.) RAGHUNATH I'RASAD SINGH v. MAHOMMED NOOH. 1942 O.W.N. (B.R.) 519 (2)=1942 A.W.R. (Rev.) 337=1942 O.A. (Supp.) 363.

- Appellate Court-Right to look into subsequent events.

The Appellate Court is entitled to look into subsequent events for the purpose of doing complete justice to the parties and in particular, for avoiding further litigation. (Mukherjea and Sharpe 11.) TARAK (HANDRA DAS v. ANUKUL CHANDRA. 49. C.W.N. 716.

— Appellate Court—Setting up new case for party—Error of law.

The judgment of a lower appellate Court is vitiated by a clear error of law if it sets up a case for a plaintiff which he himself had not set up in the trial Court, (Ghulam liasan, J.) HASHMAT JAHAN v. SHEO DULARY. 17 Luck. 472 = 198 I.C. 184 = 14 R.O. 380 = 1941 O.W.N. 1340 = 1941 A.W.R. (Rev.) 1148 = 1941 O.A. 1038 = A.I.R. 1942 Ough 180.

Appeal—Appreciation of evidence—Interference Nand Kishwar Bux Roy v. Gopal Bux Ral. [see Q.D. 1930-40. Vol. 11, Col. 2033.] I.L. R. (1940) Kar. (P.C.) 235.

Appreciation of evidence by trial Court-Interjerence.

Where the District Munsiff after a detailed examination of the evidence comes to the conclusion that the evidence was true the District Judge on appeal ought not to reverse this finding without stating his reasons. (Leach, C.J., Venkataramina Rao and Patanjali Sas:ri. JJ.) MUNISAMI MUDALI V. NARASAPPA MUDALI I.L.R (1941) Mad. 785=196 I.C. 406=14 R.M. 293=1941 M.W.N. 655=A.I.R. 1941 Mad. 539=(1941) 2 M.L.J. 79 (F.B.).

Binding nature—Person unsuccessful in getting unpleaded—Not bound by result of appeal.

A person is not bound by the result of any appeal to which he has not succeeded in getting himself made a party. (Tek Chand and Beckett, J.) SHANTI LAL v. F. HIRA LAL SHEO NARAIN. I.L.R. (1942) Lah.603=198. I.C. 726=14 R.L. 351=43 P.L.R. 471=A.I.R. 1941 Lah. 402.

Competency—Abatement of suit—Order declaring—Right of appeal. See C. P. Code, O. 22. R. 3. (1945) 1 M. L. J. 220.

——Competency—Application to Court—Order on not appealable—Subsequent making of rule giving right of appeal—Effect—Right of appeal and right to final judgment—Distinction.

When at the time an application is made to a Court no right of appeal exists against an order on such application, the fact that sub-equently a rule is made establishing a right of appeal would not make an appeal maintainable unless there is something in the rule which expressly or by necessary implication gives it retrospective effect. There is no logical distinction between a right of appeal and a right to a final judgment without an appeal. Both are equally vested rights. (King and Kuppuswami Ayyar, 11.) Examiner of Local Fund Accounts v. Subramania Mudaliar, I.L.R. (1943) Mad. 501=207 I C. 612=16 R.M. 139=55 L.W. 778=1942 M.W. N. 755=A.I.R. 1943 Mad. 208 (1)=1942) 2 M.L.J. 667.

Competency—Decision on some of the issues
—Judgment and decree issued that issues are
found against plaintiff—If "decree"—Appealability.

Where in a suit for maintenance, the Court frames several issues and decides some of the issues first, writing a separate judgment giving resons and issuing a decree to the effect that those issues "are found against the plaintiff", and adjourns the suit for evidence of the other issues, an appeal lies from the decree so deciding the first set of issues. The decisions on those issues cannot be regarded as mere findings. The judgment and the decree incorporating the findings must be regarded as an adjudication conclusively determining the rights of the parties with regard to some of the matters in controversy in the suit. An appeal therefore lies because there is a decree, and the plaintiff cannot be deprived of his remedy of appeal merely because the trial Court passes decrees which may be defective. (Happel, J.) VENKAYAMMA v.RAMAYYA. 1943 M.W.N. 589=56 L.W. 539=A.I.R 1943 Mad. 767=(1943) 2 M.L.J. 348=211 I.C. 63=16 R.M. 480.

legislation. Competency—If affected by subsequent

An appeal which was incompetent on the date when it was filed could not become competent as the result of a new Act passed subsequent to the filing of the appeal. (Varma, J.) HET RAM v. COLLECTOR OF ALIGARH. 197 I.C. 114=14 R. A. 185=1941 A.L.J. 513=1941 A.L.W 828=1941 O.A. (Supp.) 634=1941 A.W.R (Rev.) 702=1941 R.D. 772=A.I.R. 1941 All. 355.

Competency—Method of ascertainment.
Ordinarily when one wishes to find out whether an appeal is competent one has to examine the judgment and decree or order and then see whether it can be brought within the statutory provisions which allow an appeal. One has not to decide the appeal on the merits before one is in a position to say whether the Court has jurisdiction to hear the appeal or not. (Henderson, J.) SAKKAL SARDAR v. ISWAR DAS THIRANI. ILR. (1941) 2 Cal 366=199 I.C. 740=14 R C. 629=4 F L J. (H C.) 405=A.I.R. 1942 Cal. 230.

——Competency—Mortgage suit—Order directing preparation of account and making out of final decree—Appealability.

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An order in a moregage' sait directing that an excount be prepared and final decree made out is not appealable; the party aggreed must await the complainer of the final decree and then file a regular appeal against that. (Rowland and Chatterji, 11.) Shanti Devi c. Khodai Prasad Singh. 199 i.C. 511 =14 R P. 590 =8 B.R. 550=23 Pat. L.T. 615 =A.I.R. 1942 Pat 340.

Competency—Order not drawn up under S. 142. C. P. Code=Appeal—Maintainability. See C. P. Code, S. 112. 45 Bom. L. R. 961.

— Competency-Suit filed as small cause suit —Disposal by Judge has ing small cause powers— Right of appeal—Suit numbered as original suit —Effect.

When a suit is filed as a small cause suit and is actually disposed of by a Judge who has the necessary powers to try it as a small cause suit, it must be deemed to have been disposed of as a small cause suit, and therefore there can be no right of appeal against the decree in the suit. This principle must be applied even though the suit may have been numbered as an original suit after filing and before disposal. (King, J.) ARUNAGIRI GOUNDAN T. RAMASWAMI PILLAI. 1941 M.W.N. 829=54 L.W. 324=A.I.R. 1941 Mad. 867=(1941) 2 M.L.J. 537.

—Comfelency—Suit for partition—Plea by defendant that suit is bad as being for partial partition—Dismissal of suit—Defendant dissatisfied with some statement in judgment—Right to abbeat

Where a suit for partition is resisted by a defendant on the ground that the suit is one for partial partition and is dismissed on that ground it is not open to that defendant to appeal against the decree of dismissal merely because he is dissatisfied with some of the statements in the judgment. No finding in the judgment of dismissal can operate as res judicata the rights of the parties being left entirely untouched by the dismissal of the suit. (Leach, C. J. and Krishnaswami Ayyangar, J.) Bapayya v. Ramarkishnayya. 57 L.W. 470=1944 M.W.N. 527=A.I.R. 1945 Mad. 39=(1944) 2 M.L.J. 181.

Consent decree—Parties agreeing orally to arbitration by Judge and to abide by decision given—Effect—Decision—If award of arbitrator—Appeal from decision—If lies, See Arbitration Act, Chap. IV, 47 Bom.L.R. 388.

Construction of orders—Order "remitting back" notice of appeal "to be dealt with according to law"—Parties, not compelled to proceed with appeal.

An order "remitting back" a notice of appeal to the appellate tribunal "to be dealt with according to law" gives the parties only a right which the parties are not compelled to exercise to an adjudication by the appellate tribunal. (Lord Justice Du Parcq.) Shrke Meenakshi Mills, Ltd v. Patel Bros. 71 I.A. 106=I.L.R. (1944) Bom. 469=I.L.R. (1944) Kar. (P.C.) 230=216 I.C. 169=17 R.P.C 42=1944 A.U.J. 395=1944 M.W.N. 561=57 L.W. 520=48 C.W.N. 590=46 Bom.L.R. 841=1944 A.W.R. (P.C.) 46=1944 O.A. (P.C.) 46=11 B.R. 133=AIR. 1944 P.C. 76=(1944) 2 M.L.J. 17 (P.C.)

-Conversion into revision-If claimable as of right.

Conversion of appeal into revision is entirely discretionary and cannot be claimed by a party as of right. (Sathe S. M.) ALI NEWAS v. ANWAR! Bibi. 1944 A.W.R. (Rev.) 271.

——Cross-objection—Both sides filing appeals
—One appeal beyond limitation—If can be treated as cross-objection.

Where both plaintiff and defendant file separate appeals and the defendant's appeal is timebarred, it is not open to the Court to treat it as cross-objection to the plaintiff sappeal. (Almond, J. C.) MAHOMED SAKWAR KHAN v. GHAFOOR BEG. 211 I.C. 343=16 R. Pesh. 67=A.I.R. 1944 Pesh. 7.

Duty of appellant—Proof of incorrectness of judgment. RAM CHARAN DAS v. BHAGWAT SARAN. [see Q D. 1936—'40 Vol. 1. Col. 3227.] 191 I.C. 620=13 R.A. 242.

-Effect of new enactment on procedure relating to appeals-Suit filed under Agra Tenancy Act and decided under new Act-Procedure

The procedure regarding appeals is determined not by the date on which the appeal is actually filed but by the date on which the suit was originally filed. Hence in a suit filed under the Agra Tenancy Act but decided under the new Tenancy Act, the appeal would be governed only but the Agra Tenancy Act, the suppeal would be governed only by the Agra Tenancy Act. (Sathe, S.M.) CHABU v. Mahipar. 1944 R.D. 39=1944 A.W.R. (Rev.) 12.

-Failure to file first Court's order-Procedure to be followed.

If an appeal is filed without the necessary copy of the first Court's order, the appeal should be deposited as incomplete and then when the copy is filed to decide the question of limitation (Shirreff, J.M.) BACHAN RAI v. BRIJ NARAIN RAI. 1941 A.W.R. (Rev.) 565 (1)=1941 O.A. (Supp.) 496 (1)=1941 R.D. 668.

C. P. Tenancy Acr. (1920), S. 6 (6). 1941 N.L. J. 50.

-Finding of fact based on oral evidence-Interference on appeal.

A Court of appeal always attaches a great weight to the opinion of the trial Judge on the credibility of the witnesses called before him and it would be contrary to settled principles that the appellate Court should substitute its opinion on the facts based on the written depositions for the opinion of the trial Judge who saw the wit nesses in the box. A decision arrived at on a consideration of the oral evidence cannot be lightly differed from and it is not open to the appellate Court to consider the evidence in print before it and find out whether it would have come to the same conclusion as the trial Judge had. (Beaumont C.J. and Kania, J.) KHIMJI KUVERJI v. LAIJI KARAMAI. I.L.R. (1941) Bom. 211=196 I.C. 858=14 R.B. 177=43 Bom.L.R. 35=A.I.R. 1941 Bom. 129.

-Finding of fact-Duty of appellate Court. Where the law gives a right of appeal from a

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well as on questions of law, the Court of appeal has to consider and weigh the judgment appealed against. It has to examine the materials on the record and to come to its own conclusions. (R.C. Mitter, Khundkar and Pal, JJ.) BIBHABATI
DEVI v. RAMENDRA NARAYAN ROY. 202 I.C.
551=15 R.C. 355=47 C.W.N. 9=A.I.R. 1942 Cal. 498 (S.B.)

-Finding of fact-Finding as to execution and ittestation of will.

A finding as to execution and attestation of a will is a pure finding of fact. (Lord Thankerton.) MANINDRA CHANDRA LALA D. MAHALUXMI BANK, LTD. 26 P. L.T. 80-49 C.W.N. 481 = A.I.R. 1945 P.C. 105= (1945) 2 M.L.J. 46 (P.C.).

# -Finding of fact-Interference.

There are cases in which evidence is so well balanced that an inference either way can reasonably be drawn. In such cases, the appellate tribunal may select the inference they choose; but they can have no equal choice between an inference that is safe, and one that is not safe. Not safe, means that there is not evidence from which the inference can reasonably be drawn. (Lord Atkin.) SRIS CHANDRA NANDY V. RAKHA-(Lord Alkin.) SRIS CHANDRA NANDY V. RAKHALANANDA THAKUR. 68 I.A. 34 - I.L.R. (1941) 1 Cal. 468-1941 P.W.N. 263-1941 O.A. 457-1941 A.W.R. (P.C.) 34-1941 O.L.R. 329-7 B.R. 656-13 R.P.C. 173-73 C.L.J. 555-1 L.L.R. (1941) Kar. (P.C.) 54-43 Bom.L.R. 794-193 I.C. 220-1941 O.W.N. 572-22 Pat. L.T. 286-53 L.W. 469-1941 M.W.N. 354-1941 A.L.W. 419-45 C.W.N. 435-A.I.R. 1941 P.C. 16=(1941) 1 M.L.J. 746 (P.C.).

#### -Finding of fact-Interference.

In a civil appeal the Court should not interfere with findings of fact unless it is satisfied that the trial Court is clearly wrong. The judgment must show that the findings of the trial Court and the reasons therefor have been fully considered by the appellate (ourt. Further the appellate Court should give its reasons for reversing the findings of the trial Court if it decides to reverse them. (Sen, J.) NANI PATRA v. MADHU-sudan Lera. 73 C.L.J. 196.

### -If to be against whole decree.

An appeal must be preferred against the whole decree, though for the purposes of valuation the subject-matter in dispute in appeal only is valued. An appeal is not preferred against any item or items in a decree. (Harries, C.J. Fazl Ali and Manchar Lall, JJ.) RAJA BRAJA SUNDER DEB v. RAJENDRA NARAYAN BHANJ DEO. 20 Pat. 459-195 I.C. 344-7 B R. 906-14 R P. 109-22 Pat.L.T. 736=A.I.R. 1941 Pat. 269 (S.B.)

-Incompetent appeal—Correction of decree though appeal incompetent.

Though an appeal is incompetent, the appellate Court can make alterations in the decree so as to bring the operative portion of the decree into conformity with the language used in the particular enactment in question. (Bajpai and Dar, JJ.) MAHOMED MOHTASHIM v. JUTI PRASAD, IL.R. (1941) All. 360=194 I.C. 801=1941 A.W. where the law gives a right of appeal from a R (Rev.) 306=1941 O.A. (Supp.) 237=1941 judgment of a trial Court on questions of fact as A.L.J. 246=1941 R.D. 460=1941 A.L.W. 350

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(2)=14 R.A. 7=1941 O.W.N. 502=1941 A.W. R. (H.C.) 128=A.I.R. 1941 All. 277.

Incompetent appeal entertained and dismissed on merits—Second appeal—Maintainability—Procedure—righ court's power to interfere—Extent of—Revision, See C. P. Cope, S. 100. (1942) 2 M.L.J. 450.

Opinion of trial Judge. In a case involving a question of fact the decision of which depends on the reliance to be placed on the testimony of witnesses the view of the judge who tried the case and saw the witnesses is entitled to great weight. Where the only question is which set of witnesses is to be believed the hindings of the trial Judge should not be lightly regarded on a mere calculation of probabilities by the Court of appeal. (Nasim Ali and B. N. Row, JJ.) RAINANDINI V. ASWINI KUMAR CHOWDHURY. I. L.R. 1941) 1 Cal. 457=13 R.C. 363=193 I.C. 32=A I.R. 1941 Cal. 20=72 C.L.J. 181=45 C. W.N. 96.

Interference—Entry in record of rights—Construction—Finding that land described as 'belagan' is not rent free land—Interference in Letters Patent appeal. See RECORD OF RIGHTS—ENTRIES IN. 7 B.R. 750.

Interference with trial Court's appreciation of evidence—When justified.

An appellate Court is always slow and reluctant to substitute for the appreciation of the evidence by the trial Court its own estimate thereof, as undoubtedly the trial Court has the great advantages of having seen the witnesses, heard their testimony and marked their demeanour; and in appeal the appellate Court would generally be content to accept the appreciation of evidence of the trial Court. But where the trial Court fails to notice certain important aspects in the case and thereby arrives at wrong conclusions owing to misappreciation, the appellate Court would be justified and would even be bound to interfere and go into the evidence itself. (Davis, C.J. and Lobo, J.) Kassim Haji Khan v. Emperor. I.L.R. (1943) Kar. 294—212 I.C. 109—45 Cr.L J. 596—A.I.R. 1944 S. 94.

Introduction of new record after order under appeal—If can be considered on appeal.

Where a new record of certain information is put into the file after an order is passed which is appealed against, then it should be ignored when the appeal is dealt with and not taken into consideration at all. (Sathe, S.M. and Ross, A.M.) RUP RANI v. DHARAM SINGH. 1943 R.D. 51 (1)=1943 O.W.N. (B.R.) 51 (1)=1943 O.A. (Rev.) 30 (2)=1943 A.W.R. (Rev.) 30 (2).

Judgment of reversal—Discussion of reasons given by original Court—Necesstiy.

If the reasons given by the appellate Court for reversing a decree are so cogent as to justify the finding, no discussion of other less convincing reasons is necessary for making it a proper judgment. (Khundkar and Lodge, JJ.) SASHI KUMARI DEVI V. DHIRENDRA KISHORE. I.L.R. (1941) 1 Cal. 309=196 I.C. 241=14 R.C. 199=245 CM, N. 699=A.I.R. 1941 Cal. 248.

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Judgment of reversal-Reasons for-Necessity to give.

An appellate Court must give reasons based on the evidence, if it disagrees with the finding of the trial Court. (Harper, S.M. and Shirreff, J.M.) RAM DASS v RASIAWAN LONIA. 1941 A. W.R.(Rev.) 508=1941 O.A. (Supp.) 467=1941 R.D. 546 (1).

— Jurisdiction to hear-Inherent power-Absence of formal order-Effect-Appeal-Revision-Competency.

No Court has an inherent right to sit in appeal over another Court. The jurisdiction to hear appeals is conferred by statute. Where in an inquiry in a case no formal order is drawn up, there is no decree or order from which an appeal will lie. Nor can an application in revision lie when no order has been drawn up. (Beaumont C.J. and Sen, J.) Karimmiya Hamdumiya v Jafarali Bawamiya. 202 I.C. 574=15 R.B. 171=44 Bom L.R. 666=A I.R. 1942 Bom. 279

Letters l'atent appeal—Leave when given. GANPATRAO v. SHEIKH BADAR. [see Q.D. 1936-40 Vol II Col. 2639.] I.L R. (1941) Nag. 460.

Limitatoin—Appeal filed in time not subsequently traceable—Another appeal filed after expiry of limitation—If time-barred.

Where an appeal is filed within the period of limitation and is not subsequently, traceable, another appeal filed after the expiry of limitation is not time barred as it must be taken to be a re-construction of the lost appeal. (Harries, C.J. and Mehr Chand Mahajan, J.) KULJAS RAI v. PALA SINGH. 219 I.C. 425=46 P.L.R. 350=A.J.R. 1945 Lah. 15.

New grounds. See C. P. Code, O. 41, R. 2.

New plea.

A contention involving point of law can be raised for the first time in appeal where no new facts require to be investigated and decided. (Manohar Lall and Shearer, JJ.) BHANKUMAR CHAND v. SHREE LACHMI KANT KAO. 22 Pat. 280=211 I.C. 242=10 B.R. 354=16 B.P. 209=A.I.R. 1943 Pat. 320.

---New plea

A new ground raised at the time of arguments which has not been taken in the grounds of appeal cannot be considered. (Sathe, S.M.) HASHMAT ALI v. GILLA MAL. 1943 A.W.R. (Rev.) 11 (2)=1942 O.W.N. (B.R.) 803 (1)=1942) R.D.) 985 (1)=1943 O.A. (Rev.) 11 (2).

----New plea at late stage in appeal.

The appellate Court is loath to grant an appellant permission to take an entirely new point for the first time in appeal. It would not be right to allow the appellant to raise at a late stage in the appeal a point which was never raised before. (Harries, C.J. and Fasl Ali, J.) DEOKINANDAN PD. SINGH v. PARMESHWARI PD. SINGH. 1941 P. W.N. 582.

New plea—Cannot be raised in appeal when it depends on evidence not available to appellate Court.

A party who could have raised a plea in the trial Court, when it was possible to take evidence, but who did not take it then, cannot be

allowed to raise it as a new point in appeal, when it depends on evidence which is not available to the appellate Court. (Divatia and Macklin, II.) HARKUBAI FAKIRCHAND V. SHANKFRBHAI ZAUFRBHAI. 215 I.C. 12=17 R B. 117=45 Bom. L R. 1014=A.I.R. 1944 Bom. 37.

New plea—Cannot be raised in appeal when fresh issue and evidence required to determine same.

A new plea which is not raised in the pleadings, and which involves the raising of a fresh issue and the taking of fresh evidence, cannot be permitted to be raised or heard in appeal (Krishnaswami Ayyangar and Horwill, II.) RAJAH OF VENKATAGIRI V. SOBHANABRI AFPA RAO I.L.R. (1944) Mad. 663=216 I C 120=1944 M.W.N. 350=A.I.R. 1944 Mad. 211=(1943) 2 M.L.J. 645.

--- New plea changing character of suit in second appeal-Permissibility.

Where a vendee instituted a suit alleging that the vendor's title being defective he was entitled to return of the consideration money paid by him under the sale deed the nature of the suit could not be allowed to be changed in second appeal as one for recession of the conveyance. (Davies, C. J. and Weston, J) ALLAHUNO BACHO v. UDHOOMAL. I.L.R. (1942) Kar. 32=202 I.C. 584=15 R.S. 51=A.I.R. 1942 Sind 81.

New plea—Execution sale—Order rejecting application to set aside—Appeal—New plea of fact requiring investigation of fact—If can be raised for first time.

A judgment-debtor cannot lie by in the executing Court, and then bring up in appeal an allegation which would require an investigation into facts and found upon it a proposition of law that the sale is bad. He ought to put forward such an allegation during the execution proceedings, and if he does not do so, he cannot be permitted to put forward the same in an appeal against an order refusing to set uside the sale. (Burn and Mockett, II.) SHAMIMAM CHETTIAR V NAGASWAMI AYYAR & CO. 54 I.W 365=1941 M.W.N 985=201 I C 156-15 R M. 247=A.I.R. 1942 Mad. 97=(1941) 2 M.L.J. 550

----New plea-Letters Patent appeal.

An entirely new point dependant on questions of fact cannot be allowed to be raised for the first time in a Letters Patent appeal. (Tek Chand and Sale. 11.) GOBAL DEVI v. GILLAM FATIMA. 209 I C 75=16 R.L. 83=45 P.L.R. 143=A.I.R. 1943 Lah. 113.

----New plea-Letters Patent Appeal.

It is not the practice of the Bombay High Court to allow new points to be raised or argued in Letters Patent appeals. (Broomfield and Macklin, II.) Ganesii Ramchandra v. Gopal Lakshman. ILR. (1943) Bom. 104 = 204 I.C. 402 = 15 R B. 319 = 44 Bom. L.R. 819 = AI. R. 1943 Bom. 12.

New plea-Objection that suit under S. 92 C.P. Code was not instituted by all who got consent-When open for first time in appeal.

Unless the facts are not in dispute, the point that the suit was not instituted by all those to

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whom consent was given to institute the suit by the Collector under S. 92 read with S. 93, C. P. Code cannot be allowed to be raised for the first time in appeal (Davis, C.J., and Tyahji J.) MUICHAND 2. HARKIRHINDAS ILR. (1941) Kar. 204=194 I.C. 461=13 RS. 277=A.I.R. 1941 Sind 88.

—New plea—Objection to admissibility of document—Certified copy admitted in trial Court without objection.

Where the objection to be teken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an Exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. Where, therefore, a certified copy of a registered document has been admitted in evidence without objection in the trial Court, the Appellate Court cannot reject the document sither on the ground that no foundation has been laid for the admission of secondary evidence or on the ground that there is no evidence to prove the execution of the document. (Sir George Rankin). Gopal Das v. Sri Thakurji, I.L.R. (1943) Kar (PC) 69=1943 A L J 292=207 I.C 553=1943 O W. N. 334=1943 A L W. 466=1943 A W.R. (P.C.) 14=1943 O A. (PC.) 14=16 R P.C. 47=56 L. W 593=10 B R. 7=47 C W N. 607=46 Born. L.R. 220=A.I.R. 1943 P.C. 83=(1943) 2 M.L. J 51 (P.C.).

New plea—Objection to maintainability of suit if can be raised in appeal—Duty of Court to raise when it comes to its notice NAGABHUSHANA BHATTA V. SEPTHAMMA. [see Q. 1), 1936—'40 Vol. II. Col. 2642.] 45 Mys.H.C.R 321.

----New plea - Permissibility in appeal.

An objection as to the mode of allotinent of properties in a partition by arbitrators cannot be raised for the first time on appeal. (Harries, C. I and Manohar Lall J.) RAM BAHADER JHA 2. SREE KANT JHA, 22 Pat 108-211 IC 137-10 BR 344-16 R.P. 201: AIR, 1943 Pat 285.

New pleas-Plea as to maintainability of suit or application.

A point about the maintainability of an application which goes to the root of the jurisdiction of the Court can be raised for the first time in the High Court though it was not raised in the lower appellate Court. (Dir. tiu, I.) CHIMAN LAL ISHWARIAL MEHTA T. JUNION INSPECTOR OF FACTORIES. ILR. (1942) Rom 6497 202 IC 597-15 R.B. 172-44 Bom LR. 606=A.I.R. 1942 Bom. 273.

New flea-Plea of obsence of jurisdiction If can be raised in late staye, in appeal or revision,

A substantial question of jurisdiction, namely that a Court has no jurisdiction to pass a particular order suo motu. can he raised at any stage of a case, in appeal or in revision. (Middleton.) FAUJDAR SINGH v. PRABODH KUMAR MITRA. 9 B.R. 178.

-New plea-Plea not raised in Court below and not taken in grounds of appeal.

A point which is not taken in the lower Court and which is not taken in the grounds of appeal cannot be raised for the first time in the course of the hearing of an appeal. (Krishnaswami Ayyangar and Kunhi Raman, JJ.) NARAYANA-SWAMI AYYAR v. NARAYANA IYENGAR. I.L.R. (1943) Mad. 509=210 I.C 268=16 R M. 409=56 L W 25=A.I.R. 1943 Mad. 288=(1943) 1 M. T. 1148 L.J. 114.

-New plea-Plea not raised in grounds-If can be urged.

It is not open to an appellant to urge a plea in appeal which was not specifically raised in the grounds of appeal. (Agarwal and Madeley, II.)
MAIMAN NISSAN v PATESHWARI PRASAD. 19
Luck. 204=207 I.C. 522=16 R.O. 37=1943 O.A. (C.C.) 115=1943 O.W.N 780.

-New plea-Plea not raised in grounds-If can be argued.

Where a point is not taken in the grounds of appeal and the appellant is also not concerned with it, it cannot be considered in the appeal. (Sathe, S. M. and Ross, A.M.) ORI LAL v. SITA RAM. 1943 A.W.R. (Rev.) 168 (2)=1943 R.D. 299.

New plea—Plea not raised in trial Court or in grounds of appeal—If can be raised at hearing of appeal. Narasimha Ayyar v. Krishna Ayyar. [see Q. D. 1936'—40, Vol. II, Col. 2643.] 192 I.C. 85=13 R.M. 526.

New plea-Plea of estoppel-If can be raised for first time in appeal or second appeal.

A party wishing to avail himself of the plea of estoppel must plead the estoppel in the trial Court, so that his opponent may be able to show that there is no room for the application of the doctrine. If that is not so pleaded and the parties go to trial on other plaint issues, the plea should not be allowed to be raised for the first time in appeal or in second appeal. (Manohar Lall and Chatter i I).) Jano Singh v. Bishunath Lal. 196 I.C 849=14 R.P. 257=8 B.R. 127=22 Pat.L.T. 821=A I.R. 1942 Pat. 71.

-New plea-Plea of exemption from limitation raised in second appeal. See C. P. CODE, O. 7, R. 6. 1943 N L.J. 611.

-New plea-Plea of limitation.

A plea of limitation founded on undisputed acts is a question of law, and may be taken in ppeal for the first time. (Davis C.J., and I.obo. J.) RUPOMAL CODUMAL v. MT. JANAT. I.L.R. (1941) Kar. 124=14 R.S. 78=196 I.C. 565=A.I.R. 1941 Sind. 158.

New Plea—Plea of limitation given up before issues in trial Court. SHARIFA BEGAM v. COURT OF WARDS. [see Q.D. 1936—40 Vol. I1, Col 2676.] IL.R. (1941) Lah. 843=191 I.C. 676=13 R.L. 343.

-New plea-Plea of limitation-If can be raised in appeal.

A plea of limitation which depends upon a question of fact cannot be raised for the first time in appeal as a matter of right. Where the question cannot be decided without taking fresh

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refuse to entertain the plea. (Abdul Ghani and Subramania Aiyar, II.) BASKARIAH v. CHINNA-BASAPPA. 20 Mys.L.J. 17=46 Mys.H.C.R. 539.

---New plea-Plea of limitation raised in grounds of appeal before first appellate Court but not urged before it-If open in second appeal.

A plea of limitation raised by the defendant in the grounds of appeal before the first appellate Court but not urged by counsel can be urged in. (Almond, C.J. and Mir Almad, J.) MST. Noor JANA v. MST. CHANA. 206 I.C. 497=16 R. Pesh. 3=A.I.R. 1943 Pesh. 43.

-Appeal-New plea-Plea of minority in second-Limitation.

A plea of minority to support a claim to the benefits of S. 6 Limitation Act, cannot be raised for the first time in second appeal. (Stone, C. J. and Clarke, J.) SHIVJIRAM DHANNALAL V. GHU-LAB CHAND KALOORAM, I.L.R (1941) Nag. 144= 1940 N.L.J 607=194 I.C. 806=14 R.N. 14= A.I.R. 1941 Nag. 100.

-New plea-Plea of mixed law and fact-If

can be raised at late stage in appeal.

A plea which is not one of pure law, but one of mixed law and fact, cannot be allowed to be taken at a late stage in appeal, when the other side has had no opportunity to let in evidence to meet it. (Abdul Ghani and Subrahmania Aivar, J.) Siddveerappa v. Rudrachari. 48 Mys.H.C.R. 351=21 Mys.L.J. 239.

New plea—Plea of novation—If can be raised for first time in second appeal.

A plea that a transanction was as to novation

cannot be raised for the first time in second appeal. (Stone, C.J. and Clarke, J.) Shivji RAM DHANNALAL v. GULABCHAND KALOORAM. I. L.R. (1941) Nag. 144—1940 N.L.J. 607—194 I.C. 806=14 R.N. 14=A.I.R. 1941 Nag. 100.

-New plea-Plea of res judicata-If can he entertained and given effect to in appeal for first time—Subsequent events—Duty of Court to take note of.

Ordinarily it is not permissible for an appel-late Court to affirm the decision of the trial Court giving effect to a plea of res judicata taken before itself for the first time. But when the final finding on which the plea rests is given while the appeal is pending the appellate Court is not only justified, but bound to take notice of the final judgment arrived at between the parties and give effect to the same. The Court is bound to take notice of events which have subsequently happened. (Abdur Rahman, J) RANGAYYA v. RAMAYYA. 197 I C. 448=14 R.M. 367=54 L.W. 241=1941 M.W.N. 981=A.I.R. 1941 Mad. 815.

-New plea-Plea of res judicata-If can be raised for first time before full bench, hearing a reference by a bench.

The Bench in Letters Patent appeal referred the case to the Full Bench. The plea that suit in the Civil Court was barred by res judicata by virtue of the decision of the Revenue Court cannot be raised before the Full Bench hearing the case on reference by the Letters Patent time in appeal as a matter of right. Where the question cannot be decided without taking fresh evidence, the appellate Court will generally Niadar. I.L.R. (1943) Lah. 191=202 I.C. 497=

15 R.L. 133=44 P.L.R. 488=A.I.R. 1942 Lah. 217 (F.B.).

--- New plea-Plea of res judicata-If can be raised for first time in appeal.

A Court of appeal would be very reluctant to allow a plea of res judicata to be raised for the first time in appeal, or to give any finding on the point when the question was not pleaded and when noissue was raised on it. (Harries, C.J. and Manohar Lall, J.) Shiva Prasad Singh v. Sris Chandra Nandl. 22 Pat. 220=210 I C. 426=16 R.P. 147 =A.I.R. 1943 Pat. 327=10 B R. 259.

—New plea—Plea that admission in document not before Court amounts to acknowledyment under S. 19, Limitation Act—Permissibility in second appeal

A new point that an admission in a document which is neither on the record nor proved in the case, constitutes an acknowledgment under S. 19, Limitation Act, cannot be permitted to be raised for the first time in second Appeal. (Broomfeld and Lokur, JJ.) RAGHAVENDRACHARYA APPACHARYA v. VAMAN SHRINIWAS. 208 I.C. 285=16 R.P. 64=45 Bom. L.R. 253.=A.I.R. 1943 Bom. 191.

—New plea—plea that suit falls under S 69 (2) of Partnership Act—If can be raised in appeal. See Partnership Act, S. 69 (2). (1942) 2 M.L.J. 636.

It would not be right in appeal or second appeal to allow a point of law to be raised which depends on questions of fact which the party relying on the point has not chosen to raise in the lower Court. (Beaumont, C.J.) ANNU BAJABA v. DADU TUKARAM. 195 I.C. 732=14 R.B. 73=43 Bom.L.R. 222=A.I.R. 1941. Bom. 197.

—New plea—Point of law depending on acts
—Objection to competency of execution petition
on ground of insolvency of decree-holder and
failure to issue notice under 0.21, R. 16, C.P.
Code—If can be raised in appeal.

Points of law depending largely on precise facts should not be allowed to be raised for the first time in appeal. An objection that an execution petition was not competent because at that time the decree-holder was an insolvent and an objection that notice under O. 21, R. 16, C. P. Code, had not been taken out to the transfer of the decree, are essentially objections which depend on facts and should therefore be raised in the first Court and cannot be permitted in appeal. (Mockett and Shahabuddin, II) THIMMA REDING SUBBARAYUDU. 1944 M.W.N. 111=A.I.R. 1944 Mad. 425=(1944) 1 M.L.J. 225.

Though a point raised for the first time in appeal may involve a pure question of law, it it depends on facts and those facts are admittedly not disclosed in the plaint or anywhere in the record before the appellate Court, the plea is not entertainable at that late stage. (Collister and Bojpai, J.) Sagar Mal v. Parshottam Das. 198 I.C. 385=14 R.A. 279=1941 A.W.R. (H.C.)

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371=1941 A.L.W. 1095=1941 A.L.J. 770=A.I R. 1942 All. 36.

New plea-Point of law-If can be enterlained for first time in appeal.

It is well settled that, provided the determination of a question of law which is raised for the first time in appeal does not depend upon a decision as to facts which are in dispute, the appellate Court is not only competent but should, in the interests of justice, entertain the plea (Divatia and Lokaer J.) Nadharai Gopal v. Gopal Dinondo. 212 I.C. 291=16 R.B. 345=45 Bom. L.R. 980=A.I.R. 1944 Bom 50.

New plea—Law II can be raised for first time—Second appeal—Point of law. FAZL HAQ v. DAWAR SHAH. [Sec Q D. 1936—40. Vol. II. Col, 2646.] 192 I.C. 343—13 R. Pesh. 37

---New plea—Point of law—Mixed question of law and fict partnership as regards its constitution if can be raised for first time in appeal.

The legality of the constitution of a partner-ship is clearly a mixed question of law and fact cannot be raised for the first time in appeal. (Davis C.J. and Lobo, J.) MUCHAND TALIOMAL V. SHANDAS JATHANAND 194 I.C. 360=13 R.S. 271=A.I.R. 1941 Sind 73.

---New plea-Pure question of law.

A pure question of law, that a suit is barred by a specific provision of law. can be raised for the first time in appeal. (Chatterji and Shearer, J.). BADRINARAIN V. BENIMADHO. 23 Pat. 947=220 I.C. 25=11 B.R. 449=A.I.R. 1945. Pat. 186.

A question, though one of law, which would involve an investigation of fresh facts, cannot be allowed to be raised in appeal for the first time in the course of the arguments. (Wadsworth and Patanjali Sastri, JJ) Subrahmanyam v Sub

— New plea—Question of fact not arising on the record—If open in appeal.

A question of fact which has not been raised or agitated in the trial Court and which does not arise on the record cannot be allowed to be raised at the appellate stage (Kania A.C.J. and Chagla, J.) NAVNITLAL (HUNILAL & BABURAO (NO. 2), I.L.R. (1945) Bom. 82=46 Bom.L.R. 787=A.I.R. 1945 Bom. 137,

— New plea—Question of fact—Plea of non-access between spouses—It fermissible in appeal.

A question which is purely one of fact, e.g. as to non-access between spouses, and which is not definitely raised in the pleadings should not be permitted to be raised during course of arguments even in the trial Court much less so in a Court of appeal. An appellate Court should not permit such a plea to be raised before it or discuss it and make it the sole basis of its judgment. (Abdur Rahman, J) MANICKA MUDALIAR V. AMMAKANNU. 201 I C. 39=15 R. M. 180=54 L.W. 411=A.I.R. 1942 Mad. 129.

- New Plea-Question of Jurisdiction.

A plea of Jurisdiction which is based on the evidence already on record is purely a point of law and can be raised even in a Court of appeal. (Sathe, S.M. and Ross, A.M.) HAHIBUL NISA v. SALIM BUX. 1944 A.W.R. (Rev.) 281.

----New plea-Question of jurisdiction.

A point that the civil Court had no jurisdiction to entertain suit in view of the provisions of S. 21. Punjab Alienation of Land Act, can be raised for the first time in appeal, (Almond, JC) NAWAB KHAN v. PIR NAZIR AHMAD. 203 I.C. 203=15 R. Pesh. 57=A.I.R. 1942 Pesh. 81.

----New plea—Second appeal.

The High Court in second appeal cannot entertain an entirely new point if for its decision fresh facts have to be found. (Harries, C. J. and Manohar Lall.) BADRI MAHTO v. LOCHAN SAH. 198 I.C. 821=8 B.R. 465=14 R.P. 505=A.I.R. 1942 Pat. 264.

----New plea-Second appeal.

It is too late for a party to raise in second appeal, an entirely new defence which would give rise to entirely differet issues from those actually framed in the case. (Yorke, J.) TARA CHAND v. DIPA. 1944 A.L.W. 483.

----New plea-Second appeal-Plea of undue influence.

A plea of undue influence cannot be allowed to be raised for the first time in second appeal (Almond, J.C. and Mir Ahmad J) KARAM DIN V. ANANT RAM. 193 I.C. 51=13 R. Pesh.=49 A.I.R. 1941 Pesh. 6.

—New plea—Suit by remote Hindu reversioner to declare invalid alienation by widow—Finding of existence of nearer reversioner—Plea in appeal of flaud and collusion on part of nearer reversioner—If open for first time. See HINDU LAW—REVERSIONER. (1945) 2 M.I.J. 442.

New plea-Suit for possession and rent against tenant—Plea of title not made out—Plea of insufficiency of notice to quit—Permissibility in oppeal.

Where a tenant who is sued for possession and rent raises a plea of title and fails in it in the first Court, he cannot be permitted to raise, for the first time in appeal, a new plea as to the sufficiency of the notice to quit. (Meredith and Sinha, II.) Krishna Prasad Singh v. Adyanah Ghatak. 22 Pat. 513=216 I C. 111=11 B.R. 97=11 R.P. 115=A.I R. 1944 Pat. 77.

New plea-Rights when may be raised for first time in appeal.

Though in a sense an appeal is a continuation of a suit rights which could be pleaded and enforced before a suit was finally adjudicated by the first Court, cannot be pleaded as of right for the first time during the pendency of the appeal. An appellate Court can give effect to such rights only as had come into being before the suit had been disposed of and which the trial court was competent to dispose of. (Harries, C. J., Abdul Rashid and Abdur Rahman, JJ.) Zahur Din v. Jalal Din. I.L.B. (1944) Lah. 443=215 I.C. 305=17 R.L. 136=A.I.R. 1944 Lah. 319 (F.B.)

Onus Finding as to separation of joint family,

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Though there is a presumption in favour of jointness in the case of a Hindu family, when it is once found by a trial Court that the family was not joint and it is appealed against the onus is clearly on the appellant to show that the judgment appealed against was wrong. (Collister and Verma, II) MAHABIR PRASAD v. CHAHTA DEVI, 1943 A.L.W. 116.

---Order in execution. See S. 47, C. P. Code.

Order to be appealed against—Series of

appealable orders.

Where appeals are allowed from a series of orders following one another the question whether the existence of a subsequent order will or will not make an appeal against a previous order in-fructuous depends upon the relative nature of the two orders. If the second order is the principal order and effectively decides the rights and liabilities of the parties, then if it is allowed to become absolute and hinding on the parties by the non-filing of an appeal against it, its existence will render an appeal against a previous order of an interlocutory nature infructuous. But where on the other hand the first order is the principal order deciding the rights and liabilities of the parties and the second order is merely a consequential one, an appeal will lie against the first order and the second order will be automatically amended in the light of the orders finally passed in the appeal against the first order (Sathe, in the appeal against the first order SIDH NATH V. RAJENDRA SHANKER. 1943 A.W.R. (Rev.) 80=1943 R.D. 156.

—Parties—Addition of Limitation—Rent reduction case—Appeal by landlord with regard to some tenants—Subsequent addition of other tenants after period of limitation for appeal—Competency.

Where the landlord does not appeal against the decision in a rent reduction case with regard to some of the tenants he cannot subsequently add such tenants as parties to the appeal after the time for appeal has expired. (Middleton.) Thaloo Mahton v. Mathura Prasad. 8 B.R. 247.

An appellant cannot be permitted to implead a party after the expiry of the period of limitation. (Sathe, S. M.) ZAHEER HASAN v. MUJTABA HUSAIN. 1943 A.W.R. (Rev.) 185 (1)=1943 R.D. 303 (1).

----Parties--Non-inclusion of party not interested in appeal-If fatal to appeal

The non-inclusion of a party to the suit as a party to an appeal is not fatal to the appeal, if such a party is not interested in the subject matter of the appeal. (Shirreff, S.M. and Sathe J.M.) BUBHU SINGH v. BASANT RAL. 1942 O. A. (Supp.) 494 (1)=1942 O.W.N. (B.R.) 728=1942 A.W.R. (Rev.) 468 (1).

Parties—Suit against principal and agent—Decree against one alone—Appeal by that defendant—Other defendant if a necessary party. See PRINCIPAL AND AGENT—SUIT AGAINST. 1940 Rang. L.R. 693.

——Parties— Suit for contribution against several defendants—Decree in basis of calculation claimed by plaintiff—Appeal by one of defendants suggesting different basis—Other defendants if necessary parties.

In a suit for contribution against several defendants for arrears of revenue paid by the plaintiffthe latter claimed contribution on the basis of the shares owned by each of them. The trial Court gave the plaintiff a decree as claimed. One of the defendants filed an appeal without impleading the other defendants contending that contribution should be levied on a different basis.

Held, that the other defendants were not only proper but necessary parties to the appeal and that the appellant could not get any relief in their absence. (Henderson. J) SRISCHANDRA NANDI v. MAHOMED IBRAHIM MEAT. 79 C.L.J. 45=48 C.W.N. 484=A.I.R. 1944 Cal. 383.

-Points for determination—Duty of appellate Court to state distinctly and separately-Lumping together of several questions—Propriety—C.P. Code, O. 14. R. 1—Object of.

It is for the purpose of avoiding confusion that in the trial court issues are required to be framed under O. 14. R. 1, C. P. Code, as to each material proposition affirmed by one party and denied by the other. The requirements for the hearing of an appeal are not so strictly stated because the legislature presumably had confidence in the discretion and good sense of appellate Courts to recognise the necessity for distinguishing the several points arising in a case. But to lump to-gether questions which arise in an appeal only tends to confusion and is not the proper way for an appellate Court to state the points of determination in an appeal, to club together several distinct questions. (Rowland, J.) CHUNDA MAHTON v. Lal Bholanath Sah Deo. (1943) P.W.N. 117.

-Privy Council-See
(1) C. P. Code Ss. 109 & 110.
(2) Privy Council.

Remand—Duty of Court—Decision of some of the issues—Undesirability. Shfolal v. Jugal Kishore. [see Q.D. 1936.40 Vol. II Col. 2717.] 191 I C. 566=13 R.N. 203.

Remand—When to be made—Remand enabling parties to adduce fresh evidence—Propriety of. BHAGVAT SASTRULU & LAKSHMI-KANTAM. [see Q.D. 19'6-40 Vol. II. Col. 2050] 191 I.C. 383=13 R.M. 484.

-Reopening of case—Failure to adduce evidence on a point in the trial Court owing to wrong

legal advice.

Where a litigant on the advice of his counsel as to the legal position decides to call ro evidence on a particular point he cannot be allowed to have the matter reopened in appeal on establishing that the view previously taken by his counsel was erroncous. (Bennett and Madeley, JJ.)
JOGENDRA SINGH v. PEOPLES BANK OF NORTHERN
INDIA LTD. 17 Luck, 441=197 I.C. 791=14 R.O.
359=1941 O.W.N. 1309=1941 A.W.R. (Rev.) 1114=1941 O.A. 993=A.I.R. 1942 Oudh 122.

-Right of—When arises.

Q,D,--8

When a civil action has begun a litigant in that action is entitled to substantive rights such as the right of appeal as existed at the time the action was brought and those rights cannot be altered to his detriment during the pendency of the litigation which includes an appeal to the highest tribunal available. Neither can there be alteration in his favour by any subsequent legislation when finality has once been reached.

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substantive right such as a right of appeal in civil cases can arise before a suit is instituted and the cause of action itself cannot bring such a right into existence. (Grille, C. J. on difference between Niyogi and Digby, J.) SITAO JHOLIA DHIMAR v. EMPFROR. I.L R. 1943 Nag. 73=1943 N.L.J. 16=A.I.R. 1943 Nag 36=205 I.C. 161=44Cr.L.J. 237=15 R.N. 187=6 F.L.J. (H.C.) 53.

--- Right of-Civil Procedure Code-Applicability-Appeal to Privy Council-Competency.

It is true that a right of appeal is a creature of a statute; there is no inherent right of appeal against the decision of a Court. But a distinction has to be made between a class of cases where special powers are conferred upon special tribunals constituted for a special purpose and cases where appeals lie even under special Acts to the ordinary (ourts in the ordinary way. Where a right of appeal is given to the Courts in the ordinary way, then the ordinary provisions of the Civil Procedure Code apply. A right of appeal to His Majesty in Council from a decision of a High Court would have to be definitely excluded by statute if it is not to be available in accordance with the provisions of the C. P. Code, (Davis, C.J. and O'Sullivan, J.) ALUMAL v. SOBHRAJ ILR. (1944) Kar. 216=216 I.C. 319=17 R \$. 66=A.I.R. 1944 Sind 220.

Right of—If inherent against every order made by Court. See TRUST ACT. S. 74. I.L.R. (1943) Kar. 213.

 $-Right\ of -Nature.$ 

A right of appeal is a creature of statute. If does not avail an appellant to contend that a statute does not prohibit an appeal. It is necessary for him to show that the statute affirmatively confers the right of appeal. (Varma, J.) HET RAM v. COLLECTOR OF ALIGARIA. 197 IC. 114=1941 R.D. 772:=1941 A.L.J. 513=1941 A.L.W. 328=1941 O.A. (Supp. 634=1941 A.W. R.(Rev.) 702=A I.R. 1941 All. 355.

-Right of-New chactment providing for

appeal--Effect on pending proceedings.
Where a new enactment coming into force during the pendency of a suit provides an appeal where previously no appeal lay, then an appeal will lie, unless barred by the terms of the enact-ment. (Bennett and Madeley, II.) SHER ment. (Bennett and Madeley, JI.) SHER BAHADUR SINGHT, RAM NARAIN SINGH. 1944 AWR (CC.) 265=1944 OA (C.C.) 265= 1944 O W N. 416=A.I.R. 1945 Oudh 1.

--- Right of-Suit for declaration of tenancy rights-Dismissal - Tenant only appealing-Zamindar only made a respondent-Dismissal-Zamındar if can appeal against.

Where on the dismissal of a suit for declaration of tenancy rights the tenant alone appeals and the zamindar is only made a party and it is dismissed the zamindar cannot appeal against it, for he not having appealed from the first Court's decree it had become final as against him. (Sathe J.M.) JAGARNATH PRASAD SINGE v. SHYAM SUNDER DUBE. 1942 R.D. 714-1942 A.W.R. (Rev.) 389=1942 O.W.N. (BR.) 586=1942 O. A. (Supp.) 415.

- Subsequent events- Cognizarce of change of circumstances or law during pendency of

appeal. See U.P. Tenancy Act, S. 296. 1941 O.W.N. 969.

——Subsequent events—Power of appellate Court to take note of subsequent legislation and to grant relief on basis of same—Rule—Nature of appeal.

An appellate Court is entitled to take into account legislative changes since the decision under appeal was given. The Court in the exercise of its appellate jurisdiction has the power not only to correct error in the judgment under appeal but to make such disposition of the case as justice requires; and in determining what justice does require, the Court is bound to consider any change, either in fact or law, which has super-vened since the judgment was entered. An appeal is in the nature of a re-hearing, and in moulding the relief to be granted in a case on appeal, the Court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against. The duty of the Court is to administer the law of the land at the date when the Court is administering it, and the appeal may be heard and determined on the basis of a provision in an enactment passed only during the pendency of the appeal. (Gwyer, C.J. Sulaiman and Varada-chariar, JJ.) LACHMESHWAR PRASAD SHUKUL v. KESHWAR LAL CHAUDHURI. 20 Pat. 429=13 R. F.C. 4=191 I.C. 659=1941 O.L.R. 82=22 Pat. N. 136=1941 A.W.R. (FC.) 39=1941 M.W. N. 136=1941 O.A. 224=45 C.W.N. (FR) 66= 1941 O.W.N. 372=1941 P.W.N. 133=7 B.R. 362=3 F.L. J. 73=73 C.L. J. 51=53 L.W. 373= 1941 A.L.W. 255=A.I.R. 1941 F.C. 5=(1941) 1 M.L.J. (Supp.) 49 (F.C.).

APPROPRIATION. See Contract Act, Ss. 59-61.

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See also (1) C. P. Code, Sch. II (Now REPEALED (2) Arbitration Act.

Appellate proceedings declared nullity— Effect on original award.

When the rules governing an arbitration provide for an appeal from the first award, the result of declaring the proceedings by way of an appeal to be a nullity must be to leave the parties in the position which they occupied immediately before those abortive proceedings were begun. The notice of appeal is still effective and the original award stands until such time as it may be replaced by an effective decision of the appellate body. The original award cannot be said to be "merged" in the appellate decision when the appellate proceedings are declared to be a nullity. (Lord Justice Du Parag.) Shree MFENAKSHI MILLS, LTD. v. PATFL BROS. 71 I A. 106=I.L.R (1944) Bom. 469=I.L.R (1944) Kar. (P.C.) 230=216 I.C 169=17 R.P.C. 42=1944 A.L.J. 395=1944 M.W.N. 561=57 L.W. 520=46 Bom.L.R. 841=1944 A.W.R. (P.C.) 46=48 C.W.N. 590=1944 OA. (P.C.) 46=11 B.R. 133=A.I.R. 1944 P.C. 76=(1944) 2 M.L.J. 17 (P.C.)

Arbitrator—Building contract—Architect appointed arbitrator—Architect expressing ofinion or having money claim against one farty—If disqualification to act as arbitrator.

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An architect is not disqualified from acting as arbitrator in respect of a building contract merely by the fact that there is money due to him as architect from one of the parties or by the fact that he has expressed his opinions when he has made it clear that he is ready to adjudicate on the contentions of the parties with an open mind after hearing them. (Lobo, J.) SAKHI MAHOMED HYDER V. THAROOMAL. I.L.R. (1941) Kar. 505=197 I.C. 523=14 R.S. 109=A.I.R. 1941 Sind 202.

An arbitrator cannot delegate his duties except in regard to purely ministerial acts. (Din Mohammad and Sale, JJ.) Punjab Province v. Larbmi Dass. 216 I C. 231=17 R.L. 180=46 P.L.R. 50=A.I.R. 1944 Lah. 149.

In considering the jurisdiction of arbitrators the same strictness ought not to be applied which would be applicable if it were a question of submission to the jurisdiction of a Court. It is clear that if a party to a submission appears before the arbitrators and merely takes part in a preliminary discussion, he does not thereby waive his right to object to the jurisdiction of the arbitrators before the latter actually enter upon the consideration of the matters upon which they make their award. If, however, after objecting to the jurisdiction and such objection having been overruled, he proceeds with the case, under protest, to defend himself, he does not lose his right thereafter to say that the arbitrators acted without authority. But when no objection to jurisdiction is taken and a party takes part in the proceedings on the assumption that the proceedings are before a competent tribunal, it is not permissible to that party to object to jurisdiction thereafter and contend that the whole of the proceedings are coram non ludice. When pleadings have been exchanged, issues have been settled and a large quantity of evidence has been adduced and documents produced and so on, it would be unjustifiable for a party to raise the question of jurisdiction, because the objection comes too late. (Blacken, J.) ALLINDIA GROUNDNUT SYNDICATE, LTD., In re. 47 Bom.L.R. 420.

Arbitrators—Jurisdiction to rewrite award after issue.

Arbitrators become functus officio on issuing an award and have no jurisdiction subsequently to re-write the original award. (Wort and Mcredith. II.) CHHATI LALV. RAM CHARITER SAHU. 195 I.C. 87=14 R.P. 83=7 B.R, 864=A.I.R. 1941 Pat. 215.

——Arbitrator—Misconduct—Arbitrator having personal knowledge of some of the facts of the case—Effect of—Award—If invalid.

No doubt cases might arise in which the use by an arbitrator of his personal knowledge as a ground for rejecting the evidence put before him might amount to misconduct; but much must depend upon the nature of the arbitration and the relations between the arbitrator and the parties. Where the arbitrator is from the family circle of the parties, he must recessarily make the inquiry in the light of his personal knowledge

of the family, and so long as he bases his inquiry on the materials placed before him read in the light of his knowledge of the family, he cannot be held to be guilty of misconduct on that account.

Quaere. Whether as a matter of law an award can be invalidated merely because the arbitrator is personally acquainted with some of the facts upon which a decision is required. (Wadsworth and Patanjali Sastri, JJ.) RAMANUJACHARIAR w Varapathra Saver Thathachariar. 1942 M.W.N. 811=55 L.W 814=I.L R. (1943) Mad. 443=206 I.C. 207=15 R.M. 936=A.I.R. 1943 Mad. 172=(1942) 2 M.L.J. 698.

-Arbitrator-Misconduct-Decision by lot and failure to take evidence-If misconduct.

In a reference to arbitration to partition certain properties, the allotment of the properties to the parties by the arbitrator by lot amounts to misconduct, unless such allotment by lot is made by the arbitrator in the presence of the parties and with their full concurrence. Where the reference did not require it the failure of the arbitrator to take evidence or keep minutes of the proceedings, does not amount to misconduct. (Harries, C. J. and Manohar Lall, J) RAM BAHADUR JHA v. SRFE KANT JHA. 22 Pat. 108= 211 I C. 137=10 B.R. 344=15 R.P. 201=A.I. R. 1943 Pat. 285.

-Arbitrator-Misconduct - Reference for effecting partition—Omission to divide some properties because of difficulties. — Effect Sec ARBITRATION-AWARD. 22 Pat. 108.

Arbitrator-"Misconduct"-What amounts to-Gross negligence or recklessness apparent on

face of award—Effect of.
"Misc induct" in an arbitrator is not confined to corruption or dishonesty; there may be misconduct even though the arditrator has been honest or free from corruption. Proof of honest or free from corruption. irregularities in procedure, which would amount to no proper hearing of the matter in dispute, would be misconduct sufficient to vitiate the award without any imputation of dishonesty or partiality of the arbitrator. If there is an indi-cation of gross negligence or recklessness on the face of the award, that would also amount to a form of "misconduct", as it might itself be sufficient to show that there was no proper hearing of the matter in dispute (Fast Ali, C. I and of the matter in dispute (Fast Ali, C. I and Sinha, I.) SADHU SINGH v. RAMDEO SINGH. 1943 P.W N. 65=210 I.C 565=16 R.P. 181=10 B R. 299=A I.R. 1943 Pat. 318.

-Arbitrators—Powers of-Representative character of party seeking to enforce agreement-Power to determine.

When a reference comes before arbitrators, and a party who is not the original contracting party seeks to enforce the arbitration agreement, the arbitrators have to inquire whether the party is entitled to enforce it. That is a question which has to be determined by the arbitrators and not by the Court. (Kania, J.) SHIVCHANDRAI JHUNJHUNWALLA v. PANNO BIBI. I.L.R. (1943) Bom. 280=208 I C 627=16 R.B 95=45 Bom. L.R. 392=A.I R. 1943 Bom. 197.

-----Award governed by-Party wrongly applying under C-P. Code for decree thereon-It may

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contend objection to award as time barred under Art. 158, Limitation Act, as amended by Arbitration Act.

If a party to an award governed by the Arbitration Act wrongly applies under Sch. II, C.P. Code, for filing it and for a decree thereon, he cannot be allowed to contend that the opposite party's objection to the award is barred by limitation under Art. 158 of the Limitation Act, as amended by the fourth Schedule of the Arbitration Act. (Mitter and Sharpe, JJ.) NANIBALA SAHA T. RAM GOPAL SAHA. 48 C.W.N. 721= A.I.R. 1945 Cal. 19.

—Award — Bad in part — Severability— Procedure.

Where an award is bad in part, if that portion of the award is severable and the remainder of the award is good, that portion of it canbe maintained. There is nothing compelling a Court either to accept or reject an award in toto. (Mathur J) BADRI NARAIN UPADHYA v. RAJ NARAIN UPADHYA. 1944 A.L.W. 66.

-Award-Construction-Principal - Award by layman arbitrator under Co-operative Societies Act—Duty to give plain meaning to-words.

In interpreting an award made by a layman arbitrator, the Court should give the words their plain meaning unlike in the case of a decree of Court in which certain words have often a precise technical meaning. The award passed by an arbitrator appointed under the Co-operative Societies Act consisted of three parts: The first part directed that the defendants 1 to 6 do pay plaintiff a certain sum of money; the second provided that in default, the mortgaged property specified or a sufficient part thereof should be sold; the third part was to the effect that if the sale proceeds be found insufficient, the plaintiff might recover the balance from the defendants personally or from his or their other properties.

Held, (1) that the first part of the award could not be regarded as an independent remedy available to the plaintiff but must be read with the other two parts; (2) that the ordinary meaning to be attached to the words of the award was that the property should be sold in the first instrace and only if some amount thereafter remained due to the plaintiff could the defendant be arrested or his other property sold; (3) that the mere use of the words "the defendants do pay plaintiff" was not conclusive of the question of personal liability of the defendants. (Horwill, I.) Meenakshisundaram Chettiar v. Velambal Ammal. 1944 M.W.N 251=57 L.W. 317=A.I. R. 1944 Mad. 423=(1944) 1 M.L.I. 301.

-Award-Enforceability-Absence of decree. When on reference to arbitration an award is passed, if there is no objection to its validity, it

can be enforced even though no decree has been passed on the basis of the award. (Madeley, L.)
BALKRISHNA v. MST. SUKHDEI. 1943 O.W.N.
350=1943 O.A. (C.C.) 208=19 Luck, 362=
210 1.C. 451=16 R.O. 186=A.I.R. 1943 Oudi 442.

- Award-Finality-Court when com Feconsider.

Once it is found that the arbitrator had proceeded illegaly, the decision of the arbitrator, must be set aside. It cannot be said that a suit will be incompetent in the face of such an award. (Din Mohammad and Sale, I.I.) Punjab Province v. Lakhmi Dass. 216 I.C 231=17 R.L. 180=46 P.L.R. 50=A.I. R. 1944 Lah. 149.

Award—Grounds for challenging—Arbitrator given wide powers as to mode of enquiry—Award if can be questioned on the ground of inadequate representation of parties who were minors.

Where the reference to the arbitration gives full power to the arbitrator to decide to the best of his light and judgment and in any manner he decined proper and an award is given, it would not be open to challenge on the ground that the arbitrator did nor give the minors in the case any notice of the proceedings, that they were not represented and that their interests were not safeguarded. (Walfullah and Sinha, If) DEBI DAS. v. KESHAVA DEO. 1945 A.W.R. (H.C) 243.

If a formal decision is made at a meeting at which one of the arbitrators is absent hut subsequently the same is adopted by all the arbitrators in the presence of all the parties who acquiesce in it, the irregularity arising out of the absence of one of the arbitrators at the first meeting cannot be relied on as a ground to set aside the award. The irregularity must be held to be waived by the parties. (Kania J.) Ball LAXMIBAL V. SHRIDHAR MANIK. 45 Bom.L.R. 416=A.I.R. 1943 Bom. 221=210 I.C. 144=16 R.B. 174.

Award—Partial award made by arbitrators. accepted by parties—Arbitration becoming infructuous by death of some arbitrators—Suit in respect of matters covered by award—If lies.

A reference to arbitration was made without the intervention of Court to make a partition. The arbitrators made an interim award by which they effected a partition of the bulk of the properties. The parties accepted this award and they were placed in possession of their respective allotments in terms thereof. Subsequently the arbitration became infructuous by reason of the death of some of the arbitrators. In a suit brought by one of the parties for partition of the entire properties including those covered by the award,

Held, that the suit should proceed only for partition of the properties not covered by the award. (Khundkar and Biswas, J.) GANGA PROSAD GUIN v. UPENDRA NATH. 49 C.W.N. 316.

An award for partition of property made by arbitrators appointed by the Court with a view to having its terms incorporated in a decree of the Court is not one which is compulsorily registrable. (Bennett and Madeley, JJ.) Sher Bahadur Singh v. Ram Narain Singh. 1944 A.W. R. (C.C.) 265=1944 O.A. (C.C.) 265=1944 O.W.N. 416=A.I.R. 1945 Oudh 1.

Award—Scope—Reference to arbitration of suit for partition of joint Hindu family property Widow, not a party to suit, if can be awarded

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mainten inco-Award acted upon by male members but no decree passed—Widow's right to enforce the maintenance awarded—Doctrine of part performance.

In a reference to arbitration of a partition suit concerning a joint Hindu family it is open to the arbitrators to award maintenance to a widow though she was not a party to the suit. When such an award has been acted upon by the male members of the family taking possession of their respective shares but no decree was passed the latter fact cannot be pleaded in bar of the widow's right to enforce the maintenance awarded to her inasmuch as the doctrine of part performance would become applicable to the case. (Madeley, I) BALKRISHNA & MST SURHIEL 19 Luck, 362=210 UC 451=16 R.O. 186 1943 O.W.N. 350=1943 O.A. (C.C.) 208=A.I. R. 1943 Oudh 442.

Award—Setting aside Mistakun interpretation of law—Not a ground for setting aside award.

An award based on an erroreous interpretation of a general statute such as the Hindu Women's Rights to Property Act, cannot be set aside by the Court on the ground of mistake of law. A mistake of law can be invoked to obtain the intervention of the Court only if it is a mistake of law with regard to a private right (Mockett and Kunhi Ruman, IL) Venkata Rao & Padma-Valla Tymaraman, ILR, (1944) Mad. 861=1944 M.W.N. 105:557 L.W. 119:::A.I.R. 1944 Mad. 324=(1944) 1 M.L.J. 140.

Award-Suit to set aside on ground of patent error-Maintainability.

A suit to set aside an award made by an arbifrator on a reference by the Registrar of Cooperative Societies on the ground of a patent error of law on a question of limitation is maintainable. (Roberts, C.J. and Floqden, J.) CO-OPERATIVE TOWN BANK OF HENZADA T. UKYAN THA. 1940 Rang L.R. 739-194 I.C. 220=13 R.R. 286=A.I.R. 1941 Rang. 104.

Award-Validity-Adjudication upon matters beyond limits of submission-Effect of.

While it is correct that since the recent Arbitration Act there need be no form of submission, and the authority and jurisdiction of the arbitrator is to be ascertained from the agreement for, arbitration, nevertheless when the parties set out specifically what disputes have arisen and what relief is sought in consequence of the alleged default by one party, those are the only matters upon which the arbitrators are required to inquire and to adjudicate. If they go beyond what was required for their consideration and decide questions beyond which they were required to adjudicate, their award is void in toto. (Gentle, J.) Rengal Jute Mills v Jewraf Heeralal 46 C.W N. 957=A.I.R. 1943 Cal. 13:=204 I.C. 191=15 R.C. 480=77 C.L.J. 15.

Award—Validity—And binding nature—All arbitrators not participating—Absence of notice to parties as to date of hearing.

Where all the arbitrators have not participated in the proceedings and notice of the date of the hearing has not been given to the parties, the

defective and would not hind the parties. (Sathe, S.M.) MANNI v. RAMACHARAN LAL. 1944 A.W.R. (Rev.) 270 = 1944 R.D. 541.

-Award-Validity-Appeal from original board-Commencement of hearing by tribunal of members constituted under rules—Subsequent withdrawal of one member—Hearing of appeal concluded and award made by rest of the members - Effect - Award-If number-Board making appellate award consisting of more than the requisite quorum—If regularises proceedings. See Arbitration Acr, S. 10. 44 Bom.L.R. 485.

-Award-Validity-Arbitrator directed to debts but not dividing in detail-Ministerial act left to be done afterwards-If refusal to make award.

On a reference to arbitration, the arbitrators were required to divide the entire property and the debts mentioned according to their good and bad qualities. In respect of the debts the award provided as follows: "Regarding the joint debts due to others the parties shall discharge the debts due to others according to the accounts in half and half. As it has been tearnt that some of the creditors filed suits......and as none of the favour it has not been possible to devide the said debts.

Held, that it could not be said that the arbitrators had refused to make the award with reference to the debts, and that they had sufficiently allocated the liability of the parties, leaving the ministerial acts to be completed after the figures of the debts were finally know. (Mockett and Kunhi Raman, JJ.) VENKATA RAO v. PADMA-VALLI TAYARAMA. I.L.R. (1944) Mad. 861= 1944 M.W.N. 105=57 L.W. 119=A.I.R. 1944 Mad. 324=1944) 1 M.L.J. 140.

-Award-Validity-Award made in absence of parties-Arbitrators not acting on strictly admissible evidence-Rules of arbitration of Bengal Chamber of Commerce.

The Rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce included the tollowing provisions:—"15. A dispute will normally be decided by the Court (meaning arbitrators) on the written statements of the parties and oral evidence will not be taken nor will the parties be entitled to appear or any formal hearing be held. The Court shall have power, however, if it thinks fit to appoint a time and place for the hearing of the referance and to hear oral evidence. 16. In any case of a formal hearing no party shall without the permission of the Court be entitled to appear by counsel, attorney, pleader, advocate or adviser but the Court in its discretion may require the parties, with or without witnesses to attend before it. 20. The Court may proceed with the reference notwithstanding any failure to file a written statement within due time and may also proceed with the reference in the absence of any or both of the parties who being entitled to appear before the Court after due notice refuse or neglect to attend." After the parties to the arbitration lodged lengthy written statements,

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parties, the award passed in such proceedings is the Registrar of the Tribunal served them with a notice neaded "general arbitration" the body of which read as follows:-"I beg to give notice that the above arbitration will take place here at 4 p.m. on fuesday, the 12th inst." The arbitra-4 p. n. on Tuesday, the 12th inst." tion took place at that time and place and none of the parties attended it. The arbitrators made their award and communicated it to the parties. in a proceedings commenced by one of the parties to set aside the award, it was contended (1) that the arbitrators "misconducted" themselves by proceeding ex parte on madequate grounds thus depriving them of an opportunity of adducing evidence and arguing their case, (2) that the arbitrators acted on inadmissible evidence and divide debts also-Award allocating liability for (3) that the award did not deal with all matters in dispute.

Held, (i) that the arbitrators did not proceed ex parte at all but proceeded according to the normal procedure contemplated by the Rules, that the notice served upon the parties was not a notice of a formal hearing and the parties had o right to be present and further such notice was covered by Rule 20; (ii) that the arbitrators were not bound by strict tules of evidence which were applicable to Courts of law although they should act in accordance with natural justice, and that it was not contrary to natural justice, creditors are parties to the kararnama in our for arbitrators to act on materials on which ordinary and reasonable people would naturally act; and (iii) as the award recited that the arbitrators had carefully considered all the documents submitted to them, it must be assumed, in the absence of any evidence to the contrary, that they considered all matters in dispute. (Blagden J.) Chandra Bhan Bilotia v. Ganpatrai and Sons. I.L.R. (1943) 1 Cal. 156 =213 I.C. 63=16 R.C. 624=A.I.R. 1944 Cal.

> -Award-Validity-Award signed by only three out of five arbitrators-Decree based on vitiated.

> Where only three out five arbitrators sign an award, it is a material arregularity which vitiates a decree based on the award. (Horwill, J.) VENATRAMAYYA v. PAPAYYA. 56 L.W. 419=1943 M.W.N. 548=A.I.R. 1943 Mad. 718=211 I.C. 378=16 R.M. 516=(1943) 2 M.L.J. 152.

> -Award-Validity-Failure to give opportunity to produce evidence.

> The fact that sufficient opportunity was not given to all the parties to appear and produce evidence before the arbitrator, is a defect fatal to the award. (Din Mahommed and Sale, II.)
> Punjab Province v. Lakhmi Dass. 216 I.C.
> 231=17 R.L. 180=46 P.L.R. 50=A.I.R. 1944 Lab. 149.

> -Award-Validity-Lease-Valuation clause -Provision for appointment of panchas or valuers by lessor as well as lessee-Arbitrator oppointed by one alone-Award-Validity.

A clause in a lease dealing with the rights of the parties at the end of the period of the lease provided that "the lessee should appoint" panch or valuer on his own behalf, that the lessor should appoint one panch on his behalf and that there should be one panch on behalf of both. After the lesser gave the lesses the

price which the said panchas might fix for the lessee's structures, the lessee was to hand over the land to the lessor together with the structures. If the lessee did not approve of the valuation made by the panchas or it the lessee did not appoint the panch in time then the lessee was to remove the structures within a fixe! period and to clear up the land and give up possession to the lessor. If the lessee failed to do so, then the lessor was to take the land into his possession with the structures thereon or without the structures if there be none, according to law." When the lease expired the lessee appointed an arbitrator on his behalt to value the properties, but the lessor declined to appoint one when called upon to do so by the lessee. The lessee then treated his appointee as sole arbitrator authorised to act under the clause in the lease and the arbitrator made a report or award after giving notice of the various meetings which he was holding. The award was filed in the High Court and the lessor on whom notice of the filing of the award was served applied to set aside the award.

Held, that the clause did not entitle the lessee to authorise his appointee to act as sole arbitrator and did not authorise the arbitrator alone to proceed to value the structures. The award was not therefore binding on the lessor and hence was liable to be set aside. (Kania, J.) Cursetji Jamshedji v. R. D. Shirabe. 204 I.C. 519=15 R.B. 327=44 Bom. L.R. 859=A.I.R. 1943 Bom 32.

Award-Validity-Notice to appear not served on all parties.

The fact that all the parties had not been served with a notice to appear before the arbitrator is alone sufficient to vitiate the award. (Din Mohammad and Sale, JJ.) Punjab Province v Lakemi Dass. 216 I.C. 231=17 R L. 180=46 P.L.R. 50=A.I.R. 1944 Lah. 149.

Although a party may by reason of some disability be legally incapable of submitting matters to arbitration, that circumstance is not one that can be raised as a ground for disputing the validity of the award by the other parties to the reference who were aware of such disability. If one of the parties to the reference is incapable, the objection should be taken to the submission. A party will not be allowed to lie by and join in the submission and then, if and when it suits his purpose, attack the award on that ground. The presumption in the absence of proof to the countrary, is that the party complaining was aware of the disability when the submission was made. It will not be open to a party at the time when the award is filed in Court, to object to the award on the ground that another party to the arbitration proceedings had no right to refer to arbitration or to appoint an attorney to execute references to arbitration. (Lobo J.) Toya Menka Kaisha Ltd. v. Sohansing Harnamsing. I.L R. (1943) Kar. 438=213 I.C. 364=17 R.S. 9=A.I.R. 1944 Sind

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A person who is a party to a reference to arbitration connot object to an award made therein on the ground that another person who was interested in the subject-matter of the reference did not join in the reference, when such person has not objected to the reference, (Lobo, J.) Toyo Menka Kaisha Lto. v. Sohansing Harnamsing, I.L.R. (1943) Kar. 438=213 I.C. 364=17 R.S. 9=A.I.R. 1944 Sind. 51.

-----Award-Validity-Power of Court to go behind award-Adequacy of materials for award If can be challenged.

An award made in an arbitration cannot be challenged on the ground that the arbitrator had made the award without a lequate materials i.e., materials on which a Court of law would not have decided to that effect. To do so would amount to going behind the award which is not within the jurisdiction of the Court. (Kania, J.) SHIVCHANDRAI JHUN WALLA V PANNO BIBI. I.L.R. (1943) Bom. 280 = 208 I.C. 627 = 16 R.B. 95=45 Bom.L.R. 392=A.I.R. 1943 Bom. 197.

In a reference to arbitration for making a partition, the carrying of pattis is a matter entirely for the arbitrators and if in their discretion they allotted certain bonds to one patti and not to another no complaint can be made against them. The arbitrators can leave some items joint owing to the difficulties which would be encountered if they were partitioned. (Harries C. J. and Manohar Lall, J.) RAM BAHADUR JHA V. SREE KANT JHA. 22 Pat. 108—A I.R. 1943 Pat. 285—211 I.C. 137—10 B.R. 344—16 R.P. 201.

----Award-Validity-Reference to arbitration under Arbitration Act-Subject-matter partly same as subject-matter in pending suit-Reference to arbitration through Court also-Award by arbitrators under Arbitration Act-Validity-Jurisdiction to make award.

If there is a reference under the Arbitration Act, relating to the subject-matter of a pending suit in which also there is a reference to arbitration through Court under Sch. II, C. P. Code, the reference and the award under the Arbitration Act are bad, for there cannot be two conflicting jurisdictions relating to one and the same matter, the jurisdiction of the Court in the suit, and the jurisdiction of the arbitrators under the Arbitration Act, even though the subject-matter of the two proceedings is in part only the same. In such a case, it is impossible to separate the award made on the reference to arbitration under the Arbitration Act into parts so as to separate the part relating to the subject-matter of the arbitration through Court, and the award must fall in its entirety. The validity of the award under the Arbitration Act cannot be upheld as arbitrators must be held to have acted without jurisdiction. (Davis C. J. and Weston, J.) GOHRAM SHAMBAY v. JUMO. I.L.R. (1941) Kar. 570=199 I.C. 291=14 R.S. 175=A.I.R. 1942 Sind, 41.

——Award—Validity—Evidence recorded by some of the arbitrators—Others signing award after reading recorded evidence.

Where a reference is made to a number of arbitrators and some of them record evidence and then the award is sent to the absentee arbitrator who gets himself acquainted with the evidence before coming to a decision the award is not invalidated. It is not essential that all the arbitrators should be present when all the evidence is recorded. (Baguley, J.) Upo Hi Aing v. Daw Ngwe. 192 I.C. 801=13 R.R. 197=A.I. R. 1941 Rang. 22.

Where an award was declared by the arbitrators in the presence of both parties on a certain date but signed by them on a later date, the effectiveness of the award is not postponed to the date on which it was signed. The award becomes effective on the date on which the parties are made aware of it. (Sen, J.) Sudhir Kumar Chakravary v. Bilasbati Devi. 45 C.W.N. 223.

——Clause in contract—Provision for reference to Financial Commissioner for the time being— Reference made to one of two Financial Commissioners—Transfer by him to the other—Legality.

Where an arbitration clause provides for submission of any dispute to the Financial Commissioner for the time being, and a dispute is referred by the parties to one of the two Financial Commissioners it is not open to the individual so selected to divest himself of his duties and transfer the case to the other Financial Commissioner. (Din Mohammad and Sale, JJ.) Punjab Province v. Lakhmi Dass. 216 I.C. 231=17 R. L. 180=46 P.L.R. 50 = A.I.R. 1944 Lah. 149.

——Permission of Court—Award—Superses sion—Appeal—Revision—If lies, See C.P. Code, O. 23, R. 3 and S. 115. 1941 N.L.J. 333.

Reference by some heirs only-Award, binding nature.

Where only three out of five heirs made a reference to arbitration about inheritance the mere fact that all the heirs did not join in the reference is no ground for upsetting the award so far as those people who made the reference are concerned. (Baguley, J.) U Po HLAING v. DAW NGWE. 192 I.C. 801=13 R.R. 197=A.I.R. 1941 Rang. 22.

Reference—Construction — Parties to appeal agreeing to refer "all our disputes" to layman arbitrator and agreeing to abide by his award—Subject matter of submission—Matter of appeal or whole dispute—Award—If can be impeached.

Pending an appeal, the parties thereto came to an agreement to refer their disputes to arbitration and applied to the Court to remit the appeal to the arbitrator chosen by them, who was a layman and a relation of both the parties. The agreement recited that they of their own accord "have appointed.....as our sole arbitrator for settlement of all our disputes in this case. We therefore pray that the appeal case may be handed over to the said arbitrator. The award

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given by him shall be accepted by us without any objection."

Iteld, that the subject of the submission to arbitration clearly was the whole dispute and not merely the matter of the appeal, that the whole case was to be heard de novo by the arbitrator who was to settle all the disputes and the award made by him could not be impeached even if it be one that a Court would not give or one which would not be made by an arbitrator who was a lawyer. (Lord Justice Goddard.) Monindar Singht v. Ramindar Singh. 215 LC. 316=17 R. P.C. 33=1944 P.W. N. 564=11 B.R. 119=1944 A.L.J. 384=57 L.W. 518=1944 A.W.R. (P.C.) 47=A.I.R. 1944 P.C. 83=(1944) 2 M.L.J. 227 (P.C.).

Reference — Construction — Reference of dispute over estate—Arbitrator if can charge property in favour of widow.

A reference to the arbitrator giving power to decide the dispute between the parties over an estate in such manner as appeared to him just and equitable is wide enough to allow the arbitrator to create a charge for the maintenance of the widow. (Davis, C.J. and Weston, J.) JETHANAND I'HAMBERDAS v. MIRABAI. I.L.R. (1942) Kar. 36=202 I.C. 152=15 R.S. 24=A.I.R. 1942 Sind, 79.

— Reference—Legality—Unilateral reference.

A reference to arbitration by one of the parties is illegal, until and unless the other party had refused to join in the reference. (Din Mahammad and Sale, JJ.) Punjab Province v. Lakemi Dass 216 I.C. 231=17 R.L. 180=46 P.L.R. 50=A.I.R. 1944 Lah. 149.

Where after the passing of a preliminary partition decree in which minors were involved, a reference to arbitration is made without the permission of Court which has the effect of ousting the jurisdiction of Court, the entire proceedings are void ab initio. (Davies.) KISHAN LAL MUNSHI V. BIR CHAND. 1943 A.M.L.J. 30.

—Reference to—Authority—Mother acting on behalf of minor daughter—Binding character. HAR NARAIN KUNWAR & SAJJAN PAL SINGE. [see Q.D. 1936—'40 Vol. I Col. 3228.] 67 I.A. 386—I.L.R. (1940) All. 719—I.L.R. (1940) Kar. 366—43 Bom.L R. 141 (P.C.).

- Reference to-Power of Court to pass any order affecting subject-matter of suit.

Once a suit has been referred to arbitration, so long as that reference stands, the Court which has made the reference has no power to pass any order, which in any way would affect the subject-matter of the suit. The Court, has consequently, no jurisdiction after the suit has been referred to arbitration and as long as the reference subsists to intervene and give the plaintiff permission to withdraw his suit. (Nawal Kishore, C.J.) RAM-CHANDRA v. SURAJMAL. 1943 M.L.R. 44 (Civ.)

appointed.....as our sole arbitrator for settlement of all our disputes in this case. We three brothers who had a power of atterney from another therefore pray that the appeal case may be brother who was also the certificated guardian of the handed over to the said arbitrator. The award third brother, a minor Minor estaining majority

before date of reference-Counsel for minus giving consent to reference-Binding nature.

A suit against three brothers one of whom was a minor was decreed. The certificated guardian was one of the brothers and he having refused to act an appear was filed on behalf of the minor under the guardianship of a lady. The other two brothers also appealed. When the appeal came on for hearing the matter was referred to arbitration. The minor had become a major by that time. The reference was signed by one of the brothers who also happened to have a power of attorney executed in his favour by the other brother for himsen and as certificated guardian of his minor brother. The advocate who appeared for the appellants also consented. On a contention by the quandom minor that he not having signed the reference there was no valid reference.

Held, that in the circumstances the brother who signed the reference had authority to sign it on behalf of all the appeliants; that the oral consent of the counsel bound the party and that the reference could not be invalidated on the ground of the quandon. minor not having signed it. (Malik and Bennett, 11.) MADHO PRASAD z. KANHAIYA LAL. 222 I.C. 375= 1945 O.W N. (H.C.) 302=1945 A.L.W (H.C.) 349= 1945 A.W.R.(H.C.) 308 (2)=1945 A.L.J. 361=A.I.R. 1946 A. 1.

-Stay of suit-Discretion-Contract with arbitration clause—Subsequent contract creating new rights and imposing new hubilities-Suit on aoth-Stay of suit-If to be granted.

Where a second agreement between the parties materially affects, alters and modifies the rights of parties under a prior agreement and conters rights and imposes liabilities which are not at all to be found in the original agreement an arbitration clause contained in the first agreement but not found in the second has no applicability to the new rights and liabilities so imposed and conferred. The Court will not in such a case stay a suit based on both the agreements. (Blackwell, J.) RAMDAS DWARKADAS v. THE ORIENT L'ICTURES, I.L.R. 1942 Bom 759=15 R.B. 249=203 I.C. 569=44 Bom.L.R. 739=A.I.R. 1942 Bom. 332

ARBITRATION ACT (IX OF 1899)-Reference under in respect of matter in dispute in pending civil suit—Award—Validity.
ARBITRATION—AWARD. 1.L R. (1941) Sec **570**.

-8.2-Agreement executed at Amrtisar-Applicability of Act-Punjab Amendment Act I of 1911, S. 2-Punjab Government Notification, 1915.

The combined effect of S. 2 of the Punjab Amendment Act I of 1911 and the notification issued by the Punjab Government in 1415 is that the provisions of the Indian Arbitration Act apply only to those agreements executed at apply only to mose agreements executed at Amritsar which are (1) in writing and (2) in which it is expressly declared that the Indian Arbitration Act shall apply. (Tek Chand and Din Mahomed, JJ.) BOMBAY CO, LTD. v. RADHA KISHAN. I.L.R. 1942 Lah. 386=198 I.C. 744= 14 R.L. 357=43 P.L.R. 344=A.I.R. 1941 Lah. 279.

-S. 11 -Award - Validity of - Original appointment of arbitrators bad—Liffect of.
No subsequent realization of a mistake as to

### ARBITRATION ACT. (IX OF 1899)

different contracts or an attempt to rectify maters by one party can clothe with jurisdiction th arbi ration tribunal which at its inception wa illegal and without jurisdiction. An award mad by such tribanal will be invalid and cannot be Tied in court. (Lobo, L.) Gosho Kabushik Kaisha Leo, c. Mulchand Harichand. 1961 C. 15=14 R.S. 58 : A.I.R. 1941 Sind 111.

-S. 15-Construction -"As if it were a decre of the Court"-Award filed in High Court-Execution-Limitation-Limitation Act. Art. 18 -Appl. cability.

When S. 15 of the Arbitration Act speaks of the award being "enforceable as if it were decree of the Court," the expression has to be read as including both the manner of execution and the time waltin which execution mus take piace. An award under the Act which is filed in the High Court, is executable as a decree of the High Court in virtue of S. 15 o the Act, and therefore Art. 183 of the Limitation Act will apply to such a case. (Beaumont, CJ and Kuma J.) NADIRSHAW H CONTRACTOR 2 GAJRAJ SHEOKARANDAS. 43 Bom.L.R. 1006= I.L.R. 1942=Bom 124=198 I.C. 505=14 R.B 311=A.I.R. 1942 Bom. 34.

-- S. 19-Application for stay-Discretion of Court - Circumstances justifying refusar-Part cancelling contract—Right to invoke arbitration clause. Tolaram Champalal v. Jewanram Gangaram. [see Q.1), 1936—'40 Vol. 1 Col. 3229 193 I.C. 126-13 R.C. 370=A.I.R. 1941 Cal. 39

-S. 19-Application made under Act of 1899 -Act of 1910 in operation at time of hearing provisions applicable.

Where an application was made under the Arbitration Act of 1899 put though by the time the application was heard the Arbitration Act of 1940 was in operation the Act of 1 99 would prevail. (Mc Nair, J.) RUFCHANI v. I'ANNALAL. 200 I.C. 145=14 R.C. 678=A.I.R, 1941 Cal. 415.

--- S. 19-Contract-Arbitration clause-Question if words were interpolated-If can be decided by arbitrators .- Bar to suit.

The question whether there has been an interpolation of certain words though they may go to the root of the contract, falls with in the arbitration clause and can be decided by the arbitrators and a suit will not be maintamable. (Mc Nair, J.) RUPCHAND v. PANNALAL. 200 I.C. 145=14 R.C. 678=A.I.R. 1941 Cal. 415.

-S 19-Contract containing arbitration clause -One party alteging breach by other and claiming rescission of contract-Suit by other against him -Latter, if entitled to order staying suit.

Where a contract contains an arbitration clause and one party to it alleges breach by the other of its provisions and claims to have rescinded the contract on that ground, the dispute is one arising out of the agreement. If therefore, the other party brings a suit againt him in respect of the contract, he is entitled to an order under S. 19 of the Arbitration Act staying that suitappointment of arbitrators bad—Effect of. (Lort Williams, J.) Krishna v. Haripana.

No subsequent realization of a mistake as to I.L.R. (1941) 2 Cal. 534=45 C.W.N. 984=199
the distinction between the arbitration clauses in I.C. 418=14 R.C. 546=A.I.R. 1942 Cal. 83.

### -S. 19-Stay of suit-Discretion of Court.

S. 19 of the Arbitration Act confers a discretion upon the Judge—It is a judicial discretion, but there is nothing in the section which would justify the Court in holding that the discretion should not be exercised on the ground that a difficult question of law is raised. It cannot be laid down as a principle that merely because a difficult point of law is raised a Judge—must necessarily exercise his discretion in a particular manner and that he must refuse to stay the suit. (Davis, C.J. and Weston, J.) AVARAM ATAMPARKASH v. SUKHDEN & CO. I.L.R. (1941—Kar 587=199. I.C. 707=14 R S. 197=A.I.R. 1942 Sind 57.

—S. 19—Stay of suit—Discretion of Court—Contract—Arbitration clause—Question of law—Power to stay suit.

Where the point involved for decision is an important and intricate question of law such as frustration of contrict by reason of the outbreak of war which a Court of law is in a better position to decide than laymen the Court is entitled to exercise its discretion under S. 19 of the Arbitration Act and refuse stay even if there is an arbitration clause in the suit contract (Lobo, J.) SUKHDEV & CO. V. AYARAM ATAMPRAKASH. 196 I.C. 188=14 R.S. 57=A.I.R. 1941 Sind 99.

S. 19—Stay of suit—Grant of—Allegations of fraud—Contract—Arbitration clause—Suit impeaching clause in contract as forged and alleging fraud—When to be stayed.

Questions of fact and law upon which the jurisdiction of the arbitrator depends are for the Courts. It is not for an arbitrator to decide whether a contract, as put forward by one of the parties, contains forged clauses or interpolations or contains clauses which have been inserted as the result of fraud or mistake or the like. Such disputes go to the factum and existence of the contract and should be decided and must be decided by the civil Courts. A suit involving such questions should not be stayed and the issue as to whether an added or interpolated clause is binding on the party impeaching it should first be decided by the civil (ourt. Where there are serious allegations, which if established, would amount to a case of fraud, there is a prima facie case of fraud, and the civil suit should not be stayed. If the person opposing an application to stay a civil suit is charged with fraud, the Court will invariably refuse to stay; a charge of fraud is a very serious matter and any person charged with it has a right to have such a charge investigated by the Court. On the other hand if the party resisting an application to stay a civil suit is the party making a charge of fraud, different considerations will arise as the person charged does not desire trial by the civil Court. In such a case the Court will stay the suit unless a prima facie case of fraud is made out. A suit in which a prima facie case of fraud has been established should not be stayed until it has been decided whether or not the added clause in respect of which fraud is alleged, is binding on the party alleging it. If the decision upon that question is in favour of the party impeaching the clause, further proceedings in the suit will be stayed and all other questions must be referred to arbitra-

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and Manohar Lall, J.) NARSINGH PRASAD BOOBNA v. DHANRAJ MILLS 21 Pat. 544=204 I.C. 583=15 R.P. 231=9 B.R. 169=A.I.R. 1943 Pat. 53.

——S 19—Step in the proceedings—Defendant supplied with copy of plaint—Grant of time by Court for filing written statement.

Proceedings cannot be said to have commenced until the defendant has been supplied with a copy of the plaint and if time is then fixed for the preparation of the written statement, the time for this purpose is necessarily given by the Court and it cannot be regarded in any sense as a step taken in the proceedings by the defendant (Beckett, J.) PREM NATH PRAN NATH v. AMBA PARSHAI. 193 I.C. 167=13 R.L. 435=A.I.R 1941 Lah. 64.

— (X of 1940) — Applicability — Application under Act of 1899—Act of 1940 coming into force at time of hearing—Whether new or old Act applicable.

An application made under the Arbitration Act of 1849 must be governed by that Act only even though the new Act of 1940 had come into operation at the time when the application was heard. (McNair, J.) RUPCHAND v. PANNALAL. A.I.R. 1941 Cal. 415.=200 I.C. 145=14 R.C. 678.

-----Applicability-Award made before coming into operation of Act.

The Arbitration Act of 1940 on its true construction has no operation in respect of an award made before the Act came into force; it only applies to an award made under the Act. (Beaumont, C. J. and Rajudhyaksha, J.) MANJI RAMJI v. H. M. Mehta & Co. 45 Bom. L.R. 940=A.I.R. 1943 Bom. 463=211 I.C. 61=R.B. 263.

-----Applicability to Revenue Courts.

It is wrong to say that the Arbitration Act does not apply to Revenue Courts. (Ross, J. M.) RAGHUBAR DAYAL v. BIRJ MOHAN LAL. 1945 R.D. 315=1945 A.W.R. (Rev.) 116(1).

S. 2 (c)—"Court" — Jurisdiction—Conditions for.

The word "Court" in S. 2 (c) of the Arbitration Act cannot be construed as meaning that a Court has jurisdiction to receive an award only if the whole cause of action arose within the jurisdiction of the Court. Reading the sub-section as worded, it is clear that any Court which would have jurisdiction to decide the question arising from the subject matter of the reference would be the proper Court in which the award may be filed. To give the Court jurisdiction it is not necessary that the whole cause of action should arise there. The Court has jurisdiction to determine the subject-matter of the disputes between the parties when the parties reside within its jurisdiction or when the land is within its jurisdiction. (Kania, J.) Cursetji Jamshedji v. R. D. Shirabe. 204 I.C. 519=15 R.B. 327=44 Bom. L.R. 859=A.I.R. 1943 Bom. 32.

——S.8—Applicability—Arbitration agreement —Reference to single arbitrator made conditional on agreement of parties.

all other questions must be referred to arbitration as provided in the contract. (Harries, C.J. arbitration agreement in which reference to a

single arbitrator is conditional on all the parties agreeing to do so, and there is an alternative provision for appointment of two arbitrators. (Das, I) Subalchanda Biur v Mahamed Ibrahm. I.L.R. 1943 2 Cal. 298=210 I.C 454=16 R.C. 430=47 C.W.N. 570=A.I.R. 1943 Cal. 484.

Ss. 11 and 15-Filing of award-Decrees if necessary.

As soon as the objections raised by a party to the filing of an award are duly considered and overruled, the award should be made a rule of the Court. A decree in accordance with the award is superfluous, as the award when filed amounts to a decree itself. (Abdur Rahman, J.) BHAGAT RAM v. AMBALA COMMERCIAL BANK, LTD. 45 P. L.R. 215=209 I.C. 332=A.I.R 1943 Lah.222.

S. 14—Arbitration—Basis of Absence of difference between parties—Application made to stifle prosecution and to get order from Court—Validity of reference and award.

The legal basis of all proceedings in arbitration is the existence of a difference or dispute between the parties to the arbitration proceedings. Where it appears to the Court that there is no genuine reference to arbitration, and that there is no real difference between the parties but that the application is a mere device to stifle inquiry into the merits of the transactions between money-lender and an agriculturist and that it has been made by the pleaders engaged by the parties in criminal proceedings in respect of a non-compoundable offence, linked up with and followed by civil proceedings, in order to obtain an order which can be enforced as a decree, it must be held that such a reference is invalid; and the award following would be inoperative on the ground that the reference is the result of an understanding between the parties to abandon the prosecution of a non-compoundable case. The reference itself is a bogus reference (Davis, C. J. and Weston. J.) MOTUMAL ISSARDAS v. HAJI IBRAHIM KHAN I.L.R. (1943) Kar. 390=212 I.C. 287=16 R.S. 254=A.I.R. 1944 Sind 80.

S. 14 and C. P. Code, S. 115—Application for filing award made by arbitrators at request of some of parties—Arbitrators omitting to mention this in application but applying for amendment—Court dismissing application as untenable—Revision—Application in revision filed by aggrieved party—If competent.

Where an application for filing an award under S. 14 of the Arbitration Act is made by the arbitrators at the request of some of the parties, the mere circumstance that the arbitrators have not mentioned this fact in their application is not a matter of great consequence. If an application is made by them later on to have the mistake rectified by amendment, the Court should allow that application. If the Court refuses to allow the amendment and dismisses the application for filing the award as untenable, it fails to exercise the jurisdiction vested in it by law and the High Court will interfere in revision. Where an application for filing an award is made by arbitrators at the request of some of the parties, the proper procedure is to allow the parties to take up the litigation in their hands and relieve the arbitrators. Therefore, the mere fact that the arbitrators have not filed an application in revision would

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single arbitrator is conditional on all the parties (Paranik, J.) NARAYAN v. DEWAJI. ILR. (1945) agreeing to do so, and there is an alternative Nag. 323-1945 N.L.J. 169-A.I.R. 1945 Nag. 117.

——Ss. 14 25 and 42—Arbitration in suit— Award—Decree based on—Failure to give notice to party—Effect on decree.

It is the duty of arbitrators in arbitration in suits to give notice to the parties that an award has been made; after the award is filed in Court it is the duty of the Court to give notice to the parties of the fact that the award has been filed so that they might have an opportunity to file their objections to the award. The failure to give notice as required by the Act is a material irregularity which vitiates the decree based on the award. (Horeill, J.) VENKAIRAMAYYA v. PAPAYYA. 56 L.W. 419=1943 M.W.N. 548=A. I.R. 1943 Mad 718=(1943) 2 M.L.J. 152.-211 I.C. 378=16 R.M. 516.

The arbitrators are given the power to decline to produce the award in Court if their fees and charges are not paul. But if they choose to produce it even though their charges have not been paid, there is nothing in S. 14 of the Arbitration Act which prohibits such a thing being done. The non-payment of the fees and charges due in respect of the arbitration and award cannot be regarded as non-compliance with the provisions of this section, when the arbitrators are prepared to file the award, and have, as a matter of fact, produced it in Court. (Paranik, J.) NARAYAN v. DEWAJI. I.L.B. (1945) Nag. 323-1945 N.L.J. 169 = A.I.R., 1945 Nag. 117.

——Ss. 14, 31 (2), 32 and 33—Scope and effect of— Money adjudged under award—Suit to recover—Maintainability—Procedure.

A separate suit does not lie to recover a sum of money adjudged by an award in favour of a party to an arbitration to which the Arbitration Act applies. The successful party is confined to the remedy by way of an application under the Act itself. Even que tions raised in defence as to the existence, validity or effect of the award cannot be gone into by any Court other than the Court in which the award may be filed. (Samayya, J.) RASHID JAMSHED SONS & CO. r. MOOLCHAND JOTHAJEE. 1945 M.W.N. 456=158 L.W. 350=(1945) 2 M.L.J. 38.

Ss. 14 and 25—Signing by all arbitraturs—Necessity—Difference of opinion among arbitraturs, if affects question—Omission of all to sign—If invalidates award—Proper procedure in such a case.

In accordance with Ss. 14 and 25 of the Arbitration Act it is necessary that all the arbitrators should sign the award. Though no doubt the view of the majority is to prevail when there is a difference of opinion, that does not remove the necessity of the signatures of all in accordance with S. 14. But the omission of some to sign does not, however, necessarily invalidate the award. The Court in such a case should remit the award for removal of the defect in accordance with S. 16 (1) (c) of the Act. (Sathe, A. M. and Dible, J. M.) DARYAO SINGH v. RATAN LAL. 1944 A.W.R. (Rev.) 164 (2)=1944 R.D. 325.

not disentitle the persons aggrieved from filing one, trators themselves—Notice by afternoon in trators and in the second of the

It is not necessary under S. 14 (1) of the Arbitration Act that the arbitrators should themselves give notice of the award to the parties. The giving of the notice is not any judical function but only a ministerial act which the arbitrators are entitled to delegate to their attorneys A notice given by their attorneys is therefore a proper and lawful notice. (Konia. J.) BAI LAXMIBAI v. SHRIDHAR MANIK 45 Bom L.R. 416 = A.I.R. 1943 Bom. 221=210 I.C. 144=16 R.B.

-S. 14 (1)—Notice of making and signing award-Time for-If to be given on same day of making and signing.

S. 14 (1) of the Arbitration Act does not require that the making of the award, signing the award and giving notice to the parties should all be done at the same time; the section cannot be read as compelling the arbitrators to give notice on the same day on which the award is made and signed. It is of course the duty of the arbitrators after they make and sign their award to give notice to the parties within a reasonable time which must be fixed according to the circumstances of each case. (Kania J.) BAI LAXMIBAI v. SHRIDHAR MANIK. 45 Bom. L.R. 416=A.I.R 1943 Bom. 221=210 I.C. 144=16 R.B. 174.

-S. 14(1)-Scope - Award-Validity-Absence of signature of one arbitrator-Effect-Agreement to refer-Provision that decision should be unanimous-All arbitrators joining in deliberation and agreeing in decision-Absence of signature of one-If renders award invalid.

Where a matter is referred to arbitration by agreement of the parties which provides that the award to be binding on them must be the unanimous decision of the arbitrators, then if all the arbitrators join in the deliberation and agree in a certain decision, the award would be binding on the parties to the reference even though one of the arbitrators, whether accidentally, inadvertently or deliberately, does sign the award. The absence of the signature of an arbitrator on the award is not fatal to the validity of the award provided he takes part in the deliberations. It is the unanimous agreement where all the arbitrators are required to agree which is the judicial determination of the dispute referred to them by the parties; the signing of the award is not a judicial act but is merely the record of what has already been done in the judicial exercise of the functions of the arbitrators. (Manohar Lall and Beevor, JJ.) RAGHUBIR PANDEY v. KAULESAR PANDEY. 23 Pat. 719=218 I C. 275=18 R.P. 22=1945 P.W.N. 214=11 B.R. 276=A.I.R. 1945. Pat. 140.

-S. 14 (2)—Application to set aside award before it is filed-If competent.

An application cannot be made to set aside an ! award till it is filed in Court. (Mc. Nair, J.)
BENGAL JUTE MILLS CO. LTD. v JEWRAJ HEERALAL. I.L.R (1943) 2 Cal. 392=218 I.C. 182=18 R.C. 8=A.I.R. 1944 Cal. 304.

S. 14 (2)—Application to set aside before filing of award—Competency.

competent to a party to file an application fo

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setting aside an award till the award has been filed in Court. (Chagla, J.) RATANJI VIRPAL & Co. v. DHIRAJLAL MANILAL. I.L.R. (1942) Bom. 452=200 I.C. 32=14 R.B. 389=44 Bom. L.R. 175=A.I.R. 1942 Bom. 101.

- S. 14(2)—Award beyond pecuniary Jurisdiction -Proper order to be made-C. P. Code, S. 141 and O. 7, R. 10.

Where a Court finds that it has no pecuniary jurisdiction to entertain an application for filing an award, the proper order is one of return of the application for presentation to the proper Court and not one of dismissal of the application. Under R. 338 B (5) of the Rule-framed under S. 44 of the Arbitration Act, every application under S. 14 (2) of the Act for filing an award is to be registered as a suit. On the analogy of 0.7, R. 10 read with S. 141, C. P. Code, a Court is competent to pass an order returning an application for presentation to the proper Court. (Bose and Sen JJ. VINAYAK DINKAR v. ANANT DINKAR. 1945 N.L.J 253 = A.I R. 1945 Nag. 214.

-S. 14(2)—Award relating to partition—Valuation for Iurisdiction-Suits Valuation Act, S. 8.

The valuation for the purpose of the jurisdiction for filing an award relating to partition, is the valuation of the share to be partitioned and not the valuation of the entire property. S. 8 of the Suits Valuation Act is not applicable as it applies to suits where ad valorem courttee is payable. (Bose and Sen, JJ.) VINAYAK DINKAR v. ANANT DINKAR. 1945 N.L.J. 253= A.I.R. 1945 Nag. 214.

-S. 14(2)—Limitation—Letter by arbitrator filing award-If application by party-Limitation-Limitation Act, Art. 178 See Lim. ACT, ART. 178. 47 Bom.L.R. 317.

-S. 15-Execution of award-Objection to-Judgment-dcbtor, if can raise.

Where the judgment-debtor was afforded an opportunity to contest the legality of the award when it was filed and he raised certain objections which were overruled, it is not open to him to raise fresh objections after an application for execution is given. It was incumbent upon him to have raised all the objections that he had, and he could not raise some at that time and reserve others in his armoury for a later occasion. (Abdur Rahman. J.) BHAGAT RAM v. AMBALA COMMERCIAL BANK LTD. 209 I.C. 332=45 P.L.R. 215= A.I.R. 1943 Lah 222.

-Ss. 15 (b) and 16—Jurisdiction of Court— Arbitrator not deciding question—Court must remit award to the arbitrator under S. 16 for reconsideration.

Clause (b) of S. 15 Arbitration Act permits modification or correction of an award where the award is imperfect in form or contains any obvious error which can be amended without affecting such decision. But this cannot be strained to give the Court jurisdiction to record finding on questions which the arbitrator has not decided. The proper course for the Court is to remit the award to the arbitrator under S. 16 for reconsideration (Davis, C. J. and Weston, J.) Tulja-MAL CHIMANDAS v. BIKHCHAND BHAWANDAS. I.L.R. 1943 Kar 395=209 I.C. 420=16 R.S. 99= A.I.R. 1943 Sind 131.

Under the Arbitration Act of 1940, it is not S. 16—Award—Appellate Board—Constitution to a party to file an application for Ition—Board of nine members commencing to hear

appeal-Withdrawal of one member and continua-tion of hearing by remaining members-Award-Validity-Articles of association providing for

quorum of six members-Effect.

When once a board has been constituted, to hear an appeal against an award and the board has taken cognisance of the appeal and has commenced to hear it, then the board constitutes the appellate tribunal, and it is not open to any member to withdraw, and for the remaining members to continue the appeal, unless of course, the parties agree to that course being adopted. If the parties are not willing to go on before the remaining members a fresh board must be constituted. The fact that under the articles of association the quorum for a board was only six or that the withdrawal of one member from the board would have made no difference to the decision is immaterial. Where an award is given by such improperly constituted board, the proper procedure is not to set aside the original award but to declare that the decision by the appellate board was a nullity and refer the matter to the board of directors of the cotton association to be dealt with according to law. (Beaumont, C. J. and Somjee, J.) PATEL BROS. v. SHREE MEENAK-SHI MILLS, LTD. I.L.R. (1942) Bom. 558=202 I.C. 188=15 R.B. 140=44 Bom. L.R. 485=A. I.R. 1942 Bom. 239.

-S. 16—Power to remit award—Award

declared nullity.

S. 16 of the Arbitration Act empowers the Court to remit a defective award only in the cases specified there in and in no others. When what purports to be the decision of arbitrators is a nullity, there is no power to remit it. Nor is there need for any such power, since there is nothing to remit and the parties are entitled to a new and effective hearing and determination. LTD. v. PATEL BROS. 71 I.A. 106=I L.R. (1944) Bom. 469=I.L.R. (1944) Kar. (P.C.) 230=216 I.C. 169=17. R.P.C. 42=1944 A.L.J. 395=1944 M.W.N. 561=57 L.W. 520=46Bom. L.R. 841= 1944 A.W.R. (P.C.) 46=48 C.W.N. 590=1944 O.A. (P.C.) 46=11 B.R. 133 A.I.R. 1944 P.C.76 =(1944) 2M.L.J. 17 (P.C.).

—S. 16 (1) (c)—Power of Court to remit award

Non-registration of ward—If ground for remitting

Under S. 16 (1) (c) of the Arbitration Act the Court can remit the award to the arbitrator for re-consideration only if it finds an error of law in the award itself or in some document actually incorporated there to on which the arbitrator had based his award, that is to say, finds the statement of some erroneous legal proposition which is the basis of the award. It cannot remit the award if it finds a wrong conclusion on a question of fact. Want of registration of the award is a defect dehors the award or the decision of the arbitrator, and so is not covered by S. 16 (1) (c) of the Act (Mitter and Sharpe, JJ.) NANIBALA SAHA v. RAM GOPAL SAHA. 48 C.W.N. 721 =A.I.R. 1945. Cal. 19.

S. 17 and Sch. I, para. 3—Applicability-Arbitration under Co-operative Societies Act.

Assuming that S. 46 of the Arbitration Act is

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17 and Sch. I para, 3 of the Arbitration Act are inapplicable to such arbitration as the machinery and the procedure of arbitration indicated by the provisions of R. 22 of the Rules framed under S. 43 of the Co-operative Societies Act are totally inconsistent with the provisions of the Arbitration Act. (Mukherjea and Blank, JJ) NANDA KISHORE GOSWAMI & BAILY CO-OPERATIVE CREDIT SOCIETY, LTD. I.L R. 1943 2 Cal 431=208 I.C. 196=16 R.C. 152=47 C.W. N. 478=A.I.R. 1943 Cal. 255.

-Ss. 17 and 39 and U.P. Tenancy Act, Ss 263 to 272-Applicability of Arbitration Act to Revenue Courts-Appeals against decree, or orders passed on reference to arbitration-Provi-

sion of law governing.

The Arbitration Act extends to the whole of British India. As Revenue Courts in United Provinces exercise their jurisdiction as Civil Courts the Act applies to such Courts. As the U.P. Tenancy Act makes no special provision for appeals against decrees or orders passed as a result of reference to arbitration, such appeals must be governed by Ss. 17 and 30 of the Arbitraof the U. P. Tenancy Act (Nathe, A. M. and Dible, J. M.) Daryao Singh v. Rayan Lat. 1944 A.W.R. (Rev.) 164 (2): 1944 R.D. 325.

—S. 17—Award filed in Court—1f becomes decree-Suit on award filed in Court-If barred. An award does not become a decree because it is filed in Court. It only becomes executable as a decree. The cause of action on the award still subsists and it is open to a party to have his action on the award. It is therefore open to a party who has already filed an award obtained by him in Court to file a suit on that very award. (Chagla, J.) APOLLO MILLS, LTD, T. BABURHAI, CHANDULAL 211 I.C.110:::16 R.B. 269-45 Bom. L.R. 904=A.I.R. 1944 Bom. 12.

-S. 17—Decree on award—Finality.

Where an objection to the invalidity of an award on any ground whatsoever is not made when the aggrieved party had an opportunity to do so if made is rejected and a decree is passed in accordance therewith, such a decree becomes final and is unassailable either by way of appeal or revision. (Ghulam Hasan, J.) JAFAR T. AUDUL. GAFOOR. 208 I.C. 187=16 R.O. 65 1943 O.A. (CC) 130=1943 O.W.N. 198=A.I.R. 1943 Oudh 304.

-S. 17-Limitation for application to set aside awar l expiring on Sunday—Such applica-tion made on following day—Judgment pronounced on award earlier on same day—Effect of See Limitation Act, S. 4. I.L.R. (1942) 2 Cal. 160.

-Ss. 17 and 30—Power of Court to set aside award suo motu-Power to inquire into genuine-

ness of reference.

There is nothing in S. 17 of the Arbitration Act to exclude the power of the Court to set aside an award except on the application of a party. A Court has power to set aside an award suo motu for proper reasons. S. 30, by implication gives the Court power to set aside an award Assuming that S. 46 of the Arbitration Act is applicable to arbitration under rules framed under S. 43 of the Co-operative Societies Act, S. clearly gives the Co-operative Societies Act, S.

abuse of its process by bogus references made with ulterior purposes. It cannot therefore be said that the Court has no power to inquire into the genuineness of arbitration proceedings the award in which it is asked to file even when the arbitration proceedings are found to be bogus proceedings and a fraud upon a statute; e.g., upon the Dekkhan Agriculturists' Relief Act. (Divis, C. I. and Weston, J.) MOTUMAL ISSARDAS v. HAJI IBRAHIM KHAN. I.L.R. (1943) Kar. 390.=212 I.C. 287=16 RS. 254=A.I.R. 1944 Sind 80.

S. 19-Construction-"Award has been set aside."

The words 'where an award has been set aside' in S. 19 of the Arbitration Act refer clearly to the setting aside of the award by the Court and not by the agreement of parties and the consequences indicated in S. 19 can follow only where the award is set aside by Court. (Ghulam Hasan J.) Rameshwar v Surajman 1943 O.W.N. 366 = 1943 A.W.R. (C.C.) 104=210 I.C. 416=16 R. O. 184=1943 O.A. (C.C.) 236=A.I.R. 1943 Oudh 435.

An agreement to refer the matter to arbitration can be ordered to be "filed in Court" before the institution of any suit when it has been lost or accidentally destroyed or happens to be in the possession of the opposite party. The word "filed" in S. 20 of the Arbitration Act is not used in the sense that the written agreement must be physically produced in Court before it can be accepted or ordered to be acted upon. There is no reason why a party who wishes to enforce a written agreement of that kind should not be able to prove it by secondary evidence when evidence of that nature is permitted or admissible under the Evidence Act. (Harrics, C.J. and Abdur Rahman, J.) DUNI CHAND RAM PARKASH V. PREMCHAND MAYA DASS. 47 P. L.B. 214=A.L.B. 1945 Lah. 264.

S. 21—Absence of consent of parties interested—Effect—Co-tenant not contesting suit for division of holding—If should also consent.

In a suit for the division of a holding the cotenants of that holding are certainly interested in the division whether they appeared to contest the suit or not. Hence their consent to arbitration of the suit matter is essential and without such consent the order of the trial Court to refer the suit to arbitration is beyond jurisdiction. (Sathe, A.M. and Dible, J.M.) DARYAO SINGH V. RATAN LAL. 1944 A.W.R. (Rev.) 164 (2)=1944 R.D. 325.

——Ss. 21 to 25—Applicability—Oral reference by parties to suit to arbitration by judge—Judge, if becomes arbitrator—Decision—If award—Appealability.

Where a judge is asked to arbitrate between the parties to a suit before him, he does not cease to be a Court and become a pure arbitrator. Nor does his decision amount to an award within the meaning of the Arbitration Act. The provisions of Chapter IV of the Act imply necessarily that the arbitrator must be a person other than the Judge. Hence where the parties to a suit agree orally to refer their disputes to arbitration by the trial Judge and to abide by his decision, the judge is not an arbitrator though he purports to act as such, and his decision cannot be held to be an award

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falling under the Arbitration Act. But the decision is final and is not appealable for the reason that a party cannot go back on his consent to abide by the decision. (Diratia, J.) DALAL v. JAMADAR. 47 Bom.L.R. 388.

——S.21—Applicability—Reference by counsel on behalf of party to suit—Sufficiency.

A reference to arbitration consented to by counsel duly authorised by a party to a litigation is valid. The fact that the party himself had not signed the application will not invalidate the reference. (Abdur Rahman, J.) SUKH LAL V. MIAMCHAND. 46 P.L.R. 348=219 I.C. 162=18 R.L. 46=A.I.R 1945 Lah. 34.

——S. 21—Jurisdiction of Court to refer matrimonial dispute for the decision of arbitrators.

The terms of S. 21 of the Arbitration Act are exceptionally wide and the Court has jurisdiction to refer for the decision of arbitrators any matter in dispute in a matrimonial suit and arbitrators are competent to pass an award in respect of such disputes. The Court can pass a decree in terms of such an award. (Byers, /) RAMUDAMMA 7. KASI NAIDU. A.I.R. 1945 Mad. 269 = (1945) 1 M.I.J. 396.

Where the power of attorney given by a party to his counsel authorises him to refer a matter to arbitration, the validity of reference to arbitration cannot be impugned on the ground that the party himself has not signed the application when it has been signed by his counsel. (Abdur Rahman. J.) Date Single v. Mamchand. 219 I.C. 162—46 P.L.R 348—A.I.R. 1945 Lah. 34.

S. 21-'Suit'-If excludes execution proceedings.

Though S. 21 of the Arbitration Act uses the word 'suit', there is no reason to restrict its meaning in such a way as to exclude execution proceedings which are only a continuation of the suit. (Ghulam Hasan, J.) JAFAR v. ABBUL GAPOOR. 208 I C. 187=16 R.O. 65=1943 O.A. (C.C.) 130=1943 O.W.N. 198=A.I R. 1943 O.Udh 304,

S. 23—Declaratory suit as to validity of voidow's alienation—Reference to arbitration—Permissibility.

A suit praying for an alienation by a widow to be declared invalid and not binding on the plaintiff, can be referred to arbitration. (Abdur Rahman, J.) HARE SHANKAR V. MST. AMRAOTI. 219 I.C 70=46 P L.R. 108=A I.R. 1944 Lah. 280.

In order to vest jurisdiction in the arbitrators to deal with a pending suit, it is necessary that the Court should make an order referring the suit to them and should specify in the order such time as it thinks reasonable for the making of the award. It is only when the matter is referred to arbitration by the Court in that manner that under sub-Sec. (2) of S. 23 of the Arbitration Act, the Court ceases to have jurisdiction to deal with the suit on such matters therein as are referred to arbitration. (Yahya Ali, J.) NARAYANASWAMI NATTAR 2.

MANICKA NATTAR. 1945 M.W.N. 706=58 L.W. 610=(1945) 2 M.L.J. 482.

A Court cannot accept an award given after the expiry of time allowed by the Court. There can be no retrospective extension of time. (Ross, J.M.) RAGHUBAR DAYAL v. BRIJ MOHAN LAL. 1945 A.W.R. (Rev.) 116 (1) = 1945 R.D. 315.

——Ss. 30 and 41—Dispute adjusted by parties after award—Right of parties to ask Court to set aside award. See ARBITRATION ACT, SS. 41 AND 30. A.I.R. 1945 Pesh. 41.

### —S. 31—Scope of.

S. 31 of the Arbitration Act is not an enabling section, but a section which merely defines the jurisdiction. (Mc. Nair, J.) BENGAL JUTE MILLS CO., LTD. v. JEWRAJ HEERALAL. I.L.R. (1943) 2 Cal. 392=218.I.C. 182=18 R.C. 8=A. I.R. 1944 Cal. 304.

——Ss. 32 and 33—Challenging validity of contract containing arbitration clause—Proper procedure.

Having regard to S. 32 of the Arbitration Act, 1940, a suit for a declaration that a certain contract containing an arbitration clause is by way of gaming and wagering and as such void and for an injunction to restrain the Tribunal of Arbitration from proceeding with the arbitration is not maintainable. The proper procedure is to make an application to the Court under S. 33 of the Act to be decided on affidavits, or on other evidence if deemed expedient by the Court. (Lort Williams, J.) Deckinandan Dalmia v. Basantlal. I.R. (1941) 2 Cal. 123=196 I.C. 851=14 R.C. 290=45 C.W.N. 881=A.I.R. 1941 Cal. 527.

\_\_\_\_Ss. 32 and 40-Suit to enforce award-Jurisdiction of small Cause Court.

S. 32 of the Arbitration Act bars suits challenging an award, but does not bar a suit to entorce an award The jurisdiction of a Small Cause Court to entertain such a suit is not barred by S. 40 of the Act. (Pollock, J.) NANHELAL v. SINGHAI GULABCHAND. I.L.R. 1944 Nag 340=210 I.C. 473=16 R N. 159=1943 N.L.J 543=A. I.R. 1944 Nag. 24.

—S. 33—Applicability and scope—Case under Bombay Co-operative Societies Act—Arbitration proceedings—Jurisdiction—Civil Court's powers. See Bombay Co-operative Societies Act, Ss. 54 to 64. 45 Bom L.R. 676.

### ----S. 33-Application under-Forum.

The Court at the place where the contract has taken place and the defendant also resides, is competent to entertain an application made under S. 33 of the Arbitration Act. (Abdur Rahman, J.) RADHA KISHEN V. BOMBAY CO., LTD 212 I.C. 411=17 R.L. 16=45 P.L.R. 287=A I.R. 1943 Lah. 295,

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——S. 33 - Application under-Power of Court to decide on affidicits or en evidence.

S. 33 of the Arbitration Act empowers a Court to decide a case on affidavits but, it may in appropriate cases, whenever it deems it just and expedient may set down an application for hearing on other evidence and it may pass such orders for discovery and particulars as it may do in a suit. (Sen. J.) LILADHAR r. FIRM RADHAKISHAN RAMSHAHAYA. I.L.R. (1945) Nag. 634.

S. 33-"Order rejecting application-Revision.

An application made under S. 33 of the Arbitration Act to challenge the validity of an arbitration agreement or to have the effect of that agreement determined does not fall either under S. 20 or S. 39 (4) of the Act. Therefore a revision from an order rejecting such an application can be entertained. (Abdur Rahman, J.) RADHA KISHEN V. BOMBAY (O., LTV 212 I.C. 411 = 17 R.L. 16=45 P.L.R. 287=A.I.R. 1943 Lah. 295.

S. 33-Proceedings under-Nature of-

Where an application under S. 33 of the Arbitration Act is filed challenging the existence or validity of an award, the procedure laid down in Ss. 14, 15 and 16 of the Act is not made immediately applicable. Proceedings under S. 33 are entirely different from the proceedings under Ss. 14 to 17 of the Act and the Court is not bound to pronounce a judgment in accordance with the award merely because it was dismissing the application under S. 33 filed by the other side especially when it had not been moved to pass any such order by the respondent. S. 33 was enacted to provide a speedy remedy to a party objecting to a reference or an award, and instead of having to file a separate suit for the purpose he can now merely move an application which has to be generally decided on alli lavits. (Muthur and Malik, II.) BALWANT SINGH. RAMCHARAN SINGH. I.L.R. (1944) All. 375::1944 A.W.R. (H.C.) 134=1944 O.A. (H.C.) 134=1944 A.L.W. 434=1944 A.L.J. 241=A.I.R. 1944 All. 188 (1).

Ss. 34, 39 and 41—Application for stay—Duty of Court—Acting with material irregularity in eversise of powers under S. 34—Revision—Ss. 39 and 41 if deprives power of High Court.

The language of S. 34 of the Arbitration Act clearly implies that the arbitration clause should be respected and it is only when a clear case has been made out by the plaintiff and "if difficult questions of law are likely to arise, such as would inevitably entail a special case being prepared and reference to the Court made by an arbitrator" that the Court should enter upon an inquiry and decision of the case. Where a Court acts in contravention of this salutary principle, it acts with material irregularity in the exercise of its jurisdiction or pewers under S. 34 and interference in revision would be justified. There is nothing in S. 39 or S. 41 to deprive the High Court of the powers conferred by S. 115, C. P. Code. (Waliullah and Sinha, J.). CHARAN DAS P. GUR SARAN DAS. I.L.R. (1945) All. 162—1945 A.L.J., 77—1945 O.W.N. (H.C.) 68—1945 A.W.R. (H.C.) 49—1945 A.L.W. 66—A.I.R. 1945 All. 148.

of absence of agreement of arbitration It said

Jurisdiction of Court to determine existence or nonexistence of arbitration agreement—Separate application—Necessity.

S. 33 of the Arbitration Act does not take away the right of a party to set up as a defence to an application for stay the non-existence of any agreement of arbitration when the agreement is propounded under S. 34 by the other side. It is not necessary that he should make a substantive application for that purpose. The Court under S. 34 has jurisdiction to determine whether there was an arbitration agreement or not, Under S. 34, the defendant who applies for a stay has to say that there is an arbitration agreement. If the plaintiff says that there is no agreement, that issue arises between the parties. There is nothing in S. 34 to prevent the Court from deciding that issue to enable it to pass an order under the section. S. 33 provides for a case where a party wants to obtain the Court's declaration of non-existence of an agreement for his own use. In such a case he has to make an application to get the judgment. (Kania and Chagla, J.J.) BHAGWANDAS ATMASING & ATMASING. 47 Bom.L. R. 716 = A.I.R. 1945 Bom. 494.

S. 34—Appointment of medical referee of insurance company—Arbitration clause in agreement.—Termination of service for gross negligence—Suit for damages—If to be stayed.

A medical referee of an insurance company was appointed under a written agreement which included an arbitration clause which provided that any dispute arising between parties concerning their rights, liabilities or duties under the agreement would be referred to arbitration. The company terminated his services on a charge of gross negligence in respect of a medical report. In a suit for remuneration and damages for the wrongful termination of services:

Held, that the company had the right to have the suit stayed under S. 34 as the dispute concerned rights and liabilities under the agreement. (Panckridge, J.) HAPPY INDIA INSURANCE CO.. LTD, V. RUMUD BANDHU CHAKRAVARTY. 199 I.C. 768=14 R.C. 657=A.I.R. 1941 Cal. 503.

#### ---- S. 34-Burden of proof.

S. 34 of the Arbitration Act is a discretionary section. If one of the parties contends that because of an agreement between them the normal jurisdiction of the Court is given up by the other side, the onus of proof is on him who makes the allegation. Therefore the party who alleges such an agreement has to satisfy the Court first, before he asks the Court to stay its hands in respect of a suit which is pending and which is filed in the normal course by a plaintiff. It is not for the plaintiff to prove the non-existence of an agreement, (Kania and Chagla J.) BHAGWANDAS ATMASING V. ATMASING. 47 BOM.I.B. 716 = A.I.R. 1945 Bom. 494.

—S. 34—Contract—Arbitration clause—Binding agreement to refer—What amounts to—Dispute arising out of contract—Suit for damages for breach—Application for stay by defendants—Competency.

On 20—4—1940, the plaintiff placed an offer with the defendants for the purchase of goods, C.I.F. Bombay, shipment January and for February, at sellers' option, subject to scillers' ability to obtain steamer space, the country of origin being America. The defendants accepted of suit.

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the offer on the conditions and terms specified. Subsequently difficulties arose in connection with the shipment of goods from America and the correspondence between the parties disclosed that the defendants informed the plaintiffs that unless the latter intimated to the defendants their willingness to extend the time for shipment the defendants would treat the order as cancelled. Nothing was done thereafter till December, 1941, when the plaintiffs called upon the defendants to inform them whether the goods sold had been shipped and when they were expected to arrive. The defendants replied stating that they had accepted the offer, but were constrained to consider the order as cancelled. After further correspondence the plaintiffs filed a suit for damages for breach of contract on 27-3-1942. On 13-5-1942 the defendants applied for stay of suit under S. 34 of the Arbitration Act on the basis of an arbitration clause in the contract which, inter alia, provided; "any complaint, claim, dispute, doubt or question arising out of this indent, may at the instance of either party heretofore be referred to arbitration etc."

Held, (1) that there was a binding agreement to refer to arbitration the disputes arising between the parties; (2) that it could not be said that the defendants were not ready and willing at the date of the filing of the suit to submit the dispute to arbitration. The defendants did not deny the factum of the contract, their attitude being that while admitting that a binding contract had been concluded, they had, in the event which supervened, become entitled to cancel it, and the dispute arose out of an admitted contract and depended upon the evidence adduced in relation to it; (3) that there was no obligation upon the defendants to claim arbitration before the plaintiffs filed the suit; (4) that since the plaintiffs did not ask the defendants, whether they desired to go to arbitration before filing the suit, but filed the suit notwithstanding the arbitration clause which was binding upon them, the defendants could rely on the clause after suit and apply for stay of suit on the basis of that clause. (Blackwell, J) CHHABILDAS NANDLAL AND CO. v. DAMODAR KHEISEY AND CO. 45 Bom L.R. 387=212 I.C. 189=16 R.B. 336=A.I.R. 1943 Bom. 199.

-----Ss. 34 and 35-Construction and scope--

S. 34, Arbitration Act, creates an exception to the general law relating to procedure, viz., it empowers the Court which has jurisdiction to decide a dispute to refuse to do so. Where an arbitration is in existence S. 35, which is a corollary or counterpart of S. 34 and which is new, is clearly intended to modify the English common law rule in relation to the matters in question which was the law prevalent before 1940. The "legal proceedings" which are liable to be stayed under S. 34 are proceedings in respect of any matter referred." But the legal proceedings which, if notice is given of them to the arbitrators or umpire, may render invalid subsequent proceedings in the arbitration must be legal proceedings "upon the whole of the subject-matter of the reference." (Blagden, J.) All India Groundnut Syndicate, Ltd., In re. 47 Bom LB. 420.

S. 34—Right to claim stay—Not negatived by failure to demand arbitration in reply to notice of suit.

The fact that a party in reply to a notice of suitfailed to refer to the clause in the contract providing for arbitration and ask for an arbitration in accordance with it does not put an end to the right to claim under S. 34 of Arbitration Act that the suit should be stayed and the matter decided by arbitration according to the contract. (Malik, J.) INDIAN STEEL AND WIRE PRODUCTS LTD V. DEBI PRASAD MALAVIVA. I.L.R. (1944) All. 341=1944 A.L.W. 369=1944 A.L.J. 379=1944 O.A. (H.C.) 130=1944 A.W.R. (H.C.) 130=1944 A.I.R. 1944 All. 253.

—S. 34—Stay — Conditions for—Contract— Arbitration clause—Defendant not to insist on arbitration before suit by plaintiff—Application for stay of suit on basis of arbitration clause—Duty of Court to stay suit.

The mere fact that a defendant, who is threatened with legal proceedings for breach of a contract containing an arbitration clause, does not before the institution of the suit, insist on the arbitration clause, but relies on it for the first time after the suit is filed, is no ground for not granting his application for stay of proceedings under the Arbitration Act. When there is a binding agreement to submit any dispute arising out of the contract between the parties to arbitration and the dispute appears to be eminently suitable for determination by commercial arbitrators, the Court ought to give effect to that agreement and stay the suit. (Blackwell, J.) Chhabildas Nandlal and Co. v. Damodar Khetsey and Co. 212 I.C. 189=16 R.B. 336=45 Bom.LR, 387=AI.R. 1943=Bom. 199.

——S. 34—Stay of suit—Charge of fraud or misconduct made against a party—Latter desiring public investigation.

If the claim made in the suit and the claim referred to arbitration under an arbitration clause are the same the suit should prima facie be stayed. But the principle has often been acted on that if a dispute involves a charge, such as one of fraud, it ought not, if the party charged desires otherwise, to be decided by an arbitrator in privacy. If the facts alleged to constitute the fraud or misconduct would have mere evidentiary value in the investigation of the dispute they would not in themselves be a ground for refusing the stay of the suit on the application of either party. If on the other hand they are matters which would be directly in issue, then if the party against whom these charges are made wants the matter to be investigated in public, he wants the matter to be investigated in public, he ought to be allowed this, and the stay of the suit should be refused. (Blagden, J.) EASTERN STEAM NAVIGATION CO., LTD. v. INDIAN COASTAL NAVIGATION CO., LTD. ILR. 1942 2 Cal. 539=46 C.W.N. 933=207 I.C. 90=16 R.C. 30=A.I R, 1943 Cal. 238.

S. 34—Stay of suit—Grant of—Considerations—Possibility of arbitration becoming infructuous—If relevant.

The possibility that the arbitration may become infructuous should not be altogether overlooked in determining whether or not a stay of suit should be ordered. (Das J.) Subatchandra Bhur v. Mahomed Ibrahim. I L R. (1943) 2 Cal. 298=210 I.C. 454=16 R.C. 430= 47 C.W.N. 570=A.I.R. 1943 Cal. 484.

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——S. 34—'Step in the proceedings'—Application for adjournment to file written statement— Presumption—Onus.

Prima facic an application for adjournment to enable the defendant to file a written statement should be treated as a 'step in the proceedings' within the meaning of S. 34 of the Arbitration Act. But there may be such applications which are not so and in such cases whole burden is upon the defendant to establish the circumstances which will lead to the result the effect should not be given to the prima facie meaning of the application. (Dar and Sinha, JJ.) Roop Kishori, v. U. P. Government. I.L.B. (1944) All. 6812-1945 A.L.J. 38=218 I.C. 159=18 R.A. 3=1944 A.L. W. 542=1944 O.A. (H.C.) 255=:1944 A.W.R. (H.C.) 255=A.I.R. 1945 All. 24.

——S. 34—"Step in the proceedings"—Application to Court by consent—Precipes to extend time for filing written statement and obtaining time— Effect of—Right to apply for stay.

Where the defendant in a suit makes an application to the Court by consent, precipes to extend the time to file his written statement and gets time, that amounts to taking a step in the proceedings within the meaning of S. 34 of the Arbitration Act, though with the consent of the plaintiff, and desentitles him from applying for stay of suit under S. 34. (Kania, J.) Epward Radbone v. Juggilal Kamalapat. I.L.R. (1943) Bom. 298=209 I.C. 100=16 R.B. 104=45 Bom. L.R. 402=A.I.R. 1943 Bom. 228.

S. 34—"Step in the proceeding"—Test— Partnership suit—Defendant obtaining time to file offidavit opposing application for appointment of receiver and for inspection of documents—If entitled to stay of suit.

In order to constitute a step in the proceedings within the meaning of S. 34 of the Arbitration Act, the act in question must be (a) an application made to the Court either on summons or orally or something in the nature of an application to the Court, (e.g.) attending on summons for directions, and (b) such an act as would indicate that the party is acquiescing in the method adopted by the Other side of having the disputes dicided by the Court. The fact that the party was unaware of the arbitration agreement does not make his act any the less a step in the proceedings if in fact and in law it was a step. The fact that the defendant was unaware of the arbitration agreement does not make his act any the less a step in the proceedings if in fact and in law it was a step. (Das, J.) Supalchandra Bhur v Mahomed Ibrahm. I L.R. (1943) 2 Cal. 298=210 I.C. 454=16 R C. 430=47 C.W.N. 570=A.I.R. 1943 Cal. 484.

8.35 Award Setting aside Grounds Award made when no legal proceedings pending Natice of proceedings to be instituted If renders award invalid.

A Court will not and cannot set aside an award made in arbitration at a time when no actual legal proceedings were pending at all, merely on the ground that one of the arbitrators or all the arbitrators had notice that such proceedings were intended and that subsequently such proceedings are in fact commenced. At the same time, where proceedings are pending as a result of which the award may turn out to be invalid, it would not be just

for the Court to make a decree on the award immediately. (Blagden, J.) ALL INDIA GROUNDNUT SYNDICATE, LTD., In re. 47 Bom.L.R. 420

-S. 35-"Further proceedings in" a pending reference- Application for extension of time for making award.

An application to the Court for extension of time for making the award is not a proceeding in a pending reference and cannot be included in the phrase "further proceedings in" a pending reference within the meaning of S. 35 of the Arbitration Act. To merely apply to the Court for an extension of time does not offend, either against the letter or the spirit of S. 35. (Blagden, J.) ALL INDIA GROUNDNUT SYNDICATE, LTD., In re. 47 Bom.L.R. 420.

-S. 35-Joint arbitrators-Notice to one-If notice to all.

For the purposes of S. 35, Arbitration Act, notice to one of two joint arbitrators is notice to both of them. (Blagden, J.) ALL INDIA GROUNDNUT SYNDICATE, LTD., In re. 47 Bom.L.R. 420.

-S. 35-"Subject-matter of the reference"-Meaning of.

The "subject-matter of the reference", in S. 35 of the Arbitration Act, must mean the questions which arise on the pleadings, if any, in the reference, or, at all events, the questions which the arbitrators are investigating. But a legal proceeding which has for its object or one of its objects the ousting of the arbitrators from jurisdiction and the complete supersession of the arbitration as a whole is one which would prevent the arbitration from going on even if no stay has been granted under S. 34 or otherwise. (Blagden, J.) ALL INDIA GROUNDNUT SYNDICATE, LTD., In re. 47 Bom.L.

-S. 38-Applicability and scope-Fees of arbitrator or umpire fixed and paid in proceedings-Subsequent objection to same by party-Competency-Right to recover fees already paid.

S. 38 of the Arbitration Act is to be read with S. 14. S. 14 (2) ensures that the arbitrator or umpire shall receive payment of his fees before filing the award in Court, except where there is a dispute regarding the fees and resort is had by the parties, disputing the fees to the provisions of S. 38. In the latter case the applicant is required to pay the fees into Court and not to the arbitrators direct. The position, therefore, is that in the event of a dispute as to the arbitrator's fees, the matter is always subject to adjudication by the Courts provided the procedure set out in the Act is followed. But where the award is not sought to be set aside under S. 30, and the parties without following the procedure laid down in S. 38. have paid the arbitrators the feedemanded during the course of the arbitration proceedings, S. 38 (3) has no application. Having paid the fees demanded, it is not open to a party to take objection to the fees subsequently and seek to recover what he has already paid. The award is binding on the parties unless the procedure provided for in S. 38 has been adopted or the award is set aside under S. 30 (O'Sullivan J) GOBINDSING v. POHUMAL. ILB (1944) Kar. 354=219 I C. 195=A.I.R. 1945 Sind 71.

-8.39—Applicarblity—Pending reference-Award-order after Act refusing to set aside award-Appeal-Competency.

S. 39 of the Arbitration Act cannot apply to a

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ment of the Act; such a case would be governed by the old law, i.e., Sch. II, para. 16 C.P. Code, and no appeal therefore lies from an order refusing to set aside an award, passed after the Act in a reference made under the Act. (Faal Ali, C.J. and Sinha, J.) Sadhu Singh v. Ramdeo Singh. 1943 P.W.N. 65=A.I.R. 1943 Pat. 318=210 I.C. 565=16 R.P. 181=10 B.R. 299.

-Ss. 39 and 5-Order allowing leave to revoke authority of arbitrator-Appeal.

No appeal lies from an order allowing leave to revoke the authority of an appointed arbitrator under S. 5 of the Arbitration Act. The order is not an order superseding the arbitration such as could be appealed against under S. 39 of the Act. (Bobde, J.) BHAIYALAL v. SAWAL SINGHAL, I.L R. (1944) Nag. 447=216 I.C. 214=1944 N. L.J. 167=A.I.R. 1944 Nag. 152.

-S. 39-Order superseding arbitration-When appealable.

The circumstances under which under the Act the Court is empowered to supersede arbitration proceedings are contained in Ss. 19, 25 and 30 of the Arbitration Act. But they do not include the case where arbitration proceedings are superseded on the ground that there was no valid reference to arbitration. No appeal lies against such an order as it is not one superseding the arbitration under the Act. (Almond. J.C. and Mir Ahmad J.) DEVI DAS GUIZARI LAL v. MITHA SHAH RAM-DITTA MAL. 205 I.C. 319=15 R.Pesh. 91=A.I.R. 1943 Pesh. 8.

S. 39—Scope and effect of—If prevails over Cl. 15, Letters Patent (Madras)-Order of City Civi Judge in Arbitration proceeding-Appeal to High Court—Order by single Judge—Letters Patent Appeal—Competency. See LETTERS PATENT (MADRAS), PATENT (MADRAS), CL, 15. (1945) 1 M.L.J. 54.

-S. 39 (2)-Scope-If creates new right of appeal-Order of single judge dismissing application under S. 33-Appeal rejected as incompetent -Appeal to Privy Council-Competency-C.P. Code, Ss. 109 (g) and 111.

Sub-S. (2) of S. 39 of the Indian Arbitration Act saves any existing right of appeal to His Majesty in Council, but it clearly does not create any new right of appeal. When an application under S. 33 of the Arbitration Act, challenging the validity of an arbitration agreement, is dismissed by a single judge of the High Court, and an appeal therefrom is rejected as not competent under S. 39 of the Act, there is no right of appeal to His Majesty in Council, under Ss. 109 and 111. C.P. Code. It cannot be said that S. 111 entirely abrogates S. 109 (b) (Beaument, C.J. and Sen. J.) RANCHHODDAS PURSHOTTAM AND CO. V. RATANJI VIRPAD AND CO. 207 I C. 400=16 R. B 30=45 Bom. L.R. 384=A.I.R. 1943 Bom. 196.

-S 39 (vi)—Failure to appeal against order rejecting application to set aside award-Effect-Res

Where an application raising objections to an award and praying that it may be set aside is rejected, the order is in effect a refusal to set aside the award and is appealable under S. 39 (vi) of the Arbitration Act. The consequence of not appealing against such an order. reference to arbitration pending at the commence- would be that it would operate as res judicata and bar

a revision against the decree in terms of that award. (Ross, J. M.) BENI MADHO v. RAM AUTAR. 1945 A.W.B. (Rev.) 203 (1)=1945 R.D. 425.

-Ss. 41 and 30-Dispute adjusted by parties after award-Right of parties to ask Court to set aside award

Cl. (a) of S. 41. Arbitration Act makes O. 23, Rr. 1 and 3, C. P. Code, applicable to proceedings under the Arbitration Act 1940. Though the Act provides that Court shall not interfere in the award except under conditions laid down in it, the Act does not provide that the plaintiff shall not have the right to withdraw his claim or that the parties shall not have the power to adjust their dispute even after the award has been given by the arbitrator. Even if O. 23, Rr. 1 and 3 C.P. Code are inapplicable to proceedings under the Arbitration Act there is nothing in law to prohibit a party from surrendering his rights in favour of the party, whether those rights have been created by an award, or existed when the suit was instituted, and the right of litigants to agree to a decision to be given by the Court on the matter in issue between them is paramount and must supervene although there may be rules and regulations which do not give the Court a power to make the same order suo motu. (Almond. J. C and Mir Ahmad, J.) ATTAR SINGH v. BISHAN SINGH. A.I.R. 1945 Pesh. 41.

Appointment of Power of Court to appoint before notice of application under S. 20 is given.

The Court has jurisdiction to appoint a receiver in arbitration proceedings as soon as an application under S. 20 of the Arbitration Act is made even though notice of the application has not been given to the parties concerned. There is no warrant for the contention that a proceeding notice of the application proceeding only after notice of the application is given to all the parties concerned. (Fazi Ali, C.J. and Ray, J.) NAGARCHAND v. SURENDRANATH. 24 Pat. 616=A.I.R. 1946 Pat. 70.

-S. 46—Scope—Rye-laws under Bombay Cotton Contracts Act by East India Cotton Association—Bye-law 38 A-Validity-Time extended by chairman-Decision of umpire-Binding character of.

The bye-laws framed by the East India Cotton Association under the Bombay Cotton Contracts Act by virtue of S. 4 (7) read with Ss. 5 and 6 of that Act are statutory bye laws and therefore are excepted from the operation of the Arbitration Act by S. 46 of the Arbitration Act. The provision in bye-law 38 -A framed by the East India Cotton Association which gives power to the chairman to extend the time for making an award is valid; and the final decision of the domestic tribunal agreed upon made within the extended time is an award which can be filed under S. 11 of the Act. (Kania, J.) Shiv-CHANDRAI JHUNJHUNWALLA v. PANNO BIBI. I.L.R. (1943) Bom. 280=208 I.C. 627=16 R.B 95=45 Bom.L.R. 392=A.I.R 1943 Bom. 197.

-S. 47, Proviso-Scope-If affects discretion of Court under O. 23, R. 3, C. P. Code-Award in private arbitration-If can be made decree of Court as being puted-Powers of Court-S. 30. compromise.

An award made in a private arbitration during the

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compromise and on that basis a degree can be passed in terms of that award, S. 47 proviso of Arbitration act. leaves O. 23, R. 3 C.P. Code untouched, agreement to accept a future award can be treated as a compromise in the suit; the Arbitration Act of 1949, in no way alters the position. (Leach, C. L. and Labelmana Rao, J.) ARUMUGA MUDALIAR P. BALASUBRAMANIA MUDALIAR 1945 M.W.N. 220 = 58 L.W 204 = A. I.R. 1945 Mad. 294 - (1945) 1 M.L J. 463.

-Ss. 48 and 39 (6) - Award prior to, but judgment subsequent to, the Act coming into farce -Appeal -- Competency.

Where an award was prenounced prior to the Arbitration Act coming into force but the judgment thereon was pronounced after the Act came into force.

Held, the appeal against the judgment was not barred by S. 48 of the Act. The reference was not pending when the Act came into force for the proceedings on a reference came to an end when the award was made. The suit no doubt remained pending but a distinction must be drawn between the reference and the suit. (Bennett and Madeley, JJ.) SHER BAHADUR SINGH & RAM MARAIN SINGH, 1944 A.W.R. (C.C.) 265—1944 O.A. (C.C.) 265—1944—O.W.N. 416—A.I.R. 1945 Oudh. 1.

-S. 48 -- Scope-"Reference" - If includes award-Award made after Act in reference pending at time of commencement of Act-If saved.

Any award which is the result of a reference which was pending at the date of the commencement of the New Arbitration Act of 1940 is saved from the application of the new Act and the provisions of the new Act do not apply to such an award. The expression "references" in S. 48 of the new Act is wide enough to cover the necessary and logical result of a reference vis. an award. (Chag/a, J.) Apollo Mills Ltb, v. Bant-Bhai Chanbulai. 211 I C. 110 - 16 R.B. 269::45 Bom.L.R. 904=A.I.R. 1944 Bom. 12.

-Sch. I, para. 2 and S.3 -- Igreement of reference to arbitration providing for appointment of umpire only if arbitrators disagree—Appointment of umpire—Limitation.

Where the agreement of reference to arhitration provides that the arbitrators would be entitled to appoint an umpire only if they happen to disagree, it is not incumbent on the arbitrators to appoint an umpire within 30 days of their own appointment as provided for by Sch. I, para 2. of the Arbitration Act. Such a provision in the agreement must be held to contain an intention different from what has been expressed in Sch. I. para. 2, within the meaning of S. 3 of the Act. (Abdur Rahman, J.) DAIESINGH v. MAMCHAND. 219 I.C. 162=18 R.L. 46=46 P.L R. 348=A. I.R. 1945 Lah. 34.

-Sch. I, para, 3-Applicability-Arbitration under Co-operative Societies Act. See Arbitration Act (1940) S. 17 47 C.W.N. 478.

-Sch. I. para. 8—Scope and effect—Costs—Fees fixed by arbitrator or umpire. If can be taxed or dis-

The effect of para. 8 of the first Schedule of the Arbitration Act is to make arbitrators Judges in their pendency of a suit can be treated as an agreement for own cause in the matter of costs. Where the submis-

sion does not express a contrary intention, the arbitrator or umpire may himself fix the amount of his remuneration, and may include it in his award. If he includes it in his award, there is no means of taxing or otherwise disputing the amount so fixed by him, unless the amount is so unreasonable and excessive that the Court would hold him guilty of misconduct, and on that ground set aside the award under S. 30 of the Arbitration Act. S. 30 precludes the Court from setting aside an award on any ground except those mentioned in that section. (O'Sullivan, J) GOBINDSING v. PGHU-MAL. ILR. (1944) Kar. 354=219 I.C. 195=A. I.R. 1945 Sind 71.

ARMS ACT (XI OF 1878). S. 4-'Arms'-Part of a fire-arm-If "arms"-Test.

Before stray pieces of metal can be held to be parts of a fire-arm it must be shown that they are either definite parts of a fire-arm in reasonable condition or a series of old parts which without the addition of too many new parts or the expenditure of an unreasonable amount of labour could be metamorphosed into a lethal fire-arm. The matter is in each case largely one of discretion of the Court concerned. (Davies.) MISRI LAL v. EMPEROR. 1242 A.M.L.J. 34.

-S. 4-"Arms"-Rusty and unserviceable revolver-If "arms."

A fire-arm such as a revolver, which, though rusty and unserviceable could yet be repaired is a fire-arm falling within the definition of "arms" in S. 4 of the Arms Act the possession of which without license is an offence. (Kuppuswami Ayyar. J.) Public Prosecutor v, Nagabushanam. 209 I.C. 272=16 R.M. 297=1943 M. W.N. 577=56 L.W 519=A.I.R 1943 Mad. 661 =45 Cr. L. J. 124=(1943) 2 M.L.J. 283.

-Ss. 4 and 19 (f)—'Arms'—Spears electroplated and used for religious purpose.

The fact that an article which comes within the definition of "arms" in the Arms Act is used for religious purposes does not relieve the person in possession of such an arm from the operation of the Act. A spear having the appearance of a spear and capable of being used as a spear does not cease to be so by reason of its being called some thing else or being electroplated and used. for religious pur poses. (Young, C.J and Ram Lall J.) EMPEROR v. SOBHA SINGH I.LR 1941 Lah. 789=43Cr L.J 76=44 P L.R 56=14 R.L. 182= 196 I.C. 766=A.I.R. 1941 Lah. 340.

Ss. 4 and 19 (f)—"Arms"—Takwas intended primarily for domestic or agricultural use are not "arms," Unham Singh v. Emperor, [see Q.D. 1936 '40 Vol 1 Ccl. 3230.] 191 I.C. 323=42 Cr.L.J 144=13 R L 311.

-Ss. 14 and 19 (f)-Possession after expiry of license and before renewal-If offence.

The possession of a gun by a person after the expiry of his license and bef. re its renewal is in contravention of S.14 and is an offence punishable under S, 19 (f) of the Arms Act. Note 11 appended to the conditions printed on the license granted in Form XVI, which prescribes the fees payable if the license is renewed within one month of the date on which it expired and those payable after one month from that date, merely provides a period of grace during which the application for renewal may be made and the fees I discovery of arms in a house occupied by a joint

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payable thereon deposited. It does not lay down that the quondam license-holder is entitled, as of right to have the license renewed on payment of the fee mentioned. (Tek Chand and Din Mahomed JJ.) Emperor v. Bakhshi Ram. I.L.R 1943 Lah. 756=15 R.L. 235=44 CrL. J. 101=203 I.C. 452 =44 P L.R. 486=A.I R. 1942 Lah. 300.

-S. 19 (e)—Going armed—Accused carrying gun tied to bi-cycle as luggage-Offence.

If a person carries a gun not in his hand but tied to his bi-cycle in the manner of a piece of luggage, he must be said to be "going armed". within the meaning of S. 19 (e) of the Arms Act and is liable to conviction (Rowland, J.) IMAMUDDIN MIAN v. EMPEROR. 192 I.C. 766=13 R.P. 570=42 Cr.L.J. 341=22 P.L.T. 570=1941 P.W.N. 423=7 B.R. 411=A.I.R. 1941 Pat. 284.

-S. 19. (f)—Arms -Fire arm—Revolver unserviceable but not irreparable-Possession without licence-Offence.

A fire arm, such as a revolver, which, though rusty and unserviceable, could yet be repaird, is a fire-arm falling within the definition of "arms in S. 4 of the of the Arms Act; and possession of such a revolver without license is an offence punishable under S. 19 (f) of the Act. (Kuppuswami Ayyar J.) Public Prosecutor v. Nag Bhushana. 209 I.C. 272=16 R.M. 297=1943 M.W.N. 577=56 L.W. 519=A I.R. 1943 Mad. 661=45 Cr.L.J. 124=(1943) 2 M.L.J. 283.

-S. 19 (f)—Arms—Possession or control of particular person-Presumption.

The possession or control might well be possession or control of two or more persons. For examples an unlicensed Gun may be found in a room which is used by a number of adult members of the family. In such a case it is difficult to presume that that gun is in the joint possession of all members of the family. On the other hand if two spears are found in a room occupied jointly by two persons it can be inferred that the spears are in the possession or control of both the persons occupying the room. Every case must depend upon its particular facts and the Courts must consider each case and come to a conclusion whether it is proved that the incriminating article is in the possession or under the control of any particular person or in the possession or under the control of more than one person. (Harries. C.J., Din Mahomed and Sale, JJ.) EMPEROR v. SANTA SINGH. 215 I C. 161=17 R.L. 110=46 Cr.L.J. 1=A.I.R. 1944 Lah. 339 (F.B.).

sanction under S. 29—Effect.

Sanction under S. 29 of the Arms Act is necessary in order to commence a prosecution, for an offence under S 19 (f) of the Act. Where there where under S 19 (7) of the Act. Where there is no such sanction, there can be no conviction under S 19 (7). (Rowland J.) IMAMUDDIN MIAN V. EMPIROR. 192 I.C. 766=13 R.P. 570=42 Cr.L J 341=22 P.L.T. 570=1941 P.W.N. 423=7 B R. 411=A I.R. 1941 Pat. 284.

-S. 19 (f)—Discovery of arms in house occupied by joint family-Presumption-Nature of-Weight to be attached to.

There is an initial presumption in case of a

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family that the article found therein is in the possession of the head of the family. The same principle applies to all families living jointly in the same house. The weight to be attached to the presumption must vary according to circumstances. In could easily be rebutted by showing that the room or receptacle in question was in the particular and exclusive possession of a particular member of the family. The strength of the presumption would also vary according to the improbability that the article owing to its size, etc., could have escaped the notice of the head of the family. (Gruer, J,) HARBANS SINGH v. EMPEROR. 196 I.C. 727=I.L.R. 1942 Nag. 523= 43 Cr.L.J. 62=14 R.N. 127=1941 N.L.J. 405= A.I.R. 1941 Nag. 296.

-S. 19 (f)—Incriminating articles found in place belonging to joint family — Co-parceners If in possession of them.

The word 'control' in S. 19 (1) of the Arms Act means effective control. In the case of joint family effective control cannot be that of the junior members of the family; it must be with the head or the karta of the family. 'Possession' means exclusive possession, hence where the articles in question are found at a place not in the use or occupation of any particular individual but belonged to a whole family possession must be deemed to be with the manager or the karta of the family. No other member of the family could be said to have been in possession of the same. (Sinha, J.) Hirdey RAM 7'. EMPEROR. 1945 A.W.R. (H.C.) 275=1945 A.L.W. 375.

S. 19 (f)—Incriminating articles found in place in occupation of family—Head of family— If can be held to be in possession or control.

Where incriminating articles are recovered from a place in the occupation or possession of more persons than one and it is not possible to fix the liability on any particular individual, a Court is not bound to hold that the said articles were in possession or under the control of the head of the family. (Harries. C.J. Din Mahomed and Sale, JJ.) EMPEROR v. SANTA SINGH. 215 I.C. 161=17 R.L. 110=46 Cr.L.J. 1=A.I.R. 1944 Lah. 339 (F.B.).

S. 19 (f)—Incriminating articles found in place in occupation of several accused-onus.

Mere proof that an incriminating article is found in premises occupied by a number of persons does not in itself establish prima facie the guilt of any particular person or all of them jointly until a prima facie case established by the prosecution the onus does not shift on to the accused. (Harries, C.J., Din Mahomed and Sale JJ.) EMPEROR V. SANTA SINGH. 215 I.C. 161=17 R.L. 110=46 Cr.L.J. 1=A.I.R. 1944 Lah. 339 (F.B.).

-S. 19 (f)-Interpretation-'Control', meaning-Presumption of joint control-Circumstances.

In a case under S. 19 (f) of the Arms Act it is the primary duty of the prosecution to prove the possession of the accused, but there may be cases in which the circumstances are such that possession of the accused can safely be presumed, otherwise it will be impossible for the prosecution to secure a conviction. Hence the words'and control' n the section must be taken in a wider sense and intention of coneculment.

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to mean something more than actual possession. Where it was found that the room from which the illicit arms were recovered was in the joint exclusive possession of the two accused and that other male members of the house lived in another portion of the house, the accused must be held to have the joint control of the room and where there was no one willing to take the te-ponsibility the only possible presumption the Court could make was that they were in joint control. (Thomas, C.J.) LALU SINH V. LAHIROW. 201 I.C. 409 15 R.O. 95 1942 O.A. 271 1942 O. W.N. 379=1942 A.W.R. (C.C.) 250 1942 A. Cr.C. 109-43 Cr.L.J. 666=A.I.R. 1942 Ouch 448=18 Luck. 253.

EMPEROR v. ABBULL RAHMAN, I lee O.1. 1936-40 Vol I Cal. 3230] LL.R. (1940) All. 657 42 Cr. L.J. 59.

-S. 19 (f) "Possession" -- Meaning of.

"Possession', for the purposes of the Arms Act is possession for use. The mete helding of a weapon by one person on behalf of the person entitled to it is not "possessien" within the meaning of S. 19 (f). When a person holding a license for a gun stays in the house of a friend and leaves the house leaving the gun in that house intending to return for it shortly afterwards, it connot be held that the livensee is not in possession or that the friend in whose house it has been left, is in possession of it especially when the friend has not made any use of the gun. (Meredith, J.) Kedar Nath c. Emperor 191 I.C. 187=13 R.P. 316=42 Cr.L.J. 97=7 B.R. 164=A.I.R. 1941 Pat. 209.

-S. 19 (f)-Possession of arms-Presumption-House occupied by joint family.

In the case of a house occupied by a joint family there is an initial presumption that an unlicensed arm found therein is in the postession of the head of the family, when the portion of the house where it is found is not in the exclusive possession of any particular mender. (Tem Singh, I.) Musa v. Empirion. 45 P.L.R. 421 211 I.C. 493=45 Cr.L.J. 404:16 R.L. 229 A.I.R. 1944 Lah. 64.

-S. 19 (f) - Several rooms in a house each occupied by different tenants or sons of the owner -Arms found in one of them -Owner of house if can be made liable.

A person who is the head of his family cannot be presumed to be the head of his tenants also. It should be remembered that in villages each room in a house is occupied by a separate family and a room is therefore equivalent to a house. Several families live in separate rooms opening on to the court yard and the whole compound should not be treated as one house although it may belong to one person. Where unlicensed arms are found in one of the vacant rooms in such a house, it cannot be said that they were found in a house "occupied" by the owner so as to make him liable under S. 19 of the Arms Act. (Mir Ahmad, I.) MANSUR KHAN T. EMPEROR. 205 I C. 239=15 R. Pesh. 88=44 Cr. L. J. 335=A. I. R. 1943 Pesh. 20.

-S. 20-Applicability-Test-Indication of

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For a conviction to fall under S. 20, Arms Act there must be some special indication of an intention that the possession of the arms was being concealed from a public servant or from a Railway Official. Hence if a man carries an unlicensed weapon in his haversack when sitting in the platform of a Railway station, it must be conceived that it is his intention that his possession of unlicensed weapon may not be known to any public servant or Railway official and the case would fall under S. 20 of the Arms Act. (Yorke, would fall under S. 20 of the Arms Act. J.) MAN SINGH v. EMPEROR. I.L.B. (1942) All. 899=202 I.C. 562=15 R.A, 179=1942 A.L.J. 383 =1942 A.W.R. (H.C.) 261=1942 A.L.W. 503 =1942 A.Cr.C. 159=43 Cr.L.J. 854=A.I.R 1942 A. 349.

-S. 29—"Proceedings"—Meaning of-Proceedings when "instituted."

The "proceedings" referred to in S. 29 of the Arms Act clearly mean legal proceedings in a Criminal Court and such "proceedings" are "instituted" within the meaning of S. 29 only when under S 190, Cr.P. Code, a magistrate takes cognizance of the offence. (Lobo and O'Sullivan, JJ.) RASULBAKHSH v. EMPEROR. I.L.R. (1943) Kar. 524=212 I.C. 9=16 R.S 237=45 Cr.L.J. 510=A.I.R. 1944 Sind 103.

Absence of sanction—Conviction under S. 19 (f) 7 B.R. -Legality. See Arms Act, S. 19 (f). 411.

ARMY ACT (1879. 44 and 45 Vic., C. 58) S. 170-Findings of Court-martial-Jurisdiction of High Court.

The High Court has no power to interfere with matters of military conduct and purely military law. S. 170 of the Army Act relates to anything done under the Act and the person is to be exclusively tried by that Act under Court-martial and the High Court has no jurisdiction to sit in judgment on the findings of any Court-martial where a person has been tried under the Army Act, particularly when a more appropriate remedy is open to him. (Thomas, C.J.) G. R. F. X. MONTESERRAT v. MAJOR-GENERAL HAMMOND. 20 Luck. 335=1945 O.W.N. 143=1945 A.Cr.C. 73= 1945 A.I.W. (C.C.) 136=1945 O.A. (C.C.) 152=1945 A.W.R. (C.C.) 152=46 Cr.L.J. 746=1946 Oudh. Rev. 1 = 220 I.C. 373 = A.I.R. 1945 Oudh 217

ARMY ACT (VIII OF 1911), S. 2-Military Storekeepers employed by Army authoritics-If triable by Court-martial-Ordinance X of 1941,

Military Store-keepers attached to or employed with military forces raised in British India must be deemed to be on active service for the purposes of the Army Act so long as the hostilities continued, by virtue of S. 2 of Ordinance X of 1941, and could therefore be tried by a Court-martial. (Harries, C.J. Abdur Rahman, Mehr Chand Mahajan, JJ.) SARDAR JIT SINGH v IMPERATOR. I.L.R. (1945) Lah. 419=47P,L-R. 423 (F.B.)

-S. 27—Offence under-Good faith, if a defence.

Good faith can never afford a defence to a Exemption charge under S. 27 of the Indian Army Act, nal proceedings. although it may be relevant in considering the (Harries, C.J., Abdue and the same privilege is enjoyed by witnesses. question of sentence.

#### ARREST.

Rahman and Mehrchand Mahajan JJ.) SARDAR JIT SINGH v. IMPERATOR. I,L.R. (1945) Lah. 419= 47P.L.R. 423 (F.B.)

-S. 69-Preceedings instituted in ordinary Criminal Court-If can be withdrawn for trial by Court martial.

Under S. 69 of the Army Act. proceedings instituted in the ordinary Criminal Court in respect of an offence which is triable also by a Courtmartial can be withdrawn from that Court for trial by the Court-martial. (Harries, C.J., Abdur Rahman and Mehr Chand Mahajan, IJ.) SARDAR JIT SINGH V. IMPERATOR. I.L.R. (1945) Lah. 419 =47 P.L.R. 423 (F.B.).

officer-If necessary for legality of arrest-Cr.P. Code Ss. 54, 56 and 80.

The procedure for the arrest of a deserter from the army is governed by S. 123 (1) of the Army Act and the commanding officer has only to send a written report of the desertion to the civil authorities. No warrant is actually issued in such a case but the deserter is to be arrested as if a warrant is issued, and therefore S. 56, Cr.P. Code, has no application to a case of this kind. S. 80 and the following sections will apply. All that S. 80, Cr.P. Code requires is that the substance of the warrant shall be notified to the person arrested, and if the police-officer be called upon to do so, he must also show him the warrant. But the production of a warrant cannot be insisted upon. Further S. 54 (1). Cr.P. Code, empowers any police-officer to arrest without any warrant and without any order from a Magistrate any person reasonably suspected of being a deserter from His Majesty's force and in such a case no question of the production of a warrant or an order can arise. (Byers, J.)
THANGAPANDIAN NADAR, Inre. I.L.R. (1943) Mad.
827=-206 I.C. 307=-15 R.M. 965=-44 Cr.L. J. 465 == 56 L.W. 34=1943 M.WN. 47=A.I.R. 1943 Mad. 280=(1943) 1 M.L.J. 59.

ARMY RULES, S. 62-Trial of person on active service-Power of officer empowered by Central Government or Commander-in-Chief to convene Court martial.

S. 62 of the Indian Army Rules does not mean that the Central Government or the Commanderin-Chief lose their right to empower an officer to convene a Court-martial when the troops are on active service. The Central Government or the Commander-in-Chief can empower an ollicer to convene a Court-martial at all times, whereas the officer commanding forces in the field can only empower an officer to convene such a Court on active service. (Harries, C.J., Abdur Ruhman and Mehr Chand Mahajan, IJ.) SARDAR JIT SINGH v. IMPERATOR. I.L.R. 1945 Lah. 419-47 P.L.R, 423 (F.B.)

ARREST. Sec (1) C.P. Code Ss. 55, 59 and 135.
(2) CR.P. Code S. 54
(3) Presidency Towns Insol-

VENCY ACT S. 34

-Exemption from -Parties to civil and crimi-Per Mitter. J .- A party to a civil proceeding

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also, is privileged from arrest under a civil process on his way from his home to the Court premises, in the Court premises, and on his way back till he reaches home. But a party to a criminal proceeding enjoys no privilege from arrest or re-arrest wherever the arrest takes place. A man who has been acquitted on a criminal charge can e arrested immediately upon another criminal charge within the precincts of the Court after his acquittal. (Derbyshire, C J., Mitter and Khundkar. JJ.) Niharendu Duita Mazumdar. In re. I.L.R.=(1944) 1 Cal. 489=47 C.W.N. 854=A.I.R. 1945 Cal. 107 (S.B.)

ASSAM AGRICULTURAL INCOME-TAX ACT (IX OF 1939), Ss. 2 and 3-Applicability-Cooperative Society incorporated in England and owning tea estate in Assam-Manufacture and sale of tea to members - Profits - Taxability - Transactions-If sales or mutual dealings.

The assessee, the English and Scottish Joint Cooperative Wholesale Society, Ltd., which was a sterling and non-resident Society incorporated in the United Kingdom under the Industrial and Provident Societies Act, 1893, carried on business in British India as growers, manufacturers and sellers of tea. It consisted of two members, two Co-operative wholesale Societies with an unlimited capital, and owned a tea estate where it grew and manufactured tea. Except a small portion of the produce which was unfit for export and which was sold locally, the whole of the assessee's output of tea was sold to its two members at market rates and was exported to England and Scotland. Each year the members paid, by way of advances to the assessee, sums of money to meet the cost of tea to be supplied by the assessee to its members. The market prices of the tea supplied to the members were debited against these advances. The supplies were recorded as sales to the members. Out of the proceeds from the sales, the expenses of production and management and the interest on loans were paid or provided and by the rules of the Society the net profits were applied in (1) depreciation of land, buildings, live and rolling stock; (2) payment of interest not exceeding 6 per cent, on the share capital; (3) appropriation to reserve fund; (4) appropriation to a special fund for making grants as determined in general meeting; (5) payment of dividend to members rateable in proportion to the amount of purchases made by them from the remainder; and (6) carrying forward the remainder, if any, to the next account. It was contend ed for the assessee that the transactions between it and its members were not sales but mutual dealings and that there was no income which could be taxed under the Assam Agricultural Income-tax Act.

Held: (1) that the assessee Society was a trading concern and carried on business as growers, manufacturers and sellers of tea and derived profits out of such business; (2) that the dividends which it paid to its members were a distribution amongst them of its trading profit and the payments of these dividends were not a return to the members of balances from the sums which they had subscribed to the Society; (3) that the profits to the extent of 6% thereof less permitted deductions, which was distributed and paid by the

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and Gentle, J.) ENGLISH AND SCOTTISH JOINT CO-OPERATIVE WHOLESALE SOCIETY, LTD. v. Com-MISSIONER OF AGRICULTURAL INCOME TAX, ASSAM, (1945) I.T.R. 235.

-S. 2 (a) (1)-"Agricultural ancom" - Selami received for settlement of agricultural land.

Selami or premium received by the Zamindar for settlement of agricultural land comes within the dehni-tion of "agricultural income" in S. 2 (1) (1) of the Assam Agricultural Income-tax Act. These schants occur as a normal and regular, though perhaps variable, feature of the Zamındar's receipts from his agricultural estate and are very different from those paid for the grant of long-term mining leases. (Derhyshire, C. J. and Gentle, J.) INCTINDRA NARAVAN SINHA, In the matter of. 1945 I.T.B. 263 \* 49 O.W. N. 472.

—S. 2 (e) and (m)—". Income "-- Productor--Death of assessee -- Proceedings, do not a ate-Executor hos to pay tax.

"Assessee" as difined in S. Z. (e) of the Assam Agricultural Income-tax Act includes an executor by whom tax is payable. The proceedings do not abate on the death of an assessee; the executor steps into the shoes of the assessee and as such he is liable to pay the tax out of the estate assets so far as they are capable of meeting the charge. (Mc Nair and Gentle, II.) SUPHA TARANGINI DEBYA, In re. I.L.R. (1944) 2 Cal. 166:: A.I.R. 1945 Cal. 83 (1944) I.T.R. 241.

-S. 7 (c)—"Accrued due in the pretious agricultural year"-If includes arrears.

The phrase rent which accrued due in the previous agricultural year" in S-7. (c) of the Assam Agricultural Income-Tax Act refers only to the current demand of rent for that year and does not include arrears. (Derbyshue, C.J. and Panckridge, J.) BABU BROJENDRA KISHORE ROY CHOUDTURY, In the matter of. 202 I.C. 66=15 R.C. 285=1942 I.T.R. 419=46 C.W.N. 492=A. I.R. 1942 Cal. 467 (2).

S.7 (c) -- "Accrued due in the previous agricultural year" - If refers to arrear as well as current dues.

The phrase "accrued due in the previous agricultural year" in S. 7 (c) of the Assam Agriculdemand of rent for that year and does not include arrears of rent remaining unpaid. (Mc Nair and Gentle, IJ.) Sudha Tarangini Debya, In re. I.L.R. (1944) 2 Cal. 166=(1944) I.T.R. 241=A.I.R. 1945 Cal. 83.

-S. 7 (c)—Constructions—Assessment in first year and subsequent years-No distinction- Special deduction for collection expenses in first year on whole amount due for rent-Not available.

Gentle, J.—The language of S. 7 (c) of the Assam Agricultural Income tax Act is applicable alike to all assessment. The legislature has not made any special provision with regard to Society in the six ways provided by the rules was agri-cultural income as defined by S. 2(a) (2) (1) of the Assam Agricultural Income-tax Act; and (4) that due for rent, and it is not within the province of therefore the assessee Society was chargeable to agri- the Court to repair the omission. No distinction cultural Income-tax under that Act in respect of the can therefore be drawn between the assessment cultivation and for manufacture of tea at its estate in the year immediately following the Act Assam and sold to its members, (Derbyshire, C. J. coming into force and an assessment in any

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subsequent year, and the first year's assessment is not subject to any special deduction in respect of collection expenses. (McNair and Gentle, IJ.) SUDHA TARANGINI DENYA, In re. I.L.R. (1944) 2 Cal. 166=(1944) I.T.R. 241=A.I.R. 1945 Cal. 83.

-S. 28 (1)—Reference under—Competency—Con ditions-No time limit-Keterence can be made even after order by Commissioner of tax.

S. 28 (1) of the Assam Agricultural Incometax Act does not place any limit upon the time within which the Board may of its own motion refer a matter to the High Court. The only limits are that there should be a question of law which arose in the course of an assessment or in any proceeding in connection with an assessment. If these conditions are fulfilled the Board is empowered under the Act at any time to refer the matter to the High Court. A reference can be made by the Board under S. 28 (1) of the Act even after an order has been passed by the Income-tax. Commissioner of Agricultural (McNair and Gentle, JJ.) Subma Tarangini Debya, In re. I.L.R. (1944) 2 Cal. 166=(1944) I.T.R. 241=A.I.R. 1945 Cal. 83, TARANGINI

ASSAM BIJNISUCCESSION ACT (II OF, 1931)—Scope—If ultra vires—Government of India Act (1935), S. 45 A—Rules, Schedule I Part II, Item 51.

The Bijni Succession Act is not ultra vires the Assam Legislature. The fact that the subjectmatter of the Act was not made a provincial subject by declaration of the Governor-General in Council under item 51 of Part II of Schedule I of the Rules under S. 45.A of the Government of India Act would not render the Assam Legislature incompetent to deal with it as a central subject when the sanction of the Governor-General in Council has been duly obtained. The Act being one regulating a central subject comes within the competence of the Assam provincial legislature when the necessary sanction is given. L.T. 419=A.I.R. 1942 P.C. 44.

-S. 2 (1)—Scope—Lands outside Assam—If affected.

The words "together with all additions and accretions to the property comprised thereto" in S. 2 (1) of the Assam Bijni Succession Act are S. 2 (1) of the Assam Biffin Succession Act are not intended to apply to lands in other provinces outside Assam. (Sir George Rankin.) JOGENDRA NARAYAN DEB v. DEBENDRA NARAYAN ROY. I.L. R. (1942, 2 Cal. 349=201 I.C. 394=15 R.P.C. 15=5 F.L.J. (P.C.) 1=46 C.W.N. 897=8 B.R. 824 =23 Pat.L.T. 419=A.I.R. 1942 P.C. 44.

ASSAM DEBT CONCILIATION ACT (X OF 1936), Ss. 7, 8 and 16—Decision by Board that debt is time barred-Amounts to decision that Board has no jurisdiction to deal with it-Civil Court can then deal with such debt and execute decree. PulinBehari Das v. Syed Reasat Ali. [see Q.D.1936—'40 Vol. I. Col. 259] 194 I. C. 265=13 R.C. 493=A.I.R. 1941 Cal. 156.

### ASSAM LAND & REV. REG. (I OF 1886)

——S. 8 (3)—Decision of Board—Finality— Extent, Pulin Behari Das v. Syed Reasat Ali [see Q.D. 19 6-'40 Vol I Col 260] 194 I.C. 265= 13 R.C. 493=A.I.R. 1941 Cal. 156.

-(I OF 1941) S. 3—Applicability—Entire body of judgmens debtors - If should be agriculturists.

S. 3 of the Assam Debt conciliation (1941) applies only in a case in which the sole judgmentdebtor or the entire body of judgment-debtors is an agriculturist. (Henderson, J.) BIRENDRA LAL I)AS v. ABDUL HEKIM. 206 I.C. 329=15 R.C. 696=47 C.W.N. 185=A.I.R. 1943 Cal. 155.

-S.3-Decree for costs in title suit-If decree for morey.

It is impossible to say that a decree in a title suit declaring the decree-holder's title and giving him khas possession and costs can by any stretch of imagination be called a decree for money. (Henderson, J.) BIRENDRA LAL DAS v. ABDUL HEKIM. 206 I.C. 329=15 R.C. 696=47 C.W.N. 185=A.I.R. 1943 Cal. 155.

-S. 3-Order staying execution-Appeal, if lie

An appeal lies from an order staying proceedings in execution under S. 3 of the Assam Debt conciliation Act. (Henderson, J.) BIRENDRA LAL DAS v. ARBUL HERIM. 206 I.C. 329=15 R.C. 696=47 C.W.N. 185=A.I.R. 1943 Cal. 155.

ASSAM LAND AND REVENUE REGULA-TION (I OF 1886) S. 3 (b) - 'Estate'-1f includes separate account.

Obiter.—The definition of 'estate' in S. 3 (b) of the Assam Land and Revenue Regulation is not wide enough to include a separate account for the purposes of S. 17 of the Regulation. (Akram and Pal, Jl.) Surendra Nath Das v. Abbul Jalil. 201 I.C. 130=15 R.C. 138=75 C.L.J. 109 =46 C.W N. 306 = A.I.R. 1942 Cal. 354.

-Ss. 8 and 9-Fishery settled in Sylhet-Pattadar, if can acquire land-holder's status.

The settlement of fishery included in the jama-(Sir George Rankin.) JOSENDRA NARAYAN DEB v. bandi of mauzas situated in the District of Debendra Narayan Roy. I.L.R. (1942) 2 Cal. Sylhet under the rules framed under the Assam 349 P.C.=201 I.C. 394=15 R.P. C. 15=5 F.L.J. Land and Revenue Regulation, was on the basis (P.C.) 1=46 C.W.N. 897=8 B.R. 824=23 Pat. of the fishery being treated as land. The pattadar can, therefore, acquire the status of a landholder in respect thereof under Ss. 8 and 9 of the Regulation. (Biswas, J.) MAHARAM ALI v. MOBARAK ALI. 46 C.W.N. 551.

> -S. 71—Effect of—Right of purchaser at revenue salr.

> S. 71 of the Assam Land and Revenue Regulation only says that the auction purchaser at a revenue sale takes the property sold free from all incumbrances. It does not say that the purchaser takes the property free from all other (Akram and Pal, JJ.) Surendra Nath Das v. Abdul Jalil. 201 I.C. 130=15 R.C. 138=75 C. L.J. 109=45 C.W.N. 306=A.I.R. 1942 Cal. 354.

> -S. 71—Land included in permanently settled estate—Title by adverse possession—If an incumbrance.

> In the case of lands shown to have been included in a permanently settled estate any title acquired in them by adverse possession by Government ither directly or through some private persons

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would be an incumbrance within the meaning of 540=48 C.W.N. 505=A.I.R. 1944 Cal. 57.

-S. 71 Proviso (2) - Kent law for the time being in force-Meaning of Occupancy rights acquired under Sylhet Tenancy Act which came into force after sale and before suit for ejectment-If can be pleaded as

The second proviso to S. 71 of the Assam Land and Revenue Regulation speaks of the rent law for the time being in force and this obviously means the law that is in force at the time when the purchaser seeks to evict any tenant or attenipts to enhance rent. If therefore a tenant acquired occupancy rights under the Sylhet Tenancy Act which came into force prior to the institution of the suit for his ejectment though after the revenue sale, he is not precluded from putting forward his new rights as a bar to the suit. (Mukherjea and Sharpe, JJ.) NIRMALA BALA DEB v. BIRENDRA CHANDRA. 48 C.W.N. 629.

ASSAM LOCAL RATES REGULATION (III OF 1879) S. 3-Sale for arrears of revenue and of local rates-Lands assessed to local rates but not included in estate-If pass to purchaser.

A sale for arrears of revenue as well as for arrears of local rates under the Assam Local Rates Regulation does not pass to the auction purchaser lands which are assessed to these local rates but do not appertain to the revenue paying estate. The local rates are only an additional liability imposed upon the land holder who owns an estate and what is put up to sale for non-pay-ment of local rates is the estate itself which is saddled with the payment of Government revenue. (Mukherjea and Ormond. II.) GOBINDA CHAN-DRA BANIK v. SWARNAMAYI RUDRA PAL. 48 C. W.N. 718=A.I.R. (1944) Cal. 378.

ASSAM MONEY-LENDERS ACT (IV OF 1934), S. 9—"Principal of the loan"—Meaning of— Bond in respect of past liabilities including principal and interest.

Where a bond is executed in respect of past liabilities which include principal as well as interest, the creditor cannot under S. 9 of the Assam Money-lenders' Act claim arrears of interest greater than the principal of the loan, which means the money which the money-lender actually advanced to the borrower and not the amount for which the bond is executed. (Nasim Ali and Pal, IJ.) PRASANNA KUMAR DATTA v. KRISHNA KISHORE SWAMI. 45 C.W.N. 394.

ASSAM MUNICIPAL ACT (I OF 1923) Ss. 3 (15 and 59 (1) (b)—Carrying on business—If includes service.

The expression "carrying on business" in S. 3 (15) of the Assam Municipal Act does not imply service. A Government servant employed in a Munisit's Court within a Municipality cannot be regarded as "carrying on business" there so as to bring him as such within the meaning of the word "inhabitant" defined in S. 3 (15) and make him liable to taxation under S. 59 (1) (b) of the Act. (Akram, J.) ABDUL MANAF v. SUNAMGANJ MUNICIPAL BOARD. I.L.R. (1941) 1 Cal. 127=

### ASSAM MUNICIPAL ACT (I OF 1923).

-S. 40 -Rent for land let out under S. 40-How to be recovered. See Assam MUNICIPAL ACT (1 OF 1923), Ss. 141 AND 144. 45 C. W. N. 215

-S.59 (1) (b)—Government servant employed in Munsif's Court-If liable to tax as carrying on business. See Assam Municipal Act (I OF 1923), Ss. 3 (15) AND 59 (1) (b), I.L.R. (1941) 1 Cal 127.

-Ss 141 and 144—Rent for land let cut under S. 40-Remeay of Board for its recovery,

S 141 of the Assam Municipal Act relates to rents specified in S. 140 and to other monres due under the Act. The rent which may be recovered for land let out under S. 40 cannot come under the terms of the section. The remedy of the Board for the recovery of the rent of such land lies in a suit brought in accordance with the provisions of C. P. Code and the Board cannot recover this rent by having recourse either to the provisions of Ss. 99 to 108 or to the provisions of S. 141. (Nen, J.) Golaghar Municipal Board v. Sonaram Gohain. 45 C.W.N. 215-73 C.L.J. 152=A.I.R. 1941 Cal. 609=197 I C. 660=14 R.C. 371.

## -S 254-'Prostitute'-Proof.

In a case unner S. 254 of the Assam Municipal Act a heavy onus lies on the prosecution to prove that the accused person is actually a prostitute. No such inference can be drawn from the fact that she is residing in a quarter of the town ordinarily inhabited by prostitutes or that her name appears in the register of prostitutes maintained at the Thana or that she is in the keeping of a man who is a resident of the town. (Edgiey, J.) CHAIRMAN OF DHUBRI MUNICIPALITY v. KUMUDINI GANIKA. 195 I.C. 546—14 R.C. 134—73 C.L. J. 191—42 Cr.L. J. 756—45 C.W.N. 167—A.I.R. 1941 Cal. 445.

-S. 320-Act of Board trregular-Notice, if necessary.

Under S. 320 of Assam Municipal Act, notice is necessary if the act complained against was one which was done by the Board purporting to act under the Act. It cannot be said that the Board was not acting under the Act although it has not followed the correct procedure. The act of the Board would be protected so long as it purported to act according to the provisions of the Act and so long as it acted bona fide and in the belief that what it was doing was lawful. Of course that belief must not be an absurd belief. (Sen, J.) GOLACHAT MUNICIPAL BOARD TO SONA-RAM GOHAIN. 45 C W.N. 215=73 C.L. J. 15 2= 197, I.C. 660=14 R.C. 371=A.I.R. 1911 Cal. 609.

-S. 320-Validity of Notice-Onus of proof.

Under S. 320 of the Assam Municipal Act, the onus is upon the plaintiff to prove not only service of notice but also that the notice is of the kind contemplated by the section. Where there is a specific denial of the validity of the notice by the Municipality, it is not sufficient for the plaintiff to merely prove the service of the notice. He must further prove that the notice was valid. It is not the duty of the Municipality to produce the notice to show that it was not in accordance 196 I.C. 137=14 R.C. 179=A.I.R. 1941 Cal. 482. with the provisions of S. 320, (Sen. J.) Gold-

# ASSAM PURE FOOD ACT (IV OF 1932).

GHAT MUNICIPAL BOARD v. SONARAM GOHAIN. 45 C.W.N. 215=73 C.L.J. 152=197 I.C. 660=14 R.C. 371=A.I.R. 1941 Cal. 609.

### ASSAM PURE FOOD ACT (IV OF 1932)

S. 6-Sale of article containing mustard oil—No representation that it is mustard oil—Legality.

S. 6 of the Assam Pure Food Act, in so far as it refers to mustard oil, must mean that no article shall be sold, exposed for sale, or manufactured or stored for sale as mustard oil or in such a manner as to indicate that it was intended to be sold, etc., as mustard oil, unless it be derived exclusively from mustard or rape seed. But there is nothing in the section to render illegal the sale of articles containing mustard oil under circumstances in which there is no representation that the article sold is mustard oil or is to be regarded as mustard oil. (Edgley and Lodge, JJ.) NISHI KANTA SAHA v. EMPEROR. 209 I.C. 229=16 R.C. 351=47 C.W.N. 698=45 Cr.L.J. 111=A.I.R. 1943 Cal. 468.

ASSAM (TEMPORARILY SETTLED DISTRICTS) TENANCY ACT (III OF 1935)— Limitation for suit Rent—Cause of action arising before Act.

The shorter period of limitation for recovery of arrears of rent prescribed by the Assam Tenancy Act, 1935, does not apply to suits, the cause of action of which arose before the Act. (Nasim Ali, Mitter and Sharpe, JJ.) SWARNAMAYI RAY v. MUBESWAR ALI. 48 C.W.N. 833=79 C.L.J. 1=218 I.C. 151=17 R.C. 206=A.I.R. 1944 Cal. 426.

S. 44 Applicability—Pre-Act contract relating to cash rent.

Pre-Act contracts relating to cash rent are not hit by S. 44 of the Assam Tenancy Act, 1935. The landlord is, therefore, entitled to recover cash rent at the contractual rate for both the periods before and after the Act came into force. (Nasim Ali, Mitter and Sharpe, JJ.) SWARNAMAYI RAY V. MUNESWAR ALI. 48 C.W.N. 833=79 C.L.J. 1=218 I.C. 151=17 R.C. 206=A.I.R 1944 Cal. 426.

ATTACHMENT: See also (1) Cr. P. Code, S. 145 and 146.

 (2) Execution—Attachment.
 (3) C. P. Code O. 38 and O. 21, Rr. 41—63.

ATTESTATION: See also (1) Evidence Act, Ss. 68 and 15.

(2) T.P. Act, Ss. 3, 59 and 123. (3) Will.

——Effect—Knowledge of contents.

Attestation of a deed does not by itself prove that the person attesting it had knowledge of its contents or consented to the transaction. No doubt there may be cases in which the fact of attestation may be taken in conjunction with certain other circumstances such as the course of negotiations and other connected events, and inferences as to consent to the transaction may be drawn from those circumstances supported by the fact of attestation. (Rowland, J.) LACHHMI NARAIN v. RAM SARAN DUSADH. 196 I.C. 380=14 R.P. 195=8 B.R. 18,

AUCTIONER.

If imports knowledge of contents of deed—Reversioner attesting deed of gift by widow and identifying her before the Sub-Registrar—If can challenge the gift on the widow's death.

Mere attestation is not enough to involve the witnesses with knowledge of the contents of the deed, and this is equally true of the witnesses who identify the executant before the Registrar. The two widows of the last male holder partitioned his property and each took separate possession of her share. The senior widow made a gift of her share to the plaintiff, the second nearest reversioner to the estate at that time. Sometime later, after the death of the senior widow, the junior widow made a gift of her share to her own brother by means of a registered deed. This was attested, among others, by the then nearest reversioner and the plaintiff; the latter further identified the executant before the Sub-Registrar. After the death of the junior widow, the plaintiff, as the nearest reversioner to the estate of the last male holder at the time, sued to recover the property forming part of the estate in the possession of the defendants who claimed to retain it under the registered deed of gift executed by the junior widow.

Held, that there was neither evidence to show that the widows attempted to interfere with the reversionary interest in the last male holder's estate, nor any evidence from which it could be legitimately inferred that the claimtiff had knowledge of the contents of the deed of gift and that in the circumstances no consent on his part could be implied and he was entitled to recover the property. (Lord Thankerton.) RAJAMMAL v. SABAPATHI PILLAI. 47 BOM.L.B. 642=58 L.W. 281=1945A.I.J. 264=1945 M.W.N. 532=A.I.R. 1945 P. C. 82= (1945) 1 M.L.J. 397 (P.C.)

Knowledge of the contents of a document ought not to be inferred from the mere fact of attestation. But an attestation may take place in circumstances which would show that the person attesting the document did in fact know all its contents. (Verma and Yorke, JJ.) SUNDER KUER v. SHAH UDEY RAM. 212 I.C. 168=16 R.A. 253=1944 A.W.R. (H.C.) 8=1944 A.L.J. 19=A. I.R. 1944 A.II. 42.

ATTORNEY. See LEGAL PRACTITIONER.

AUCTIONEER—Position and liabilities of—Sale not completed after initial deposit—Demand for return of deposit—Applicability of S. 230, Contract Act—Auctioneer's right to commission, law as to.

In England an auctioneer has always been regarded as a stake-holder and it has never been doubted that if he has received a notice from the purchaser to return the deposit in a case where the sale had gone off on account of the default of the seller, the auctioneer would be bound to return the deposit to the purchaser. There is nothing in the Indian Contract Act which is in any way inconsistent with the English Law on this subject. S. 230 of the Contract Act has got no application to the case where a demand for return of deposit is made. The primary liability to pay the commission to the auctioneer is on the seller and even if the former has a lien on the deposit with regard to his commission, the lien is ordinarily enforceable against a deposit when the deposit becomes the property of the seller. In certain circumstances on equitable

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nsiderations it may be possible to allow an actioneer to recover his commission from the sposit even against the purchaser. In a case here the conduct of the auctioneer is found to open to a certain amount of suspicion, he is of entitled to get his commission from the urchaser's deposit. (Dur, J.) KALKA PRASAD v. ARJU PRASAD. 199 I.C. 302=14 R.A. 361=1941 A.L. J. 756=1941 A.W.R. (H.C.) 365=1941 A.L. V. 1110=A.I.R. 1942 All. 90 (2).

AIL-See CR.P. CODE S. 496.

ANKER AND CUSTOMER—Bank appointed ecciver—Moneys realised as receiver put into its current ecount under Court's order—If become assets of Bank—Companies Act, S. 153.

Where pending the hearing of a suit relating to n estate a Bank is appointed Receiver of that state, the moneys realised by it as Receiver and eposited in its own current account under the irection of Court remain the moneys of the wners of the estate and do not become the assets of the Bank. The Receiver and the Bank in such case are the same person; and the Bank as a eceiver cannot become in law its own creditor by joing through the formality of opening a current account with itself. The fact that it does so under an order of Court cannot possibly alter he legal position. If therefore, the Bank mbarks upon a scheme of composition with its reditors under S. 153 of the Companies Act, it should frame a scheme on the footing that the noneys held by it as receiver do not form part of ts assets, and the Bank can be directed to deposit such moneys into Court. (Mukherja and Sen, JJ.) BHOWANIPORE BANKING CORPORATION, 1.TD. v. BEJOY KUMAR. 204 I.C. 222=15 R.C. 487=46 C.W.N. 910=A.I.R. 1942 Cal. 556.

Banker failing to repay money paid into current account—If guilty of offence under S. 409, I.P. Code. See PENAL CODE, S. 409. 45 C.W.N. 1071.

-Banker's Ilen—Trust money in hands of customer— Kight of bank to lieu on—Payee of cheque entrusting another to cash cheque and to obtain draft in name of payee—Person entrusted cashing chique and getting draft in his own name-Breach of trust—Suit by person entrusting to declare beneficial interest in draft— Maintainability—Bank's right to set-off amounts due to it by person obtaining draft—Prayer for recovery of amount of draft—If to be included.

The respondent endorsed a cheque drawn in her favour to the first defendant who was instructed to pay the appellant bank a certain amount on her (respondent's) behalf, to take as a loan a certain amount for himself for which he was to execute a promissory note in her favour, to pay a certain amount to herself in cash and to obtain a draft from the appellant bank in her name payable at Madras. The first defendant cashed the cheque and carried out all the instructions except in regard to the draft. He got the draft in his own name and not in the name of the respondent and did not endorse it over to her. The respondent, being unable to realise the amount of the draft, gave notice and then instituted a suit against the first defendant and the appellant bank for a declaration that she was entitled to the beneficial interest in the draft. The appellant pleaded that the first defendant owed a large amount to the bank and the bank was entitled to set-off the amount of the draft against the sums due by the first defendant.

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It was also contended that the suit for the declaration alone was not maintainable.

HGJ, (1) that the first defendant under the circumstances became a trustee for the plaintiff and by obtaining a draft in his favour he committed a breach of trust and that the plaintiff was entitled to the declaration prayed for; (2) that the plaintiff was entitled to sue for the declaration only and was not bound to include a prayer for recovery of the amount of the draft, because it was necessary for the plaintiff respondent to get her right to the amount of the draft declared before she could sue for recovery of the amount. (Somitys, J.) CHETTINAD MERCANTILE BANG, LTD, c. PICHAMMI ACHI. 1945 M.W.N 525 - 1945 Comp. C. 98 (1945) 2 M.L.J. 100.

Banker's lien. When attaches to money scienceal balance of account self subject to sen.

A banker's right of lien can only attach to money so long as it remains an ear-marked sum of money; while after it has ceased to be such a separate ear-marked sum of money and is represented only by a balance or account or debt due from the bank, no hen can continue to attach to it, though the right of the bank by way of set-off will not thereby be affected. (Fazl Ah, C. J. and Becvor, J.) RADHA RAMAN v. CHOTA NAGPUR BANKING ASSOCIATION, LTD. 23 Pat. 501=218 I.C. 402=11 B.R. 305=18 R.P. 47=1945 Comp.C. 4=1944 P.W.N. 473=A I.R. 1944 Pat. 368.

---Cheques-Acceptance-Practice See Neso-TIABLE INSRUMENTS ACT (XXVI of 1881) Ss. 6 AND 7. 71 I.A. 124=(1944) 2 M.L.J. 275. (P.C.)

Contract between-Law applicable-Bank having their only office in Travancore-Fixed deposit by customer residing in Bombay-Amount faid by him to Bank's agents in Bombay-Receipt issued in Travancore-Law governing transaction.

A Bank incorporated in Travancore and having their only office in that State wrote to the plaintiff residing in Bombay, on enquiry made by him, informing him of their rates of interest on fixed deposits and enclosing the necessary opening forms for fixed deposit account. They also informed him that remittance made to their account with a certain Bank in Bombay would be accepted by them at par. The plaintiff remitted a certain amount to the Bank in Bombay and wrote to the Bank at Travancore enclosing the executed opening form, and also the specimen signature card and requesting the issue of a fixed deposit receipt for two years in his name and the Bank did so. Some time later, creditor's petitions were presented to the Travancore Court for winding up the Bank, and the Bank thereupon obtained the sanction of the Court to a scheme of arrangement approved by the majority of creditors. A question arose as to whether the plaintiff was bound by this arrangement and as to the law governing the contract of deposit.

Held, (i) that the law which governed a contract depended upon the intention of the parties, express or implied, and if no intention was expressed in documents as in this case, the Courts were left to infer the intention by reference to considerations where the contract was made and how and where it was to be performed

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(ii) that the contract in this case was made by the offer by the plaintiff in the opening form accepted by the Bank by the issue of the deposit receipt and therefore, the contract of deposit was made at Travancore, (iii) that the terms of the deposit receipt which formed part of the contractual documents providing that the receipt must be sent in for payment to Travancore, pointed strongly to payment at Travancore, that therefore, the place where the contract was to be performed was Travancore and that consequently the law of that state which made the scheme of arrangement binding upon the plaintiff governed the transaction, and (iv) that the fact that the interest payments were made by a cheque on Bombay had very little hearing on the legal position. (Lord Atkin.) State Aided Bank of Travancore v. Dhrit Ram. 69 1.A. 1=1.L.R (1942) Kar. (P.C.) 7=1.L.R. (1942) Bom. 318 = 14 R.P.C. 115=1942 M.W.N.310=55 L.W. 289=198 I.C. 753=8 B.R. 490=1942 Comp. C. 80=46 C W.N. 826=44 Bom.L.R. 557=1942 A. W.R. (P.C.) 46=A.I.R. 1942 P.C. 6=(1942) 2 M.L.J. 256 (P.C.).

——Deposit in names of husband and wife of salary of husband—Loan by husband alone—Setoff of one against another—Right to claim—Presumption as to money standing in account of husband and wife. See Company—Winding up—Set-off. (1942) 1 M.L.J. 161.

——Draft—Stopping payment—Powers of Bank and purchaser. See NEGOTIABLE INSTRUMENTS ACT, S. 85-A. 47 P.L.B. 196.

----Lien-Right of banker to combine accounts of customer-Limitation.

By S. 171 of the Contract Act a banker can have a lien for a general balance of account against any goods bailed to him. But money deposited into a bank by a customer does not constitute a case of bailment, and the section, therefore, does not in terms apply in such a case. The Contract Act, however, is not exhaustive and deals only with certain parts of the law of contract, and in cases where the law in terms is not applicable, the principles of English law should be applied as rules, of justice, equity, and good conscience under S. 6 of the C. P. Laws Act. Under the English law, a banker has a lien on all the moneys of his customer in his hands. Where the customer has opened a deposit account and a loan account, the banker has the right to combine the two accounts and transfer one from the other if he so chooses to set-off or liquidate the debt. As a lien is a right of defence and not a right of action, the law of limitation does not apply to it. (Puranik, J.) SETH DEVENDRA KUMAR v. GULAB SINGH. 1945 N.L.J. 468.

——Loss of cheque intimated and payment countermanded—Payment under that cheque—Liability of Banker—Negligence.

Where a customer intimates to the Bank the loss of a particular blank cheque and the number of it is given and payment under it is contermanded but the money is nevertheless paid under such a cheque, the customer cannot be debited with the amount. The Banker is no doubt under an obligation to honour his customer's cheques but he is equally under an obligation not to cash them if he receives in good time express

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instructions of the customer countermanding payment though there is no express provision in the Indian law corresponding to S. 75 of the English Bills of Exchange Act which invalidates payment after a countermand by the customer, the Indian law recognizes a payment to be valid only when it is 'payment in due course' as difined in S. 10, Negotiable Instrument Act, (i.e.) in good faith and without negligence. (Niyogi, J.) BANSILAL ABIRCHAND v. SADASHEO. I.L.R. 1943 Nag. 687=215 I.C. 289=17 R.N. 43=1942 N.L.J. 139=1942 Comp.C. 116=A.I.R. 1944 Nag. 17.

---- Payee of cheque—If has cause of action against drawee banker,

The payee of a cheque has as a rule no cause of action against the banker on which it is drawn. (Panckridge, I.) Punjab National Bank, Ltd. v. Bank of Baroda, Ltd. 199 I.C. 802=14 R.C. 639=1941 Comp. C. 242=A.I.R. 1941 Cal. 372.

— [On appeal (Lord Wright) BANK OF BARRODA LTD. v. PUNJAB NATIONAL BANK LTD. 71 I.A. 124=48 C.W.N. 810=57 L.W. 571 =1944 Comp. C. 213=A.I.R. 1944 P.C. 58= (1944) 2 M.L.J. 275 P.C.]

——Post dated cheques—Certification by manager of Bank—Liability of Bank.

The Bank cannot plead, as against an innocent third party, their manager's failure to observe the instructions regarding certification of cheques. A manager is of course expected to conform to the canons of prudent banking, but he has authority to certify generally, and that includes, so far as third parties are concerned, the power to crtify imprudently or irregularly.

A Bank manager's authority to certify cheques generally includes as far as third parties are concerned, the power to certify imprudently or irregularly and hence as against an innocent third party the bank cannot plead their manager's failure to observe the instructions as to certification. (Punckridge, J.) Punjab National Bank, Ltd. v. Bank of Baroda, Ltd. 199 I.C. 802=14 R.C. 639=1941 Comp. C. 242=A.I.R. 1941 Cal. 372

[On appeal (Lord Wright) BANK OF BARDDA LTD V. PUNJAB NATIONAL BANK LTD.] 71 I.A. 124 E48 C.W.N. 810=57 L.W. 571=1944 Comp. C. 213=A.J.R. 1944 P.C. 58=(1944) 2 M.L.J. 275 (P.C.)

—Relationship—Fiduciary capacity—When arises—Moneys paid by party for the purpose of effecting specific transaction and credited in anamath account—Is held in trust—Insolvency of Bank—Right to preferential payment. OFFICIAL ASSIGNEE, MADRAS v. NATESAM PULLAI. [see Q.D. 1936. 40 Vol. I. Col. 273] 194 I.C. 728—14 R.M.41.

Trusit—Custamer having current account at one branch making over to that branch chaques drawn on another branch for realisation and eredit—Bank suspending payment before receipt of intimation by customer of realisation—Right to preferential payment.

A customer of the Bombay branch of the T.N. & Q. Bank, Ltd., having a current account in that branch, delivered on 16—6—1938, for realisation and credit in his current account, a cheque of

that date for Rs. 1,500, drawn in his favour on the Anderson street branch of the Bank at Madras and another cheque for sum of Rs. 433-2-0 drawn in his favour on the same branch. According to the course of dealings with the bank he could draw on the said bank only after the said amounts were realised and intimation thereof had been given to him. But before he received such intimation, the bank suspended payment. The amount of Rs. 1500 was realised on 18-6-1938, and the other amount on 20-6-1938, by the Anderson street branch at Madras. The customer claimed the amounts as held in trust for him.

Held, (1) that the proceeds of the cheques must be deemed to have been realised by the Bombay branch on the respective dates on which they were realised by the Anderson street branch; (2) that in regard to the amount of Rs. 1500, there was, on the facts, "ascertainment" that the proceeds had been realised by the bank, to make the amount available for drawing, the amount having been realised on 18-6-1938, and it being open to the customer to have easily ascertained that the amount was realised by the bank, but that in regard to the other amount of Rs. 433—2—0, it could not be held that there had been such ascertainment." The customer was therefore entitled to rank as an ordinary creditor in respect of the sum of Rs. 1,500 and as a preferential creditor in respect of the sum of Rs. 433—2—0. (Venkataramana Rao, I.) Modern Automobiles v. T.N. & Q. Bank, Ltd. 1942 M.W.N. 342—A. I.R. 1942 Mad. 377—206 I.C. 434—15 R.M. 975 =(1942) 1 M.L.J. 241.

### BANKER'S BOOKS EVIDENCE ACT (XVIII OF 1891), S. 2 (8)—Requirements.

An extract taken from the ledger books of a book was signed by the sub-accountant of the bank for the manager. It was not a true copy of the ledger entries. The certificate read "We certify that this is a true extract from the books of the bank."

Held, that it was not a certified copy of entries in a banker's book as defined in the Banker's Books Evidence Act. (Ba U and Shaw, JI.) FATIMA BEE BEE v. OFFICIAL TRUSTEE. 198 I.C. 564=14 R.R. 207=A.I.R. 1941 Rang. 344.

BAR COUNCILS ACT (XXXVIII OF 1926). 8.8—Madras Bar Council Rules, Rr. 1 (i), 16 and 22

—Advocate enrolled in Rangoon High Court before separation of Burma-Application to Madras High Court after separation for enrolmant there—Exemption from compliance with Madras Bar Council Rules— Power to grant—Enrolment fee under Art. 30, Stamp Act-If to be paid afresh.

The petitioner, an advocate of the Rangoon High Court, who had obtained the law degree of the Rangoon University, was enrolled as an advocate of the Rangoon High Court long before the province of Burma was separated from British India under the Government of India Act of 1935. As a result of the invasion of Burma by the Japanese, the petitioner came over to Madras where he was born, and applied to the High Court at Madras for enrolment as an advocate of that High Court. The Bar Council of Madras passed a resolution under the proviso to R. 16 of the Madras Bar Council Rules, recommending exemption from strict compliance with the rules

## BANKER'S BOOKS EVIDENCE ACT, 1891. | BAR COUNCILS ACT (XXXVIII OF 1926).

requiring study for one year as a pupil in the chambers of an advocate practising in Madras and the passing of the prescribed Examination, etc. The petitioner who had already paid the stamp fee under Art. 30 of the Indian Stamp Act to the Rangoon High Court for his enrolment there also applied for exemption from paying the stamp fee over again for his enrolment in the High Court at Madras.

Held, (1) that the case was a fit one for granting an exemption from strict compliance with the Madras B ir Council Rules relating to enrolment; (2) that the petitioner, having once paid the stamp fee, as required by Art. 30 of the Stamp Act to the Rangoon High Court, which had the status of an "Indian High Court" at that time, came within the exemption contained in that Article, and was not therefore bound to pay fresh stamp fee on his enrolment in the High Court of Madras. (Leach, C.J., Krishnaswami Ayyangar and Nomayya, JJ.) Krishnaswami, in re. I.L.R. (1942) Mad. 663=202 I.C. 306-15 R.M. 481=55 L.W. 327=1942 M.W.N. 763=A.I.R. 1942 Mad.455 = (1942) 1 M.L.J. 599 (F.B.)

-S. 10-Misconduct-Benami purchase of speculative interest in prospective litigation.

The purchase of a speculative interest in a contemplated litigation by an Advocate benami in the name of his mother, by concealing his identity as the real purchaser, denial of the fact of the benami purchase and assertion that the mother was the real purchaser and production of false evidence in support thereof amount to misconduct which upon a strict view of professional thics renders him unfit to be a member of the legal profession. (Thomas, C.J. and Ghulum Hasan, J.) Public Prosecutor v. Kanhaya Lal Shukla. 1942 O.W.N. 756:-1942 O.A. 614=204 I.C. 330=44 Cr.L.J. 197=1942 A.W.R. (C. C.) 358=15 R.O. 342=A.I.R. 1943 Oudh. 159.

-S. 10 - Misconduct - Advocate writing letter to clerk of magistrate requesting him to expedite application filed by him-Propriety.

It is mainfest that it is improper for an advocate to address a letter to a clerk in a Magistrate's office asking that an application filed by him should be dealt with urgently. The proper course for an advocate, if there was any delay, is to for an advocate, if there was any defay, is to bring the matter to the notice of the Magistrate himself. (Leach, C.J., Krishnaswami Aiyangar and Happell, JJ.) Kalyanasundaram Aiyar, Inre. I.L.R. (1941) Mad. 354=194 I.C. 587=14 R.M. 40=1941 A.W.R. (Supp.) 7 (1)=1941 A.L.W. 106=42 Cr.L.J. 602=1941 M.W.N. 56=53 L.W. 62=1941 O.W.N. 203=1941 O.A. (Supp.) 100=A.I.R. 1941 Mad. 230=(1941) 1 M.L.J. 128 (F.B.)

S. 10—"Misconduct" — Meaning of—If reasonable cause within meaning of Cl. 10. Letters Patent (Bombay). See Letters Patent (BOMBAY), CL. 10. 43 Bom.L.R. 250.

S. 10 (1) & (2)—Jurisdiction under— Exercise of—Principles—Misconduct of purely professional character and that which lies within ambit of criminal law.

S. 10 (1) of the Bar Councils Act gives to the High Court a very wide field of misconduct over

### BAR COUNCILS ACT (XXXVIII OF 1926), | BENAMI.

which to exercise its jurisdiction, but such jurisdiction is one which ought to be circumspectly exercised. Though a deliberate fraud of a criminal charactor committed on a client must necessarily amount to professional misconduct in an advocate, it does not follow that the special tribunal created by the Act is one which ought necessarily to deal, at any rate, in the first place, with every case in which an advocate is charged with committing a fraud or other crime in relation to his professional practice. A distinction should be drawn between that species of misconduct which is purely of a professional character and misconduct which also lies within the ambit of the criminal law. In the former case a special tribunal such as that which is contemplated by the Act is a proper one to deal exclusively with purely professional delinquencies. But it is doubtful whether it was the intention of the Act that a tribunal under it should in all cases usurp the functions of a criminal or civil court merely by reason of the accident of the person complained against being an advocate and the subject matter of the complaint being a matter connected with his professional practice. In a simple case of a charge of misappropriation against an advocate the matter should be dealt with under S. 10 of the Act only after the complainant has taken such steps, if any as he may be advised to take to establish either the guilt of the practitioner in question in a criminal court or his liability in a civil suit. Should either of these proceedings be taken and terminate in the framing of the charges levelled by the complainant against the advocate in question, then it will ant against the advocate in question, then it will be possible for him to approach the High Court again under the Act. (Collister, Bajpai and Braund, JJ.) In the matter of H, AN ADVOCATE, CAWNFORE. I.L.R. (1941) All. 592=195 I.C. 116=14 R.A. 19=1941 O. (Supp.) 512=1941 A. L.J. 390=1941 A.L.W. 684=42 Cr.L.J. 673=1941 A.Cr.C. 165=1941 A.W.R. (H.C.) 217=1941 O.W.N. 841=A.I.R. 1941 All. 280 (S.B.)

S. 10 (2)—Scope—Omission to frame charge before inquiry-Vitiates the proceedings.

It is obligatory on the part of a District Judge who is directed by the High Court under S. 10 (2) of the Bar Councils Act to hold an inquiry into the conduct of an Advoacte practising in the district who has been accused of misappropriation district who has been accused of misappropriation of client's money, to hold the inquiry after framing a charge. The failure on the part of the District Judge to frame a charge vitiates the whole of the proceedings. (Leach, C.J. Lakshmana, Rao and Kunhi Raman, J.). An Advocate, Ellore, In the matter of. I.L.R. (1944) Mad. 397 = 213 I.C. 380=17 R.M. 94=57 L.W. 97=1944 M.W.N. 129=A.I.R. 1944 Mad. 247=(1944) 1 M. I. 124 (FR) M.L.J. 124 (F.B.)

-Rules under R. 7-Scope-Mandatory or directory—Death of member of tribunal before signing report—Effect.

The direction in R. 7 of the rules of procedure under the Bar Councils Act that all members of the tribunal shall sign their findings is mandatory, if a member of the tribunal dies before the report has been completed, that is, drawn up and signed, the tribunal ceases to be properly constituted. In such circumstances the report of the surviving such circumstances are such circumstances. There is no presumption of advancement in the surviving such circumstances and agarwal JJ.) Sarbar Jahan v. Arzal Begam. 16 Luck, 341=192 I.C. 873=1341 O.L. R. 240=1941 A.W.R (C.C.) 93=1941 O.L. R. 240=1941 O.R. 1941 O under the Bar Councils Act that all members of the tribunal shall sign their findings is mandatory, If a member of the tribunal dies before the report has been completed, that is, drawn up and signed,

members of the tribunal cannot be taken into consideration by the Court, and a new tribunal must be constituted and the investigation proceeded with de novo. (Leach, C.J. Mockett and Kuppuswamy Avyar, JI.) An Advocate, In the matter of. I.L.R. (1942) Mad. 428=199 I.C. 149 = 14 R.M. 554=55 L.W. 42=1942 M.W.N. 124 (I)=A.I.R. 1942 Mad. 267=(1942) 1 M.L.J. 160

BENAMI-Advancement-Deposit in bank - Joint account-Principle of advancement - Applicability-Onus.

The general rule of law is that where a person with funds, supplied by himself, buys property in the name of another there is a resulting trust in favour of the former, the beneficial interest being in him though the ostensible ownership is in the latter. In England an exception had been engrafted on this rule by the Court of Chancery, that where the purchase is made ostensibly in the name of wife or child, there is a pres-umption of an intended advancement. But no such presumption arises under the Indian Law. The rule of Indian law is not confined to cases of purchasers in the name of wife or child, but applies to transactions effected in the name of a near relative like a nephew. Again, its operation is not limited to purchases of immovable property only but is applicable to deposits in banks made by a person in the joint names of himself and his wife or child or near relative payable to either or survivor. The onus of proving the "contrary intention" is on the person who alleges advancement in his or her favour. (Tekchand and Beckett, JJ.) PUSHKAR NATH v. SHAMBU NATH. 212 I.C. 494=16 R.L. 297=A.I.R. 1943 Lah. 321

-Advancement-Doctrine of-Applicability India-Purchase by father or husband in name of child or mife-Onus-Result of failure to discharge it.

The English equitable doctrine of advancement is not applicable to India. Hence where a father or husband pays the money and purchases the prperty in the name of a child or wife as there is no presumption of advancement the burden of proving lies on the child or wife to show that the father or husband had put them into their names by way of gift or advancement. If they fail to prove this the presumption would arise that the father or husband who provided the money is the rightful owner. (Braund and Yorke, JJ.) HASAN RAZA v. ASHFAQ-UN-NISSA. 1942 A.L.W. 324.

Advancement-Doctrine of-If applicable to Indian Christians when husband purchases in name of wife. See Trusts Act, S. 82. (1942) 1 M.L.J. 528.

-Advancement--Money deposited by husband in bank in names of himself and his wife-Presumption as to See COMPANY-WINDING UP-SET OFF. (1942) 1 M.L.J. 161.

-Alvancement-Presumption of-Applicability to India.

### RENAMI.

-Bogus sale to defraud creditors-Transfer by benamidar-Suit for possession by transferee against owner-Plea of fraudulent nature of benami sale in defence-Availability.

Where the real owner of a property transferred to a benamidar his property to defraud creditors and died and the benamidar transferred it to a person who was aware of the fraudulent nature of the transaction; in a suit by such transferee against the brother of the original owner for possession the defendant could set up the fraudulent nature of the original benami sale as a defence and the maxim in pari delicto potior est conditio possidentis and the maxim ex turpi causa non oritur actio would prevail against the principle nemo suam turpitudinem est audiendus. (Digby, J.) BISHWANATH v. SURAT SINGH. 204 I.C. 423=15 R.N. 158=1942 N.L.J. 586=A.I.R. 1943 Nag. 113.

-Burden of proof.

The onus of proving that a transaction is benami on the person alleging it. (Divatia and Lokur, JJ.) RATANCHAND FAKIRCHAND v. DEOCHAND. 47 Bom. L.R. 871.

-Burden of proof.

The burden of proving the banami nature of a transaction is on the party alleging it. (Krishnaswami Ayyangar and Kunhi Raman JJ.) KAHA-SAM PILLAI v. SIVABHAGYAMMAL. I.L.R. (1943) Mad. 794=1943 M.W.N. 113=56 L.W. 116=A. I.R. 1943 Mad. 373=210 I.C. 180=16 R.M. 391 =(1943) 1 M.L J. 203.

-Burden of proof-Property in name of Maho. medan wife.

Where property stands in the name of a Mahomedan wife, the burden lies on those who allege that it had been purchased benami for the benefit of her husband, to establish the correctness of their allegations. In such a case there is no presumption that the property belongs to her husband and is not the wife's property. (Yorke and Agarwal, JJ.) SARDAR JAHAN V. AFZAL.
BEGAM. 16 Luck. 341=192 I.C. 873=13 R.O. 415=1941 A.W R. (C.C.)93=1941 O.L.R. 240= 1941 A.L.W. 328=1941 O.W.N. 208=1941 O.A. 154=A.I.R. 1941 Oudh. 288.

### -Burden of proof—Salecercificate.

If a sale certificate stands in the name of a person, the Court is certainly bound to presume that he is the real owner of the property and the burden lies upon the party who alleges that such person is a benamidar to rebut the presumption and show that the apparent state of affairs is not the real state. (Mukheriea and Ellis, 11.) JITENDRA NATH SUR v. AMARENDRA NATH SUR. 79 C.L.J. 248.

—Burden of proof—Test to determine character of transaction—Circumstances to be considered—Doctrine of advancement—Applicability in India. SABHAGIBAI v. PERKASH, CHAND. [see Q.D. 1926—'40 Vol. I. Col. 283.] 191 I.C. 111 = 13 R.S. 125.

Decree for costs against benamidar—If can be executed against beneficial owner.

The executing Court is to execute the decree as it stands and cannot be asked to enter into a

### BENAMI.

who is beneficially entitled under the decree or against whom the decree is to be executed. If a decree on the face of it awards costs against the benamidar, the executing Court cannot execute it against the beneficial owner. (Iqbal Ahmad, C.J., Ganga Nath and Dar, JJ.) CHANDRA SHEKHAR v. MANOHAR LAL I.L.R. 1942 All. 832 (F.B.)=201 I.C. 695=15 R.A. 79=1942 A.L.J. 367=1942 A.W.R. (II.C.) 241=1942 A.L.W. 478=A.I.R. 1942 All. 233.

-Nature and incidents of benami-transactions--Purchase by father in name of son . Onus -- Effect of S. 82, Trusts Act.

In the case of benami transactions, in the sense of a real transaction the benamidar becomes a trustee holding on a resulting trust. Hence in the case of a real as opposed to a purely fictitious purchase by a father in the name of his son in which the father admittedly provided the purchase money, a resulting trust in all cases arises in the father's favour, unless there is positive evidence of an advancement or gift. And, if a gift is alleged by the son in whose name the transaction stands, it is for him to prove it. S 82 of the Trusts Act does not in any way alter the law. It says no more than that the Court has to be satisfied of two things before a resulting trust can be declared; first that some one other than the actual transferee provided the purchase money and secondly, that the person did not intend the money to be a gift. It does not say how the Court is to be satisfied of this latter fact and still less upon whom the onus of proving it is to lie. (Yorke and Bround. IJ.) Sindiga Begam v. ABBUL JABBAR KHAN, I.L. R. (1942) All 478=1942 A.L.W 512 206 I.C. 275=15 R.A. 503=1942 A.L.J. 534 1942 A.W. R. (H.C.) 197=A.I.R. 1942 All. 308.

-Nature of transaction -- Gift by A to W's wife to benefit B but to save property from B's creditors.

If A makes a gift of his property to B's wife with a view to benefit B but wishing to save it from B's creditors, the transaction is not a benami transaction unless there is a resulting trust in favour of A. The fact that R's wife's name is put in instead of B's and that therefore she holds it benami for B. does not make her a benamidar. (Stone C. J.) RATNIBAL T. KHEMRAJ GANPAT. I.L.R. (1944) Nag. 125-214 I.C. 332 =1944 N.L.J. 85=A I.R. 1944 Nag. 133.

-Part only of transaction found to be such -- Relief -Onus in case of Benami.

Per Allsop, J .- The law recognizes henami transactions, that is, it will enforce the rights of the real owner of any property against the ostensible owner whether the property is a whole or a share. The real owner has to prove the facts on which he relies, but if the Court believes that those facts exist, it must act in accordance with them.

Per Mathur, J .- In a case where it has to be decided whether a transaction is benami or not it would not be open to a Court to hold that a part of it was genuine and the other part was benumi. In a case to have it declared that a certain transaction standing in the name of a certain person was benami the initial onus lies heavily on the discussion of, or to decide the question as to plaintiff in the first place to show by clear and

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convincing proof that it was with his or her money that the property was purchased though not in his or her name; and secondly that he or she had been in initial enjoyment of the same since the date of the purchase. (\*\*Illsop\* and. Mathur, JJ.) Bans Narain v. Chaudrani Kuer. 215 I.C. 138=1944 O.A. (H.C.) 99=1944 A.W. R. (H.C.) 99=1944 A.L.J. 121=17 R.A. 66=A.I. R. 1944 All. 130.

——Presumption — Joint Hindu family — Bengal School—Conveyance in wife's name—Presumption.

The law is well-settled that the apparent state of things must be presumed to be the real state of things that is to say, if a conveyance stands in the name of one, he would be presumed to be the beneficial owner unless the contrary is shown by the other side. This presumption is modified by the further presumption which is peculiar to a Hindu joint family, namely, that if the person in whose name the conveyance stands is a co-parcener of a Hindu joint family, the presumption would ordinarily be that the purchase was made in his name for the benefit of all the co-parceners of the said Hindu joint family. But this further presumption does not apply where the conveyance stands in the name of a non-co-parcener of a Hindu joint family, as for instance, wives, daughters-in-law, or sons in a Bengal family who are not co-parceners in a family governed by the Bengal School. (Mitter, J.) Surennraballa Debi v. Bhupendra Kumar. 45 C.W.N. 177.

—Presumption--Purchase by Indian Christian husband in name of wife-Effect-Doctrine of advancement-Application of. See Trusts Act, S. 82. (1942) 1 M.L.J. 528.

### ----Presumption—Purchase in wife's name.

The proposition that there is a presumption in India that a purchase made in the name of the wife is a purchase for her husband is some what wide. It ought to be stated in the form that as benami purchases in the name of wives are very frequent in India, slight evidence would be required to show that the purchase was made really for and on behalf of the husband, the wife being a mere benamidar, (Mitter, J.) Surendrabala Debt v. Bhupendra Kumar. 45 C. W.N. 177

### BENGAL ACTS REGULATIONS ETC.

Agra and Assam Civil Courts Act. (XII of 1887.)

Agricultural Debtors Act (VII of 1936) Alluvion and Diluvion Act (IX of 1847)

" " Regulation (XI of 1825)

Board of Revenue Act (1913)

Cess Act (IX of 1880).

Co-operatitve Societies Act(XXI of 1940) Cotton Cloth and Yarn Control Order, (1943)

Court of Wards Act (IX of 1876) Estates Partition Act (V of 1897)

Excise Act (V of 1919)

Food Adulteration Act (VI of 1919)

General Clauses Act (I of 1899)

# BENGAL, AGRA & ASSAM C. C. ACT, 1887.

Ghatwali Lands Regulation (XXIX of 1814)

House Rent Control Order (1942)

Land Registration Act (VII of 1876)

Land Revenue Assessment (Resumed lands) Regulation (II of 1819).

Land Revenue Sales Act (XI of 1859.)

Land Revenue Settlement Regulation (VII of 1822)

Licensed Warehouse and Fire Brigade Act (I of 1893)

Limitation Regulation (II of 1805)

Local Self Government Act (III of 1885)

Money-lenders Act (VII of 1933)

Money-lenders Act (X of 1940)

Municipal Act (XV of 1932)

Non-Agricultural Tenancy (Temporary Provisions) Act (IX of 1940)

Patni Regulation (VIII of 1919)

Permanent Settlement Regulation (I of 1793)

Public Demands Recovery Act (III of 1913)

Public Gambling Act (II of 1887)

Rationing Order.

Rent Act (X of 1859)

Rent Recovery Under Tenures Act (VIII of 1865)

Revenue Commissions Regulation (I of 1829)

Revenue Free Lands (Non-Badshahi Grants) Regulation (XIX of 1793)

Revenue Free Lands Regulation (VIII of 1800)

Sair Regulation (XXVII of 1793)

Sanitary Drainage Act (VIII of 1895)

State Prisoners Regulations (III of 1818)

Survey Act (V of 1875)

Tenancy Act (VIII of 1885)

Village Chaukidari Act (IV of 1870)

Village Self Government Act (V of 1919) Wakf Act (XIII of 1934)

### BENGAL ACTS

See also CALCUTTA ACTS.

Cotton Cloth and Yarn (Emergency) Search Order (1945)

High Court Rules.

House Rent Control Order (1943)

Improvement Act (XVIII of 1911)

Municipal Act (III of 1899)

" " (III of 1923)

Tenancy Act (I of 1880)

BENGAL, AGRA AND ASSAM CIVIL COURTS ACT (XII OF 1887), S. 8 (2)—Additional District Judge—Jurisdiction to deal with application for registration of wakf estate when transferred to him by District Judge. See Mussalman Wakf ACT, S. 2. 1942 P.W.N. 94

# BENGAL AGRICUL, DEBTORS' ACT, 1936.

\_\_\_\_\_S. 13 (2)—Order of re-distribution of business \_\_Effect of \_\_If effect transfer of jurisdiction.

An order of a District Judge under S. 13 (2) of the Civil Courts Act does not effect a transfer of jurisdiction. It merely distributes, as a matter of convenience and with reference to certain local areas, the civil business amongst two or more Courts, each of which has jurisdiction over the whole area. In such cases neither of the Courts would lose the Jurisdiction which it acquired under S. 13 (1) of the Act. (Mukherjca and Biswas, JJ.) MASRAB KHAN v. DEBNATH MALL ILR. (1942) 1 Cal. 289=201 I C 234=15 R C. 144=46 C.W.N. 141=76 C.L.J. 255=A.I.R. 1942, Cal. 321.

\_\_\_\_\_S. 21-Valuation of suit-Trial Court's decision-If determines right of appeal.

The decision of the trial court on the question of valuation of the suit for purposes of jurisdiction must be taken as final and conclusive during all the stages of the suit and must determine the right of appeal under S. 21. Such a decision is conclusive irrespective of what the parties might agree later on to be the actual market-value of the properties in suit. (Mukherjea and Roxburgh, JJ.) PRIYA NATH ROY v. SRIDHAR CHANDRA ROY. 201 I.C. 456=15 R.C. 200=A.I.R. 1942 Cal. 50.

BENGAL AGRICULTURAL DEBTORS'
ACT (VII OF 1936 S. 2 (6) (a) Effect of — Act
if affects Original Side decree of High Court
—such decree transmitted to District Court for
execution—Notice from Board—If operates to
stay its execution.

The Bengal Agricultrual Debtors' Act does not affect the High Court in the exercise of its ordinary original civil jurisdiction even after the amendment made in S. 2 by insertion of sub-S (6) (A) by Act VIII of 1940. A notice under S 34. of the Act does not operate as a stay of execution of a decree passed by the High Court in the exercise of its ordinary original civil jurisdiction even when it has been transmitted to the District Court for execution, as the word "debt" as defined in S. 2 does not include the liability founded upon such a decree. (Das. J.) HAZAREE-MUIL v. BALARAM. I.L.R. (1943) 2 Cal. 407=210 I.C. 445=16 R.C. 426=47 C.W.N. 752=A.I.R. 1943 Cal. 640.

——S. 2. (6a)—Munsif's Court exercising Small Cause jurisdiction—If Civil Court.

The Court of a Munsif exercising the jurisdiction of a Court of small causes is a Civil Court within the definition given in S. 2. (6a) of the Bengal Agricultural Debtors' Act. (Roxburgh J.) FAZAL AHMED v. ETIM ALI. 200 I.C. 341=15 R.C. 58=46 C.W.N. 391=A.I.R. 1942 Cal. 337.

——S. 2 (6a)—Munsif's Court invested with Small

A Court of Munsif invested with Small Cause powers is a Civil court within the meaning of the definition given in the Bengal Agricultural Debtors' Act. (Mukherjea and Blank, JJ.) SUBODH CHANDRA MAITY V. BIDHO BHUSAN DAS. 47 C.W.N. 543.

\_\_\_\_S. 2 (6a)—Small Causes Court—If Civil Court.

### BENGAL AGRICUL, DEBTORS' ACT, 1936.

A Court of Small Causes constituted under the Provincial Small Cause Courts Act is not a Civil Court" within the meaning of the Bengal Agricultural Debtors' Act. (Edgley and Biswas JJ.) LILABATI DEBI v. AVSHA KHATUN. 202 I.C. 13=15 R.C. 296=75 C.L.J. 107=46 C.W.N. 390=A.I.R. 1942 Cal. 466.

\_\_\_S, 2 (8)—"Debt"—What constitutes.

Per Mukherjea, J.—The definition or description of debt as given in S. 2 (8) of the Bengal Agricultural Debtors' Act has both a positive and negative aspect, and in order that a particular liability may rank as a debt, it is not enough that it is not included in any one of the exceptions mentioned in the section, it must fulfil the positive test of being essentially the liability of a debtor.

Per Biswas J.—In order to constitute a debt under the Bengal Agricultural Debtors' Act, two conditions must be fulfilled, namely, (1) that there must be a present obligation to pay on the part of the debtor, and (2) that this obligation must be in respect of a liquidated claim or demand against him. Where there is uncertainty as to either of these points uncertainty as to the Obligation to pay, though not necessarily as to the quantum of the claim, there will be no debt at all. (Mukherjea and Biswas JJ.) [ABED SHEIKH V. TAHER MALLIK 45 C.W.N. 519=73 C.L.J. 234=197 I.C. 606=14 R.C. 358=A.I.R. 1941 Cal. 639.

S. 2 (8)—"Debt"—Liability of defendants under preliminary decree for mesne profits. See BENGAL AGRICULTURAL DEBTORS' ACT, S. 34. 45 C. W.N. 519.

— Ss 2 (8) (iii) and 34—Money decree for share of bhag produce—Not a debt—Execution of such decree—Cannot be stayed by notice. HEMENDRA NATH RAY v. PURNA CHARAN. [see O.D. 1936—'40 Vol. 1. Col. 3230] I.L.R. (1941) 1 Cal. 132—13 R.C. 499—194 I.C. 367.

S. 2 '(9)—Adhiars bargadars and bhagdars—not debtors. Hempinga Nath Ray 2. Purna Charan. [see Q. D. 1936—'40 Vol. I, Col. 3231] I.L.R. (1941) 1 Cal. 132=13 R.C. 499=194 I.C. 367.

S. 8—Application by creditor—Applicant found not to be creditor—Application, if must be dismissed. S. 8 of the Bengal Agricultural Debtors' Act makes it quite clear that the Debt Settlement Board acquires jurisdiction only on an application made either by a debtor or by a creditor. If the man who makes the application under S. 8 is found to be not the creditor of the debtor whose debts he wants to settle, the application must be dismissed without going into the other questions raised. (Mitter and Latifur Rahman, 1/1.) MONMOHAN ROY v. SANTILOCHAN ROY. 48 C.W. N. 288.

It is only a debtor that can make an application for settlement of his debts under S. 8 of the Bengal Agricultural Debtors' Act. An application to the Board specifying only one debt and denying liability for it, i not maintainable and any order passed thereon is void's (Mukherica and Ellis, J.). SRIKANTA KUMAR v.

ATUL KRISHNA BISWAS. 49 C.W.N. 143 = 219 I.C. 303 = A.I.R. 1945 Cal. 214.

-S. 8 (5)—Application dismissed by Board under S. 17 (1) - Second application to another Board-Maintainability.

Where an application by a debtor to a Board is dismissed by it under S. 17 (1) of the Bengal Agricultural Debtors' Act, a second application by him to another Board relating to the same debt is not maintainable. (*Henderson. J.*) PURNA LALL NANDAN v. BHUPENDRA CHANDRA DUTT. 192 I.C. 544=13 R.C. 320=45 C.W.N. 82=A.I. R. 1941 Cal. 31.

-S, 8 (5) - Notice on second application before Board-Validity-Jurisdiction of Civil Court to decide.

The question as to whether a Board had jurisdiction to entertain a second application is one for the Board to decide. The Civil Court receiv-ing notice of it has no jurisdiction to consider whether the notice is valid or not. (Henderson, HASINA BIBI V. BATA KRISHNA DAS. 48 C. W.N. 141.

-S. 8 (5)—Scope—Further application, limited to debts not included in first.

It is doubtful if the view that S. 8 (5) of the Bengal Agricultural Debtors' Act, which permits a further application should be limited to cases where the debtor, through oversight, had omitted to mention a particular debt in his first application is sound. (Roxburgh and Blank, JJ.). JADU MONDALANI v. SAROJINI CHAUDHURANI. I.L.R. (1944) 1 Cal. 423=47 C.W.N. 888=A.I. R. 1945 Cal. 100.

-S. 8(5) - Scope – Second application in respect of debt included in first-If entertainable by Board.

S. 8 (5) of the Bengal Agricultural Debtors' Act obviously contemplates a case where a debt incurred before the first application was omitted from it through inadvertence or otherwise. In any case a second application in respect of a debt included in the first application is not entertainable by the Board, if the first application was dismissed under Sub-S. (3) of S, 13 or under Cl. (b) (ii) of Sub-S. (1) or Sub-S (2) of S. 17 of the Act. (Mukherjea and Ellis, Jf.) BIBHUTI BHUSAN ROY v. BHOLANATH SINHA. 49 C.W.N 151 = A.I.R. 1945 Cal. 326.

-S. 8.(5)—Scope—Second application relating to same debt after dismissal of first—not maintainable. Kali Sundar Roy v. Khum Chand. [see Q.D. 1936-40 Vol. I. Col. 3231] 13 R.C. 244=191 I.C. 421.

-S. 13 (2)—Notice, if includes general notice.

The word "notice" in S. 13 (2) of the Bengal Agricultural Debtors' Act should not be given an artificial limitation. It means not only the special notice provided for in Sub-S. (1) but also the general notice requiring all creditors to submit a statement of the debts due to them. (Henderson, J.) MATILAL PARAK v. PASHUPATI-MISRA. 48 C.W.N. 152.

-S. 13 (2)—Order that debt is nil—Legality.

It is impossible for a Board to pass an order under S. 13 (2) of the Bengal Agricultural Debtors' Act saying that the debt is nil. Such an order has no legal effect of sny soit. (Hender son, J.) Biraja Mehan Bhattachapjee v. Q.D,-12

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ABANINATH. I.L.R. (1941) 2 Cal. 430=45 C.W. N. 817=200 I.C. 105=14 R.C. 668=75 C.L.J. 87=A.I.R. 1942 Cal. 227.

-Ss. 13(2) and 34—Order under S. 13(2)—If terminates proceedings before Board-Effect of, on notice under S. 34.

An order under S. I3 (2) of the Bengal Agricultural Debtors' Act does not terminate the proceedings before the Board. The position is that they continue to be pending before the Board and until they are disposed of in some way or other, notice issued to the Civil Court under S. 34 remains a good notice and the Civil Court cannot direct the execution proceedings to proceed. (Henderson, J.) BIRAJA MOHAN BHATTACHARJEE v. ABANINATH. I.L.R. (1941) 2 Cal. 430-45 C.W.N. 817-200 I.C. 105-14 R.C. 668 =75 C.L.J. 87=A.I.R. 1942 Cal. 227.

-S. 18-Question if Independent is barred by limitation - Jurisdiction of Board to decide.

The Board has jurisdiction to determine the question of the existence of the debt and that implies the determination of the further question whether it is barred under the law of limitation. The fact that the debt is based on a decree of Civil Court, makes no difference. The decision of the Board, if erroneous, cannot be treated as a nullity, but must be appealed against. (Henderson, J.) HAFIZUDDIN MANDAL v. MAHIM CHANDRA GHOSH. 49 C.W.N. 541.

-S. 18 (4)-Revisional jurisdiction of High Court.

The term "Civil Court" in S. 18 (4) of the Bengal Agricultural Debtors' Act includes the High Court exercising revisional jurisdiction, under S. 115, C. 1. Code. The High Court cannot, therefore, interfere in revision with an order made by the Board settling a debt under S. 18 of the Bengal Agricultural Debtors' Act. (Henderson, I) HARUPADA DATTA v. RAM SRISTI KUNDU, I.L.R. (1942) 2 Cal. 478=207 I.C. 615=16 R.C. 128=A.I.R. 1943 Cal. 250.

-S. 20 (as amended)—Applicability—Pending proceedings.

S. 20 of the Bengal Agricultural Debtors' Act as amended by Act VIII of 1940, applies to proceedings pending at the time the Amending Act came into force. (Henderson, J.) RAM RANJAN DAS v. MAHARAJ BAHADUR SINHA. I.L.R. (1943) 1. Cal. 357=47 C.W.N. 239=212 I.C. 72=16 R. C. 578=A.I.R. 1944 Cal. 88.

-S. 20 (as amended) - Applicability-Pending

S. 20 of the Bengal Agricultural Debtors' Act, as amended by Act VIII of 1940, applies to a suit pending at the time when the Amending Act came into force, as that Act has not touched the substantive rights of the parties but has merely altered the procedural law by changing the forum in which a dispute as to whether a particular inability is or is not a debt is to be determined. (Nasim Ali and Blank, JJ.) BIRESWAR MORALY. INDU BHUSAN KUNDU. I.L.R. (1943) 1 Cal. 134=209 I.C. 412=16 R.C. 360=46 C.W.N. 1020=A.I.R. 1943 Cal. 573.

8. 20 (as amended)—Applicability—Proceedings before Board terminating before amendment.

S. 20 of the Bengal Agricultural Debtors' Act, as amended in 1940, has no application to a case where the proceedings before the Debt Settlement Board and before the Appellate Officer had terminated before the amendment came into force. A decision arrived at by the Board before the amendment as to whether a liabi-Iity amounted to a debt or not can, therefore, be questioned by a Civil Court. (Mukherica and Akram. JJ.) SURENDRA NATH v. HARAN CHANDRA. 49 C. W.N. 592.

-(as amended by Act VIII of 1940) Ss. 20 and 34-Application under S. 174, B.T. Act, pending when amending Act came into force-Notice for stay-Question if lability is debt-Power of Court to decide.

S. 20 as amended applies to pending proceedings. Where an application under S. 174 B. T. Act, remains undisposed of when the Amending Act comes into force, the executing proceeding must be deemed to be pending within the meaning of the Explanation to S. 34 as it cannot be said that the sale has become absolute. S. 20 as amended therefore, applies to the execution decided only by the board. (Henderson, J.) RAM RANJAN DAS 7. MAHARAJ BAHABUR SINHA. I.L. R. (1943) 1 Cal. 357=47 C.W.N. 239=212 I.C. 72=16 R.C. 578=A.I.R. 1944 Cal. 88.

-Ss. 20 and 18=Powers of Board-Decisions of question if transaction between parties is mortgage of sale.

S. 20 of the Bengal Agricultural Debtors' Act is not exhaustive of the matters which a Board may or may not decide. The power of the Board under that section to decide whether a liability is a debt or not includes the power to decide whether or not there is a liability. Further a question as to the existence of a liability comes within the terms of S. 18 of the Act which expressly empowers a Board to decide whether a debt exists or not. Consequently the Board has jurisdiction to decide whether a transaction between the parties amounts to a mortgage by conditional sale creating the relationship of debtor and creditor between them, or to an out and out conveyance with a condition for repurchase. (Biswas and Latifur Rahman II.) BAZINR RAHMAN V. AMIRADDIN. 48 C.W.N. 699=A.I.R. 1944 Cal. 401.

-S. 20 (as amended)—Retrospective effect. S. 20 of the Bengal Agricultural Debtors' Act as amended by the Amending Act VIII of 1940 is not attracted to a case where the application for settlement of debt was presented to a Board before the Amending Act came into force and the notice under S. 34 of the Act was also issued by the Board before that date. (Mukheriea and Biswas, IJ.) JABED SHEIKH v. TAHER MALLIK. 45 C.W.N. 519=197 I.C. 606=14 R.C. 368=73 C.L.J. 234=A.I.R. 1941 Cal. 639.

-S. 26 (a)—"Arrears of rent payable under such award"-Meaning of.

The words "arrears of rent payable under such

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of it. The landlord is, therefore, entitled to include in a suit for subsequent rent the entire amount of arrears payable under the award and not only the instalment of such arrears which had become payable on the date of the suit. (Bisters, I.) Sashikanta Acharva C. Aptababbin Bepari. 47 C.W.N. 680.

Ss 27 (1) and 25 (1) (e) -Award converting usufructuary into simple mortgage Jurisdiction of Board. Fazlur Rahman Sarkar T. Atal. Behary Ghose, [see Q. D. 1936 '40 Vol. 1. Col. 3231.] 193 I.C. 254-13 R.C. 386:-42 Cr.L.J. 359:-- A.I.R. 1941 Cal. 123.

-S. 33—Creditor failing to avail himself of certificate procedure to realise award amount-Suit to recover such amount. Maintainability.

A creditor who fails to avail himself of the certificate procedure under 8.28 (1) of the Bengal Agricultural Debtors' Act within the prescribed period to recover the amount payable under an award, is entitled to sue for its recovery amended therefore, applies to the execution maked, is entirely to the restrictions proceeding and the executing court cannot in a Civil Court subject only to the restrictions ignore the notice of the Board under S. 34 on contained in S. 35 (3) of the Act. Such a suit the ground that there was no debt within the is not barred by the provisions of S. 33 of the meaning of the Act, as that question can be Act, as at the date of the suit there is no debt for decided only by the board. (Henderson, L.) RAM which any amount is still "payable under the RANJAN DAS T. MAHARAJ BAHABUR SINHA. I.L. award" within the meaning of cl. (b) of that the still are also as a still section. (Mukherjea and Biswas, II.) NALINI KANTA MAITY v. BROJOMOHAN PARA. 199 I.C. NALINI 450 14 R.C. 557 45 C.W.N. 466 A.I.R. 1941 Cal. 361.

> -Ss. 33, 34 and 35-Sale held in execution during pendency of application before Board-Validity-Notice for stay not issued by Board.

> Ss. 33, 34 and 35 of the Bengal Agricultural Debtors' Act must be read together. A sale held in execution of a decree is valid even though at the time of the sale an application for the settlement of the decretal debt was pending before the Debt Settlement Board, if no notice was issued by it under S. 34 of the Act. The fact that the decree holder was aware of such an application and he allowed the sale to proceed without intervening, makes no difference, (Edgley, J.) SREEDHAR CHANDRA v. SUPHINDRA NATH. 47 C.W.N. 506.

> -Ss. 33 and 34-Sale held in violation of-If nullity-Remedy of judqment-debtor.

> An execution sale held in violation of the terms of Ss. 33 and 34 of Bengal Agricultural Debtors' Act is a nullity, and the judgment-debtor can get rid of such a sale by an application under S. 47, C. P. Code. (Henderson, J.) KISHOREGANJ CO-OPERATIVE BANK, LTD. 70. RUK MINI KANTA BHATTACHARJYA. 213 I.C. 381-17 R.C. 10-48 C.W.N. 359-A.I.R. 1944 Cal. 231.

-S. 33-Small Cause Court decree transferred for execution to Civil Court Decree made subject-matter of award by Bourd-Transferee Court, if can entertain application for execution-Section, if applies to pending cases.

An application under O. 21 R. 10, C. P. Code, made to a transferee Court which is a Civil Court in a case in which a Small Cause Court award" in S. 26 (a) of the Bengal Agricultural decree has been transferred to it for execution due and not merely to any particular instalment the meaning of S. 33 of the Bengal Agricultural

Debtors' Act. The transferee Court is not therefore competent to entertain that application except in accordance with S. 29 (5) of the Act if the Debt Settlement Board has made an award in respect of the decree. In such a case the decree-holder must remain content with such relief as he may obtain by executing the decree in the Small Cause Court. S. 33 of the Bengal Agricultural Debtors Act has however, no application to pending cases. It will not bar the application under O 21, R. 10, C. P. Code, if the judgment-debtor had not applied to the Debt Settlement Board when that application was entertained. (Henderson, J.) SUDHANSU KUMAR PAL v. NUR MAHUMED HAZI. I.L.R. (1944) 1 Cal. 312=77 C.L.J. 338=A.I.R. 1944 Cal. 232= 47 C.W.N. 725.

-S.33—Suit for ejectment under S. 48 C of the Bengal Tenancy Act without claim for arrears of rent-is not one in respect of debt constituted by arrears of rent. MYMENSINGH LOAN OFFICE, LTD. v. BASIR SHEIKH [see O D. 1936 40 Vol. I. Col. 3231] 191 I.C. 225=13 R.C. 254.

-S. 34—Applicability—Civil Court in Bengal executing decree passe by Court not subject to Act—Liability under decree—If 'debt.'

S. 34 of the Bengal Agricultural Debtor's Act applies to the execution proceedings in a Civil Court in Bengal. The fact that the decree was passed by a Court which is not subject to the Act is really irrelevant. The liability under the decree is a debt within the meaning of the definition in S. 2 (8) of the Act. Further, if there is any dispute about it is a question to be decided by the Board. (Henderson. J.) Kalidas Charravarty v. Kalidas Mondal. 48 C.W.N. 499.

S. 34—Applicability—Mortgage sale set aside under O. 21, R. 90 C. P. Code, by executing Court—order of remand by High Court—subsequent notice for stay-balance of purchase money deposited by auction purchasers before notice-Executing Court, if bound to stay proceedings.

A Sale held in execution of a mortgage decree was set aside by the executing Court on an application filed by the judgment-debtors under O. 21, R. 90 C. P. Code and an appeal therefrom was also dismissed. But the High Court in revision remanded the case for a hearing on the merits. The executing Court received a notice under S. 34 of the Bengal Agricultural Debtors Act before it proceeded to hear the application for setting aside the sale pursuant to the order of remand. The auction-purchasers deposited the balance of the purchase-money before the notice and by that deposit the entire decretal dues were satisfied.

Held, that the order of the High Court had the efficit of wiping off the debt retrospectively and that as the debt was satisfied by the sale S. 34 of the Bengal Agricultural Debtors' Act had no application and that consequently the executing Court was not obliged to stay the proceedings. (Edgley and Akram, I J) BIJOY GOBINDA BASU v. Noakhali I.oan Office L.td. 46 C.W.N. 725=75 C.L.J. 499=206 I.C. 73=15 R.C. 653=A I.R. 1943 Cal. 119.

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-Ss. 34, 35—Applicability—Presidency Small Cause Court's decree-Notice from Board -If can operate to stay execution proceedings.

Where a decree of a Presidency Small Cause Court which is not a decree of a Civil Court within the meaning of the B.A.D. Act has been transferred for execution to the Munsif's Court, a notice under S.34 cannot operate to stay the execution proceedings pending in that court. The fact that the application to the Board which issued the notice was made after the amendment of S. 20 is immaterial. (Henderson, J.) GEO MILLER & Co., Ltd. v. Padna Motor Service. I.L.R. (1941) 2 Cal. 543=198 I.C. 735=14 R.C. 488=45 C.W. N. 922=A.I.R. 1941 Cal. 706.

(as amended in 1940), Ss. 34 and 20-Application under S. 174, B.T. Act pending when amending Act came into force-Notice for stay-Question, if liability is debt—Power of Court to decide. See B.A.D. Act, Ss. 20 and 34. A.I.R. 1944 Cal. 88

- S. 34-"Barga" suit-Civil Court, if bound to stay.

Obiter:—A Civil Court receiving a notice under S. 34 of the Bengal Agricultural Debtors' Act in a "barga" suit is bound to stay the proceedings of that suit, and it is for the Board to decide whether a "barga" claim is or is not a debt within the meaning of the Act. (Biswas and Roxburgh, JJ.) SITARAM BHATTACHARJEE v. PANCHA MUCHI. 74 C.L.J. 416=201 I.C. 399=15 R.C. 193=46 C. W.N. 14=A.I.R. 1942 Cal. 229.

S. 34—Decree for ejectment under S. 66
(2) of the Bengal Tenancy Act—Application by tenant to Board within time specified in decree S. 66 for paying arrears of rent-Notice to executing Court-Court, if can stay execution in respect of rent and proceed with ejectment.

Where a decree for ejectment is passed under S. 66 (2) of the Bengal Tenancy Act but the tenant instead of paying the arrears of rent applied to the Debt Settlement Board within the time specified in the decree for its payment, and the Board thercupon issued a notice under S. 34 of the Bengal Agricultural Debtors' Act to the executing Court, that Court is bound to stay the whole execution case. It cannot merely stay the execution of the actual decree for rent and procued with the execution of the decree for eject-ment. (Henderson, J.) KASHI NATH 2. SONAULLA. I.L.R. (1941) 2 Cal. 547=199 I.C. 795=14 R.C. 677=45 C.W.N. 908-A.I.R. 1942 Cal. 232.

-S. 34—Decree of Court in Native state-Transfer for execution to British Indian Court-Latter Court, if bound to stay on notice from

A claim under a decree obtained in a Court in a Native State is not a debt within the meaning of Bengal Agricultural Debtors' Act. Consequently, a British Indian Court to which the decree is transferred for execution is not bound to stay the proceedings on receipt of a notice from a Board under S. 34 of the Act. (Henderson, J.) AMANATULIA PRODHAN v. SUSHIL CHANDRA. 46 C.W.N. 610.

Ss. 34 and 20—Ejectment suit—Reol question involved one as to existence of to mortgage debt—Suit, if must be stayed.

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In a suit which was in form for ejectment, the defendant contended that she was not a tenant under the plaintiff and that the document on which the latter relied to prove the relationship of landlord and tenant showed no more than that her husband had borrowed money from the plaintiff upon a mortgage of the house which had been sold to her by him and from which the plaintiff was seeking to evict her.

Held that as the real question in the suit was whether there was a mortgage debt and as that question could be decided only by the Board under S. 20 of the B.A.D. Act as amended, the Court should stay the suit on receipt of a notice under S. 34 of the Act. (Khundkar and Lodge, J.J.) MST. MASTHA V. ULATANNESSA BIEL A.I.R. 1941 Cal. 222.

——Ss. 34 and 35—Failure of Board to issue notice—Execution sale—Validity—Setting aside of sale—Revival of debt. Sheikh Tamizali 7. Masarali Bhuiya [see O D. 1936 '40 Vol. 1 Col. 3232] 193 I.C. 451—13 R.C. 439—A.I.R. 1941 Cal. 58.

\_\_\_\_\_S. 34—Insolvency Court receiving notice--If bound to stay proceedings.

A District Judge exercising insolvency jurisdiction is bound to stay the proceedings before him on receipt of a notice under S. 34 of the Bengal Agricultural Debtors' Act. The jurisdiction which he exercises under the Insolvency Act is one exercised by him as the principal Civil Court of the District and not as persona designata and the insolvency proceeding is one relating to a debt within the meaning of the Bengal Agricultural Debtors' Act. (Mukherjea and Blank, II.) RAMKUMAR RAMDHAN v. SAMANTA KUMAR 46 C.W.N. 667.

——S. 34—Joint decree against several judgment-debtors—Some cone applying to the Board —Entire proceedings, if must be stayed.

Where some of the parties to a proceeding who were jointly liable for a debt applied to a Debt Settlement Board for the settlement of their debt and the Board issued a notice under S. 34 of the B. A. D. act to the Court to stay proceedings, the proceedings so far as they related to the applicants before the Board only must be stayed and they should continue so far as the other parties are concerned. 43 C.W.N. 318, Foll. (Derbyshire, C.J. and Mukherjea, J.) UPENDRA NARAYAN v. SHIP CHANDRA. 199 I.C. 834=14 R.C. 654=A.I.R. 1941 Cal. 116.

Mortgage—Right of mortgage—Joint mortgage decree against three judgment-debtors—Two of them appling to D.S. Board and obtaining stay—Liability of nonapplicant J.D. for whole debt.

Where two out of three of the judgment-debtors against whom a joint mortgage decree had been passed applies to the Board for settlement of their debt and the execution proceeding against teem is stayed on receipt of a notice under S. 34 of the B.A.D. Act, the judgment-debtor who has not applied to the Board is liable for the whole debt and not for a proportionate share only. The mortgagee decree-holder has neither released any one of the judgment-debtors nor has he purchased himself any portion of the mortgaged debt. Under these circumstances no question of apportionment of the debt or piecemeal redemp-

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tion can possibly arise. (DerbysLire, C.J. and Mukherjea, J.) Upendra Narayan v. Shib Chandra. 199 I.C. 834: 14 R.C. 654 -: A.I.R. 1941 Cal. 116.

----S.34-Jurisdiction of Civil Court-Question as to jurisdiction of Board to entertain application -- Power to decide.

Subject to the provisions of S. 20 of the Bengal Agricultural Debtors' Act, the Civil Court has jurisdiction to determine whether a Debt Settlement Board had jurisdiction to entertain a particular application, and if it comes to the conclusion that the Board had no jurisdiction it can ignore a notice issued by it under S. 24 of the Act. (Mitter and Sharpe, J.) University Sinch Jhav. SM. NAZIMANNESSA. 48 C.W.N. 712.

——Ss. 34, 20 and 2 (8) Liability incurred before and after 1st January, 1940, included in application to Board—Suit in respect of same liability—Partial stay—Permissibility.

Where the debtor has included a liabitity incurred partly before and partly after 1st of January, 1940, in his application to the Board under S. 8 of the Bengal Agricultural Debtors' Act, the Board itself is the only authority which has jurisdiction to decide whether any part of the liability is a debt or not. A Civil Court in which a suit in respect of the same liability is pending, is bound to stay the entire suit on receipt of a notice under S. 34 of the Act. A question of partial stay of the suit can arise only if the claim for the period subsequent to the 1st of January, 1940, is not included in the application before the Board, or if the Board itself decides under S. 20 that this portion of the claim is not a debt within the definition in S. 2 (8) of the Act and that the Board cannot therefore, deal with it. (Biscess and Royburgh, JJ.) SITARAM BHATTACH AGET C. PANOHA MUCHI. 74 C.L. J. 416-201 I.C. 399 15 R.C. 193 2 46 C.W.N. 14—A.I.R. 1942 Cal. 229.

S. 34-Notice for stay-Amount of debt-Power of Court to determine.

Under S. 18 (1) of the Bengal Agricultural Debtors' Act, it is the function of the Board not of the Civil Court to determine the amount of debt. On receipt of a notice under S. 34 of the Act, the Court should stay the suit until the Board decides the amount of the debt and makes an award in respect of it. (Derbyshire C.J. and Mukherjea, J.) Sris Chandra Sen v. Mahim Chandra. 45 C.W.N. 194=A.I.R. 1941 Cal. 256.

Ss. 34 and 20—Notice for stay—Duty of Court—Power to decide if debt is debt within Act.

A Civil Court receiving a notice under S. 34 of the Bengal Agricultural Debtors' Act is precluded by S. 20 of that Act from deciding whether a particular debt is a debt within the meaning of the Act or not. By that section the Board is to decide that matter. Under S. 34, the Civil Court must proceed on the footing that there is a debt within the meaning of the Act and on that footing must stay the proceedings until the Board decides that matter. (Nasim Ali and Pal, I). I FRASTULIA MULLIK & CO. V. RAIHA KRISHKA DULTA & SONS. 46 C.W.N. 455 (2).

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Ss. 34 and 20—Notice for stay—Execution proceedings in respect of decree of High Court—Jurisdiction of Civil Court to determine if liability amounts to debt.

Under S. 20 of the Bengal Agricultural Debtors' Act, the jurisdiction of the Board to decide whether the liability in a particular case amounts to a debt or not within the meaning of the Act is exclusive. Consequently a Civil Court receiving a notice under S. 34 of the Act is precluded from going into that question and is bound to stay proceedings even though they relate to the execution of a decree of the High Court passed in its original jurisdiction. (Mukheriea and Ellis, J.) MAHALEBLAL r. INDER CHAND. 49 C.W.N. 237.

——S. 34—Notice for stay—Maintamability of application before Board—Jurisdiction of Civil Court to decide.

A Civil Court cannot ignore a notice received under S. 34 of the Bengal Agricultural Debtors' Act on the ground that the application on which such notice is passed is not maintainable before the Board. The Board alone has jurisdiction to decide the question as to the maintainability of the application. (Roxburgh, J.) NANI BAI BAISHYANI V. MALIKAM AGARWALLA. 214 I.C. 272=17 R.C. 45=48 C.W.N. 151=A.I.R. 1944 Cal. 161.

—S. 34—Notice for stay of execution—Validity—Notice omitting one decree-holder and adding stranger as judgment-debtor—Formal defects not affecting merits. Pyari Mohan Manji v. Hashem Ali Khan. [see Q.D. 1936-'40 Vol. I Col. 3232.] 194 I.C. 317=13 R.C. 497=A.I.R. 1941 Cal. 251.

——S. 34—Notice for stay—Question if debt was incurred before or after 1st January, 1940— Duty of Civil Court.

A notice issued in respect of a debt which in the opinion of the Board itself was incurred after 1st January, 1910, is plainly without jurisdiction. In such a case the Civil Court is not bound to stay the proceedings. But if it is clear from the notice or otherwise that the Board definitely formed the opinion that the liability was incurred before the aforesaid date, and in that view issued the notice the Civil Court is bound to stay the proceedings, although in its own view the liability was incurred after that date. Where it is not apparent from the notice or otherwise that the Board applied its mind to the question of the date of the liability at all and the Civil Court is of opinion that the liability was incurred after 1st January, 1940, the proper course for it would be to draw the attention of the Board to this fact and to invite the Board to withdraw the notice. It thereafter the Board persists in its notice taking the view that the liability was incurred before 1st January, 1940 (not withstanding the Court's view to the contrary), the Court is bound to stay the proceedings. (Raw and Biswas, Jl.) Abinash Chandra v. Nakul Ruhidas. I.L.R. (1944) 1 Cal. 549=219 I.C. 372=47 C.W.N. 891=A.I.R. 1945 Cal. 192.

\_\_\_\_S. 34-Notice for stay-Subsequent proceedings in Civil Court-If nullity.

The Civil Court has in every case jurisdiction to determine whether a notice which it receives under S. 34 of the Bengal Agricultural Debtors'

Act is with or without jurisdiction. Therefore, if in a particular case it makes a mistake in the exercise of this jurisdiction and refuses to stay proceedings, the subsequent proceedings are not a nullity. They merely amount to an erroneous exercise of jurisdiction which will have to be corrected by recourse to the appropriate appellate or revisional authority. (Rau and Biswas, JJ.) ABINASH CHANDRA v. NAKUL RUHIDAS. I.L.R. (1944) 1 Cal. 549=219 I.C. 372=47 C.W.N. 891 =.AI.R. 1945 Cal. 192.

Ss. 34 and 20-Notice for stay-Suit for accounts-If should be stayed.

A suit for accounts in which a preliminary decree directing the defendant to render accounts has been passed, is not a suit in respect of a debt within the meaning of S. 34 of the Bengal Agricultural Debtors' Act until his liability has been ascertained. Such a suit cannot, therefore, be stayed at that stage on receipt of a notice from a Board. The amendment to S. 20 of the Act merely provides that it is for the Board to decide whether a liability is a debt or not. It has nothing to do with the question whether the suit comes within the terms of S. 34. (Henderson, J.) Amiya Narain Sanyal v. Mohinikanta. 47 C. W.N. 927.

\_\_\_\_S. 34—Notice for stay—Suit for specific performance of contract to grant lease or for refund of selami—Entire suit, if to be stayed.

On receipt of a notice under S. 34 of the Bengal Agricultural Debtors' Act, a suit for specific performance of a contract to grant a lease with an alternative prayer for a refund of the selami already paid, should proceed as a suit for specific performance of contract and consideration of that portion of the claim which relates to the refund of the money should be stayed till the matter is decided by the Debt Settlement Board or the appellate officer. (Mukherjea and Blunk, J.) BARADA KANTA PAL v. SARASWATI DASE. 47 C.W.N. 472.

\_\_\_\_\_S. 34-Notice under-If operative outside Benyal.

The Bengal Agricultural Debtors' Act is operative only in the province of Bengal and no notice under S. 34 of the Act issued by a Debt Settlement Board in Bengal can be binding on any Civil Court functioning outside the province. Therefore, a Munsif in Assam is at liberty to ignore a notice issued by a Debt Settlement Board of Bengal under that section. (Mukherjea and Biswas, Jl.) M. NURUL HAQUE v. MOHINI MOHAN. 46 C.W.N. 455 (1).

S. 34—Notice on second application before Board—Maintainability of such application—Power of Civil Court to decide.

The question as to whether a Board shall or shall not entertain a second application under S. 8 (5) of the Bengal Agricultural Debtors' Act is essentially one for the Board to decide and its decision is subject to appeal and revision under the Act. The Civil Court receiving notice of it under S. 34 of the Act, cannot override the decision of the Board on the point and ignore the notice, but ought to stay the proceedings before it. (Roxburgh and Blank, II.) Japu Monnaham

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v. Sarojini Choudhurani. I.L.R. (1944) 1 Cal. 423=47 C.W.N. 888-A.I.R. 1945 Cal. 100.

-S. 34 -Order refusing stay of execution -Appeal not filed -- Revision.

The High Court may interfere in revision with an order refusing to stay execution proceedings although the proper remedy for the petitioner is to appeal to the District Court against that order when it would serve no useful purpose to allow proceedings which will be null and void to go on. (Henderson, J.) HASINA BIBL V. BATA KRISHNA DAS. 48 C.W.N. 141.

--- \$.34-Order staying execution-Appeal-Revision.

An order of a munsif staying execution proceedings on a notice under S. 34 is appealable to the District Court. But the failure to appeal to the District Court does not prevent interference by the High Court in revision. (Henderson, J.) GEO MILLER & Co., LTD v. PABNA MOTOR SERVICE. I.L.R. (1941) 2 Cal. 543-198 I.C. 735-14 R.C. 488=45 C.W.N. 922=A.I.R. 1941 Cal. 706.

-3. 34-Order staying proceedings-Appeal. It is doubtful whether an order staying proceedings would amount to a decree and would be appealable as such. It is difficult to say that an order adjourning a case conclusively determines anything. (Henderson, J.), PURNA LALL NANDAN v. Bhupendra Chandra Dutt. 192 I.C. 544-13 R.C. 320-45 C.W.N. 82-A.I.R. 1941 Cal. 31.

S. 34—Order under S. 13 (2)—Effect on notice under S. 34. See BENGAL AGRICULTURAL DEBTORS' ACT, Ss. 13 (2) AND 34. 45 C.W.N. 817.

S. 34—Proceeding for ascertainment of mesne profits under O. 20, R. 12, C. P. Code—If one in respect of 'debt'—Such proceeding, if must be stayed on reccipt of notice.

A Civil Court receiving a notice from a Board under S. 34 of the Bengal Agricultural Debtors' Act is not bound to stay a proceeding for ascertainment of mesne profits under O. 20, R. 12 C. P. Code, as such proceeding is not one in respect of a "debt." A preliminary decree for mesne profits in a title suit must be taken to have only determined that the defendants were trespassers and hence liable to pay mesne profits to the plaintiff. It is only when a final decree for a specified sum is passed against them as a result of an enquiry under O. 20, R. 12, C. P. Code, that they would become debtors in law and their liability to pay the sum fixed by the judgment would rank as a debt. (Mukherjea and Biswas, JJ.) JABED SHEIKH v. TAHER MALLIK. 197 I.C. 606—14 R.C. 368—45 C.W.N. 519—73 C.L.J. 234—A.I R. 1941 Cal. 639.

-S. 34—Power of Board to issue notice— Review application pending before it.

S. 34 of the Bengal Agricultural Debtors' Act confers no power on a Debt Settlement Board to issue a notice for stay when an application for review is made to it. Accordingly if a Board issues a notice under this section in such a case it will be acting without jurisdiction, and the Civil Court will be competent to ignore it. (Biswas and Roxburgh, JJ.) LAKSHMI PRIYA v. SOUPAMINI, 45 C.W.N. 345,

----(as amended by Act VIII of 1940) Ss. 34, 20, 8 and 2 (8)—Rent suit for period both anterior and subsequent to 1st January, 1940 Application by defendant to Board -Notice by Roard -Partial stay of suit-I'ermissibility.

A rent suit which included a claim for rest for periods both anterior and subsequent to 1st January, 1940 was filed in the court of a munsif. The Defendant applied to the Board mentioning the entire claim as one item of Debt and the Board issued a notice under S. 34 of the B. A. D. Act requesting the Munsif to stay all further proceeding in connection with the suit. The munsif made an order of stay. Subsequently the Act was amended and under S. 2 (8) of the amended Act, the word "debt" includes liabilities incurred piror to 1st January 1940. As a liability incurred subsequent to let Jan. 1940 is no longer a debt within the meaning of the Act the plaintiff made an application to the munsif praying that the stay order might be vacated atlea t with regard to that portion of the claim which was for the period subsequent to 1st Jan. 1940:

Held, that as under S. 20 (amended Act) the Board had the exclusive jurisdiction to decide whether the liability was a debt or not and till that matter was decided by the Board the Civil Court had nothing further to do except to stay all further proceedings in the suit under S. 34 of the Act. The question of partial stay of suit could arise, if the claim for the period subsequent to 1st January 1940, was not before the Board at all, or if the latter expressly decided not to deal with that portion of the claim as not being a debt within the meaning of the Act. (Mukherjea and Biswas, II.) MANAGER, NATOR RAJ WARD'S ESTATE v. GEDA BEWA. 200 I.C. 39=14 R.C. 656=75 C.L.J. 400-46 C.W.N. 12=A.I.R. 1941 Cal. 658.

-Ss. 34 and 2 (8) -- Kent suit for period prior and subsequent to 1st January, 1940-Problem of stay of suit -- Best solution.

Where a claim in a rent suit pending in a Court covers arrears prior to 1st January, 1940, as well as for a period subsequent to the said date. and that Court receives a notice from a Board under S. 34 of the Bengal Agricultural Debtors' Act, the best way of solving the problem of what is to be done as regards the stay of the suit is to permit the plaintiff to withdraw the claim for the period subsequent to the 1st of January, 1940, with permission to bring afresh suit on the same cause of action. (Henderson, J.) JOGINDRA NATH ROY v. GAFUR SHEIK. 46 C.W. N. 655.

-S. 34-Stay of proceedings - Property transferred by judgment-debtor pending execu--Transferee applying to Board-Court, if should stay execution proceedings on receipt of notice-Transfer alleged to be benami-Question, if to be decided by Court or Board.

Where a Judgment-debtor transferred a share in his putni while proceedings in execution of the decree against him was pending, and the transferee made an application under S. 8 of the Bengal Agricultural Debtors' Act and the Board sent a notice under S. 34 of the Act to the executing Court,

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Held, (i) that although the transferee was not personally liable for the decretal amount, he was bound to pay it if he wished to save the putni, that he was entitled to make a case that that liability was a debt within he meaning of S. 2 (8) of the Act and under S. 20 of the Act it was for the Board to decide whether that liability was a debt or not, and that the appropriate order for the Court to make on receipt of the notice would be that execution should go on against the judgmentdebtor but that the tenure should not be brought to sale even to the extent of the interest of the judgment-debtor until the disposal of the application by the Board; (ii) that if the case of the decree-holder was that the transfer of the property was a mere benami transaction, that question must be decided by the Executing Court and not by the Board being outside the scope of S. 20 of the Act, and that if it was found to be benami the Court must proceed with the execution. (Ilenderson, J.) Mahamaya Debt v. Indra Narayan Das. 202 I.C. 758=75 C.L.J. 344= 15 R.C. 389=46 C.W.N. 880=A.I.R. 1942 Cal. 532.

A suit wrongly stayed under S. 34 of the Bengal Agricultural Debtors' Act by a Small Cause Court which is not a Court, within the definition of 'Civil Court' in the Act, does not abate by reason of on award being made by a Debt Settlement Board. (Henderson, J.) SANKAR NARAIN GHOSAL v. AMAR NATH MAZUMDAR. 46 C.W.N. 345.

——S.34—Suit by Bank stayed on notice from Board—Bank becoming scheduled bank before award—Application for trial of suit made after award—Jurisdiction of Court.

A suit filed by a Bank for the recovery of a mortgage debt was stayed by the Court on receipt of a notice from the Board under S. 34 of the Bengal Agricultural Debtors' Act. The Bank was included in the second schedule to the Reserve Bank of India Act before the Board made an award, with the result that the claim in the suit ceased to be a debt within the meaning of the Bengal Agricultural Debtors' Act. The Bank applied to the Court for the trial of the suit after the award was made. The Court held that it had no jurisdiction to question the action of the Board.

Held, (i) that as soon as the debt due to the Bank ceased to be a debt within the meaning of the Bengal Agricultural Debtors' Act, it was the duty of the Court to proceed with the suit without any application being made to that effect, and that the delay in making the application did not affect its jurisdiction; (ii) that the award of the Board was entirely without jurisdiction and the jurisdiction of the Court could not be taken away by a proceeding which had no legal effect; (iii) that the Court had jurisdiction to decide whether a certain claim was a debt within the meaning of the Bengal Agricultural Debtors' Act. (Henderson, J.) New Standard Bank, Ltd. v. Munsar Ali. I.L.R. (1941) 2 Cal. 68=196 I.C. 266=14 R.C. 203=45 C.W.N. 578=A.I.R. 1941 Cal. 442.

——Ss. 34 and 33—Suit for declaration of title and possession on basis of sale—Defence that transaction was mortgage—Notice from Board on application by defendant for settlement of mortgage debt—Jurisdiction of civil Court—If barred.

A notice issued by a Debt Settlement Board under S. 34 of the Bengal Agricultural Debtors' Act cannot prevent a civil Court from trying a suit which is one for a declaration of the plaintiff's title to a certain property based upon an alleged sale by the defendant and for recovery of possession thereof, although the main defence of the defendant is that the transaction was really a mortgage and that he has applied to the Board for settlement of the mortgage debt. Nor is there anything in S. 33 of the Act which bars the Court from proceeding to try the suit. (\*!lenderson, J.). Sachiraan! Biswas v. Nagendra (\*!lenderson, J.). Sachiraan! Biswas v. Nagendra Natil. 203 I. C. 420=46 C.W.N. 951=15 R.C. 426=A.I.R. 1942 Cal. 552.

—S. 31—Validity of notize—Jurisdiction of Board to consider—Notice issued on second application in respect of debt included in prst—First application dismissed under S. 17 (2).

When a notice is issued by a Board under S. 34 of the Bengal Agricultural Debtors' Act, the Civil Court has jurisdiction to determine whether the notice is a valid one or not and to ignore it if it is found to be a nullity unless the validity of the notice is challenged on a ground which is within the exclusive competence of the Board to decide. If, therefore, a Board issues a notice on a second application being presented to it in respect of a debt which was included in the first application which was dismissed under S. 17 (2) of the Act, the Civil Court can ignore the notice on the ground that the second application on the basis of which it was issued was not entertainable by the Board. (Mukherjea and Ellis, If.) BIBHUTI BHUSAN ROY v. BHOLANATH SINHA. 49 C.W.N. 151=A.I.B. 1945 Cal. 326.

S. 34—Validity of notice—Jurisdiction of Court to determine—Erroneous decision as to its validity—Whether a nullity.

On receipt of a notice under S. 34 of the Bengal Agricultural Debtors' Act, the executing Court has jurisdiction to determine whether the notice is a vaild one or not, and to ignore it if is a nullity. If, therefore, the Court determines this question even wrongly, the determination cannot, be said to be without jurisdiction; it would amount only to an erioneous exercise of jurisdiction to be corrected by the appropriate appellate or revisional authority. If, therefore, the Court holds a sale wrongly treating the notice under S. 34 as a nullity, its decision and the resulting sale cannot themselves be treated as nullities (Kau and Sen, II.) MAHOMED IBRAHIM v. SABURJAN BEWA. I.L.R. (1944) 1 Cal. 317=210 I.C. 320=16 R.C. 425=77 C.L.J. 481=47 C.W.N. 796=A.I.R 1943 Cal. 624.

It is undoubtedly open to a Civil Court to determine whether a notice issued by the Board under S. 34 of the Bengal Agricultural Debtors' Act is valid or not and to conore the notice if it is found to be a nullity, provided

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its validity is not challenged on any ground which it is within the exclusive competence of the Board to decide. (Mukherjea and Ellis, JJ.) MAHOMED ABDUL WASHE v. BROJENDRA MOHAN MAITRA. 49 C.W.N. 532.

S. 34, Expl.-Application under O. 21, R. 90, C. P. Code-If execution proceeding.

An application under O. 21, R. 90, C. P. Code, is not an "execution proceeding for the sale of any property" within the meaning of the explanation to S. 34 of the Bengal Agricultural Debtors' Act and it is not liable to be stayed on service of the notice under that section. (Henderson, f.) RADHA BENODINI DEBI v. GAJAN-CHANDRA BHATTACHARJEE. 49 C.W.N. 306.

S. 35-Sale in defiance of-Validity-Notice under S. 34 not received before sale.

A sale held in defiance of S. 35 of the Bengal Agricultural Debtors' Act is a nullity, although the notice under S. 34 of the Act was not received by the Court before the sale. (Henderson, J.) JNANENDRA NATH BASU v. PROFULLA BALA DEBI. 49 C.W.N. 578.

S. 36 (a)—Court informed of application before Board after final decree in suit on mortgage by conditional sale-Delivery of possession by Court-Award of Board inconsistent with decree—Remedy of mortgagor—Suit or application—C. P. Code, Ss. 47 144 and 151.

While a suit on a mortgage by conditional sale was pending, an application including this debt was made by the mortgagor before a Debt settlement Board. Information of this application was received by the Court only after it had passed the final decree. The Court held that there was nothing to stay and delivered possession. The board made an award which was inconsistent with the decree of the Court. The mortgagor relied on the provisions of S. 30 (a) of the Bengal Agricultural Debtors' Act.

Held, that the remedy of the mortgagor was by way of a suit and not by an application under S. 47 or S. 144 or S. 151, C. P. Code. (//enderson J.) ABBUS SAMAD v. BAIDYANATH NANDI. 48 C.W.N. 605 (2).

-S. 37-A-Applicability-sale held after 12-8-1935 and before establishment of Board.

S. 37-A (1) of the Bengal Agricultural Debtors Act extends the retrospective operation of the section to sales held after the 12th of August 1935 under sub-Cl. (1) (b) of Cl. (d) such sales should have been held before a fully constituted Board came into existence for the particular area in which the debtor resided. This sub-clause should not be read as laying down a further limitation that the sales must have been held after the establishment of the Board under Sec. 3 (1) and before the appointment of its personnel under S. 3 (2). All that is required is that at the date of the sale, there was no fully constituted Board, functioning or capable of functioning, irrespective of the date when the Board had been established by notification under S. 3 (1). (Biswas and Lanjur Rahman. II.) RASH. BEHARI BANERJEE v. NARAYAN CHANDRA BASU. 48 C.W.N. 681.

-S. 37-A (1) (b) (iii)—Single application by all lebtors jointly liable for arrears of rent-Sale held efore Amendment Act of 1940-Right to relief.

The condition laid down in Cl. (b) (iii) of S. 37-A (1) of the Bengal Agricultural Debtors' Act is fulfilled where the sale took place before the commencement of the Amendment Act of 1940, and the debt was one for arrears of rent in respect of which several persons were jointly liable. That the debtors have combined together in one single application does not make any difference, and they are entitled to relief under S. 37-A of the Act. (Mukerlea and Ellis, JJ.) KAMESWAR SINGH 2. NARAN CHANDRA DUTT. 49 C.W.N. 103.

-S. 37 A (3)—"Entertain"—Application under Bongal Money Lenders' Act dismissed as in ompetent-Subsequent application filed under S. 37 A. Bengal Agricultural Debtors' At, pending-Second application under Bengal Money-Lenders' Act-Maintainability.

The judgment-debtor made an application under the Bengal Money-Lenders' Act, which was dismissed as incompetent as no proceedings were pending when it was filed. Subsequently he filed an application for relief under S. 37-A of the Bengal Agricultural Debtors' Act before the Debt Settlement Board. While this application was pending, he filed a second application under S. 36 of the Bengal Moncy-Lenders' Act,

Held, (i) that as the application under S. 37-A of the Bengal Agricultural Debtors' Act had been "entertained" by the Debt Settlement Board, Sub-S. (3) of the section operated as a bar to the second application under the Bengal Money-Lenders' Act; (12) that the first application under the Bengal Money-Lenders' Act having been thrown out in limins, had not been "enter-tained" by the Court. (Henderson, J.) SAHADEB MONDOL T. TARAKESWAR MONDOL. 49 C.W.N. 498.

-S. 37-A (3)-"Entertain" - Meaning of a Application under Bengal Money-Lenders' Act dismissed on ground that no suit or proceeding was fending on or after 1st January, 1939—If "entertained" by Court.

The expression "entertain" in S. 37-A (3) of the

Bengal Agricultural Debtors' Act means to "admit a thing for consideration", and when a suit or tresceding is not thrown out in limine but the Court receives it for consideration and disposal according to law, it must be regarded as entertaining the suit or proceeding, no matter whatever the ultimate decision might be. When an application under S. 36 of the Bengal Money-Lenders' Act was dismissed by a Court on the ground that no suit or proceeding in connection with the debt was pending on or after the 1st January, 1939, the application should be regarded as having been entertained by the Court, and not thrown out in limine. 49 C.W.N. 498 considered. (Makherles and Ellis, GHOSE. 49 C.W.N. 499 - A.I.R. 1945 Cal. 381.

-8. 87-A (8)-"Entertained"-Meaning of-Application under Bengal Money-Lenders' Act dismissed for default, then restored and again dismissed for nonprosecution-If hars application under S. 37-A.

The Legislature in S 37-A (3) of the Bengai Agricultural Debtors' Act has deliberately used the word "entertained" and not "decided." To entertain is to admit to consideration, and it is not necessary that a matter should be heard and decided by a Civil Court under the Bengal Money-Lenders' Act, before it can operate as a bar to a proceeding under S. 37-A. An application under the Bengal Money-Lenders' Act which was once dismissed for default but was restored to file and then after certain proceedings, was again dismissed for nonprosecution must be deemed to have been "entertained" by the Civil Court and would bar a subsequent application under S 37-A of the Bengal Agricultural Debtors'

Act. (Mukheriea and Ellis, JJ.) CHARU DAS v. AMULYA KUMAR BOSE. 49 C.W.N. 156. CHARU BAL

-S. 37-A (3)—"Entertained—Meaning Application under S. 36 of Bengal Money Lenders' Act dismissed on ground that loan was a commercial loan-If bars application under S. 37-A.

An application would be deemed to be "entertained" within the meaning of S. 37-A (3) of the Bengal Agricultural Debtors' Act if it is admitted to consideration and not thrown out *in limine*, whatever the ultimate decision might be. Where, therefore, an application under S. 36 of the Bengal Money-Lenders' Act was dismissed on the ground that the loan was a commercial loan, S. 37-A (3) of the Bengal Agricultural Debtors' Act would operate as a bar to a subsequent application under S. 37-A. (Mukherjea and Ellis, JJ.) BOGRA BANK LTD., v. AYANUDDIN KHALIFA. 49 C.W.N.

-S. 37-A (3)—"Entertained"—Meaning of-Suit filed under S. 36, Bengal Money-Linders' Act withdrawn with liberty to bring fresh suit-If bars application under S. 37-A.

S. 37-A (3) of the Bengal Agricultural Debtors' Act does not operate as a bar to the entertainment of an application under S. 37-A by the Board, when prior to that application the debtor had filed a suit in a Civil Court for relief under S. 36 of the Bengal Money-Lenders' Act, but withdrew it with liberty to bring a fresh suit. The suit cannot be said to have been "entertained" within the meaning of S. 37-A (3). The Legislature uses the word "entertained" and not decided. "To entertain" is to "admit a thing for consideration," and when a suit or proceeding is not thrown out in limine, but the Court receives it for consideration and disposal according to law, it can certainly be regarded as entertaining a suit or proceeding, no matter whatever the ultimate decision might be. (Mukheriea and Ellis, JJ.) SASHI BHUSAN BASURI v. MOTIBALA DASSI. 49 C.W.N. 154 = A.I.R. 1945 Cal. 317.

-S. 37-A (3)—' Entertained"—Suit under Bengal Money-Lenders' Act withdrawn on ground of satisfaction of debt-If bars application under S. 37-A.

When a suit under the Bengal Money-Lenders' Act is withdrawn on the express statement of the mortgagor that the debt has been previously satisfied, the suit must be deemed to have been "entertained" within the meaning of S. 37-A (3) of the Bengal Agricultural Debtors' Act, so as to bar a subsequent application under S. 37-A. (Mukherica and Ellis, JJ.) LALIT MOHAN MAJUMDAR v. RAGHUDAS. 49 C.W.N. 157.

-S. 39-Transfer of case already dismissed by Board-Validity.

The power of transfer under S. 39 of the Bengal Agricultural Debtors' Act must be confined to pending cases. An order of the appellate officer transferring a case which has already been dismissed by the Board is therefore, a nullity. (Henderson J.) Pran Krishna Naskar v. Bhagawan Chandra. I.L.R. (1944) 1 Cal. 326 = 218 I.C. 216=18 R.C. 25=47 C.W.N. 797= A.I.R. 1945 Cal. 66.

-S. 40-A-Contents of order - Indication of points for consideration, decision thereon and reasons.

The District Judge or the Additional District Judge dealing with an application made under S. 40-A of the Bengal Agricultural Debtors' Act should give indications in his order to show that he applied his mind to the questions involved. At least, there must be some-

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thing appearing in his order to indicate what was the point for consideration in the case, what was his decision thereon and some reason, may be very brief, to support his conclusions. (Mitter and Latifur Rahman, //.) Monmohan Roy v. Santilochan Roy. 49 C.W. N. 288 = A.I.R. 1945 Cal. 378.

-S. 40-A-Order of Appellate officer made without jurisdiction-Revision.

Under S. 40-A of the Bengal Agricultural Debtors' Act, the District Judge can revise an order of the Appellate Officer although made without jurisdiction. This section is not confined to orders made by the Appellate Officer on appeal. It applies to all orders made by him, be they right or wrong, and within or without jurisdiction. (Mukheriea and Ellis, MOHESH CHANDRA v. ABDUL GAFUR. 49 C.W.N.

-S. 40-A-Order of District Judge-Proper form.

Under S. 40-A of the Bengal Agricultural Debtors' Act, the District Judge is required "to consider" such papers as may be forwarded to him by the Appellate officer. Such consideration ought clearly to be a real and effective judicial scrutiny of all the materials on the record. The order on the face of it must show that such consideration has taken place, and it should be recorded in such terms as to render a proper exercise of the revisional jurisdiction of the High Court possible. Biswas and Latifur Rahman, Jl.) MAHENDRA KUMAR DE v. NIKUNJA BEHARI 48 C.W.N. 841.

S. 40-A-Order of District Judge-Revision-C. P. Code, S. 115.

An order made by the District Judge or Additional District Judge under S. 40-A Bengal Agricultural Debtors' Act, is open to revision by the High Court under S. 115, C. P. Code, as such Judge exercises his authority under the section as a Court and not as persona designata. (Mukherjea and Blank. JJ). Gobinda Chandra Saha v. Rashmani Dassya. I.L.R. (1943) 2 Cal. 462=77 C.L.J. 474=207 I.C. 371=16 R.C. 56=47 C.W.N. 473=A.I.R. 1943 Cal. 470.

S. 40-A-Orders of District Judge-Revision-Civil Procedure Code, S. 115.

The District Judge exercising Jurisdiction under S. 40-A of the Bengal Agricultural Debtors' Act is not only a Court but a Court subordinate to the High Court within the meaning of S, 115 C.P. Code and consequently his orders are revisable by the High Court. (Biswas and Latifur Rahman. I.). BAZLER RAHMAN v. AMIRADDIN. 48 C.W.N. 699=A.I.R. 1944 Cal. 401.

S. 40-A—Order of District Judge—Revision
Power of High Court—C. P. Code, S. 115.
Under S. 40-A of the Bengal Agricultural

Debtors' Act the powers of revision have been given to the Court of the District Judge and not to a persona designata. The High Court has therefore power to interfere under S. 115, C. P. Code with an order passed by the District Judge under S. 40-A of the Bengal Agricultural Debtors' Act. (Henderson, J.) HARIPADA DATTA v. RAM SRISTI KUNDU. I.L.R. (1942) 2 Cal. 478=207 I.C. 615=16 R.C. 128=A.I.R. 1943 Cal. 250.

-8.40-A-Order of Dt. Judge setting aside order of Board also if without jurisdiction-Jurisdiction of Civil Court.

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An order of a District Judge made under S. 40 A of the Bengal Agricultural Deptors' Act setting aside not merely the order of the Appellate Officer but that of the Debt Settlement Board as well, although not in conformity with the provisions of Sub S. (5) of that section, is not one made without jurisdiction, and hence a Civil Court is not competent to pronounce that order to be a nullity on that ground. (Mucharfea and Ellis, JJ.) MOHESH CHANDRAY. ABOUL GAFUR. 49 C. W.N. 319.

-S.44—Board's power of reciew-Appeal. preferred against its order.

The Board has no jurisdiction by reason of R. 91-A to entertain an application for review of its order when an appeal has been preferred against it. (Henderson. J.) HARIPADA DATTA V. RAM SRISTI KUNDU. I.L.R (1942) 2 Cal. 478— 207 I.C. 615=16 R.C. 128=A.I.R. 1943 Cal. 250.

-S. 45-Personal knowledge of members of Boarā—If can be acted on

Although an order of a Debt Settlement Board need not be founded on a strict compliance with the provisions of the Evidence Act and of the C. P. Code, it cannot be said that the Legislature intended that the members of a Board should be entitled to import their personal knowledge into a case. Assuming that they are so entitled, it is the duty of the Board to indicate that it has done so and at the same time to indicate the nature of the extraneous information so introduced. (Biswas and Latifur, JJ.) MAHENDRA KHMAR DE v. NIKUNJA BEHARI. 48 C.W.N. 841.

-Ss. 52 and 8, and R. 146-Application by Mortgagor before Board under S. 8—Collector refusing sanction under R. 146—Subsequent mortgage suit-Limitation-Exclusion of period between dates of application and of Collector's order.

If a mortgagor files an application under S. 8 of the Bengal Agricultural Debtors' Act for set-Rs. 5.000 but tlement of his debt which exceeds does not exceed Rs. 25,000 and the Collector refuses his sanction to the Board to deal with that application under R. 146 of the Rules framed under the Act, the application must be taken to be pending before the Board within the meaning of S. 52 of the Act for the period of time intervening between the date of filing the application before the Board and the date of the lector's order. Therefore the mortgagee is entitled to add this period in computing the period of limitation for a subsequent mortgage suit. (Mitter and Biswas, IJ.) Khetai Molla v. Nityananda Sarkar. I.L.R. (1943) 1 Cal. 244 = 216 I.C. 229=17 R.C. 142=A.I.R. 1944 Cal.

-8.52—Application under S.171 of B. T. Act to prevent sale in execution of rent decree—Rent decree. subject-matter of proceeding before Board-Right of applicant to benefit of section-Both periods of exemption, if can be added.

An application under S. 171 of the Bengal Tenancy Act to prevent a sale in execution of a rent decree is an application regarding a debt before the Debt Settlement Board when the rent decree based upon that debt is the subject-matter of the proceeding before it, and the applicant can get the benefit of S. 52 of the Bengal Agricultural Debtors' Act. If there ever is a case in

which the two periods provided for in S. 52 of the Bengal Agricultural Debtors' Act are separate, the party seeking to avoid limitation would be entitled to add them together. (Henderson, J.) FURKHAN AHMAD v. BHARAT CHANDRA, 49 C.W.N. 310.

-S. 52—Civil suit on original consideration of promissory note-Limitation Period during which application based on promissory note was penaing before Board -- If Saved.

Under S. 52 of the Bengal Agricultural Debtors' Act, limitation is saved for a civil suit based on original consideration of a debt for which there is a promissory note for the period during which an application based on the promissory note was sending before a Board. (Henderson, I.) CHA LURA RUMAR D. KALA MEAH. 79 C. L.J. 112, -209 L.C. 594-47 C.W.N. 893-A.I.R. 1943 Cal. 633.

-S. 52 - Interpretation - Period between dismissal of application by Board and review application-Period between dismissal of review application and filing of appeal therefrom-If may be excluded.

S. 52 of the Bengal Agricultural Debtors' Act should be strictly construed. The words "the time during which such proceedings continued" in that section mean any period during which something in connection with the proceedings was going on. It does not include a period during which nothing was pending on the file at Therefore, the period between the dismissal of the application by the Board and the filing of an application for review, and the period between the dismissal of the review application and the filing of an appeal there-from cannot be PROBODH CHANDRA HALDAR V. BANI CHARAN KUNDH. 200 I.C. 797=15 R.C. 106=74 C.L.J. 545=46 C.W.N. 211=A.I.R. 1942 Cal. 289.

S. 52-Scope-If provides for two independent periods of exemption.

S. 52 of the Bengal Agricultural Debtors' Act provides for two different and independent periods and the litigant is entitled to claim exemption of both of them if the conditions laid down in the section are fulfilled. He is in the first place entitled to deduct the period during which a proceeding in respect of the same debt was pending before the Debt Settlement Board, irrespective of the fact as to whether he was or was not debarred by the provisions of this Act from filing a suit or making any application in respect of the sum in the Civil Court. The provision made in the latter part of the section is an additional provision which is not in any way dependent upon what is stated in the earlier part of the section. (Mukherjea and Blank, II.) SUBODH CHANDRA MAITY v. BIDHU BRUSAN I) AS. 47 C.W.N. 543.

-S. 52-Time during which review application was pending before Board-If must be ex-

The time during which a review application was pending before the Board must be excluded under S. 52 of the Bengal Agricultural Debtors' Act in computing the period of limitation for a suit. (Henderson, J.) NIRMAL CHANDRA v. NARESH CHANDRA. 48 C.W.N. 845.

## BEN. ALLUVION & DILUVION ACT, 1847.

-R. 22-Transfer of application to ordinary Board having no territorial jurisdiction-Effect.

R. 22 of the Rules framed under the Bengal Agricultural Debtors' Act requires that the transfer should be made to an ordinary Board having jurisdiction in the area in which the debtor is ordinarily resident. But where an application properly presented to a Special Board is transferred to an ordinary Board having no territorial jurisdiction, the application is not liable to de dismissed as incompetent. Only the proceedings before the ordinary Board must be held to be without jurisdiction. (Biswas and Latifur Rahman, II.) BAZLER RAHMAN v. AMIR-ADDIN. 48 C.W.N. 699=A.I.R. 1944 Cal. 401.

BENGAL ALLUVION AND DILUVION ACT (IX OF 1847). S. 6-Chars formed out of river bed since decennial settlement-Liability to assessment.

Chars formed out of the bed of navigable or non-navigable rivers since the decennial settlement are prima facie liable to be assessed to revenue. The river bed may be the property of the Zamindar. To negative the claim of the Crown the zamindar must prove that (1) the lands were actually in existence at the time of the decennial settlement and (2) specifically included in the estate as settled. For the purpose of the first element the bed of a flowing river, navigable or non-navigable, passing through a permanently settled estate cannot be regarded as waste land covered with water and placed in the same category as waste lands covered with jungly weeds. For the purpose of the second element the fact that the river bed from which the char had been thrown up was at the date of the decennial settlement the property of the zamindar or that that settlement was imposed upon the zamındari as a whole is not sufficient. (Mitter and Khundkar, J.J.) Secretary of State v. Midnapore Zamindary Co., Ltd. 197 I.C. 5=14 R.C. 306=46 C.W. N. 218=A.I.R. 1941 Cal. 520.

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825), S. 4—Right under—Absence of offer by patnidar to pay additional rent for increment to tenure-Does not take away the right conferred by S. 4 of the Regulation. MIDNAPORE ZEMINDARY Co., LTD. v. BIJOY SINGH DUDHURIA. [see Q.D. 1936—'40 Vol. I, Cal. 3233]. 193 I.C. 578=13 R.C. 420=A.I.R. 1941 Cal. 1.

S. 4 (3) para. 2—Right to island chars—If can be claimed by subordinate tenant.

Under S. 4 (3), para. 2 of Regulation 11 of 1825, a Char thrown up on the bed of a large and navigable river the channel between which and the main land is fordable at any season of the year can be claimed as an accretion to his tenure by a subordinate tenant who holds the adjoining estate or tenure under some zamindar or other superior landholder. (Mukherjea and Sen, JJ.) Monohar Kaibarta v. Jagadish Chandra. 202 I.C. 398 =15 R.C. 330=45 C.W.N. 298=A.I.R. 1942 Cal. 357.

-S. 4 (3)—Fordability of channel—Elements necessary

Under S. 4 (3) it is enough if the channel is fordable at any season of the year and the word

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"year" refers to the year in which the formation of the island took place. A channel must be regarded as fordable if it could be crossed on foot during the dry season of the very year in which the char was formed. (Mukherjea and Sen. JJ.) Manohar Kairaria v. Jacadish (Handra 202 I.C. 398=15 R.C. 330=46 C.W. N. 298=A.I.R. 1942 Cal. 357.

-S. 4(3)—Title to island arising in waters-English and Indian Law.

Under the English law an island rising up in a tidal and navigable river prima facie belongs to the Crown. A subject may acquire title to the island arising in tidal waters where the bed and the soil of the tidal river were in the subject before the island arose. Thus under the Law of England the title to such an island is regarded as an incident of the ownership of the bed. The Indian law follows the same principle subject to the doctrine of fordable channel which is peculiar to it. (Mukherjea and Sen, II.) to it. (Mukherjea and Sen, II.) Manohar Kaibarta v. Jagadish Chandra. 202 I.C. 398 =15 R.C. 330=46 C.W.N. 298=A.I.R. 1942 Cal. 357.

-S. 4 (3)—Tow path between holding and channel-Holding, if contiguous to island char.

There was a tow path between the channel and the plaintiff's holding. It was neither a regular nor a public pathway. It may be that it was a part of the plaintiff's raiyati land and was used by boatmen during rainy season for the purpose of towing boats,

Held, that the plaintiff's holding was contiguous to the island char. (Mukherjea and Sen, II.) Manohar Kaibarta v. Jagadish Chandra. I.C. 398=15 R.C. 330=46 C.W.N. 298=A.I.R. 1942 Cal. 357.

BENGAL BOARD OF REVENUE ACT (1913), S. 6-Order of Board-Jurisdiction of Civil Court.

The jurisdiction of the Civil Court to declare an order of the Board of Revenue ultra vires where it acts without jurisdiction, is not excluded by S. 6 of the Bengal Board of Revenue Act, (Raw and Biswas, JJ.) MAHOMED MANJURAL HAQUE v. BISSESSWAR BANERJEE. 47 C.W.N. 408=77 C.L.J. 32=210 I.C. 479=16 R.C. 437=A.I.R. 1943 Cal. 361.

BENGAL CESS ACT (IX OF 1880), S. 6-Incidence of cess-"Annual net profits."

The words "annual net profits" in S. 6 of the Cess Act have reference to the property and not to the individual. Cess is assessed on the basis of the annual net profits; but it is paid in respect of the property and not in respect of any part of the profits. (Manchar Lall and Das. J.J.) KAMAKSHYA NARAIN SINGH v. ARJUN. 24 Pat. 551.

-(as amended by Bihar Act II of 1936), S. 6 -Scope and effect of-Levy of cess from moner and occupier in part-If illegal-Effect of amendment of 1936.

According to the scheme of the old Cess Act (Bengal Act, IX of 1880), as it stood before its amendment by Bihar Act II of 1936, the only person who can be assessed to pay cess with regard to the profits of a coal mine is the occupier, the person who is in direct possession of

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the mine and works there and in case the occupier is different from the owner, the latter cannot be assessed in law upon the royalties which he receives from the occupier. If, however, in practice and for the sake of convenience, the Collector realises from the owner cess proportionate in amount to the royalties received by him, and from the lessees cess proportionate to the balance of the net profits left in their hands, the procedure is erroneous and irregular, but not illegal. The Collector levies in effect only what he is entitled to levy in law though the mode of recovery is irregular. The amendment of the Act in 1936, has not made any difference. (Manohar Lall and Das, JJ.) KAMAKSHYA NARAIN SINGH v. ARJUN. 24 Pat. 551.

——S. 13—Scope—Prices of year in which return was made—If to be considered—Fall in prices—Remedy.

There is nothing in the Cess Act or Rules which lays down the prices of any particular year, i.e., the year for which the return was filed should be considered. If a drop in prices occurs, there is a remedy open by way of an application under S. 13 of the Act. (Swanzy.) HARIHARGIR v. PROVINCE OF BIHAR. 11 B.E. 273.

On a consideration of the provisions of the Bengal Cess Act, it is clear that the statute aims at the obtaining by the Board of Revenue of correct particulars of the income from the lands for the cess year, and has nothing to do with the income which was being received for such lands before the valuation or re-valuation as the case may be. The statute has not taken away the right to recover rent or arrears of rent for the period before the return was filed. The landlord cannot be prevented from recovering the rent for the period covered by the old cess return at a rate higher than that mentioned in the new cess return. The penalty for not making a return or not giving a correct return can only apply to the recovery of rent for the period after the return is filed. The bar imposed by S. 20 of the Bengal Cess Act will not therefore prevent a landlord from realising rent at a higher rate than that mentioned in the cess return for the period before the cess return was filed. (Harries, C.J. and Manohar Lall, J.)
SAMANTA RADHA PRASANNA DAS v. BARENDRA
KRISHNA DAS. 20 Pat. 527=198 I.C. 122=14 R.P. 383=8 B.R. 331=A.I.R. 1941 Pat, 617.

S. 41—Liability for cess—If arises by reason of interest in immovable property—Nature and incidents of tax. See C. P. CODE, S. 102. A.I.B. 1945 Pat, 417.

S. 41—Rent payable—Decree for rent and cess at specified rate—Subsequent reduction of rent in rent reduction proceedings—Effect on cess decreed—Decree for cess—If affected.

There is nothing in Bihar Act IX of 1938 to suggest that after a decree has been passed, the decree-holder cannot recover the entire amount of the cess which has been decreed. Where a landlord has already obtained a decree for arrears of rent and for cess at a specified rate, and rent is subsequently reduced in rent reduction proceedings under S. 15 of Bihar Act IX of 1938, the decree for cess is not affected by the rent reduction proceedings, the cess being recoverable over and above the rent. The decree-holder is there-

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fore entitled to recover the entire amount of cess decreed and there is no warrant for holding that cess must be charged under S. 41 of the Bengal Cess Act only on the amount of rent as reduced under S. 15 of Act IX of 1938. (Harries, C.J. and Fazl Ali, J.) INDERDEO SAHALV. RAM RANBIJOV PRASAD SINGH. 21 Pat. 628=203 I.C. 418=9 B.R. 80=15 R.P. 172=24 P.L.T. 46=A.I.R. 1942 Pat. 470.

S. 41(1)—Applicability—Patal lease executed in 1871—Undertaking to bear pay of mail runners, postal muharrir, postal cess and tax now fixed and which will be fixed in future—Liability for cess—Benefit of S. 41(1)—If available.

A patni lease of the year 1871 provided, inter alia, "The pay of the mail runners, and of postal muharrir and postal cess and tax, etc., which has been now fixed in the Collectorate and will be fixed in future will be realised from us the patnidars and our representatives in proportion to the fixed Jama besides the Jama of the said mahal. In case of non-payment it will be set off against our chalani money. If any plea or objection be put forward it will be void and illegal." Subsequently the Bengal Cess Act (IX of 1880) was passed; the lessor had to pay cess in respect of three quarters (F. 1341-1346) and he claimed reimbursement from the lessees patnidars in respect of the amounts he paid as cess, contending that the patnidars were liable under the covenant in the lease, for the entire amount of cess payable annually for the patni tenure, while the patnidars claimed the benefit of deduction of half the rate of cess as provided in S. 41 (2) of the Bengal Cess Act.

Held, (1) that the terms of the covenant should be interpreted on two well-established principles, rim., (a) that the contract under which exemption was claimed must be strictly construed against the claimant and it must appear from its terms, beyond the possibility of any dispute, that the parties intended to vary the liability imposed by the statute and (b) that the construction to be placed ought to be such as to render it reasonable rather than unreasonable and as would make it just to both parties rather than unjust to one of them; (2) that there being no express term in the contract varying the liability as imposed by the Cess Act, it was unreasonable to saddle the patnidars with the entire cess of the patni tenure contrary to the provisions of S. 41(2) of the Act; (3) that on a proper interpretation of the terms of the covenant, the painsdars had in no way contracted themselves out of the benefits of S. 41 (2) of the Act; (4) that the respondents were therefore liable to pay only the cess calculated on the basis of the annual valuation of the patni tenure less a deduction at one-half of the rate for every rupee of the rent payable for the tenure; (5) that the lease having been created prior to the enactment of the Cess Act when the parties to the lease could have no idea as to the nature of their rights and obligations in regard to future impositions, assessments or tax that might be levied from time to time by Government, and there being no express words in the covenant to that effect, there was nothing to justify the exemption of the holder of the estate from payment of his quota of the cess according to the provisions in S. 41 (1) of the Cess Act. (Sinha and Pande, J.) HYMAYUN v. HARENDRA. 24 Pat. 438=1945 P.W.N. 425=A.I.R. 1945 Pat. 447.

S. 41—Contract between parties Varying liability imposed by statute.

It is open to the parties to enter into a contract at variance with the provisions of the cess Act;

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in other words, the liability to pay cess can be contracted out. It must appear from the terms of the contract beyond the possibility of any dispute, that the parties intended to vary the liability as imposed by the Statute. Where a lease in favour of the tenant was to the effect that the zamindars (lessors) with pay revenue and cesses etc. and that the mokaridars have nothing to do with the payment thereof, and if any new cesses are imposed, the Zamindars will pay the same.

Held, that those words merely reiterated the legal position that the primary responsibility for the payment of Government revenue and cesses which were payable under the cess Act by the zamindar rested on the zamindar, that is, the lessor, and that it had been agreed by the parties that it was not one of the terms of the lease that the responsibility of the lessor should be transferred to the shoulders of the lessee, and that those words did not have the effect of doing away with the statutory liability of the lessees to pay their portion of the cesses, that is to say, cesses levied on the annual income of their tenure minus the landlord's portion. (Fasl Ali, C.J. and Sinha, J.) BALWANT RAO NAIK v. BISWANATH MISSIR. A.I.R. 1945 Pat. 417.

-S. 49—Certificate officer—Powers Power to add or implicate parties exempted by

Cess Deputy Collector.
Proceedings under S. 49 of the Bengal Cess Act are taken by the Collector or Cess Deputy Collector and may be said to originate the certificate proceedings. It is not open to the certificate officer to amend the certificate so as to implicate or add parties against whom the Collector or Cess Deputy Collector did not issue a requisition. The certificate officer's power to amend a certificate does not extend to including as certificate debtors persons whom the require-ing officer (Collector or Cess Deputy Collector) has once exempted under S. 49. (Middleton.) GUNESHWAR JHA v. JAIMOHAN. 8 B.R. 777.

-S. 58-Sum recoverable under-If

due"—Double the cess on holding payable on default—If liquidated debt and sum due.

Sums recoverable under S. 58 of the Bengal Cess Act are sums due to the landlord. If a person is liable to pay a sum, such a sum is due from him. When the holder of an estate can recover double the cess from a tenure-holder who is in default, then when such a default occurs the tenure-holder is liable to pay double the cess, and that is a sum due from him to the landlord. Double the cess on a holding is certainly a liquidated debt and is a sum due. (Harries, C.J., Fazl Ali and Dhavle, JJ.) KAMESHWAR SINGH BAHADUR v. MAHADEOJEE DEOLA ASTHAN TEMPLE. 21 Pat. 634=201 I.C. 582=15 R.P. 59=8 B.R. 802=23 P.L.T. 582=A. I.R. 1942 Pat. 329 (F.B.)

### -S. 64-A-Applicability.

S, 64-A of the Bengal Cess Act applies to proceedings before a decree and not to proceedings afterwards. (Harries, C.J., Fuel Ali and Dhavle, JJ.) KAMESHWAR SINGH BAHADUR v. Sri Mahadrojee Deola Asthan Temple. 21 Pat. 634=201 I.C. 582=15 R.P. 59=8 B.R. 802 =23 P.L.T. 582=A.I.R. 1942 Pat. 329 (F.B.)

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S. 64 A-Applicability-Double the amount of cess with interest under S. 58-Suit to recover -Limitation.

Ch. IV of the Bengal Cess Act is a self-contained Chapter dealing with the rights and obligations of the parties in respect of a rentfree tenure or holding. The Legislature intended that all sums recoverable in respect of such holdings should be recoverable under S. 64-A of the Act and that the 4 years' period of limitation would apply. Any sum which is recoverable is a sum due from the person from whom it is sought to be recovered. S, 64-A would therefore apply to a sum to recover double the amount of cess with interest under S. 58. The fact that the holder of the estate has an option in the matter does not affect that question. (Harries C.J. Fast Ali and Dhavle, II.) KAMESH-WAR SINGH BAHADUR V. SRI MAHADEOJEE DEOLA ASTHAN TEMPLE. 21 Pat. 634=201 I.C. 582=15 R.P. 59=8 B.R. 802=23 P.L.T. 582=A.I.R. 1942 Pat. 329 (F.B.).

### -S. 64-A-Scote and effect of.

The effect of the introduction of S. 64-A into the Bengal Cess Act is that all claims under Ch. IV of the Act now fall under S. 64-A and not under S. 47 which originally covered claims to all sums payable under the Act. (Harries, C. J., Fazal Ali and Dhavle, JJ.) KAMESHWAR SINGH BAHADUR v. SRI MAHADEOJEE DEOLA ASTHAN Temple. 21 Pat. 634=201 I.C. 582=15 R.P. 59= 8 B.R. 802=23 P.L.T. 582=A.I.R. 1942 Pat. 329 (F.B.)

-S. 99-Attachment under-Suit by proprietor for rent-If barred-Procedure.

An attachment of the estate by the Collector under S. 99 of the Cess Act does not bar the filing of a suit for rent by the proprietor against the tenant. But the Court is not competent to proceed with the suit and pass a decree so long as the attachment is not removed. The necessary consequence is that the hearing of the suit must have to remain stayed during this period. This procedure would on the one hand, enable the Court to pass a proper decree after giving due credit to the tenant for any amount that he might have had to pay to the Collector during this period and on the other hand it will avoid the consequence which must necessarily arise if a simultaneous legal proceeding can be instituted by the Collector against the same tenent for recovery of the same arrears of rent. (Nasim Ali and Mukherjea, JJ.) MANINDRA CHANDRA ROY v. Gopi Ballay Sen. 195 I.C. 691=14 R.C. 123=45 C.W.N. 44=A.I.R. 1941 Cal. 353.

-Ss. 100 and 105 (b)—Collector performing duties under this Act-If an officer of crown.

Under the present administration at least all the senior officers of Government are 'officers of the Crown' as that expression is understood in this country. When the Collector performs the duties cast upon him by the cess Act be performs them as Collector that is as an officer of the Crown and not as an agent of the local authorities (Harries, C.J. Fast Ali and Manohar Lall, JJ.) JHALAK PRASAD SINGH v. PROVINCE OF BHAR. 20 Pat, 573=194 I.C. 663=14 R.P. 17=7 B.R. 818 1941 I.T.R. 386=4 F.L.J. (H.C.) 178=22 Pat. BEN. CO-OPTIVE. SOCIETIES ACT (1940) L.T. 863=1941 P.W.N. 689 (S.B.)=A.I.R. 1941 Pat. 306.

——S. 105-B—Scope of inquiry—Consideration of rates of previous valuation—If sufficient compliance with rules.

Where in an application under S. 105-B of the Bengal Cess Act, the Road Cess Officer considers the rates of the previous revaluation, which are found suitable, it cannot be said that he is wrong, he must in such a case be held to have sufficiently complied with the rules. (Swanzy,) HARIHAR-GIR V. PROVINCE OF BIHAR. 11 B.R 273.

BENGAL CO-OPERATIVE SOCIETIES ACT (XXI OF 1940), S. 4—Registration of Society cancelled and liquidator appointed under Act 11 of 1912—Procedure to be followed by Liquidator after Bengal Act coming into force.

Where after the registration of a society is cancelled and a liquidator is appointed under the Co-operative Societies Act (II of 1912), the Bengal Co-operative Societies Act (XXI of 1940) comes into force, the procedure to be followed by the liquidator thereafter is the old procedure and not that laid down in the new Act. (Henderson, J.) MATILAL MAJUMDAR v. MAJIBAR RAHMAN, 49 C.W.N. 626.

Under S. 4(2) of the Co-operative Societies Act, 1940 an award made under the former Act which has been repealed is deemed to have been made under the new Act. As a result the procedure laid down in this Act for the enforcement of awards will have to be followed. (Henderson, J.) DACCA CO-OPERATIVE TOWN BANK LTD. v. JNANADA SUNDARI DEBYA. 49 C.W.N. 475

A Small Causes Court is not a Civil Court within the meaning of Sch. III of the Co operative Societies Act, 1940, as it is not one of the classes of Civil Courts referred to in S. 4 of Act XII of 1887. (Henderson, J) DACGA CO-OPERATIVE TOWN BANK, LTD. v. JNANADA SUNDARI DEBYA. 49 C.W N. 475.

BENGAL COTTON CLOTH AND YARN CONTROL ORDER (1943)—Validity—Defence of India Rules, R. 81.

The Bengal Cotton Cloth and Yarn Control Order, made by the Bengal Government on October 19th 1943, comes within the terms and powers of R. 81 (2) (a) and (b) of the Defence of India Rules and is valid. (Derbyshire, C. J. and Gentle, J.) KHETSIDAS GIRDHARILAL, In the matter of. 49 C.W.N. 595.

8.7—Direction issued by Additional Textile Controller to dealer to sell entire stock to specified person at specified rate—Validity—Government of India Act, S. 299 (1).

By S. 7 (1) of the Bengal Cotton Cloth and Yarn Control Order as amended on April 2nd, 1945, the Provincial Textile Controller can prescribe maximum prices for the sale of cloth. On the same date the Government of Bengal gave the Additional Controller the same powers as the Controller. A direction issued by the latter officer to a licenced dealer to hand over his entire stock to one of the handling agents mentioned therein and prescribing the rates at which he was to be pair after such handling over, is clearly within the powers given in R. 81 (2) (a) and (b) Defence of India Rules and is in accordance with condition 5 of the license which is

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set out in the Bengal Cotton Cloth and Yarn Control Order.

Per Gentle, J.—Assuming that the dealer will be deprived by his property by virtue of the direction, that will be done with authority of law, and consequently, there will be no infringement of S. 299(1) of the Government of India Act. The direction that payment will be made subsequent to the goods being handed to the handling agent, does not violate the provisions of the Sale of Goods Act. (Perbyshire, C.J. and Gentle, J.) KHETSIDAS GIRDHARHAL, In the matter of. 49 C. W N. 595.

BENGAL COURT OF WARDS ACT (IX OF 1879), S. 10-C-"Cwil Court"——Meaning of—If includes High Court.

The words "Civil Court" in S. 10-C of the Bengal Court of Wards Act mean the Court of the District Judge, the Court of the Additional Judge, the Court of the Subordinate Judge and the Court of the Munsif. They do not include the High Court. (Derbyshire, C. J., Panckridge and Nasim Ali, JJ.) RAI ANATH NATH POSE V. SRIS CHANDRA NANDY. 196 LC. 322=14 R.C. 221=73 C.L.J. 277=45 C.W.N. 617=:A.I.R. 1941 Cal. 529 (S.B.).

S 10-C-"Date of assumption of charge of property"-Interpretation.

The words "the date of the assumption of charge of the property" in S. 10-C of the Court of Wards Act refer to the date when the Court of Wards takes actual possession of the property and not to the date of the original declaration of the ward as a disqualified proprietor. The words "the property" in the section must be taken to mean the particular property taken over by the Court of Wards at the particular date when it takes possession. If, therefore, the Court of Wards takes possession of different properties on different dates, the date of the assumption of charge of such properties is the particular date on which they were taken possession. (Ormond, J.) Sushila Devi v. Nawabzada Pari Banu Khan. 49 C.W.N. 120.

S. 10 (c)—Sale in breach of section—Is void, not voidable.

A sale held in contravention of S. 10 (c) of the Court of Wards Act, as amended in 1936, is void and not merely voidable. (Ran, J.) MANOMOHINI. CHAUDHURANI 7. NITYANANDA SAHA. 47 C W.N. 799=77 C.L.J. 277=210 I.C. 150=16 R.C. 402=A.I R. 1943Cal. 609.

S. 10 (c)-Words 'for seven years thereafter"-Interpretation.

In S. 10 (c) of the Court of Wards Act, the words "for seven years thereafter" are not attracted to decrees which do not carry any interest. Apparently, the Ligislature thought that in cases of decrees carrying interest, if interest he paid regularly, no injustice will be done to the decree-holder if the levy of the execution be postponed for seven years more. (Nasim Ali and Pal. Jl.) MANAGER, KASIMBAZAR RAJ WARDS ESTATE V. RAKHAL DAS. I.L.R. (1942) 2 Cal 241=46 C. W N. 454=205 I.C. 395=15 R C. 613=A.I.R. 1943 Cal. 99.

S. 10-C-Words "for seven years there-after"—Interpretation.

The words "for seven years thereafter" in S. 10 C of the Court of Wards Act, mean for seven years after the expire of four years from the

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date on which the Court of Wards assumed Co., LTD v. PRAMATHA NATH. I.L.R. (1942) 2
Cal. 295=46 C.W. N. 662=205 I.C. 399=15 R.C 612=A.I.R. 1943 Cal. 100.

-S. 10 (c) (1)—Ward paying during year interest for that year alone-If entitled to exemption.

Under S. 10 (c) (1) of the Court of Wards Act, "the interest due under such decree or order which has to be "paid in full every year during the said seven years" is interest for each of those seven years. Therefore, a ward is estitled to the benefit of this sub-section if during the fifth year he pays the interest for that year alone. (Das J.) H. V. Low & Co., Ltd. v. Pramatha Nath Malia. [Reversed on appeal.] 47 C.W.N. 273.

----S. 10 (c) (1)-Ward paying during fifth year interest due for that year alone-If entitled to exemption.

In order to be entitled to exemption from execution of a decree for seven years after the expiry of four years referred to in S. 10 (c) (1) of the Court of Wards Act, the ward must pay at the end of the fifth year not merely the interest due for that year but also the entire interest due for the previous four years. 47 C.W.N. 273, reversed. (Derhyshire, C.I. and Lodge.I.) H.V. I.OW & Co., Ltd. v. Kumar Pashupati Nath. I.L.R (1944) 1 Cal. 1=47 C.W.N. 896.

-S. 18—Scope— Non-compliance — Effect– Ward-If bound by acts or omissions of Court of Wards.

A ward of Court is not bound by the acts of the Court of Wards unless the provisions of S. 18 of the Court of Wards Act are fully complied with. Where therefore, the manager of the Court of Wards omits to make any demand on the lessee of coal mine belonging to the wards for cesses payable by the lessue without at all considering the question of the liability of the lessee, it cannot be said that S. 18 of the Court of Wards Act has been complied with. The ward therefore is not bound by the omission on the part of the Court of Wards to realise cess and can claim the same from the lessee after he comes into possession of his estate. The lessee cannot plead that he has got a discharge from the Court of Wards. (Manohar Lall and Das, J.) NAM-AKSHYA NARAIN SINGH v. Arjun. 24 Pat. 551.

-S. 35-Right of Court of Wards against creditors—Property in charge of Receiver— Power of Court of Wards to apply for his discharge.

The Court of Wards has only the same rights as against creditors of the ward which the ward himself, if not disqualified, would have, except in so far as it is so provided in express terms in the Court of Wards Act S. 35 of the Act does not give the Court of Wards any better right to obtain possession of a particular property than the ward himself, if not disqualified, would have. Where therefore a property of the ward is in charge of a Receiver appointed in a suit by a creditor against the ward before the Court of Wards took over the management, the Court of Wards is entitled only to move the Court for discharge of the Receiver on grounds which would sary for the Commissioner to invoke S. 34 of the

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entitle the ward himself, if not disqualified, to move the Court. (Derbyshire, C.J. and Lodge, J.) BHABANI CHURN LAW v. TULSI CHANDRA. I.L. R (1944) 1 Cal. 623=48 C.W.N. 183=A.I.R. 1945 Cal. 183.

S. 59-A—Manager of Estate under Court of Wards—Public servant. Angelo v. Kandan Manihi. [see Q.D. 1936 '40 Vol. I Col. 318] 21 MANJHI. [see Pat. L.T. 1085.

-S. 60-A-Applicability after relinquishment of estate by Court of Wards.

S. 60 A of the Bengal Court of Wards Act provides that no property which is or has been under the charge of the Court of wards shall be liable to be taken in execution without leave of the Court. The section applies to execution of a decree even after the court of wards has released the estate of the judgment debtors. (Harries, C.J. and Manohar Lall, J.) LACHMI NARAYAN v. MAHOMED MEHDI. 20 Pat. 223=192 I.C 387=13 R.P. 455=7 B.R. 385=21 Pat L.T. 947=A.I. R. 1941 Pat. 70.

-S. 60-A-"At any time"-Meaning of-If confined to period of ward's lifetime.

Though the prohibition in S. 60A of the Bengal Court of Wards Act is one limited to a compare-tively short space of time the wards "at any time" cannot mean at any time during within the wards lifetime. The prohibition against execution in the section can apply to execution even after the wards death. (Harries C.J. and Manohar Lall, J.) LACHMI NARAYAN v. MAHOMED MEHDI. 20 Pat. 223=192 I.C. 387=13 R.P. 455=7 B.R. 385= 21 Pat.L.T. 947=A.I.R. 1941 Pat. 70.

-S. 60-A-Scope and operation-"His property" -Meaning of.

The bar imposed in S. 60-A of the Court of Wards Act against execution in the circumstances mentioned in that section operates "at any time" but of course it operates only in respect of the execution of a decree made under circumstances mentioned in the section, not necessarily in respect of all decrees. The words "his property" in the section do not mean any of his property. (Ormond, J.) SUSHILA DEVI v. NAWAB-ZADA PARI BANU KHAN. 49 C.W.N. 120.

-Ss. 69 and 70—Rule 115—Is intra vires Angelo v. Kanian Manjhi. [see Q.D. 1936-'40 Vol J. Col 318] 21 Pat.L.T. 1085.

BENGAL ESTATES PARTITION ACT (V OF 1897)—Existence of separate knewat-If proof of formal partition barring partition under Act.

The existence of a separate khewat is not always sufficient proof of a formal partition or that the present proprietors are in possession in severalty of lands representing their respective interests so as to bar a partition under the Bengal Estates Partition Act. (Middleton,) Unit Narain Man-ton v. Bibi Rasool. Bandi. 9 B.R 33.

——S. 34—Applicability—Order allowing application under S. 29—Appeal under S. 112 (1) (b)—Resort to S. 34—Necessity.

In an appeal under S. 112 (1) (b) of the Bengal Estates l'artition Act from an order under S. 29 that an application he admitted, it is not neces-

Act at all. (Mieddleton.) UDIT NARAIN MAHTON v. BIBI RASOOL BANDI. 9 B.R. 33. v. Bibi Rasool Bandi.

-S. 44 (2) and (3)—Apportionment of cess without notice-If ultra vires-Jurisdiction of Civil Court-Limitation.

Any apportionment of cess by the Collactor under sub S. (3) without the notice prescribed by sub-S. (2), of S. 44 of the Cess Act will be an act without jurisdiction and the Civil Court will have jurisdiction to declare such on apportionment as ultra vires, illegal and not binding on the party concerned. As the apportionment is a nullity, no question of limitation can arise for bringing a declaratory suit. (Akram and Pal, JJ.) RITENDRA KANTO LAHIRI v. DHIRENDRA KANTO LAHIRI. I.L.R. (1943) 1°Cal. 469=207 I.C. 25=16 R.C. 1=77 C.L.J. 141=47 C.W.N. 277=A.I.R. 1943 Cal. 193.

\_\_\_\_S. 99—Applicability—Co-sharers—Bakasht lands—Some co-sharers placed in posses-sion for convenience of management - Settlement of rayats by latter in course of management-Acquisition of occupancy rights-Subsequent partition—Lands allotted by partition to co-sharer subject to tenancy—Right to eject tenants. Rajendra Narayan v. Hargobind Choudhury. [see Q.D. 1936-40 Vol I. Col 324] 192 I.C. 508= 13 R.P. 494=7 B.R. 480=A.I.R.1941 Pat. 19.

-S. 99-Mortgage of share by co-sharers-Subsequent partition—Mortgagor allotted other properties in lieu of mortgaged property Suit on mortgage ignoring partition—Sale—Obstruction to delivery—Remedy of mortgagee—Application for amendment of all proceedings and documents -Competency-Dispute as to identity of property.

Where a partition follows a mortgage and other properties are allotted to the mortgagor in lieu of the mortgaged property, there can be no doubt that the martgagee can proceed against the substituted security and can bring to sale the property which represents the property originally mortgaged. When the mortgagee does not proceed against the substituted security but ignoring the partition proceeds against the property originally mortgaged and bring the same to sale and difficulties arise after the whole proceedings are over in obtaining delivery of possession, he may be permitted to amend the plaint, preliminary decree and final decree, but no further amendment can justifiably be made, i. e., no amendment can be made in any of the relevant documents and proceedings following the final decree, such as the execution petition, sale proclamation and the sale certificate. If an amendment were allowed in the latter, the result would be that property will have been bought and sold which has never been even put up for sale. After such amendment fresh steps will have to be taken to bring the substituted property to sale. But when there is a serious dispute as to what was the subject matter of the mortgage, proceedings for amendment of the relevant documents in the case are not appropriate. A question involving the identity of the property mortgaged cannot be dealt with on an application to amend. A case of misdescription can be dealt with by amending the plaint, and decree, but not a dispute as to the identity of the properties which are the subject-matter of the

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mortgage. (Harries, C.J. and Fazl .11i, J.) SHYAMAKANT LAI. v. RAM LAI. 193 I.C. 748= 13 R P. 617=7 B.R. 636=22 Pat.L.T. 267=A.I. R. 1941 Pat. 399.

S. 99—Scope—If affects accrual of occu-pancy rights under Bihar Tenancy Act- Settle-ment of raiyat by co-sharer in possession on behalf of all co-sharers - Effect of - Occupancy rights -Accrual of-If effective after partition. RAJENDRA NARAYAN v. HARGORIND CHOUDHURY. [see Q.l). 1930—'40 Vol. I. Col. 326] 192 I.C. 508=-13R.P. 494=7 B.R. 480=A.I.R. 1941 Pat.19.

-S. 119-I)uty of Revenue Court-Partition by Revenue Court-Right of parties to challenge in subsequent civil suit.

The Revenue Court has jurisdiction to decide, when allotting a patti, as to which land should go to one party or the other. It has further jurisdiction to decide the character of the lands because it has to fix a valuation in order to equalise the assets in proportion to the share of each cosharer. In doing so it has to embark upon an elaborate inquiry as to the character of the land, who is in possession thereof, whether it is in the possession of the tenants or of the co-sharer landlords on behalf of all or on their own behalf. Under Chapter 6, Estates Partition Act, the Batwara Officer has to prepare a record of rights which it would adopt for the purpose of the partition. It is enjoined by the Act that the Batwara Officer shall have regard to the survey record if it exists. But he has also the power to alter it so as to bring it in accord with the actual state of affairs which exists on the land at the time when the partition is proceeding. The cosharers, who are parties to the partition, have full opportunities to contest, and as a matter of experience they do contest these questions at all possible stages. If after the parties have adopted a basis or have failed to convince the Batwara Officer to adopt another view, a partition takes place, they cannot afterwards be allowed in a Civil Court to contest the legal effect of that partition by urging that the Batwara Officer was wrong when he treated the land as bakasht and that as a matter of fact he should have treated the land as the lands of one of the co-sharers only. (Harries, C.J. and Manohar Lall J.)
MAHADEO SARAN PANIE v. SHAIKH KHUDA
BAKHSH, 22 Pat. 99=15 RP. 358 = 206 I.C. 547=9 B.R. 333=A.I.R. 1943 Pat. 180.

-8. 119-Jurisdiction of Civil Court--Il'hen ousted.

S. 119 of the Estates Partition Act excludes jurisdiction of Civil Courts only in matters which related to the mode of determination of Government revenue or to the details of partition and allotment, and it does not oust the jurisdiction of the Courts in matters involving questions of title. (Mukherica and Akram, IJ.) BIMA-LENDU ROY v. SHEBAITS OF DEITY GOPAL DEY. 49 C.W.N. 117.

-S. 119-Orders not liable to be contested-Limits.

What is barred by S. 119 of the Estates Partition Act, or not liable to be contested or set aside by civil suit or orders passed under the different sections referred to there in, and not a suit by

## BENGAL EXCISE ACT (V OF 1919).

any person claiming an interest in land. (Varma. J.) Kunjbehari Rai v. Buni Sinha. 190 I.C. 817=7 B.R. 47=A.I.R. 1941 Pat. 50.

BENGAL EXCISE ACT (V OF 1919), S. 83 (b)—Cognisance of offence taken on challan submitted by Inspector of Police—Latter acting on letter from Collector of Excise—Validity of acting on proceedings.

Where a Magistrate took cognisance of an offence under the Excise Act on a challan submitted by an Inspector of Police acting on a letter written by the Collector of Excise sanctioning the prosecution,

Held, that even assuming that the letter amounted in itself to a complaint or report as described in S. 83 (b) of the Excise Act, the Magistrate did not take cognisance on such complaint or report, that the police officer who filed the challan of which cognisance was taken did not answer to the description required by S. 83. namely, "an Excise Officer authorised by the Collector in this behalf" and that in the circumstances the entire proceedings were void. Roxburgh, J.) FAKIR MAHOMED v. EMPLROR. 194 I.C. 777=14 R.C. 18=72 C.L.J. 611=42 Cr.L.J. 619 =45 C.W.N. 112=A.I.R. 1941 Cal. 246.

BENGAL FOOD ADULTERATION ACT (VI OF 1919), S. 6-Ghee consigned to firm seized at railway station-Conviction of consignee –Sustainabitity.

Where ghee consigned to a firm were seized at the railway station, a partner of that firm is not liable to be convicted under S. 6 of the Bengal Food Adulteration Act, as it could not be said that he was storing it for sale at the railway station.

Two tins of ghee consigned to a firm were seized at the railway station and found adulterated. The accused was found to be a partner in the firm and convicted under S. 6.

Held, that the conviction could not be sustain ed inasmuch as the accused could not be said to be storing ghee for sale at the railway station. (Henderson, J.) CHAIRMAN, DISTRICT BOARD v. SREENIBASH. 197 I.C. 68 = 14 R.C. 359 = 43 Cr. L.J. 107=A.I.R. 1941 Cal. 491.

-S 6 (1) and (4) -Consignce taking delivery of consignment of oil at railway station-Oil found to be adulterated from sample taken at railway premises-Presumption, if arises. HARI RAKSHAK DUTT v. CHARMAN, DISTRICT BOARD BIRBHUM. [see Q.D. 1936—'40 Vol. I. Col. 3233]. 194 I.C. 136—13 R.C. 492—42 Cr.L.J. 522—72 C.L.J. 531—A.I.R. 1941 Cal. 150.

-S. 6 (3)—Want of opportunity to examine nature of goods—If valid defence.
RAKSHAK DUTT v. CHAIRMAN, DISTRICT HARI BOARD, BIRBHUM. [see Q.D. 1936—'40 Vol. I, Col. 3233] 194 I.C. 136=13 R.C. 492=42 Cr.L.J. 522=72 C.L.J. 531=A.I.R. 1941 Cal. 150.

BENGAL GENERAL CLAUSES ACT (I OF 1899), S. 8—Scope and applicability. DHIRENDRA NATH ROY v. IJJETALI MIAH. [see Q.I.). 1936—'40 Vol. I, Col. 333]. 13 R.C. 514—194 I.C. 511.

BENGAL GHATWALI LANDS REGULA. The last male proprietor of certain shares in TION (XXIX OF 1814)—Execution of decree two tauzis died in 1900. Ten years later his Q.D.—14

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of Civil Court against ghatwal-Attachment of "surplus profits"-Allgwance to ghat wal-Power to fix-Allowance fixed by executive authority-If binding on executive Court.

It is well-settled that the surplus profits of a ghatwali tenure in the Sonthal Parganas, governed by the Bengal Regulation XXIX of 1814, which may be left after the payment of Government revenue, the wages of the chowkidars employed by the ghatwal and "other like charges" are available for the satisfaction of the decrees obtained against the ghatwal. Whatever is left over to the ghatwal out of the income of his tenure after the payment of the Government revenue, etc., is his personal property and as such liable to be seized in execution by holders of decree against the ghatwal. The question of what would be the surplus profits available to the decree-holders must be determined by the executing Court. The ghatwal's maintenance executing allowance and the personal expenses cannot be regarded as coming within the term "other like charges," though the Court executing the decree must make provision for the maintenance and other necessary expenses of the ghatwal judgment-debtor. His maintenance allowance connot be regarded as salary to be fixed by the executive authorities. When the surplus profits are under attachment by the Civil Court, it is that Court which has to determine the amount of the surplus profits available to the decreeholder and for that purpose to fix the allowance to be paid to the ghatwal judgment-debtor. Any allowance which may have been fixed by the executive authorities previously cannot be binding on the Civil Court executing a decree against the ghatwal. (Chatterji, J.) HAR KISHORE PRASAD SINHA V. LOKNATH PRASAD DHANDHANIA. 194 I.C. 234=13 R.P. 686=7 B.R. 734=A.I.R. 1941 Pat. 502.

BENGAL HOUSE-RFNT CONTROL ORDER. (1942) para 12-Order of District Judge-Revision-District Judge, if acts as Court or as executive officer.

The District Judge exercising powers under paragraph 12 of the House-Rent Control Order, Bengal, acts merely in the capacity of a superior executive officer, and not as a Court. Consequently his orders are not revisable by the High Court under S. 115. C. P. Code. The District Judge was not and could not have been invested with the authority of a Court by the provisions referred to above. It is only a legislative enactment or a rule having statutory authority that can constitute a Court or invest a Judge with authority to determine matters outside his ordinary jurisdiction. (Mukherjea and Blank, JJ.) KIRON CHANDRA BOSE v. KALIDAS CHATTERJEA. I.L.R. (1943) 2 Cal, 272=77 C.L.J. 31;=288 I.C. 108=16 R.C. 145=47C.W.N. 460=A,I.R, 1943 Cal. 247,

BENGAL LAND REGISTRATION ACT (VII OF 1876)—Duty of Revenue Court—Daughter-in-law of last male holder not claiming possession or title but opposing applications of other aptlicants--Co-sharer in possession-Proper course-Constructive possession-Sufficiency.

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his place. The widow died in 1940. It was found that sons of daughters of the last male proprietor had no title to the property and were not in possession. If was found that one K, an agnate who belonged to a separated branch of the family was in possession of the property more as a co-sharer than as agent or representa-tive of L. There was no evidence to show that L had surrendered her rights to K. But she did not apply for mutation of her name, though she opposed all the applications for registration except that of K.

Held, that the succession would not open until the death of L; that L must, for the purpose of mutation, be regarded as constructively in possession and her name should be recorded though she did not claim title or possession over the property, in dispute. To order the mutation of any other person's name would be placing person at a great advantage at her death, a course which the Revenue Courts ought not to adopt. (Middleton.) RAM SAROBAR SARAN SINGH v. UMANATH SINGH. 10 B.R. 542.

-Jurisdiction-Question of priority as between two Court sales—Jurisdiction of Land Registra-tion Court to decide—Possession based on Court sale-Finding of-If conclusive in revision.

It is not the province of the Land Registration Court te decide finally a question of priority as between two Court sales in a case where each of the rival claimants relies on a Court sale and delivery. A finding of possession on a Court sale has possession cannot be lightly interfered with in revision. (Middleton.) JADUNANDAN SINGH v. HARKISHUN SAHAI. 7 B.R. 889=1941 P.W.N.

-Mortgage-Refusal-to register deed on the ground of minority of executant-Subsequent agreement by guardian of executant declaring that he executed as guardian-If validates deed in respect of minor's interest-Mortgagee's right to be recorded.

Where a mortgage deed has been refused registration under the Registration Act on the ground that the executant was a minor, there is no valid registered deed operating as a transfer. A subsequent agreement by the guardian of the minor executant declaring that he executed the deed not only on his own behalf but also as guardian of the minor executant cannot validate the mortgage so as to entitle the mortgagee to have his name recorded as a mortgagee under the Land Registration Act in respect of the minor's share. The order refusing registration, if not appealed from, becomes final and cannot be evaded by the subsequent argeement by the guardian of the minor executant. Where there is no effective change of title, there is no use of relying on possession, because possession must be in accordance with some title. Nor can the principles of equity be invoked to evade statutory requirements; equity cannot go contrary to statutary law. (Middleton.) RAMESHWAR NATH CHAUBEY v. RAM CHETAN RAI. 1941 P.W.N. 472

-Mutation-Possession by widew in lieu of

widow and daughter-in-law L were recorded in corded for long time by mistake-If confers right or if ground for continuing entry.

> The position of a wislow in possession of her husband's property in lieu of dower is analogous in its effect to that of a mortgagee in possession; but such possession is not in fact the possession of a mortgagee, and is not the form of possession for the record of which the Land Registration Act makes provision. The fact that the widow has been recorded for over 30 years may imply a proprietary right, but the entry cannot confer such a right if in fact no such right existed; nor can such a right be conferred by the consent of the beirs of her deceased husband. The mere fact, that there has been such an entry either by error or omission, would not make it equitable or logal to perpetuate such a mistake to the detriment of others. (Waddleter) MAHOMED ALAM F. SADAR ALAM AND OTHERS, IIBR. 80.

> -Possession not based on title -If sufficient to support—Application for registration.

> Mere possession not based on any title will not justify registration under the Land Registration Act of the name of a person alleged to be in possession in a possibly unlawful way. Possession must be shown to be in accordance with a prima facie title. "(Middleton.) JAGDISHWARI PRASAD v. SHAM PRAKASH NAPAIN. 7 B.R. 894.

> -"Possession"-Purchaser of interst of coparcener in Hindu joint family—Delivery of pessession under (). 21, R. 95, C.P. Code-Mulation-Right of purchaser to be recorded along with other members of the family.

A recent delivery of possession under (), 21, R, 95, C.P. Code, cannot be disregarded in mutation proceedings unless there is very strong evidence to the contrary. Where the interest of a Hindu co-parcener in a Hindu Mitakshara joint family is sold in execution of a money decree against him, the purchaser of such interest who obtains delivery of possession under O. 21, R. 95, C.P. Code, can be registered in the place of the co-parcener along with the other members of the family. (Middleton.) RANJIT SINGH v. JHAMELI SINGH. 8 B.R. 515.

-Proceedings under-Scope-Application for registration-What has to be proved-Order of Civil Court for registration of person not proving possession-If binding on Revenue Court.

An application for registraton under the Land Registration Act must prove some title or at least bona fide claim, and also that he is in possession in accordance with such a title or claim. Even if the Civil Court has directed the Revenue Court to register the name of a person who has not proved his possession, the Revenue Court must respectfully decline to do so. The fact that the objector has no locus standi to object and has not himself applied for registration is irrelevant when the applicant not being in possession is not entitled to registration whether there is any objection or not. (Middleton.) RADHA KRISHNA v. HARI DAS. 8 B.R. 37.

Res judicata—Decisions as to possession— Effect—Possession of person in 1913—If conclusive as to possession in 1942-Duty to investigate claims. See C.P. Code, S. 11. 9 B.R. 195.

-Revision-Concurrent finding as to passesdower-If confers right to be recorded-Widow re sion-Interference by Board of Revenue.

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Under the Land Registration Act, when there are concurrent findings by the lower Courts that the objector's evidence of possession is better than that of the applicant, the Board will not interfere with the findings of fact about possession in the absence of sufficient reasons. (Middleton.) JAGDISHWARI PRASAD v. SHAM PRAKASH NARAIN. 7 B.B. 894

——Scope—Property sold for cess under certificate sale—Purchaser obtaining registration of his name as proprietor—Subsequent—Sale of interest of original recorded proprietor by Civil Court—Purchaser at latter sale getting delivery and applying for registration—Right as against purchaser at certificate sale.

The respondent purchased a property in 1933 a certificate sale for arrears of cess, and he got his name recorded under the Land Registration Act in 1935. Subsequently in execution by a Civil Court, the interest of the original recorded proprietor was sold in June, 1938 and purchased by the petitioner, and this sale was confirmed in July, 1938 and delivery of possession was given in August, 1938, but the respondent was not a party to these proceedings. The petitioner having applied for registration of his name as purchaser at the Civil Court sale,

Held, there having been no delivery of possession to the petitioner as against the respondent, the Revenue Court could not deprive the respondent who had been recorded properietor of his registration, which had been long completed and become final, and that succession in the case was not from the recorded proprietor. (Middleton.) CHANDRADIP NARAIN SINGH v. KULDIP SHAI. 8 B.R. 408.

-----Ss. 3 (6) and 47-Manager-Meaning of.

"Manager" under S. 3 (6) of the Bengal Land Registration Act means any person who is in charge of an estate as an executor. A person is not in charge of an estate merely by being declared entitled to manage it. Under S. 47 of the Act, only an appointment by the Collector, the Court of Wards or any Civil or Criminal Court, can be recognised by the Land Registration Court. (Middleton) RAMCHARAN SINGH v. DHAROHAR KUER. 10 BR. 387.

——Ss.7 and 8—Scope—Possession of woman claiming as heir to last recorded proprietor—If can be recorded.

Ss. 7 and 8 of the Bengal Land Registration Act provide for the recording of the names of proprietors, managers, and mortgagees in respect of revenue paying land, but it does not follow that every person in possession has the right to be recorded. There are forms of possession for the record of which the Act makes no provision. The possession of a woman who claims as heir to the last recorded proprietor is not of a kind which can be recorded under the Act and she does not come under any of the categories mentioned in the Act. (Middleton) Ballia Sinch v. Jhalko Kuer 7 B.R. 513=1941 P.W.N. 458.

-----S. 28—Construction—Entry based on fraudulent misrepresentation—Correction of.

S. 28 of the Bengal Land Registration Act should (Swansy) KESHAW not be construed too strictly, and when an entry is LAL. 11 B.B. 309.

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based on a fraudulent misrepresentation, it should be corrected under S. 85 of the Act. (Middleton.) UMAT BATOOL v. FATIMA ZOHRA, 9 B.R. 162.

——Ss. 42 and 52, proviso—Scope—Registration of name of mortgagee-Question of possession—Dispute as to validity of mortgage against vendee—Duty of Revenue Courts.

In a land registration proceeding it is no doubt immaterial for the purpose of registering the name of a mortgagee whether he is in possession or not, but it is undesirable for the revenue authorities to recognise a mortgage the validity of which as against a purchaser of the property ought to be settled by the Civil Court. (Middleton.) BHAGWAN DASS v. CHHOTU PRASAD VARMA. 10 B.R. 248.

-----S 45-Applicability-Neither party proving possession-Procedure.

Where in a Land Registration case neither party has really established possession, the case is one in which S. 45 of the Land Registration Act should be applied. A person having the *prima facie* right to possession should be put in possession. (Middleton.) WASI AHMED v. ABDUL RASHID MIAN. 10 B.R. 393.

———Ss. 52 and 55—Mutation—Application for— What applicant has to prove.

Before an applicant can obtain mutation, he must prove not only that he has a bonn fide claim to succession but also that possession has passed on such succession. (Swanzy.) BISHESWARI BAHUASIN v. SUNDARI KUMARI. 9 B.R. 130.

8.52—Scope and effect—Purchaser of share in estate in Civil Court execution sale obtaining delivery—Failure to apply under S. 42 in time—Right of as against purchaser at certificate sale.

A purchaser of a share in an estate in execution of a decree of a Civil Court who obtains delivery of possession, but who does not apply within 6 months of his purchase for registration under S. 42 of the Land Registration Act, cannot be said to have acquired possession in accordance with his succession within the meaning of S. 52 of the Act. There a person who purchases that share at a subsequent certificate sale and obtains delivery of possession in pursuance thereof cannot be ousted by the former and is entitled to have his name registered to the exclusion of the former. (Lee.) FAUDARI BHAGAT v. HARIHAR SAO. 11 B.R. 358.

Where both possession and succession are disputed, and there is conflicting evidence in support of both parties, the case is one to which S. 55 of the Land Registration Act applies and the dispute can only be properly determined by a Civil Court to which it should be transferred. (*Lee.*) KEDARNATH CHOUDHURY v. SUGABATI CHOUDHARIN. 11 R.R. 400.

8. 55—Applicability—Lis pendens—Applica-

In determining the right to possession under S. 55 of the Bengal Land Registration Act, the doctrine of list pendens, where it applies, ought to be given effect to. In a case where neither party has established possession the case is a fit one for the application of S. 55. (Swarsy) KFSHAWAR PRASAD SINGH v. BIHARI LAL. 11 B.B. 309.

-S. 55-Duty of Collector-Dispute as to possession and title-Reference to Civil Court-Procedure.

Where in proceedings under the Land Registration Act, both title and possession are the subject of vehement dispute between the parties, both claiming mutually exclusive possession and challenging the title deeds, the case is eminently one for determination by a Civil Court; and the Collector should therefore refer the matter in dispute to the Civil Court under S. 55 of the Land Registration Act. (Lee.) MST. AJHOLA KUER v. MST. BAL KUER. 11 B.R. 473.

-S. 55—Scope—Duty of Land Registration Officer-Possession of Gotra of deceased-If to be disregarded.

The best evidence of possession in favour of a Malik's right is the collection of rent and the payment of revenue. What the Land Registration Officer has to do under the Land Registration Act is to find and decide the factum of possession. The possession of Gotra of the deceased proprietor, if proved, is not the possession of a trespasser, but is attributable to a bona fide claim. Such possession cannot therefore be dis-(Middleton.) BIRANJ KUER v. DWARIKA regarded. SINGH. 1941 P.W.N. 426.

-S. 78—Applicability—Tenancy under several estates.

Per Pal, J.—S. 78 of the Bengal Land Registration Act contemplates a tenancy under a single estate. It does not apply to a case where there is one tenancy under several estates or at least when there has been registration in respect of some of these estate. (Mukherjea and Pal, JJ.) Brojendra Kumar v. Bilouis. I.L.R. (1942) 2 Cal. 565 = 209 I C. 138=16 R.C. 284=47 C.W.N. 94= A.I.R. 1943 Cal. 332.

-S. 78-Registration effected after dismissal of rent suit by trial Court-Decree, if can be passed by appellate Court.

A landlord who effects registration of his name under S. 78 of the Bengal Land Registration Act after his suit for rent is dismissed by the trial Court and while it is pending in appeal, can get a decree passed by the appellate Court for the rent due to him. (Edgley and Akram, II.) GANGA PRA-SANNA v. KUMAR BRAHMA NIRANJAN. 46 C.W. N. 702.

Ss. 78, 79 and 80—Scope—If controlled by S. 81. See Bengal Land Registration Act, S. 81 22 Pat. 311.

-S. 78—Suit for rent by assignee of rent— Assignee not a registered proprietor—Suit, if barred. See BIHAR TENANCY ACT, S. 60. 196 I C. 552.

-S. 79-Scope and effect of-Receipt for rent by mortgagee-Effect of, See BIHAR TENANCY ACT, S. 60. 23 Pat. 858.

-S. 81—Applicability—Privies or successorsin-interest of parties to contract of lease.

S. 81 of the Bengal Land Registration Act applies not only as between persons who are parties to the contract but also as between persons who are their privies or successors in interest. The section would therefore apply to the case of a contract between a lessor and a lessee and their privies or successors-in-interest. (Fazl Ali C.J.

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and Sinha J.) Geyanchand Suchasti v. Bun-han Mahton. 22 Pat. 311=211 I.C. 235:=16 R. P. 221=10 B.R. 362=AI.R. 1944 Pat. 11.

-S. 81-Scope and effect.

Per Pal. J.-S. 81 of the Bengal Land Registration Act protects "the conditions of any written controt" from any interference by the provisions of Ss. 78 to 80. It does not protect "any written ontract" from such interference. (Mukkerjea and Pal, II.) BROJENDRA KUMAR v. BILQUIS, I.L.R. (1942) 2 Cal. 565=209 I.C. 138: 16 R. C. 284=47 C.W.N. 94=A.I.R. 1943 Cal. 332.

-S. 81-Scope-If controls Ss. 78, 79 and 80 -Assignee of landlord's rights under written lease-Right to recover rent from lessee-Non-registration of name-1f har to right of suit.

The language of S.81 of the Bengal Land Registration Act would show that it was meant to control Ss. 78.79 and 80. Where there is a written contract of lease showing that a certain party is liable to pay rent, that person cannot very well say that not withstanding the contract he is not so liable merely because the lessor has assigned his rights under the lease to another whose name is not registered as provided by S. 78 of the Act. The assignee is not precluded from recovering rent from the lessee though his name is not registered under the Act. (Fazl Ali C J. and Sinha, J.) GEVANCHAND SUCHANTI T. BUDHAN MATHON 22 Pat. 311=211 I.C. 235=16 R.P. 221=10 B.R. 362=A.I.R. 1944 Pat. 11.

-S. 85-Mistake in Register D-Commissioner directing steps to be taken under S. 85-Land Registration Deputy Collector ordering correction-If ultra vires.

Where there is a mistake of long standing in Register D, and the Commissioner directs that if a mistake needing correction exists in the Register, he should be moved for its correction under S. 85 of the Land Registration Act, the Land Registration Deputy Collector cannot disregard it and pass an order of correction. Such an order is ultra vires. (Middleton.) KESHWAR SAHU v. MST. GAMBHIRAN. 7 B.R. 996 (1).

-\$.85-Second appeal-Summary rejection-Propriety.

The Commissioner can no doubt reject a second appeal in a Land registration case summarily under S. 85 of the Bengal Land Registration Act, but where the two Courts below have differed definitely on the important point of possession, it is desirable that the second appeal should be fully heard on its metits and not dismissed or rejected summarily. (Middleton.) DAKHO KUER v. CHHO-HARO KUER. 10 B.R. 165.

-Construction-Jurisdiction of Collector to sell-Omission to issue notification-If renders sale void-Latest date-Discretion of Collector.

S. 5 of the Bengal Land Revenue Sales Act cannot be construed as meaning that the Collector is required to fix a date on or before which any arrears of revenue must be paid and that when no notification is issued and in conquence no such date is fixed, the Collector has no jurisdiction to sell the estate. The Legislature could not have intended to give the Collector a discretion in the matter. The intention of the Legislature in enacting S. 5 was to ensure that persons who

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had attached estates in execution of decrees and in certain cases the owners of estates themselves shoud be warned that there were arrears of revenue to be paid and that in default of their being paid before a certain date the estates were liable to be sold. The notification under S. 5 is to specify the latest date on which payment of arrears would be recieved. Such latest date to be inserted in the notification is one of the latest dates fixed by the Board of Revenue under S. 3; the discretion of the Collector in selecting the particular date is fettered by the direction that the notification should be published not less than 15 clear days preceding it. It is also well settled that when an estate is in arrears on one of the latest dates for payment fixed under S. 3. the Collector has jurisdiction to sell it, and that the omission to issue a notification under S. 5 in any case in which it is required does not render the sale void but a mere irregularity which may in certain cases render the sale liable to be annulled. (Agarwala and Shearer, II.) RAM RITHAN SAHI v. RAZIA BEGAM. 21 Pat. 682=205 I.C. 147=15 R.P. 257=9 B.R. 200=A.I.R. 1943 Pat. 88.

--- Purchase by co-proprietor at revenue sale brought about by him by intentional default-Another co-proprietor, when entitled to reconvevance.

In the case of revenue sales brought about by the intentional default of a co-proprietor, who ultimately purchases the estate at the designed revenue sale, another co-proprietor will be entitled to get a re-conveyance only if he was not in default and was not aware of his co-sharer's default in time(i.e.) before the kist date fixed under S. 3 of Act XI of 1859. (Mitter and Khundkar, JJ.) PRAMATHA NATH BISWAS v. PROVABATI GHOSE. 75 C.L. J. 207

BENGAL LAND REVENUE SALES ACT (XI OF 1859) -- Sale under - Sale becoming final -Power to annul on ground of hardship.

A sale under the Bengal Land Revenue Sales Act cannot be annulled on the ground of hardship after it has become final and conclusive, even though the demand of the kist for the estate sold has actually been paid in time. (Middleton.)
AZIZUR RAHMAN v. GIRWARDHARI MAHTON. 10 B.R. 89.

-8.3-Latest date of payment-Arrears of revenue shown as due in Touzi--Register in respect of kist-Last day of Kist-If latest day of payment for arrears.

When arrears of revenue are shown as being due in the Touzi Register from any estate in respect of any particular Kist, this must be taken as showing, until the contrary is proved, that the last day of the Kist is the latest day of payment for the arrears and that, if such arrears are not paid by that day, the estate will prima facie be liable to be brought to sale under S. 3 of Act XI of 1859. (Edgley and Akram, J.J.) RUKMINI KISHORE DE v. JAI CHANDRA DATTA RAY. I.L. R. (1942) 2 Cal. 125=15 R.C. 536=204 I.C. 598=A.I.R. 1943 Cal. 62.

S. 3—Notification fixing three kists for estates whose annual revenue is less than Rs. 100-1f applies to separate accounts.

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respect of estates the annual revenue of which was less than Rs. 100 the arrears are to be cleared up by three instead of four kists, does not apply to separate accounts but to entire estates. (Mitter and Khundkar, JJ.) MANMATHA NATH MUKHERJEE V. ANANGA KUMAR. I.L.R. (1941) 2 Cal. 353=74 C.L.J. 131=198 I.C. 152=14 R. C. 438=45 C.W.N. 890=A.I.R. 1941 Cal. 702.

-S. 5-Applicability-Estage not attached but advertised for sale in execution of mortgage decree—Sale for arrears of revenue—Notification—Necessity.

S. 5 of the Bengal Land Revenue Sales Act does not apply to sales of estates which have not been attached but have been advertised for sale in execution of mortgage decrees. The words "arrears of estates under attachment by order of any judicial authority" in the 3rd clause of S. 5 must be strictly construed and do not cover such cases of sale in execution of mortgage decrees. A notification under S. 5 is not essential though desirable. (Agarwala and Shearer, JJ.) RAM RIJHAN SAHI v. RAZIA BEGAM. 21 Pat. 682= 205 I C. 147=15 R.P. 257=9 B R. 200=A.I.R. 1943 Pat. 88.

-S. 5-"Land Revenue"-Nimaksayer-If part and parcel of land revenue or "other demand" in clause 4 of S. 5.

The words "other demands" in the fourth clause of S. 5 of the Bengal Land Revenue Sales Act must be construed on the ejusdem generis principle. Nimaksayer is clearly a sum annually payable to the Government by the proprietor of an estate in respect of it and hence is part and parcel of revenue for purpose of S. 5 of the Bengal Land Revenue Sales Act and is not one of the "other demands" enumerated in the fourth clause of S. 5. In view of the definition of revenue in Act XI of 1859 and Act VII of 1868, "land revenue" in S. 5 of the Act of 1859, cannot be construed as being the jama fixed at the time of Permanent Settlement. (Agarwala and Shearer, //) RAM RIJHAN SAHI v. RAZIA BEGAM. 21 Pat. 682=205 I.C. 147=15 R.P. 257=9 B.R. 200=A.I.R. 1943 Pat. 88.

-Ss. 5 and 6-"Notification" under-If notice under S. 8, Land Revenue Sales Act, 1868.

There is no warrant for making a distinction between a "notification" under Ss. 5 and 6 of the Bengal Revenue Sales Law of 1859 and a "notice" referred to in S. 8 of the Bengal Revenue Sales Law of 1868. Such a distinction is wholly unfounded. A "notification" under the former Act which is intended for the public is none the less a "notice" contemplated by S. 8 of the Act of 1868. (Chatterji and Shearer, J.) BADRINARAIN 7. BENIMADHO. 23 Pat. 947 = 220 I.C. 25 = 11 B.B. 449 = A.I.R. 1945 Pat. 186.

-S. 5-Omission to issue notification-Effect on

In a case where a notification under S. 5 of the Bengal Land Revenue Sales Act was necessary but was not issued, it is incumbent on a person challenging the sale on the ground of the omission to issue the notification to show that it was specifically taken as ground in the petition of appeal to the Commissioner and that in consequence of this omission substantial injury had been caused The general notification of the Board of to him. (Agarwala and Shearer, IJ.) RAM Revenue under S. 3 of Act XI of 1859 that in RIJHAN SAHI v. RAZIA BEGAM. 21 Pat. 682

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205 I.C. 147=15 R.P. 257=9 B.R. 200=A.I.R. 1943 Pat. 88.

-S. 6-Contents of notification-District in which lands are situate not stated-Shares ex luded from sale not specified-Names of all proprietors not mentioned -Notification, if defective.

A notification issued under S. 6 of Act XI of 1859 mentioned the number of the touzi, the name of the mahal and the total revenue payable. It then stated that the entire mahal was not to be sold and specified the exact share to be sold. The proprietors were mentioned as S and others. The amount of revenue actually in arrears was also specified and it was further stated that the other parts of the tousi were not to be

Held, that the notification was not defective. There is nothing in S. 6 of the Act which requires that the district in which the lands of the touri are situate should be specified, aithough they are entirely outside the district on the collectorate roll of which the touze is borne. The notification need not specify the shares which are excluded from sale, when the share sold is not a residuary share. The non-mention of the names of all the proprietors is not an irregularity in the notification. (Mukherjea and Ellis, JJ.) BHUPENDRA CHANDRA v. RASH MONI GOPE. 49 C.W.N. 420.

-S. 6-Mistake in notification as to extent of interest to be sold in individual mauza in residuary estate-If vitiates sale.

A trivial error or mistake in mentioning the interest to be sold in one of many mauzas comprised in a residuary estate to be sold, in the notification issued under S. 6 of the Bengal Land Revenue Sales Act cannot be said to be a mistake which can in any way contribute to the property being sold for an inadequate price so as to render the sale invalid, when it is found that the notification was carefully drawn up and published and stated that what was to be sold was the ijmal or residuary estate, and it was intimated that if the property to be sold had not been exhaustively described, that is, if some mouza had been omitted or the interest shown against any particular mauza was in fact greater than that shown in the notification, the purchaser would obtain a valid title to that mauza or interest. (Agarwala and Shearer, JJ.) RAM RIJHAN SAHI v. RAZIA BEGAM. 21 Pat. 682=205 I.C. 147=15 R.P. 257=9 B.R. 200=A.I.R. 1943 Pat. 88.

S. 6-Notification affixed only in Court of district which bears touzi on its roll-Lands of touzi situate entirely in another district-Validity.

The provisions of S. 6 of the Bengal Land Revenue Sales Act are complied with by affixing the notification in the offices of the Collector and Judge of the district which bears the touzi on its roll, although the lands of the tousi are situate entirely in another district. (Mukherjea and Ellis, J.). BHUPENDRA CHANDRA v. RASH MONI GOPE. 49 C.W.N. 420.

-8.6—Notice of sale—Rules and forms prescribed by Board of Revenue-Nature of-Non-compliance with them-Effect of.

The special rules issued and the special forms prescribed by the Board of Revenue for drawing up the notice of sale under S. 6 of Act XI of 1859 have no statutory force, not being framed under any authority conferred by the Act. They

Government's own officers. The omission of the particulars therein specified will not vitiate the notice, if the particulars given are sufficient to identify the estate or share of an estate to be sold and give prospective buyers full information as to what they are invited to bid for (Edgley and Biswas, II.) SAKINA KHATOON P. KHIROD CHAN-DRA MANNA. I.L R. 1942 1 Cal. 310-200 I.C. 506=15 R.C. 51=74 C.L.J. 340=46 C.W.N. 73= AI.R.1942 Cal. 173.

-S. 6-Notice to be served in Court of District Judge served in Court of Munsiff-Latter acting a. Judge's Registrar-Irregularity.

Where a copy of the notice under S. 6 of the Land Revenue Sales Act required to be served in the Court of the District Judge was, in fact, served in the Court of the Hunsiff who was acting as his Registrar, and it was so served owing to carelessness and not owing to any notion that that was the correct procedure, there is irregularity in the publication of the notice, and if this has led to substantial injury the sale is liable to be set aside. (Roxburgh, J.) PROVINCE OF BENGAL v. RAMLAL OSWAL. 201 I.C. 154=15 R.C. 143=46 C.W.N. 534=74 C.L.J. 562=A.I. R. 1942 Cal. 308.

-8.6-Notification-Sale of residuary estate for arrears due on it-Names of all proprietors-If to be set out su full.

S. 6 of the Bengal Land Revenue Sales Act does not require that the names of the various proprietors of the estate to be sold should appear in the notification, where the estate belongs to a very large number of persons many of whom have taken the precaution of opening separate accounts and when it is only the residuary estate that is being sold for arrears due upon it. It is clearly unnecessary to set out in the notification the names of all the proprietors, as persons intending to bid at a revenue sale do not at all require such information in order to know what the property advertised for sale is. A statement in the column headed "Name of the proprietor of the property which will, be sold" "RR, and of the property which will, be sold" "RR, and others" would be sufficient. (Agarwala and Shearce, JJ.) RAM RIJHAN SAHI V. RAZIA BEGAM. 21 Pat. 682=205 .I.C. 147=15 R.P. 257=9 B.R. 200=A.I.R. 1943 Pat. 88.

-S. 6—Sufficiency of notice—Test-Non-mention of mouza or Sadar Jama-If fatal- One of two defaulting shares in arrear for two kists and the other for only one-One latest date of payment given in both cases-Notice, if sufficient.

The test of a valid notice under S. b of the Bengal Land Revenue Sales Act is whether the specification of the estate or share of an estate therein is sufficiently definite to enable likely purchasers to know exactly what is going to be sold and to ensure thereby reasonable competi-tion. No hard and fast rule can be laid down as to what will constitute such sufficiency. It must depend upon the particular facts of each case. The non-mention of the mousa in the notice of sale is not a fatal omission. If the property advertised for sale is not the whole estate but only certain shares which are correctly specified, the omission of the Sadar Jama of the whole estate is also not fatal. Where one of the two defaultare in the nature of administrative directions to ing shares is in arrear for two kists and the other

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share for only one, and only one latest date of payment is given in both cases but the unpaid amounts would become 'arrears of revenue" amounts would become 'arrears of revenue' within the meaning of S. 2 of the Act before that date, the information given is enough to satisfy intending purchasers that the sale is going to be held on a proper date. (Edgley and Biswas. J.) SAKINA KHATOON v. KHIROD CHANDRA MANNA. I.L.R. (1942) 1 Cal. 310= going to be held on a proper date. Biswas. II.) SAKINA KHATOO 200 I.C. 506=15 R.C. 51=74 C.L.J. 346=46 C. W.N. 73=A.I.R. 1942 Cal. 173.

-S. 7-Non-scrvice of notice on co-sharer-If ground for annulment of revenue sale of separate

A revenue sale of a separate account cannot be annulled on the ground of hardship at the instance of a co-sharer for non-service on him of the notice under S. 7 of the Bengal Revenue sale law, where there is no evidence of fraud on the part of the other co-sharers. Service of notice under S. 7, which is intended for tenants would be of no special value to the maliks. (Middleton.) Abdul Razak Khan v. Kuldip Sahay. B.R. 30.

-S. 7-Service of notice in wrong place-Irregularity-Sale, if liable to be set aside.

The service of one of the notices issued under S. 7 of Act XI of 1859 in the wrong place with a misleading description of the property is, undoubtedly, an irregularity. But if this irregularity is relied upon for purposes of setting aside a revenue sale, it must be proved affirmatively that it had really the effect of misleading bidders and caused substantial loss to the proprietors. (Mukheriea and Ellis, JJ.) BHUPENDRA CHANDRA v. RASH MONI GOPE. 49 C.W.N. 420.

S. 8—"Notice"—If includes notification under Bengal Act XI of 1859. See BENGAL LAND REVENUE SALES ACT (1859) Ss. 5 AND 6. 23 Pat. 947.

S. 8—Scope—If subject to S. 25 of Act XI of 1859. See Bengal Land Revenue Sales Act (1859), S. 33. 23 Pat. 947.

-S. 8—Scope—Revenue sale—Certificate granted to purchaser—Suit to set aside sale alleging non-service of notices under Ss. 5. 6 and 7 of Act XI of 1859— Maintainability.

It is clear from S. 8 of the Bengal Land Revenue Sales Act of 1868 that after a sale certificate has been granted under S. 28 of the Bengal Land Revenues Sale (Act XI of 1859), the title of the purchaser cannot be impeached on the ground of non-service of the notices prescribed by the Act of 1859, and the Court is precluded from entering into the question whether the notices were duly served or not. Hence a suit to set aside a revenue sale, after the grant of a sale certificate, on the ground of non-service of notices under Ss. 5, 6 and 7 of Act XI of 1859, is clearly barred under S. 8 of the Act of 1868. (Chattetji and Shearer, JJ.) BADRINARAIN v. BENIMADHO, 23 Pat. 947=220 I.C. 25=11 B.R. 449=A.I.R. 1945 Pat. 186.

-S. 10—Opening of sepatate account—Effect of-Liability to pay kist for period prior to separation-If remains joint with larger account.

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of liability to pay according to the dowl kistiband but the separation of liability for sale in default of payment according to the kists notified under S. 3. The liability for sale of the separate account is separated from the liability for sale of other separate accounts or of the residuary that is left after the opening of the separate accounts. It is wrong to state that if a separate account is carved out of a larger account, the liability of both the accounts to pay the kists for the period prior to the date on which the Collector records his sanction to the opening of the separate account remains joint. After the separate account is opened out of the larger account, the larger account has no existence for revenue administration and cannot, obviously, be put up to sale. (Mitter and Khundkar, JJ.) MANMATHA NATH v. ANANGA KUMAR. I.L.R. (1941) 2 Cal. 353=74 C.L.J. 131=45 C.W.N. 890=198 I.C. 152= 14 R.C. 438=A.I.R. 1941 Cal. 702.

-S. 11-Opening of separate account-Conditions.

The jurisdiction of the Collector to open a separate account is absolutely dependent on the existence of the circumstances mentioned in S. 11 of Act XI of 1859. A separate account opened in the absence of those circumstances will be without jurisdiction. (Akram and Pal, JJ.)
SURENDRA NATH DAS v. ABDUL JALIL. 201 I.C.
130=15 R.C. 138=75 C.L.J. 109=46 C.W.N. 306=A.I.R. 1942 Cal. 354.

S. 12—Nimhowla and osat nimhowla in Government Khasmahal—If protected—Entry in settlement papers that they "are not recognised by Government"-Effect of.

Where a nimhowla and an osat nimhowla in a Government Khasmahal are entered in the settlement papers "as not recognised by the Government", the effect of the entry is, at least, to deprive these tenures of the protection of the third exception in S. 12 of Act VII of 1868. They are not even under-tenures requiring to be annulled by the Government under that section. At most they are incumbrances which fall with the revenue sale. (Rau and Mukherjea, IJ.) SASHI-KUMAR BAISHNAB v. RAMANI MOHAN DAS. 214 I.C. 19=17 R.C. 12=77 C.L.J. 422=A.I.R. 1944 Cal. 228.

-S. 12—'Tenure'—If includes interest of Jotedar or raiyat.

The interest of a Jotedar or raiyat is not a tenure within the meaning of S. 12 of Act VII of 1868 and is, therefore, not protected. (Biswas, J.) ABDUL KARIM v. RAJCHENDRA. 199 I.C. 44-14 R.C. 518-46 C.W.N. 493-A.I.R. 1942 Cal. 378.

-Ss. 13 and 14—Joint sale of separate accounts-Legality.

A joint sale of two or more defaulting separate accounts of an estate is not warranted by the provisions of Act XI of 1859 and is illegal. S. 14 of the Act points to a separate sale as the proper procedure. The rule laid down by the Board of Revenue in Note 8 to S. 13 of the Act in the Government Manual directing a joint sale is not The concluding sentence of S. 10 of Act XI of a statutory rule, and can have no legal effect. 1859 does not directly contemplate the separation (Edgley and Biswas, II.) SAKINA KHATOON &

46 C.W.N. 73=A.I.R. 1942 Cal. 173.

-S. 14—Applicability—No bid at sale of separate account.

The procedure prescribed in S. 14 of the Bengai Land Revenue Sales Act applies just as much when there are no bids at all at the sale of a separate account under S. 13 and the sale proves wholly abortive as when the bids are insufficient and the sales prove partially abortive. (Rau and Bisteas, JJ.) MAHOMED MANJURAL HAO v. BISSESWAR BANERJEE. 47 C.W.N. 408-210 I.C. 479=16 R.C. 437=77 C.L J. 32=A.I.R. 1943 Cal. 361.

-S. 14—Declaration for sale of entire estate-When may or may not be made.

Under S. 14 of Act XI of 1859 the Collector is not bound to make a declaration for the sale of the entire estate in every case where the bid for one defaulting separate account fails to realise the full amount of arrear due thereupon, without previously putting up the other separate accounts which are also in arrears and have been advertised for sale. He can do so only if he finds that even if the other sales are held and the proceeds are sufficient in each case to cover the amount due upon the account sold, the estate as a whole will still be left in arrear. If on the other hand the arrears due upon one or more of the separate accounts advertised for sale, if realised, will be sufficient to wipe off the demand against the estate as a whole, the collector is bound to proceed with the sales, of the separate accounts seriatim, stopping only when he finds that by appropriating the purchase money of each account. sold to the liquidation of its own arrears, the estate as a whole is freed from its liability for arrears of revenue in the general account (Edgley and Biswas, J.).) SAKINA KHATOON v. KHIROD CHANDRA MANNA. I.L.R. 1942 1 Cal. 310=200 I.C. 506=15 R.C. 51=74 C.L.J. 346= 46 C.W.N. 73:=A.I.R. 1942 Cal. 173.

-S. 14—Sale of entire estate—Closing of separate accounts—Blending of arrears for periods prior and subsequent to abortive salc— Legality.

The Collector holding the sale of an entire estate under S. 14 of Act XI of 1859 can close the separate accounts. The blending by him of the two amounts of arrears—one for the period anterior and the other subsequent to the abortive sale of the separate account—is not illegal. (Mitter and Khundkar, JJ.) Manmatha Nath v. Ananga Kumar. I.L.R. (1941) 2 Cal. 353=74 C.L. J. 131=198 I.C. 152=14 R.C. 438=45 C.W.N. 890=A.I.R. 1941 Cal. 702.

14—Sale proclamation—Entry arrears in wrong column-Validity of sale.

The entry in the sale proclamation of the amount of arrears in a wrong column, column No. 7, instead of column No. 8, does not effect the validity of the sale, especially when the said amount has been entered in the right column in the copy published in the Collectorate and in the Court of the District Judge. (Mitter and Khund-

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KHIROD CHANDRA MANNA, I.L.R. (1942) 1 Cal. I.L.R. (1941) 2 Cal. 353=74 C.L.J. 131=198 310=200 I.C. 506=15 R.C. 51=74 C.L.J. 346= I.C. 152=14 R.C. 438=45 C.W.N. 890=A.I.R. 1941 Cal. 702.

> - S. 14-Sale under-If different from sale by anction--Appeal-Limitation-5. 25.

> There is nothing in the Bengal Revenue Sale Law which puts a sale under S. 14 of the Act on a different footing as regards an appeal from a sale by auction. On the other hand S. 25 of the Act, specifically mentions an appeal against any sale made under the Act. When S. 14 is applied on the ground that there are no bidders at the sale of a share, the share is, for ten days, not for sale in the usual sense; that is, for that period it is not liable to be sold by public auction; it does not mean that when it is sold to a co sharer that sale has a special characteristic. An appeal from such a sale can not also be entertained if time (Middleton.) AZIZUE RAHMAN 2'. GIRbarred. WARDHARI MAHTON. 10 B.R. 89.

> -Ss. 14 and 18-Scope-Sale-Alisence of bidders-Notice of sale of whole estate after 10 days in default of payment of arrears by other cosharers-Payment of arrears by one co-sharer day-Effect of Subsequent payment by defaulting next sharer-If effective.

> On 8-1-1940, a share in a Tauzi was put up for sale. As there was no bid, it was announced, in accordance with S. 14 of Act XI of 1859, that unless within 10days one or more of the recorded co-sharers in the estate paid up the whole arrears due from the share in question, the entire estate would be put up for sale. On the next day the recorded proprietor of a separate account in the Tauzi deposited the arrears and on the same day the defaulting proprietor of the share deposited the arrears and the collector thereupon passed an order of exemption from sale.

> Held, that the arrears having been deposited by the co-sharer the purchase was complete, and the collector had therefore no jurisdiction to exempt the defaulting share. (Middleton.) RAM KISHORE PANDEY v. SHEODUTT PRASAD. 7 B.R. 422: 1941 P.W.N. 489.

> -- S. 25-"Appeal"-Nature-If an "appeal" under Limitation Act.

> There is no warrant for holding that an appeal under S. 25 of the Bengal Revenue Sale Act is not really an appeal as contemplated by the Limitation Act. The word "appeal" in S. 25 of the Act cannot be interpreted in any different sense from that in which it is used in the Limitation Act. Middleton.) MAHOMED YUSUF v. ANANDI PRASAD 8. B.R. 114.

> -S. 25-Applicability-Sale under S. 14-Appeal-Limitation. See BENGAL LAND REVENUE SÂLES ACT, S. 14. 10 B.R. 89.

-S. 25—Jurisdiction of commissioner-. Ippeal perferred beyond time-Order on after hearing-Revision-Interference by Board.

A commissioner's order under S. 25 of the Bengal Revenue Sale Law is final and the Board will not ordinarily interfere with his order in revision; but where the commissioner entertains an appeal which is preferred beyond the period of limitation prescribed for it by S. 2 of the Bengal kar, JJ.) MANMATHA NATH v. ANANGA KUMAR. Act VII of 1868, he acts without jurisdiction, and

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his order on such an appeal is therefore liable to be set aside in revision by the Board of Revenue. Yusuf v. Ananli (Middleton.)γ∣∨номер PRASAD. 8 B.R. 114.

-Ss. 25 and 26-Reference to Board by Commissioner — Competency — Non issue of notice under S. 25—When amounts to hardship—Powers of Commissioner and of Board to set aside sale.

The non-issue of a notice under S. 5 of the Bengal Revenue Sales Act cannot be held to be a hardship if it was not required by law. The mere fact that on a previous occasion a notice under S. 5 was issued when it was legally necessary to do so would not mean that it amounts to a hardship if the notice is not issued when there was no legal necessity to do so. In such a case it is not open to the Commissioner to make a reference to the Board under S. 26 of the Act. He can set aside the sale himself under S. 25, if he thinks the notice was legally necessary, but the Board cannot set aside the sale under S. 25. (Middleton.) SUBHKARAN DAS 7. GOBIND MAHESH-WAR PRASAD. 8 B.R. 428.

-S. 25—Revision—Jurisdiction of Board of Revenue.

Though an order of the Commissioner under S. 25 of Bengal Act XI of 1859 is not generally open to revision by the Board of Revenue, the Board can revise what may be called a miscellaneous order under the Act when such an order appears to the Board to be illegal. (Middleton.) RAM KISHORE PANDEY v. SHEODUTT PRASAD. 7 B.R. 422=1941 P.W.N. 489.

\_Ss. 25 and 26—Setting aside of sale--Conditions to be imposed-If confined to compensation

only. The conditions which the Board of Revenue may impose under S. 26 of the Bengal Revenue Sales Act, while setting aside a revenue sale, are not limited to the compensation laid down in S. 25. It can direct the arrears and all Government dues and interest at 61/4% to be deposited as a condition for the setting aside of the sale. (Middleton.) AHMAD HUSSAIN v. JIWACHH SAHU. 8 B.R. 403.

S. 26—Annulment of sale—Inherent power of Board-Order of Board annulling sale without representation by Commissioner-Validity.

The Board of Revenue has no inherent power

to make an order annulling a revenue sale apart from the provisions of S. 26 of the Bengal Land Revenue Sales Act. Therefore, an order by the Board annulling a sale with out a representation by the Commissioner under this section, is with out jurisdiction and ultra vires. (Rau and Biswas, JJ.) MAHOMED MANJURAL HAQUE z. BISSESSWAR BANERJEE. 47 C.W.N. 408=77 C.L.J. 32=210 I.C. 479=16 R.C. 437=A.I.R. 1943 Cal. 361.

\_\_\_\_\_S. 26 Applicability—Appeal time-barred under S. 25—Jurisdiction of Commissioner to make recommendation-Limitation Act, Ss. 2 (10) and 18.

An appellant under S. 25 of the Bengal Land Revenue Sales Act is not a person having a right to institute a suit or make an application within the meaning of S. 18 of the Limitation Act, an appeal not being a suit under S. 2 (10) of the Limitation Act. The Commissioner has therefore Revenue Sales Act. (Edgley and Bismes, 1)

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no jurisdiction to entertain under S. 25 of the Land Revenue Sales Act a time-barred appeal. Such an appeal not being a properly constituted appeal he has no jurisdiction in respect of such an appeal to make a recommendation under S. 26 of the Act. (Middleton.) SAHDEO SAHAI SINHA v. NATHUNI LAL. 8 B R. 397.

-S. 26—Applicability—Sale under S. 14. S. 26 of the Bengal Land Revenue Sales Act applies to a sale under S. 14 of the Act. (Ran and Biswas, JJ.) Mahomed Manjural Haque v. Bissesswar Banerjee. 47 C.W.N. 408=77 C. L.J. 32=210 I.C. 479=16 R.C. 437=A.I.R. 1943 Cal. 361.

-S 26 -O'der of Board annulling sale-Suit for declaration that it is ultra vires—Board if necessary party—Member of Board if protected from suit-Judicial Officers' Protection Act.

The Board of Revenue is not a necessary party to a suit for a declaration that its order annulling a sale under S. 26 of the Bengal Land Revenue Sales Act is ultra vires and void. The Board of Revenue cannot be sued in its official capacity either in the name of the Board itself or in any other name and the only way of impleading it in the suit would be by impleading the member constituting the Board as a party defendant in his individual capacity and in his own name. As the Board does not act judicially in annulling the sale, the member concerned is not protected from suit by the Judicial Officers' Protection Act. But he MAHOMED MANJUKAL HAQUE v. BISSESSWAR BANERJEE. 47 C.W.N. 408=210 I.C. 479=16 R. C. 437=77 C.L.J. 32=A.I.R. 1943 Cal. 361.

-S. 26 –Powers of Board—Setting aside in revisison on ground of hardship.

The Board has power to interfere in revision in order to correct a mistake partly caused by the negligence of an officer of the Court of Wards in omitting to mention a separate number specifically and will, in revision, annul a revenue sale on the ground of hardship under S, 26 of the Bengal Land Revenue Sales Act. (Middleton.) AHMAD HUSSAIN v. JIWACHH SAHU. 8 B.R. 403.

-S. 26—Sale—Setting aside—Failure Mukhtear to pay revenue owing to family troubles

and grief-If ground for.

The fact that Mukhtear entrusted with paying the land revenue on behalf of the owner forgets to pay the kist and fails to inform the owner on account of family trouble or grief can be no ground for annulling a revenue sale under S. 26 of the Bengal Revenue Sales Act. It is the plain duty of a Mukhtear, who engages in such business, to regularly check up the list of the estates adver-tised for sale in the Collector's Court. Failure to do so is carelessness in the extreme, and cannot be tolerated. (Lee.) HARINARAYAN PANDE v. BIN-DESHWARI PRASAD. 11 B.R. 385.

S. 31—Purchase money of one defaulting share—Appropriation towards discharge of arrears due from another-Permissibility.

The appropriation of the purchase money of one defaulting share towards the discharge of the

## BEN, LAND REVENUE SALES ACT (1859)

SAKINA KHATOON v. KHIROD CHANDRA MANNA. I.L.R. (1942) 1. Cal. 310=200. I.C. 506=15. R.C. 51=74 C.L.J. 346=46 C.W.N. 73=A.I.R. 1942 Cal. 173.

-S. 33—Bengal Land Revenue Sales Act (1868), S. 8-Relative scope and combined effect.

Both S. 33 of Act XI of 1859 and S. 8 of Act VII of 1868 must be given their full effect. The combined effect of the two sections is that after a sale certificate is granted, the sale is liable to be impeached by suit if it had been held contrary to the provisions of the former Act, provided that the irregularity complained of is not of the kind mentioned in S. 8 of the latter Act. (Chatterji and Shearer, J.). BADRINARAIN v. BENI MADHO. 23 Pat. 947=220 I.C. 25=11 B.R. 449= A.I.R. 1945 Pat. 186.

-S. 33—Fraud—Co-sharer not in default arranging with potential purchasers for reconveyance to him of his interest-Effect of.

Where an estate has been sold in consequence of a default on the part of some of the co-owners of the estate in paying the arrears of revenue, there is no reason why a co-owner who has not himself been in default should not re-purchase the property or his interest in it if he can. Such conduct is not in any way fraudulent so as to render the sale void or invalid. And it makes no difference if, knowing that a sale is bound to take place, he arranges with potential purchasers to reconvey his interest to him in the event of the property being knocked down to any of them or even sets up an agent to outbid them and buy the property on his own behelf. That does not amount to fraud which will vitiate the sale. (Agarwala and Shearer, JJ.) RAM RIJHAN SARI v. RAZIA BEGAM. 21 Pat. 682=205 I.C. 147 =15 R.P. 257=9 B.R. 200=A.I.R. 1948 Pat. 88.

-S. 33—Fraud—What constitutes—Ground for setting aside sale—Agreement among bidders not to bid against one another—Co-sharers parties

to agreement-If vitiates sale.

In order to justify a revenue sale being interfered with on the ground of fraud it must be shown that the fraud in question took place not during the sale, but prior to it, the sale having been directly brought about or engineered by means of it and that the perpetrators of the fraud were the co-owners of the proprietors who challenge the sale or otherwise stood in a fiduciary relationship to them. An agreement between the bidders at an auction sale not to bid against one another and later to divide the property between them; to which some co-sharers are also parties, is not void as against public policy and cannot be held to be fraud vitiating the sale. (Agarwala and Shearer. JJ.) RAM RIJHAN SAHI v. RAZIA BEGAM. 21 Pat. 682—205 I.C. 147—15 R.P. 257=9 B.R. 200=A.I.R. 1943 Pat. 88.

-8.33—Revenue sale—Setting aside—Fraud -Inadequate price-Inference.

The mere circumstance that at the revenue sale the property fetched a low price does not at all warrant a conclusion or even by itself raise a suspicion that the sale was brought about by farud, so as to render it void or liable to be annulled. (Agarwala and Shearer, II.) RAM RIJHAN SAHI v. RAZIA BEGAM. 21 Pat. 682=205 I.C, 147=15 R.P. 257=9 B.R. 200=A.I.B. 1943 Pat. 88.

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-S. 33--Sale under S. 14-Whether can be annulled at defendant's instance in collateral action.

A sale held under S. 14 of the Bengal Land Revenue Sales Act in a case where there were arrears of revenue, can only be annulled by a Civil Court under the conditions prescribed in S 33 of the Act. Such a sale cannot be annulled at the instance of a defendant in a collateral action or proceeding. (Ran and Biswas, II.) Ma-HOMED MANJURAL HAQUE v. BISSESSWAR BANERJEE, 210 I.C. 479=16 R.C. 437=47C.W.N. 408=77 C.L.J. 32=A.I.R. 1943 Cal. 361.

-S. 37-Annulment of tenure-Institution of proceedings against under-tenant-If certificate amounts to.

When the purchaser of a superior interest becomes entitled to annul an intermediate tenure, a demand of rent directly from an undertenant in the presence of the tenure-holder by way of a certificate proceeding constitutes an effective election to annul the tenure. (Chakravartti, J.) JITENDRA NATH MONDAL v. JAHAR LAL DAS. 50 C.W.N. 37.

-S. 37-'Encumbrance'-Subordinate not being under-tenure-If may be encumbrance.

A subordinate interest which is not an undertenure within the meaning of S. 37 of Bengal Act XI of 1859 but is merely in the nature of an under tenure, may be classed as an encumbrance. (Nasim Ali, Mitter, Khundkar, Rau and Pal, JJ.) KHAMANKARI DASI v. HARSHAMUKHI DASI. I.L.R. (1943) 2 Cal. 581=208 I.C. 461=16 R.C. 209=77 C.L.J. 232=47 C.W.N. 582=A.I.R. 1943 Cal. 345.

-S. 37-Rights of auction-purchaser.

Per Mukherjea, J .- The statutory title which the law gives to the auction-purchaser at a revenue sale is for protection of revenue and in order to ensure due payment of revenue by such purchaser and to avoid the necessity of repeated sales of the property, he is entitled to all the rights which the original settlor had at the time of the settlement, (Mukherjea and Roxburgh, JJ.) Aptabuddin Howladhar v. Abual Kasem. I.L.R. (1941) 2 Cal. 199=45 C.W.N. 851=200 I.C. 98=14 R.C. 666=73 C.L.J. 405=A.I.R.1941 Cal. 604.

-S. 37- Under-tenure - Meaning - Undertenure not wholly within defaulting estate-Whether can be annulled.

The context requires that the word "under-tenure" in S. 37 of Bengal Act XI of 1859 should not be interpreted by applying the definition in the Act of 1868. It may be a tenure under more than one estate. Consequently a purchaser of an entire estate in the permanently settled Districts of Bengal sold for arrears of revenue due on account of the same can annul an under tenure which is created under the said estate as well as other estates so far as it lies within the estate sold. 70 C.L.J. 34. overruled. (Nasim Ali, Mitter, Khundkar, Rau and Pal. II.) KHAMAN-KARI DASI v. HARSHAMUKHI DASI. I.L.R. (1943) 2 Cal. 581=208 I.C. 461=16 R.C. 209=77 C.L. J. 232=47 C.W.N. 582=A.I.R. 1943 Cal. 345.

-S. 37—Valid sub-division of tenure—If operates as breach of continuity of tenure-Gati tenure

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sold at revenue sale-Sub-division of tenure with consent of defaulting proprietor-Effect of-Position of purchaser -B. T. Act, Ss. 50 and 88.

Though a valid sub-division of a tenure does not operate as a breach of the continuity of the tenure for the purposes of S. 50, Bengal Tenancy Act, it would so operate for the purposes of S. 37, Land Revenue Sales Act, it it were valid and binding against a purchaser of the superior interest in a sale for arrears of Government revenue.

A defaulting proprietor of a gati-tenure cannot consent to a valid-subdivision of the tenure so as to bind a purchaser at a revenue sale. The subdivision of the tenure being invalid as against the purchaser, amounts merely to an amicable arrangement among the tenure-holders for the more convenient enjoyment of the property. (Khundkar and Lodge, JJ.) AMULYADHAN SINHA v. KANAK CHANDRA. 199 I.C. 733=14 R.C. 624 =45 C.W.N. 896=A.I.R. I941 Cal. 368.

-S. 37. Excep. (1)—Burden of proof—Existence of tenure from Permanent Settlement-Presumption from long possession—When arises.

In a suit for ejectment of an under-tenant under S. 37 of the Land Revenue Sales Act, the burden of proof lies on the defendant to prove that he comes within one or other of the excep-tions mentioned in the section. Where the exception on which the defendant relies is that set out in the first clause, which saves which has been istimrari or mokarari tenure held at a fixed rent from the time of the Permanent Settlement, the burden will be lightened to a great extent by giving effect to the presumption in his favour arising from proof of and undisturbed possession. Each case must depend upon its own facts and circumstances as to what should be deemed to be sufficiently long possession for the purpose of justifying such a presumption. Where the tenure is proved to have been in existence in 1830, it is open to the Court to infer as a fact, in the absence of anything to the contrary, that the tenure did exist at the date of the Permanent Settlement. (Bigwas, J.) Ananda Mohan Poddar v. Durga Charan Dutta. 203 I.C. 258=15 R.C. 413=46 C.W.N. 668=A.I.R. 1942 Cal. 527.

-S. 37. Secondly—Settlement—Meaning of. Per Mukherjea, J .- The word "settlement" as used in S. 37, secondly, of the Bengal Land Revenue Sales Act, refers not to the permanent settlement of the year 1793 but it means the particular settlement or contract with the Government, whenever that might have been made, by which revenue was assessed upon certain lands. It means only the original settle-ment and not any subsequent re-settlement. (Mukherjea and Roxburgh, Jl.) APTABUDDIN HOWLADHAR v. ABUAL KASEM. I.L.R. (1941) 2 Cal. 199=45 C.W.N. 851=200 I.C. 98=14 R.C. 666=73 C.L.J. 405=A.I.R. 1941 Cal. 604.

-S. 37 (4)—'Garden'—Enclosed land for growing vegetables.

An enclosed plot of land devoted to the cultivation of vegetables is a garden, and is, therefore, protected under S. 37 (4) of the Revenue

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or are of a permanent nature. (Edgley, J.) RAMESWAR NATHANY v. SUBODH GOPAL I.L.R. (1943) 2 Cal. 167=207 I.C. 302=16 R.C. 50=77 C.L.J. 28=47 C.W.N. 434=A.I.R. 1943 Cal. 262

S. 37 proviso—'Raiyat'—Means cultivator and does not include his successor in interest. KHODADAT BIBI v. KAMALA RANJAN ROY. [see Q.D. 1936—40 Vol. I Col. 3233] 192 I.C. 77=13 Ř.C. 301.

Ss. 53 and 37—Co-sharer purchaser holding separate account—Power to annul encumbrance—Sale caused by his own default.

Under S. 53 of the Revenue Sales Act, read with S. 37 as it must be, a co-sharer of an estate holding a separate account opened under S. 10 or 11, if he purchases the entire estate at a sale on account of its own arrears—whether a sale directed under S. 14 or a sale otherwise held would acquire the estate free from all en-cumbrances and with power to annul undertenures as provided for by S. 37, although the sale may have been caused by his own default. (Chakravarti, J.) JITENDRA NATH MONDAL v. JAHAR LAL DAS. 50 C.W.N. 37,

-S. 58—Applicability—Share of estate.

The word 'estate' in S. 58 of the Bengal Land Revenue Sales Act does not include a share of an estate and the section applies only to integral estates. (Rau and Biswas, JJ.) MAHOMED MAN-JURAL HAQUE v. BISSESSWAR BANERJEE. 210 I. C. 479=16 R.C. 437=47 C.W.N. 408=77 C.L.J. 32=A.I.R. 1943 Cal. 361.

-(VII OF 1868), S. 2—Appeal beyond time -Jurisdiction of Commissioner to entertain-Order on appeal-Liability to be set aside.

The Commissioner is not competent even to entertain an appeal which is not preferred within the time prescribed by S. 2 of Act, VII of 1868; and an order passed by him on an appeal preferred beyond the time so limited is without jurisdiction and must be set aside, although the appellate order is one which set aside an illegal order. (Middleton.) ABDUL LATIF v. MANZURUL HASSAN. 8 B.R. 290.

——S. 2—Appeal to commissioner beyond time prescribed—Jurisdiction of commissioner to entertain. See BENGAL LAND REVENUE SALES ACT. (1859), S. 25. 8 B. R. 114.

----S. 2-Revision-Land revenue sale-Appeal to Commissioner -- Order dismissing -- Interference by Board in revision.

The Board will refuse to interfere in revision with an order of the Commissioner passed in an appeal under S. 2. of the Bengal Land' Revenue Sales Act (VII of 1868) against a land revenue sale. (Middleton.) PACHKAURI GIR v. RAJNANDAN SINGH. 9 B.R. 415.

-S. 12 Exception Thirdly—Recognition of tenure—Note made in column for special incidents in Revisional Survey Record—Presumption—Bengal Survey and Settlement Manual, para. 437 (1).

An etmam was recorded in the Revisional Survey Record as a permanent tenure with, rent liable to enhancement. There was a further note in the column for special incidents in the follow-Sales Act. It is immaterial whether the plants ing terms: "Not binding against Government for grown on the land have to be planted every year the purpose of assessment; the profit of the BEN. LAND REVENUE SALES ACT (1868), BEN. COCAL 3 3LF-307 F. ACT, (1835).

tenure has come out of the profit of the superior landlord."

Held, that the record prima facie showed as a special incident of the tenure that it was not recognised by the settlement proceeding within the meaning of the third excepting clause of S. 12 of the Bengal Act VII of 1868.

Held also, that the note only raised a presumption as to the existence of this special incident and that it would be open to the tenure-holder to show that the tenure was recognised in the above sense and that its rent was taken as the basis of the assessment of the profits of the estate. (Pal.) J.) ROHINI RANJAN DAS v. (JMESHCHANDRA DUTTA. 207 I.C. 34=16 R.C. 15=76 C.L. J. 203 =47 C.W.N. 241=A.I.R. 1943 Cal. 211.

-S. 14—Co-sharer paying up full arrears— Sale, if Complete.

As soon as the full arrears are paid by a cosharer, the purchase is complete under S. 14 of the Bengal Revenue Sale Law, (Middleton.) PACHKAURI GIR v. RAJNANDAN SINGH. 9 B.R.

-S. 14-Deposit by co-sharer-Acceptance by Deputy Collector-If amounts to declaration of purchase by unauthorised officer.

Under S. 14 of the Bengal Revenue Sale Law, a recorded sharer is entitled to purchase the defaulting share by paying to the Provincial Government the whole arrear due from that share. Acceptance of the deposit is only an administrative act and if a Deputy Collector accepts the deposit, it does not amount to a declaration by an officer not empowered to make it that the depositor was a purchaser under S. 14, (Middleton.) PACHKAURI GIR v. RAJNANDAN SINGH. 9 B.R. 415.

-Ss. 14 and 18—Holder of separate share also co-sharer in defaulting share—Right to purchase-Power of Collector to exempt share on default.

Under S. 14 of the Bengal Land Revenue Sale Law, the holder of another separate account who happens also to be a co-sharer in the defaulting share is not debarred from purchasing the defaultshare. If the defaulting share is not purchased by a co-sharer the Collector can, under S. 18 of the Act, exempt the entire share from future sale. The Collector has, however, no power to exempt the share from its liability to be purchased by a co-sharer. (Middleton.) PACHKA-URI GIR v. RAJNANDAN SINGH. 9 B.R. 415.

Ss.14 and 12—Tenants recorded as "raiyats

sthitiban"—Whether protected.
Tenants recorded as "raiyats sthitiban" are not entitled to protection under S. 14 of the Land Revenue Sales Act unless they prove that they actually cultivate the land, but they will be protected by the third exception to S. 12 of the Act if they hold their tenancy under an under-tenure which itself is protected by this exception. (Roxburgh and Akram. JJ.) KHALILAR RAHMAN v. MAMUDA KHATOON. I.L.R. (1942) 2 Cal. 502=208 I.C. 399=16 R.C. 200=76 C.L.J. 393=A.I. R. 1943 Cal. 446.

(4) and (5) -Settlement with one of proprietors after natices-Whether enures for benefit of all.

A settlement of a temporarily settled estate with one of the proprietors after notices were issued under S. 10 (4) and (5) of Regulation VII of 1822, the other co-proprietors neither attending nor objecting, has the effect of a joint settlement with all the proprietors, and enures to the v. Snehalafa Guna. 47 C.W.N. 730.

-8.14(8)—Corrector's power to recuse order of his own to correct entry in record.

No Court has any power to revise its own orders, once they have been duly signed except for correcting elerical mistakes. Any person aggrieved by the order of a Court has his legal councily either in the Civil Court or in the Court to which the original Court is subordinate. The Collector has no power to revise his orders passed in settlement operations under Regulation VII of 1882. If the order is wrong, the remedy is by way of revision to the Board of Revenue, but the Collector cannot revise his own order even for the purpose of correcting an entry in the Settlement Record. (Lee.) RAGHUNAN-DAN SINGH v. NAGESHWAR SINGH. 11 B.R. 448.

BENGAL LICENSED WAREHOUSE AND FIRE BRIGADE ACT (1 OF 1893), Ss. 4 6, 8, 10, 12, 13, and 14—Applicability—Kuilways-Railways Act, Ss. 7, 47 and 135.

The provisions of Ss. 4, 6, 8, 10, 12, 13 and 14 of Bengal Act I of 1893 are inconsistent with Ss. 7 and 47 of the Railways Act and have no application to railways. It is, therefore, not incumbent on the railways to take out a license for their warehouses under the provisions of the Bangal Act and no tax is payable by the railway on that account. These provisions, if applied to railways would result in a division of control between the Central Government and the local authorities, which would be entirely inconsistent with the main scheme of the Railways Act. Further, the railway is protected under the provisions of S. 135 of the Railways Act. The license fee prescribed by the Bengal Act is a tax in aid of the funds of a local authority within the meaning of this section, the local authority being the Commissioner of Police who is entrusted under the Act with the control of the Fire Brigade Fund under the general superintendence of the Local Government, (Edyley, J.) MARRIOTT v. MUNICIPALITY of Howrah. I.L.R. (1941) 1 Cal. 345=196 I.C. 394=42 Cr.L.J. 855=14 R.C. 236=45 C.W.N. 347=A.I.R. 1941 Cal. 319.

BENGAL LIMITATION REGULATION (II OF 1805) S. 11, Second—Assessment of invalid lakhiraj with revenue—Cause of action—When arises, Province of Bengal v. Mritunjoy Roy. [see Q.D. 1936—'40 Vol. I. Col. 358.] 191 I.C. 499=13 R.C. 246.

-S. 11, Second-Claim barred under-Not revived by subsequent repeal of Regulation. PROVINCE OF BENGAL v. MRITUNJOY ROY. [see Q.D. 1936—'40 Vol. I. Col. 358]. 191 I.C. 499—13 R.C. 246.

-S. 11, Second-Not impliedly repealed by Act XIV of 1859. Province of Bengal v. MRITUN Joy Roy. [see Q.D. 1936—'40 Vol I. Col. 358]. 191 I.C. 499=13 R.C. 246.

BENGAL LAND REVENUE SETTLE- BENGAL LOCAL SELF-GOVERNMENT MENT REGULATION (VII OF 1822). S.10 ACT (III OF 1885). Ss. 10, 18-B and 19-

# BENG. LOCAL SELF-GOVT. ACT (1885).

Election held under S. 10 (1) declared void under S. 18-B-Appointment by Local Government-Legality.

If an election held, under S. 10 (1) of the Bengal Local Self-Government Act is subsequently declared void under S.18-B of the Act, the machinery which is provided in S. 19 should be put into operation. It is not within the competence of the Local Government to make an appointment under S. 10 (2), and if an appointment has to be made it should be by the Commissioner under S. 19 if the vacancy is not filled by an election within the time prescribed. [Affirming (Biswas, J.) SASHI SEKHAR BASU V. PROVINCE OF BENGAL. I.L.R. (1942) 1 Cal. 555 (Derbyshire, C. J.) and Gentle J.) UPENDRA NATH MALLICK v. SASHI SHEKHAR BOSE. 46 C.W.N. 641=205 I.C. 79=15 R.C. 577=76 C.L. J. 281 = A.I.R. 1943 Cal. 65.

**-S.** 20 and R. 103--Power of Roard to contract -Contract not executed in manner provided by sule-Enforceability.

Under S. 20 of the Bengal Local Self-Government Act, the power of the Board to contract is subject to the rules made by the Provincial Government under S. 138. R. 103 which requires a contract or agreement entered into by the Board to be sanctioned at a Board meeting, signed by the chairman and two other members of the Board and sealed with its common seal, is intra vires the rule-making power of the Local Government, and unless the contract is so sanctioned and executed, it is not binding upon the Board and cannot be enforced against it. (Gentle, J.) BARASAT BASIRHAT LIGHT RAILWAY CO., LTD. v. DISTRICT BOARD, 24 PAR-GANAS. I.L.R. (1944) 2 Cal. 101.

-S. 28—Order of removal of chairman by Government-Application made by Board Government for such removal not valid-Jurisdiction of Civil Court.

The very foundation of the exercise of the power by the Local Self-Government under the last part of S. 28 of the Local Self-Government Act for the removal of the Chairman of a District Board for persistent neglect of duty as chairman is the application of the Board. If there was no valid application by the Board to the Government, the foundation of the order for removal by Government is gone and there is no reason why the Civil Court cannot declare that order as inoperative. There is nothing in the Act which takes away the jurisdiction of the Civil Court to try this matter either expressly or by necessary implication.

Per Pal, J.-A Chairman of a District Board as such has a legal character and is prima facie entitled to a relief from a Civil Court from any interference with his right in that character. The decision of the Board or of the Government finding that the Chairman persistently neglected his duty will not be conclusive and will remain liable to be questioned in a Court of law. (Nasim Ali and Pal II.) LUTFAR RAHMAN v. WALIUR RAHMAN. 75 C.L.J. 491=205 I.C. 483=15 R.C. 636=A.I.R. 1943 Cal. 59.

Ss. 30 (b) and 28-Validity of requisition —Some of requisitionists withdrawing from requisition—Remaining requisitionists less than sta-

BENG. LOCAL SELF-GOVT. ACT (1885).

thereafter—Order of Government thereon—If ultra vires

Where 15 out of 30 members of a District Board sent a requisition under S. 30 (b) of the Local Self-Government Act for a special meeting for the removal of the Chairman from his office but before the expiry of the period prescribed for the meeting to be called by the Chairman seven of the requisitionists withdrew from the requisition.

Held, that there was no requisition as required by S. 30 (b) of the Local Self-Government Act and that therefore the resolution passed by the Board at a meeting held thereafter for sending an application to the Provincial Government for the removal of the Chairman was not valid and that consequently the action taken by the Government thereon was ullra vires and ineffective. (Nasim Ali and Pal, Jl.) LUTFAR RAHMAN v. WALIUR RAHMAN. 75 C.L.J. 491=205 I.C. 483 =15 R.C. 636=A.I.R. 1943 Cal. 59.

-S. 35-A-Provident Fund Rule-Construction-Rule providing that District Board may grant additional contribution-Contribution, if discretionary.

A Provident Fund Rule of a District Board provided that "the District Board may grant from the District Fund at the time of the retirement to any servant . . . an additional contribu-tion at the rate of half a months pay for each complete year of service rendered by such servant, subject to a maximum of 15 months' pay".

Held, that the question whether or not any additional contribution as contemplated by the rule should be made in any particular case was at the discretion of the District Board, and that if the District Board in any case decided to make an additional contribution the rate fixed by the rule was not imperative though subject to the maximum prescribed by it. (Akram and Pal, JJ.)
DISTRICT BOARD OF KHULNA v. JOSESH CHANDRA.
I.L.R. (1943) 1 Cal. 558—209 I,C. 432—47 C.W. N. 323=A.I R. 1943 Cal. 447.

-S. 73—Roadside land — Powers of District Board-Power to settle same for building purposes.

Roadside land which is under the control and administration of a District Board under S. 73 of the Bengal Local Self-Government Act does not vest in the District Board. The powers of the District Board in respect of such land are limited to the use of the roadside land for purposes ancillary to the maintenance of the main road but the District Board has no right whatever to divert it to a different purpose and to settle it for the purpose of building on it. (Manchar Lall and Beever, J.) DISTRICT BOARD OF MANBHUM v. B. N. Ry. 23 Pat. 931 = A.I.R. 1945 Pat. 200.

S. 79—Scope—If must be read with S. 20. The authority of the Board under S. 79 of the Bengal Local Self-Government Act "to take measures for the construction, repair and maintenance of works" is subject to the express power given in S. 20 to contract, which power is subject to the rules made by the Local Government. The provisions of S. 79 are not exclusive of, but must be read together with the provisions of S. 20. There is no additional separate power contained in S. 79 for a Board to make contracts and it has no quisition—Remaining requisitionists less than statutory number—Resolution passed at meeting held by the mode prescribed in R. 103. (Gentle, L.) BENG, LOCAL SELF-GOVT. ACT (1885).

BARASAT BASIRHAT LIGHT RAILWAY CO., LTD. v. DISTRICT BOARD, 24 PARGANAS. I.L.R. (1944) 2 Gal. 101.

A guarantee by the Board to supplement the net earnings of a tramway company by such annual sums, not exceeding Rs 38 000, being 4 p. c. on the amount of the company's share capital, as might be necessary to make the net profits equivalent to Rs. 1,500 per annum per mile of the tramway, is not authorised by S. 82 or any other provision of the Bengal Local Self. Government Act, and is, therefore, not enforcible against the Board. There is no provision in the Act which permits a Board, whose resources are public funds, to guarantee or to pay to a trading undertaking any sum to increase its trading profit or to convert its trading loss into a trading profit. The reference to 4 p.c. on the amount of the company's share capital does not make the guarantee to be in respect of interest on capital expended on the tramway, which S. 82 permits; it is an explanation of how the limit of R. 38,000 was ascertained. (Gentle, J.) BARASAT BASIRHAT LIGHT RAILWAY CO., LTD. v. DISTRICT BOARD, 24 PARGANAS. I.L.R. (1944) 2 Cal. 101.

- 8. 82—Guarantee not sanctioned by specified

authority-If enforcible against Board.

A guarantee by the Board under S. 82 of the Bengal Local Self-Government Act without the sanction of the specified authority, is ineffective, and cannot be enforced against the Board. (Gentle, J.) BARASAT BASIRHAT LIGHT RAILWAY CO., LTD. v. DISTRICT BOARD, 24 PARGANAS. I.L.B. (1944) 2 Cal. 101.

—S. 86-A—Bridge constructed by District Board dismantled and reconstructed by Road-Foard—Sanction for levy of toll obtained only for old bridge—Unrealised balance of sanctioned amount—If can be realised by levying toll on new bridge—Such balance and price of old materials used—If District Board's contribution to new bridge.

Under S. 86-A of the Bengal Local Self-Government Act, the toll can be recovered only from persons using a bridge in respect of which the sanction of the Local Government is given. If that bridge is dismantled and a new bridge is erected on the same site, the unrealised balance of the amount sanctioned for the old bridge cannot be realised by levying a toll on the new bridge, when neither the estimated cost of renewal was included in the amount originally sanctioned nor a fresh sanction for a toll has been obtained in respect of the new bridge. Where the old bridge which was dismantled was constructed by the District Board out of its own funds and the new bridge was reconstructed by the Road Board with grants from the Central Road Fund and there was no sort of connection whatever between the one and the other except that materials of the value of about Rs. 250 only were used from the old bridge, the new bridge cannot be taken to be the old one in another garb; nor can the out-standing balance which was due on account of tolls in respect of the old bridge be regarded as a contribution by the District Board towards the cost of the new bridge. The question whether the price of the materials of the old bridge which

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bridge can be regarded as a contribution out of the District Board Fund is not wholly free from difficulty having regard to the provisions of S. 52 and 53 of the Act. (Edgley and Biswas, JJ.) PABNA DIST. BOARD V. RANJIT CHANDRA LAHIRI, I.L.R. (1942) 1 Cal. 194=45 C.W.N. 1035=198 I.C. 788=75 C.L.J. 386=14 R.C. 500=A.I.R. 1942 Cal. 72.

——S. 86-A—Sanction of Local Government— Omission to specify amounts to be recovered— Validity.

Under S. 86-A of the Bengal Local Self-Government Act, the sanction of the Local Government will not be valid or complete unless it expressly mentions the amounts the recovery of which is sought to be authorised thereby. (Edgley and Biswas, JJ.) PABNA DISTRICT BOARD V RANJIT CHANDRA LAHIRI. I L.R. (1942) 1 Cal. 194-45 C.W.N 1035-198 I.C 788-75 C. L.J. 386-14 R.C. 500-A.I.R. 1942 Cal. 72.

—S. 138—R. 103 of Rules framed under—Validity—Contract by Board not executed in manner provided by rule—Enforceability. See BENGAL I OCAL SELF-GOVERNMENT ACT, S. 20 AND R. 103. I.L.R. (1944) 2 Cal. 101.

——S. 146—Applicability—Suit against District Board.

S. 146 of the Bengal Local Self-Government Act does not contemplate a suit against the District Board as such, but is applicable only to suits against the members of any District Board or against any of their officers. A suit against the District Board is, therefore, maintainable without notice under the section. (Akram and Pal, JJ.) DISTRICT BOARD OF KHULNA V. JOSESH CHANDRA. I.L.R. (1943) 1 Cal. 558=209 I.C. 432=47 C.W.N. 323=A.I.R. 1943 Cal. 447.

BENGAL MONEY-LENDERS ACT (VII OF 1933), S. 2 (2)—"Successor-in-interest" of borrower—Meuning of—If includes purchaser of equity of redemption.

The expression "successor-in-interest" in S. 2 (2) of the Bengal Money-Lenders Act may be taken to include an executor or persons who have succeeded to the original borrower's property by inheritance who will be liable to the extent of the borrower's assets which have come into their hands. But it is not the intention of the Legislature that it should include a purchaser of the equity of redemption. (Edgley, I.) HRISHIKESH BANERJEE v. JITENDRA NATH ROY. 45 C.W.N. 850.

S. 4—"Amount of such interest recoverable in the suit"—Interpretation—Simple mortgage suit.

The expression "the amount of such interest recoverable in the suit" in S. 4 of the Bengal Money Lenders' Act means the arrears of interest recoverable in the suit and not up to the date of the suit. The expression, therefore, means with reference to a simple mortgage suit, the arrears of interest up to the date fixed for redemption. (Rau and Mukherjea, JJ.) KHIRODE CHANDRA GHOSH v. NARENDRA NATH SANYAL. 45 C.W.N. 15.

the price of the materials of the old bridge which | ——S. 4—"Principal of the loan"—Meaning of had been used for the construction of the new | —Renewed bond. Suphanya Mohan Basak v.

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Manorama Gupta. [see Q.D. 1936-40 Vol. I Col. 3233.] I.L.R. (1941) 1 Cal. 83=192 I.C. 321=13 R.C. 307=72 C.L.J. 391.

— (X OF 1940)—If ultra vires—Provisions relating to promissory notes—Conflict between Act and Contract Act—How resolved—Doctrines of repugnancy and ultra vires-Decrees on promissory notes passed before Act-Question of ultra vires-If arises.

Assuming that the Bengal Money-lenders Act affects and was intended to affect rights and liabilities based on promissory notes, it does not necessarily follow that the Act must be wholly void as ultra vires the Provincial Legislature. The Act must, taken as a whole, be held to fall within the description, "legislation in respect of money lending and money-lenders" a subject within the exclusive competence of the Provincial Legislature (Entry No. 27 in List II). The fact that among the documents on which moneys may be lent promissory notes form an important class will not justify the view that the regulation and control of money-lending have to that extent been taken out of the purview of provincial legis-lation. In the event of a conflict between provisions contained in the Act so far as they bear upon promissory notes and provisions relating thereto contained in a Central enactment, the latter should prevail, as it is the doctrine of repugnancy and not the doctrine of ultra vires that has to be applied in such cases. Any argument that the Act is ultra vires based on the exclusion of promissory notes from the sphere of provincial legislation, would not avail in cases where claims under promissory notes had merged in decrees made before the commencement of the Act. (Spens, C.J. Varadachariar and Zafrulla Khan, JJ.) BANK OF COMMERCE LTD., KHULNA v. AMULYA KRISHNA BASU. 6 F.L J. 221=212 I C. 138=1944 M.W.N. 175=57 L.W. 213=1944 O.W.N. 184=1944 A.L.W. 271=16 R.F.C. 102= 10 B R. 506=I.L R. (1944) Kar. (F.C.) 46=48 C.W.N. (F.R.) 36=79 C.L.J. 220=A.I.R. 1944 F.C. 18 = (1944) 1 M.L.J. 178 (F.C.).

-Preamble and S. 36—Applicability of Act— Loan advanced in Bihar but payable either there or at Calcutta.

The Bengal Money-Lenders Act is not applicable to a loan advanced in Bihar on a promissory note although it is expressly made payable either in Bihar or at Calcutta, if the intention of the parties was that the contract should be governed by the law of the place at which the loan was effected namely, the law of Bihar. Consequently a decree passed by the Calcutta High Court on the promissory note cannot be reopened under S. 36 of the Act. The expression "transactions of money lending in Bengal", occurring in the preamble to the Act can only mean transactions of moneylending which take place in Bengal. (Edgley, J.) BRIJ RAJ MARWARI v. ANANT PRASAD. I.L.R. (1942) 1 Cal. 505=202 I.C. 326=15 R.C. 321= A.I.R. 1942 Cal. 509.

-S. 2 (2)—'Borrower'—Lessee from mori-

gagor. A lessee from the mortgagor who took the lease after the mortgage, and any person who derives an interest in the mortgaged property

within the definition of borrower in S. 2 (2) of the Bengal Money-Lenders Act. (Mitter and Khundkar, JJ.) SAILENDRA NATH v. AMARENDRA NATH. I.L.R. (1941) 1 Cal. 514=198 I.C. 315=14 R.C. 448=73 C.L.J. 435=45 C.W.N. 530=A.I.R. 1941 Cal. 484.

-Ss. 2 (2) and 30—"Borrower"—Puisne mortgagee vis-a-vis prior mortgagee-Purchaser of mortgagor's right vis-a-vis mortgagee—If borrowers—Right to benefit of S. 30.

A puisne mortgagee, vis-a-vis the prior mortgagee, and a purchaser of the mortgagor's interest via-a-vis the mortgagee or mortgagees are borrowers within the meaning of S.2 (2) of the Bengal Money-Lenders Act. Therefore, in a suit on a mortgage filed by a non-impleaded puisne mortgagee against a purchaser at a sale in execution of a prior mortgage decree who had also paid off a decree obtained by another prior mortgagee, the plaintiff as the puisne mortgagee is entitled to the benefit of S. 30 of the Act in respect of the claims on the two prior mortgages, if the suit is one to which the Act applies. The defendant as purchaser of the interest of the mortgagor is also entitled to the benefit of that section in respect of the claim of the plnintiff as mortgagee. (Mitter and Khundkar, JJ.) SAILENDRA NATH v. AMARENDRA NATH. I.L.R. (1941) 1 Cal. 514-73 C L.J. 435-198 I.C. 315-14 R.C. 448-45 C.W.N. 530=A.I.R.1941 Cal, 484.

· S. 2 (2)—'Borrower'—Purchaser of part of equity of redemption.

A purchaser of a part of an equity of redemption is a borrower within the meaning of S. 2 (2) of the Bengal Money-Lenders Act. (Henderson, J.) ABDUR RAHIM v. ABDUR RAUF. 200 I.C. 734=15 R.C. 68=46 C.W.N. 179=A.I.R. 1942 Cal. 342 (1).

-S. 2 (4)—"Commercial loan"—Loan taken by dotcor to equip his dispensary with drugs.

A loan taken by a doctor for the purpose of equipping his dispensary with surgical instru-ments and drugs to be administered to his patients is not a commercial loan. But it will be so, if his dispensary is really a shop. (Henderson, J.) HARI NARAYAN v. HARI PADA. 46 C.W.N. 844.

-S. 2 (4)—"Commercial loan"—Meaning of— Loan for commercial and other purposes-Loan to pay off business debts.

A loan advanced partly for commercial and partly for other purposes is not a commercial loan according to S. 2 (4) of the Bengal Money-Lenders Act. A loan is a commercial loan only if the money is borrowed solely for commercial purposes. The borrower may thereafter spend the money for purposes other than commercial purposes but that would not in any way affect the nature of the loan. If a loan is taken by a person solely for paying off his business debts, it is undoubtedly a commercial loan. (Sen and Das, J.) PROMODE KUMAR SETT v. SHEIK AMINUDDIN. 49 C.W.N. 645.

-S. 2 (4)--Commercial Loan—Question as to -Finding in original suit that it was advanced to improve business-Whether conclusive.

A finding that the mortgage money was borrowed by the guardian of the minor debtors to improve the finances of their business arrived at which is affected by the mortgage, will come in the original mortgage suit where the point for

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decision was whether or not there was any legal necessity for the loan, is not conclusive between the parties in a proceeding under the Bengal Money-Lenders Act on the question whether the loan was a commercial loan. (Mukheriea and Pal. II.) PROBHABATI MITRA v. ANII. KUMAR DAS 209 I.C. 428=47C.W.N. 645=A.I.R 1943 Cal. 629.

-S. 2 (4) -Commercial loan-Test-Inteniton of parties or actual user-If material.

In determining whether a loan was a commercial loan within the meaning of S. 2 (4) of the Bengal Money-Lenders Act, what is material is the intention of the parties at the time when the loan is taken and it must be intended to be used solely for business purposes, but whether, it was actually used or not is not material except that it might throw some light on the original intention. (Mukherjea and Blank, II.) GURUPADA BHOW-MIC v. UPENDRA NATH. 46 C.W.N. 774.

The expression "for the purposes of any husiness" in S. 2 (4) of the Bengal Moncy-Lenders' Act includes purposes incidental to the carrying on of the business. It cannot be said that it is only where the money is applied or sought to be applied to the primary purposes of the business that it will satisfy the requirements of the definition of a commercial loan. The liquidation of pre-existing liabilities which were incurred for the purposes of the business must be regarded as a legitimate purpose of the business itself, although it may not be a direct purpose. Accordingly a mortgage executed in favour of a creditor to repay old loans advanced by him for the purpose of business comes within the definition of a com-mercial loan. Further in such a case there is no new loan in fact but the old loan is merely secured by the mortgage. If therefore, it is a commercial loan before, it still remains so notwithstanding the security. (Mukherjea and Biswas, IJ.) Purna Chandra v. Jov Chand. I.L.R. (1943) Cal. 362 = 205 I.C 550=15 R.C. 645=47 C.W.N. 236= A.I.R. 1943 Cal. 179.

-S. 2 (4)—Recital of commercial purpose in mortgage-deed-Evidentiary value.

A recital in a mortgare-deed that the money was advanced for commercial purposes is not conclusive on that point. It is undoubtedly a piece of evidence which can be and ought to be taken against the mortgagor. But the mortgagor should not be refused an opportunity to adduce evidence for the purpose of showing that the recital is not correct. (Mukherjea and Biswas, JJ.)
KUMAR PROSANNA GHOSE v. SATISH CHANDRA
I.L.R. (1943) 1 Cal. 386=206 I.C. 340=15 R.C. 697=47 C.W N. 202=A I.R. 1943 Cal. 152

S 2 (3)—"Interest"—Money realisable by mortgagee from tenants and money covered by rent decrees.

Monies which a mortgagee in possession might have realised from the tenants but actually did not, and monies covered by rent decrees obtained by him, are "interest" within the meaning of S. 2 (8) of the Bengal Money-Lenders Act. (Hender son J.) Meherunnissa Bibt v. Satish Chandra Dutta. I.L.R. (1944) 1 Cal. 321=77 C.L. J. 323=217 I.C 87=17 R.C. 152=47 C.W,N. 894=A.I. R. 1944 Cal. 288.

-Ss. 2(8) and 36—Preliminary mortgage decree -Interest due between dates of decree and of payment -If comes within definition-Total interest up to date fixed for payment exceeding maximum allowed by S. 30 but notinterest up to date of de ree-Decree, if may be re-opened.

Where a preliminary mortgage decree directs an account to be taken of what is due for principal and interest on the mortgage at the date of that decree and also of what will be due for interest on the principal from the date of the decree up to a date six months subsequent to the date on which the report is submitted to the Court for countersignature, and further directs the payment of the amount found due on the report within six months of the date of the counter-singulature, the interest awarded to the mortgagee by the preliminary decree on the principal sum found due for the period between the date of that decree and the date fixed therein for payment is interest within the meaning of S. 2 (8) of the Bangal Money-Lenders Act. It follows therefore that although the amount of interest due on the mortgage bond calculated up to the date of the passing of the preliminary decree is not in excess of the maximum allowed by S. 30 of the Act, if the total amount of interest calculated up to the date fixed for payment is in excess of that maximum, the judgment-debtor is entitled to apply under S. 36 of the Act for relief from the payment of this excess of interest and claim that the decree should be reopened and new instalment decree passed. (Sen. I.) MOHINI MOHAN ROY 7. RAI ASHUTOSH GHOSH. I.L.R. (1942) 1 Cal. 395=201 I C 372=15 R.C. 187=46 C.W.N. 59 = A.I.R. 1942 Cal. 367.

S. 2 (12)—Bond executed by vendee for unpaid purchase money—Transaction, if a loan.

Every loan is a debt but every debt is not a loan. Unpaid purchase money due to a vendor is a debt due to him, and a bond executed by the vendee in respect there-of is not a transaction which is in substance a loan. Therefore, the vendee is not entitled to get any relief under the Bengal Money Lenders Act in a suit upon such a bond. (Nasin, Ali and Pal, /J.) SARADINDU SEKHAR v. I.ALIT MOHAN. 196 I.C. 287=14 R.C. 206=73 C.L.J. 530=45 C,W.N. 734=A.I,R. 1941 Cal. 538.

-S.2(12)-Bond given for securing unpaid price-Whether loan-Tests.

It cannot be laid down that in no circumstances can a bond ostensibly given for securing the unpaid price be regarded as one for a loan. In order to determine the question whether a particular transaction amounts to a loan, the substance and not the form must be looked to, and the facts and circumstances attending it must be taken into consideration. If the conculsion he that it was really an interest-bearing investment, it would be a loan. (Mitter and Sen JJ.) FATHEH CHAND v. AZIMUTDIN. I.L.R. (1943) 1 Cal. 297-47 C.W.N. 52 = 206 I.C 145-15 R.C. 670-76 C.L.J. 49-A.I. R. 1943 Cal. 108.

S 2 (12)—Commercial loan—Test—Inference from user—If legitimate.

In order to determine whether a loan is a commercial loan the material question would be what was the intention at the time when the loan was taken. If there is no indication in the instruBENG AL MONEY-LENDERS' ACT, (1940).

ment on which the loan was advanced it would be legitimate to make inferences from the user to which the money was put to, immediately or shortly after the loan was advanced and from other facts and circumstances of the case. To be a commercial loan the money must be borrowed with the intent of using the whole of it for a commercial venture. (Mitter and Sen, JJ.)
FATEHICHAND v. AZIMUDDIN I.L.R. (1943) 1
Cal. 297-76 C L.J. 49=206 L.C. 145=15 R.C. 670=47 C.W.N. 52=A.I.R. 1943 Cal. 108.

-S. 2 (12)-'Loan'-Arrears of putni rent-

Agreement to pay interest.

Arrears of rent due by a putnidar to a Zamindar do not come within the definition of loan as contained in S. 2 (12) of the Bengal Money-Lenders Act merely by reason of an agreement between the parties under which the putnidar promises to pay interest on those arrears in excess of what is pavable under law, when there is no bond or security taken in respect thereof. To constitute a loan there must be an element of advance either actual or notional, (Mukherjea and Blank. IJ.) SATINATH BASCHI v. BRUPENDRA NARAYAN SINHA. 211 I.C. 428=16 R.C. 531=77 C.L.J. 134=A.I.R. 1944 Cal. 14.

-S. 2 (12)—Nature of transaction—Sale— Purchase money paid partly in cash and partly by execution of pronote carrying interest-Transac-

tion, if loan.

Where on a sale of land the purchase price was discharged partly in cash and partly by the execution of a handnote carrying interest at a high rate, the transaction is in substance a Ioan. (Henderson, J.) NIRODE BARANI DEBYA v. SISIR KUMAR MUKHERJEE 203 I.C. 584=15 R.C. 455 =47 C.W.N. 205=A.I.R. 1942 Cal. 616.

-Ss. 2 (12) and 36—Security bond given by vendee for price of goods already supplied and to be supplied in future—Interest made payable only if vendee failed to pay money within certain time

-Transaction, if a loan.
There may exist circumstances under which the transaction by which a bond or security is taken in respect of unpaid purchase money may come within the definition of a loan as laid down in S. 2 (12) of the Bengal Money-Lenders Act. But where security was taken as a sort of floating security not only for the sum which was actually due at the time as the price of goods supplied to the vender but for other goods that the vendee might purchase from the vendor in future, and interest was made payable on the amount only if the vendee failed to pay the same within a certain time, there is no question of advance, either express or implied and consequently the transaction cannot be treated in substance as a loan within the meaning of S. 2(12) of the Bengal Money Lenders Act. A decree passed on the security bond cannot therefore, be reopened under S. 36 of that Act. (Mukherjea and Roxburgh, JJ.) KUNJA BEHARI PAL v. SATYENDRA NATH DAS 45 C.W.N. 1122=198 I C. 303=14 R.C. 446=74 C.L.J. 379= A.I.R. 1941 Cal. 689.

-Ss. 2 (12) and 34—Suit by one co-mortgagor against others to recover money paid in excess of his share in satisfying mortgage decree-Whether one in respect of a 'loan'.

decree by payments made by all the co-mort-

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gagors, one of them institutes a simple money suit against the others for the recovery of a certain sum with interest upon the allegation that the plaintiff had to pay more than his share of the common debt, the suit is not in respect of a loan as defined in S. 2 (12) of the Bengal Money-Lenders Act. Consequently the defendants in that suit are not entitled to claim benefit under S. 34 (b) of the Act in respect of the decree passed therein. (Mukerjea and Blank, JI.) PASHU-PATHI NATH ROY v. SACHIMATH ROY. I.L.R. (1943) 2 Cal 180=209 I C. 15=16 R.C. 273=47 C.W.N. 405=A.I.R. 1943 Cal. 330.

-S. 2 (12) (d) (ii) -Loan advanced by Cooperative Society assigned to non-member-Nature

of loan-If altered.

A loan advanced by a Co-operative Society is excluded from the definition of loan given in the Bengal Money-Lenders Act. The nature of the loan is not altered by reason of the fact that the Society assigns its rights for the recovery of the loan to a non-member. The debt is transferred to him together with its attribute. (Sen and Das, JJ.) PANCHANAN BANERJEE v. NIRMAL CHANDRA LAHIRI. 50 C.W.N. 7.

-Ss. 2 (22) and 36—Application under 0.21 R. 90, C. P. Code-If suit to which Act applies-Termination of execution case before 1st January, 1939-Application under O. 21, R. 90 pending on that date-Application for review-If competent

An application to set aside an execution sale under O. 21, R. 90, C. P. Code, is not "a suit to which this Act applies" within the meaning of S. 2 (22) of the Bengal Money-Lenders Act, nor does it, if successful, have the effect of turning an execution case which had terminated before 1st January, 1939, into such a suit. It makes no difference that the application is made bona fide. Where, therefore, possession of the property which was sold in execution of a decree was delivered before 1st January, 1939, and only an application under O. 21, R. 90, C. P. Code was pending on that date, there is no suit to which the Act applies, and consequently no application for review under S. 36 (6) of the Act is competent. (Henderson, J.) JITENDRA NATH BERA v. MAKHAN LAL. I.L.R. 1942 2 Cal. 148=46 C.W.N. 659=201 I.C. 512=15 R.C. 268=75 C.L.J. 366=A.I. R. 1942 Cal. 452 (1).

-S. 2 (22)—Decree for money advanced on hundi-Execution proceeding pending-Decree, if one passed in suit to which Act applies. See Bengal Money-Lenders Act, Ss. 36 and 2 (22). 46 C.W.N. 555.

——Ss. 2 (22) and 36—Decree passed before 1st January, 1939—Decree remaining unsatisfied on that date but no execution proceeding pending-If

one in suit to which Act applies.

A decree passed in a suit before the 1st January 1939, in respect of which no proceeding in execution was pending on that date is not a decree in a suit to which the Act applies within the meaning of S. 2 (22) of the Bengal Money-Lenders Act although the decree had not been fully satisfied on that date. Such a decree cannot, therefore, be agor against others to recover money paid in reopened under S. 36 of the Act. (Mukherjea arces—Whether one in respect of a loan.)

Where after the satisfaction of a mortgage cree by payments made by all the co-mort.

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-Ss. 2 (22) and 36-Mortgage suit terminating in final decree before 1st January, 1939-No execution proceeding pending on that date-Statement of claim filed thereafter by decree-holder on notice under S. 13 of Benyal Agricultural Debtors' Act-If makes mortgage suit one to which Act applies.

A mortgage suit which had terminated in a final decree before 1st January, 1939, and in respect of which no execution proceedings were pending on that date, cannot be taken to be a suit to which the Bengal Money-Lenders Act applies by reason of the fact that the decree holder had filed a statement of claim after the 1st January, 1939, on the basis of his decree to a Debt Settlement Board in pursuance of a notice issued under S. 13 of the Bengal Agricultural Debtors' Act, the debtor having applied to settle his debts under S.8. The mortgage decree cannot, therefore, be reopened by reason of the first part of proviso (ii) to S. 36 (1) of the Bengal Money-Lenders Act. If however, the morigagee decree-holder applies to execute his decree or applies for a personal decree after 1st January, 1939, the debtor would then have the right to make an application under S. 36. (Mitter and Blank, JJ.) MOHIUDDIN BISWAS v. GOPI CHARAN MONDAL 48 C.W.N. 85=211 I.C. 440=16 R.C. 538=A.I.R. 1944 Cal.

-Ss, 2 (22) and 36-'Pending suit or proceedings-Relevant date.

The date relevant for the purpose of determining whether any suit or proceeding in connection with the loan was pending is the 1st January, 1939 and not the date of the application under S. 36 of the Bengal Money-Lenders Act. (Mitter and Blank, JJ.) MONMOHAN MUKHOPADHYAY v. MADA-RIPORE LOAN OFFICE, LTD. 48 C.W.N. 87.

2 (22) and 36-Proceeding before Debt Settlement Board-If a suit to which Act applies.

A proceeding before a Debt Settlement Board, either started by the creditor, or in which the creditor had filed a claim under S. 13 of the Bengal Agricultural Debtors' Act, when the proceedings had been started by the debtor, would be a "suit to which the Bengal Money-Lenders Act, applies," if it was pending on or started after the 1st January, 1939, and an award made therein by the Board could be re-opened but for S. 36 (1), proviso (ii) of the Bengat money-Lenders Act which protects such awards. (Mitter and Blank, JJ.) MOHIUDDIN BISWAS v. GOPI CHARAN MONDAL. 48 C.W.N. 85=211 I.C.440=16 R.C. 538=A.I.R. 1944 Cal. 82.

Ss. 2 (22) and 36-Property sold in execution of morigage decree purchased by decree-holder—Decretal dues set-off against purchase money before 1st January 1939—Application for lelivery of possession made after that date— Decree, if one passed in suit to which Act applies.

Where mortgaged property sold in execution of mortgage decree was purchased by the decree-holder who was allowed to set-off the decretal dues against the purchase money before the 1st January, 1939, and the decree-holder auction purchaser filed an application for delivery of possession after that date, the mortgage decree is

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Lenders Act applies within the meaning of S. 2 (22) of that Act and is therefore, liable to be re-opened under S. 36 of that Act if the other conditions are fulfilled. (Mukherjea and Blank JJ.) RAMESH CHANDRA GUHA v. FARIDPORE LOAN Co., LTD. 207 I.C. 103=16 R.C. 27=47 C.W.N. 361=A.I.R. 1943 Cal. 223.

-S. 2 (22)—Purchaser of equity of redemption-If borrower.

A purchaser from a mortgagor of the equity of redemption in the mortgaged property is a 'horrower' within the meaning of the Bengal Money-Lenders Act as defined in S.2 (22). (Biswas and Roxburgh, J.) Budhan Mia v. Jorindra Mohan Dutt. 204 I.C. 592=15 R.C. 532=46C.W.N. 129=74 C.L.J. 200=A.I.R. 1942 Cal. 132.

-Ss. 2 (22) and 36—Suit to which Act applies— Application filed after 1st January, 1939, for retriew of order under S. 83, T. P. Act, passed before that date-If revives earlier proceeding.

The mere filing of an application after 1st January, 1939, for the review of an order passed in a proceeding under S. 83 of the T. P. Act prior to that date, does not have the effect of reviving that proceeding. Nor could the application itself be regarded as a proceeding coming under any of the three clauses of S. 2 (22) of the Bengal Money-Lenders Act. In no sense thus could the review application—avail to—bring into existence—a "suit to which this Act applies." (Biswas and Akram, II.) BHUPENDRA NATH ROY v. SUSHIL CHANDRA. 49 C.W.N. 542 = A.I.R. 1945 Cal. 370.

-Ss 2 (22) and 36-Suit to which Act applies -Decree passed in suit before 1st January, 1939--No proceeding in execution pending-Procedure for obtaining relief.

A suit for the recovery of money in which a decree has been passed before 1st day of January 1939, and no proceeding in execution of the decree is pending on that date, is not a suit to which the Bengal Money-Lenders Act applies, even though the decree has not been satisfied. Therefore an application by the judgment-debtor for relief or for review under the Act is not maintainable. He can get relief only by way of a suit under S. 36 of the Act. 45 C.W N. 859, dissented from. (Sen. I.) NABAKUMAR SINGH v. MAHARAJA JOGINDRA NATH ROY. I.L.R. (1942) 1 Cal. 354=200 I.C. 350=15 R.C. 57=46 C.W.N. 84=A.I.R. 1942, Cal. 324.

-Ss. 2 (22) and 36-Suit to which Act applies-Final decree in mortgage suit passed before 1st January, 1939—Such decree not satisfied on that date—Procedure for obtaining relief.

Where a final decree in a mortgage suit was passed before the 1st January, 1939, but such decree remains unsatisfied on that date, the suit must be regarded as "pending" on that date within the meaning of S. 2 (22) of the Bengal Money-Such a suit is, therefore, one to Lenders Act. which the Act applies. As regards the procedure which should be adopted in applying for relief under the Act in cases such as the above, the provisions of S.39 allow the borrower to obtain relief either by filing a suit or by makingan application. Inthe case of applicaions, it is the intention of the legislature that they should be made either one passed in a suit to which the Bengal Money in the proceedings in execution of a decree BENGAL MONEY-LENDERS' ACT (1940). or, if no such proceedings have been taken or are pending, the debtor should be at liberty to file what is described in the act as an application for review. To such an application, the rules contained in Chapter XXXI of the Original Side Rules of the Calcutta High court are not applicable. (Edgley, J.) SURESH CHANDRA v. LAL MOHAN. I.L.R. (1941) 2 Cal. 184=199 I.C. 825 =14 R.C. 645=45 C.W.N. 859=A.I,R. 1942. Cal. 121.

-Ss. 2 (22) and 36—Suit to which Act applies-Preliminary, final and personal decrees passed before 1st January, 1939—No execution proceeding pending on that date or filed since—Decrees—If can be reopened.

Where the preliminary, final and personal decrees in a mortgage suit were all passed before 1st January, 1939, and no proceeding in execution was pending on that date or has been filed since, the three decrees were not made in a suit to which the Bengal Money Lenders Act applies and consequently they cannot be reviewed and reopened under S. 36 of the Act, even though the personal decree has not been satisfied. 45 C.W N. 859 and 46 C.W.N. 33, overruled. (Nasim Ali, Mitter and Akram, JJ.) APARNA Kumari v. Girish Chowdhury. 48 C.W.N. 406

-S. 2 (22)—"Suit to which Act applied"— Proceeding under O. 21 R. 100, C. P. Code, started by third party pending on 1st January, 1939.

Where a proceeding under O. 21, R. 100 C.P. Code, started by a third party in respect of property sold in execution of a decree was not disposed of till after the 1st January, 1939, the decree was one made in a suit to which the Act applies within the meaning of S. 2 (22) of the Bengal Money-Lenders Act. (Mukherjea and Blank JJ.) KAMALAKSHYA CHOWDHURY v. JOY-CHAND LAL. 48 C.W.N. 105.

-S. 2. (22)—Suit to which Act applies—Suit

for foreclosure.

A suit for foreclosure is a suit to which the Act applies within the meaning of S 2, sub-S. (22). The wording of S. 2, sub-S. (22) is sufficiently wide to include a foreclosure suit inasmuch as it is certainly a suit for the enforcement of a security taken in respect of a loan. (Mukherjea and Sen, JJ.) Samtruddin Maltey v. Naba Kumar Saha. 201 I.C. 476=15 R.C. 206=A.I.R. 1942 Cal. 224.

-S. 4-"Principal of the loan"-Meaning of.

The phrase "principal of the loan" used in S. 4 of the Bengal Money-Lenders' Act, means the actual advance that was made by the creditor to the debtor, and not the balance of principal left outstanding at the date of the suit after part payment had been made towards the principal. (Mitter and Akram, J.).
NATHUMAL LODHA v. NITYANANDA BHARAT. 49 C.W.N. 750.

-Ss. 5 (3) and 36 (1)—Decision of Small Cause Court, Calcutta in suit under S. 36 (1)-

Right of appeal.

There is no right of appeal to the High Court from a decision by a Judge of Small Causes Court, Calcutta, in a suit filed under S. 36 (1) of the Bengal Money-Lenders Act. S. 5 (3) of the Act provides for an appeal from the decision made by such Court functioning as a "competent"

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Court" within the meaning of the Act. and Sharpe, JJ.) Sm. Gouri Bala Dasi v. JNANENDRA NATH BYSACK. 48 C.W.N. 675.

-Ss. 28 and 29-Applicability-Assignment of decrees.

Ss. 28 and 29 of the Bengal Money-Lenders' Act deal with the assignment of loans, where the relation of lender and borrower still exists that is, while the contract is still executory. They do not apply where there has been a judgment. The contract is then merged in the judgment and the relationship between the parties is that of judgment-creditor and judgment-debtor and no longer that of lender and borrower. (Lord Goddard.) RENULA BOSE v. MANMATHA NATH BOSE, 72 I A. 156=49 C.W.N. 491=A.I.R. 1945 P.C. 108 (P.C.).

Ss. 29 (2) and 36—Assignee of loan 'before commencement of Act—If protected

S. 29 (2) of the Bengal Money-Lenders Act makes it clear that a person who has obtained an assignment of a loan before the commencement of the Act is subject to the same statutory liabilities and disabilities as the original lender "except where the context otherwise requires." If the borrower seeks remedy under S. 36 of the Act, the only exception provided by the context in that section in favour of such an assignee is contained in the proviso to S. 36 (d). Apart from this provision, the remedies provided by S. 36 are equally efficacious as against the lender or an assignee from such lender provided the assignment took place before the commencement of the Act. Sub-S. (5) of S. 36 cannot be taken to protect a person in the position of such an assignee. (Edgley. J.) MANMATHA NATH Bose v. RENULA BIBI 45 C.W.N. 863= 198 I.C. 71=14 R.C. 42=A.I.R. 1941 Cal 681.

—— Ss. 29 (2) and 30—Interest on promissory notes—Sections, if prevail over Ss. 32.79 and 80 of Negotiable Instruments Act-Government of India Act, S. 107 (2).

Interest on promissory notes being a matter with respect to contract in the concurrent Legislative List, and the Bengal Money-Lenders Act having received the assent of the Governor-General, Ss 29(2) and 30 of that Act which regulate such interest must prevail over Ss. 32 79 and 80 of the Negotiable Instruments Act, in view of the provisions of S. 107 (2) of the Government of India Act.

Quaere; Whether Ss. 29 (2) and 30 of the Bengal Money-Lenders Act affect the rights of holders of promissory notes in due course. (Nasim Ali, Mitter and Akram JJ.) BANK OF COMMERCE, LTD. v. KUNJA BEHARI KAR. 213 I.C. 171=17 R.C. 1=1944 F.L.J. 197=48 C.W.N. 403=A.I R. 1944 Cal. 196 (S.B.).

-S 30—Compound interest—If prohibited. The Bengal Money-Lenders' Act (X of 1940) nowhere prohibits compound interest. All that, S. 30 says is that the borrower shall not be liable to pay interest at a higher rate per annum than 8 per cent. simple in the case of secured loans. What has, therefore, to be ascertained in each case is whether the interest which the borrower has been made liable to pay exceeds the interest which would have been payable, had the rate of interest been 8 per cent. simple. (Sen. J.) RATAN CHUNDER v. NIRMAL CHUNDER. 45 C.W.N. 13

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-S. 30-Decree not allowing interest between dates of suit and decree-If may be read as covering period between dates of lean and decree.

Per Pal, J .- In order to see whether or not in any case the decree imposes any liability in excess of the statutory limit provided by S. 30 of the Bengal Money-Lenders Act, the decree itself must be looked into and it must be ascertained for which period and on which principal, the amount of interest was decreed. If in any case the Court does not decree any interest for the period between the date of the suit and the date of the decree, the decree for interest should not ! be read as having been made for the period from the date of the loan to the date of the decree ( (Mukherjee and Pal. J.) Probhabati Mitra 2. Anil Kumar Das. I.L.R. (1944) 1 Cal. 169:209 I.C. 428=47 C.W.N. 645=-A.I.R. 1943 Cal. 629.

-Ss. 30 and 36-Reflect of Act being in som: measure invalid.

That part of the Bengal Money Lenders' Act which has been held to be invalid by the Federal Court in Bank of Commerce, Ltd., Khulna v. Kunj. Behari Kar is severable from the rest of the Act, and the Act cannot be held to be whelly void. (Spens, C.J. Varadachariarand Zafrulli Khan, Jl.) BANK OF COMMERCE, LTD., KHULNA v. NRIPENDRA NATH DATTA. I.L.R. (1945) Kar. (F.C.) 25 49 C.W.N. (F.B.) 6=1945 M.W.N. 135 79 C.L.J. 133 (1944) F.L.J. 275 = A.I.R. 1945 F.C. 7 = (1945) 1 M.L.J. 30

-S. 30-Interest at date of suit equalling principal-Pendente lite interest-If can be awarded.

S. 30 (1) (a) of the Bengal Money-Lenders Act is mandatory. The horrower is not liable to pay in any circumstances more than twice the amount of the original loan. If, therefore, the amount of interest at the date of the institution of the mortgage suit is equal to or exceeds the principal, pendente lite interest cannot be awarded. (Mitter and Khundkar, II) SAILINDRA NATH v. AMARENDRA NATH. I.L.R. (1941) 1 Cal. 514=198 I.C. 315=14 R.C. 448=73 C.L. J. 435=45 C.W.N. 530=A.I.R. 1941 Cal. 484.

-S. 30-Interest between dates of suit and decree - Section, if controls Court's discretion under S. 34 C.P. Code.

Per Pal, J.-As regards the period from the date of the suit to the date of the new decree that may be made, interest on the principal sum adjudged will still be at the descretion of the Court under S. 34 C.P. Code subject of course to the limits imposed by S. 30 of the Bengal Money-Lenders Act. The opening words of this section are wide enough to embrace even discretion given by S. 34, C.P. Code. (Mukherjea and Pal, II.) PROBHABATI MITRA v. ANIL KUMAR DAS. I.L.R. (1944) 1 Cal. 169=209 I.C. 428=47 C.W.N. 645 =A.I.R. 1943 Cal. 629.

-S. 30—Interest decreed in excess of limits— Difference negligible—Right of judgment-debtor

to relief.
When the interest decreed is in excess of the limits prescribed by S. 30 of the Bengal Money-Lenders Act, the Court is bound to grant relief to the judgment-debtor although the difference

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ASRAD ALI SIRKAR 7. PIONEER BANK, LTD. 200 I.C. 308-15 R.C. 6-46 C.W.N. 424-A.I.R. 1942 Cal. 228.

S. 30-Provision in agreement for com-found interest—Legality—Proper decree.

The Bengal Money-Lenders Act does not make a provision in an agreement between the parties for compound interest as such illegal. The Court should calculate interest according to the agreement but should not pass a decree exceeding the sum which would be due had the agreement provided for the maximum rate of simple interest allowed by S. 30 of the Act. (Derbyshire, C.J. and Panckridge, J.) MAHMARSHMI RAKHIT TO SHAMBANGHI, I.L.R. (1941) 1 Cal. 499:73 C. L. J. 344 : 197 T C. 853 - 14 R.C. 397 :: 45 C.W.N. 526-A.I.R. 1941 Cal. 673.

-S. 30-S. spe and effect--If affects decree alreidy obtained.

The effect of S, 30 of the Bengal Money-Lenders' Act is to afford a defence to a borrower as to the amount for which he is liable. It does not affect judgments already obtained, but merely provides that the amount of a jud-ment already obtained is to be taken into account in calculating the final amount for which a borrower may be liable. That section therefore cannot of itself avail a judgment debtor against whom a decree has been regularly obtained and remains unreversed. (Lord Gollard.) RENULA BOSE v. MANMATHA NATH BOSE 72 T.A. 156-49 C.W.N. 491-A.I.R. 1945 P.C. 108 (P.C.).

-Ss. 30 and 36-Validity-If affects subject of "banking" -Government of India Act, S.h. VII, List I. Entry 38.

Where the validity of Ss. 30 and 36 of the Bengal Money-Lenders' Act was impugned on the ground that they affected the subject of "banking" (Entry 38 in List I) and that as the application of those sections would greatly reduce the amount which a bank would recover in execution of decrees obtained by it, they constituted a serious interference with the "conduct of banking business."

Held, that the contention seemed to rest on an unduly wide interpretation of the expression "conduct of banking business," It would be too much to say that every law, which in its operation might affect the property or interests of a bank just as it affects the property or interests of other persons, would constitute an encroachment on entry 38 in List I. On a reasonable construction the entry must be limited to laws which affect the conduct of the business of banks qua banks. In this view the objection to the validity of those sections had to be overruled. (Spens, C.J., Varadachariar and Muhammad Zafrulla Khan, JJ.) BANK OF COM-MERCE, LTD., KHULNA v. NRIPENDRA NATH DATTA. LLB. (1945) Kar. (F.C.) 25=49 C.W.N. (F.B.) 6= (1944) F.L.J. 275=1945 M.W.N. 135=79 C.L.J. 133=A.I.R. 1945 F C 7=(1945) 1 M.L.J. 30 (F.C.). -Ss. 30, 36 and 38—Validity so far as they affect claims on promissory notes—Government of India Act, S. 100 and Sch. VII, List I, Entry 28; List II, Entry

The question of the validity of provincial legislation with respect to a matter enumerated in List II, is not finally settled by a decision that the legislation is, in pith and substance, one dealing with such a matter. The and substance, one dealing with such a matter. opening words of sub-S. (3) of S. 100 of the Constitution Act-"Subject to the two preceding sub-ections" -import a further limitation on the provincial power, is very negligible. (Mukherjea and Sen, II.) because sub-section (1) which is thus incorporated in contained in sub-section (3), a provincial legislature shall not have power to make laws with respect to any of the matters enumerated in List I. It can, if at all, encroach on List I subjects, only incidentally. Mere incidental encroachment would not amount to a transgression of the prohibition imposed on the provincial legislature by sub-section (1). It would not be sufficient it the impugned provisions in a provincial enactment were incidental to a subject enumerated in the Provincial List; their incidental character must be determined with reference to their relation to the subjects enumerated in List I. Ss. 30, 30 and 38 of the Bengal Money-Lenders' Act affect the rules enacted in Ss. 32, 79 and 80 of the Negotiable Instruments Act (which are among the essentials of the law relating to promissory notes) so substantially that they cannot be regarded as merely amounting to an incidental encroachment on the law relating to promissory notes. The encroachment is serious and substantial. There is no warrant for limiting the three categories of documents specified in Entry 28 of List I to instruments which are negotiable. Nonnegotiable promissory notes are known to the law and aer recognised by the Negotiable Instruments Act. Even if it were possible to limit Entry 28 to negotiable instruments, there is no justification for importing the

further limitation that this entry relates to only so much of the law as bears on the negotiability of such instru-

ments and its consequences. In this view of the scope

of that entry, the attack on the impugned provisions of the Bengal Act will not be met by treating them as legislation with respect to "contracts" (entry 10 of List III)

because sub-section (2) of S. 100 makes even legislation on List III matters "subject to the preceding sub-

section", whenever such legislation is enacted by provincial legislature. (Spens, C. J., Varada-

chariar and Zafrulla Khan, JJ.) BANK OF COM-

MERCE, LTD., KHULNA v. KUNJA BEHARI KAR.

LL.R. (1945) Kar. (F.C.) 28=49 C.W.N. (F.R.) 1=

sub-section (3) enacts that notwithstanding anything

1945 M.W.N. 92=1945 O.W.N. 89=1945 A.L.W. 91 =79 C.L.J. 139=(1944) F.L.J. 269=A.I.B. 1945 F. C. 2 = (1945) 1 M.L.J. 24 (F.C.). -ss. 30 (1), 36 (1) proviso and 2 (16)-"Principal of the original loan"—Meaning of— Mortgage executed to secure money due on previous money bonds and additional sum advanced in

cash. In view of the definition as given in S. 2 (16) of the Bengal Money-Lenders Act, the principal of the original loan must ordinarily be taken to be what had been actually advanced at the time of the first loan, not what has been regarded or treated by the parties as principal at the time of renewals. But that meaning must give way if it conflicts with the first proviso to S. 36 (1). Where, therefore, a mortgage which is executed to secure the monies due on account of the principal and arrears of interest due on simple money bonds previously executed by the mortgagor and for an additional sum advanced in cash at the date of the mortgage, proceeds upon an adjustment then made which cannot be re-opened in view of the first proviso to S. 36 (1) of the Act, the principal of the original loan must be taken to be what has been agreed upon by the parties in the mortgage instrument and not what has been actually advanced by the mortgagee. The fact that the original advance has been stated in the

BENGAL MONEY-LENDERS' ACT. (1940). BENGAL MONEY-LENDERS' ACT. (1940). ALI. I.L.R. (1943) 2 Cal. 471=212 I.C. 582=16 R.C. 618=47 C.W.N. 578=77 C.L.J. 180=A.I. R. 1944 Cal. 113.

> -S. 30 (1) (a)—Applicability—Interest on decretal amount.

The interest payable on the decretal amount must be regarded as a liability included in the decree to which the terms of S. 30 (1) (a) of the Bengal Money-Lenders Act have no application and in respect of which this sub-section cannot operate to afford a judgment-debtor any relief, (Edgley, J.) MANMATHA NATH BOSE v. RENULA BIBL 45 C.W.N. 863=198 I.C. 71=14 R.C. 427=A I.R. 1941 Cal. 681.

S. 30 (1) (a)—Applicability—Re-opening of pre-Act decree.

Where a decree is one passed before the commence-ment of the Bengal Money-Lenders' Act and the question is whether the interest paid before such commencement or included in the pre-Act decree is a legal hability, the provision applicable would be Cl. (2) of S. 30 which refers only to sub-Cl. (c) of Ci. (1) which lays down the maximum rate of interest, and does not refer to sub-Cl. (a). The limit of twice the principal laid down in the latter clause may not apply in such a case. Although S. 30 (1) (a) may not apply in judging whether the decree is liable to be re-opened, it must be applied when a new decree is to be passed in accordance with the provisions of the Act. (Chakravartti, J.) AJARADDI v. SONAI BIBI. 49 C.W.N. 638.

-S. 30 (1) (a)—Decretal amount together with past payments exceeding twice the loan-Liability of borrower.

If the amount due to the lender in respect of principal and interest has been declared by a decree of a competent Court, S. 30 (1) (a) of the Bengal Money Lenders Act does not operate to release the borrower from his hability under the decree although the payments made before the decree together with the amount of the decree exceed twice the amount of the principal of the original loan, provided the interest payable in respect of the loan does not exceed the limits specified in S. 30 (1) (c) of the Act. (Eagley, I.) MANMATHA NATH BOSE v. RENULA BIBL. 45 C.W. N. 863=198 I.C. 71=14 R.C. 427=A.I.R 1941 Cal 681.

-Ss. 30 (1) (a) and 36-Payment of twice the principal of loan-If releases borrower from further hability under any circumstances— Borrower seeking release from further liability, under decree-If can be granted declaration.

The meaning of S. 30 (1) (a) of the Bengal Money-Lenders Act is that after the commencement of that Act no borrower is liable to pay in respect of principal and interest in respect of any loan more than twice the principal of the original loan. Payments in respect of the loan may be voluntary payments or payments made under a decree in respect of the loan or payments treated in a decree as being made in respect of the loan as for instance, by way of set-off; but in whatever manner they are made, the sum total of them is not to exceed twice the principal of the original loan under any circumstances. If the borrower pays that amount, he is absolved from liability to mortgage instrument by way of recital would not make any difference. (Mitter and Akram, II.) pay anything more in respect of the loan, even NRIPENDRA CHANDRA SAHA v. MAHOMED ABBAS though the loan is crystallised into a decree. If a pay anything more in respect of the loan, even

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borrower who has already paid twice the principal of the loan seeks relief under the Act in respect of a decree passed on the loan, it is not necessary in order to give him relief that the powers under S. 36 of the Act should be exercised at all. He can be granted a declaration that he is not liable to pay any more money under the decree. 45 C.W.N. 863 reversed. (Derbyshire, C.J. and Nasim Ali, J.) Manmatha Nath Bose v. Renula Bose. 45 C.W.N. 1091.

-----S. 30 (1) (c)—Post-decretul interest—If can be taken into account.

In considering whether the interest that is allowed by a decree is in contravention of the provisions of S. 30 (1) (c) of the Bengal Money-Lenders Act, the relevant period would be up to the date of the decree in the case of a suit on a simple money bond and up to the period of grace as provided for in the preliminarry decree in a suit on a mortgage. Post-decretal interest that is awarded by the Court either legally or illegally cannot be taken into account in making the calculation. (Mitter aud Blank, JJ.) Devray Ray v. Lalji Morarji. 48 C.W.N. 200.

offends section.

For the purpose of applying the test as to whether the limits prescribed by S. 30 of the Bengal Money-Lenders Act have been exceeded in awarding interest to a lender, the total interest awarded is to be taken for the whole period up to the date of payment, and this is to be compared with the amount arrived at for the same period calculated at the statutory rates. It is not correct to split this period into two parts, viz, the period up to date of suit and the period from date of suit up to the date of payment, and to apply the test to the parts separately. It is, therefore, immaterial that in the process of calculation a rate of 12 per cent. is taken for part of the period, namely, the period pendente lite provided that the total irterest on the principal amount included in the decree including the interest for the period pendente lite does not exceed the amount calculated for the the same period at the limit of 8 per cent. laid down in S. 30 (1) (c) (ii). (Mukherjea and Roxburgh. IJ.) RAMESH CHANDRA BHADURI v. JNANADA PROSANNA BHADURI. I.L.R. (1941) 2 Cal. 342=198 I.C. 756=14 R.C. 493=74 C.L. J. 405=45 C.W.N. 772=A.I.R. 1942 Cal. 39.

Act. S. 31-Applicability-Decree passed before

S. 31 of the Bengal Money-Lendors Act merely prohibits the Court from granting interest on the decretal amount at the time it passes the decree. It has, therefore, no application to a case where the decree has already been passed before the Act came into force. If such a decree allows interest on the decretal amount, it cannot be reopened on that ground. (Panckridge, J.) Annapurna Ray v. Srish Chandra Dutt. 200 I C. 123=14 R.C. 669=45 C.W.N. 877=A.I.R. 1941 Cal. 539.

S. 31—Applicability—Decrees passed before Act.
S. 31 of the Bengal Money-Lenders Act is ntended to operate only on decrees to be passed after the Act came into operation and not on

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decrees passed before the Act. (Derbyshire, C.J. Panckridge and Nasim Ali, JJ.) Accounte Mukherjee v. Sallendra Mohan. I.L.R. (1941) 2 Cal. 169=195 I C. 779=14 R.C. 135=45 C.W.N. 548=73 C.L.J. 287=A.I.R. 1941 Cal. 495.

If a decree allowing interest on the decretal amount is passed before the Bengal Money-Lenders Act came into force, the appellate Court in an appeal from that decree can under S. 31 (a) of the Act modify the decree by disallowing the interest allowed on the decretal amount. (Mitter and Khundkar, JJ.) Sallendra Nath v. Amarendra Nath. I.L.R. (1941) 1 Cal. 514=198 I.C. 315=14 R.C. 448=73 C.L.J. 435=45 C.W.N. 530=A.I.R. 1941 Cal. 484.

——S. 31—Decree allowing interest on decretal amount passed before Act—Whether can be modified.

Under S. 31 of the Bengal Money-Lenders Act what the Courts are prohibited from doing since the commencement of the Act is passing decrees allowing interest on the decretal amount, in cases where the loan was advanced before the commencement of the Act. But the section does not enable a Court to revise or modify a decree allowing interest on the decretal amount passed prior to the commencement of the Act. (Derbyshire, C.J. and Panckridge, J.) MAHALAKSHMI RAKHIT V, SHAMRANGINI. I.L.R (1941) 1 Cal. 499=197 I.C. 853=14 R.C. 397=73 C.L.J. 344—45 C.W.N. 526=A.I.R. 1941 Cal. 673.

——Ss. 31 and 38—Order under S. 38—Sub-sequent interest—If allowable.

S. 31 of the Bengal Money-Lenders Act is not directly or indirectly applicable to a special proceeding for an account under S. 38 of that Act. Neither an order directing an account to be taken nor an order declaring the amount payable nor any other order passed under S. 38 is a decree and the borrower is not, therefore, entitled to the relief from liability for interest on the decretal amount afforded in S. 31. Consequently, the lender will continue to be entitled to have interest at the rate allowed under the Act running on his debt even subsequent to the date of the order under S. 33 until payment of the debt, or if the borrower makes a deposit until the date of the service of the notice on the lender under S. 39 (2), or until the right thereto or any part thereof is duly and legally extinguished either after the filing of a mortgage suit by the mortgagee in which he shall obtain a mortgage decree (in which case this will be on such terms and on such date or dates as the Court disposing of any such suit may duly decree) or otherwise by due operation of law. Such further future interest will, however, be subject to the rule of law corresponding to the rule of Damdupat as laid down in S. 31 (a) and (b) of the Act. Such interest will cease in any event when it reaches a sum greater than the amount there allowed. (Ormond. J.) BENGAL MONEY-LENDERS ACT. In re. 48 C.W.N. 743

ntended to operate only on decrees to be passed \_\_\_\_\_S. 31 (a)—Decree allowing interest passed after the Act came into operation and not on before Act—If can be modified,

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S. 31 (a) of the Bengal Money-Lenders' Act merely prohibits the Court from passing any decree in which interest on the decretal amount is allowed. There is no provision in the Act which says that if a decree is passed whereby interest on the decretal amount is granted before the Act came into force, the judgment-debtor would be entitled to have that decree set aside, or modified, by a disallowance of that portion of the decree by which interest is granted on the decretal amount. (Sen, J.) RATAN NIRMAL CHUNDER. 45 C.W.N. 13. RATAN CHUNDER v.

-S. 31 (a)—Decree allowing interest passed

before Act—If can be modified.

S. 31 of the Bengal Money Lenders' Act prohibits the Court in certain circumstances from granting interest on the decretal amount at the time it passes the decree. It has no application to a case where the decree has already been passed before the Act came into force. There is no section in the Act which says that in such a case, the Court may upon an application brought subsequent to the decree vary its order granting interest on the decretal amount. (Sen, J.) SAI-LENDRA M. DEY v. ACCOWRIE MUKHERJEE. 45 C.W.N. 11.

-Ss. 31 (a) and 34 (1) (a)—Pre-Act mortgage loan-Mortgagor agreeing to pay interest until realisation of instalments granted by decree under S. 34 (1) (a)-Interest thereon-If can

be allowed.

S. 31 (a) of the Bengal Money-Lenders Act prohibits award of interest on the "decretal amount", which means or at least includes the amount found or declared due by the decree, for the period after the date of the decree up to the date of redemption as well as for the period thereafter up to realisation and supersedes both O. 34, R. 11 (a) and O. 34, R. 11 (b), C.P. Code, in respect of mortgage loans advanced before the Act notwithstanding any agreement by the mortgagor to pay interest until realisation. The words "notwithstanding anything contained in any law for the time being in force" in S. 31 of the Act includes the law applicable to an agreement and therefore the agreement itself. Consequently no interest can be allowed on the instalments granted by a decree under S. 34 (1) (a) of the Act from the date of that decree up to the respective dates on which they are made payable. (Das, J.) NEMAI CHAND SEN v. RAM KEWAL SHA. 48 C.W.N. 736.

-S. 31 (a)—Scope and effect—Preliminary mortgage decree-Interest between dates of suit and decree—Whether can be awarded—Interest allowed under O. 34, R. 11(a), C.P. Code—If banned—Agreement to the contrary—How far effective-Mortgage bond providing for interest till realisation of entire amount—Mortgagee's right to interest on principal up to dates of

several instalments.

S. 31 (a) of the Bengal Money-Lenders Act prohibits, in the case of loans advanced before the Act, the award of any interest only on the decretal amount, and does not prohibit the award of interest from the date of the suit up to the date of decree. The term "decretal amount" with reference to a preliminary decree in a mortgage suit means the amount found or declared to be due to the plaintiff at the date of the decree decrees on promissory notes,

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under O. 34, R. 2, (1) (a) or (b), C. P. Code. The prohibition of the award of any interest on the decretal amount necessarily includes a prohibition of interest on any portion of the decretal amount, and the interest allowed by O. 34, R.11 (a), C.P. Code, on certain items of the decretal amount, falls therefore within the ban of S. 31 of the Bengal Money-Lenders Act as much as the interest allowed by O. 24, R. 11 (b), C.P. Code, on all the items of the decretal amount. S. 31 of the Bengal Money-Lenders Act unlike Ss. 30 and 34, is not intended to apply where there is an agreement to the contrary. If the mortgage-bond specifically provides for the payment of interest at 9 per cent. per annum on the principal "till the realisation of the entire amount", the rate of interest stipulated is, of course, cut down by S. 30 of the Act to 8 per cent. per annum, and the period of the stipula-tion is cut down by O. 34 R. 11, C.P. Code, so as to end at the date fixed for redemption in the preliminary decree instead of running on "till the realisation of the entire amount"; and after the date fixed for redemption, the rate of interest allowed by Cl. (b) of that rule is such as the Court deems reasonable. But within these limits the agreement is still effective. The mortgagee in such a case is entitled to interest at 8 per cent. per annum on the principal not only up to the date of the preliminary decree but also up to the dates fixed therein for payments of the several instalments of the decretal amount the interest between any two successive dates being reckoned on the portion of the principal outstanding between those dates; but he is not entitled to any further interest. (Rau and Biswas, JJ.) ATUL KRISHNA DAS V. AMRITALAL CHAKARAVARTY I.L.R. (1943) 2 Cal. 364=218 I.C. 178= 18 R.C. 11=47 C.W.N. 466-77 C.L.J. 257= A.I.R. 1944 Cal. 322.

### -S. 33—If retrospective-

S. 33 of the Bengal Money-Lenders Act has no retrospective effect and does not affect agreements which had been performed prior to its enactment. Consequently a borrower is not entitled to claim the return of the amount paid by him to the lender by way of capitalist commission before the Act came into force. J.) JUGGANNATH ROY v. MADAN MOHAN. I.L.R. (1942) 1 Cal. 186=204 I.C. 602=15 R.C. 533=45 C.W.N. 1042=A.I.R. 1942 Cal. 125.

paid –S. 33—Scope–Fees lawyers and "tohorie" to lender's officers-If can be deducted.

S. 33 of the Bengal Money-Lenders Act is intended against Money-Lender's commissions and things of like nature. An agreement to pay the fees of the lender's lawyers for investigating title in the case of a mortgage is excepted. The borrower cannot, therefore object to a deduction by the lender of a sum paid to his lawyer under an agreement for that purpose. Any deduction by the lender for tohorie to his own officers, however, stands on a different footing. (Mitter and Akram. II.) RAJANI KANTA PAL v. HRISHIKESH DAS. 48 C.W.N. 755=A.I.R. 1944 Cal. 391.

-S. 34—If ultra vires, so far as it deals with

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The Bengal Money-Lenders Act, in so far as it deals with decrees passed on promissory notes, is not ultra vires. 45 C. W. N. 609, foll. (Mukherjea and Biswas JI.) MOHINI RANJAN v. SURENDRA CHANDRA GHOSAL. 200 I.C. 268 4 4 R.C. 698 45 C.W.N. 973 74 C.L.J. 88 4 F.L.J. (H.C.) 319 = A.I.R. 1942 Cal. 149.

——S. 34—Mortgage decree passed before Act —Order for instalments—If can be made.

Under S. 34 of the Bengal Money-Lenders' Act, 1940, an order for instalments regarding a mortgage debt must be made at the time that the preliminary decree is passed. The section makes no provision for instalments being ordered at any other time. Where, therefore, the preliminary and the final decrees have already been passed before the Act coming into force, no order for instalments can be made under the section. (Sen, I.) Sallendra M Dey v. Accownie Mukherjee. 45 C.W.N. 11.

——S. 34—Nature of provision—Composite decree—Validity.

S. 34 of the Bengal Money-Lenders Act is only for the defendant's benefit and is merely directory and can be waived by him. A composite mortgage decree partaking of the features of a preliminary decree in so far as it directs payment within a time and also of the features of a final decree in so far as it directs a sale, can be passed under this section with the consent of parties. Such a decree would be a nullity if it is a decree of Court and not a consent decree. (Das, J.) Gour Chand Mallik z. Pradyumna Kumar Mallik. I.L.R. (1943) 2 Cal. 485=A.I.R. 1945 Cal. 6.

S. 34—Preliminary decree—Construction— Claim and costs made payable in instalments— —Instalment of costs—When payable.

By a preliminary decree it was ordered that the defendant should pay to the plaintiff a certain amount and also the taxed costs by five equal annual instalments. The first of such instalments was made payable on or before 15th August, 1941 and the instalment of costs upon taxation.

Held, that the true meaning of the decree was that the claim and the costs were both payable by five equal annual installments, the first instalments of the claim was payable on 15th August, 1941 and the first instalment of costs on the date of taxation. (Das, J.) RANGALAL MANDAL v. NARENDRA NATH GHOSE. I.L.R. (1943) 2 Cal. 576=217 I.C. 104=17 R.C. 161=47 C.W.N. 637 =A.I.R. 1944 Cal. 414.

Ss. 34 and 36—Relief by way of instalment—Whether can be given when decree not reopened.

S. 34 (1) (b) of the Bengal Money-Lenders Act provides for a remedy which is quite independent of the provisions of S. 36 of the Act. There is no question of re-opening of a decree under S. 34 (1) (b) but the reliefs which are specified in that section would be available to a borrower even if the decree could not be re-opened under S. 36 of the Act. (Mukherjea and Blank, II.) PASHU-ATHI NATH ROY V. SACHINATH ROY. I.L.R. (1943) 2 Cal. 180=209 I.C. 15=16 R.C. 273=47 C.W.N. 405=A.I.R. 1943 Cal. 330.

S. 34 (1) (a)—Applicability—Mortgage decree passed before Act.

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By S. 34 (1) (a) of the Bengal Money-Lenders Act the Court has been empowered to grant instalments in suits in respect of mortgage loans at the time of the passing of the preliminary decree after the commencement of the Act. The provisions of this section are, therefore not attracted to a case where the decree is passed before the Act and cannot be reopened under the Act. [Affirming the Judgment of Sen, J. in 45 C.W.N. II.] (Derbyshire, C.J., Panckridge and Nasim Ali, J.). Accounte Mukherjee v. Saliendra Mohan. I.L.R. (1941) 2 Cal. 169=195 I.C. 779=14 R.C. 135-45 C.W.N. 548=73 C.L.J. 287=A.I.R. 1941 Cal. 495.

—— Ss. 34 (1) (a) and 31—Mortgage suit— Award of interest—Power of Court -Limitations —C.P. Code, O. 34, Rr. 3, 4 and 11.

The Bengal Money-Lenders Act does not totally abrogate the provisions of O. 34, Rr. 2, 4 or 11, C.P. Code. These provisions are only modified to the extent indicated in S. 34 (1) (a) and S. 31 of the Act. The power to award pendente lite interest in a mortgage suit is not thus taken away by the Act. Three limitations only have been imposed by the Act on these provisions of O. 34 in respect of the award of interest, namely, (1) that the pendente lite interest and interest allowable under O. 34, R. 11 (a) (i) up to the period of grace, which must be determined in terms of S. 34 (1) (a) (ii) of the Act, would not be according to the contract rate, where there is such a rate, but would be according to the rate scaled down by S. 30 (1) (c) of the Act; (2) that the amount of that interest should not exceed the principal of the loan in accordance with the method of calculation to be made in accordance with S. 30(1) (a) and (b) of the Act; and (3) O. 34, R. 11 (b) is not to apply where the loan was advanced before the Act. (Mitter and Akram. JJ.) PROMODE NATH SINHA v. RASESHWARI 1)ASSI. I.L.R. (1942) 1 Cal. 414=75 C.L.J. 174=204 I.C. 502=15 R.C. 525=46 C.W.N. 153=A.I.R. 1942 Cal. 128.

——S. 34 (1) (a)—Preliminary mortgage decree —Grant of instalments—Power of Court to impose conditions.

In the case of a loan on a mortgage the Court in passing a preliminary decree has the power in a fit case to require additional security from the judgment-debtor as a condition of giving him instalments. It may also impose other conditions with a view to see that the decree-holder does not lose the full benefit of his security during the period that the instalments may be spread over by reason of any act or default on the part of the judgment-debtor. Where the loan is secured on revenue-paying properties and patni taluks, the Court may impose the condition that the judgment debtor must pay up all past arrears of revenue, cess and patni rent, and also the revenue, cess and patni rent that may fall due and in default the decree holder will be entitled to apply for a final decree. This additional right given to the decree-holder to apply for a final decree does not militate against the provisions of S. 34 (a) (ii) of the Act. (Mitter and Akram, IJ.) PROMODE NATH SINHA v. RASESHWARI DASSI. I.L.R. (1942) 1 Cal. 414=75 C.L.J. 174=46 C.W.N. 153= 204 I.C. 502=15 R.C. 525=A.I.R. 1942 Cal. 128,

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-S. 34 (1) (a) First Proviso-Default in payment of instalment-Extension of time to pay that instalment-Power of Court to grant.

The first proviso to S. 34 (1) (a) of the Bengal Money-Lenders Act empowers the Court only to extend the time for payment of the entire amount which has fallen due on default in payment of any particular instalment. The Court is not entitled to grant an extension of time with regard to the pay-ment of the particular instalment. If any case of hardship arises, the judgment-debtor is not without his remedy. He can deposit in Court the amount due by him in respect of that particular instalment before the final decree is actually made as laid down in the second proviso, and the passing of the final decree can thereby be stopped. (Mukherjea and Pal. II.) PRAMATHANATH SANYAL v. SAILESH CHANDRA. 206 I.C. 422=15 R.C. 701=47 C.W.N. 306=A.I.R. 1943 Cal. 214.

-8' 34 (1) (a) (ii)—Notice in prescribed form-If condition precedent to application for final decree-Notice signed only by one of two plaintiffs and mentioning wrongly amount for which default was made—Application for final decree-If maintainable.

Under S. 34 (1) (a) (ii) of the Bengal Money-Lenders Act, giving of a notice in the form prescribed by rules made under that Act is a condition precedent to the plaintiff's right to apply for a final decree for sale. Rule 24 (1) is mandatory that the notice should be in Form No. 15. That form indicates that the notice should be signed by the plaintiff himself and if there are two or more plaintiffs by all of them. A notice signed by only one of two plaintiffs and mentioning wrongly the amount of instalment for which default in payment was made, does not comply with the requirements of the Act and an application by the plaintiffs for a final decree for sale is, therefore not maintainable. (Das, J.) RANGALAL MONDAL v. NARENDRA NATH GHOSE. I.L.R. (1943) 2 Cal. 576=47 C.W.N. 637=217 I.C. 104=17 R.C. 161=A.I.R. 1944 Cal. 414.

-S. 34 (1) (b)—Applicability—Decree partly satisfied and claim to unsatisfied balance given up.

S. 34 (1) (b) of the Bengal Money-Lenders Act contemplates only a case where the amount of the decree is still payable. It cannot apply to a case where the amount of the decree has already been realized and thus has ceased to be payable any longer. In a case where the amount of the decree is realized or paid in part an order under the section may be made in respect of the part still remaining payable. But the section cannot be resorted to if the decree has been satisfied in part and the claim to the unsatisfied balance has been given up. (Mukherjea and Pal, JJ.) PROBHABATI MITRA v. ANIL KUMAR DAS. 209 I.C. 428-47 MITRA v. ANIL KUMAR DAS. 209 C.W.N. 645=A.I.R. 1943 Cal. 629.

S. 34 (1) (b)—Application under—Maintainability-Decree entered as satisfied by sale proceeds in execution.

The exercise of the power of the Court to order payment of the decretal amount by instalments under S. 34 (1) (b) of the Bengal Money-Lenders under S. 34 (1) (b) of the Bengal Money-Lenders deals with default in payment of any instalment Act pre-supposes the existence of a subsisting referred to in Sub-S. (1) (b). That is an order decree. An application under this provision is, for instalments made on an application by a judg-therefore, not maintainable after the executive. Act pre-supposes the existence of a subsisting therefore, not maintainable after the executing ment debtor after a decree has been passed. It has

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Court has entered up satisfaction of the decree in full by the proceeds of a sale in execution.

Per Nasım Ali. J.—It may be that if the sale be set asıde later on under O. 21, R. 90 C. P. Code, the order of the executing Court entering up satisfaction of the decree will automatically be vacated and the decree would be revived. On the happening of such a contingency it would be open to the judgement-debtor to make an application for relief under S. 34 (1) (b) of the Act. (Nasim Ali and Blagden, JJ.) RADHICA LAL GOSSAIN D. JITENDRA NATH. I.L.R. (1942) 2 Cal. 523=46 C.W.N 877=208 I.C. 401=16 R.C. 201=76 C. L.J. 354=A.I.R. 1943 Cal. 458.

-S. 34 (1) (b)—Applicability—New decree

passed after re-opening decree.

Per Pal, J.—There is nothing in S. 34 of the Bengal Money-Lenders Act to limit its operation only to the passing of a decree where there has been no decree at any previous stage. Even when the Court makes a new decree after reopening a decree in suits in respect of loans advanced before the commencement of this Act other than those referred to in Cl. (a) of that section, the order should be in terms of S. 34 (1) (b) and should direct that if default is made in making payment of any instalment, that instalment, and not the whole of the decretal amount should be recoverable. (Akram and Pal, IJ.) BIBHUTI BHUSAN PAL v. KUMAR KALI BANKING CORPORA-TION LTD. 47 C.W.N. 309.

S. 34 (1) (b)-If ultra vires, so far as it operates on decrees on promissory notes passed before Act—Provision, if in conflict with Negotiable Instruments Act or C. P. Code—Government of India Act, Sch, VII, Items 28 and 53 of List I and Items 4 and 15 of List III.

S. 34 (1) (b) of the Bengal Money-Lenders Act. so far as it operates on decrees in suits on loans. evidenced by promissory notes passed before the commencement of the Act, would not come under Item No.28 or 53 of List I of the seventh schedule of the Government of India Act, and is not ultra vires of the Bengal Legislature. Legislation with respect to decrees on promissory notes before th commencement of the Act is not legislation "with respect to promissory notes" (Item No. 28 of List I). The provisions of S. 34 (1) (b) (ii) are not in conflict with the Negotiable Instruments Act. These provisions are in conflict with Rr. 3 and 11, O. 21, and Rr. 2 (26). 3, O. 37 of the Code of Civil Procedure (an existing Indian law). They come under Items 4 and 15 of the Concurrent List, List III and the repugnancy has been cured by the assent of the Governor General. (Derbyshire, C.J. Panckridge and Nasım Ali, JJ.) HARSUKHDAS v. DHIRENDRA NATH, I.L.R. (1941) 2 Cal. 107=196 I.C. 161=14 R C. 182=73 C.L. J 333=1941 F.L. J. (H.C.) 308=45 C.W.N. 609=A.I.R. 1941 Cal. 498 (F.B.).

-S. 34 (2)—Applicability—Money decree reopened and new decree payable in instalments passed—Time for payment of instalment—If may be extended.

S. 34(2) of the Bengal Money-Lenders Act

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no application where a money decree has been re-opened and as part of the new decree that is passed an order for payment in instalments is made with a direction that in default in payment of an instalment the decree holder purchaser would be put back in possession of the property restored to the judgment-debtor under S. 36 (2) (e). In the latter case the Court has no jurisdiction to extend the time for the payment of any instalment. (Henderson, J.) Ananda Chandra Sen v. Suresh Chandra. 48 C.W.N. 453.

——S. 35—Applicability—Mortgage decrees— Duty of Court—Valuation of property.

There in nothing in S. 35 of the Bengal Money-Lenders Act which excludes mortgage decrees from its operation. In carrying out the directions of that section, it is incumbent upon the Court not only to specify so much of the property of the Judgment-debtor which it considers saleable at a price sufficient to satisfy the decree, it must also specify the price of the property below which it cannot be sold. In cases coming under the section the Court has to determine the price of the property which is to be put up for sale on proper evidence, and one and only one valuation can be given in the sale proclamation. The section cannot be complied with by mere insertion of the two valuations given by the decree-holder and the judgment-debtor respectively. (Mukherjea and Pal, J.) Asharam Thikadar v. Bijoy Singh Chapra. I.L.R. (1944) 1 Cal. 166=47 C.W.N. 666.

abortive-Fresh sale-Specified price, if can be reduced. See CALCUTTA HIGH COURT RULES AND ORDERS (O. S.). CHAP. XXVII. RR. 3, 9, 12 AND 21 I.L.R. (1944) 1 Cal. 245.

-S. 35-Scope-Sale proclamation issued before Act.

There is nothing in S. 35 of the Bengal Money-Lenders Act restricting it to cases of loans taken after the Act or to decrees passed after the Act. But that section has no application to a sale proclamation validly issued before the Act came into operation. (Mukherjea and Sen, II.) GIRISH CHANDRA DAS v. SIBA PRASAD JANA. 202 I.C. 125 =15 R.C. 292=75 C.L.J. 45=46 C.W.N. 275=A. I.R. 1942 Cal. 472.

-S. 35, Proviso-"Amount decreed"-Meaning of—Two mortgages of same property in favour of same Mortgagee—First mortgage executed by all three owners—Second mortgage executed by only two of them-Suit on both mortgages decreed—Difference between specified price and highest bid foregone by decree-holder-How to be deducted.

The expression "amount decreed" in the proviso to S. 35 of the Bengal Money-Lenders Act means the principal and interest covered by the decree. Where two mortgages of the same property were executed in favour of the same mortgagee and the first mortgage was executed by all the three owners of that property while the second only by two of them on their shares and a suit brought by the mortgagee on both the mortgages is decreed against all the mortgagors, the "amount decreed" against the mortgagor who was not a party to the second mortgage would be less than

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the "amount decreed" against each of the other two mortgagors. The "amount decreed" against the former is the amount due in respect of the first mortgage, while the "amount decreed" against the other two mortgagors is the total of the amounts due under both the mortgages. such a case, the difference between the specified price and the highest bid which the decree-holder has consented to forego has to be deducted entirely out of the amount decreed in respect of the first mortgage, and not out of the total of the amounts decreed in respect of both the mortgages or proportionately according to the ratio between the two amounts decreed in of the first and v. Netai Chand Datta. I.L.R. (1943) 2 Cal 280=216 I.C. 57=17 R.C. 99=A.I.R 19 44 Cal.

-S. 36—Agreement remitting certain amount and settling principal at certain sum-Re-opening.

Where by an agreement between the lender and the borrower a certain amount is remitted and the outstanding principal is settled at a certain sum, the Court can under S. 36 of the Bengal Money-Lenders Act, re-open the settlement regarding the principal but not the remission. (Mitter and Akram, JJ.) RAJANI KANTA PAL v. HRISHIKESH DAS. 48 C.W.N. 755=A.I.R. 1944 Cal. 391.

-S. 36—Applicability—Loan advanced in Bihar but payable either there or at Calcutta-Decree passed by Calcutta High Court-If can be re-opened. See Bengal Money-Lenders Act, Preamble and S. 36. I.L.R. (1942). 1 Cal. 505.

-S. 36—Application under—Nature o/—C. P. Code, O. 47.

An application for relief under the Bengal Money-Lenders Act is an original application under that act and not an application for review under O. 47. C. P. Code (Derbyshire, CJ. and Panckridge, J.) LAL MOHAN CHATTEFJEE v. SURESH CHANDRA MUKHERJEE. I.L.R. (1942) 2 Cal. 116=208 I.C. 154=16 R.C. 148=46 C.W. N. 607=A.I.R. 1943 Cal. 170.

-Ss. 36 and 2 (22)—Application under O. 21 R, 90, CP. Code-If suit to which Act applies-Termination of execution case before 1st January 1939-Application under O. 21, R. 90 pending on that date—Application for review—If competent. See Bengal Money-Lenders Act. Ss. 2 (22) and 36. 46 C.W.N. 659.

-S. 36—Decree allowing interest in excess of limits specified in S. 30-Whether can be re-opened when new decree would be for larger sum.

If a decree allows interest in excess of the limits specified in S. 30 of the Bengal Money-Lenders Act, prima facie it can and ought to be re-opened under S. 36 of that Act if the other conditions laid down in that section are complied with. It is immaterial that if calculation be now made, the new decree would be for a sum in excess of what was allowed by the original decree. (Mukherjea and Pal, JJ.) PROBHABATI MITRA V. ANIL KUMAR DAS. 209 I.C. 428=47 C.W N. 645 =A.I.R. 1943 Cal. 629.

-Ss. 36 and 2 (22)-Decree for money advanced on hundi-Execution proceeding pending-Decree, if may be re-opened.

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A decree for money advanced on the basis of a hundi in respect of which an execution proceeding is pending is not a decree passed in a suit to which the Bengal Money-Lenders Act applies, as money advanced on a hundi which is a negotiable instrument other than a promissory note is not a loan within the meaning of the Act. Consequently such a decree cannot be re-opened under S. 36 of the Act. (Mukheriea and Blank JJ.) BARADA CHARAN NANDI v. EASTERN UNION BANK, LTD. 201 I.C. 349=15 R.C. 169=75 C.L.J. 425=46 C.W.N. 555=A.I.R. 1942 Cal. 389.

——S. 36—Decree passed after 1st January, 1939 but before Act coming into force—If can be reopened.

Under S. 36 of the Bengal Money-Lenders Act a suit for the re-opening of a decree passed after 1st January, 1939 and before the Act came into force, is maintainable. (Mitter and Akram, II.) D. J. HILL v. RAMTARAN BANERJI. 50 C.W.N. 47.

——Ss. 36 and 2 (22)—Decree passed before 1st January, 1939—Decree remaining unsatisfied on that date but no execution proceeding pending —If can be re-opened, See BENGAL MONFY-LENDERS ACT, Ss. 2 (22) AND 36. 46 C.W.N. 557.

S. 36—Form of decree—Declaratory decree absolving judgment-debtor of all liability—If can be bassed.

A mere declaratory decree absolving the judgment-debtor of all liability cannot legally be passed on an application under S. 36 of the Bengal Money-Lenders, Act, without a proper accounting in the manner laid down in the section. (Chakravartti, J.) AJARADDI v. SONAI BIBI. 49 C.W.N. 638.

The Court cannot grant a decree under S. 42 of the Specific Relief Act or under the provisions of Civil Procedure Code, declaring that the judgment-debtor need pay no more under the decree. Such a result can only be reached by re-opening the decree under S. 36 of the Bengal Money-Lenders' Act. (Lord Goddard.) RENULA BOSE v. MANMATHA NATH BOSE. 49 C. W.N. 491=A.I.B. 1945 P.C. 108 (P.C.).

S. 36—Grant of instalments-Discretion of Court.

Although the granting of instalments is to a large extent discretionary, the exercise of the discretion must be based on proper legal evidence. (Sen and Das, JJ.) RAJSHAHI PEOPLE'S BANK, LTD. v. DEBENDRA MOHAN MOITRA, 49 C.W.N. 709.

3. 36—Grant of relief—Decrees and loans for which no decrees have been passed—Subsistence of liability on 1st January, 1939—If sufficient.

Under S. 36 of the Bengal Money Lenders Act relief may be granted to a debtor in respect of a decree if the decretal liability subsists on the 1st January, 1939, when the transaction is otherwise liable to be reopened. There is nothing in the Act or in general principles which would make subsistence of that liability on the date of the suit or application or on the date of the commencement of the Act a further requirement.

Obiter: Even in cases of loans for which no decrees have been passed, it is sufficient if the liability subsists on 1st January, 1939. (Chakravartti, J.) AJARADDI v. SONAI BIBI. 49 C.W.N. 638.

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Ss. 36 and 30—Grant of relief in respect of liability under decree—Decree, if must be re-opened.

In order to grant relief to a borrower in respect of his liability under a decree in excess of the limits set out in S. 30 of the Bengal Money-Lenders Act, the decree must be re-opened. (Sen. J.) JUGGANNATH ROY v. MADAN MOHAN. I.L.R. (1942) 1 Cal. 186=204 I.C. 602=15 R.C. 533=45 C.W.N. 1042=A.I.R. 1942 Cal. 125.

\_\_\_\_\_S. 36-Grant of relief-Person other than borrower.

Under the provisions of the Bengal Money-Lenders Act, it is open even to a person who is not a "borrower" to show to what extent a "borrower" is liable, if thereby he can obtain any relief. There is nothing in the Act preventing the granting of relief, if otherwise obtainable, at the instance of such a person. (Edgley and Biswas, JJ.) Saradindu Mukherjee v. Jaharlal Agarwalla. I.L.R. (1942) 1 Cal. 326=200 I.C. 353=74 C.L.J. 61=46 C.W.N. 33=15 R.C 174=A.I.R. 1942 Cal. 153.

S. 36—Grant of relief—Renopening of decree—If necessary.

If the Court takes a fresh account between the parties on the basis of the rate of interest permitted by the Bengal Money-Lenders Act and arrive at a figure other than that mentioned in the decree, it has of necessity to re-open the transaction between the parties. That being so, the Court ought to consider granting to the applicant the relief mentioned in S. 36 (2) of the Act. The Court cannot leave the decree and the sale held there under in tact, and merely release the applicant of all liability as regards interest in excess of the limits specified in S. 30 of the Act, although the price realised at the sale is insufficient to satisfy the dues of the decree-holder calculated in accordance with the Act. (Derbyshire, C.J. and Panckridge, J.) LAL MOHAN CHATTERJEE v. SURESH CHANDRA MUKHERJEE. I.L.R. (1942) 2 Cal. 116=208 I.C. 154=16 R.C. 148=46 C.W. N. 607=A.I.R. 1943 Cal. 170.

——Ss. 36, 34 and 30—If ultra vires—Governement of India Act, Ss. 292 and 299.

The provisions of Ss. 30, 34 and 36 of the Bengal Money-Lenders Act, 1940, so far as they authorise Courts to reopen decrees passed before the Act came into operation and to pass new decrees in accordance with the Act, are not ultra vires the Bengal Legislature. They do not offend either S. 292 or S. 299 of the Government of India Act. The subject-matter of the Act comes within Item 27 of List II in Sch. VII of the Government of India Act. (Derbyshire, C.J., Panckridge and Nasim Ali, J.). PROMODE KUMAR v. BENOY KRISHNA. ILR. (1941) 2 Cal. 85=196 I.C. 80=14 R.C. 161=73 C.L.J. 316=4 F. L.J. (H.C.) 288=45 C.W.N. 581=A1.R, 1941 Cal. 425 (S. B.).

If an application under S. 36 of the Bengal Money-Lender's Act is rejected, the remedy is by way of revision. If it is, however, successful, and the decree is re-opened and a new decree is passed, the decree-holder is entitled to appeal

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against the new decree. If on appeal the new decree is set aside and the original decree is restored a second appeal from that decision is competent. (Henderson, J.) GOLAM MAHIUDDIN v. HRISHIKESH DATTA. I.L.R. (1943) 2 Cal. 360 = 47\_C W.N. 464=218 I.C. 158=17 R.C. 205= A.I.R. 1944 Cal. 319 (1).

S. 36—Order granting application—Appeal -Court-fees.

No appeal lies from an order granting an application under S. 36 of the Bengal Money-Lenders Act. But the aggrieved party can file an appeal against the amended decree. If the subjectmatter of the appeal can be valued, ad valorem court-fees will have to be paid under Sch. I, Art. 1 of the Court-Fees Act on the memorandum of appeal. If the subject-matter of the appeal cannot be valued, the fixed court-fee provided for in Sch. II, Art. 17 (vi) will have to be paid. Whether the subject-matter of the appeal can be valued or not depends upon the nature of the grounds taken in the memorandum of appeal. (Mitter and Sen, II.) PRAN HARI BAIDYA v. JOGESH CHANDRA. 46 C.W.N. 681.

Revision—C. P. Code, Ss. 96 and 115.

An order reopening a decree under S. 36 of the Bengal Money-Lenders Act is not appealable as such. But an appeal would lie against the new decree after reopening the old one under S. 96 C. P. Code. As the aggrieved party has the right of appealing against the new decree where all questions relating to the impropriety of the order reopening the old decree may be raised and decided, the High Court should not entertain an application for revision against the order reopening the decree unless it considers it to be absolutely necessary for the purpose of avoiding costs or protraction of litigation. (Mukherjea and Blank, JJ.) JADU NATH RAY v. KSHITISH CHANDRA ACHARJYA. I.L.R. (1943) 2 Cal. 479=79 C.L.J. 155=A.I.R. 1945 Cal. 177.

-S. 36—Powers of Court—Power to release borrower from liability without re-opening decree.

Under S. 36 of the Bengal Money-Lenders Act the Court may re-open a decree if it contravenes the provisions of S. 30 and further in suitable cases may, even without re-opening the decree, release a borrower of all liability in excess of the limits specified in S. 30 (1) and (2) of the Act. (Edgley, J.) MANMATHA NATH BOSE v. RENULA BIBL. 45 C.W.N. 863=198 I.C. 71=14 R.C. 427=A.I.R. 1941 Cal. 681.

S. 36—Power of Court to act suo motu.

Under S. 36 of the Bengal Money-Lenders Act, the Court may suo motu grant any relief to which a borrower may be entitled under the Act, and it is not necessary for him to come before it by a separate application. Consequently the Court can grant relief under the section on materials contained in an affidavit filed by him in opposition to an application for final decree in a mortgage suit. (Sen, J.) Jogesh Chandra v. Pran Krishna. 46 C.W.N. 661.

-S. 36—Powers under—When may be exercised.

Before the powers under S. 36 of the Bengal

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cant must show that their exercise will bring relief against the specific evils, such as unduly high rates of interest at which the Act is aimed. The powers under the section cannot be exercised merely on the ground that the borrower is able to show that the exercise of them will ease his burden generally without regard to the Act. (Panckridge, J.) KAMALA RANJAN v. BFPIN ВЕНАВІ. I.L.R. (1941) 2 Cal. 73=196 I.C. 290 =14 R.C. 205=45 С.W.N. 619=A.I.R. 1941 Cal. 540.

-S. 36-Preliminary mortgage decree-Total interest up to date fixed for payment exceeding maximum allowed by S. 30 but not interest up to date of decree-Decree, if may be reopened. See Bengal Money-Lenders Act. (1940) Ss. 2(8) AND 36. 46 C.W.N. 159.

-S. 36-Proceedings under-Decree-halder purchaser spending money on property purchased—Right to reimbursement.

In a proceeding under S. 36 of the Bengal Money-Lenders Act, the decree-holder who has spent money on the property purchased by him cannot claim that sum by way of reimbursement. He must seek his remedy, if any, in other proceedings. (Mitter and Akram. II.) D. J. HILL v. RAMTARAN BANERJI. 50 C.W.N. 47.

Rules as to affidavie—C. P. Code, O. 19, R. 3 (1)

An application to obtain relief under S. 36 of the Bengal Money-Lenders Act is not an interlocutory application such as is mentioned in O. 19, R. 3 (1), C.P. Code. It is really a separate proceeding in the larger proceeding of the suit and the decision of the Judge, (subject of course to appeal) when given, is a final decision upon the rights of the parties under the Act. Therefore, the affidavit the Court must receive and act upon in such a proceeding must be confined to such facts as the deponent is able of his own knowledge to prove. An affidavit stating that the deponent learnt from somehody else that the loan was a commercial loan is not satisfactory evidence, nor indeed evidence upon which the Court could act. (Derbyshire, C.J. and Nasim Ali, J.) HAFIZ SHAMSED AHMED v. CHATOO LAL DEY. 46 C.W.N. 474.

-S. 36-Procedure for obtaining relief-Decree passed in suit before 1st January, 1939-No proceeding in execution pending. See BENGAL MONEY-LENDERS ACT, Ss. 2 (22) AND 36. 46 C.W.

S. 36-Procedure for obtaining relief-Final decree in mortgage suit passed before 1st January, 1939—Such decree not satisfied on that date. See Bengal Money-Lenders Act, Ss, 2 (22) and 36. 45 C.W.N. 859.

S. 36—Reopening of account.

Under S. 36 of the Bengal Money-Lender's Act, the Court will not reopen the account unless it has reason to believe that the reopening of the account would entitle the borrower to get some relief under the Act. (Sen, J.) SAILENDRA M DEY v. Accowrie Mukherjee. 45 C.W.N. 11. SAILENDRA M.

S. 36—Reopening of composite murtgage decree The rule that a final decree in a mortgage suit is fully satisfied when the mortgaged property is Money-Lenders Act can be exercised, the appli- brought to sale and that thereafter the judg-

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ment-debtor may be entitled to have the personal decree reopened under S. 36 of the Bengal Money-Lenders Act but not the final decree, has no application to a case where the Court, instead of passing a final decree followed by a personal decree, has passed a composite decree. As such a decree cannot be split into two, the judgment debtor is entitled to have it re-opened. (Henderson, J.) SITA NATH NANDI v. MANGAL CHANDRA. 46 C.W.N. 856.

—S. 36—Re-opening of decree after sale by transferee Court to decree-holder and before delivery of possession—Re-opened decree directing delivery of possession to decree-holder purchaser on default in paying instalments—Jurisdiction of executing Court to deliver possession on such default without fresh transfer of decree.

After a decree was transferred to another Court for execution and the property was purchased by the decree-holder in execution sale, that decree was re-opened by the transferor Court under S. 36 of the Bengal Money-Lenders Act and instalments were granted. The re-opened decree contained a direction to the effect that on default by the judgment-debtor the decree-holder would get possession of the property sold. The judgment-debtor defaulted and the decree-holder thereupon obtained delivery of possession from the executing Court. On objection by the judgment-debtor,

Held, that as the decree-holder had not taken delivery of possession no question of making an order under S. 36 (2) (c) or (e) of the Bengal Money-Lenders Act arose and that there was also no question of transferring the new decree for execution as the sale by the executing Court was in tact.

Held also, that as the new decree directed that the decree-holder would get possession on default by the judgment-debtor, the executing Court was bound to execute it as it was. (Henderson, J.) BABULAL BANIA v; HARINAM SHAW. 48 C.W.N. 674.

-S. 36—Re-opening of decree—Effect of—Old decree and adjudications implied therein-If wiped out. The powers given by S. 36 of the Bengal Money Lenders Act are to be exercised only for the purpose of giving relief to the borrower against specific evils sought to be remedied by the Act, that is to say, to give relief from all liability for interest in excess of the limits specified in the Act. If in the exercise of the powers conferred by this section the Court thinks fit to re-open a decree the Court has to pass a new decree. The old decree is re-opened only so far as it is necessary to give relief to the borrower and the passing of the new decree does not mean that the old decree and all the adjudications implied in that decree are gone for ever. Under S. 36 (2) (a) of the Act the decree is to be re-opened only to the extent necessary to substitute the method of accounting sanctioned by the Act for the calculation on which the original decree was passed and the parties are not relegated to their rights and liabilities on the original cause of action. (Das. J.) SAMBHU CHARAN DEY v. HRISHIKESH DEY. 49 C.W.N. 367.

\_\_\_\_\_S. 36—Re-opening of decree—Ground for— Claim for instalment.

The Court can re-open a decree under S. 36 of the Bengal Money Lenders Act only if it is necessary to do so for the purpose of exercising any of the powers which are conferred by sub-

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S. (1) of that section. A claim for instalments is not one of the reliefs which comes under the purview of that sub-section and cannot by itself afford a ground for re-opening a decree. (Mukherjea and Sen, JJ.) ANATH NATH v. RAJENDRA NATH. 198. I.C. 810=14 R.C. 508=45 C.W.N. 975=A.I.R. 1942. Cal. 120.

Decree allowing interest in excess of statutory rate.

If a decree made in a suit to which the Bengal Money-Lenders Act applies, allows interest in excess of what is permitted under S.30 of the Act, here is sufficient ground for reopening the decree. Asto whether it is worth while for the judgment debtor to have a new decree when considerable time has elapsed since the date of the decree, is absolutely immaterial, (Mukherjea and Blank, JJ.) HEMENDRA NATH SANYAL v. SASHIBHUSAN TALUKDAR 205 I.C. 640=15 R.C. 657=75 C.L.J. 427=A.I.R. 1943 Cal. 101.

Court to allow.

There is nothing in S. 36 of the Bengal Money Lenders Act which by implication abrogates S. 34 C. P. Code. On the contrary, S. 36 begins with the words: "Notwithstanding anything contained in any law for the time being in force." Hence the existing laws are only affected to the extent laid down in the section. There is nothing in that section itself to justify an inference that the power of the Court to allow interest for a period subsequent to the decree has been taken away. Accordingly the Court has jurisdiction to allow interest for the period between the passing of the original decree and the passing of the new decree, when a new decree in a money suit is passed on an application for review under S, 36 (6) of the Act. (Henderson, J.) Purnachandra Biswas v. Kshirode Sundari Dutt. 204 I. C. 507=15 R. C. 529=46 C.W.N. 915=76 C.L.J. 275=A.I.R. 1942 Cal. 610.

S. 36—Re-opening of decree—Jurisdiction of Small Cause Court—Application pending before Debt Settlement Board.

A Small Cause Court Judge has jurisdiction to deal with an application under S. 36 of the Bengal Money-Lenders Act for reopening a decree passed by his Court, although another application is pending before the Debt Settlement Board in respect of the same matter. (Henderson, J.) Tirthapada Dey v. Kabiruddin. 206 I.C. 211=15 R.C. 686=75 C.L.J. 505=A.I.R. 1943 Cal. 142.

S. 36—Re-opening of decree—New decree allowing full interest up to its date—Profits realised by decree-holder from property purchased by him in execution—Whether can be deducted therefrom.

If the decree-holder has purchased a property in execution of his decree which is reopened under S. 36 (6) of the Bengal Money-Lenders Act, the Court may refuse to give him any additional interest for the period between the passing of the original decree and the passing of the new decree on the ground that he has realised profits from that property. But if the Court by the new decree gives him the full amount of

interest allowable under the Act up to the date of that decree, it cannot deduct the value of the profits therefrom, as it would be thereby compelling him to make a refund of such profits for which there is no provision in the Act. (Henderson, I) POGRA BANK, I TD. v. RAMANI MOHAN. I.L.R. (1943) 1 Cal. 170=209 I.C. 165=16 R. C. 319=46 C.W.N. 1026=A.I.R. 1943 Cal. 569.

-S. 36-Re-opening of decree-Order setting aside sale under that decree-If can be made.

no provision for an order setting aside a sale under a decree, when that decree is reopened and a new decree is passed, but is specifically confined to making an order for delivery of possession. (Henderson, J.) Indra Sekhar Chakravarti v. Bidhumukhi Devi. 46 C.W.N. 915.

-S. 36-Re-opening decree-Power of Court-

Decree by consent.

Under S. 36 of the Bengal Money-Lenders' Act, the power of re-opening a transaction extends to re-opening a decree. The fact that the decree was made by consent is immaterial, as is also the fact that the amount was agreed. (Lord Goddard.) RENULA BOSE v. MANMATHA NATH BOSE. 49 C.W.N. 491 = A.I R. 1945 P.C. 108 (P.C.).

S 36 of the Bengal Money-Lenders Act does not empower a Court to re-open a decree which is otherwise in order simply because it is in contravention of S. 31 of the Act. (Mitter and Blank, JJ.) Devraj Ray v. Lalji Morarji. 48 C.W.N. 200.

-S. 36-Re-opening of decree-Profits realised by decree-holder purchaser-If can be taken into account towards payment of debt.

If the decree-holder has purchased a property in execution of his decree which is re-opened under S. 36 of the Bengal Money-Lenders' Act, the Court cannot take into account the mesne profits as going towards the payment of the debt, although it may be justified in taking them into account in considering what rate of interest it would allow for the period since delivery of possession or whether it would allow any interest for that period at all. (Chakravartti, J.) AJARADDI v. SONAI BIBI. 49 C.W.N. 638.

-S. 35-Re-opening of decree-Proper test-Interest decreed exceeding statutory limit-Decree holder claiming less in execution—Relief if may

be refused.

If an application is made by a judgment-debtor under S. 36 of the Bengal Money-Lenders Act for re-opening a decree passed against him, the proper test is to weigh the actual amount of the liability in respect of total interest under the decree as against what the amount would be if calculated at the appropriate rate specified in S. 30. It is wrong in applying as a test of the relief to be obtained by the debtor what the decree-holder may choose to claim in execution of his decree. If, therefore, the amount decreed in respect of interest exceeds the amount that could be decreed if the limits applicable under S. 36 (2) read with S. 30 (1) (c) are applied in calculating the liability of the judgment debtor, the decree is to he re-opened under S. 36 (1) (a) and S. 36 (6) at the instance of the judgment-debtor, although the amount claimed by the decree-holder in execu-

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tion is less than the amount due to him applying the statutory limit. (Mukheriea and Roxburah, JJ ) PROBODH KUMAR GOSWAMI T. LAUT MOHAN DEY. 199 I C. 53=14 R.C 517=45 C.W.N. 1120 =A.I.R. 1942 Cal. 65.

-\$ 36-Re-opening of decree-Refusal on ground that new decree will be for larger sum-

Propriety

An application for review under S. 36 of the Bengal Money-Lenders Act cannot be refused S. 36 of the Bengal Money-Lenders Act makes merely on the ground that the new decree will be for a larger sum than the original decree. (Hen derson, 7.) Indra Strhar Charpavarti v. Bidhumukhi Devi 46 C.W.N. 915.

> -S. 36-Re-opening of decree-Restoration of property to judgment debtor-Mesne profits ..

Power of Court to award.

The Court, while re-opening a decree under S. 36 of the Bengal Money Lenders Act and ordering restoration to the judgment-debtor of the property acquired by the decree-holder in execution of the same, cannot direct investigation of the mesne profits with regard to that property for the period that it was in possession of the decree-holder. There is no provision in the Act for giving such mesne profits to the judgment-debtor. (Mukherjea and Sen, IJ.) TAMIUK LOAN OFFICE CO., LTD. v. GANGA NARAIN KAR. 46 C.W N. 919.

-S. 36-Re-opening of mortgage decree-All items of mortgaged properties rot sold

A final mortgaze decree is not fully satisfied when all the items of the mortgaged properties have not been sold, and it can therefore be re-opened. (Mitter and Blank, JJ.) MONMOHAN MUKHOPADHYAY v. MADARIPORE I OAN OFFICE, LTD. 48 C.W.N. 87.

-8. 36-Re-opening of mortgage decree- Fresh money decree if can be passed—One of mortgagors applying for relief also under Bengal Agricultural Debtors' Act-Entire proceedings-If must be stared.

If a mortgage decree is re-opened under S. 36 of the Bengal Money-Lenders' Act, a fresh mortgage decree, and not a simple money decree, has to be passed. As under the law a mortgage decree has to be passed in the presence of all the mortgagors, a mortgage decree cannot be re-opened and a fresh mortgage decree passed under the section in the absence of one of the mortgagors. Where two mortgagors apply for relief under S. 36 of the Bengal Money-Lenders Act and one of them subsequently applies for relief before D. S. Board under the Bengal Agricultural Debtors Act. the Court on receipt of a notice from the Board should not merely stay the proceedings so far as he is concerned and continue the hearing as against the other, but should stay the entire proceedings until the matter before the Board is disposed of, as the mortgage decree cannot be re-opened in the absence of one of them. (Sen and Das, JJ.) RAJSHAHI PROPLE'S BANK, LTD. v. DEBENDRA MOHAN MOITRA. 49 C.W.N. 709.

-S. 36-Re-opening of mortgage decree-Interest haid in excess of statutory rate-If may be appropriated towards principal

In taking fresh accounts on the reopening of a mortgage decree under S. 36 of the Bengal Money Lenders Act, any interest which had been paid by the mortgagor in excess of the rate permitted by the Act should not be appropriated towards principal, but should be credited against

interest due. All that the borrower is allowed under S. 36 (1) (d), is a refund of the excess paid. If the excess is allocated to principal, it would be a refund in effect of an additional rebate of interest. By allocating the excess payment to a reduction of principal, interest payable on that reduced principal is similarly reduced and the mortgagor will obtain a greater advantage than seems to have been intended by S. 36. (Mc. Nair, J.) KUMAR PRAMATHA NATH ROY v. KANAKENDRA NATH TAGORE. I.L.R. (1943) 1 Cal. 199=15 R.C. 464=204 I C. 165=77 C.L.J. 24=46 C.W N. 873=A I.R. 1943 Cal. 17.

-S. 36-Re-opening of mortgage decree-Refusal on ground that applicant would have to pay larger sum as interest-Propriety.

The Court cannot refuse to re-open a mortgage decree on an application made under S. 36 of the Bengal Money-Lenders Act on the mere ground that if that was done the applicant would have to pay a larger sum by way of interest in order to redeem the property than he had to pay under the original preliminary decree. (Henderson, J.) JANAKI DEBYA v. HAZI MINNATALI 46 C.W.N.

559.

-S. 36—Re-opening of mortgage decree after

sale-Sale, if can be set aside.

The Court re-opening a mortgage decree under S. 36 of the Bengal Money-Lenders Act after the mortgaged property is sold in execution of that decree, has no juri diction to set aside the sale. (Nasim Ali and Rau, JJ) SURESH CHANDRA BASAK v. KUMADA SUNDARI PAL. J.L R. (1943) 1 Cal. 354=209 I.C. 444=A.I.R. 1943 Cal. 628

-S. 36-Re-opening of transaction-Rate of interest in mortgage bond above permitted rate -Duty of Court.

Where the rate of interest in a mortgage bond is above the permitted rate, and such interest has been paid for some time, it is the duty of the Court to re-open the transaction between the lender and the borrower and to take an account of what has been paid and also what ought to have been paid according to the Act, and on such re-opening and taking of accounts to give the borrower such relief as he is entitled to under the Act. (Derbyshire, C. J. and Gentle, J.)
ABDUL WAHED HOWLADAR v. SUKUMARI DEBI. 203
I.C. 485=15 R.C. 437=75 C.L.J. 299=A.I.R. 1942 Cal. 568.

-S. 36 (1)—Right of suit—Decree passed on loan at creditor's suit—Subsequent suit by borrower—If maintainable—Forum of suit.

A suit by a borrower under S. 36 (1) of the Bengal Money-Lenders Act is maintainable even after a decree has been passed against him on the loan at the instance of the creditor. Such a suit must be instituted by the borrower in the Court which has passed the decree and in no other Court. (Mitter and Khundkar, JJ.) SATYA-NARAYAN BANERJEE V. RADHANATH DAS. I.L.R. (1942) 1 Cal. 235=198 I.C. 739=75 C.L. J. 229=14 R.C. 489=45 C.W.N. 1085=A.I.R. 1942 Cal. 69.

-S. 36-Right to relief-Interest ordered under preliminary mortgage decree exceeding statutory rate-Decree-holder relinquishing claim to excess interest.

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Once a borrower establishes that the interest which has been claimed and ordered under a preliminary mortgage-decree exceeds the rate permitted by the Bengal Money-Lenders Act, he is entitled to have the transaction re-opened, and if the transaction is re-opened he is entitled to such relief as the Court ought to grant under the provisions of the Act. The decree-holder, cannot, by relinquishing his claim to the excess interest, bar him from such relief. (Derbyshire, C. J. and Panckridge, J.) KUMUB BEHARI SEN V. SATYA BRATA SEN. 46 C.W.N. 605=206 I.C. 196=15 R.C. 685=A.I.R. 1943 Cal. 169.

-S. 36-Right to relief-Purchaser of portion of equity of redemption made party in mortgage suit.

A purchaser of the equity of redemption in some of the mortgaged properties who was made a party in the mortgage suit along with the mortgagor and who was affected by the preliminary decree passed in the suit, is entitled to apply to the Court for re-opening the transaction between the lender and the borrower on the lines laid down in the Bengal Money-Lenders Act. If such resopening gives relief he will get the henefit of the new decree. (Derbyshire. C.J., Nasim Ali and Gentle, IJ.) JUENDRA NATH GHOSE v. HRISHIKESH BANERJEE. 46 C.W.N. 692.

S. 36—Satisfaction of decree—Foreclosure suit—Compromise decree amount payable in instalments—Mortgagee entitled to recover possession on default of any instalment-Decree, if satisfied on default.

A suit for foreclosure culminated in a compromise decree which provided that the mortgage money was payable in certain instalments and that on default in payment of any one of the instalments the entire sum would become due and the mortgagee would be entitled to recover possession of the mortgaged property by taking out execution. There was default in 1938 and execution proceedings were started in 1940.

Held, that the decree could not be said to have been satisfied as soon as default occurred in 1938, that although the liabilities of the mortgagor might have been at an end as soon as the decree had become final, the decree itself was not satis-fied unless execution proceedings were taken and the mortgagee decree-holder got possession of the mortgaged property, and that, therefore relief could be granted under S. 36 of the Act. (Mukherjea and Sen. JJ.) SAMIRUDIN MALTEY v. NOBA KUMAR SAHA 201 I.C. 476=15 R.C. 206=A.I.R. 1942 Cal. 224.

S. 36—Suit by judgment-debtor for relief— Property purchased by decree-holder at price exceeding decretal amount-Surplus amount withdrawn by judgment-debtor and her creditors— Judgment-debtor, if should be required to deposit that amount.

Where the property of the judgment-debtor was purchased by the decree-holder in execution at an amount much above the decretal amount, with the result that after setting off the decretal dues against the price at which he had purchased he had to deposit in Court a certain sum a portion of which was withdrawn by the creditors of the judgment-debtor and the balance by the judgment debtor herself, and the judgment-debtor filed a

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suit under S. 36 of the Bengal Money-Lenders Act for relief.

Held, that the judgment-debtor must deposit in Court the surplus amount withdrawn by herself and her creditors before she could be allowed to proceed further with her suit. (Mitter and Akram, II.) D. J. HILL v. RAMTARAN BANERJI. 50 C.W.N. 47.

-Ss. 36 and 2 (22)—Suit to which Act applies—Preliminary, final and personal decrees passed before 1st January, 1939—No execution proceeding pending on that date or filed since— Decrees if can be reopened. See BENGAL MONEY-LENDERS ACT, Ss. 2 (22) AND 36. 48 C.W N. 406.

-S. 36 (1)—Grant of relief—Loan fully satisfied before Act-Mortgage amount deposited by mortgagor under S. 83, T. P. Act and withdrawn by mortgagee before Act-Mortgage debt, if extinguished.

Where a loan has been fully satisfied before the Bengal Money Lenders' Act came into force, there can be no scope for the grant of relief in a suit under S. 36 (1), subject to the express provision to the contrary in Cl. (d) of S. 36 (1). Where before that Act came into force, the mortgagor deposited the mortgage amount under S. 83 of the T. P. Act and the mortgagee with drew that amount producing the mortgage deed in Court for return to the mortgagor, whether the deposit was in fact sufficient or not, it had the effect of completely extinguishing the mortgage debt so far as to bar an application for relief by the mortgagor under the Bengal Money-Lenders' Act. (Biswas and Akram, BHUPENDRA NATH ROY v. SUSHIL CHANDRA. 49 C.W.N. 542 = A.I.R. 1945 Cal. 370.

-8. 36 (1)—Loan fully satisfied by amicable settlement before 1st January, 1939-Relief, if can be granted.

Where there was no suit in respect of a debt but it had been discharged by amicable payment before the 1st January, 1939, the Court has no power in a suit by the borrower for relief filed after the Bengal Money-Lenders' Act came into operation to direct a refund to the borrower of the amount which may be found to be in excess of what may be found out on calculating interest in terms of S. 30 of the Act. It makes no difference in principle where the loan had been fully satisfied prior to the 1st January, 1939, either by payment in cash or in kind or by accord and satisfaction. (Mitter and Khund-BHUPENDRA NATH v. MANORANJAN kar, JJ.) BHURIA. 49 C.W.N. 189.

-S. 36 (1)—Power of Court to reopen decree -'Transaction'-If includes decree.

Under S. 36 (1) of the Bengal Money-Lenders Act, the power of re-opening the decree flows from and is dependent on powers which the Court has been authorised to exercise under Cls, (a) to (e) of that sub-section. It is, therefore. restricted to cases where the question of the exercise of all or any of these powers arises. Even if the word "transaction" in S. 36 (1) (a) is interpreted to include a decree, that power can be exercised only when the decree is to be reopened and accounts between the parties are to be taken. If there is no question of taking accounts, the Court has no power to reopen the decree under S. 36 (1) (a). The power of the Court to order payment by instalments and thereby to give relief to the debtor under S. 36 (2) (d) cannot be

(1) (a) as that power can be exercised only after the decree has been re-opened and not before. (Derbyshire, C.J., Panckridge and Nasim Ali, J.) ACCOWRIE MUKHERJEE 2. SALLENDRA MOHAN, I.L.R. (1941) 2 Cal. 169=195 I.C. 779=14 R.C. 135=45 C.W.N. 548=73 C.L.J. 287=A.I.R. 1941 Cal. 495.

-S. 36 (1) and (6)—Remedies open to borrower— Application to Court which passed decree made more than a year after commencement of Act-Execution proceedings pending in another Court - Application, if competent.

Reading sub-sections (1) and (6) of S. 36 of the Bengal Money Lenders Act together the position of a person claiming relief under that section is as follows:-If the suit has not proceeded to a final decree, that is to say, if the suit is actually being heard, the borrower may apply in that suit for relief under the Act. No separate formal application would be necessary. He may raise the plea in his written statement or he may claim relief at the time of the hearing of the suit by placing such facts before the Court as would entitle him to relief. After the suit has proceeded to a final decree the borrower has four remedies, namely, (a) he may apply for relief by instituting a suit for that purpose before the Court having jurisdiction to entertain such suit; this is provided for in sub-S. (1) of S 36; (b) he may apply to the Court which passed the decree if there are proceedings in execution pending before that Court; this is provided for by S. 36 (6) (a) (i); (c) he may apply to the Court, which passed the decree, for a review of such decree, provided he makes that application within one year of the commencement of the Act; this is provided for by S, 36 (6) (a) (ii); and (d) if an appeal is pending he may apply to the appellate Court : vide S. 36 (6) (b). It is clear from the above that no application lies to the Court which passed the decree under S. 36 (6) (a) (i), if execution proceedings are pending before another Court and not before that Court, and that the borrower cannot avail himself of the provisions of S. 36 (6) (a) (ii) if more than one year has clapsed since the passing of the Act before the making of his application. (Sen. J.) S RAY v. KARUNA KIS-HORE KAR. I.L.R. (1944) 2 Cal. 70.

-S. 36 (1) (a)—"Reopening a transaction"— Meaning of-Order releasing judgment-debtor of liability in excess of statutory limits and directing fresh accounts to be taken-Effect of.

On an application filed by a judgment-debtor for relief under the Bengal Money-Lenders Act, the Court released him of all liability in excess of the limits specified in S. 30 (1) and (2) of the Act and ordered an account to be taken and a report made of his liability. The Court however observed in its order that it was not necessary to re-open the decree and did not pass an order for payment by instalments under S. 36 (2) (d) of the Act.

Held, that the Court by ordering a fresh account between the parties on the basis of the interest allowed by the Act had in fact re-opened the transaction between them, and that being so, it was bound to give effect to S. 36 (2) (d) of the Act. (Derbyshire, C.J. and Nasim Ali, J.) BHUPENDRA KRISHNA MUKHERJEE v. GUNENDRA KRISHNA ROY. 46 C.W N. 814.

-S. 36 (1), proviso (i)-Agreement "purporting to create new obligations"-Meaning of-Agreement keeping alive original obligation and invoked for re-opening the decree under S. 36 modifying some of its terms-If amounts to.

An agreement "purporting to create new obligations" referred to in proviso (1) to S. 36 (1) of the Bengal Money-Lenders Act covers only the case where the original obligation undertaken by the borrower at the time of the loan is completely superseded and a substituted obligation created, and not a case of mere taking of accounts or of a mere agreement to pay on the basis of the original obligation what is found to be the amount due on the taking of accounts. An agreement which does not extinguish the original obligation but keeps it alive modifying only some of its terms, is not one creating new ohligations and is not therefore covered by the proviso. Where in the agreement on the basis of which the original loan was given does not contain a stipulation for compound interest but later on the arrears of interest on the loan is by agreement between the parties added to the principal then outstanding and the horrower agrees to pay interest on it on the footing that it is to be the principal, this new transaction is one which creates a new obligation, for it creates a completely substituted obligation on the closing of the previous dealings and so would come within the proviso. (Mitter and Akram, II.) JADU NATH ROY v. JAGAT PRASANNA MUKHERJEE. 48 C.W.N. 625= A.I.R. 1944 Cal. 320.

S. 36 (1), proviso (i)—Applicability—Proceeding under S. 38.

S. 36 (1) of the Bengal Money-Lenders Act together with proviso (i) is applicable to a proceeding under S. 38 of the Act. In the case of such a proceeding, the date mentioned in the proviso is the date when the borrowers make the JADU NATH ROY v. JAGAT PRASANNA MUKHERJEE. 48 C.W.N. 625=A.I.R. 1944 Cal. 320.

-S. 36 (1), proviso (i)-" Date of the suit"-Execution proceeding, if such suit.

Where the question of the application of proviso (i) to S. 36 (1) of the Bengal Money Lenders' Act arises in the course of execution, that is to say, in a "suit to which this Act applies," which happens to be an execution proceeding, the date of the suit will be the date of the application in execution. 46 C.W.N. 906, foll. (Akram and Blank, ff) BARODA PROSAD SUKUL v DURGA PROSAD ROY. 49 C.W.N 216=A.I.R. 1945 Cal. 320.

-S. 36 (1) Proviso (1)—"Date of the suit"-Interpretation.

The suit referred to in proviso (i) to S. 36 (1) of the Bengal Money-Lenders Act must be that type of the three types of suit contemplated by sub S. (1) in the course of which the relief is being given, and in which therefore the question of the application of the proviso arises. If the question arises in the course of a straight-forward suit by the creditor for his dues, the date will be the date of commencement of his suit, if it arises in the course of execution, that is to say in a "suit to which this Act applies", which happens to be an execution proceeding, the date will be the date of the application in execution, and if the question arises in a suit by a borrower for relief, the date will be the date of the borrower's suit. (Roxburgh and Akram, IJ.) JAGABANDHU DE v. Akshoy Kumar Sil. I L.R. (1942) 2 Cal. 516 =206 I.C. 89=15 R.C. 658=46 C.W.N. 906=75 C.L.J. 485=A.I.R. 1943 Cal. 637.

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-S. 36 (1) Proviso (i)—'Date of suit'--Meaning of.

The words "the date of the suit" in S. 36 Cl. (1) proviso (i) of the Bengal Money-Lenders Act mean "the date" when the suit contemplated by S. 36, Cl. (1) is brought and not the date of any application by the borrower under that Act. Nasim Ali and Pal, JJ.) NRISINHA CHANDRA PAL v. Kanaklata Dasi. 201 I.C. 306=15 R.C. 166 =46 C.W.N. 457 (1)=A.I.R. 1942 Cal. 369 (2).

-S. 36 (1), proviso (i)-" Date of suit"-Meaning of-Review application under S. 36(6) (a) (ii)-If such suit.

The suit referred to in proviso (i) to S. 36 (1) of the Bengal Money-Lenders' Act is the suit contemplated by S. 36(1); that is to say, it is either a suit to which the Act applies and in connection with which relief is claimed by the borrower or a suit expressly brought by the borrower for relief under the sub-section itself. Accordingly where the borrower files an application under S. 36 (6) (a) (ii) for review of a mortgage decree the suit for the purposes of proviso (1) to S. 36 (1) is the mortgage suit itself and not the review application, and any transaction within twelve years from the date of the commencement of the mortgage suit can be re-opened. (Mukheriea and Ellis, 11.) SURENDRA NATH v. KUMARKALI BANKING CORPORATION, LTD. 49 C.W.N. 214 = A.I.R. 1945 Cal. 333.

-S. 36 (1) proviso-"Suit"-Meaning of-Adjustment made less than 12 years prior to start of execution proceeding and more than 12 years prior to its revival-If barred.

In 1926, a settlement of account was arrived at between the parties calculating interest at a rate in excess of the maximum allowed by the Bengal Money-Lenders' Act. In 1930, a suit was filed and a preliminary mortgage decree was passed in 1931 and a final decree in 1934. Soon after an execution proceeding was started but this was struck out for non-appearance of parties in 1935. In 1944 the execution proceeding was revived by the decree-holder, and in that proceeding the judgment-debtor made an application under the Bengal Money Lenders' Act.

Held, (i) that the "suit" in S. 36 (1) proviso of the Act refers not to the application made under the Act. but to the suit filed in 1930 or the execution proceeding started in 1934 and as in either case the adjustment has been arrived at within 12 years, its re-opening is not barred by the proviso; (ii) that in re-opening the adjustment the Court should, in effect ignore it as it has been arrived at calculating interest at a rate in excess of the statutory rate. (Ormond, J.) RADHA-BALLAV SHAH v. NARENDRA NATH SHAH. 49 C. W N. 343.

——S. 36 (1) Proviso (i)-"Suit by the parties"

—Meaning of—If includes application under

section during execution proceedings.

The "suit by the parties" mentioned in proviso (1) to S.36 (1) of the Bengal Money-Lenders Act means the suit that is spoken of in sub-S. (1) (i.e.) it is either a suit to which this Act applies and in which relief has been claimed by the borrower, or the suit that is instituted under sub-S. (1) itself. It does not mean an application made under the section during execution proceedings. Where such proceedings relate to a mortgage decree, the "suit by the parties" is the mortgage suit itself.
(Mukherjea and Blank, JJ.) BAIDYANATH DUTTA
v. MRITYUNJOY MUKHERJEE. I.L.R. (1944) 1 Cal. 441=48. C.W.N. 504=A.I.R. 1944 Cal. 318.

-S. 36 (1), proviso (ii)-Final decree on mortgage by conditional sale before 1st January 1939-Application for possession by decree-holder after that date-Decree, if can be re-opened.

Where in a suit to enforce a mortgage by conditional sale, the final decree is passed before the 1st January, 1939, but an application for possession is made by the decree holder after that date, the decree is liable to be re-opened on an application by the judgment-debtor under S. 36 of the Bengal Money Lenders' Act. The judgment debtor's application is not hit by proviso (ii). The application made by the decree-holder for possession is one for the execution of his decree, and as it was pending after the 1st January, 1939, the decree is one passed in a "suit to which this Act applies." That decree is not fully satisfied until possession is delivered to the decree-holder in compliance with the directions in the decree. The explanation to proviso (ii) has no application to the case, as the decree-holder has not purchased the property in execution of a decree, (Sen, 1) BAZLU v. GOLAM MOSSAIN. 49 C. W.N. 467=A.I.R. 1945 Cal. 281.

S. 36 (1) Proviso (ii)—Mortgage decree for sale—Preliminary and final decrees—When fully satisfied—Personal decree made after 1st, January, 1939—Preliminary decree, whether can be re-opened-Mode of giving relief.

(1) A final decree for sale in a mortgage suit is fully satisfied by the sale of the mortgaged property and the application of the sale p roceeds to the payment of the mortgage debt. In case the purchaser is the decree-holder himself. it is not fully satisfied till the proceeding for delivery of possession of the property sold is completed. If the final decree is satisfied before the 1st January, 1939, it cannot be re-opened even if the mortgage debt had not been satisfied in full, and a proceeding under O. 34, R. 6, Civil Procedure Code, was pending on or after the 1st January, 1939. (2) A preliminary decree passed in the usual form is not satisfied by the sale of mortgaged property but it becomes satisfied as soon as the personal decree under O. 34, R. 6. Civil Procedure Code is obtained, and the only decree that remains executable after that is the personal decree. If a preliminary decree incorporates a personal decree as is contemplated by Cl. (3) added to O. 34, R. 4, Civil Procedure Code, it cannot certainly be satisfied till the personal liability is also satisfied. (3) If a personal decree has been made before the 1st January, 1939, the preliminary decree must be regarded as satisfied before that date and cannot be re-opened, and the only decree that can be reopened is the personal decree, provided any proceeding in connection with the same was pending on or after the 1st January, 1939. (4) If the personal decree is made after the 1st of January. 1939 the preliminary decree can be re-opened, but it cannot be re-opened in such a way as to affect the final decree for sale already satisfied. The result will be that the sale of the mortgaged property will stand and the personal liability of the mortgagor will be scaled down and re-adjusted. (5) In both the cases coming under paragraphs (3) and (4) the mode of giving relief to the borrower would be the same. The Court is to look to the original claim in the mortgage suit and the amount decreed to the mortgagee in the preliminary

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with the provisions of the Money-Lenders Act. From that, the amount realised by sale of the mortgaged property is to be deducted and for the balance only, if any, a new personal decree should be passed. (Musherica and Blank, JJ.) Bhaba-NI Prasad Moitra v. Satyendra Nath Mukher-Jee. J.L.R. (1943) 2 Cal. 417=77 C.L.J. 373= 209 I.C. 34=16 R.C. 275=47C.W.N. 524=A.I.R. 1943 Cal. 372.

S. 36 (1) Proviso (ii)—Mortgage executed before 1939 to satisfy decree passed on earlier mortgage—Earlier mortgage carrying interest in excess of maximum allowed under Act-Decree passed in 1940 on later mortgage—If can be reopened so as to affect earlier mortgage decree.

A mortgage was executed before the 1st day of January, 1939, in satisfaction of a decree passed on an earlier mortgage which carried interest at a rate higher than the maximum rate of interest allowed under the Bengal Money-Lenders Act. A decree was passed in 1940 on the later mortgage which fixed interest within the limits specified in the Act. On an application made for re-opening this decree,

Held, that having regard to S. 36 (1), proviso (ii) of the Bengal Money-Lenders Act, the Court in granting relief was not permitted to do anything which affected the earlier mortgage decree, as it was not a decree passed in a suit to which the Act applied, and that consequently the Court could not re-open the earlier mortgage and grant relief by a refund of the interest paid in excess of the maximum allowed under the Act. (Sen.J.) PROMODE KUMAR ROY v. TINCOWRIE DEV. 197 I.C. 817=14 R.C. 395=I.L.R (1942) 1 Cal. 157=45 C.W.N. 1006=A.I.R. 1942 Cal. 37.

-S. 36 (1), proviso (ii) Preliminary and final mortgage decrees-When fully satisfied-Preliminary, final and personal decrees passed before 1st January, 1939—Execution of personal decree pending there after-Decrees, if can be re-opened.

A preliminary mortgage decree gives the mortgagee the right to realise the amount declared to be due on the mortgage, and until that amount is realised in full the decree cannot be said to be satisfied. Where, therefore, the proceeds realised by the sale of the mortaged property in execution of the final decree fall short of the decretal amount and the execution of the personal decree passed for the balance is still pending, the preliminary decree cannot be said to have been satisfied merely by reason of the sale and the passing of the personal decree. But a final decree for sale is fully and completely satisfied if the mortaged property mentioned in the preliminary decree is sold and the sale proceeds applied in payment of the decretal amount, even if the entire mortgage money is not realised. Where in a case in which the preliminary final and personal decrees were passed before 1st January, 1939, and the proceeding in execution of the personal decree was pending thereafter, an application for re-opening the decree under S. 36 of the Bengal Money-Lenders Act was made.

Held, (i) that the preliminary decree was not fully satisfied before 1st January.1939, but that the final decree was, and that, therefore, the fordecree, and calculate what the amount should be mer decree was not protected from interference if a new decree was then made in accordance by the proviso (ii) of S. 36 (1) of the Act, but

that the latter decree was; (ii) that the scaling down of the preliminary decree would affect the final decree and the sale held there-under and consequently it would amount to a disregard of the prohibition contained in the proviso, and that for this reason the preliminary decree could not be re-opened; (iii) that the only decree that could be re-opened was the personal decree, that the Court would have to calculate the amount that could be allowed to the mortagee if a new preliminary decree was made and deduct from this the amount realised by sale of the mortgaged properties and pass a personal decree for only the balance, and that if the balance was negative, nothing would be recoverable under the personal decree but that the mortgagor could not claim refund of any amount as that would be doing something which affected the final decree. (Mukheriea and Sen. IJ.) NARESH CHANDRA GUPTA v. LAI MAMUD BHUIYA. I.L R. (1942) 2 Cal. 243=202 I.C 343=15 R.C. 323=76 C.L., J. 41=46 C W.N. 457 (2)=A.I R. 1942 Cal. 379 followed in Nilmony v. Chandra Madhu. 46 C.W.N. 463.

-S. 36(1) (a), proviso (ii)—Sale in execution of final mortgage decree held before 1st January, 1939 Personal decree for unrealised balance not passed, but not barred by limitation on that date-Preliminary and final decrees, if can be re-opened.

A mortgage suit remains pending on the 1st January, 1939, although the preliminary and final decrees have been passed and the sate held in execution of the final decree confirmed before that date, if the amount mentioned as due in the final decree has not been realised in full by the sale and on the 1st January, 1939, an application for a personal decree has not become barred. The circumstance that no personal decree has been actually passed or has been applied for is immaterial. It follows that the preliminary and final decrees being decrees in a suit which has been pending on the 1st January, 1939, are decrees in a suit to which the Act applies and neither of them has been fully satisfied by that date. The bar of the second proviso to S 36 (1) is thus crossed. (Chakravartti, J.) AJARADDI v. SONAI BIBI. 49 C.W.N. 638.

-S. 36 (1) (a) proviso (ii)—Sale in execution of final mortgage decree held before 1st January 1939-Personal decree remaining unsatisfied on that date-Preliminary, final and personal decrees-Whether can he re-opened.

Where in a suit for the recovery of money lent upon a mortgage, the final decree was executed by the sale of the mortgaged property before the 1st January, 1939, but a personal decree for the unrealised balance remained unsatisfied on that date and a proceeding for its execution was instituted thereafter, the Court can in the exercise of its powers under S. 36 of the Bengal Money-Lenders Act re-open the preliminary decree and final decree as well as the personal decree so as to affect all the three. Each of the three decree in the suit is a decree to which the Act applies, and none of these three decrees was fully satisfied by the 1st January, 1939. 46 C.W.N. 457 and 47 C.W.N. 524, overruled. 75 C.L.J. 299, approved. (Nasim Ali, Mitter and Abram, JJ.) MRITUNJOY MITRA v. Satishchandra Banerjee. I.L.R. (1944) 2 Cal. 376=213 I.C. 273=17 R.C. 7=48 C.W.N. 361=A.I.R. 1944 Cal, 193 (F.B.).

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-S. 36 (1), Proviso (ii)—Scope—Mortgage decree passed in 1939—Consideration for mortgage being sums due under prior decrees—Mortgage, if may be re-opened—Such prior decrees, if may he "affected".

Where a decree was passed on a mortgage in a suit which was pending on the 1st day of January, 1939, and the consideration for the mortgage was the total of two sums which were due under two prior decrees, an application for re-opening the mortgage transaction under S 36 of the Bengal Money-Lenders Act is hit by the second proviso to sub-S. (1) of that section, which lays down that in re-opening transactions the Court is not to do anything which "affects" any decree of a Court. The re-onening of the mortgage transaction must necessarily involve a re-opening of the two prior decrees. It is no answer to say that the decrees had ceased to exist by reason of the execution of the mortgage bond in lieu thereof, and that, therefore, there were no decrees to be affected. Proviso (ii) does not mean that a decree may not be affected within the meaning thereof, if it is no longer subsisting. On the other hand, it seems clearly to contemplate the affecting of decrees which were already satisfied. The exception within the Proviso (ii) is of no avail to the applicant. The two prior decrees cannot obviously be said to be decrees in suits to which the Act applies, as neither the suits nor any execution proceedings in connection therewith were pending on the 1st January, 1939. Nor can it be said that the decrees were decrees which were not fully satisfied by that date. The decree had ceased to exist on execution of the mortgage hand in lieu thereof, and that would doubtless be satisfaction of the decrees. In any case, the decrees must be deemed to have been satisfied, if their execution had become barred by limitation. (Mukheriea and Ristuas, J.J.) TARAPADA BANFRIEE v. AJIMADDIN MALLICK, 197 I.C. 821=14 R C. 393=45 C.W.N. 969=74 C.L.J. 7=A.I.R 1941 Cal. 699.

-S.36 (1), proviso (ii)—Time-barred decree— If fully satisfied.

A decree is fully satisfied when the obligation created by it is completely discharged; and the judgment-debtor cannot be compelled in law to do anything further in compliance with its directions. A decree which is time-harred can be treated as satisfied by operation of the law of limitation and will come under proviso (ii) to S. 36 (1) of the Bengal Money Lenders Act. This proviso does not contemplate satisfaction of a decree by payment alone. (Mukherjea and Blank, JJ.) BHA-BANI PROSAD MOITRA v. SATYENDRA NATH MUK-HERJEE. 209 I.C. 34=16 R.C. 275=47 C.W.N. 524=77 C.L.J. 373=A.I.R. 1943 Cal. 372.

-S. 36 (1) (b)—Mortgage—Application for sale-Application by defendant for relief under the Act-Agreement setting the issues-Defendant not receiving full benfit which Act gives him-Agreement, can be recorded and decree passed-C. P Code. O. 23 R. 3.

In th course of an application for sale in a mortgage suit, the defendant applied for relief under the Bengal Money-Lenders Act and for reduction in the amounts due under the decree. When the application was pending, an agreement was arrived at between the parties disposing of issues and disputes between them. The agreement

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was lawful and did not work a substantial injustice to the defendant although he did not receive the full benefit which the Act gave him.

Held, that the provision in S. 36 (1) (b) of the Act enabling the Court to re-open any account taken between the parties not withstanding any agreement purporting to close previous dealings did not prevent the plaintiff from having the agreement recorded, and a decree passed in accordance therewith. (Gentle, I.) UPENDRANATH DAS v. DURLAY CHANDRA KUNDU. I.L.R. (1943) 2 Cal. 373=218 I.C. 140=18 R.C. 4-AI.R. 1944 Cal. 334.

decretal amount in excess of limits prescribed by S. 30—If re-opens decree—Duty to make new decree.

If the Court reduces the amount due under a decree by a sum which, according to it, is the excess amount allowed in contravention of S. 30 of the Bengal Money-Lenders Act, and makes proportionate alteration in the order for costs also, it in reality re-opens the decree and it is bound to make a new decree as contemplated by S. 36 (2) of the Act. If it is a mortgage decree the new decree has got to be made in accordance with S. 34 of the Act. (Mukherjea and Sen, JJ.) Anath Nath v. Rajendra Nath. 198 1.C. 810 = 14 R. O. 508=45 C.W.N. 975=A.I.R. 1942 Cal. 120.

-S. 36 (1) (c)—"Liability"—If must subsist on date of application.

In a case where relief is asked for in a suit to which the Act applies or in an independent suit, the word liability in S. 36 (1) (c) cannot be taken to mean liability which is subsisting at the date of the application or suit or at the dete on which the Act came into operation. (Biswas and Latifar Rahman, JJ.) BALAI CHAND DE v. AKSHAYA KUMAR. 48 C.W.N. 596.

S. 36 (1) (c) and (2)—Mortgage decree Court relieving judgment-debtor from liability to pay interest in excess of limits specified in S 30—i/bound to re-open decree.

Where after a decree has been passed on a mortgage the judgment-debtor seeks relief from liability to pay interest on the mortgage in excess of the limits specified in S. 30 of the Bangal Money-Lenders Act, the Court cannot grant him relief without re-opening the decree. Once the decree is re-opened, the Court must under S. 36 (2) pass a new decree in accordance with the terms of S. 34 (1) (a) of the Act. 45 C.W.N. 859 and 863, dissented from. (Sen. J.) MRITUN-JOY ROY V. NETAI CHAND DUTT. I.L.R. (1942) 1 Cal. 61=204 I. C. 493=15 R.C. 524=45 C.W.N. 976=AIR. 1942 Cal. 123.

Under S. 36 (1) (c) of the Bengal Money-Lenders Act, the Court may in a proper case, vithout re-opening a decree, treat it as fully atis fied by writing off the amount by which the lecree holder's dues under the decree exceed the mount calculated at the rate of interest prescribed in S. 30. (Edgley, J.) Suresh Chandra v. LAL Mohan. I.L.R. (1941) 2 Cal. 184=199 I.C. 225=14 R.C. 645=45 C.W.N. 859=A.I.R. 1942 Cal. 121.

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—S. 36 (1) (c)—Relief in respect of preliminary mortgage decree—Duty of Court to ropen decree and pass new deree—Power to grant instalments and interest.

The Court exercising the power contained in S.36 (1) (c) of the Bangal Money-Lenders Act in respect of a preliminary mortgage decree which allows interest in excess of what is allowable under S. 30 (1) (c) of the Act, should reopen that decree and pass a new decree in accordance with the provisions of the Act. With the supersession of the preliminary decree, the final decree passed on the basis there of mustialso go. The new preliminary decree which has to be passed must be in accordance with S 34 (1) (a) (i) of the Act and must therefore give instalments to the Mortgagor if there is an application by him. It may impose conditions, with a view to see that the decree holder does not lose the full benefit of his security during the period that the instalments may be spread over by reason of any act or default on the part of the judgment-debtor. The Court has power to grant simple interest at the rate of 8 percent, per annum on the principal of the loan from the date of the institution of the mortgage suit up to the date of the passing of the new preliminary decree and there after at the same rate up to the date of default, should the judgment-debtor fail to pay the instalments provided the amount of interest directed to be paid together with the amounts already paid does not exceed the principal of the loan. (Mitter and Akram, JJ.) PROMODE NATH SINHA V. RASESHWARI DASSI. I.L.R. (1942) 1 Cal. 414 = 204. I C 502=15. R.C. 525 = 77 C.L. J. 174= 46 C.W.N 153=A.I.R. 1942 Cal. 128.

3. 36 (2)—Costs that may be added to new decree.

For the purposes of S. 36 of the Bengal Money-Lenders' Act all that the Court can add to the new decree are those amounts provided for in S. 36 (2) of the Act, namely, the costs in respect of the re-opened decree and even that is left to the discretion of the Court. It cannot add to the decretal amount, (c.g.) costs incurred by the purchaser in a partition suit or in improvements effected by him. He is left to recover his dues in other proceedings but not in the proceedings for relief by the debtor under this section. (Mitter and Waight, JJ) SUHASHINI PODDAR v. SREENATH CHAKRAVARTY. 49 C.W.N, 769.

S. 36 (2)—Re-opening of final mortgage decree

New preliminary decree for sale—If and when may
be passed—Right of decree-holder purchases to personal
decree—Restoration of property to judgment-dehtor—
Liability of decree-holder purchases for mesne profits—
Restoration of property to decree-holder purchases on
judgment-debtor's default—Basis of title of former.

Although a final mortgage decree in execution of which the decree-holder has purchased the mortgaged property is re-opened and a new decree is passed the title to the property continues to remain in the decree-holder purchaser. The rights conferred on the judgment-debtor to whom possession is restored under S. 36 (2) (c) of the Rengal Money-Lenders' Act are therefore of the nature of *lure in re alieno*, the title being still in the decree-holder purchaser but burdened with the enjoyment of the judgment-debtor as long as he pays the instalments payable under the new decree. When the new decree is fully paid up, he becomes the owner.

The consideration being extinguished, the sale becomes void from the date of the payment of the last instalment payable under the new decree. From the above, the following conclusions follow:—(i) where all the mortgaged properties have been sold in execution of the re-opened final mortgage decree and purchased by the decree-holder, a new preliminary mortgage decree followed on default of payment of instalment by a new final mortgage decree would be meaningless, for such decrees would have to be for sale of the mortgaged properties. In such a case there would be at the time nothing to sell, as the title to the mortgaged properties would not then be with the judgment debtor but with the decree-holder himself by reason of his purchase in execution of the re-opened final mortgage decree; (ii) if all the mortgaged properties had not been sold in execution of the re-opened final mortgage decree, there would be the necessity of passing a new preliminary decree for sale of the remaining unsold properties. That preliminary decree must provide for two things on default being made by the judgment-debtor in the payment of the instalments payable under the new decree, namely, (i) that possession of those properties which had been purchased by the decree-holder in execution of the re-opened final mortgage decree is to be restored to him and the amount at which he had purchased the same to be set-off against the balance of the new decree, and (ii) that if after the set-off there remains a sum still payable to the decree-holder, the latter will have the right to apply for a new final decree for the sale of those unsold mortgaged properties in terms of S. 34 (1), Cl. (a) (ii); (iii) that the decreeholder purchaser is not accountable to the judgmentdebtor for mesne profits from the date at which he had taken possession of the properties parchased in execution of the re-opened decree till the date when the order for restoration of those properties to the judgment-debtor is made at the time of the re-opening of the old decree, although he is accountable for such profits to the judgment-debtor from the date of the order for restoration if he keeps him out of possession in spite of that order, as (e.g.) when he files on appeal from the order re-opening the decree or from the new decree and obtains an ad interim order for stay of delivery of possession; (iv) if the judgment-debtor commits default in the payment of any instalment payable under the new decree the decree-holder on getting back the properties from the judgment-debtor in terms of S. 36 (2), Cl. (2). would enjoy the same on the basis of the title he had acquired by his purchase in execution of the re-opened decree. The third and the fourth propositions would be equally applicable when the re-opened decree is a simple money decree. As the decree-holder purchaser would hold the properties restored to him on judgmentdebtor's default on the title acquired in execution of the final mortgage decree (though re-opened), the words of O. 34, R. 6, C.P.Code, would not stand in his way if he were to apply for a personal decree for the balance even if by reason of the sale of all the mortgaged properties in execution of the re-opened decree the new decree has to take, and takes, the form of a decree for a sum of money which simply directs payment of the decretal amount in instalments. (Mitter and Sharpe, IJ.) JADU NATH ROY v. KSHITISH CHANDRA ACHARJI. 49 C.W.N. 30.

The new decree under S. 36 (2) (a) of the Bengal Money-Lenders Act, 1940, should be in terms of S. 34 and not as directed by S. 36 (2) (d) of the Act. (Derbyshire, C.J., Panckridge and

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Nasim Ali, JJ.) PROMODE KUMAR v. BENOY KRISHNA. I.L.R. (1941) 2 Cal. 85=196 I.C. 80= 14 R.C. 161=73 C.L.J. 316=4 F.L.J. (H.C.) 288 =45 C.W.N. 581=A.I.R. 1941 Cal. 425 (S.B.).

-S. 36 (2) (a) and (b)—Effect of—Attaching creditor of decree holder of mortgage decree-If decree-holder of that decree - Property purchas ed bona fide by him in execution-If may be restored to judgment debtor of that decree on being re-opened.

The effect of Cls. (b) and (c) of S. 36 (2) of the Bengal Money-Lenders Act is that if the decree-holder of the re-opened decree is the purchaser, possession must be restored to the debtor. If any other person is the purchaser, possession cannot be restored to the debtor, provided that such a purchaser had purchased bona fide. An attaching creditor of the decree-holder of a mortgage decree which is re-opend cannot be regarded as the "decree-holder" of that decree within the meaning of those two sub-clauses, by reason of the fact that he attached that decree and carried on the proceedings in execution. Consequently the judgment-debtor of the mortgage decree cannot have the possession of the properties which the attaching decree-holder had bona fide purchased at the Court-sale, restored to him. (Mitter and Blank, JJ.) MONMOHAN MUKHOPADHAYAY v. MADRIFORE LOAN OFFICE, LTD. 48 C.W.N. 87.

-S. 36 (2) (a)—New decree—If should be in terms of S. 34.

When a decree is reopened under S. 36 (1) of the Bengal Money-Lenders Act, the new decree under sub-S. (2) (a) must be passed in terms of BIBHUTI BHUSAN PAL v. KUMAR KALI BANKING CORPORATION, LTD. 47 C.W.N. 309.

-S. 36 (2) (a)—Re-opening of decree— Extent.

S. 36 (2) (a) of the Bengal Money-Lenders Act does not relegate the parties to their rights and liabilities on the original cause of action. The decree is re-opened only to the extent necessary to substitute the method of account-taking sanctioned by the Act in place of the calculation on tioned by the Act in place of the calculation on which the original decree was passed. (Spens, C.J., Varadachariar and Zafrulla Khan, JJ.) BANK OF COMMERCE, LTD., KHULNA v. AMULYA KRISHNA BASU. 6 F.L.J. 221=212 I C. 138=1944 M.W.N. 175=57 L.W. 213=1944 O.W.N. 184=1944 A.L.W. 271=16 R.F.C. 102=10 B.R. 506=I.L.R. (1944) Kar. (F.C.) 46=48 C.W.N. (F.R. 36=79 C.L.J. 220=A.I.R. 1944 F.C. 18=(1044) 1 M.I. 178 (F.C.) (1944) 1 M.L J. 178 (F.C.).

-S. 36 (2) (a)—Re-opening of decree—Position of parties-Plea of payment rejected in suit-If can be given effect to.

S. 36 (2) (a) of the Bengal Money-Lenders' Act does not relegate the parties to their rights and liabilities under the original cause of action but authorises the re-opening of the decree only to the extent necessary to substitute the method of accounting sanctioned by the Act in place of the calculation on which the original decree was passed. The Court re-opening the decree cannot, therefore, give effect to the debtor's plea of payment prior to the suit which, in the suit, he had advanced unsuccessfully. (Chakravartti, J.) AJA-REDDI v. SONAI BIBI. 49 C.W.N. 638.

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S. 36 (2) (b)—Right of purchaser at Court

sale to complete sale-If protected.

The right to which reference is made in S. 36 (2) (b) of the Bengal Money-Lenders Act is not necessarily a right in respect of the property which was sold at the Court sale. The language used is sufficiently wide to include the right which a purchaser, who has as required by the conditions of sale deposited 25 per cent. of the purchase money, has to apply to have the sale completed. The position of such a purchaser, if he is not the decree-holder, is safeguarded by S. 36 (2) (b) of the Act. (Edgley, J.) KIRONBALA v. HIRALAL. 196 I.C. 413=14 R.C. 230=45 C.W. N. 621=A,I.R. 1941 Cal, 492.

—S. 36 (2) (b) and (c)—Scope—Decree-holder purchasing undivided share of fudgment dibtor in execution of re-opened decree—Separate allotment given to him in partition suit—Right of judgment-debtor to restoration of possession of that allotment.

Where the decree-holder purchases an undivided share of the judgment-debtor in certain property at a sale in execution of the re-opened decree and on the basis of the title thus acquired by him a separate allotment is given to him in a partition suit, the property so acquired is acquired by him "in consequence of the execution of the re-opened decree' within the meaning of S. 36 (2) (a) of the Bengal Money-Lenders' Act, and the judgmentdebtor is entitled to get restoration of possession of that allotment. The right of the judgment-debtor to get restoration is not taken away by S. 36 (2) (b). No doubt under this clause there cannot be any restoration of possession to the judgment debtor if the decreeholder purchases the judgment-debtor's property in execution of the re-opened decree and thereafter conveys the property to a bona fide purchaser for value, and it would not make any difference whether that bona fide purchaser for value gave cash money as consideration for his purchase or a bond or another property of his in exchange. But a partition is neither an exchange nor a conveyance, and by it a co-sharer gets a separate allotment by virtue of his antecedent title as co-sharer and there is no acquisition of property in another independent right. This clause, therefore, is not attracted to it. (Mitter and Waight, JJ.) SUHASHINI PODDAR 2. SREENATH CHAKRAVARTY. 49 C.W.N. 769.

—S. 36 (2) (c)—Decree-holder purchaser also acquiring another title to same property by purchase at putni sale, rent sale and certificate sale—Restoration

when may be directed,

Under S. 36 (2) (c) of the Beugal Money-Lenders Act, the Court is not only competent but bound to restore possession of those properties only which the decree-holder acquired in consequence of the execution of the decree which is reopened. But if after purchase in execution of the re-opened decree, the decree holder acquired another and an independent title to the same property, which destroys or defeats the title previously acquired, the Court could not order restoration of possession in such cases. It would be otherwise, however, if the subsequent acquisition was subject to the previous purchase and did not override it. Accordingly on re-opening a mortgage decree the Court can direct restoration of the property purchased by the decree-holder in execution there of, (1) where that property was again purchased by the decree-holder at a subsequent certificate sale, which was subject to extended the content of the property and the decree-holder at a subsequent certificate sale, which was subject to extended the content of the property and the decree-holder at a subsequent certificate sale, which was subject to extended the content of the property was subject to extended the case of the property was subject to extended the case of the property was subject to extended the case of the property was subject to extended the case of the property was subject to extended the case of the property was subject to extended the case of the property was subject to extended the propert

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had the effect of transferring merely the right title and interest of the debtor, and (2) where that property was again purchased by the decreeholder at a subsequent rent sale held at the instance of a superior landlord at a time when the property had already vested in him and he was not made a party to the execution proceeding the Court cannot, however, direct restoration of the property (1) where that property was again purchased by the decree-holder at a subsequent putnisale, although the putni rent for which the sale was held accrued after his purchase at the mortgage sale and (2) where that property had been purchased by him at a putni sale held prior to the mortgage sale. (Mukherjea and Blank, IJ.) Kamalakshya Chowdhary v. Joychand Lal. 48 C.W.N. 105.

——S. 36 (2) (c)—Property purchased by decreeholder along with stranger in equal shares—Restoration of half-share of decree holder—If proper.

Where in execution of the re-opened decree, the property had been purchased by the decree-holder along with a stranger, in equal shares an order under S. 36 (2)(c) of the Bengal Money-Lenders' Act restoring to the judgment-debtor the half share purchased by the decree-holder is proper. (Mitter and Warght, JJ). Subhashini Poddar v. Srinath Charravary. 49 C.W.N. 714.

—Ss. 36 (4) and 2(22)—Applicability—Property sold and possession delivered to decree-holder before 1st January, 1989—Subsequent suit by him for declaration of title and possession on allegation of dispossession—If one to which Act applies—Application to set aside safe by judgment-decree enaing in settlement that it money is paid by certain date sale would be set aside—liflect of.

A suit for a declaration of title and recovery of possession of property filed after 1st January, 1939 by a decree-holder auction-purchaser who had taken delivery of possession before that date on the allegation that he was subsequently dispossessed, is not a suit to which the Act applies within the meaning of S. 2 (22) of the Bengal Money-Lender's Act, and the judgment-debtor cannot, therefore, maintain an application under S. 36 of the Act relying on such a suit. The fact that an application filed by the judgment-debtor under O. 21, R. 90, C. P. Code, ended in a settlement whereby it was agreed that if a certain sum was paid within a certain time the sale would be set aside, but no payment was made, does not make the title suit a suit to recover, a loan or to enforce an agreement. S. 36 of the Act does not, therefore, apply to the suit by virtue of the provisions of sub-S. (4) (Henderson, J.) GOLAM Mohiudding. Hrishikesh Datta, 218 I.C. 158. =I.L.R. (1943) 2 Cal 360=47 C.W.N. 464=17 218 I.C. 158. R.C. 205=A.I.R. 1944 Cal. 319 (1).

would be otherwise, however, if the subsequent acquisition was subject to the previous purchase and did not override it. Accordingly on re-opening a mortgage decree the Court can direct restoration of the property any property from one member to another either by purchased by the decree-holder in execution there of, (1) where that property was again purchased by the decree-holder at a subsequent certificate which was subject to encumbrances and assignee of the interest of the other members, and assignee of the interest of the other members, and assignee of the interest of the other members, and assignee of the interest of the other members, and assignee of the interest of the other members, and assignee of the interest of the other members.

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such cannot seek the protection of S. 36 (5) of the Bengal Money-Lenders' Act. (Sen and Das, JJ.) Das, JJ.) KHIRODE SUNDARI v. CHUNI LAL. 49 C.W.N. 779.

-S. 36 (5)—Pre-Act assignee—If exempted from S. 30.

S. 36 (5) of the Bengal Money-Lenders Act applies to an assignee who became such even before the Act. Consequently a decree obtained by him cannot be re-opened under that section. Other provisions of the Act do however apply. There is nothing in S. 30 which makes its provisions subject to their being invoked under S. 36. If, therefore, the borrower shows that the sum he has paid is equal to or exceeds twice the amount of the principal of the original loan, his liability is discharged by S. 30 which prevents the pre-Act assignee from recovering from him any further sum. (Derbyshire, C.J. and Gentle, J.) HEMANTA KUMAR v. BASANTA KUMAR. 46 C.W.N. 677=75 C.L J. 338=204 I.C. 296=15 R.C. 494=A.I.R. 1943 Cal. 26.

—S. 36 (5)--Pre-Act, Assignee-If protected. Per Derbyshire, C.J.-S. 36 (5) of the Bengal Money-Lenders Act includes a pre-Act bone fide transferee within its protective provisions, since a pre-Act transferee cannot have had the notice prescribed by S. 28 (2) of the Act. The case in S. 36 (1) (d) is, however, a special one, and a transferee coming under this provision is not protected by S. 36 (5).

Per Nasim Ali, J.—S. 36 (5) of the act protects only bona fide assignees for value after the Act who did not receive the notice referred to in S. 28 (1) (a) of the Act, but not the assignees before the Act. (Derbyshire, C.J. and Nasim Ali, J.) MANMATHA NATH BOSE v. RENULA BOSE. 45 C. W.N. 1091.

S. 36 (5)—Pre-Act assignee—1f protected. Under S. 36 of the Bengal Money-Lenders' Act, the Court cannot grant relief to a judgment-debtor against a bona fide assignee for value of the decree, where both the decree and the assignment took place before the Act came into operation. S. 36 (5) affords protection to the rights of a bona fide assignee for value who has not received the notice referred to therein. It includes a pre-Act bona fide assignee to whom no such notice could have been given. (Lord Goddard.) RENULA BOSE v. MANMATHA NATH BOSE. 49 C.W.N. 491=A.I.R. 1945 P.C. 108 (P.C.)

S. 36 (5)—Pre-Act Assignee—If protected. S. 36 (5) of the Bengal Money-Lenders Act applies to both ante-Act and post-Act assignees. Consequently a bona fide assignee for value who took his assignment before the Act is entitled to claim the benefit of this provision. (Sen, J.) BHUPENDRA NATH DUTT v. DEBENDRA NATH ASH. 201 I.C. 273=15 R.C. 164=46 C.W.N. 368=A.I.R. 1942 Cal. 370.

S. 36 (5)—Pre-Act assignee—If protected. A bona nde assignee who took his assignment before the Bengal-Money-Lenders Act came into force, is not protected by the provisions of S. 36 (5) of the Act. (Roxburgh, J.) Krishnadhon Mondal v. Nalini Chandra. 46 C.W.N. 388.

-S. 36 (5)—Pre-Act assignee—If protected. S. 36 (5) of the Bengal Money-Lenders Act should be interpreted in its plain grammatical sense which would bring a pre-Act assignee with-

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in the fold of its protection. It would be applicable to cases where the proviso to S. 36 (1) (d) applies. Mukherjea and Blank, IJ.) PRAFULLA Kumar Das v. Kamini Kumar Chakravarthi. I.L.R. (1942) 2 Cal. 389=75 C.L.J. 288=206 I.C 253=15 R.C. 693=46 C.W.N. 673=A.I.R. 1942 Cal. 476.

-S. 36 (6)—Ground for refusal of relief— Applicant unscrupulous.

The fact that the applicant is an unscrupulous man is not a valid reason for rejecting his application under S. 36 (6). (Henderson, J.) Purnach-ANDRA BISWAS v. KSHINODE SUNDARI DUTT. 204 I.C. 507=15 R.C. 529=46 C.W.N. 915=76 C.L. J. 275=A.I.R. 1942 Cal. 610.

-S. 36 (6)—Re-opening of decree—Interest between dates of that and new decree-Award of-Power of Court-C. P. Code, S. 34.

When a new decree in a money suit is passed on an application for review under S. 36 (6) of the Bengal Money-Lenders Act, the Court has jurisdiction to allow interest for the period between the passing of the original decree and the passing of the new decree. There is nothing in that section to justify an inference that the power of the court under S. 34, C.P. Code to allow interest for a period subsequent to the decree has been taken away. (Henderson, J.) INDRA SEKHAR CHAKRA-VARTI V. BIDHUMUKHI DEVI. 46 C.W.N. 915.

-S. 36 (6) (a)—Applicability—Decree passed

after 1st January, 1939.
S. 36 (6) (a) of the Bengal Money-Lenders Act applies to a decree passed after 1st of January, 1939, in a suit pending both on and after that date (Mukherjee and Blank, JJ.) SAILABALA DASI v. HARISHCHANDRA DE. 46 C.W.N. 875.

-S. 36 (6) (a)—Decree barred by limitation

-If decree fully satisfied.

Per Henderson, J.-A decree which is barred by limitation is not a decree which has been fully satisfied within the meaning of S. 36 (6) (a) of the Bengal Money-Lenders Act. (Nasim Ali, Muter and Akram, JJ.) APARNA KUMARI v. GIRISH CHANDRA CHOWDITURY. 48 C.W.N. 406.

-S. 36 (6) (a)—Decree passed before 1st January, 1939-Execution pending on that date-Application concerning that decree—If competent.

Where a decree has been passed before the 1st January, 1939, but an execution case in connection therewith is still pending on that date, the decree is one pasted in a suit to which the Bengal Money-Lenders Act applies within the meaning of S. 36 (6) (a) of that Act. An application under this provision concerning such a decree is, therefore, competent. (Mukherjea and Biswas, JJ.) Mohini Ranjan v. Surendra Chandra. 200 I.C. 268=14 R.C. 698=45 C.W.N. 973=74 C.L.J. 88=4 F.L.J. (H.C.) 319=A.I.R. 1942 Cal. 149.

Appeal from order—Court-fees.

A memorandum of appeal filed against an order passed on an application made under S. 36 (6) (a) (i) of the Bengal Money-Lenders Act for reopening a decree, must bear ad valorem Court-fees. (Mukerjea and Blank, II.) KSHITISH

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CHANDRA v. SATISH CHANDRA. I.L.R. (1942) 2 Cal. 131=205 I.C. 57=15 R.C. 569=46 C.W.N. 536=A.I.R. 1943 Cal. 75.

——S. 36 (6) (a) (i)—Application under— Competency—Prior application under Cl. (a) (ii) dismissed for default.

An order of dismissal for default of a previous application by a borrower under S. 36 (6) (a) (ii) of the Bengal Money Lenders' Act does not bar an application by him under S. 36 (6) (a) (i) for the same reliefs. (Mukherjea and Biswas, IJ.)
KUMAR PROSANNA GHOSH v. SADISHCHANDRA.
ILR. (1943) 1 Cal. 386=15 R.C. 697=206 I.C.
340=47 C.W.N. 202=A.I.R. 1943 Cal. 152.

-S. 36 (6) (a) (i)—Order dismissing application-Appeal-Revision.

An order dismissing an application under S. 36 (6) (a) (i) of the Bengal Money-Lenders Act is not appealable under any provision of law. The remedy of the judgment-debtor is to come up to the High Court for revision of that order under S. 115, C. P. Code. (Mukherjea and Blank, II.) SAILABALA DASI v. HARISH CHANDRA DE. 46 C. W.N. 875.

-S. 36 (6) (i) and (ii)—Order refusing to re-open decree-Appeal.

Where on an application under S. 36 (6) of the Bengal Money-Lenders Act the Court refuses to re-open a decree, the order is non-appealable, whether it is made under sub-Cl. (1) or sub-Cl. (2). The Act certainly confers no right of appeal against such an order, and in so far as the order is made under sub-Cl. (ii), an appeal will be expressly barred by O. 47, R. 7 (1), C. P. Code, treating the application as one for review. treating the application as one for review. (Biswas and Roxburgh, JJ.) BUDHAN MIA v. JOTINDRA MOHAN DUTT. 204 I.C. 592=15 R.C. 532=74 C.L.J. 200=46 C.W.N. 129=A.I.R. 1942 C.J. 122 1942 Cal. 132.

-S. 36 (6) (a) (i) and (ii)—Order rejecting application for relief—Appeal.

No appeal lies from an order rejecting an application for relief under S. 36 of the Bengal Money-lenders Act, whether such application is made in the execution proceeding under S. 36 (6) (a) (i), or by way of review under S. 36 (6) (a) (ii). (Biswas and Akram, ff.) BHUPENDRA NATH ROY v. SUSHIL CHANDRA, 49 C.W.N. 542 = A.I.R. 1945 Cal. 370.

——S. 36 (6) (a) (i) and (ii)—Orders under—Appeal—C. P. Code, Ss. 47 and 96.

An order made under S. 36 (6) (a) (i) of the Bengal Money Lenders Act, either granting or refusing a prayer for re-opening a decree does not come under S. 47, C. P. Code, and is not appealable as such. If the decree is re-opened and a new decree made, an appeal would undoubtedly lie against the new decree which supersedes the old, under S. 96, C.P. Code. Such an appeal could be taken not only by the decreeholder who is prima facie aggrieved by the amendment but by the judgment debtor also on the ground that it did not go far enough in his favour. But if the application of the judgment-debtor under S. 36 (6) (a) (i) of the Act is refused, there is no provision of law under which an appeal would lie against the order of refusal and the only remedy of the aggrieved party

Code. The remedy of the aggrieved party is practically the same whether the order is made under sub-Cl. (i) or sub-Cl. (11) of S. 36 (6) (a). (Mukherjea and Roxburgh, II.) PROMODE NATH Sinha Roy v. Raseshwari I)assi. I.L.R. (1941) 2 Cal. 402=14 R.C. 271=196 I.C. 683= 45 C.W.N. 776=A.I.R. 1941 Cal. 530.

-S. 36 (6) (a) (ii)—Decree on hand-note passed by Small Cause Court-Hand-note executed for balance due on mortgages-l'ower of Small Cause Court to reopen scitled account on

mortgages. A Small Cause Court which has passed a decree on a hand-note which was executed on account of the balance due on two mortgages, has jurisdiction on an application made to it under S. 36 (6) (a) (ii) of the Bengal Money-Lenders Act to re-open the account which closed the previous dealings on the mortgages. (Henderson J.) BHUTNATH ADDY v. KHAGENDRA NATH BANERJEE. 45 C.W.N. 1069=76 C.L.J. 15.

\_\_\_\_S. 36 (6) (a) (ii)—Proceeding under— Interrogatories—Power of Court to administer— Civil Procedure Code, O. 11.

The Court has power in a proper case to administer interrogatories under O. 11, Civil Procedure Code, in a miscellaneous proceeding under S. 36 (6) (a) (ii) of the Bengal Money-Lenders Act. (Mukherjea and Sen, JJ.) SUKDEVJEE v. RAMKRISHNA LAHA. 196 I.C. 758=45 C.W.N. 924=14 R C. 274=A.I.R. 1941 Cal. 537.

money realised by payment and sale before Act-Personal decree not barred on date of application made after Act but barred on date of order-Decree, if can be re-opened.

A mortgage decree was passed for a sum in excess of the limits specified in S. 30 (1) (a) of the Bengal Money-Lenders Act, but only a sum which was less than twice the principal money was realised by payment and sale prior to the passing of the Act. When the Act was passed and when the application for re-opening the decree was made under S.  $3^{(i)}(6)(a)(ii)$ , the remedy of the mortgagee decree-holder to apply for a personal decree under O. 34, R. 6, C. P. Code, was not barred, but it was barred at the date of the order.

Held, that the fact that no steps were taken by the mortgagee decree-holder after the passing of the Act to obtain personal decree and that he allowed the remedy to be barred does not affect the right of the mortgagor to have the decree reopened. (Mukherjea, and Pal, JJ.) KULADA CHARAN ROY v. AJIT KUMAR GHOSH. 47 C.W.N.

S. 36 (6) (ii)—Relief given by way of review—Court, if bound to pass new decree.

Where an application is made for review of a decree under S. 36 (6) (ii) (a) of the Bengal Money-Lenders Act and relief is given by way of review, then that procedure itself must spso facto involve a "reopening" of the decree. That being so, the Court is bound to pass a "new decree" in accordance with the provisions of the an appeal would lie against the order of refusal Act under the terms of Cl. (a) of sub-S. (2). and the only remedy of the aggrieved party (Biswas and Roxburgh, JJ.) BUBHAN MIA v. would be to apply for revision under S. 115, C.P.

JOTINDRA MOHAN DUTT. 74 C L.J. 200=204 I.C. BENGAL MONEY-LENDERS' ACT (1940). BENGAL MONEY-LENDERS' ACT (1940). 592=15 R.C. 532=46 C.W.N. 129=A.I.R. 1942 Cal. 132.

-S. 36 (6) (b)—Applicability—Decree pas-

sed in suit filed before 1939.

S. 36 (6) (b) of the Bengal Money-Lenders Act applies to a case where a decree was passed in a suit instituted before the 1st January, 1939, provided that such decree was not fully satisfied by that date. (Edgley and Biswas, IJ.) SARA-DINDU MUKHERJEE v. JAHARLAL AGARWALLA. IL. R. (1942) 1 Cal. 326-74 C.L.J. 61-46 C.W.N. 33=201 I.C. 353=15 R.C. 174=A.I.R. 1942 Cal. 153.

-S. 36 (6) (b)—Application for review of decree-Court to which appeal is filed from order passed in execution proceedings-It can hear.

Under S. 36 (6) (b) of the Bengal Money-Lenders Act, the appellate Court which is empowered to hear an application for review to have a decree re-opened under S. 35 (1) (a) or to be released from all liability in excess of the limits specified in S. 30 (1) and (2) of the Act, is the Court before which a decree of the nature referred to in Cl. (a) of sub-S. (6) is being questioned or challenged by way of a direct appeal and not the Court in which an appeal is pending in connection with some order made in the proceedings taken for the execution of such a decree. (Edgley and Biswas, JJ.) JOGENDRA NARAIN SING v. SOURENDRA NARAIN. I.L.R. (1941) 2 Cal. 232=195 I.C. 554=14 R.C. 116=45 C.W.N. 774=A.I. R. 1941 Cal. 431.

-S. 38-Application by mortgagor-Prior deposit of principal by him under S 83 of T.P. Act before Act coming into force—If operates as

estoppel.

A deposit of the principal amount due under a usufructuary mortgage made by the mortgagor under S. 83 of the T. P. Act before the Bengal Money-Lenders Act came into force, but refused by the mortgagee, does not estop the mortgagor from making an application under S 38 of the latter Act for a declaration that nothing is due on the mortga e. (Henderson, J.) Meherun-NISSA BIBI v SATISH CHANDRA DUTTA. I.L.R. (1944) 1 Cal. 321=47 C.W.N. 894=77 C.L.J 323=217 I.C. 87=17 R.C. 152=A.I.R. 1944 Cal. 288.

-Ss. 38 and 36-Application for taking accounts-Mortgage bond more than 12 years old-Amount mentioned therein as principal including also arrears of interest on sum actually advanced -Such amount, if to be treated as principal for all purposes-Interest on such amount from date

of bond-If payable.

The provisions of S. 36 of the Bengal Money-Lenders Act including proviso (1) to the first sub-section are attracted in a proceeding under S. 38 of the Act. Therefore in an application under the latter section for taking accounts in respect of a loan secured by a mortgage executed more than twelve years before the date of the application, the amount mentioned as the principal in the mortgage bond must be treated as the principal of the loan for all purposes, although that amount includes in addition to the sum actually amount includes in addition to the sum actually advanced the arrears of interest thereon. Interest in the meaning of S. 38 of the Bengal Moneywould be payable on this amount from the date of the mortgage bond under S. 30 of the Act. under that section. There is nothing in the defini-

(Mitter and Akram, JJ.) BIRBHADRA CHANDRA

v. Surendra Prasad. 48 C.W.N. 496=A.I.R. 1944 Cal. 303.

S. 38-Form of order—Declaration of amount due from mortga gee to mortgagor.

On an application made by a mortgagor under S. 38 of the Bengal Money-Lenders Act, the Court cannot grant a declaration that anything is due from the mortgagee to him. It can only grant a declaration that nothing is due on the mortgage. (Henderson, J.) Mehfrunnissa Bibi v. Satish Chandra Duuta. I.L.R. (1944) 1 Cal. 321=77 C.L.J. 323=217 I C. 87=17 R C. 152= 47 C.W.N. 894 A.I.R. 1944 Cal. 288.

- Ss. 38 and 30 (2) - Metical of taking accounts -Interest pand before Act in excess of statutory rate up to certain period and at less than statutory race thereafter-Excess interest, if to be credited towards outstanding principal at end of first period or towards

interest according thereafter.

In taking accounts under S. 38 of the Money-Lenders Act in the case of a mortgage where interest had been paid before the commencement of the Act at a rate in excess of the statutory rate up to a certain period and at less than the statutory rate thereafter, the excess interest paid during the first period ought to be credited towards the outstanding principal at the end of that period and not towards interest accruing after that period. If there is a stipulation in the mortgage bond entitling the mortgagor to make part payments towards the principal by specified instalments, the excess amount of interest should be credited towards the principal subject to that stipulation. In order to determine whether there was an excess payment before the commencement of the Act, it is not correct to find out the sum which has been paid as interest for the whole period from the date of the bond up to the commencement of the Act and to see whether this amount exceeds the amount calculated at the statulory rate for the same period. (Nasım Aliand Blank, JJ.) Sanat Kumar Mukherjee v. Pramatha Nath Roy. 48 C.W.N. 551=A.I.R. 1944 Cal. 325.

-S. 38-Morigagee with possession in lieu of interest-It absolved from accounting-Mortgage created hefore Act-Rate of interest permissible-T. P. Act,

S. 77.

In a proceeding under S. 38 of the Bengal Money-Lenders Act, a mortgagee who has been put in possession in lieu of interest under a mortgage created before the Act came into force is not absolved from accounting, notwithstanding S. 77 of the T. P. Act. If the mortgage-bond does not mention any rate of interest, the Court would be right to take an account and limit the rate of in-Money-Lenders Act. (Henderson, J.) Meherunnissa Bibi v. Satish Chandra Dutta. I.L.R. (1944) 1 Cal. 321=77 C.L.J. 323=217 I.C. 87=17 R.C. 152=47 C.W.N. 894=A.I.R. 1944 Cal 288.

-Ss. 38 and 2 (12)-Usufructuary mortgagor-If a borrower.

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tion of a "loan" in S. 2 (12) of the Act to suggest that it does not include a transaction in which interest is payable in kind. (Henderson, J.) RAM CHARAN SINGH v. GOPINATH KABORI. 48 C.W.N. 470=A.I.R. 1944 Cal. 302 (2).

–S. 38 (3)–Appeal tiled under–Court-fee– Court-Fres Act, Art. 17.

A fixed court-fee of Rs, 20 and not an ad valorem court-fee is payable on a memorandum of appeal filed under the provisions of S. 38 (3) of the Bengal Money-Lenders Act. Henderson, J.) AZIZAL BARI v. JEW MAHAMMAD KHAN. 214 I.C. 90=17 R.C. 18=48 C.W.N. 347=A.I.R. 1944 Cal. 230.

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S. 3 (36) -'Owner'—If includes lessee.

The definition of "owner" in S. 3 (38) of the Bengal Municipal Act is wide enough to cover both the person in whom the title to the property lies and the lessee of that property. (Roxburgh and Akran, JJ.) BHUPENDRA NATH MUKHERJEE v. COMMISSIONER OF THE UTTERPARA MUNICIPALITY. I.L.R. (1942) 2 Cal. 496=208 I.C. 115=16 R.C. 143=76 C.L. J. 389=46 C.W.N. 936= A.I.R. 1943 Cal. 254.

-S. 3 (54)—Definition of Magistrate—If exhaustive.

The definition of the term "Magistrate" in S. 3 (54) of the Bengal Municipal Act is exhaustive. Consequently, a Magistrate of the first class to whom the District Magistrate has not made over any duties under this Act has no jurisdiction to Pass an order of demolition under S. 330 of the Act. (Lodge and Roxburgh JJ.) CHAIRMAN, TOLLYGUNJ MUNICIPALITY v. MASH AHMEN, I.L.R. (1942) 1 Cal. 530=199 I.C. 792=14 R.C. 691=43 Cr. L.J. 593=46 C.W.N. 316=74 C.L.J. 499=A.I.R. 1942 Cal. 288.

-Ss. 33 and 34 -Applicability-Filing forged nomination paper.

Filing a nomination paper with a forged signature of the seconder is not an offence under S. 33 or any other section of the Bengal Municipal Act, but constitues an offence under S. 471, I.P. Code, S. 34 of the Bengal Municipal Act does not, therefore, apply to a prosecution for such an offence. (Edgely and Sen, II.) BIBHUTI BHUSAN BANERJEE v. DWARIKANATH BHATTA-CHARJEE I.L.R (1944) 1 Cal. 192=207 I.C. 415 =16 R.C. 112=44 Cr.L.J. 601=77 C.L.J. 265= 47 C.W.N. 676=A.I.R. 1943 Cal. 574.

-S. 38—Grounds for setting aside election—Election held during period of supersession of Municipality. S. 38 of the Bengal Municipal Act empowers the District Judge sitting as an election Court to set aside the election of any candidate only if any of the grounds specified in Cls. (a) to (d) of the section are made out. The District Judge has therefore, no authority under the section to set aside an election on the ground that it was held after the Municipality was superseded under the Defence of India Rules and no order for constituting it was made. (Mukherjea and Akram, JJ.) PRASAD DAS MULLICK v. KARTIC CHANDRA MULLICK. 78 C.L.J. 264=218 I.C. 304=18 R.C. 38=A.I.R. 1945 Cal. 30. 304=18

-Ss. 52 and 149-Delegation of authority -

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It is wrong to limit the operation of S. 52 of the Bengal Municipal Act only to the powers referred to in S 51. The functions of a chairman under S. 149 are not excluded from the scope of the delegation contemplated by S. 52. A vice-Chairman is therefore, competent to act for the chairman in the Review Committee by virtue of a delegation of authority under S 52. (Bistous, J.) HARL BRUSAN DE T, MUNICIPAL COMMISSIONERS OF KAMARHATL 45 C.W.N. 1113.

 S. 92 (2)—Adjourned meeting transacting busis. ness not on agenda of prairies meeting - Minutes signed

and confirmed - Effect Model Rules, R. 31.
If the minutes of an adjourned meeting are duly signed and confirmed, the meeting is to be deemed to be free from all defects and irregularity under the provisions of S. 92 (2) of the Bengal Municipal Act, although the meeting transacted business which was not on the agenda of the previous meeting contrary to R 31 of the Model Rules framed under the Act. (Roxburgh, J.) AKSHOY KUMAR BANERJEE v. COMMISSIONER, TOLLYGUNGE. 46 C.W N. 393.

--S. 103 (3) - Contract between Municipality and private individual not signed and scaled-It binds latter-Party receiving advantage-If liable to comperisate.

A contract between a Municipality and a private individual which is not in writing or signed or scaled as required by S. 103 of the Bengal Municipal Act is binding neither upon the Municipality nor upon that individual. It makes no difference whether the contract is executory or executed. S. 65 of the Contract Act, however, applies to such a case although an imperative provision of an Act has rendered the contract unenforceable and so void. Under this section, the party who has received any advantage under the contract is liable to make compensation to the other party, if the latter has suffered any loss. If their only loss is the loss of the benefit of the contract, no compensation can be recovered. (Roxburgh, J.) AKSHOY KUMAR BANERJEE v. MUNICIPAL COMMISSIONER, TOLLYGUNGE 46 C.W.N. 393.

S. 138 (2)—Production of disament of title-Power of Municipality to call for before issue of notice -Notice of transfer given by both transferer and transforce-Suit for declaration by transferee outhout producing do ument-Maintainability - Specific Relief Act. S. 42.

When a transferee applies for mutation, the Municipality has implied authority to call for the production of his document or title before the issue of notice under S. 138 (2) of the Bengal Municipal Act, although both the transferor and the transferee have given notice of the transfer. If the Municipality calls for the production of that document repeatedly before the Vice-chairman, Chairman and the Commissioner, its action may not be business-like but cannot be considered unreasonable or improper. A suit by the transferee for a declaration that he is an assessee of the Municipality and is entitled to be mutated as such without the production or further production of his docu-Scope of -Chairmanship of Review Committee-If can ment of title, is not maintainable under S. 42 of the Specific Relief Act, as there is no denial by

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the Municipality of his legal character. Further, even if the demand by the Municipality for the production of the document is irregular, it is an irregularity not affecting the merits under S. 92 (1) (c) of the Bengal Municipal Act; and the suit is, therefore barred under this section. (Blank. J.) AKSHOY KUMAR BANERJEE v. MAHO-MED HEDAYATULLA. 48 C.W N. 81=211 I.C. 529 =16 R.C. 559=A.I.R. 1944 Cal. 73.

-S. 145 (3)—Appointment of person outside panel as assessor-Approval of Government-If can be obtained subsequently.

S. 145 (3) of the Bengal Municipal Act expressly authorises the Commissioners to appoint any person approved by the Local Government as assessor, though he may not be included in the panel, referred to in sub S. (1). The fact that the approval of the Local Government was obtained after the appointment, and not before it, makes no difference. (Biswas, J.) HARI BHUSAN DE 2. MUNICIPAL COMMISSIONERS OF KAMARHATI, 45 C.W.N. 1113.

-S. 148 (3)-Failure of committee to give

notice to assessor-Irregularity.

The failure of the Review Committee to give notice to the assessor as required by sub-S. (3) of S. 148 of the Bengal Municipal Act which subsection has since been repealed, is nothing more than a mere irregularity, when the Assessor had ceased to be in the service of the Municipality (Biswas, J.) HARI BHUSAN DE v. MUNICIPAL, COMMISSIONERS OF KAMARHATI. 45 C.W.N. 1113.

-S. 149 (before amendment)—Constitution of Review Committee-Resolution appointing three, instead of two Commissioners-Sittings attended only be two of them-Constitution of Committee-I vitiated.

The fact that the resolution passed by the Commissioners by which the Review Committee was constituted mentioned three instead of two Ward Commissioners besides the chairman, does not vitiate the constitution of the Committee, when in point of fact the sittings of the Committee were attended by only two of them besides the chairman. (Biswas, J.) Hari Bhusan Dr v. Municipal Commissioners of Kamarhati. 45 C.W.N. 1113.

-S. 149—Compliance with formalities—Onus of proof.

It is for the plaintiff to show that the formalities required by S. 149 of the Bengal Municipal Act were not duly carried out, if he wishes the Civil Court to interfere with the assessment on that ground. (Roxburgh, J.) MUNICIPAL COMMIS-SIGNERS OF THE PABNA MUNICIPALITY v. NABA GOVINDA CHOWDHURY. 46 C.W.N. 830.

-S. 149-Objection to assessment disallowed by Commissioners—Absence of notice under Ss. 138 (2) and 147 (2)—Civil suit—If maintainable.

An assessee whose objection to the assessment of his holding has been decided against him by the Municipal Commissioners, cannot by means of a civil suit re-open the question of the assessment on the ground that the correction in the assessment list was made without giving him notice under S. 138 (2) of the Bengal Municipal Act or on the ground that the assessment was enhanced

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without giving him notice under S. 147 (2) of the Act. A suit by the assessee for a declaration that the assessment was illegal and ultra vires on either of the above grounds is, therefore, not maintainable in a Civil Court. (Roxburgh, J.) MUNICIPAL COMMISSIONERS OF THE PABNA MUNI-CIPALITY v. NABA GOVINDA CHOWDHURY. 46 C. W.N. 830.

-S. 198-"Keeping"-Casual mooring in

course of plying-If amounts to.

Mere casual mooring in connection with setting down and picking up passengers in the course of plying the boats does not amount to "keeping" within the meaning of S. 19% of the Bengal Municipal Act. It is impossible to say that the word "keeping" is wider than and includes the word "plying". They are really totally different things. (Henderson, J.) Dula Mia v. Dacca Municipa-Lin y. I.L R. (1944, 1 Cal. 438=212 I.C. 600=17 R.C. 3=45 Cr.L.J. 646=48 C.W.N. 271=A.I.R. 1944 Cal. 160.

- S. 215—Rules framed under, R. 1—Appointment of assessor without allowing interval of three months to kim to complete work-Irregu-

larity. The fact that an assessor is appointed at a time which does not allow him the necessary interval of three months between the completion of his work and the date on which the assessment is to take effect as required by R.1 of the Rules framed by the Local Government under S. 215 of the Bengal Municipal Act, is no more that mere irregularity. An objection to the appointment on this ground will fail when there is no evidence that the shortness of time in any way affected the work of the assessor or that it resulted in any prejudice or injustice to any party concerned. (Biswas. J.) HARI BHUSAN DE v. MUNICIPAL COMMISSIONERS OF KAMARHATI. 45 C.W.N. 1113.

-S. 215—Rules framed under Rr. 4 and 9-Notice by assessor to owner or occupier-If obligatory -Failure to fill up last two columns of Form B-

Validity of assessment list.

Neither under S. 134 of the Bengal Municipal Act nor under R. 4 of the Rules framed under S. 215 of that Act, is it obligatory on the assessor to issue a notice to the owner or occupier; he may do so, whenever he thinks fit. If the assessor had otherwise all necessary information before him regarding the holding, and he also actually inspected it, the failure, to issue notice under S 134, cannot be regarded as an illegality. When there is no notice under S. 134 and therefore, no return submitted by the owner or occupier in Form B, there can be no question of he assessor filling up the last two columns of this form. The failure to do so will not, therefore, render the assessment list/invalid. (Biswas, J.) ARI BHUSAN DE v. MUNICIPAL COMMISSINERS OF LAMARHATI, 45 C.W.N. 1113.

-8.215-Rules framed under, R. 9-Absence of certificate by assessor-Validity of assessment list.

The failure of the assessor to endorse a certificate on the assessment list under the latter part of R. 9 does not render the assessment list invalid in law. The object of the rule evidently is to ensure the authenticity of the assessment list as submitted by the assessor to the chairman. If the assessment list, as published under S. 147 of the Bengal

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Municipal Act bears the signature of the chairman, it is a complete guarantee of its genuineness. (Biswas, J.) Hari Bhusan De v. Commissioners of Kamarhati. MUNICIPAL 45 C.W.N. 1113.

-S. 215 -Rules framed under, R. 10-Absence of note by assessor showing basis of assessment-Validity of assessment list.

It does not appear that the note by the assessor under R. 10 showing the basis on which the annual valuation had been determined, is required to be incorporated in the assessment list itself as an integral part thereof. If, therefore, the Commissioner has not under S. 136 of the Bengal Municipal Act directed the inclusion of a statement on this point, the absence of it does not necessarily invalidate the assessment list. (Biswas J.) HARI BHUSAN DE v. MUNICIPAL COMMISSIONERS OF KAMARHATI. 45. C.W.N. 1113.

-S. 241—Proceedings not taken by Municipality for removal of encroachment-Suit for injunction-

Whether premature.

Where the Municipality has not taken any proceedings under S. 241 of the Bengal Municipal Act for the removal of an encroachment on a public street, a suit by the plaintiff for declaration of his right to maintain the encroachment and for an injunction to restrain the Municipality from taking proceedings for its removal is premature and is liable to be dismissed for want of cause of action. (Nasim Ali and Blank, IJ.) DACCA MUNICIPALITY v. KRISHNA LAL PAL, I.L.R.(1943) 1 Cal. 1=207 I.C. 226=16 R.C. 39=A.I.R. 1943 Cal. 234.

-S. 241-Projection over public street-Right to retain-Whether can be acquired by prescription -

Compensation for removal-When payable.

Any structure or fixture projecting over a public street is liable to be removed under S. 241 of the Bengal Municipal Act, and the owner or occupier cannot acquire a right to retain it by prescription. If it was constructed before the date mentioned in the proviso to S. 241, he is entitled to get some compensation if he suffers any damage by its removal. If however it was constructed after the dates specified in the proviso, he is not entitled to get any compensation. (Nasim Ali and Blank, JJ.) DACCA MUNICIPALITY. KRISHNA LAL PAL. 207 I.C. 226=16 R.C. 39=I.L.R. (1943)1 Cal. 1=A.I.R. 1943 Cal. 234.

-S. 330-Order under - Jurisdiction of Magistrate of first class. See Bengal Municipal Act, S. 3 (54). 46 C.W.N. 316.

Ss. 330 (a) and 332—Requirements—Sanc-

tion for prosecution under S. 501.

If the Commissioners had sanctioned at a meeting the prosecution of a person under S. 501 of the Bengal Municipal Act, the requirements of S. 330 (a) (1) read with S. 332 of the Act are prima facie satisfied. (Edgley and Blank, JJ.) CHAIRMAN, KISHOREGANJ MUNICIPALITY T. RADHIKA MOHAN GHOSH. I.L.R. (1944) 1 Cal. CHAIRMAN, 199=215 I.C. 212=17 R.C. 95=46 Cr. L.J. 70= A.I.R. 1944 Cal. 377.

-Ss. 501, 312 and 318--Prosecution for erecting building without sanction—Duty of prosecution.

BEN. NON-AGRI, TEN. (TEM. PRO.) ACT (1940)

Where a person is prosecuted under S. 501 of the Bengal Municipal Act for erecting a building within the Municipal area without obtaining the necessary permission under S. 318 of the Act, it is essential for the purpose of the prosecution to show that the latter section was actually in operation in the Municipality at the time when the prosecution was instituted. But if the conditions prescribed by the proviso to S. 312 of the Act were operative no special notification under sub-Ss. (1) and (2) of that section would be required. (Edgley and Blank, IJ.) CHARMAN, KISHOREGANJ Municipality v. Raddika Mohan Ghosh, I L.R. (1914) 1 Cal. 199=215 I.C. 212=17 R.C. 95=46 Cr.L.J. 70=A I R. 1944 Cal. 377.

-S. 535-Service of Proper notice of suit-

Onus of proof.

In a suit against a Municipality, it is for the plaintiff to prove that proper notice of suit was served on them. (Roxburgh, J.) MUNICIPAL COMMISSIONERS OF THE PABNA MUNICIPAL PALITY V. NABA GOVINDA CHOWDHURY. 46 C.W.N. 830.

S. 535 (2)—Limitation for suits—Exclusion of period of notice-Limitation Act, S. 15 (2). S. 15 (2) of the Limitation Act applies to suits for which a special period of limitation is pres-cribed under S. 535 (2) of the Bengal Muncipal Act. The plaintiffs in such suits are, therefore entitled to deduct the period of the notice which they had to give under S 535 (1). (Biswas, I.) COMMISSIONERS OF THE PARNA MUNICIPALITY T. NIRODE SUNDARI DASYA. 202 I.C. 762=15 R.C. 386-46 C.W.N. 943-A.I.R. 1942 Cal. 544.

-Ss. 539 and 3 (38)—Entry in assessment list as owner-Alteration-Power of Civil Court

Proper procedure.

The Civil Court has no power to interfere in the matter of an entry in the assessment list of the Municipality on its own interpretation of the word 'owner' in the Bengal Municipal Act, when the Municipality have not in any acted ultra vires or mala fide and their action as a matter of procedure is in all respects proper. The only way in which the list can be altered is by the procedure under S. 148 of the Act, or by moving the Commissioners to take action under S. 138 of the Act. (Raxburgh and Akram, II.) BHUPENDRA NATH MUKHERJEE v. COMMISSIONER OF THE UTTERPARA MUNICIPALITY I.L.R.(1942) 2 Cal. 496=208 1.C. 115=16 R.C 143=76 C.L.J. 389 ==46 C.W.N. 936=A.I.R (1943) Cal. 254.

BENGAL NON-AGRICULTURAL TEN-ANCY (TEMPORARY PROVISIONS) ACT (IX OF 1940)—Application for stay of proceedings—Application made by person who has filed suit under O. 21, R. 103, C.P. Code—Order of dismissal-Appeal-If competent.

Where a person who has instituted a suit under O. 21, R. 103, C. P. Code, for a declaration that he is a tenant of the decree-holder files an application to the executing Court under the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act for staying all further proceedings, and that application is dismissed, an appeal is not competent from the order of dismissal. (Henderson, J.) Balbeo Singh v. Upendra Chandra. 45 C.W.N. 780.

Suit to recover arrears of rent and for ejectment—Defendant denying that arrears were due-Stay of suit-When may be ordered.

Where the plaintiff instituted a suit both to recover arrears of rent and for ejectment, and the defendant denied that anything was due on account of rent and filed a prayer for staying the suit under the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act.

Held, that on the plaint as filed the defendant was not entitled to the stay but that if the defence was well-founded and nothing was due on account of rent, the suit would have to be stayed. (Henderson, J.) NUT BEHARI DAS v. MAHOMED ALL. 196 I.C. 697=14 R.C. 275=45 C W.N. 791=A.I.R 1941 Cal. 528.

2-Ferry-man - If non-agricultural tenant.

A ferry-man (i.e) a person with whom a ferry is settled is not a non-agricultural tenant. (Henderson, J) RAM CHARIT BHAKAT v TETARIKUMARI KUAR. 201 I.C. 516=15 R.C. 221= A.I R. 1942 Cal. 136.

--- Ss. 2 and 3-Heritable tenancy-Suit to eject heirs of tenant-If to be stayed.

If tenancy is heritable, any suit to eject the heirs of the tenant will automatically have to be stayed. It is for the defendants to establish that they have a 'tenancy. (Henderson, J.) SWARNA KUMARI v. SUDHANGSU KIRON. 76 C.L.J. 403.

-Ss. 2, 3 and 6-Lessee of land with structures on it-If non-agricultural tenant-Right to reli**e**f.

A lessee of land with structures on it erected by the landlord is not a non-agricultural tenant within the definition of S. 2 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, and he is not, therefore, entitled to relief under S. 3 or S. 6 of the Act. (Mukherjea and Bisreas II.) JAHUR MIA v. ABDUL GAPFUR. 196 I.C. 346=14 R.C. 223=45 C.W.N. 603=A.I R. 1941 Cal. 452.

-S. 2-Non-agricultural tenant-Ownership of his huts passing to landlord under compromise decree for ejectment—Effect on status - Subsequent execution of decree-Tenant, if protected.

A decree for ejectment of a non-agricultural tenant was passed on a compromise before the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act came into force. Under the terms of the compromise the tenant was given three years' grace in which to evacuate the land and remove the huts, and if he failed to do so, the ownership of the huts would pass to the decree holder. He failed to do so with the result the decree-holder became the owner of the huts from 1942. On an execution case filed in 1943,

Held, that on the date of the execution case the tenant was not a non-agricultural tenant within the meaning of S. 2 of the Act, as the ownership of the huts had passed to the decree-holder, and he was, therefore, not protected by the provisions of the Act. (Henderson, J.) HEM CHANDRA v. BRINDABAN CHANDRA. 49 C.W.N. 684.

-S. 2-"Non-agricultural tenant"—Person with right to sell fruits from trees and fish from

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tank on land is quite insufficient to make him a non-agricultural tenant within the meaning of S. 2 of Bengal Act IX of 1940. (Henderson, J.) BHAGABAT CHANDRA JANA v. NAGENDRA NATH BANERIEE. 45 C.W.N. 382 (2)=14 R.C. 350= 197 I.C. 180=A.I.R. 1941 Cal. 265.

S. 2 -'Tenant'—If includes ex-tenant.
The word 'tenant' in S. 2 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act is used not in its strict legal sense, but in its wider popular sense and includes not only the current tenant as set out in that section but the ex-tenant remaining in occupation who formerly held in the manner described in the section as non-agricultural tenant. (Derbyshire, C.J., Nasim Ali and Muter, JJ.) SUKUMARI DEVI v. RAJ-DHARI PANDEY. I.L.R. (1942) 1 Cal. 497=198 I.C. 136=14 R.C. 435=74 C.L.J. 485=5 F.L.J. (H.C.) 1=46 C.W.N. 174=A.I.R. 1942 Cal. 49 (C.R.) (S.B.).

-S. 2--Tenant of land and buildings; who has erected ekchalas-If non-agricultural tenant.

A tenant of both the land and buildings is not a non-agricultural tenant within the meaning of S. 2 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, although he has himself erected some ekchalas. (Henderson, I.) AJIT KUMAR DAS v. ANUKUL CHANDRA. 198 I. C. 176=14 R.C. 443=45 C.W.N. 678=73 C.L.J. 527=A.I.R. 1941 Cal. 718.

-S. 3-Appeal by tenant-lf liable to be stayed.

A tenant's appeal cannot be regarded in any sense to be a suit or proceeding for ejectment and is not liable to be stayed under S. 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act. (Chakravartti, J.) Kali PROSAD SAHA v. NAIHATI JUTE MILLS CO. LTD. 221 I.C. 561=50 C.W.N. 50.

-S. 3-Appeal by tenant against decree for electment-If liable to be stayed.

An appeal by a tenant against a decree allowing ejectment does not come within the meaning of the expression "suit or proceeding in any Court for ejectment" in S. 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, and the hearing of such an appeal is not liable to be stayed under that section. (Rissuas and Dis, JJ.) ABDUL HAMID BEPARI v. NRIPENDRA KUMAR ROY. 49 C.W.N. 681.

-Ss. 3 and 6—Applicability — Appeals— Appeal by tenant against decree for ejectment.

The provisions for stay contained in Ss. 3 and 6 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act do not apply to an appeal. The words "every suit and proceeding in any Court for ejectment of a non-agricultural tenant" used in these sections cannot be said to include an appeal. In any case, a tenants' appeal against a decree for ejectment can in no sense be brought within the words "suit for ejectment". (Edglev and Biswas, JJ.) PRANKRISHNA MUKHERJEA V. JNANANDA ROY. I.L.R. (1941) 2 Cal. 273-198 I.C. 181-14 R.C. 442-45 C.W.N. 967=A.I.R. 1942 Cal. 47.

-S. 3-If ultra vires,

On a contention that S. 3 of the Bengal Non-The fact that the only right that a person has Agricultural Tenancy (Temporary Provisions) is to sell fruits from the trees and fish from the Act, in so far as it directs that all proceedings

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for ejectment even in execution of decrees shall be stayed for a number of years, is repugnant to O. 21, R. 24. C. P. Code, which directs that the Court shall issue its process for the execution of the decree once the preliminary measures have been taken,

Held, that O. 21, R. 24 must be read subject to S. 4 (1), C. P. Code, which saves any special power conferred by or under any other law for the time being in force and when it is so read, no question of repugnancy between C. P. Code, and the impugned Act will arise. (Spens, C. J. Varadachariar and Muhammad Zafrulla Khan, JJ.) MUKUNDA MURARI CHAKRAVARTI V. PABITRAMOV GHOSH. (1944) F.L.J. 249=49 C W N. (F.R.) 8=218 I.C. 172=79 C L.J. 87=11 B R. 304=18 R F C. 1=A.I.R. 1945 F.C 1=(1944) 2 M.L.J. 367 (F.C.).

-S. 3-If ultra vires-Government of India Act, Ss. 100 and 107-C.P. Code, O.21, R. 24.

The provisions of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act relating to stay of proceedings for the ejectment of non-agricultural tenants for a period of two years, are not beyond the law-making powers of the Bengal Legislature. That legislature in curtailing the powers of the Court to grant possession has acted under Item 2, taken in conjunction with that part of Item 21 which deals with rights in or over land, of List II (i.e. Provincial Legislative (1811) of Sch. VII of the Government of India Act The above provisions of the Bengal Act are not void under S. 107 of the Government of India Act as being in conflict with the provisions of O. 21, as being in conflict with the provisions of 0.21, R. 24, C.P. Code. (Derbyshire. C.J., Nasim Aliand Mitter, J.). Sukumari Devi v. Rajdhari Pandey. I L.R. (1932) 1 Cal. 497=198 I.C. 136=14 R.C. 436=74 C L.J. 485=5 F.L.J. (H C.) 1=46 C.W.N. 174=A I.R. 1942 Cal. 49 (S.B.) followed in 46 C.W.N. 889=15 R.C. 401=76 C. L.J. 489=203 I.C. 184=A.I.R. 1942 Cal. 550.

-S. 3—Suit for arrears of rent and ejectment -If liable to be stayed.

A suit for the recovery of arrears of rent and for ejectment is one for ejectment because of non-payment of rent and is, therefore, not liable to be stayed under S. 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act. 46 C.W.N. 1025, foll. (Hender son, J.) ISWAR LOKENATH SIBTHAKUR v. MANIN 49 C.W N. 239. DRA NATH DUTT.

-S. 3 -Suit for ejectment on account of non-payment of rent-Suit against monthly tenant for arrears of rent and ejectment, after notice.

A suit for the recovery of arrears of rent and for ejectment brought by the landlord against a monthly non-agricultural tenant after serving a notice upon him to pay up the arrears and to quit the land, is one for ejectment because of non-payment of rent, and the landlord is entitled to an order for ejectment subject to the provisions of the proviso to S. 3 of the Bengal Non-Agricultural Tenancy Act. (Derbyshire, C.J. and Gentle, J.) RADHIKALAL GOSWAMI v. GOPESWAR BASU. 46 C.W.N. 1025=76 C.L.J. 459.

-S. 3-Suit for ejectment "on account of nonpayment of rent"-Suit for arrears of rent and electment-Allegation by defendant that claim for arrears is false-Duty of Court.

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A suit against a tenant for arrears of rent and for ejectment is one for ejectment on account of non-payment of rent and is not liable to be stayed under S. 3 of the Bengal Non-Agricultural Tenancy Act. A plaintiff cannot, however, deprive a defendant of the protection given him by the Act merely by putting forward a false claim for arrears of rent. When the defendant raises such a plea it is the duty of the Court to see whether the plaintiff's claim is a mere pretence, and if it is, to stay the suit. (Henderson, J.) RADHA-RAMAN PAL v. SASADHAR PRAMANIK. 48 C.W.N. 673(2)

-S. 3-Suit for electment of defendant as tenant -When may be stayed - Suit for ejectment of defendant as trespasser -- Pro edure to be followed.

A suit for ejectment may be one to eject a tenant on the ground that the defendant was a tenant under the plaintiff and his tenancy has subsequently ceased to exist, or it may be one to eject a trespasser on establishment of the plainuff's title. In the former case, if the plaint itself shows that the defendant is a non-agricultural tenant, and ejectment was not sought on the ground of non-payment of rent, the Court is bound to stay the suit under S. 3 of the Non-Agricultural Tenancy Act at its very inception. If any dispute arises as to the character of the tenancy, the Court is bound to take evidence and if it comes to the conclusion that the defendant in fact is a nonegricultural tenant, then also the suit must be stayed. If on the other hand, the suit purports to be one for ejecting a trespasser, different considerations arise. As the plaintiff does not admit the defendant to be a tenant, the suit cannot be stayed in limine. The Court must proceed to hear the suit in the ordinary way and take evidence. If after taking evidence it forms an opinion that the defendant is really a tenant and non-agricultural tenant within the meaning of the Act, it is not bound to stop the proceedings forthwith unless it futher finds that the suit, as it stands could be regarded as a suit to evict the defendant as a tenant on the ground that the tenancy has been determined in any lawful manner. If the Court allows the plaintiff to convert a suit for possession against a trespasser into one for ejectment of a tenant it is certainly bound to stay the suit. But if, on the other hand, the suit is one which must necessarily fail, if the defendant is found to be a tenant and the plaintiff does not want to treat it as a suit for ejectment of a tenant, the Court should dismiss the suit on the finding that the plaintiff failed to prove his case, and the question of stay will come, if and when the plaintiff institutes a fresh suit against the defendant, seeking to eject him on the ground that the tenancy which was found in his favour in the previous suit had since then been determined. (Mukherjea and Biswas, II.) PROVABATI DEBI V. PROTAP CHANDRA MAZUMDAR. I.L.R. (1942) 1 Cal 49=200 I.C. 453=:15 R.C. 3=45 C.W.N. 991=74 C.L.J. 104=A.I.R. 1942 Cal. 145.

S.3-"Suit for ejectment on account of the non-payment of rent"—Interpretation.

The words "ejectment on account of the non-payment of rent" in S.3 of the Bengal Act IX of 1940 are not used for purposes of indicating that the cause of action for ejectnest must be

the non-payment of rent, as under the substantive law non-payment of rent cannot be a ground for ejectment of a non-agricultural tenant. Legislature meant that if a tenant was in arrears, a suit for ejecting such a tenant would be a suit for ejectmeent "on account of the non-payment of rent". (Mitter, J.) PURNENDU NATH TAGORE v. NARENDRA NATH. 194 I.C 581=14 R.C. 1=45 C.W N. 22=A.I.R. 1941 Cal. 302. Referred to in 201 I C. 516=15 R.C. 221=A.I.R. 1942 Cal. 136.

--- S. 3-Suit for ejectment "on account of non-payment of rent"-Interpretation.

Per Mukherjea, J,-Obiter: The words "suit or proceeding for ejectment on account of non-payment of rent" in S. 3 of the Non-Agricultural Tenancy Act refer to that class of cases where under the terms of the lease itself the lessee forfeits his tenancy by reason of non-payment of rent. As a relief against forfeiture in such cases is provided in S. 114 of the T. P. Act, the Legislature probably thought it proper to exempt this Class of cases from the operation of S. 3 of the Non-Agricultural Tenancy Act. (Mukherjea and Biswas, JJ.) PROVABATI DEBI V. PROTAB CHANDRA MAZUMDAR. I.L.R (1942) 1Cal. 49= 45 C.W.N. 991=74 C.L.J 104=200 I.C. 453= 15 R.C. 3=A.I.R. 1942 Cal. 145.

ment and for rent-If can be stayed-Decree passed in such suit-Proper order for stay.

In order to attract the operation of S. 3 of Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, what is necessary is that the suit or proceeding must be one for ejectment of a non-agricultural tenant and the ejectment must be sought for on a ground other than non-payment of rent. The words "suit for ejectment on account of non-payment of rent" refer to cases where the lease contains a condition that it will be forfeited if there is default in the payment of rent for a certain period. A suit for ejectment of a tenant on a ground other than non-payment of rent must, therefore, be stayed under the section, although rent is also claimed in such a suit. What the legislature intended is that only the suit for the ejectment should be stayed and that the Court should proceed with the suit so far as it relates to the recovery of rent. If the application for stay is made after such a suit is decreed and the decree is put into execution. the Court should stay the proceeding for the delivery of possession only and allow the decree-holder to proceed with the execution of the decree so far as it relates to recovery of arrears of rents and costs. The proviso to S. 3 of the Act has no application to such a case. (Mukherjea and Sen. JJ) RELIANCE JUTE MILLS CO., LTD. v. DUKHI SHAH. 203 I C. 184=15 R.C. 400=76 C.L.J. 489=46 C.W.N. 889=A.I.R. 1942 Cal. 550.

-S. 3-'Suit for ejectment'-Suit for khas

possession by lessor on basis of covenant.

A suit for khas possession by a lessor of a permanent lease on the basis of a covenant in the lease entitling him to take khas possession on payment of compensation if he requires the land himself for his own use, is a suit for ejectment the proviso means the entire amount of the decree ann

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and is therefore, liable to be stayed under the provisions of the Bengal Non-Agricultural Tenancy Act. (Henderson, J.) Krishna Chandra Saha v. Jogesh Chandra Saha. 206 I.C. 308=15 R C. 692=47 C.W.N. 155=A.I.R. 1943 Cal. 140 (1).

-Ss. 3 and 6-Suit-If includes appeal.

The word 'suit' as used in S. 3 or 6 of the act must be taken to exclude every kind of appeal, whether it be an appeal by the landlord against a decree refusing ejectment or an appeal by the tenant against a decree granting ejectment. (Biswas, J.) DULICHAND MAHESRI v. PROHLAD CHANDRA, 220 I.C. 22=A.I.R. 1945 Cal. 50.

-Ss. 3 and 6-"Suit or proceeding"-If includes appeal-Appeal by tenant against decree for ejectment.

I'er Biswas, J.—The words "Suit or proceeding" used in S. 3 or S. 6 of the Bengal Non-Agricultural (Temporary Provisions) Act do not include an appeal. Even assuming that an appeal is not excluded from the scope of these provisions, a tenant's appeal against a decree for ejectment cannot be deemed to be a proceeding for ejectment. It is a proceeding against ejectment. The provisions of Ss. 3 and 6 would not consequently apply to it.

Per Mukherjea. J .- It cannot be laid down that the expression "proceeding" as used in Ss. 3 and 6 of the Act is not sufficiently wide to include an appeal or that an appeal arising out of a suit for ejectment of a non-agricultural tenant is not hit by the provisions of these sections. (Mukherjea and Biswas, JJ.) JAHUR MIA v. ABDUL GAFFUR 196 I.C. 346=14 R.C. 223=45 C.W.N. 603= A I.R. 1941 Cal. 452.

-S. 3-"Suit" or "proceeding" -If include appeal.

The words "suit" or a "proceeding" in S. 3 of the Act do not include an appeal. (Henderson, I.)
RAM CHARIT BHAKAT v. TETARI KUMARI KUAR
201 I.C. 516=15 R.C. 221=A.I.R. 1942 Cal. 136.

-Ss. 3 and 6-"Suit"-Whether excludes landlord's appeal.

The word "suit" in Ss. 3 and 6 of the Bengal Non Agricultural Tenancy (Temporary Provisions) Act must be taken to exclude every kind of appeal, whether it be an appeal by the Landlord against a decree refusing ejectment or an appeal by the tenant against a decree granting ejectment. (Biswas, I) RUKMINI MAHESRI v. PRAHLAD CHANDRA. I.L.R. (1944) 1 Cal. 221= 47 C W.N. 702.

-S. 3, Proviso-"Date of decree"-"Costs of proceeding"-"Amount of decree"- Meaning of.

The expression "date of the decree" in the proviso to S. 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act means the date on which the judgment was delivered and not the date on which the decree was signed.

The proceeding in the expression "costs of the proceeding" in the proviso is the execution case in the course of which the application for stay of delivery of possession was filed.

Semble:- The expression "amount of the decree" id

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not merely the amount decreed on account of arrears of rent, where a decree is passed for both arrears of rent and mesne profits. (Henderson, J.) ISWAR LOKE-NATH SIBTHAKUR v. MANINDRA NATH DUTT. 49 C.W.N 239.

-S.4-If ultra vires.

S. 4 of the Bengal Non-Agricultural Tenancy Act is not ultra vires the Provincial Legislature, being a piece of legislation covered by items Nos. 2 and 21 taken together of the Provincial List under the Government of India Act If there is really any conflict between the provisions of this section and those of S. 51 or O. 21 R. 35, C.P. Code, conflict is avoided by S. 4. C. P. Code. (Mukherjea and Blank, J.). RAMESH CHANDRA SARKAR v. Annada Bala Devi. 46 C.W.N. 694= 5 F.L.J. (H.C.) 149.

-S. 4-Order under-If a decree-Appeal-C. P. Code, S. 47.

An order made under S. 4 of the Bengal Non-Agricultural Tenants Act amounts to a decree and comes within S. 47, C. P. Code. An appeal is, therefore, competent from such an order. (Henderson, J.) SHAMSUNNESSA KHATUN V RAMJAN SHEIKH. 201 I.C 640=15 R.C. 262 =46 C.W.N.611=A.I.R. 1942 Cal. 428 (1)

——8s. 6 and 3—Applicability—Appeals—Appeal by tenant against decree for ejectment. See Bengal Non-Agricultural Tenancy Tem-PORARY PROVISIONS) ACT, Ss. 3 AND 6. 45 C.W.N. 967.

BENGAL PATNI REGULATION (VIII OF 1819) S. 3-Patni tenure created in respect of lands already given in prior pitni-Whether valid.

A Zamindar after creating a patni tenure in respect of certain lands can grant another valid pathi tenure in respect of those and other lands in favour of another person, provided it does not operate in derogation of the right of the first patnidar. If there is a stipulation in the contract between the zamindar and the second patnidar that his tenure would be liable to be sold under the summary process provided in the Patni Regulation, such stipulation would be valid. (Mukherjea and Pal JJ) Brojendra Kumar v. Bilques. I.L.R. (1942) 2 Cal. 565=209 I C. 138=16 R.C. 284=47 C.W.N. 94=A.I.R. 1943 Cal. 332.

-S. 3 (4)-Applicability-Pending actions. Cl. (4) added to S. 3 of the Patni Taluk Regulation by the Amendment Act X of 1941 was intended to have retrospective effect and govern even pending actions. (Rau and Biswas. JJ) RAMAPATI CHATTOPADHYA 7. ARABINDA KUMAR PAL. I.L.R. (1943) 1 Cal. 438=207 I.C. 44=16 R.C. 18=47 C.W.N. 366=A.I.R. 1943 Cal. 217.

-Ss. 5 and 6—Compromise between zamindar and part-owner of paini—Rent apportioned in respect of share of latter—Other part-owners not parties to compromise—Effect of—Patni, if split up.

A compromise between a zamindar and a partowner of a patni under which the former recognises the latter as his patnidar at a rent apportioned in respect of his share in the patni, does not have the effect of splitting up the patni

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compromise. however, is that the zamindar cannot hold the part-owner in question personally liable for rent and cesses payable for the share of the other patnidars. (Mitter and Blank, II.) PULIN BEHARI TEWARI 7. RAM RANIAN. I.L.R. (1944) 2 Cal. 90=214 IC. 179=17 R.C. 36=48 C.W.N. 312=A.I.R. 1944 Cal. 219.

-Ss. 5 and 6-Part-transfer of patni taluk-Position of transferee vis-a-vis Zemindar.

A zemindar is not bound to recognise as his tenant a transferee of a fractional part of a patni taluk. He is entitled at his option to treat the transferor only as his tenant, ignoring the transferee altogether. In such a case, he is not bound to implead the transferee as a defendant in a rent suit brought by him, and the entire tenancy would be represented in that suit by the transferor and the other patnidars. (Mitter and Biswas II.) TATIS CHANDRA PAL v. KSHIRODE KUMAR. I.L.R. (1943) 1 Cal. 274=208 I.C. 309=16 R.C. 155= 76 C.L.J. 83=47 C.W.N. 186=A.I.R. 1943 Cal. 319.

-Ss. 5 and 6-Sale by part-oraner of patni of his share-Ilis liability to pay rent-Il'hen ceases.

In the case of a sale by a part-owner of a patni of his share in the patni, his liability to pay rent ceases from the date of the transfer by which he parts with his entire interest in the patni (Mitter and Blank JJ.) PULIN BEHARI V. RAM RANJAN. 214 I C. 179=17 R.C 36=I.L R. (1944) 2 Cal. 90=48 C.W N. 312=A.I.R. 1944 Cal. 219.

-Ss. 5 and 6-Scope and effect of - Patni tenure -Sale for arrears of rent averted by farment by one sharer-Right to contribution from others-Transfer by other sharers prior to period of arrears- Effect of.

All the co-sharers in a fatni tenure are personally liable for the raini rent payable to the zamindar, and the liability of each co-sharer subsists even after he has transferred his share in the tenure and parted with possession to the transferee, except when the transfer has been effective as against the landlord under S, 5 of the Bengal Patni Regulation of 1819 Where therefore a patni tenure is put up for sale for arrears of rent, and the sale is averted by one co-sharer paying the entire rent, the latter is entitled to contribution from the other co-sharers who are it default in proportion to their shares even though they are not in possession and had transferred their shares with possession to another prior to the period in respect of which the rent was in arrears if it is found that the transfer was not effective against the zamindar. (Manohar Lall and Dass ff.) MAHI-DHAR v. BANSIDHAR. 24 Pat. 401 - A.I.R. 1945 Pat.

-Ss. 8, 11 and 15-Applicability and scope-Non-compliance-Effect-Sale-If automatically annul, darpain.

Both the Patni Regulation and the Bengal Tenancy Act exist side by side. Each of them has its own provisions relating to the realisation of rent in respect of patni tenures and a zamindar is at liberty to proceed either under the one or the other for the purpose of recovering arrears of rent from the defaulting patnidar. This being so, it must follow as a logical sequence that if the zamindar elects to proceed under the Bengal tenure, when the other part-owners are not Penancy Act, then in order to cancel a darpatni, parties to the compromise. The effect of the he must proceed under S. 167 of the Act; but if

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on the other hand, he wishes to proceed under the Patni Rugulation, then he must conform to the provisions or Ss. 8, 11 and 15, etc., of that Regulation in order to put an end to the darpatni tenure. Each of these enactments contain a special procedure for annulling the under-tenures which would have been wholly unnecessary, if the under-tenures were annulled automatically upon the sale of the superior tenure. The darpatni is not automatically annulled by a sale of the patni tenure. (Fazl Ali, C.J., Manohar Lall and Chatterji, Jl.) Piri Hyi CHAND LAL v. PRABHARATI JI. 23 Pat 31=212 I.C. 504=16 R.P. 299=10 B.R. 525=1944 P.W.N. 37=A.I.R. 1944 Pat. 41 (F.B.).

S. 8—Applicability—Tenure created under sale deed in 1878 and treated as patni—Character not challenged at all—Admission in deed by tenurcholder that in case of arrears they may be realised by two six-monthly sales—Effect of.

Where a tenure has been treated as a patni tenure since 1879, and the patni character has never been challenged at all, and there is an admission by the patnidar in the sale bond evidencing the creation of the tenure in 1879 that if he failed to pay the arrear rents they could be realized by two six-monthly sales as provided under the provisions of the patni Regulation, it must be held that the tenure is patni falling under the Regulation and saleable under S 8 of the Regulation. (Middleton) RAMNI MOHAN ROY v. DEB PRASANNA MUKHARJEE. 8 B.R. 399.

—— Ss. 8, 9 and 17—Patni sale not realising full amount of demand—Suit for unrealised balance—Maintainability—Covenant to pay rent in patni leave—If binds assignee of lessee—Bengal Tenancy Act, S, 168-A.

The Patni Regulation does not expressly or by necessary implication forbid the institution of a suit for the recovery of the unrealised balance of a demand for which a sale was held under the Regulation itself. Such a suit is maintainable where the patni lease contains an express stiputation that if the whole of the arrears of rent are not realised by putni sale, the balance would be recovered from other properties belonging to the defaulter. Such a covenant is not a mere personal covenant; but binds the assignees of the lessee as well. The fact that S. 168-A of the Bengal Tenancy Act may stand in the way of the execution of the decree that may be passed in the suit is no ground for refusing to pass the decree. Whether this section is at all attracted to a particular case can only be decided when the decree is put into execution. (Mukherjea and Ellis, Jf.)
RAJKUMARI USHA PROVADE v. SACHINDRAKUMAR BASU. 49 C.W.N. 351=79 C.L.J. 176=A.I.R. 1945 Cal. 216.

\_\_\_\_\_S. 8—Service of notice—Verification by substantial men—If mandatory.

If notices have been duly served in accordance with S. 8 of the Patni Regulation, it is really immaterial that the witnesses who verified the service were not all substantial men. This part of the section is merely directory and not mandatory. (Mukherjea and Pal, JJ.) BROJENDRA KUMAR V. BRIQUIS I.L.R. (1942) 2 Cal. 565=209 I.C. 138=16 R.C. 284=47 C.W N. 94=A.I.R. (1943) Cal. 332.

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——S. 8 (second)—Presentation of petition to Deputy Collector—Validity—Collector's duty to accept petition—Whether can be delegated.

A petition by a Zemindar for the sale of patni presented under S. 8 (second) of the Patni Regulation need not be received by the Collector himself. It is within the competence of the Collector to delegate his duty of receiving such petition to a Senior Deputy Collector and when the petition is presented to such Deputy Collector, it is presented to the Collector within the meaning of the above provision. (Nasim Ali and Pal JI.) DHARRINDRA KRISHNA MUKHERJI V. NIHAR GANGULY 208 I C 378=16 R C. 181=76 C.L. J. 138=47 C.W N. 156=A.I.R. 1943 Cal. 266.

Neither the area nor the hastabud can be regarded as the true or only criterion for deciding the question whether a village is to be regarded as the principal village within the meaning of S. 8, second, of the Patui Regulation. The importance of the village is the guiding test. (Mitter and Khundkar, JJ.) KAMALARANJAN ROY v. BHOLANATH. 45 C.W.N. 727.

——S. 8, (second)—Publication of mofussil notices—Publication at cutchery or at principal village—Zemindar, if has option—Cutchery of patnidar—If includes that of dar-patnidar.

The manner in which Mosussil notices are to be served is regulated by the provisions of S. 8 (second) of the Patni Regulation. This part of the Regulation does not authorise two alternative methods of service to be chosen at the option of the zemindar. If there is a cutchery in existence which satisfies the description given therein, the publication must be at that cutchery. If there is no cutchery on the land of the defaulter, that is to say, a cutchery of the patnidar on the land of the patni taluk, it is then and then only that it would be open to the zemindar to publish at the principal town or village of patni mahal. The cutchery on the land of the defaulter, that is to say, on the land of the patni taluk must be a cutchery of the patnidar. If there be no cutchery of the patnidar on the land of the patni, but there are cutcheries of the darpatnidars or subordinate tenure-holders or others holding under the patnidar, the zemindar is not required to effect the Mofussil service on such curcheries. (Mitter and Khundkar. JJ.) KAMALA-RANJAN ROY v. BHOLA NATH. 45 C.W.N. 727.

—S. 8 (second)—Service of notice—Statutory mode of proof not followed—Sale, whether hable to be reversed.

The requirements of S. 8 (second) of the Patni Regulation as to the procuration of receipt, attestation and certificate are merely directory. The service of the notice can be proved by evidence other than what is required by the section to be proved by the peon. When the service (a) is either not controverted or (b) though controverted, is proved to the satisfaction of the court by the evidence on record, the defect or irregularity in or the total absence of the statutory evidence (i.e.), receipt, signature of attesting witnesses or certificate of the Munsif, etc., will be irrelevant considerations and will not in the least affect the sale. (Nasim Ali and Pal, JJ.) DHARENDRA KRISHNA MUKHERJEE v. NIHAR GANGULY. 208

BENGAL PATNI REGULN. (VIII OF 1819). I.C. 378=16 R.C. 181=76 C.L.J. 138=47 C.W. N. 156=A.I.R. 1943 Cal. 266.

amount in petition and notice—Validity of sale.

It is mandatory that the balance actually due to the Zemindar from the patnidar should be specified in the petition under S.8 (second) of the Patni Regulation. Any excess specification in the petition and in the notices that require to be served, subject to the maxim "de minimis non curat lex" will vitiate the sale. The fact that the excess amount was reduced on the date of the sale would be immaterial. (Nasim Ali and Pal, II) DHARENDRA KRISHNA MUKHERJI v NIHAR GANGULY 208 I.C. 378=16 R.C. 181=76 C.L.J. 138=47 C.W.N. 156=A.I.R. 1943 Cal. 266.

S. 11-Sale of patni tenure—Liability of purchaser for rent for previous period.

When a patni tenure is properly and validly sold under the provisions of Regulation VIII of 1819 for arrears of rent due in respect of the same, the purchaser cannot be saddled with the rent charge for any previous period. He takes it free and clear of any such obligation and the utmost that can be said is that, liability for rent for any previous period is transferred to the surplus sale proceeds. (Derbyshire, C.J. and Mukherjea, J.) Gouri Sankar v. Jatindra Nath. 199 I.C. 893=14 R.C. 659=A.I.R. 1941 Cal. 255.

Annulment of subordinate howla.

Per Pal, J.—The Putni Regulation does not contemplate sale of portions of a putni tenure and consequently if it be possible for the putnidar to get his putni sub-divided into several putni tenures, each having the incidents of an entire putni, yet keeping the integrity of the original putni unaffected so far as it stood in relation to subordinate howla, then the infirmity of the subordinate howla, may infinitely be increased by acts to which the howladar is no party. This will be opposed to all principles and such unreasonable departure is not at all necessary to safeguard the interest of the landlords. (Akram and Pal, II.) Luffur Rahman v. Jogjiban Ghosh. 75 C.L.J. 471.

——S. 11 (2)—Applicability—If confined to sale under Regulation.

There is no doubt that clause (2) of S. 11 was intended to apply only to a sale under the regulation. (Fasl Ali, C. J., Manohor Lal and Chatterji, JJ.) Pirthyl Chand Lal v. Prabhaba'il Jl. 23 Pat. 31=212 I.C. 504=16 R.P. 299=10 B.R. 525=1944 P.W.N. 37=A.I.R. 1944 Pat. 41 (F.B.).

\_\_\_\_\_S. 11, Cl. (2)—Cancellation of intermediate tenure—Requirements.

In order that the intermediate tenure may stand cancelled the requirements of S. 11, C1. (2) of the Putni Regulation are the following—(1) The putni taluk must be sold (a) under the rules of the Regulation, (b) for its own arrears. (2) The intermediate tenure must originate with the holder of the putni that is sold. (3) The putnidar who created the intermediate tenure had no special authority to grant such tenure from his superior landlord. The last few lines of

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the clause which purport to contain the reason for the cancellation of the intermediate tenure make it clear that the tenure which is thus liable to be cancelled must be the one carved out of the interest of the defaulting putnidar and consequently must necessarily be the one created after the putni that is sold. (Akram and Pal, II) LUTFUR RAHMAN v. JOGJIBAN GHOSH. 75 C.L.J. 471.

A darpatni is not automatically annulled by the purchase of the patni by the zamindar in execution of a sent-decree.

It can be annulled by the zamindar doing some unequivocal act showing his intention to annul it. Notice to the darpatnidar is not a condition precedent to the annulment. But failure to give notice will give the darpatnidar an equitable right to re-imbursement for sums spent by him subsequent to and in ignorance of the annulment.

Service of notice of annulment need not be in the manner provided by C.P.Code. It is enough if the notice is received.

The right to annul is not merely personal to the zamindar and can be exercised either by a vendee or by a lessee. The right has to be exercised within a reasonable time. Ordinarily such a time would be before the zamindar parts with his interest. Where the zamindar has taken proceedings to annul a darpatni under S 167 of the B.T. Act, but they have been rendered ineffective through the laziness or dishonesty of some Government Officer, it is unrea enable to hold that the rights of a person with whom the patni has been settled should be adversely affected thereby. In such a case, it is open to the latter to annul the dirpatni within a reasonable time from a decree declaring the subsistence of the darpatni. (Henderson, J.) ANADI NATH v. ANNAPURNA DEBI. 49 C.W N. 271 = A.I. R. 1945 Cal. 306.

S. 13-Darpatnidar heliing possession of patni as girbidar-It tenant of zemindar.

There is nothing in the provisions of the Patni Regulation which turns a darpatni I ir holding possession of the patni as a girled ir into a tenant of a zemindar. S. 13 gives the girled ir rights against the patnidar, but does not give the zemindar any rights against the dirputnidar, (Hondrson, I.; UDAY CHAND MAHTAB P. BIBHUTI BHUSAN DAS. IL.R. (1941) 2 Cal. 249.

-S. 14-Reversal of pathi sale Benamidar's right to maintain suit.

An ostensible purchaser of a patni who may be a benamidar for somehody else is not incompetent to maintain a suit for setting aside the sale under S. 14 of the Patni Regulation. (Mukherjea and Pal, II.) BROJENDRA KUMAR V. BILGUIS. I. LR (1942) 2 Cal. 565=209 I.C. 138 = 16 R.C. 284=47 C.W.N. 94=A.I.R. 1943 Cal. 332.

S. 14—Reversal of pathi sale—Indomnity to purchaser—Right to collection charges against Zemindar.

On reversal of a patni sale under S. 14 of the holder of the putnithat is sold. (3) The putnidar who created the intermediate tenure had no special authority to grant such tenure from his superior landlord. The last few lines of J.) Bijoy Chard v. Official Truster Cy

BENGAL PATNI REGULN. (VIII OF 1819)
BENGAL, I.L.R. (1941) 1 Cal. 90=195 I.C.
423=14 R.C. 96=45 C.W.N. 90=A.I.R. 1941
Cal. 337.

S. 14—Reversal of patni sale—Indemnity to purchaser—Right to interest on purchase-money deposited and on rent paid to Zamindar—Purchaser, if bound to apply to Collector for refund of surplus sale proceeds—Or to show that collections made by him fall short of amount of rent paid to zemindar.

On the reversal of a pathi sale under S. 14 of Regulation VIII of 1819, the auction-purchaser is entitled to apply to the Court which set aside the sale for a decree against the zamindar for the purchase-money deposited by him in the collectorate and for the amount of rent paid by him to the zimindar between the date from which the sale took effect and the date of its reversal together with interest at a reasonable rate from the date of payment till repayment. The auction-purchaser is not bound to apply to the Collector for refund of the surplus sale proceeds. The zamindar should move the Court for an order requiring the Collector to send the money to that Court and the Court should adjust the amount sent towards the decree against the zamindar. Further, the auction purchaser is not bound to show that the collections, less the collecting charges, made by him fall short of the amount of rent which he paid to the zamindar and claim only the difference between the two as the amount of his loss. For, the legal effect of the decree reversing the sale is as if the sale had never been held and any retention by the zamindar of the amount of rent paid to him is itself a loss to the auction-purchaser, such retention being another's the auction purchaser's money. (Mitter and Akram, JI) BIJOY (HAND v. OFFICIAL TRUSTEE OF BENGAL, I.L.R. (1941) 1 Cal. 90=195 I.C. 423=14 R.C. 96=45 C.W.N. 90=A.I.R. 1941 Cal. 337.

S. 14—Reversal of patni sale—Rent for period between date of sale and its reversal—

Liability of painidar.

The legal effect of a decree reversing a patni sale is as if the sale had never been held. It is he and he only who is liable to pay patni rent to the zamindar for the period between the date from which the sale took effect and the date of its reversal. (Mitter and Akram, JJ.) BIJOY CHAND v. OFFICIAL TRUSTEE OF BENGAL. I.L.R (1941) 1 Cal. 90=195 I C. 423=14 R.C. 96=45 C.W. N. 90=A.I.R. 1941 Cal. 337.

-S. 14-A-Locus standi to apply - Hindu reversioner.

A reversionary heir to the estate of a Hindu is competent to make an application for setting aside a patni sale under S. 14-A of the Patni Regulation as a person holding an interest in the patni by virtue of a title acquired prior to the sale although he cannot be regarded as the defaulting tenure-holder within the meaning of this section. (Mukherjea and Biswas JJ.) ABDUL AWAL v. UDAY CHANDRA DAS. 200 I.C. 480=15 R.C. 49 = 45 C.W.N 998=74 C.L.J. 176=A.I.R. 1942 Cal. 167.

—S 15 (2)—Proclamation issued under— Effect of—Tenures created prior to creation of patni—If affected by patni sale.

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It is well established that a purchaser at a paini sale gets the paini as it existed at the time of its creation and that tenures created prior to the creation of that paini are not affected by the sale. The proclamation issued under S. 15 (2) of the Paini Sale Law declares nothing more than this and it cannot be said that, merely because a proclamation was issued and steps were taken to give effect to the proclamation the owners of tenures created before the paini were dispossessed. (Edgley and Sen JI) USHA PRAVA DE V. HRIDAY BASHINI SADHU. ILR (1943) 2 Cal. 436=216 I.C. 48=46 Cr. L.J. 138=17 R.C. 96 =A.I.R. 1944 Cal. 389.

S. 17 (3)—Suit for balance due after sale— If maintainable.

The Patni Regulation does not expressly or by necessary implication forbid the institution of a suit for realisation of the balance of any demand for recovery of which a sale was held under the Regulation. The utmost that can be said is that there is no provision in the Regulation itself expressly dealing with the situation which arises when the ale proceeds fall short of the demand. S. 17 (3) of the Regulation obviously has got no application to such cases and as no fresh sale of the tenure can be held for the realisation of the balance, the only remedy of the zamindar must be to enforce his contractual rights against the tenant. As these rights have not been in any way affected or taken away by the statute, they must be deemed to exist. (Mukherjea and Ellis, Jl.) Usha Prova De v. Sachindra Kumar. A.I.R. 1945 Cal. 216.

BENGAL PERMANENT SETTLEMENT REGULATION (I OF 1793) Art. 6—Effect of —Rights of zamindar, if affected by Bihar Agricultural Income-tax Act.

Regulation I of 1793 contains no assurance or undertaking to the zamindar that he would for ever thereafter be immune from taxation such as that imposed by the Bihar Agricultural Incometax Act. The Regulation merely contains an assurance that the jama or land revenue payable by the zamindar would never be increased. What was to be fixed for ever was the annual payment which the zamindar had undertaken to pay as a condition of holding their estates. The Zamindars were recognised as proprietors and payment which was a condition such recognition was declared to be for ever fixed. The effect of the Regulation is that re-assessment and re-settle-ment of the lands should be for ever barred and the Government would no longer be entitled to increase the jama by reason of an increase in the zamindar's income. The Bihar Agricultural Income Tax Act does not in any way purport to affect, vary or repeal any proviway purport to all the control of the regulation (Harries, C.J., Fazl Ali and Manohar I.all, JJ) JHALAK PRASAD SINGH v. PROVINCE OF BIHAR, 20 Pat. 573=194 I.C. 663 = 14 R P. 17=7 B R. 818=1941 I.T.R. 386=4 F. L.J (H C.) 178=1941 P.W.N. 689 (S B)=22 Pat. L.T. 863=A.I.R. 1941 Pat. 306 (S.B.).

BENGAL PUBLIC DEMANDS RE-COVERY ACT (III OF 1913), Ss. 3 (6), 5 and 6—Amount fayable by patnidar directly to Collector on account of landlord's revenue if revenue or rent—Construction of paini fatta.

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A patni patta expressly stated the total patni jama and provided that out of it the patnidar should pay a certain sum direct to the Collector on behalf of the landlord on account of revenue and pay the balance to the landlord direct. It was further provided that in case of default on the part of the patnidar to pay the Government revenue as stipulated and consequent sale of the estate for arrears, the patnidar would be liable in damages to the landlord. As regards the net patni rent payable directly to the landlord, provision was made for its payment in instalments and for the payment of interest on arrears in default of payment by the due date.

Held, that on a true construction of the pathi patta, the amount which the pathidar bound himself to pay direct to the Collector on behalf of the landlord on account of revenue was revenue and not rent that the arrear of that amount was not, therefore a public demand although the estate was managed by the Court of Wards on behalf of the landlord, and that consequently no certificate could be filed under S. 6 of the Public Demands Recovery Act in respect thereof. (Biswas, J.) RAM KRISHNA BHATTACHARYYA 7. BADRI NARAYAN. 210 I.C. 154=16 R.C. 405=47 C.W.N. 640=A.I.R. 1943 C 1. 531.

——Ss. 4 and 6 - Certificate against dead man - Effect of Substitution of heirs - Permissibility.

A certificate against a dead man is a mere nullity. As the Act makes no provision for the substitution or addition of his heirs as certificate debtors, the only course open to the certificate officer was to make a new certificate before the new rule which was published in the Calcutta Gazette on 21st May, 1935, came into force. (Henderson, J.) NALINI KANTA ROY v. SURESH CHANGRAVERTY I.L.R. (1941) 1 Cal 63 = 45 C.W.N. 632=197 I C. 166=14 R.C. 325=73 C.L.J. 45=A.I.R. 1941 Cal 329.

S. 4—Certificate in respect of arrears of incometax—Name of certificate-holder given as "Secretary of State on behalf of Income tax Officer"—Period for which demand is due not mentioned—Validity of certificate.

No objection can be taken to the validity of a certificate issued in respect of arrears of income-tax on the ground that in col. 2 of the certificate the name of the certificate-holder is entered as "Secretary of State on behalf of Income-tax officer, Howrah". The addition of the words "on behalf of Income-tax officer. Howrah" does not in any way alter or qualify the name of the certificate-holder which is given as the Secretary of State. Nor can an objection be taken to its validity on the ground that no period for which the demand is due is mentioned in Col. 4. Income-tax is calculated and assessed by reference to the income of the assessee for a given year, but it is due when demand is made under Ss. 29 and 45 of the Income tax Act. It then becomes a debt due to the Crown, but not for any particular period. (Sir John Beaumont.) DOORGA PRASAD v. SECRETARY OF STATE. 49 C.W.N. 334 =1945 I.T.R. 285=80 C.L.J 13=26 P.L.T. 149= 219 I.C. 417=11 B.R. 456=A.I.R. 1945 P.C. 62 (P.C.).

Ss. 4 and 6—Certificate forwarded to Collector under S. 46 (2) of Income-tax Act—Certificate by certificate officer in respect thereof—If issued under S. 4 or 6.

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A certificate specifying the amount of arrears of income-tax payable by an assessive, when forwarded to the Collector under S. 46 (2) of the Income-tax Act, has the effect of making the claim against the assessee a public demand payable to the Collector. Accordingly a certificate issued by the certificate officer in respect thereof is under S. 4 and not under S. 6 of the Fublic Demands Recovery Act. (Sir John Beaumint.) DOORGA PRASAD 7. SECRETARY OF STATE. 49 C.W. N. 334=1945 ITR. 285=80 C.L.J. 13=26 P.L.T. 149=219 I.C. 417=11 B.R. 456 4 A.I.R. 1945 P.C. 62 (P.C.).

——Ss. 4 and 5—Certificates signed without filling in blanks—If legal—Sale on basis of such certificate—Validity. Suphir Chandra Charrayartir v. Suphanshu Kumar, [see Q D. 1936. 240 Vol. I Col. 3234.]. 191 I.C 266=-13 R.C. 223.

- Ss. 4 and 6-Filing of certificate-Proof.

Where a certificate is stated on the face of it to have been filed in the office of the certificate officer, the particulars of it are registered under Rule 70 and it is produced by that office, it is sufficiently proved that the certificate officer caused the certificate to be filed in his office, and it is not necessary to have recourse to the presumption arising under S. 114, Illustration (c) of the Evidence Act. (Sir John Seaumont.) DOORGA PR 88 40 pt. SECRETARY OF STATE. 49 C W.N. 334 1945 I.T.R. 285=80 C.L.J. 13:26 P.L.T. 149 219 I.C. 417=11 B.R. 456=A I.R. 1945 P.C. 62 (P.C.).—Ss. 5 and 6 Jurisdiction of certificate officer—Property situate outside his district. SECRETARY OF STATE v. Syeb Saduk Riza. [see O.D. 1936—40 Vol.] Col. 370]—193 I.C. 807=13 R.C. 453=A.I.R. 1941 Cal. 167.

——Ss. 7 and 52—Scope—Certificate against dead man—No order of substitution and no notice sent to heirs—Helect—Heirs—If bound.

S. 52 of the Bengal Public Demands Recovery Act applies only where a certificate debtor dies after the issue of the certificate and before it is fully satisfied. It does not apply to a case where the original certificate itself is issued against a dead man. The entire proceedings based upon the certificate so issued against a dead person are wholly inoperative to affect the heirs of the deceased, when no order for substitution of the heirs was ever passed in the proceedings and no fresh notice sent as is provided under S. 7 of the Act. Where the debtor dies after the proceedings are properly started against him, but no notice served on the heirs or steps taken under S. 50 to appoint a guardian for a minor beir, the heirs cannot be said to be on record and the proceedings and sale will not bind the heirs and their shares will not be affected by the sa'c. (Manchor Lall, J.) NISAR MAHOMED KHAN C. TANQUIR AHMED. 194 I.C. 479-13 R.P. 729-17 B R. 782 =23 Pat.L.T. 195=A.I.R. 1941 Pat. 529.

S. 7—Scope—Proceedings for arrears— Separate accounts opened in respect of some cosharers after period of arrears and payment of quota by them—Proceedings against all—If bad.

Where certificate proceedings have been started to realise dues from all the co-sharers of an estate or village, the fact that separate accounts have been opened with regard to some of the co-sharers after the period for which the arrears are due would not make the proceedings without jurisdiction though they may have paid their own

quota. Such payment does not do away with the liability of the entire estate to pay the arrears due from the whole estate. (Manohar Lal, J.) NISAR MAHOMED KHAN v. TANQUIR AHMAD. 194 I.C. 479=13 R P. 729=7 B.R. 782=23 Pat.L.T. 195 =A.I.R. 1941 Pat. 529.

-S.8-Order prohibiting tenants from paying rent and for sale of property outside District - Jurisdiction of cetificate officer. Secretary of STATE v. SYED SADEK REZA. [see O.D. 1936—'40 Vol I. Col. 379.] 193 I.C. 807=13 R.C. 453=A.I.R. 1941 Cal. 167.

-S. 15-Certificate Officer accepting bid obtained by peon-Sale, if valid.

There is nothing in S. 15 of the Public Demand Recovery Act to suggest that the certificate officer must himself do everything is connection with the sale and not have the work carried out by his Nazir or other officers. The mere fact that the certificate officer directed a peon to go to the Mofussil and obtain bids and accepted a bid so obtained, does not affect the validity of the sale. (Henderson, J.) NAGENDRA NATH ROY v. DINENDRA NATH ROY. 45 C.W.N. 193.

-S. 20—Certificate sale for arrears of rent— Representation of tenancy by some of tenants-Applicability of principle—B. T. Act, S. 146-A.

Although S. 146-A of the Bengal Tenancy Act may not in terms apply to a certificate sale for arrears of rent, the principle of representation of the tenancy by some of the tenants embodied therein will. The certificate procedure is no doubt a summary mode for recovery of arrears of rent, but S. 20 (3) of the Public Demands Recovery Act makes it clear that the certificate holder may yet bring the tenure or holding to sale. He can of course, do so by joining as certificate-debtors all the persons interested in the tenancy but even where he has not done so, he can succeed by showing that the persons against whom the proceedings are taken also represent the interest of those who have been left out, in other words, that the persons named in the certificate as debtors do in fact represent the tenancy in its entirety. Whether one or some of the co-sharer tenants can be regarded as a representative of the whole body of co-tenants is essentially a question of fact which has got to be determined on evidence like any other fact, and where as here it has to be decided de hors the provisions of S. 146 A of the Bengal Tenancy Act, the tests laid down therein may only serve as a guide so far as they go. It cannot be said that consistently with the provisions of this section, there may not still be other conditions in which the presence of even one or some of the tenants as defendants will be as effective as that of all. (Biswas, J.) NURJAN BIBI v. SAYEMALI MULLA. 45 C.W.N. 460.

-S. 20-Representation of tenancy-Bengal Tenancy Act, S. 146-A.

S. 146 A of the Bengal Tenancy Act does not codify the general law regarding representation and does not apply to certificate sales. The question whether the defendants represented the entire interests of the tenants for the purposes of the Public Demands Recovery Act must be decided under the general law without reference to that section. It does not follow from

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the fact that the defendants are the only persons whose names appear in the rent roll that they represent the entire tenancy right. Again the mere fact that one of the defendants alone paid the rent would not make him the representative of all the tenants for all purposes. (Sen, J.) FAZALAR RAHIM v. KHORSED ALAM, I.L.R. (1941) 1 Cal. 339=45 C.W N. 277=199 I.C. 403=14 R.C. 542=A.I.R. 1941 Cal. 333.

--- S. 20 -- Sale of property for amount of certiscate and also for subsequent arrears—Legality of sale.

Under the Public Demands Recovery Act, property can be sold only for the sum due under the certificate. A sale of the property not only for the amount of the certificate but also for the arrears of subsequent years for which no certificate had been issued is illegal. (Sen. J.) FAZALAR RAHIM v. KHORSED ALAM. I.L.R. (1941) 1 Cal. 339=45 C.W N. 277=199 I.C. 403 =14 R.C. 542=A.I.R. 1941 Cal. 333.

S. 20 (3)—Applicability—Certificate sale at instance of Receiver appointed by Collector— Estate attached by Collector under S. 99 of Cess

Act.
To bring a case within the purview of S. 20 (3) of the Public Demands Recovery Act, it is necessary that the certificate in execution of which the sale took place must be obtained by the landlord (i.e.) either by the sole landlord or by the entire body of landlords. Where an estate was attached under S. 99 of the Cess Act by the Collector who appointed a Receiver and a holding was put up for sale for arrears of rent on a certificate issued on the requisition of the Receiver.

Held: that the provisions of S. 20 (3) of the Public Demands Recovery Act were not attracted to the case as neither the Collector nor the Receiver appointed by him could be said to be the land lord with regard to the holding which was sold, and that consequently the purchaser had no right to annul the incumbrances. (Mukherjea and Akram, JJ.) FAYEZUDDIN AHMAD v. NATABAR CHANDRA SAHA. 218 I.C 136=18 R.C. 1=48 C. W.N. 685=A.I.R. 1944 Cal. 445.

S. 20 (3)—Title of purchaser—Interest of tenant who is neither certificate debtor nor represented by him-If passes.

S. 20 (3) of the Public Demands Recovery Act pre-supposes that there has been a sale of the entire interest of all the tenants of the tenure or holding. It does not and cannot mean that the interest of a tenant of the holding or tenure who is neither a certificate debtor nor represented by a certificate debtor can be sold in execution of a certificate. (Sen, J.) FAZALAR RAHIM V. KHOR-SED ALAM. I.L.R. (1941) 1 Cal. 339=199 I.C. 403=14 R.C. 542=45 C.W.N. 277=A.I.R. 1941 Cal. 333.

S. 29-Scope-Suit to declare that sale did not affect interests of plaintiff—Bar of.

S. 29 of the Bengal Public Demands Recovery Act applies only to the case of a proper certificate, the section assumes that the certificate was a proper certificate. But when there was no proper certificate at all, having been issued against a dead man, the heirs to whom no notice was sent and who were not at all on the record are not debarred from bringing a suit to have

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it declared that the sale did not affect their interests in the property. (Manohar Lall, J.) NISAR MAHOMED KHAN V. TANQUIR AHMAD. 194 I.C. 479=23 Pat. L.T. 195=13 R.P. 729=7 B.R. 782=A.I.R 1941 Pat. 529.

——S. 34—Point taken in petition under S. 9 but not pressed—If can be raised before Civil Court.

S. 34 of the Public Demands Recovery Act does not debar the plaintiff from raising before the Civil Court a point mentioned in his petition under S. 9 of the Act but not pressed by him. (Biswas, J.) RAM KRISHNA BHATTACHARYYA v. BADRI NARAYAN. 47 C.W.N. 640=210 I.C. 154=15 R.C. 405=A.I.R. 1943 Cal 531.

——S. 36—Parties to suit—Secretary of State—If necessary party.

The Secretary of State, if he is the certificate-holder, is a necessary party to a suit under S. 36 of the Public Demands Recovery Act for setting aside a sale. (Nasim Ali and Blank, II.) BAIKUNTHA CHANDRA DAS v. SURESH CHANDRA DUTTA. 46 C.W.N. 975.

—S. 36—Parties to suit—Secretary of State—If necessary party—Limitation for suit—Exclusion of period of notice—C. P. Code, S. 80.

Where the Secretary of State is a certificate-holder he (now the Province of Bengal) is a necessary party to a suit brought under S. 36 of the Public Demands Recovery Act to set aside certificate sale. It follows, therefore, that the period of the notice served on the Secretary of State under S. 80, C. P. Code, namely two months, can be excluded in computing the period of limitation for the suit. (Mitter and Khundkar, JJ.) Gaibanda Loan Office v. Salyadunnessa Khatun. 46 C.W.N. 967=I.L.R. (1943) 1 Cal. 22=205 I.C. 523=15 R.C. 639=76 C.L.J. 17=A.I.R. 1942 Cal. 114.

#### -S. 36 Proviso-Suit under-Limitation.

A suit instituted more than one year from the date of the delivery of possession of the property to the purchaser is barred under the proviso to S. 36 of the Public Demands Recovery Act, unless fraud is established under S. 18 of the Limitation Act. (Edgley, J.) KSHEMADA KINKAR ROY v. SHYAMA SUNDARI BEWA. 76 C L.J. 323.

—S. 37—Adjustment of certificate debt-Question relating to—Jurisdiction of Civil Court. Secretary of State v. Syed Sadek Reza. [see Q.D. 1936—'40 Vol. I Col. 381] 193 I.C. 807=13 R.C. 453=A.I.B. 1941 Cal. 167.

——Ss. 37 and 35—Question if certificate was "duly filed"—Jurisdiction of Civil Court. Secretary of State v. Syed Sadek Reza. [see Q.D. 1936—'40 Vol. I Col. 381.] 193 I.C. 807—13 R.C. 453—A.I.R. 1941 Cal. 167.

When a certificate officer is satisfied that the certificate-debtor is a minor, S. 41 of the Public Demands Recovery Act requires that a guardian should be appointed, and it makes it incumbent upon the certificate officer to see that the minor is thereafter represented by that guardian. Where the proceedings which led up to the making of a certificate and the certificate

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itself are defective by reason of the fact that a minor whose interests have been affected has not been properly represented by a guardian, it is open to the minor to challenge the validity of the certificate in so far as it affects him. A suit brought for such a purpose is not barried by S. 37 of the Act. (Khundkar and Bistuas, ff.) MANINDRA KUMAR DE v. SATISH CHANDRA DE. 49 C.W.N. 437.

——S. 37—Scope—Suit to set aside Sale on ground other than fraud—jurisdiction of Civil Court—Sale held on date different from that mentioned in sale proclamation—Suit to set aside Maintainability. Tikendrajii Ghose v. Mritun-joy Mondal (Jaday Mondal) [see Q.D. 1936—40 Vol. I, Col. 3235.] 13 R.C. 272—191 I.C. 571.

——S. 46—Applicability—Question between auction purchaser and representatives of certificate debtor.

S. 46 of the Bengal Public Demands Recovery Act is no bar to a suit in which the question is between the auction-purchaser and the representatives of the certificate debtor. (Manohar Lall, J.) NISAR MAHOMED KHAN V. TANQUIR AHMAD. 194 I.C. 479=23 Fat. L.T. 195=13 R.P. 729=7. B.R. 782=A.I.R. 1941 Pat. 529.

BENGAL PUBLIC GAMBLING ACT (II OF 1867), S. 3-Conviction under-Proof required.

A conviction under S. 3 of the Bengal Act (II of 1867) cannot be sustained in the absence of a finding that the premises in question were being used as a common gaming house within the meaning of the definition in S. I. In order to establish this point, the prosecution would have to prove that the instruments of gaming found in the place were kept or used for the profit of the lessee of the premises. (Henderson, J.) Abbul v. Emperor. 202 I.C. 677-43 Cr. L.J. 887-15. R. C. 392-AI.R. 1943 Cal. 121.

Ss. 5 and 6—Expression—"Common gaming house" not used in search warrant—prosecution, if entitled to benefit of S. 6. EMPEROR v. Gobinda Chandra Das. [sec Q.D. 1936—'40 Vol. I, Col. 3235.] 13 R.C. 304—192 I.C. 182—42 Cr.L.J. 253.

S. 5—Search warrant executed by different officer—Legality of search. Emperor 2. Gobinda Chandra Das. [see Q.D. 1936—'40 Vol. I. Col. 3235.] 13 R.C. 304—192 I.C. 182—42 Cr. L.J. 253.

Ss. 5 and 6—Warrant stating that house is used for gambling—Recovery of instruments of gaming—Presumption if arises.

# BENGAL RATIONING ORDER, Cls. 67&9. | BEN. REV. COMMRS. REGULN. (1829)

A warrant issued under S. 5 of the Bengal Public Gambling Act must indicate that the Magistrate has reason to believe that the house which he directs to be searched is used as a commongaming-house, or, in other words, as a house which is used by its owner or occupier for the purpose of making profit out of gambling transactions which take place therein. A warrant which merely states that the Magistrate has reason to believe that the house is used for certain gambling is not legal, and if the house is searched under such a warrant, the presumption which is raised under S. 6 of the Act cannot arise from the instruments of gaming found therein. In such a case, it must be proved by independent evidence that the owner or occupier of the house derived a profit from the use of these instruments of gaming. (Edgley. J.) JITENDRA BHUBAN Das v. EMPEROR. I.L R. (1941) 1 Cal 58=195 I.C. 7=14 R C. 39=42 Cr. L.J. 643=45 C.W.N 24=A.I.R. 1941 Cal. 413.

-S. 6-Instruments of gaming-Evidentiary value.

S. 6 of the Bengal Public gambling Act merely provides that the finding of the instruments of the gaming shall be evidence that the premises used is a common gaming house. It is for the Magistrate to say whether he is prepared to come to such a finding or not. (Henderson, I.)
ABDUL v. EMPEROR. 202 I.C. 677=43 Cr. L.J.
887=15 R.C. 392=A.I.R. 1943 Cal. 121.

-S.6-Race-books found in house-Eviden-

tiary value.

Under S. 6 of the Public Gambling Act, the fact that certain race-books and betting slips were found in the house might be treated as evidence. But this section would not make the evidence on this point conclusive. Edgely, J.)
BENOY KRISHNA ROY v. EMPEROR. 192 I.C. 736
=13 R.C. 344=42 Cr.L.J. 319=A.I.R. 1941 Cal. 32.

-S.6–When can be invoked.

Before S. 6 of the Bengal Public Gambling Act can be invoked in aid of the prosecution, it must be established that before the search the Police Officer had reason to believe that the premises in question were used as a common gaming house. Evidence to the effect that he had reason to believe that gambling was going on there is not sufficient. (*lienderson, J.*) ABDUL v. EMPEROR. 202 I.C. 677=43 Cr. L.J. 887=15 R.C. 392=A. I.R. 1943 Cal. 121.

BENGAL RATIONING ORDER, Cls 6, 7 and 9-Scope--If subject to R. 4 of Def. of India Rules. See CALCUTTA MUNICIPAL ACT, SS. 424 AND 488. 49 C. W.N. 704.

BENGAL RENT ACT (X OF 1859), S.6-Part of land held by cultivation and part for residential purposes-Raiyat, if can acquire occupancy rights.

Under S. 6 of the Rent Act, a raiyat holding, by cultivation at least a portion of the land comprised in the tenancy for a period of 12 years can acquire occupancy rights therein. The tenancy being one, the landlord cannot split it up and say that because a portion of the tenancy land is being used for another purpose, the tenancy

ceases to be governed by the Act. (Akram and Pal, JJ.) RAJKUMARI BAISHNABI v. MIRJA SAMSUDDIN. 200 I.C. 314=14 R.C. 702=75 C.L. J. 29 SUDDIN. 200 I.C. 314=14 R.C. 702=75 C =46 C.W.N. 277=A.I.R. 1942 Cal. 330.

-S 23 (5)—Suit to eject raiyat on termination of lease-Jurisdiction of Civil Court.

A suit to eject a raiyat on the termination of his lease is not within the terms of S. 23(5) of the Bengal Rent Act, and the Civil Court has jurisdiction to try such a suit. (Henderson, J.) RANA PARAKRAM JUNG BAHADUR v. PRASADI RAM SHAHA. I.L.R (1944) 1 Cal. 434=218 I. C. 186 =18 R.C. 9=A.I.R. 1945 Cal. 23,

-Ss. 160 and 151-Order of Deputy Collector in execution proceedings-Appeal and second

appeal.

In S. 160 of the Rent Act, the word "suit" does not include execution proceedings. No appeal or second appeal lies from an order passed by a Deputy Collector in those proceedings. (Henderson, J.) SAKKAL SARDAR v. ISWAR DAS THIRANI. I.L.R. (1941) 2 Cal. 366=4 F.L.J. (H C. 405=199 I.C. 740=14 R.C. 629=AI.R. 1942 Cal.

BENGAL RENT RECOVERY UNDER-TENURES ACT (VIII OF 1865), S. 16— BENGAL "Incumbrance which may have accrued thereon by any act of any holder, etc."—Meaning of—Under-rawat with occupancy right—If affected by sale for arrears of rent under Chota Nagpur Tenancy Act.

Although an under-raiyati interest is an incumbrance accrued on the holding by an act of the raiyat, the occupancy right which is acquired by the under-raisat by custom is not a creation of the raiyat. It is a creation of custom, and therefore of law, custom having the force of law. Hence the interest of an under-raiyat who acquires occupancy right by custom cannot be said to be an "incumbrance which may have accrued thereon by any act of any holder of the said under-tenure" within the meaning of S. 16 of the Bengal Rent Recovery (Under-Tenures) Act of 1865. The section does not therefore entitle the purchaser of an under-tenure to eject an occupancy raiyat in actual possession of the land in a holding which is sold for arrears of rent under S. 208 of Chota Nagpur Tenancy Act. Nor does the section entitle the purchaser of a raiyati holding to eject an under-raiyat having occupancy right in the land. (Fasl Ah and Chatterji, JJ.) GHASHI SAHU v. SHIB SAHU. 20 Pat. 870=199 I.C. 684=8 B.R. 603=1943 P.W. N. 39=14 R.P. 605=23 Pat.L.T. 540=A.I.R. 1942 Pat. 140.

BENGAL REVENUE COMMISSIONERS REGULATION (I OF 1829)—Revision— Powers of Bihar and Orissa Board of Revenue -Questions of fact-Interference-Grounds.

The Bihar and Orissa Board of Revenue has general powers of supervision and control and itcan set aside an order declared by law to be final if such orders had been made without jurisdiction. As a supervising Court the Board may interfere for the purpose of preventing gross abuse or gross injustice. Although the Board does not, as a matter of practice, often interfere on questions of fact, it cannot be said that it can

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in no circumstances interfere on questions of fact. (Middleton.) RAM KESHWAR SINGH v. DEOKI SINGH. (1941) P.W.N. 311=7 B.R. 634. BENGAL REVENUE FREE LANDS (NON-BADSHAHI GRANTS) REGULATION (XIX OF 1793), Ss. 7 and 8—Assessment of rent—Suit for—Damages for period prior to suit—If can be recovered. JUGAL CHARAN v. DEBENDRANATH. [see Q.D. 1936-'40] Vol. I Col. 3235.] 192 I.C. 518=13 R.C. 316.

——Ss. 7 and 8—Half of produce—Material time for assessing value. JUGAL CHARAN v. DEBENDRANATH. [see Q.D. 1936—'40 Vol. 1, Col. 3235]. 192 I.C. 518=13 R.C. 316.

——S. 9—Applicability—Lands held in assertion of lakniraj rights but no grant before or after 1790 proved—Assessment of rem—Civil suit—Maintainability. JUGAL CHARAN v. DEBENDRANATH. [see Q.D. 1936—'40 Vol. I, Col. 3236] 192 I.C. 518—13 R.C. 316.

—S. 9—Land held under invalid lakhiraj grant—Assessment of revenue—Civil suit—Maintainability—Bengal Regulation II of 18 9, S. 30—Bengal Act VII of 1862. JUGAL CHARAN V. DEBENDRNATH. [see Q.D. 1936—40 Vol. 1 Col. 3216. 192 I.C. 518=13 R C. 316.

—S. 10—No entry in Pergunah register relating to lakhiraj—Non-registration of grant—Presumption. Province of Bengal v. Mritun-Joy Roy. [see Q.D. 1936—'40 Vol. I, Col. 385.] 191 I.C. 499=13 R.C. 246.

BENGAL SAIR REGULATION (XXVII OF 1793) — Applicability — Itais and bazaars coming into existence subsequent to date of Regulation.

Bengal Sair Regulation of 1793 applies only to hats and bazaars existing at the date of that Regulation and not to those which came into existence afterwards. (*llarries, C.J. and Fasl Ali, J.*) MASOOD ALMAD v. BIKAN MAHURI. 190 I.C. 569=13 R.P. 208=7 B.R. 85=21 Pat. L.T. 808=1940 P.W.N. 798=A.I.R. 1941 Pat. 6.

BENGAL SANITARY DRAINAGE ACT (VIII OF 1895), S. 23—Proprietor under compromise with Government paying as drainage cess less sum than fixed by Collector—Rate fixed by Collector not altered—Amount recoverable from tenants.

Under S. 23 of the Bengal Sanitary Drainage Act the proprietor of an estate is entitled to recover from the subordinate tenants half the amount payable by him as drainage cess on the basis of the rate determined by the Collector under S. 21, although after such determination by the Collector there was a compromise between the Government and the proprietor and the Government accepted a less sum in full satisfaction of its claim, when there was no alteration of the rate determined by the Collector and the tenants who were not parties to the compromise were expressly excluded from it. (Mukherjea and Blank, JJ.) Khagendra Nath Banerjea v. Rani Harshamukhi Dassi. 46 C.W.N. 657=75 C.L.J. 381=205 I.C. 391=15 R.C. 614=A.I. R. 1943 Cal. 49.

BENGAL STATE PRISONERS REGULA-TION (III OF 1818)—Arrest under warrant— If by civil or criminal process.

### BENGAL TENANCY ACT, (VIII OF 1885).

An arrest under a warrant of commitment and Bengal State Prisoners Regulation (III of 1818) is arrest by a lawful process akin to criminal process. (Derbyshire C. I., Mitter and Khundkar, JJ.) NIAHARENDU DUTTA MAZUMBAR, In re. I.L.R. (1944) I Cal. 489 SB.)=47 C. W.N. 854 (S.B.)=AIR. 1945 Cal. 107.

Since S. 7-A, Bengal State Prisoners Regulation, was brought into existence in the discharge of the functions of the Crown in its relations with Indian States, it does not come into conflict with S. 2 of the Constitution Act. The effect of the introduction of the amendment of S. 7-A in the Pengal Regulation III of 1818 would hence be that its validity is not open to challenge. (Harris, C.J., Abdur Rahman and Manne, J.) Seth v. Emperor. 47 P.L.R. 265-A.I.R. 1945 Lah. 274 (P.B.).

General in Council to put ex-ruler of Indian State under restraint. See GOVERNMENT OF INDIA ACT, SS. 313 2 AND 3. A.I.R. 1915 Lah. 274 (F B.).

BENGAL SURVEY ACT (V OF 1875), S. 45— Discretion of Collector—Interference by Board.

The Board of Revenue will decline to interfere with the discretion of the Collector under S.45 of the Bengal Survey Act where he declines to take any action under that section on an application for demarcation of boundaries on the ground that, a dispute regarding possession is likely to arise. (Middleton) RAM RAN BIJOY PRASAD SINGH v. RAM PRASAD RAI. 10 B.R. 45.

BENGAL TENANCY ACT, (VIII OF 1885), Ss. 3 and 26-F-() ecupancy holding purchased before 1928-Purchase recognised by one of co-sharer landlords-Furchaser, if tenant-list right to preemption.

A purchaser of an occupancy holding before the amending Act of 1928 was passed whose purchase was recognised by one of the co-sharer landlords is a tenant within the definition in S. 3 of the B.T. Act. He has, therefore, a right of pre-emption under S. 26 F of that Act. (Henderson, J.) Altab. All v. Abdul. Majid. 45 C.W.N. 1068=198 I.C. 105=14 R.C. 435=75 C.L.J. 104=A.I.R. 1941 Cal. 716.

——S. 3 (6) and Sch. III, Art, 2—Purchaser of Zamindary together with arrears of rents due from subordinate tenure-holders—II hether can sue for such arrears as landlord.

A purchaser of a Zamindary together with all arrears of rents payable by subordinate tenure-holders, is entitled to sue for such arrears as a landlord and obtain a rent decree, although he was not the actual landlord during the period of accrual of the rents. He can, therefore, avail himself of the special period of limitation allowed by the B. T. Actto a landlord suing for arrears of rent. (Rau and Biswas, JJ.) RAMAPATI CHAITO-PADHYA v. ARABINDA KUMAR PAL. I.L.R. (1943) 1 Cal. 438=207 I.C. 44=16 R.C. 18=47 C.W.N. 366=A.I.R. 1943 Cal. 217.

S. 3 (17) proviso.—Retrospective effect.
The proviso to S. 3. (17) of the B.T. Act has no retrospective effect. (Henderson J.) Sudmindra-

CHANDRA SINGHA v. JADAV MARAK. 199 I.C. 745 =14 R.C. 627=A.I.R. 1941 Cal. 717.

S. 3 (17) proviso (i)—Application by land-lord under S. 26 F—Whether "a document executed by him."

An application for pre-emption under S. 26-F of the B.T. Act verified and signed by the land-lord is a document executed by him within the meaning of S. 3 (17) proviso (i) of the B.T. Act. The words "any document executed by him" in the provise do not mean "any document executed by him in favour of another." (Pal, J.) BASARADDI v. KROSHALI. I.L.R. (1943) 2 Cal. 348=211 I.C. 356=47 C.W.N. 387=77 C.L J. 53=16 R.C. 524 =A.I.R. 1944 Cal. 67.

-S. 3 (17), proviso -Scope and effect-Whe-

ther creates statutory tenancy.

The operation of S. 3, (17), proviso of the B. T. Act is this: As soon as it is proved that a person cultivates the land of another person under a system generally known as adhi, barga, or blag, prima facie he is not a tenant. He connot be held to be a tenant by any authority other than a Civil Court unless (i) he has been expressly admitted to be a tenant as in proviso (i); or (ii) he has been held to be a tenant by a Civil Court; or (iii) is (now) held to be a tenant by a Civil Court. In other words if the question whether or not such a person is a tenant arises in a Civil Court, that Court can decide the question on evidence before it without the requirement of prior admission as prescribed by proviso (i) or of prior decision of a Civil Court as prescribed by the first part of proviso (ii). This will be the effect of the words "or is" in proviso (ii). If, however, the question arises elsewhere, either before a Revenue Officer or in a Rent Court or before any authority other than a Civil Court, that authority is debarred from deciding the question unless either there is (1) the required prior admission contemplated by proviso (i), or, (2) the prior decision contemplated by the first part of proviso (n) or (3) any subsequent decision by a Civil Court while the matter is still pending before that authority. This last proposition again follows from the words "or is" in proviso (11). Accordingly the section does not intend to create any statutory tenaucy and it cannot be made to mean that as soon as either of the requirements of the proviso is present the person shall be held to be a tenant. The fulfilment of the requirements will only remove the bar to the establishment of the tenancy so that the authority may now proceed to determine the question on evidence. (Pal, J.) BASA-RADDI V. KROSHALI. 47 C.W.N. 387=77 C.L. J. 53 = I.L.R. (1943) 2 Cal. 348=211 I.C. 35b=16 R.C. 524=A.I.R. 1944 Cal. 67.

-----S. 4-'Under-raiyat'--Sub-lessee of home-stead land under occupancy raiyat-T. P. Act-If

applicable to sub-lease.

Where the lands included in the holding of an agricultural raiyat consist partly of agricultural and partly of homestead lands, and the portion which can be used as homestead is let out for residential purposes, the under-tenant will be an under-raiyat within the meaning of S. 4 of the B.T. Act, and the provisions of the T.P. Act will not be applicable to the sub-tenancy. (Mukherjea and Rexburgh, JJ.) ARUN KUMAR SINHA v.

BENGAL TENANCY ACT, (VIII OF 1885).

Durga Charan Basu. 196 I.C. 702=14 R.C. 273-273 C.L.J. 604=45 C.W.N. 805=A.I.R. 1941 Cal. 606.

-S.5-Status of tenant-Tenure-holder or

raiyat.

A kabuliyat executed prior to the Bengal Tenancy Act did not clearly indicate whether the tenant was to cultivate the land himself or lease it out to others. In one place it said that besides enjoying the land in raiyati right the tenant would have no right of sale or transfer without the consent of the landlord and there were further restrictions on his right to cut away and appropriate trees. The executants of the kabuliyat was Rajbansi by caste and Jotedar by profession. At the inception of the tenancy the area was considerably less than 100 bighas and the C.S. records described the tenant as settled raiyat.

Held, that in the circumstances of the case the presumption raised by the C.S. records in favour of the tenant was not rebutted and that he was a raiyat and not a tenure-holder. (Mukherjea, J.) SURENDRA MOHAN SARDAR v. NAGENDRA CHANDRA LAHIRI. 196 I.C. 121=14 R.C. 178=73 C.L.J. 73

=A.I.R. 1941 Cal. 480.

-S. 5 (5)—Tenant claiming to be raiyat—

Onus of proof.

Where the land demised has more than 100 bighas in area, the presumption arising under S. 5 of the B.T. Act is that the settlement holders are tenure-holders. The onus is on those who claim to be raivats to rebut the said presumption, and this they can do by a reference to the lease itself if the lease is of an unambiguous nature, but if it is ambiguous, the surrounding circumstances must be looked at. (R.C. Mitter and Latifur Rahman, JJ.) Syed Uddin Ahamed v. Hemanta Kumari Devi. 72 C.L.J. 402.

-S. 12—Transfer of permanent tenure—Liability of original tenant for subsequent rent.

As soon as a transfer of a permanent tenure is complete under S. 12 of the B.T. Act, the liability of the transferor, if he is the original tenant, to pay rent for the period subsequent to the transfer comes to an end in spite of his personal covenant. The rule of English Law that his lia-bility will only cease by reason of a privity of contract after the transferee is accepted a tenant by the lessor, is not applicable to such a case. The effect of a transfer being completed with all the formalities required by S. 12 of the Act is that there is a statutory obligation on the part of the lessor to recognise the transferee as a tenant. Of course if there is a contract between a landlord and a tenant that the transfer shall not be valid and binding unless security is given or some other condition is fulfilled, the original tenant might still remain liable for the rent. But when there is no such condition, the lessor has got no other option but to recognise the transferee. (Mukherjee and Blank, JJ.) SARADINDU MUKHER-JEE v. KUNJA KAMINI ROY. 202 I.C. 663=15 R C. 379=76 C.L. J. 328=46 C.W.N. 798=A.I.R 1942 Cal. 514.

S. 18-A—Document by tenant describing nature of tenancy—Landlord not party to it— Admissibility. See Evidence Act, S. 13. 46 C. W.N. 169.

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-S. 18-A-Sale certificate—Not an instrument of transfer by tenant. Basanta Kumari Dasi v. Jnanendra Nath Ghosh. [see Q.D. -'40 Vol [ Col. 397.] 191 I.C. 824=13 R.C. 285.

-S. 18-A-Sale Certificate-Whether instrument of transfer.

Sale certificates are not instruments of transfer and so are not hit by S. 18-A of the Bengal Tenancy Act, (Khundkar, J.) AMAR NATH MISRA v. TRILOCHANDAS DUTTA. 209 I.C. 292= Nath 16 R.C. 347=76 C.L.J. 251=A.I.R. 1943 Cal.

-S. 18-A-Transaction in which nature of tenancy is asserted-Admissibility-Landlord not party to

transaction—Evidence Act, S. 13.
It cannot be held that S. 18-A of the B. T. Act necessarily precludes the applicability of S. 13 of the Evidence Act to transactions in which the incidents of any nature of holding are asserted or denied merely on the ground that the landlord is not a party to the same. (Biswas, J.) DWARKA-DAS MARWARI v. PARBATI DASI. 202 I.C. 545= 15 R.C. 364=46 C.W.N. 770=A.I.R. 1942 Cal. 486.

-S. 20 (1-A)—Whether creates new right.

S. 20 (1-A) of the B. T. Act is not declaratory of the law prior to the date when it came into force but creates a new right. (Henderson, J.) ASIRADDIN SARDAR v. SANTOSH MOHINI DASI. 47 C.W.N. 80=76 C.L.J. 469.

-S. 22-Co-sharer landlord in exclusive possession-Thikadar under-Settlement of land on settled raiyat owning share in proprietary interest—Accrual of occupancy rights—Subsequent collectorate partition-Land allotted to another co-sharer-Right of latter to recover possession-Bengal Estates Partition Act, S. 99. INDER CHANARA v. RADHAKRISHNAJI. [see Q.D. 1936—'40 Vol. I Col. 399]. 13 R.P. 501=7 B.R. 521=192 I.C. 515=A.I.R. 1941 Pat. 24.

-S. 22 (before amendment in 1908)—Co. sharer landlord purchasing occupancy holding-Liabi-

lity to pay rent.

Under S. 22 of the B. T. Act, as it stood before its amendment in 1908, a co-sharer landlord who purchases an occupancy holding becomes liable after his purchase to pay rent as a tenant to the whole body of landlords including himself. His liability is for rent and not for compensation for use and occupation. Consequently a suit for such rent is excepted from the cognizance of a Court of Small Causes. (Biswas, I.) SURENDRA CHANDRA ROY v. BIMALENDU ROY. 46 C.W.N. CHANDRA ROY v. BIMALENDU ROY. 46 C.W.N. 494=208 I.C. 228=76 C.L. J. 38=16 R.C. 154= A.I.R. 1943 Cal. 252.

-S. 22 (2)—Co-sharer landlord purchasing occupancy holding sub-letting it to settled raivat-Holding allotted at partition to another co-sharer—

Right of settled raivat to recover possession.

A settled raiyat, to whom a co-sharer landlord who has purchased an occupancy holding, sublets the land or any portion of the land comprised in the holding, at once acquires a right of occupancy in it, whether in the village, in which the holding

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possession of the holding even if at a partition it was treated as bakasht land and allotted to another co-sharer. (Meredith and Shearer, 11.) Anand Prasad Singh v. Medni Prasad Singh. 219 I.C. 207=11 B.R. 367=A.I.R. 1944 Pat. 313.

-S. 22 -Purchase by co-proprietor of raigati holding prior to amendment of 1907-Effect of-Holding allotted to another at fartition-Right of purchaser to possession—Raight helating from to amendment of 1907 by co-proprietor—Effect of Holding allowed at partition to another-Right to bossession.

Per Shearer, J. (Meredith, J. contra)—Where a co-proprietor purchases a raiyati holding prior to the amendment of S. 22 of the B. T. Act, in 1907, the purchase must be held to be for the benefit of all the proprietors and to be merely an acquisition to the bakasht of the estate, the purchased lands by the purchase immediately becoming bakasht lands. If, therefore, as a result of partition it is allotted to another proprietor, the purchasing co-proprietor is not entitled to recover possession of it. (Meredith and Shearer, IJ.) Anand Prasad Singh v. Medni Prasad Singh. 219 I.C. 207=11 B.R. 367=A. I.R. 1944 Pat. 313.

-Ss. 23 and 76-Land let out as raivati for agricultural purpose—Conversion of portion into tank and raising remainder for crection of house—It prohibited by S. 23-Such user, if constitutes improvements -Remedy of landlord.

Where one portion of the land which was let out as raiyati land for the purpose of agriculture is converted into a tank and the remaining portion is raised for the purpose of the creetion of a dwelling house thereon, so that no portion of the land can be used for agriculture, the land is used in a manner which is prohibited by S. 23 of the B. T. Act. The excavation made on the land and construction proposed to be made do not constitute improvements within the meaning of S.76 of the Act under this section, the improvement must be an improvement to the holding in which the construction is made. The Act does not empower a tenant to utilise one holding for the purpose of improving another holding irrespective of the question whether such use would impair the value of the former holding. Again, the improvement must be consistent with the purpose for which the holding was let and it must add to the value of the holding. In the above circumstances, the landlord is entitled to a mandatory injunction upon the tenant directing him to restore the land to its original condition and also to an injunction restraining him from using the land in such a way as to render it unfit for the purpose of agriculture. (Sen, J.) RAJA KAMALARANJAN v. ABDUL GAFUR. 45 C.W.N. 464.

-Ss. 23-A to 38-Applicability-Tenant having higher rights combined with occupancy rights.

Ss. 23-A to 38 of the B. T. Act are applicable when the tenancies are occupancy holdings, pure and simple, but they have no application when the tenant has higher rights in the land under an express or implied grant from the landlord, is situated, the custom of transferability exists though such rights are combined with those of or not. He is, therefore entitled to recover an occupancy raiyat acquired under express

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provisions of the Act. (Mukherjee and Blank, JJ.) HIRENDRA LAL SARKAR v. KANAKLATA CHOUDHURANI. 202 I.C. 693=15 R.C. 383=75 C.L.J. 347=46 C.W.N 849=A I.R. 1942 Cal. 510.

-Ss. 26-B and F-Raiyat transferring portion of occupancy holding before 1928 and residue afterwards - Landlord taking possession of residue by preemption-If entitled to recover possession of first sold portion.

If a raiyat transfers a portion of a non-transferable occupancy holding prior to the amendment of the Bengal Tenancy Act in 1928 and the residue of the holding in his possession after 1928, the mere transfer of the residue of the holding will not by itself constitute abandonment so as to entitle the landlord to recover possession of the first sold portion. But if the landlord exercises his right of pre-emption under S. 26-F of the B. T. Act, as it stood prior to its repeal by Act VI of 1938, with regard to the residue of the holding and takes possession of the same, or, if the second transferee gets the tenancy subdivided and the rent apportioned under S. 88 of the B T. Act, the landlord has the right to recover khas possession of the portion sold to the first purchaser. (Mukherjea and Blank JJ.) NRIPENDRA CHAND SAHA v. JOWADALI MONDAL. I.L.R. (1942) 2 Cal. 232=201 I.C. 655=15 R.C. 265=46 C.W.N. 623=A.I.R. 1942 Cal. 423.

26-C-Applicability-Gift of occupancy holding by Mahomedan.

The words "every transfer" in S. 26-C are quite general, and must be held to include a transfer by a Mahomedan. Therefore a gift of an occupancy holding by a Mahomedan must not only comply with the rules of Mahomedan law, but also satisfy the requirements embodied in this section. (Biswas, J.) SRIMATIJAN v. FULJAKHATUN 199 I.C. 464=14 R.C. 560=A.I.R. 1941 Cal.

-Deed of exchange of raiyati lands not registered -Admissibility-Part performance-Applicability of

A deed of exchange of raisati lands is required to be registered under S. 26-C of the B. T. Act, which is expressed in absolute terms. If it is not registered, it cannot affect title or be received in evidence of the transaction of exchange. Although Acts in the nature of part performance may have taken place, there is no equity on which a plaintiff can found a claim of title any more than a defendant his defence. The English doctrine of part performance cannot be applied in India with such a result as to create without a registered instrument an interest which a statute says can only be created by such an instrument. It is not correct to say that where specific performance is not barred, the equity of part performance is still available in India to support a claim based on title, even though no registered instrument of transfer, as required by law, has been obtained; nor that there is any contract of transfer which can be proved in such a suit by the unregistered instrument, (Chakravartti, J.) BIRENDRA KISHORE ROY v. NARUZZMAN PEADA. 49 C.W.N. 649.

-S. 26 E-Application for confirmation of sale-

S. 26-E of the Bengal Tenancy Act could be made. Such an application would not attract Art. 181 of the Limitation Act which contemplates a case where a Court has got to be moved by an application and without which it is not bound to exercise its powers. S. 26 E, as it stood prior to the Amendment Act of 1938, nowhere laid down that an application was necessary for confirmation of the sale. (Mukherjea and Biswas, J.) MANDI MIA V. SEKANDER MIA. 195 I.C. 708-14 R.C. 128=45 C.W.N. 493=A.I.R. 1941 Cal. 411.

-S. 26-E-Application for confimation of sale rejected for non payment of landlord's fee-Fresh application-If competent.

Where an application by the purchaser for confirmation of sale under S 26-E of the Bengal Tenancy Act was rejected by the Court for noncompliance with its order directing payment of landlord's fees, and the Court, however, did not direct a forfeiture of the purchase-money and resale of the property under sub S. (3) of that section, it is competent for the purchaser to make another application for confirmation of the sale. (Mukherjea and Biswas, JJ.) MANDI MIA v. SEKANDER MIA. 195 I.C. 708=14 R.C. 128=45 C.W.N. 493=A.I.R. 1941 Cal. 411.

-S. 26-E-Execution sale confirmed without payment of landlord's fee-Validity.

An execution sale of an occupancy holding cannot be held to be void on the ground merely that confirmation of the sale was made without payment of the landlord's fee as required by S. 26-E of the B.T.Act. (Roxburgh, I.) ATUL CHANDRA BHADURI v. SHEIKH AKTAR ALI. I.L.R. (1944) BHADURI V. SHEIKH AKTAR ALI. I.L.R. (1944) 2 Cal 62=217 I.C. 95=17 R.C. 159=48 C.W. N. 309 = A I R. 1944 Cal. 260.

S. 26-E-Payment of landlord's fees-Time limit.

There is no time limit prescribed by S. 26-E of the Bengal Tenancy Act for the payment of the landlord's fees. The Court can indeed specify the time within which the fees have got to be paid and in default can forfeit the purchase-money and direct a re-sale, but so long as it is not done. an application for the payment of the landlord's fees is not barred. (Mukherjea and Biswas, JJ.) Mandi Mia v. Sekander Mia. 195 I.C. 708=14 R.C. 128=45 C.W.N. 493=A.I.R. 1941 Cal. 411.

S. 26-E-Sale of holding before repeal of section -Confirmation of sale subsequent to repeal—Landlord's fee, if must be paid.

If a sale of an occupancy holding in execution of a money decree was held prior to the repeal of S. 26-E of the Bengal Tenancy Act by the Amendment Act of 1938, the purchaser applying for confirmation of the sale after the repeal of that section is bound to pay the landlord's fees under the provisions of that section before he can have the sale confirmed. When the repealing enactment repeals a substantive right as well as the procedure by which the right was enforced, in such cases if the right is saved in respect of any transaction which was completed prior to the introduction of the Act, the remedies in respect of such rights are also saved under S. 8 of the Limitation—Limitation Act, Art. 181.

There is no period of limitation within which an application for confirmation of sale under Biswas, II.) MANDI MIA 2. SEKANDER MIA. 195

-S. 26-F (4)-Co-sharer vendor-If entitled to join in application by another co-sharer.

A co-sharer who has transferred a portion of his interest, is not entitled to join in an application under S. 26-F (4) of the Bengal Tenancy Act made by another co-sharer. (Henderson, J.) JOGENDRA LAL GHOSE v. MANICK LAL GHOSE. 49 C.W.N. 388.

-S. 26-F (4)—Notice under S. 26-C (4) not served-One co-sharer tenant hearing of transfer applying for pre-emption-Application by others to be joined as co-applicants filed after a month thereof-If barred.

No notice of transfer was served under S. 26-C. (4) of the B. T. Act upon the co-sharer tenants. But one of them hearing of the transfer filed an application for pre-emption under S 26-F of the Act. The other co-sharer tenants applied under S. 26-F (4) to be joined as coapplicants after one month of this application.

Held, that their application was not barred. (Blank, J.) GOLAM EHIYA v. ABDUL ROB. 48 C.W.N. 417.

-S. 26-F (5) and (6) (as amended by Act VI of 1938)—Application by co-sharers-Court allotting whole of share to one of applicants-

Legality of order.

On an application by co-sharers under S. 26-F of the B. T. Act, the court cannot allot the whole of the share transferred to one of the applicants, as such an order really amounts to a dismissal of the application of the other appli-cants, which is in direct contravention of Sub-S. (5) of that section. Apportionment means the division of the property amongst the persons entitled to it and in making the apportionment the Court must allot something to all of them. (Henderson, J.) Nabiruddin Sarkar v. Osman Gani. 197 I.C. 398=14 R.C. 360=A.I.R. 1941 Cal. 481.

—S. 26-G (as amended) — Applicability—

Anomalous mortgages.
S. 26-G of the B. T, Act as amended by Act XVIII of 1940 applies to anomalous mortgages in which possession of the mortgaged property has been delivered. (Roxburgh and Blank, JJ.)
Monomohan Das v. Parswanath Das. 209 I.C.
457=47 CW.N. 789=16 R.C. 369=77 C.L.J. 483=A.I.R. 1943 Cal. 588.

S. 26-G (as amended) — Applicability-Anomalous mortgages—Remedy by way of application under sub-S. (5)—If open to mortgagors

in such cases.

S. 26-G of the B. T. Act as amended in 1940 does apply to anomalous mortgages, but in view of the special terms of sub. S. (5) the remedy by way of application provided therein is not open to the mortgagors in such cases. They are left to their ordinary remedy by way of suit. (Roxburgh and Blank, JJ.) SAHARADDIN DEWAN v. ALTAPUDDIN AHMED. 210 IC. 264=16 R.C. 422=77 C.L.J. 426=47 C.W.N. 791=A.I.R. 1943 Cal.

—S. 26 G—Applicability—Mortgage giving mortgagee all rights of usufructuary mortgagee and also right of sale, Khoaj Jamadar v. Abdul Sobhan Khan. [ see Q.D. 1936—'40 Vol. I, Col. 420]. 191 I.C. 713=13 R.C. 274.

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—S. 26. G. (as amended in 1940)—Applicability-Mortgage with possession for nine years-Interest and rents payable to landlord alone to be appropriated out of usufruct-Principal to be paid separately-Non-payment of principal-Extinguishment of mortgage on expiry of nine years.

S. 26. G of the B. T. Act as amended by the Amendment Act of 1940 affects every mortgage in which possession of land is delivered. A mortgage of an occupancy holding executed in 1926 under which possession was delivered for a period of nine years and which provided for the appropriation only of the interest on the loan and the rents payable to the landlord from the usufruct and for separate payment of the principal, falls within the purview of the section and must be deemed to take effect as a complete usufructuary mortgage with all the resultant consequences. The period of nine years mentioned in the mortgage deed should be regarded as "the period mentioned in the instrument" for the purpose of the section and the mortgage must under S. 26-G (5) he deemed to have been extinguished on the expiry of that period even though the principal amount had not been paid. (Edgley, I.) NARENDRA NATH CHARRABARTH v. BANAMALI MANDAL. I.L.R. (1943) 1 Cal. 453 == 212 I.C. 389=16 R.C. 597=A.I.R. 1944 Cal. 111.

- S. 26-G — Mortgage — Construction — Usufructuary or mortgage by conditional sale. MAHENDRA NATH SARDAR V. KALI PADA HALDAR. [see O.D. 1936—'40 Vol. 1. Col. 3237] I.L.R. (1940) 2 Cal. 573=194 I.C. 508=13 R.C. 513.

-S. 26-G-Mortgaged land represented as mokarari holding-mortgagor, if estopped from showing that it is occupancy holding. MAHENDRA NATH SARDAR v. KALI PADA HALDAR. [see Q. D. 1936—'40 Vol. I Col. 3237] I.L.R. (1940) 2 Cal. 573—194 I.C. 508—13 R.C. 513.

-S. 26-G (5)-Mortgage deed providing that mortgagor roould get back possession only on paying for buildings constructed by marigagee-Order for pos. session in terms thereof-Legality.

At the time of the execution of the mortgage the land was producing nothing. The intention of the mortgagee was to build and there was a clause in the deed to the effect that the mortgagor would only get back possession of the land on paying a fair price for any buildings which might be constructed by the mortgagee. On an application by the mortgagor under S. 26-G (5) of the Bengal Tenancy Act to recover possession, the Munsiff put the mortgagor on terms that she was to pay a certain sum at which he assessed the value of the structures, as a condition precedent to being put into possession. This order was reversed on appeal. Agreeing with the munsiff,

Held, (1) that the mortgagee had an equitable claim to remain in possession in terms of the agreement; (2) that the doctrine against clog on the equity of redemption could not be invoked by a mortgagor against an equity which he had himself created in favour of the mortgagee. (Henderson, J.) JYOTILAL MANDAL v. BIRUBALA DASI. 49 C.W.N. 593.

S. 26 G-"Mortgagor" and "mortgagee"-If include those deriving title from them.

The terms "mortgagor" and "mortgagee" in

S. 26-G of the B. T. Act include those deriving

title from them. (Roxburgh and Blank, IJ.) SAHARADDIN DEWAN v. ALTAFUDDIN AHMED. 210 I.C. 264=16 R.C. 422=77 C.L.J. 425=47 C. W.N. 791=A.I.R. 1943 Cal. 590.

S. 26-G-Validity.
The provisions of S. 26-G of the B. T. Act relating to the re-transfer of the mortgaged property are matters wholly within the legislative competence of the Provincial Legislature as provided by Item 21 of List II of Sch. VII of the Government of India Act. The provisions are easily severable from those relating to the extinguishment of the debt secured by the mortgages dealt with, so that even if it were held that the latter provisions were void for repugnancy to any existing Indian Law, this would not affect validity of the former provisions. (Roxburgh and Blank, JJ.) Monomohan Das v. Parswanath Das. 209 I.C. 457=47 C.W.N. 789=16 R.C. 369=77 C.L.J. 483=A.I.R. 1943 Cal. 588.

-S. 26-G-Validity-Transfer of Property Act, Ss. 68 and 98.

The provisions of S. 26-G of the B. T. Act relating to the re-transfer of the mortgaged property are covered by Item 21 of List II, and no question of repuganancy to any existing Indian law can, therefore, arise. As regards the question whether the section is repugnant to Ss. 68 (1) (a) and 98 of the T. P. Act in extinguishing debts due and secured by the mortgages therein referred to, it may be remarked that there is nothing in the latter provisions which provides that a contract, otherwise illegal, must be enforced. S. 37 of the Contract Act also specifically exempts performance of contracts where performance is dispensed with or excused under any law. (Roxburgh and Blank, II.) SAHARADDIN DEWAN v. ALTAFUDDIN AHMED. 210 I.C. 264=16 R.C. 422 =77 C.L.J. 426=47 C.W.N. 791=A.I.R. 1943 Cal. 590.

-S. 26-G (1-a)-Mortgage by conditional sale executed by two persons-One of them taking sub-tenancy under mortgagee—Suit for rent by mortgagee against him—Plea of extinction of mortgage by him—If barred—Co-mortgagor not being party to suit—If material.

Where a mortgage by conditional sale is executed by two persons and one of them takes a subtenancy under the mortgagee, in a suit by the mortgagee for rent he can plead that the mortgage has been extinguished under S. 26-G (1) (a) of the Bengal Tenancy Act and that the relationship of landlord and tenant no longer exists. The fact that the co-mortgagor is not a party to the suit is immaterial. (Henderson, J.) Mohendra Nath Haldar v. Mohendra Nath Sardar. 48 C.W.N. 571=A.I.R. 1944 Cal. 305.

S. 26-G (1-a) and (8) (b)—Scope and effect—Mortgage by conditional sale with possession—If extinguished at end of fifteen years.

A mortgage by conditional sale with possession comes within the terms of S. 26-G (1-a) of the Bengal Tenancy Act and should be deemed to be extinguished at the end of 15 years. There is no repugnancy between sub-S. (1-a) and sub-S. (8-b) and these provisions are mutually exclusive. Under sub-S. (8-b), the mortgagee is only given an opportunity to show that in fact it has not been

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so extinguished. If the mortgagee fails to obtain a declaration in a properly framed suit under this sub-section, the mortgage will be extinguished by the operation of sub-S. (1-a). (Henderson, J). MOHENDRA NATH HALDAR v. MOHENDRA NATH SARDAR. 48 C.W.N. 571=A.I.R. 1944 Cal. 305.

S. 26-G (1) (a) and (5) (after amendment in 1938)—Validity—If ultra vires Provincial Legislature—Section, if conflicts with Ss. 62 and 68 of T. P. Act.—Scope of section—Personal covenant in nature of indemnity clause in usufructuary mortgage—If alters nature of mortgage.

S. 26-G of the B. T. Act as it stood after amendment in 1938 is not ultra vires the Provincial Legislature. Sub-S. (1) (a) of this section which was introduced by Act VI of 1938, so far as it allows the mortgagor of an occupancy holding in any form of usufructuary mortgage which was entered into before Act IV of 1928 to recover possession of the mortgaged property after the expiry of 15 years or the period mentioned in the bond, whichever is less is undoubtedly in conflict with the provisions of S. 62 of the T. P. Act. But this repugnancy is perfectly immaterial, as this is a matter which is not covered by the concurrent list. This relates to transfer of or contracts relating to. Agricultural lands and the Provincial Legislation is valid, even though it contradicts any existing Indian Law. If the Provincial Legislature has power to make a legislation with regard to future transfers, it can certainly, in virtue of its plenary powers, give retrospective effect to such provision so as to affect transfers made before 1928. S. 26-G (5), so far as it provides that the consideration shall be extinguished, is not in conflict with S. 68 (1) (a) of the T. P. Act under which the mortgagee has a personal remedy against the mortgagor. It is only a pure usufructuary mortgage that conforms to the type defined in S. 58 (d) of the T. P. Act, which comes within the purview of S. 26-G of the B.T. Act. If there is a personal covenant to pay the mortgage, will cease to be a usufructuary mortgage and it can rank only as an anomalous or mixed mortgage, which is excluded from the purview of that section. If this construction is sound, no conflict with S. 68 (1) (a) of the T. P. Act is possible, for in cases where that section will come into operation S. 26-G of the B. T. Act will have no application at all. But the presence of a personal covenant to pay in a usufructuary mortgage, which is in the nature of an indemnity clause as when the mortgagor undertakes to pay interest or compensation or the whole or a portion of the mortgage-money if the mortgagor is dispossessed from the mortgaged property, will not alter the nature of the mortgage, and the case will still come under S. 26-G of the B. T. Act. Such an agreement is no part of the mortgage transaction, for it comes into effect only when the mortgage fails. It is a collateral agreement, and whether it is enforceable or not is another matter. (Mukherjea and Roxburgh, JJ.) AKBAR ALI v. MAFIJUDDIN. 45 C.W.N. 823=74 C.L.J. 370=198. I.C. 674=14 R.C. 483=5 F.L.J. (H.C.) 6=A.I.R. 1942 Cal. 55.

S. 26-G (5) and (8)—Application by mort-gagor under sub-S. (5) and suitby mortgagee under sub-S. (8)-Which should be decided first,

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Where in respect of a mortgage by conditional sale, the mortgagor makes an application under S. 26-G (5) of the Bengal Tenancy Act, and the mortgagee institutes a suit under sub-S. (8), the Court should first decide whether the application under sub-S. (5) should succeed or not. If it succeeds, the mortgagee's suit becomes entirely infructuous. (Henderson, J.) OMARJAN BIBI v. AJGAR ALI. 49 C.W.N 307.

-S 26-G sub-S. (5) (before amendment)— Application for restoration of possession dismissed for default by Revenue officer-Second application before Civil Court-Maintainability-C.P. Code, S. 141.

Although an application by a mortgagor for restoration of possession of the mortgaged holding under S. 26-G (5) of the B. T. Act (as it stood prior to Bengal Act XVIII of 1940) was previously di-missed for default by a revenue officer, a second application under the same provision before the Civil Court is maintainable in law. The right of the mortgagor to recover possession is a recurring right and continues, so long as possession is not restored to him. If the right to recover possession is negatived by a competent tribunal, it cannot certainly be reagitated in the same Court or another Court, but, if the application is merely dismissed for default, a subsequent application cannot be barred, as the latter is not based on the same cause of action.

Obiter: It is extremely doubtful whether the revenue officer was a Court exercising civil jurisdiction within the meaning of S. 141, C P. Code. (Mukherien and Sen, J.) SASHI BHUSAN MISRA 21. MADHU SUDAN Manpal. I L R (1942) 2 Cal. 28=202 I.C. 601 =15 R C. 371=A.I R. 1942 Cal. 522

-S. 26-G (5)—Application in respect of mortgage by conditional sale-Not maintainable.

An application under S. 26-G (5) of the B. T. Act in respect of a mortgage by conditional sale is not maintamable. (Henderson. J.) ABDUL RAHMAN v. ADA-MALI. 48 C.W N. 606 (1).

-Ss. 26-G (5)and 3(3)—Complete usufructuary mortgage-Mortgage with possession for certain period -Period considered sufficient to extinguish loan-Personal covenant to indemnify mortgagee if loan is not so extinguished — Nature of mortgage. PRAFULLA CHANDRA GOPE v. SOARU MAHOMED. [see O.D. 1936—'40. Vol. I, Col. 423.] 191 I.C. 720=13 R.C. 277.

-S. 26-G (5) (before amendment)—If ultra vires.

S. 26-G (5) of the Bengal Tenancy Act (as it stood prior to Bengal Act XVIII of 1940) is not ultra vires the Provincial Legislature. Mukherjea and Sen, JJ.) SASHI BUSAN MISRA V. MADHU SUDAN MANDAL. I.L.R. (1942) 7 Cal 28 = 202 I.C. 601 = 15 R.C. 371 = A.I.R. 1942 Cal. 522.

-Ss. 26-G (5) and 3 (3)-Mortgage-Construction. GAYAMANI BEWA v. DHARANIDHAR JANA [see Q.D. 1936-'40 Vol. I, Col. 3237 ] 191 I.C. 175.

-S. 26 G. (5)-Mortgage including both occupancy holdings and tenures-Mortgagor's right to recover possession of occupancy holdings. Prafulla Chandra Gope v. Soaru Mahomed. [see O.D. 1936 —'40 Vol. I, Col. 423.] 191 I.C. 720=13 R.C. 277. -S. 26-G (5)-Mortgage of occupancy holding

describing it as mokarari tenancy-Mortgagee cognisant of actual facts-Estoppel against mortgagor. PHU-TNATH JANA v. GOPAL PROSAD SAHU. [see Q.D.

1936—'40 Vol. I, Col. 423.] 193 I. C. 26=13 R.C.

-S. 26-G (5)—Mortgagors in possession adihars under mortgaget-If competent to apply for restoration of possession. PRAFULIA CHANDRA GOPE V. SOARU MAHOMED. [See Q D. 1936-40, Vol. I, Col. 423. 191 I.C. 720=13 R C. 277.

revision-Recovery of possession by mortgagee-Properremedy-C P. Code, S. 144.

An application under S. 26-G (5) and (6) of the B. T. Act by the mortgagor to be put into possession was dismissed by the Munsif but was allowed by the District Judge and in accordance with that decision the mortgagor was put into possession. In revision the decision of the District Juage was set aside and that of the Munsif restored. The mortgagee applied for restitution under S. 144, C,P. Code.

Held, that the proper remedy of the mortgage was by an application under S. 144 C.P. Code, and that a suit by him would be barred. (Henderson, J.) GURU PROSAD v. SHFIKH KARIM BUX. 45 C.W N. 346

—S. 26-G (5), (6), (7)—Order refusing restoration -Appeal.

An order rejecting an application for restoration of property under S. 26-G (5) of the Bengal Tenancy Act is an order under sub-S. (6) of that section and consequently it is appealable in accordance with the provisions of CP. Code, under sub-S. (7) of that section added by the Amending Act XVIII of 1940. (Mukherjea and Pal, II) MATHU MIA V RAJABAN BARAL 206 I C. 392=15 R C. 699=76 C L.J. 319=47 C.W.N. 263=A.I.R. 1943 Cal. 177.

-26-G (5)—Successor-in-interest of mortgagor-Locus standi to at ply.

An application under S. 26-G (5) of the B. T. Act can be made by any successor-in-interest to the original mortgagor whether he himself is or is not an occupancy raiyat, provided the original mortgagor was an occupancy raiyat. (Henderson, J) ASMATENESSA BIBLD. KARIMADDI BEPARI. 48 CWN 604-217 I.C. 336=17 R.C. 191=A.I.R. 1914 Cal. 376.

-S. 26-G (7)-Order restoring possession to mortgagor-Second appeal-Revision.

A second appeal lies to the High Court from an appellate order of the District Judge restoring possession to the mortgagor under S. 26-F of the B. T. Act. An application in revision is, therefore, not maintainw PARSWANATH DAS. 209 I.C. 457=47 C.W.N 789=A.I.R. 1943 Cal. 588.

S. 26-G (7)—Retrospective operation.
Suh-S. (7) of S. 26-G of the B. T. Act inserted by Act XVIII of 1940 has not the effect of making competent appeals which were incompetent when filed. There is nothing to suggest that it has such retrospective effect. (Henderson. J.) KARAM NITTYAMOYEE DASSYA, 45 C.W.N. 397. KARAM NEWAJ D.

-S. 26-G (8)—Applicability—Mortgage extinguished under sub-S. (1-a) before Amendment Act of 1940.

Sub-S. (8) of S 26 G of the Bengal Tenancy Act only applies to mortgages subsisting on the date of the commencement of the Bengal Tenancy (Amendment) Act of 1940, and not to mortgages which have been extinguished

before that date by the operation of sub-S. (1-a). (Henderson, J.) MOHENDRA NATH HALDAR v. MO-HENDRA NATH SARDAR. 48 C.W.N. 571=A.I.R. 1944 Cal. 305.

-S. 26-J-Decision under-If res judicata.

A decision in a proceeding under S. 26-J of the B.T. Act does not operate as res judicata in respect of the incidents of the tenancy in a subsequent suit. (Pal. 1.) SRISH CHANDRA NANDY 7. KALA CHAND ROV. I.L.R (1942) 1 Cal. 510=202 I C. 570=15 R C 367=75 C.L.J. 20=46 C.W.N. 169=A.I.R. 1942 Cal. 445.

-S. 26-J—Finding as to status of tenant— Res judicata.

The proceedings under S. 26 J of the Bengal Tenancy Act are of a summary character, and a finding arrived at in those proceedings about the status of the tenent will not be res judicata in a subsequent suit brought for a declaration of the status of the tenant. (Mitter and Akram, 11.) BISWA NATH JANA v. BHUPENDRA NATH GHOSE. 46 C.W.N. 133.

-Ss. 26-J and 188—Sale of occupancy holding under erroneous description as mokarari before repeal of sections—Landlords' right to recover balance of land-lord's fees by application—If subsists after their repeal -Bengal General Clauses Act, S. 8 (c) and (e). DHI-RENDRA NATH ROY v. IJJATALI MIAH. [see Q D 1936 '40 Vol. I Col. 428]. 194 I.C. 511=13 R.C. 514.

-S. 29—Applicability—Suit for assessment of fair rent.

In a suit for assessment of fair rent, S. 29 of the B. T. Act can not possibly have any application. (Henderson, I.) GOPAL CHANDRA 7. DWARIKA NATH 195 I C. 864=14 R.C. 144=74 C.L.J. 535. =A,I R. 1941 Cal. 446-

-Ss. 38 and 52 (b)—Raiyat at fixed rate—If can claim abatement of rent on ground of part of tenancy leing covered by deposit of sand—"Deficiency in area"-Meaning of.

In so far as S. 18(2) of the Bengal Tenancy Act enacts that the provisions of S. 38 among other sections, shall not apply to raiyats holding at fixed rates, a raiyat holding at fixed rates cannot claim under S. 38 (1) abatement of rent on the ground that part of the holding has been covered by a deposit of sand rendering it unfit for the purposes of the tenancy. Nor can he claim such abatement under the provisions of S. 52 (b) of the Bengal Tenancy Act. "Deficiency in area" cannot be construed to mean and include deficiency in the area fit for cultivation or for the purposes of the tenancy. (Riswas and Akram, JJ.) KAMADA KUMAR v. HARAPADA BANERJEE. 49 C.W.N. 417=A.I.R. 1945 Cal. 295.

-S. 38 (1) (b)—Reduction of rent on ground of fall in prices-Finding that such fall was due to temporary cause-Question of fact or law-Second appeal.

Where in a suit for recovery of arrears of rent the defendant claims a reduction of the rent under S. 38 (1) (b) of the B. T. Act on the ground that there has been a fall in the average local prices of staple foodcrops, the question whether the economic depression as causing the fall in the prices does or does not tend to last indefinitely is a question of fact. But the question as to what facts are required to be established in order to show that the cause is only temporary will be a question of law or atleast a mixed question of fact and law. to eject defendant as trespasser. KHODADAT BIBI v.

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Therefore, a finding of the lower appellate Court that the cause is a temporary one can be set aside in second appeal, if the premises of its reasoning are not correct. (Pal, J.) RAM TARAK SINGH v. SALAGRAM SINGH. I L R. (1943)2 Cal. 192=212 I.C. 567=16 R.C. 614=A.I.R. 1944 Cal. 153.

-S. 48 (c)—Decree for ejectment against under raiyat-If binds his sub-lessee.

The principle that a decree for eviction against a lessee is binding on the sub-lessee even though the latter has not been made a party to the suit is not applicable to the case of a tenancy under the Bengal Tenancy Act. A sub-lessee under an under-raigat who acquires the status of an under-raiyat, can be ejected only under the provisions of S. 48 (c) of that Act and not otherwise. (Mukheriez, J.) SFRAJUL HUO MIA 7. ABJAL MIA. I L R. (1941) 1 Cal. 382=196 I C. 419=74 C L J. 388=45 C.W.N. 339=14 R.C. 234 = A.I.R. 1941 Cal 351.

-Ss. 48-D and 75 A-Decree for enhancement of rent and decree for electment-If mutually exclusive.

The provisions of S. 48 -D of the B. T. Act lead to the conclusion that a decree for enhancement of rent and a decree for ejectment are mutually exclusive. Under S. 48-D (ii), the Court has to fix a fair rent. If the defendant agrees to pay, the decree would be one enhancing the rent and within the terms of S. 75-A of the Act. If the defendant does not agree, the only decree which can be passed is one for ejectment which is entirely outside the scope of that section. (Henderson, 7.) RAJ MOHAN SAHA v. JOGENDRA NATH SARKAR. 201 I.C 323=15 RC 167=75 C.L.J. 84=46 C.W.N. 255 = A I.R. 1942 Cal. 353.

-S.48-F-Applicability-Sub-lease created before 1928.

S. 48-F of the B. T. Act does not apply to a sublease created before the Amending Act of 1928 came into force. (Mukherira, /.) SERAJUL HUQ MIA v. ABJAL MIA. I.L R. (1941) 1 Cal. 382=196 I C. 419=74 C L. J. 388=45 C.W.N. 339=14 R C. 234 =A.I.R. 1941 Cal. 351.

-S. 48-F-Sub-lease by under-raivat-Landlord's consent-If necessary.

The word 'transfer' in S. 48-F of the B. T. Act is sufficiently wide to include a sub-lease as well, and an under-raiyat cannot sub-let his land except with the consent of the landlord. (Mukherica, J.) SERAJUL HUQ MIA v. ARJAL MIA. I.L R. (1941) 1 Cal. 382 = 196 I C 419=74 C L J. 388=45 C.W.N. 339= 14 R.C. 234=A.I.R. 1941 Cal. 351.

-S. 48-G—Retrospective operation.

S. 48-G of the B.T. Act cannot be said to be retrospective in its operation so as to attract the provisions of S, 65 when the decree for rent was obtained against an under-raiyat before the Amending Act IV of 1928 was passed. (Mukherica, J.) ARDUS SAMAD MOLLA v. ABDUL GOFUR MOLLA. I.L.R. (1941) 1 Cal. 409 = 196 I.C. 357=14 R.C. 227=45 C.W.N. 367 A.I.R. 1941 Cal. 396.

-S. 50-Presumption under-Applicability-Record of-rights finally published. KHODADAT BIBI 7. KAMALA RAJAN ROY. [see Q.D. 1936-'40 Vol. I Col. 3238.] 192 I.C. 77=13 R.C. 301.

- S. 50—Presumption under—Applicability—Suit

KAMALA RANJAN ROV. [See Q.D. 1936-40 Vol. I 3238]. 192 I.C. 77=13 R.C. 301.

-S. 50-Presumption under-Rebuttal-Slight variation in rent—If sufficient. ABDUL WAHEB v. NAGENDRA CHANDRA LAHIRI. [see Q.D. 1936'40 Vol. I Col. 3238.] I.L.R. (1940) 2 Cal. 559=192 I.C 685=13 R.C. 335.

S. 51 — Presumption under — Applicability — Written lease, ATUL KRISHNA BOSE v. ZAHED MONDAL. [see Q.D. 1936-'40 Vol. I Col. 3238] 193 I.C. 635=13 R.C. 445=A.I.R. 1941 Cal. 102.

-S. 52-Applicability-Claim to additional

rent for accreted lands.

S. 52 of the Bengal Tenancy Act would not in terms apply to a case of a claim to additional rent for lands accreted to a tenure but would be a guide. (Mitter and Khundkar, JJ.) MIDNA-PORE ZEMINDARY Co., I.TD. v. KUMAR CHANDRA SINGH. I.L.R. (1943) 2 Cal. 245=210 I C. 594 =16 R.C. 472=77 C.L.J. 347=47 C.W.N. 733 =A.I.R. 1943 Cal. 544.

-S. 52—Applicability—Tenancy composed of

undivided share in land.

S. 52 of the B. T. Act is applicable to a tenancy composed of an undivided share in a plot of land after the amendment in 1928 and 1938 of the defi-nition of a holding in S. 3 (9) of the Act. (Akram, 1.) Brojendra Mohan Maitra v. Saroha Mandal. I.L.R. (1942) 2 Cal. 111=46 C.W.N. 727=204 I.C. 556=15 R.C. 531=A I.R. 1943 Cal. 58.

-S. 52-Excess area found on re-measurement-Settlement of increased rent-Previous measurement not proved to be in accurate—Deduction from total area-If may be allowed-Rule of

practice.

Where on re-measurement an increase in the area of the land settled with a tenant is found, deduction from such increased area can be allowed for the purpose of settling increased rent although it is not proved that the previous measurement, on the basis of which the settlement was made, was in any way inaccurate or wrong. When the subsequent measurement is made during the cadastral survey operation and the previous measurement was a private measurement made by the landlord without the aid of any scientific instrument, it would not be improper for the Court to make some deductions from the survey area with a view to reduce the two areas to a common standard for comparison. In the absence of any better materials, it would be proper for the Court to adopt as a matter of practice the rules laid down by the settlement authorities according to which a deduction of 5 per cent. from the total area is allowed when the previous measurement is proved to have been done with more than usual accuracy and in all other cases a deduction of 10 per cent. is permitted. (Mukherjea and Biswas, JJ.) JANAKINATH GUHA v. BAZLER RAHAMAN. I.L.R. (1941) 2 Cal. 24=45 C.W.N. 575=198 I.C. 644=14 R.C. 480=A.I.R. 1942 Cal. 85.

-Ss. 52 and 179-Scope and effect-Post-Act and pre-Act agreement not to claim reduction of rent on account of diluvion-Validity.

the land, so far as it related to abatement of rent which was at the time of telling or at the time of

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on account of diluvion, in S. 52 (1) (b) of the Bengal Tenancy Act and in that sense what was common law before became statutory law. It further stated that the rights so defined in that section are not to be curtailed or modified by any contract between the landlord and the tenant except in one class of cases precisely defined in S. 179. In S. 179 the legislature contemplates only contracts made after the passing of the Act. So, a contract, if made after the passing of the Act between the landlord and any class of tenant of agricultural land in a permanently settled area other than a mourasi mukurari tenant, and a contract between the landlord and every class of tenant of agricultural land in a non-permanently settled area, is to be regarded as illegal, if such a contract precluded the tenant from claiming abatement of rent on any ground mentioned in S. 52 of the Act. But contracts of that nature between landlords and tenants which were in existence at the time of the passing of the Bengal Penancy Act are outside the purview of that Act and would not be affected by S. 52 of that Act. There is no express provision or any provision in the Bengal Tenancy Act which by necessary implication has taken away the vested right of the landlord under a pre-Bengal Tenancy Act contract to realise the full rent in spite of deluvion. Therefore, an agreement that the tenant would not claim abatement of rent on the ground of diluvion contained in a pre-Bengal Tenancy Act contract is valid and enforcible after the passing of the Bengal Tenancy Act. (Mitter and Blank, 11.) NANDA LAL BANERJEE v. ASKARAM BABU. I.L.R. (1944) 2 Cal. 263=48 C.W.N. 321=A.I. NANDA LAL BANERJEE v. ASKARAM BABU. R. 1944 Cal. 310.

- S. 52-Zamindar and putnidar-Whether can contract out of this provision.

A zamindar and a putnidar can contract themselves out of the provisions of S. 52 of the B. T. Act. (Rau and Biswas, JJ.) RAMAPATI CHAT-TOPADHAYA v. ARABINDA KUMAR PAL. I.L R. (1943) 1 Cal. 438=207 I.C. 44-16 R.C. 18= 47 C.W.N. 366=A.I.R. 1943 Cal. 217.

-S. 52 (1) (a) proviso-Applicability-Suit pending on appeal on date of its coming into force.

By reason of S. 3 (1) of Act XIII of 1939, the proviso which was added by that Act to S. 52 (1) (a) of the Bengal Tenancy Act applies to a suit which is pending on appeal on the date when that Act came into force. (Mitter and Khundkar, II.) MIDNAPORE ZAMINDARY CO., LTD. v. KUMAR CHANDRA SINGH. I.L.R. (1943) 2 Cal. 245=210 I.C. 594=16 R.C. 472=77 C.L.J. 347=47 C.W. N. 733=A I.R. 1943 Cal. 544.

- S. 52 (1) (a) proviso-Scope and effect-Claim for additional rent for accreted land-Proof required of landlord.

According to judicial decisions interpreting S. 52 (1) (a) of the Bengal Tenancy Act as it stood before the proviso was added in 1939, the landlord was entitled to additional rent as soon as he proved alluvial accretion to the tenure. The proviso merely gives effect to those decisions and lays no additional burden on the landlord. It does not require the landlord to prove further that the area of the land of the tenure including The legislature embodied the common law of the accreted portion is in excess of the area

the last adjustment of rent. (Mitter and Khundkar, JJ.) MIDNAPORE ZEMINDARY CO., LTD. v. KUMAR CHANDRA SPNGH. I.L.R. (1943) 2 Cal. 245=210 I.C. 594=16 R.C. 472=77 C.L.J. 347=47 C.W.N. 733=A.I R. 1943 Cal. 544.

—S. 52(1) (b)—"Deficiency in area"—Landlord undertaking to maintain embankment existing on boundary of tenure—Embankment washed away by river and new embankment erected encrowing upon demised lant—Tenant, if can claim reduction of rent.

In a mourashi moharari lease, it was agreed that the tenant would not be entitled in future to claim a reduction of the rent settled for any reason whatsoever and that the landlord should maintain an embankment which existed on the boundary of the tenure for its protection against the inroads of a river. The embankment was later washed away by the river and the landlord erected a new embankment on a position of the demised land reducing thereby its area. It was not proved that the lands lay in a permanently settled area.

Held, that the area taken from the tenure by the embankment amounted to a deficiency in the area of the tenure of the tenant such as entitled him to claim reduction of rent under S. 52 (1) (b) of the B. T. Act. (Khundkar and Bisvaas, JJ.) SARAT CHANDRA MITRA v. SARADINDU. 49 C.W.N. 462.

——S. 52 (1) (b)—Tenant contracting out of his rights under—Burden of proof. See B. T. AGT, SS. 179 AND 52 (1) (b). 49 C.W.N. 462.

——S. 65—Rent decree—Tenant transferring interest thereafter—Transferee not made party to execution proceeding—Sale, if passes holding.

tion proceeding—Sale, if passes holding.

Under the Bengal Tenancy Act the right to bring a tenure or holding to sale in execution of a rent decree is dependent on the existence of the relationship of landlord and tenant at the time. If, therefore, after the passing of a rent decree, the tenant transfers his interest and the transferee is not made a party to the execution proceeding, the sale will not pass the holding and the transferee's interest will be unaffected by it. (Biswas and Blank, II.) BINAPANI DERI V. BANKU BEHARI MONDAL. 209 I.C. 237=16 RC. 331=77 C.L.J. 81=47 C.W.N. 651=A.I.R. 1943 Cal. 475.

\_\_\_\_\_ S. 68 - Applicability - Putni taluks.

S. 68 of the B.T. Act is not applicable to putni taluks. (Rau and Biswas, JJ.) KAMAPATI CHATTOPADHYA V. ARABINDA KUMAR PAL. I.L.R (1943) Cal. 438=207 I.C. 44=16 R.C. 18=47 C.W.N. 366=A.I.R. 1943 Cal. 217.

——S. 69—Proceedings under—Genuine dispute— Pendency of proceedings under S. 144, Cr. P. C.—If justifies inference of dispute.

It is not justifiable to assume that there is a genuine dispute, in proceedings under S 69, B.T. Act, merely because proceedings under S 144, Cr.P.Code, have been instituted. (Swanzy.) THAKUR PRASAD v. JUGU GOPE. 11 B.R. 118.

———S. 69—Revision—Order by Revenue Divisional Officer rejecting objections as frivolous—Interference by Commissioner and Board of Revenue.

Where in an application by the landlords under S. 69 B.T. Act, the tenants raise an objection alleging that the andlords are not in possession of the village in respect of which the application is made, it is an objection which

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the Revenue Court has jurisdiction to decide and he has jurisdiction also to decide whether there is a genuine dispute or not. If the Court rejects the objection as vexatious and frivolous, the order on the point is final and neither the Commissioner nor the Board of Revenue has jurisdiction to interfere with that decision, even though it may be wrong in law or based on a wrong view of the facts. (Swanzy.) THARUR PRASAD v. JUGU GOPE. 11 B R. 118.

Under S. 74-A of the B.T. Act both the landlord and his agent can be fined separately for realising an illegal imposition from a tenant, if both were concerned in its realisation. (Biswas, J.) MANSHA CHARAN v. JALKADAR DEWAN. I.L.R. (1942) 2 Cal. 440=46 C.W.N. 887=205 I.C. 453=15 R C. 622=A.I R. 1943 Cal. 102.

——Ss. 75-A and 110—Enhancement of rent in proceeding for settlement of rent—When takes effect.

Enhancement of rent in a proceeding for settlement of a fair and equitable rent under Chap. X of the B.T. Act is enhancement of rent within the meaning of S. 75-A of the Act. S. 75-A of the Act although in the nature of a general provision, controls the special provision contained in S. 110 as regards the date from which a rent settled under Chap. X is to take effect. (Biswas, J) NAGENDRA CHANDRA LAHIRI v. PROBHAT CHANDRA DEB. 203 I.C. 625=75 C.L.J. 414=15 R.C. 456=A.J. R. 1942 Cal. 607.

S. 75-A—Scope—Decree for enhancement of rent and decree for ejectment. See B.T. Act Ss. 48-D and 75-A. 46 C.W.N. 255.

S. 75 A—Suit for enhancement filed before 27th August 1937—Decree passed after that date but before 18th August, 1938—Suit pending in appeal on latter date—Proper procedure.

Where a suit for enhancement of rent was instituted before 27th August, 1937 and decreed after that date but before 18th August, 1938, the date on which S. 75-A of the B. T. Act came into force, and the suit was pending in appeal on latter date,

Held, that as the decree of the first Court was rendered inoperative till 27th August, 1937 by Cl. 2 of S. 75-A of the B.T. Act, the appeal should be kept pending till that date and thereafter disposed of accordance with law. (Akram and Pal, JJ.) Prassinna Dev Raikat v. Bisseswar Das. I.L.R. (1943) 1 Cal. 589=207 I.C. 277=16 R.C. 46=47 C.W.N. 374=77 C.L.J. 385=A.I.R. 1944 Cal. 46.

-----S.75-A (2)--Applicability-Decree for enhancement under S. 105—Decree passed before section coming into force.

S. 75-A, sub-S. (2) of the B.T. Act, applies to a decree for enhancement of rent made by a Revenue Officer under S. 105 of that Act. It is immaterial that the decree was passed before that section came into force, as the decree is one made under the provisions of the Act and is, therefore, within the terms of that section. (Henderson, J.) NAGENDRA CHANDRA LAHIRI V. MOULVI MD. ABDUS SOBHAN SAHIB, I.L.R. (1942) 1 Cal. 58=199 I.C. 800=14 R.C. 676=45 C.W. N. 1001=A.I.R. 1942 Cal. 142 (1).

S. 76—Land let out as raiyati for agricultural purpose—Conversion of portion into tank and raising remainder for erection of house—Such user, if constitutes improvements. See B.T. Act, Ss. 23 and 76. 45 C.W.N. 464.

\_\_\_\_\_S. 85-A - Applicability - Patri tenure - Surrender by fractional pitnidar.

The provision for surrender as contained in S. 85-A of the B.T. Act is totally incompatible with and contrary to the essential incidents of a patnias laid down in Regulation VIII of 1810, and in view of the provisions of S. 195 (e) of the B.T. Act it cannot be made applicable to a patnitenure. Even if it applies, it cannot possibly entitle a fractional patnidar to surrender his undivided share in the taluk unless his co-sharers also joined with him. (Derbyshire, C.J. and Mukherjea, J.) NITYA RANJAN MUKHERJEE V. NIRANJAN CHANDRA. 195 I.C. 79=14 R.C. 43-74 C.L.J. 393=45 C.W.N. 137=A.I.R. 1941 Cal. 330.

\_\_\_\_S. 86-Validity of surrender-Non-transferable

holding-Surrender subsequent to sale.

If a tenant sells his holding, although the holding is not transferable, the vendee acquires a right in the tenancy, which is binding on the landlord, and the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been an abandonment or a relinquishment of the holding or a repudiation of the tenancy. It follows therefore that the original tenant is not competent therafter to surrender the tenancy which he has already sold. (Edgley, I.) KALA MIA V KSHETRA MOHAN PAL. 199 I.C. 430=14 R.C. 544=A.I.R. 1941 Cal. 269.

-S. 86-A-Retrospective effect.

S.86-A of the Bengal Tenancy Act merely lays down a rule of evidence, but has no retrospective effect. It has no application to a case where the diluvion and the abatement of rent took place before its enactment. (Henderson, I.) GOPAL VAKTA v. GOPAL MUNSHI. 195 I.C. 450=14 R. C. 100=45 C.W.N. 679=A.I.R. 1941 Cal. 432.

——S. 87—Under raiyati holding transferred before Amendment Act of 1938—Landlord, if can take steps to

re-enter after that Act came into force.

Where an under-raiyati holding was transferred before the Bengal Tenancy Amendment Act of 1938 which made it transferable came into force but the landlord took steps to re-enter under S. 87 of the Bengal Tenancy Act only after the former Act came into operation.

Held, that the new Act did not abrogate the right to re-enter which accrued to the landlord before it came into force, and that the date on which he actually took steps under S. 87 of the Bengal Tenancy Act was immaterial unless any question of limitation arose. (Edgley, J.) KALE JODDAR v. TAPEE BIBI. 48 C.W.N. 827.

——S. 88—Rent of tenure distributed without lands being partitioned—Decree against co-sharer for his share of rent—If executable as rent decree.

A decree obtained against a co-sharer, in respect of his share of the rent is a rent decree where as a result of the distribution of the rent of the tenure under S. 88 of the Bengal Tenancy Act, he has become the sole tenant of the decree-

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holder though the lands have not been partitioned. As the interest of the judgment-debtor is a tenure within the meaning of the Act, there is nothing which can prevent the decree-holder from bringing it to sale under Chap. XIV. (Henderson, J.) NIRMAL CHANDRA V. JOGINDRA NATH. 49 C.W.N. 161 (1).

Rent without partition of lands-Effect of-

Decree, by landlord, if rent decree.

There is nothing in the definition of a tenure in S. 3 (18) or in the provisions of S. 5 (1) of the B. T. Act to support the proposition that there cannot be a tenure comprising an undivided interest in the land. If on an application by the co-sharers of the judgment-debtor under S. 88 of the act, the rent was distributed although the lands were not partitioned, the law does not make it impossible for the handlord to obtain a rent decree. As the interest of the judgment-debtor is a tenure within the meaning of the Act, there is nothing which can prevent the decree holder from bringing it to sale under chapter 14. (Henderson, I.) Godindra Chandra Roy v. Jogindra Nath Roy. A.I.R. 1945 Cal. 325.

S. 88. proviso (i)—Division of tenure—Consent of landlord—Presumption from rent

receipts.

Receipts for aliquot parts of the cash rent from each of several tenants are sufficient to raise the presumption mentioned in the first proviso to S. 88 of the Bengal Tenancy Act, that the landlord had given his express consent in writing to a division of the tenure. (Khundkar, J.) AMAR NATH MISRA v. TRILOCHANDAS DUTIA. 209 I C. 292=16 R.C. 347=76 C.L.J. 251=A.I.R. 1943 Cal. 565.

S. 88 (2), proviso (c)—Interpretation.
S. 88 (2), proviso (c) of the B. T. Act does not lay down that a tenant who does not join in the application for division of rent will not be debarred from re-agitating the matter in some subsequent proceeding. It goes much father than that. It prohibits a Court from making an order at all with respect to the share of such a tenant (Henderson, J.) RAJ RAJESWAR THAKUR V. LAKSHMI KANTA PRAMANIK. 217 I.C. 16=17 R. C. 151=A.I.R. 1944 Cal. 287.

— S. 88 (6)—Order refusing application for sub-division on ground that applicant and opposite party are not co-sharers—Appeal, if competent.

The Civil Court hearing an application for the subdivision of a tenancy is entitled to decide whether or not the applicant and the opposite party are co-sharers and a decision on this point is clearly a decision under S. 88 of the B.T.Act, and as such appealable under sub-S. (6) of that section. (Mukherjea and Sen, JJ.) JIBANDHAN. ATUL CHANDRA. 46 C.W.N. 401 = 77 C. L.J. 12.

S. 88 (6)—"Prescribed fee"—Meaning— Fee not prescribed by Local Government—Appeal, if competent without any fee being paid.

The words "prescribed fee" in S. (6) of the B.T. Act do not mean the "mutation fee" mentioned in sub-S. (4) but mean the fee prescribed by the Local Government. But the fact that the Local Government, has not prescribed any fee cannot take away the right of appeal granted by sub-S. (6). The reasonable interpretation of the sub-section would be that until the fee is pres-

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cribed, the appeal would lie without any fee being paid. (Mukheriea and Sen, J.) JIBANDHAN v. ATUL CHANDRA. 46 C.W.N. 401=77 C.L.J. 12.

-Ss. 93, 94, 95, 98 and 99-Appointment of com mon manager in respect of loint properties not belonging to same set of owners by one order on one application-Legality-Law before and after Amending Act of 1928.

Where there are several items of joint property which do not belong to the same set of co-owners, one application for appointment of a common manager is not maintainable, but the properties must be divided into groups and there must be a separate application for each one of such groups, each group consisting of properties in which the co-owners are the same set of persons. If in such a case only one application is made resulting in one order of appointment, the order is an illegal one, and a suit lies at the instance of any co-owner to recover possession from the common manager, as his appointment is not a valid one. This represents the law under Ss. 93, 94, 95, 98 and 99 of the Bengal Tenancy Act both before and after the Amending Act IV of 1928. (Mitter and Lati/ar Rahman, JJ.) HARIPADA BISWAS  $\nu$ . Md. Nural Absar. 49 C.W.N. 330=80 C.L.J. 160 = A.I.R. 1945 Cal. 336.

-95-Common Manager and Proprietors-Powers of borrowing.

Per Nasim Ali, J .- There is no authority or principle which precludes a proprietor or a set of proprietors of an estate under the management of a common manager appointed by the District Judge under S. 95 of the Bengal Tenancy Act from borrowing money without the Permission of the District Judge for purposes un-connected with the management of the estate. He can pay off the debt incurred by him out of his share of the income of the estate which may be paid to him by the common manager or in any other way he likes provided he does not interfere with the management of the common manager. A creditor, therefore, can lend money to him agreeing to the repayment of the debt by such proprietor or set of proprietors. The common manager is not bound to pay driectly to such a creditor out of the share of that particular proprietor or set of proprietors in the profits of the estate unless the order of the District Judge to that effect is obtained as under S.98 (4) of the Act the common manager is to deal with and distribute the profits of the estate in accordance with the orders of the District Judge. If a proprietor or a set of proprietors want to borrow money for purposes unconnected with the management of the estate and desires that the debts to be incurred by him or them is to be paid out of his or their shares of the profits of the estate in the hands of the common manager, such a proposal can be considered by the District Judge as a , matter dealing with the profits of the estate. Although the common manager is an officer of the Court, there is nothing in law which prevents a particular proprietor or a set of proprietors from authorising him to raise in his own name a particular loan as their agent. He will not be personally liable for its repayment, unless he pledges his personal credit. (Nazim Ali and Pal, 11.) SUKUMARI GUPTA v. DHIRENDRA NATH ROY. 197 I.C. 869=14 R.C. 401=73 C.L.J. 356=A.I. R. 1941 Cal. 643.

-- \$95-Sale of property under management of common manager - Sanction of District Judge-Not necessarv.

The sanction of the District Judge is not necessary for the sale of the property under the management of a common manager appointed by him in execution of a decree obtained against the proprietors of that pro-

perty (Henderson J.) DWARKANATH RAY. v. SYED ABDUL LATIF MIAN 48 C.W.N. 346.

-S. 103 (1) before 1928 amendment and S. 103 B-Entries in respect of non agricultural land -Presumption.

A record of rights could be lawfully prepared in respect of non-agricultural land under S. 101 (1) of the Bengal Tenancy Act even before its amendment in 1928, and entries therein would attract the stautory presumption under S. 103-B of the Act. (Biswas, J.) KAIHINDRA NARAYAN DAS v. GUNENDRA KRISHNA Roy. 48 C. W.N. 153.

-S. 102 (gg) as amended in 1907—Survey ordered before coming into force of amendment-Omission to record irrigation rights or to Prepare fard-iabpashi-Effect of-If negatives irrigation rights. HARIHAR PRASAD SINGH v. JANAK DULARI KUER [see Q.D. 1936-'40 Vol. I Col. 3238.] 191 I.C. 275= 153=A.I.R. 1941 Pat. 118.

-S. 103-B-Presumption from entry in record of rights-Evidence showing foundation for such entry -If necessary.

An entry in the record of rights must be presumed to be correct unless the contrary is proved. A party relying on such presumption is not bound to adduce evidence to show that there was foundation for the entry. Roxburgh J.) HARSHAMUKHI DASI v. KSHITITINDRA DEB ROY. 209 I.C. 156=16 R.C. 296=47 C.W.N. 662 = A.I.R. 1943 Cal. 453.

-S. 103 B (5)—Presumption under—Availability against person challenging correctness of entry-under S. 106 ABDUL WAHEB v. NAGENDRA CHANDRA LAHIRI. [seeQ.D. 1936-40 Vol. I Col. 3239] I.L.R. (1940) 2 Cal. 559 = 192 I.C. 685 = 13 R.C. 335. -Ss 103-B (5), 102 and 101-Tenancy not

governed by Act-Entry as to its permanency-Presumbtion.

Per Pal,—An entry in the record of rights as to the permanent character of a tenancy which is not governed by the B.T. Act gives rise to the statutory presumption under S. 103 B (5) of that Act, when such entry was made under an order made by the local Covernment under S. 101 after its amendment in 1928. S. 102 (h) of the Act authorises a Revenue Officer to make such an entry and the authority is not taken away by the proviso to that section. (Nasım Ali and Pal, JJ.) JOGENDRA KRISHNA v. SUBASHINI I.L.R. (1941) 2 Cal. 44=74 C.L.J. 145=197 I.C. 376=14 R.C. 351=45 C.W.N. 590=A.I.R. 1941 Cal. 541.

S. 104-Fresh settlement-Effect of Rights of tenant.

will not abrogate the A fresh settlement rights of the tenant if the landlord gets a lease from the Government and is in a position to fulfil his obligations to the tenant. (Mukherjea, J.) SRIKANTA MRIDHA v. PRAFULLA CHANDRA GHOSH. 200 I.C. 235=14 R.C. 692=74 C.L.J. 139=A.I. R. 1942 Cal. 133.

-S 104-Settlement of rent-Rent fixed under pre-Act contract-If can be ignored-Revenue settle. ment not accepted by proprietor.

In settling rent under S. 104 of the B.T.Act, the Revenue Officer is not only not competent to disregard or alter the terms of the contract entered into between the proprietor and the tenant before the passing of the Act, but on the other hand is bound to fix the rent on the basis of that contract. It is immaterial that the revenue settlement is not accepted by the proprietor and it is made with a stranger or that the Government has taken

khas management of the estate under Regulation VII of 1822. A person aggrieved by the decision of the Revenue officer may institute a suit under S. 104-H of the Act. (Mukherica and Ellis, J.) PROVINCE OF BENGAL v. MIDNAPORE ZEMINDARY CO., LTD. 49 C.W.N. 395=A.I.B. 1945 Cal. 341.

lity to payment of rent.

A perusal of the grounds of appeal specified in S. 104-H affords complete conviction that the entry of rent settled in the settlement rent roll prepared under Ss. 104-A to 104-F, included a decision as to liability to the payment of rent. The Settlement Officer is not entitled to disregard, or to alter, contractual rights, but is bound to regard them and to give effect to his view of them. (Lord Thankerton.) Kumar Chandra Singh v. Midnapore Zemindary Co. 69 I.A. 51=I.L.R. (1942) Cal. 1=8 B.R. 627=14 R.P.C. 128=46 C.W.N. 802=I.L.R. (1942) Kar. (P.C.) 23=199 I.C. 545=A.I.R. 1942 P.C. 8 (P.C.).

Ss. 104-H and 111-A-If provide alternative remedies.

S. 111-A of the B. T. Act cannot be construed to provide an alternative remedy, when the remedy provided by S. 104-H is no longer open. The specific provisions of Ss. 104-H and 104-J cannot be cut down by any such construction, as it would render nugatory the period of limitation of action provided by S. 104-H and the finality provided by S. 104-J. (Lord Thankerton.) KUMAR CHANDRA SINGH v. MIDNAFORE ZEMINDARY CO. 69 I.A. 51=I.L.R. (1942) Cal. 1=8 B.R. 627=14 R.P.C. 128=46 C.W.N. 802=I L. R. (1942) Kar. (P.C.) 23=199 I.C. 545=A.I.R. 1942 P.C. 8 (P.C.).

Ss. 105 and 105-A-Withdrawal of proceeding under S. 105-Determination of special issue

under S. 105-A-Jurisdiction of Court.

When in a proceeding instituted under S. 105 of the Bengal Tenancy Act for settlement of rent a special issue is raised by the landlord under S. 105-A as to the correctness of certain entries in the settlement record, the Court has jurisdiction to hear and decide that issue although the landlord subsequently withdraws his substantive application under S. 105. (Bartley and Roxburgh-JJ.) SANAT KUMAR v. DEBENDRA NATH. 199 I. C. 445=14 R.C. 552=45 C.W.N. 304=A.I.R 1941 Cal. 332.

-----S. 106-Scope of suit-Dispute regarding

entry as to amount of rent payable.

A dispute regarding an entry in the Record of Rights as to the amount of rent payable is within the scope of the suit under S. 106 of the B. T. Act. The decision of such a dispute will not be a settlement of rent within the meaning of S. 113 of that Act, but will only settle the dispute as to what should be the correct entry under the head "amount of rent payable". But an order that the amount of rent decided to be payable will come into effect from a certain date, is uncalled for in such a suit. (Pal, I.) Sarat Chanlea Mitra v. Santosh Kumar Haldar. 209 I.C. 569=47 C.W.N. 544=16 R.C. 374=AIR. 1944 Cal. 145.

—S. 106—Scope of suit—Enquiry into title—Power of Revenue officer.

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The suit contemplated by S. 106 of the Bengal Tenancy Act is for decision of a dispute regarding any entry made in or omission from the record. If investigation of title is necessary for such a purpose it will certainly be within the competence of the Revenue officer exercising jurisdiction under this section to do that. No doubt in a suit under this section the Revenue officer has primarily to go on the question of actual possession. But there may be cases where the determination of the question of possession itself may be dependent on the question of title, as when the character of the disputed land is not such as to admit of continuous occupation by either party and both the parties claim title to it and assert their respective possession of the same by reason of some occasional acts of enjoyment. In such a case who is in possession is to be determined by the fact of the title, each having the same apparent actual possession. (Pal, J.) CHAIRMAN, DISTRICT BOARD RANGEUR v. JAGATPAT SINGH DUGAR. 198 I,C. 23=14 R C. 416=73 C.L.J. 397=45 C.W.N. 797=A.I.R. 1941 Cal. 676.

S. 106—Scope of suit—Question if person

in possession is benamidar for another.

A suit under S. 106 of the B. T. Act only calls for a decision on the question of actual possession on the date of the entry in the Record of Rights, and not of the title to possess. The question whether the person in possession is a benamidar for another does not, therefore, fall to be decided in such suit. (Pal, J.) SARAT CHANDRA MITRA v. SANTOSH KUMAR HALDAR. 209 I.C. 569=47 C.W.N. 544=16 R.C. 374=AIR. 1944 Cal. 145.

A decree for costs passed by a Special Judge in permitting the withdrawal of a suit brought under S. 106 of the B. T. Act with liberty to institute a fresh suit can be executed by a Civil Court to which it is transferred for execution. (Henderson, J.) SAHA SAMSUDDIN AHMED v. SERAJAL HAQ. I.L.R. (1942) 2 Cal. 121=203 I.C. 222=75 C.L.J. 503=15 R.C. 407=46 C.W. N. 696=A.I R. 1942 Cal. 567.

——S. 108-B (5)—Entry as to rate of rent in record of rights—Presumption—Production by tenant of earlier rent decree showing lower rate—

If shifts burden of proof.

The presumption of correctness attaching to an entry in the record of rights as to the rate of rent for an occupancy holding, is not rebutted by the tenant by the mere production of a rent decree passed between the predecessors of the same parties many years before the records of rights was framed showing a lower rate of rent. The burden of proof is not in such circumstances shifted to the landlord's shoulders and it is not his duty to prove by other evidence that the rent was enhanced after the date of the decree or that the enhancement was within the limits prescribed by law. (Khundkar, J.) JUGAL KISHORE BANERJEE v. SREERAM CHATTERJEE. I.L.R. (1942) 2 Cal. 554=207 I.C. 436=16 R.C. 56=76 C.L.J. 384=47 C.W.N. 144=A.I.R. 1943 Cal.

The proviso to S. 111-A of the B. T. Act is satisfied apart from any matter covered by S. 104-H by holding it to be applicable to cases where the challenge is, for instance, as to the right of the Settlement Officer to deal with the subjects under Ss. 104-A to 104-F. (Lord Thankerton.) KUMAR CHANDRA SINGH v. MIDNAPORE, ZEMINDARY CO. 69 I.A. 51=I.L.R. (1942) 2 Cal. 1=8 B.R. 627=14 R.P.C. 128=46 C.W.N. 802= I.L.R. (1942) Kar. (P.C.) 23=199 I.C. 545= A.I.R. 1942 P.C. 8 (P.C.).

S. 144 (as amended in 1928)—Jurisdiction of High Court—Suit for rent. See LETTERS PATENT (CALCUTTA), CLS. 12 AND 44. 49 C.W.N. 552.

-S. 146-A—Applicability—Certificate sale. See BENGAL PUBLIC DEMANDS RECOVERY ACT, S. 20. 45 C.W.N. 277.

-S. 146-A-Rent suit-Principle of representation—Condition. HARAN CHARAN NANDAL v. HIRALAL NASKER. [see Q.D. 1936—'40 Vol. I Col. 3239.] 194 I.C. 172—13 R.C. 486—A.I.R. 1941 Cal. 88.

-S. ·146A (3)—Interpretation.

The proper interpretaion of sub-S. (3) of S. 146-A of the B. T. Act is that the four sub-clauses must be read in a disjunctive way. If the landlord institutes a rent suit against a person falling within any one of the descriptions in any one of the said four sub-clauses and gets a decree, that decree will be regarded as a rent decree and the sale in execution thereof as a sale under Chap. XIV of the Bengal Tenancy Act provided that the parties who have interest in the tenancy and who have been left out of the suit do not fall within any one of the categories described in the other three sub-clauses of sub-S. (3). (*Mitter, J.*) RAMANATH BANERJEE v. GIRISH CHANDRA SINHA, I.L.R. (1941) 1 Cal. 278=196 I.C. 602=45 C.W.N. 119=A.I R. 1941 Cal. 515

-S. 146-A (3)—Scope and effect—Representation in rent suits.

The doctrine of representation in rent suits does not rest solely on the provisions of S. 146 A of the B.T. Act. Sub-S. (3) of that section enacts no more than this that if the defendants in the suit include all the persons mentioned in the various clauses of that subsection, then the entire body of co-sharer tenants shall be deemed to be represented by them, or in other words that in that case there will be an irrebuttable presumption that the entire tenancy has been represented in the suit. It does not say that the non-joinder of any such persons of any other persons having an interest in the tenancy will of itself negative representation. The question of representation is one of fact, and must depend on the particular circumstances of each case. There is no reason why, apart from the provisions of sub-S. (3), it may not be still open to a party interested to show that, in point of fact, the entire tenancy was represented in the suit by the persons who were actually joined as defendants. (Biswas, J.) SURATAN BIBI v. LUTU GOPAL BHATTACHARIYA. I.L.R. (1942) 1 Cal. 523=205 I.C. 66=15 R.C. 570=A.I.R. 1943 Cal. 51.

-S. 146-A (3)—Scope—Representation of entire body of co-sharer tenants-Meaning of.

The four clauses of sub-S. (3) of S. 146-A of the B.T. Act are disjunctive, but the Court cannot hold two holdings and these holdings were in possession of

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that the defendants in the suit represented the entire body of the co sharer tenants, if it is found that even one co-sharar tenant answering any of the descriptions in the four clauses has been left out. (Khundkar, J.) MAHADEB MANDAL v. RATAN MANDAL. I.L.R. (1944) 1 Cal. 612 = 219 I.C. 201 = A.I.R. 1945 Cal. 186.

-Ss. 148-A and 162 to 166-Rent decree obtained by some of co-sharer landlords-Application for its execution by them-Amount payable to them stated therein as amount payable under decree and not total amount-Effect of sale.

Where a rent suit instituted by some of the co-sharerlandlords was in compliance with all the relevant provisions of the B. T. Act, particularly of S. 148-A of that Act, and the decree obtained in that suit was a valid decree available against the holding in the manner provided in Chapter XIV of the Act and the execution of the decree complied with all the requirements of Ss. 163 to 166 and S. 148-A (7) and also of S. 162 excepting that in naming the amount recoverable under the decree the total amount so recoverable was not stated but only the amount payable to the applicants for execution was given as the amount recoverable, but the application for execution contained all other descriptions of the decree and was for the benefit of the entire body of the decree-holders,

Held, (i) that this non-compliance with S. 162, if non-compliance it was, did not in any way affect the execution proceeding and the sale held in it would have the effect of passing the entire holding to the purchaser as contemplated by S. 65 and Chap. XIV of the B. T. Act and that the character and effect of the execution was not in any way affected by the fact that the application by the other cc-sharers for joining the execution case as co-applicants was disallowed, (ii) and that consequently a purchaser at another rent sale held subsequently to the above sale did not acquire any title to the holding by his subsequent purchase- (Pal, J.) SADEN v. DIL 46 C.W.N. 505. DILIP KUMAR ROY CHOWDHURY.

S- 148-A-Rent suit-Rent for earlier period covered by award of Debt Settlement Board tacked to claim in suit-Deccree, if rent decree.

A decree passed in a suit to recover rent due for a certain period does not cease to have the effect of a rent decree merely because the landlord has included in the suit the rent due for an earlier period which was covered by an award made by a Debt Settlement Board. It is necessary to examine the award and to see whether if it were a decree passed in a rent suit, it could be executed as a rent decree. If it could, then it may be so executed in the absence of any other obstacle in the way of the decree-holder. But if the award includes rent which could not be recovered in the suit on account of the bar of limitation, the decree passed in the suit cannot be executed as a rent decree but must be executed as a money decree. (Henderson, J.) JOGEN-DRA NARAYAN MAZUMDAR v. NURMAHAMMAD-ULLA SARKAR. 77 C.L. J. 67. Affirmed on L. P. Appeal in A.I.R. 1945 Cal. 32=219 I.C. 109=18 R.C. 67.

-S. 148-A-Single suit for rent in respect of two holdings in possession of different persons and for different periods-Decree passed in suit-Validity-If has effect of rent decree-C. P. Code, S. 99.

Where an original holding had been split up into

different persons but a single suit had been brought to recover rent for different periods in respect of the two holdings, there can be no doubt that two separate causes of action were improperly joined in the suit for rent. But the decree passed in the suit could not be reversed merely on the ground of misjoinder even in a proceeding by way of appeal if it has not affected the ments of the case, in view of the provisions of S. 99, C P. Code. If there was no appeal from the decree and no objection was raised by any of the defendants concerned to the frame of the suit, they cannot be heard to say in a subsequent suit that the decree was without jurisdiction. If in passing the decree, the Court moulded the decree in such a manner as to enable the decree to apply distributively to the two holdings in respect of which the suit was brought and the execution proceedings were also moulded on the same lines so that each set of detendants knew what they had to pay, the decree has the effect of a rent decree. (Harries, C.J. and Fazl Ali, SUNDAR PANDIT v. MAHADEO PRASAD. 197 I.C. 476=8 B.R. 228=14 R.P. 312=A.I.R. 1942 Pat. 243.

A co-sharer landlord who is made a defendant in a suit framed under S. 148-A of the Bengal Tenancy Act remains only in name as a party, if no notice or summons of the suit is served on him and he does not appear. In that case he is not a party to the suit in the eye of law and the decree would not be in that event a rent decree. But if he is either served with the summons of the suit, or if he appears and is represented in the suit, the decree would be a rent decree, if other material conditions of S. 148-A are fulfilled. If in such a case the special notice under sub-S. (2) is not served on him the only effect of the non-service is that he does not lose his right to sue for his share of the rent for that period in a separate suit. (Mitter and Bisquas J.). JATIS CHANDRA PAL t. KSHIRODE KUMAR. I,L.R. (1943) 1 Cal. 274=208 I.C. 309=16 R.C. 155=76 C.L.J. 83=47 C.W.N. 186=A.I.R. 1943 Cal. 319.

S. 148-A (4)—Non-consolidation of rent suits

-Effect of decree passed in main suit.

Non-compliance with sub-5. (4) of S. 148-A of the Bengal Tenancy Act would be at most an inregularity, and could not alter the nature of the decree passed in the main rent suit with which the other suits were not consolidated. If would be a rent decree. (Mitter and Biswas, J.) JATIS CHANDRA PAL v. KSHIRODE KUMAR I.L.R. (1943) 1 Cal. 274=208 I.C. 309=16 R.C. 155=76 C.L J. 83=47 C.W.N. 186=A.I.R. 1943 Cal. 319

S. 148-A (6)—Separate decrees passed in favour of different co-plaintiffs—Validity.

S. 148-A (6) of the Bengal Tenancy Act, no doubt requires one decree to be passed specifying the amount payable to each co-sharer landlords or to each set of co-sharer landlords, separately. If however, instead of drawing up one decree in that form, separate decrees are drawn up in favour of the different sets of co-plaintiffs, the matter is only one of form and not of substance; (Mitter and Biswas, J.) JATIS CHANDRA PAL v. KSHRODE KUMAR. I.R. (1943) 1 Cal. 274 = 208 I.C. 309 = 16 R.C. 155 = 76 C.L.J. 83 = 47 C.W.N. 186 = A.I.R. 1943 Cal. 319.

——S. 149 (3)—Order under—Appeal, if lies— Appeal filed against order—Further appeal or revision to High Court—If competent.

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No appeal lies from an order under S. 149 (3) of the B. T. Act. But if an appeal is filed against the order a further appeal to the High Court from the decision of the appellate Court is competent, and not an application in revision. (Henderson, J.) RAMAN CHANDRAT, KEDAR NATH, 197 I.C. 15=45 C.W.N. 930=14 R.C. 305=A.I.R. 1941 Cal. 441.

— S. 153—Decision on amount of rent annually payable—Decision groung effect to tenant's plea of suspension of rent—If amounts to.

Whether, when the Court gives effect to the tenant's plea of suspension of rent, it can be said to have decided a question relating to the amount of rent annually payable by the tenant as is contemplated by the proviso to S. 153 of the B.T. Act depends on the nature of the pleadings and the facts of a particular case. When the tenant has not been put in possession of any portion of the demised premises or has been permanently deprived of it and the court either directs suspension or abatement of rent generally it cannot be said that a question of the amount of rent payable by the tenant is not decided in such cases. Even if a case of total suspension of rent is different in principle from one of abatement or apportionment of rent it may be fairly argued that in a case where the plea taken by the tenant is one of partial dispossession by the landlord a question would always arise as to whether the rent should be suspended in its entirety or would be apportioned merely and if the Court allowed suspension that would amount to an implied decision that there should not be any apportionment in that particular case. (Mukherjea and Roxburgh JJ.) ATAR MIAN v. INDRA KUMAR, 196 I.C. 639 =45 C.W.N. 761=14 R.C. 265=76 C.L.J. 29= A.I.R. 1941 Cal. 556.

S. 155—Suit for electment of occupancy tenant

-Allegation of several acts if waste—Kight to sucWhen accrues—Limitation Act, Art. 32.

A suit for ejectment of an occupancy tenant and for compensation on the ground that he had used the lands in a manner which rendered the same unfit for the purposes of the tenancy, such as is contemplated in S. 155 of the Bengal Tenancy Act, is governed by Art. 32 of the Limitation Act. It is well settled that if there is a misuse by the tenant even of a portion of the land comprised in the tenancy, the landlord's right to eject may and must be exercised in respect of the whole holding, and he cannot bring a suit for the ejectment only from the But this does not portion which was actually misused. mean that where the tenants affect only a portion of the land by any acts of waste, the landlord shall be bound to sue at once and that he may not wait till further acts of waste are committed on the rest of the tenancy. Similarly, it does not follow that because a suit for ejectment may be barred, if it is founded on any particular act of waste or misuse, it may not yet be within time as regards other acts of a similar kind which might equally found a fresh cause of action. Therefore, in order to decide whether a suit is barred or not, it is necessary for the Court to come to an express finding as to when the plaintiff first came to know of each of the several acts of misuse or waste alleged. It is also necessary to see when the various acts complained of produced the result which would give the plaintiff the right to sue. The right to sue does not accrue until and unless the land has been rendered unfit for the purposes of the tenancy. The result is not neces

sarily reached as soon as the act is commenced. Neither can it be said that it is not reached until the act is finally completed. It is a question of fact, which depends on the evidence as to when and at what stage the land may be regarded as having become unfit by reason of any acts committed by the tenants. (Biswas. J.) PROBHATI DEBI v. TARAK NATH KUNDU. 46 C.W.N. 786.

-S 155-Suit for electment of occupancy tenant -- Limitation-Exclusion of period of notice-Limitation Act, S. 15 (2).

In computing the period of limitation for a suit for ejectment of an occupancy tenant on the ground that he had used the land in a manner which rendered the same unfit for the purposes of the tenancy, the landlord is entitled to claim the exclusion of the period of the notice served by him on the tenant under S. 155 of the Bengal Tenancy Act. Such a notice is a notice of a suit within the meaning of S. 15 (2) of the Limitation Act. (Biswas, J.) PROBHATI DEBI v. TARAK NATH. KUNDU. 46 C.W.N. 786.

-S. 158-B (2)—Absence of notice—Legality of

Per Mukherjea, J.—A sale held in execution of a rent decree without complying with the provisions as to notice in S. 158-B (2) of the B. T. Act (which is now S. 148-A (7) of the present Act) is not a nullity out and out, and void for want of jurisdiction. The sale is still good as a money sale and it would pass the right, title and interest of the judgment-debtor. It is not correct to say that it is an irregular sale, which will mean that it has to be set aside by a proper proceeding.

Per Roxburgh, J.—The issue of notice under S. 158-B (2) is not mandatory and is not a condition precedent to give the Court jurisdiction to sell. In omitting to give proper notice under this provision, the Court commits an irregularity and the sale of the entire holding remains good subject to proceeding under O. 21, R. 90, C. P. Code. The irregularity cannot have the effect of turning that sale into something of a different character, namely, a sale merely of the right, title and interest of the judgment-debtor. (Mukheriea and Roxburgh, JJ.) JAB ALI KHAN v. BHUPATISH CHANDRA P.OV. 201 I.C. 574=15 R.C. 242=74 C.L.J. 360=A.I.R. 1942 Cal. 61.

-S. 158-B(2)—Absence of notice—Waiver by cosharers.

Per Mukherjea, J .- The provision for giving notice in S. 158-B (2) of the Bengal Tenancy Act is intended merely to safeguard the interests of the other co-sharer landlords. It is the co-sharers alone who can impeach the sale on the ground of notice and it is open to them also to waive their right to notice, and treat the sale as a rent sale. If the co sharers after being apprised of the sale keep quiet and do not take any steps, it would amount to waiver of their right to notice. (Mukherjea and Roxburgh, J.). RAJJAB ALI KHAN v. BHUPA TISH CHANDRA ROY. 201 I.C. 514=15 B.C. 242=74 C.L.J. 360=A.I.R. 1942 Cal. 61.

-8. 159—Annulment of encumbrance—Right of purchaser of under raivati holding.

S. 159 of the B. T. Act by itself cannot give the purchaser of an under-raiyati holding at a sale in execution of a decree for rent the right to annul incumbrances as provided for in that section. The purchaser will have this right only if the decree for arrears created a charge under S. 65 of that Act. (Mukherica, J.) ABDUS SAMAD MOLLA v. ABDUL GOFUR MOLLA. I.L.R. (1941) 1 Cal. 409=196 I.C. 357=14 R.C. 227=45 C.W.N. 367 = A.I.R. 1941 Cal. 396.

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-S. 159-Purchaser of holding after rent decree not impleaded in execution proceedings -Whether bound by execution sale.

A purchaser of a holding after the passing of a rent decree is bound by the sale held in execution of that decree, although he was not made a party to the execution proceedings. There is no statutory provision which requires a decree-holder to give a notice to a person who is not the judgment-debtor or a representative of the judgment-debtor. (Henderson, J.) SURENDRA NATH HALDAR v. PRATAP CHANDRA MAJAI. 76 C.L.J. 248.

-Ss. 159, 160 and 167—Rent sale—When subject to under-raivati interest.

A purchase of a holding at a sale in execution of a rent decree is subject to the under-raiyati interest therein only if the under-raiyati interest was an "incumbrance" within the meaning of S. 161 of the B. T. Act but it had not been annulled by the purchaser under S. 167, or if it was a "protected interest" as defined in S. 160 of the Act. S. 159 in fact makes it clear that on no other basis could the under-raivati interest be held to be binding on the purchaser. This is a section which purports to enact an exception to the general rule that the tenure or holding itself shall pass at a rent sale, and it makes an exception only in favour of "protected interest" on the one hand, and in incumbrances" on the other, provided in the case of the latter the purchaser takes no steps to annul the same. It follows that all other interests will ipso facto stand determined by such sale. In other words, an interest will subsist, if it is a protected interest, it will also subsist, if it is an incumbrance and is not annulled; but an interest, which is neither a protected interest nor an incumbrance, must yield to the rights of the purchaser. As the definition of the term "incumbrance" in S. 161 (a) shows, if an interest is a protected interest, it cannot be an incumbrance, but the converse does not follow that if it is not an incumbrance, it must be a protected interest. An interest is not therefore necessarily saved from a rent sale by merely showing that it is not an incumbrance, it can be saved only where it is not an incumbrance because it is a protected interest. (Biswas, J.) KHATERUDDIN v. TRIPURASUNDARI DEBI. 46 C. W.N. 383=201 I.C. 344=15 R.C. 170=A.I.B. 1942 Cal. 375.

Ss. 159 and 161—Reservation of power to annul incumbrances—Scope and object. Pro-Tulla Nath Tagore v. Santosh Kumar. [See Q.D. 1936—'40 Vol. J. Col. 3239.] I.L.R. (1940) Kar. (P.C.) 394—I.L.R. (1941) 1 Cal. 1=1941 P.W.N. 278—45 C.W.N. 309

-Ss 159 and 167-Several purchasers-Power to annul incumbrance—If must be exercise jointly.

The power to annul the incumbrances under the B.T. Act is given to "the purchaser" meaning there by the entire body of purchasers when there are more than one purchaser of the tenure or holding. Such power must therefore be exercised by the entire body of the auction-purchasers jointly. (Akram and Pal, JJ) SARALA SUNDARI v. PURNA CHANDRA. I.L.R. (1942) 2 Cal. 52=46 C.W.N. 409=205 I C. 272=15 R.C. 593=76 C.L.J. 377=A.I.R. 1943 Cal. 52.

Dwelling houses in S. 160 (e) of the B. T. Act. mean permanent dwelling houses. The collocation of the words in this clause goes to show that the object is to protect leases on which permanent

structures have been erected. (Biswas, J.) LATIM SEKH v. TRIPURA SUNDRI. 46 C.W.N. 383. =201 I.C. 344=15 R.C. 170=A.I.R. 1942 Cal. 375.

S. 162—Rent decree obtained by some of cosharer landlords—Application for its execution by them-Amount payable to them stated therein as amount payable under decree and not total amount—Effect of sale. See B. T. Act Ss. 148-A AND 162 TO 166. 46 C.W.N. 505.

-Ss. 164 to 167—Sale of tenure at rent sale -Sub-tenant under defaulting tenant-Position of -If becomes tenant under purchaser till annulment

and trespasser thereafter.

When a tenure is purchased at a rent sale a sub-tenant under the defaulting tenant does not become automatically a tenant under the purchaser and remain a tenant till the tenancy is put an end to by a notice under S. 167 of the B. T. Act. If the purchaser exercises his right to annul the incumbrance the position of the subtenant will be that of a trespasser from the very moment of the sale. He can be treated as a tenant if the time for exercising his right of annulling incumbrances has expired. (Mukherjea and Biswas, JJ.) PROVABATI DEBI v. PROTAB CHANDRA MAZUMDAR. I L.R. (1942) 1 Cal. 49= 200 I.C. 453=15 R.C. 3=45 C.W.N. 991=74 C. L.J. 104=A.I.R. 1942 Cal. 145.

-Ss. 165 and 163-Sale proclamation with power to avoid all encumbrances ordered-Further proceeding stayed by Debt Settlement Board -Stay order vacated beyond one month from date fixed for sale—Nature of fresh proclamation to be issued—C. P. C. O. 21, Rr. 67 and 69.

Where after a proclamation of sale with power to avoid all encumbrances was ordered under S. 165 (1) of the B. T. Act further proceedings were stayed by a notice issued by a Debt Settlement Board under S. 34 of the Bengal Agricultural Debtors Act and the order of stay was vacated beyond the period of one month from the date fixed for the sale, R. 69 of O. 21, C. P. Code, will operate to require a fresh proclamation to be issued and the proclamation will be one of the kind leading to the part of the sale, which is being adjourned namely a proclamation under S. 165 (1) for sale with power to annul encum-S. 165 (1) for sale with power to annual checking brances and not a proclamation under S. 163 of the B. T. Act for sale free from encum-Brances. At this stage the words "under R. 67" in R. 69 of O. 21, C. P. Code, are to be interpreted to mean R. 67 as varied by S. 165 (1) of the B. T. Act read with S. 163 (3). It follows that the proclamation must be for a sale with power to annul encumbrances and fixed for a date not less than fifteen or more than thirty days" from the date of the postponement" which date of postponement must be the date on which fresh proclamation is ordered. (Biswas and Roxburgh, JJ.) BIBHUTI BHUSAN DAS v. BEJOY CHAND MAHTAB. I.L.R. (1942) 1 Cal. 359=202 I.C. 434=15 R.C. 335=75 C.L.J. 186=A.I.R. 1942 Cal. 481.

-S. 167—Annulment of sub-tenancy—Right of purchaser-Nature of sub-tenancy-If material A purchaser of a raiyati holding at a sale held in exection of a rent decree is entitled to annul

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Municipality. The right of the purchaser to annul an incumbrance which includes a sub-tenancy depends on whether or not the decree in execution of which the purchase is made is a rentdecree and is wholly irrespective of the nature of sub-tenancy sought be annulled. It is, therefore immaterial whether the sub-tenancy is for any agricultural purpose or not. (Biswas, J.) BIDYAT LAIA DASI v. AHADALI SHEIK. 45 C.W.N. 165.

-S. 167—Application under—Limitation— Starting point—Application to set aside sale disallowed by trial Court, allowed by Appellate Court and ultimately disallowd by High Court-Confirmation of sale by trial Court while disallowing application. See B. T. Act, Ss. 174 (3) 174-A (5) AND 167. 46 C.W.N. 706.

-S. 167-Fresh notice-Power of Court to isssue—Question of service of previous notice pending in appeal. Kiran Chandra Das v. Matilal Biswas. [see Q D. 1936—'40 Vol. I. Col. 479.] 191 I.C. 796=13 R.C. 282.

-S. 167—Incumbrances created by registered instrument-Purchaser, if can be taken to have had "notice".

Under S. 167 (i) of the B. T. Act, a purchaser must be taken to have had notice of an incumbrance within a reasonable time of his purchase when that incumbrance has been effected by a registered instrument. (Akram and Pal, JJ.)
SARALA SUNDARI v. PURNA CHANDRA, I.L.R.
(1942) 2 Cal. 52=46 C.W.N. 409=205 I.C. 272 =15 R.C. 593.=76 C.L.J.377=A.I.R. 1943 Cal.

-S. 167-Landlord purchasing-holding-In execution of rent decree—If entitled to hold it free of incumbrance without annulling same.

A landlord who purchases a holding in execution of his rent decree is not entitled to hold it free of the mortgage to which it is subject without annulling the same under S. 167 of the B. T. Act. The procedure provided by this section is the only mode of annulling an incumbrance, and the purchaser must have recourse to it within the specified period for the purpose. If that is not done, the landlord purchaser must hold the property subject to the mortgage, and will be entitled to redeem. In this respect the statute recognises no distinction between a landlord purchaser and a stranger purchaser under a rent decree. (Biswas, J.) Chunnu Lalv. Amluk Chandji. 46 C.W.N 706.

-S. 167—Mortgage of non-transferable occupancy holding-If amounts to incumbrance-Land lord purchaser at rent sale not annulling such mortgage-Mortgagee's right to sue on mortgage-Mortgagee purchasing at mortgage sale-If can sue for possession against landlord-Landlord not made party to mortgage suit-Remedy of mortgagee purchaser.

A transfer by way of mortgage of a nontransferable occupancy holding or of a portion of it is certainly a limitation of the interest of the tenant and hence amounts to an incumbrance with in the meaning of S. 161 of the B. T. Act and as an incumbrance it does not stand ipso facto cancelan under raiyati jama, although it consists of led by the rent sale, but has to be annulled by the homestead lands within the jurisdiction of a purchaser under S. 167 of the Act. It would make

no difference that the purchaser was the landlord himself and not a stranger. If the landlord purchaser does not annul the mortgage, then in a suit to enforce the mortgage bond to which he is made a party, no question of transferability of the holding could be raised by him. But such a question could certainly be raised by him if the mortgagee purchases the holding in execution of his decree and sues to recover possession of the same from the landlord purchaser or the persons with whom the land has been settled by him. The plea, however is of no help if the mortgage sale took place after 1928 when the occupancy holdings were made transferable by law. If however, the mortgagee purchaser did not make the landlord purchaser a party to his mortgage suit, he cannot maintain a suit for possession against him and his only remedy, would be a suit to enforce his mortgage security. (Mukherjea and Roxburgh, IJ.) BIDHURANJAN SARKAR v. SOLEMAN PRAMA-NIK. I.L.R. (1941) 2 Cal. 209=73 C L J. 578= 197 I.C. 334=14 R.C. 338.=45 C.W.N. 883= A.I.R. 1941 Cal. 613.

-S. 167-Order refusing to issue notice-Revision—C. P. Code, S. 115. KIRAN CHANDRA DAS v. MATILAL BISWAS. [see Q.D. 1936—'40 Vol. I, Col. 479.] 191 I.C. 796=13 B.C. 282.

-S. 167-Patni sale-Annulment of darpatni-Service of notice on darpatnidar-If necessary -Manner of service-Right of annulment-If personal to Zamindar-Time within which it has to be exercised. See BENGAL PATNI TALUKS REGULATION, S. 11 (2) . 49 C.W.N. 271.

-S. 168-A (as amended in 1940)—Applicability and construction—Decree for arrears of rent—Transfer outside Bengal for execution— Right of decree-holder to execute by arrest or by attachment of property other than holding-If

S. 168 A of the B. T. Act, as amended by Act XVIII of 1940, does place a restriction on the mode of executing a decree for arrears of rent in Bengal. There is nothing in the section preventing an application being made under S. 39, C. P. Code, to the Court passing the decree to transfer the decree for execution by a Court outside Bengal, and there is nothing on the face of the section to prevent the decree-holder executing the decree by arrest of the judgment debtor. What it actually says, is that if execution is to be by attachment and sale of property, then the only property which can be proceeded against is the property in respect of which arrears of rent were recovered. If the decree is transferred for execution to another province, the section cannot limit the powers of a Court outside Bengal. The section must be read as applying only to Bengal and must not be read as prohibiting transfers of the decree for execution or as attempting to govern the rights of litigants in Courts of other provinces. (Harries, C. J. and Manchar Lall, J.) JAGDAMBA PRASAD . KALYANI PRASAD SINGH DEO. 1943 P.W.N. 70.

-S. 168-A-Applicability-Decree for antecedent balances of puin rent obtained in suit brought after sale of putni-Putni Regulation, S. 17.

A decree for antecedent balances of putni rent obtained in a suit brought after the sale of the putni under Regulation VIII of 1819 is a decree for arrears of rent within the meaning of S. 168-A of the B. T.

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section is in no way repugnant to the provisions of S. 17 of the Putni Regulation. (Mukherlea and Blank, J/.) ABDUL AZIZ v. MAHARAJ UDAY CHAND. 207 I.C. 384=16 R C 59=77 C.L.J. 271=47 C.W.N. 520= A.I R. 1943 Cal. 358.

-S. 168-A-Applicability-Decree for cesses-Cesses payable by rent-free holder-Bengal Cess Act Chap. IV.

Cesses payable by a holder of a rent-free land under Chapter IV of the Bengal Cess Act, constitute a charge on the rent-free nolding, and S. 168-A of the B. T. Act is attracted when a decree for such cesses is put into execution. (Mukherica and Sharpe, IJ.) SRI SRI ISWAR JOY CHANDI v. MANMATHA NATH DAS. 49 C.W.N. 756.

-S. 168 A-Applicability-Decree for rent on jalkar.

S. 168-A of the Bengal Tenancy Act does not apply to a decree for arrears of rent due in respect of a jalkar. (Henderson. J.) NIVANANI DEBI v. CHHA-KURAM DOLOI. 217 I.C. 117=17 R.C. 172-48 C.W.N. 500 = A.I.R. 1944 Cal. 416.

-S. 168-A-Applicability-Decree for sum of money obtained by Zemindar against darpatnidar girbidar-I/ one for rent.

S. 168-A of the B. T. Act cannot possibly have any application to decrees obtained by a plaintiff against a person with whom there is no relationship of landlord and tenant. A darpainidar holding possession of a patni as girbidar, is not a tenant of the Zemindar. A decree for a sum of money obtained by the latter against the former on the basis of an agreement by which the former agreed to pay to the latter a sum of money which was equal to the patni rent for a year, is not one for rent, and as such, S. 168-A of the B. T. Act does not apply. (Henderson, J.) UDOY CHAND MAHTAB v. BIBHUTI BHUSAN DAS. I.L.R. (1944) 2 Cal. 249.

S. 168-A-Applicability-Patni tenures.
S. 168 A of the B. T. Act is applicable to patni tenures. (Mukherica and Akram, JJ.) UDOY CHAND MAHATAB v. AJIT KUMAR ROY. 80 C.L.J. 41.

-S. 168 A-Applicability-Patni tenures-Section, if affects Patni Regulation.

The operation of S. 168-A of the Bengal Tenancy Act is not withdrawn from the putni tenures by reason of S. 195 (e) of the Act. There is nothing in S. 168-A which can be said to affect the Putni Regulation itself. No doubt it affects the putni tenures. But as there is nothing in the Putni Regulation relating to the execution of any decree for arrears of rent due in respect of the putni and as S. 168 A only gives certain special provisions relating to such execution, the provisions contained in the Putni Regulation are not affected by S. 168-A of the Bengal Tenancy Act. (Nasım Ali and Pal, JJ.) SATISH CHANDRA v. SUDHIR KRISHNA GHOSH. 201 I.C. 24=15 R.C. 110=5 F.L.J. (H.C.) 131=75 C.L.J. 190=46 C.W.N. 540=A.I.R. 1942 Cal. 429.

-S. 168-A-Applicability-Pending proceed. ings.

Sub. S. (2) of S. 168-A of the Bengal Tenancy Act shows that pending proceedings are not outside the scope of the section. If the sale of any property other than the defaulting tenure was completed before the section came into force the sale would certainly stand but if the property was attached and not sold, the judgment-debtor is given the right to apply for release of the property on payment of costs. The words of the Act and consequently comes within its mischief. The sub-section are wide enough to include a case where the

landlord having put up to sale the defaulting tenure before the section is introduced proceeds against other properties of the judgment debtor which are attached but not sold when the section comes into force. Such cases would be governed by sub-S. (1), Cl. (a) and the expression "shall not be executed" occurring in that clause would impose limitations upon all proceedings in execution commenced or continued after the new section comes into force. (Mukherlea and Blank, Jr.) ATUL CHANDRA CHAKRAVARTHI v. UPENDRA NARAYAN. I.L.R. (1942) 2 Cal. 397 = 202 I.C. 147 = 15 R.C. 297 = 75 C.L.J. 267 = 46 C.W.N. 684 = A.I.R. 1942 Cal. 473.

S. 168-A which was introduced in the Bengal Tenancy Act by the Amending Act of 1940 prohibiting the attachment and sale of the property of the judgment-debtor other than the defaulting tenure, was not intended to affect sales which were confirmed before the amending Act came into operation. (Nasim Ali and Pal, JJ.) PRAFULLA KUMAR ROY v. BIBHABATI ROY. 201 I.C. 319=15 R.C. 165=46 C.W.N. 549=A.I.B. 1942 Cal. 369 (1).

—S. 168 A—Attuchment made before section coming into force—Judgment-debtor not applying for its release under sub S. (2)—Sale of property attached—Validity.

Where an attachment of property took place before S. 168-A of the Bengal Tenancy Act came into force and the judgment-debtor did not apply to have the attachment released under sub-S. (2) of that section, a sale held after that section came into force in pursuance of the attachment is valid. (Henderson, J.) UDAY CHAND MAHTAB v. PHANINDRA LAL GHOSH. I.I. B. (1944) 1 Cal. 28=218 I.C. 198=18 B.C. 17=A.I.B. 1944 Cal. 384.

5. 168-A—Attachment of decree passed in favour of judgment debtor—If barred.

An attachment of a decree passed in favour of a judgment-debtor under O. 21, R. 53, C. P. Code, in execution of a rent-decree obtained against him, is not hit by S. 168-A (i) (a) of the Bengal Tenancy Act. (Mukherjea and Sharpe, JJ.) ANIL KUMAR BASU v. BIMAN BIHARI MITRA. I.L.R. (1944) 2 Cal. 340=217 I.O. 101=17 R.C. 163=48 C.W.N. 344=A.I.R. 1944 Cal. 240.

-S. 168-A-"Decree-holder"-Meaning of. The word "decree-holder" in S. 168-A of the B. T. Act must be given its natural meaning. It does not mean "landlord". Where, therefore, a rent suit was instituted by several co-sharer landlords but the execution proceedings were taken by only some of them who purchased the holding making the others, who refused to join in the execution petition, as parties, a purchaser of the interest of the latter at a putni sale held prior to the institution of the execution case cannot file an application under S. 168-A (1) (b) praying that the purchasing co-sharer landlords should be compelled to deposit the rent which had become due between the date of his purchase in the putni sale and the date of the confirmation of the rent sale. (Hendersan. J.) SARAT KUMAR RAY v. KIRAN CHANDRA RAY. I.L.R. (1943) 1 Cal. 408=212 I.C. 120=16 R.C. 582= A.I.R. 1944 Cal. 110,

----S. 168-A-'Decree for rent' — Zemindar mortgaging zemindari after granting ijara lease— Mortgagee empowered to recover rent from

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ijaradars for appropriation towards interest— Decree obtained by mortgagee for such rent— If hit by section.

Where a zemindar after granting an ijara lease in respect of his zemindari mortgages it to another and assigns to the mortgagee his right to recover rent from the ijaradars and empows him to appropriate so much of it as is necessary to pay the interest due to him, the rent paid to the mortgagee by the ijaradars is rent in the proper sense of the word. Consequently a decree obtained against the ijaradars by the mortgagee for such rent cannot but be a decree for rent which is hit by S. 168-A of the B. T. Act. (Mukheriea and Blank, JJ.) SATISH CHANDRA v., BISHNUPADA PAL, I.L.R. (1942) 2 Call 325=202 I.C. 488=15 R.C. 352=5 F.L.J. (H.C.) 144=46 C.W.N. 628=A.I.R. 1942 Cal. 470.

A decree-holder purchasing a holding in execution of his rent-decree under S. 168-A of the B. T. Act is not liable to deposit in Court the rent which has become payable between the date of the institution of the suit and the date of the confirmation of the sale. (Henderson, J.) JAGADISH CHANDRA SINHA v. MUNSUR MOLLA. 46 C.W.N. 920.

S. 168-A of the Bengal Tenancy Act does not bar the execution of a rent decreee by the appointment of a receiver of the judgment-debtor's property under S. 51 (d) C.P. Code. (Nasim Ali, Mitter and Sharpe, J.). SUDHIR KRISHNA GHOSE v. SATISHCHANDRA. 218 I.C. 41=17 R.C. 194-48 C.W.N. 835=78 C.L.J. 343=A.I.R. 1944 Cal. 418.

——S. 168-A—Property other than holding attached before section coming into force—Whether can be sold subsequently.

Where in execution of a decree for rent the decree-holder attached property other than that to which the decree relates before S. 168-A of the B. T. Act came into force, there is nothing to prevent him from selling that property in execution of the decree after that section has come into force when the judgment-debtor has not availed himself of his right to get the property released from attachment under sub-S. (2) of that section. (Henderson, J.) NAKUL CHANDRA GANGULI E. NAKUL CHANDRA GANGULI. I.L.R. (1942) 2 Cal. 561=207 I.C. 203=16 R.C. 35=A.I.R. 1943 Cal. 237.

S. 168-A-Property sold before section coming into force—Delivery of possession—If can be obtained subsequently.

S. 168-A (2) of the Bengal Tenancy Act does not apply to a case where a property other than the defaulting tenure, was attached and sold before the Amending Act of 1940 which introduced that section came into operation. Sub-R. (2) really contemplates a case where the property was attached before the Amending Act came into force but was not actually sold. But where the property was sold before the Amending Act the section is no bar to the decree-holder purchaser obtaining delivery of possession of such property after that Act came into operation. (Natim Ali and Blank, J.) KALIDAS BOSE v. MAHENDRA NATH MUKHERJEE. 47 C.W.N. 126=77 C.L.J. 22.

-S. 168-A-Rent due after suit-Liability of auction purchaser-Landlord obtaining decree for such rent-Effect of-Produce rent-Money equivalent-Basis of calculation.

Under S. 168-A of the B. T. Act, an auctionpurchaser of a holding in execution of a rent decree is liable for rent due subsequent to the suit when such rent has not in fact been paid by the judgment-debtor. although the landlord has obtained a decree for such rent. The auction-purchaser cannot, however, be made liable for the decretal amount. If the tenancy is held on a produce rent, the auction-purchaser is entitled to pay in kind. If he is unwilling to do so, the money equivalent is to be calculated on the basis of the value of the produce when the rent accrued due. (Henderson, J.) SARAJ BASHINI DEBI v. PARINDRA NATH. 49 C.W.N. 614.

-S. 168-A—Retrospective effect.

S. 168-A of the B.T Act has no retrospective effect except as provided for in sub-S. (2). (Henderson, 1.) KALIDAS SAHA v. KIRAN CHANDRA. 202 I.C. 614 =15 R.C. 373=46 C.W.N. 864=76 C.L J. 472 =A.I.R. 1942 Cal. 521.

-S. 168-A-Sale of portion of holding sufficient to satisfy decree-Decree-holder,

compelled to sell whole holding.

S. 168-A of the B.T. Act is obviously made to help tenants and not landlords The use of the word "entire" shows the limits which are placed upon the right of the decree-holder. To hold that although the decree can be satisfied by the sale of a small portion of the holding, the decree-holder against his own wishes and in spite of the protest of the judgment-debtor is compelled to bring the whole tenure to sale, would be to the disadvantage of the tenant. (Henderson, J.) ABDUR RASHEED v. SRISHCHANDRA NANDY. 48 C.W.N. 172 (1) =A. I.R. 1944 Cal. 301 (2).

—— S. 168 A—Scope—Section prevents execution and not passing of decree.

S. 168-A Bengal Tenancy Act, might stand in the way of the decree-holder executing a rent decree in a particular way and whether this section at all is attracted to a particular case can only be decided when the decree is put into execution. It cannot be a ground for refusing to pass a decree that the decree if passed, could not be executed in a particular manner. (Mukheriea and Ellis, JJ.) USHA PROVA DE v. SACHINDRA KUMAR. A.I.R. 1945 Cal. 216.

-S. 168-A—Scope—Execution by arrest of

iudament-debtor not prohibited.

S. 168-A of the B.T. Act is no bar to the execution of a decree for rent by the arrest of the judgment-debtor. (Henderson, J.) BAHADUR SINGH v. SANYASI CHARAN, I.L.R. (1943) 1 Cal. 538=47 C.W.N. 287 =207 I.C. 341=16 R.C. 55=A.I.R 1943 Cal. 233.

S. 168 A—Scope—If in conflict with Bengal Patni Regulation, S. 17, proviso.

S. 168-A of the B. T. Act does not, in any way, affect the right of instituting a suit or obtaining a decree. The only restriction it imposes is upon the mode of execution of the decree and as no particular mode of execution is prescribed in the Patni Regulation itself, it cannot be said that S. 168-A of the B. T. Act is in conflict with the proviso to S. 17 of the Patni Regulation. 47 C.W.N 523, Referred to. (Mukherjea and Akram, JJ.) UDOY CHAND MAHATAB v. AJIT Kumar Roy. 80 C.L.J. 41.

-S. 168-A-Surplus sale proceeds of putni sale-If can be attached in execution of decree for previous arrears of rent.

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S. 168-A of the B. T. Act does not preclude the landlord from attaching in execution of a decree for pre-vious arrears of rent the surplus sale proceeds of a putni tenure sold under putni Regulation VIII of 1819 lying with the Collector to the credit of the judgmentdebtor. (Mukheriea and Akram, JJ.) MONMOTHA KUMARI BOSE v. PRIVA KUMAR ACHARYA. 49 C.W.N.

- S. 168-A—Validity.

S. 168-A of the B.T. Act is a valid piece of legislation which is quite within the competency of the Provincial Legislature 46 C W.N. 540, Foll. (Mukherjea and Blank, JJ.) SATISH CHANDRA v. BISHNUPADA PAL. I L.R. (1942) 2 Cal. 325 = 202 I C. 488 = 15 R C. 352 =5 F.L.J. (H.C.) 144=46 C.W.N. 628=A.I.R. 1942 Cal. 470.

-S. 168-A—Validity.

S. 168-A of the B.T. Act is not ultra vires the Provincial Legislature. (Mukheriea and Blank. vincial Legislature. (Mukherjea and Blank, JJ.)
ABDUL AZIZ v. MAHARAJ UDAY CHAND. 207 I.C. 384=16 R.C. 59=77 C.L.J. 271=47 C.W.N. 520= A.I.R. 1943 Cal. 358.

-S. 168-A-Validity-Repugnancy to S. 51, C. P. Code-Government of India Act, S. 107 (1).

S. 168-A of the B. T. Act is a valid piece of legislation which is quite within the competence of the provincial legislature under items Nos. 2 and 21 of the provincial list. Item No. 21 of List 2 is wide enough to cover all matters of the remedial or adjective law in relation to land, and land tenures, arising out of relationship of landlord and tenant, and includes provisions for collection and realisation of rent by the landlord from the tenant. Under item No. 2 of the provincial list, the provincial legislature is capable of regulating the powers and jurisdiction of a Civil Court with regard to any of the matters included in item No. 21. The Legislature by enacting S. 168-A of the B. T. Act has done nothing else except to curtail or take away the powers of the Court to allow the landlord decree-holder to proceed against any property of the tenant other than the tenancy in arrears, for realisation of the decretal dues. This undoubtedly, it is competent to do. Really, a case of repugnancy does not arise if no aspect of any provincial legislation encroaches upon any field other than that of the provincial legislature. But assuming that the operation of S. 107 (1) of the Government of India Act is not excluded from cases where the provisions of the provincial law are exclusively on provincial subjects, it is certainly necessary to attract the operation of the subsection that the existing Indian law with which the provincial law is said to have come into conflict relates to one of the matters enumerated in the concurrent list. It is not enough to say that S. 168-A of the B. T. Act has introduced a provision differing from that contained in S. 51, C. P. Code. The rival existing Indian law is not S. 51, C. P. Code; but the provision of that section as incorporated into the B. T. Act, but as that provision. so far as it deals with the question of procedure in a suit or proceeding between the landlord and the tenant comes under items Nos. 2 and 21 of the provincial list, there is no existing Indian law on any matter enumerated in the concurrent list with which S. 168-A of the B. T. Act can be said to have come into conflict. Further S. 168-A of the B. T. Act is not repugnant to S. 51. C. P. Code, and repugnancy is avoided by the express words of S. 4, C. P. Code. Consequently it is not void under S. 107 (1) of the Government of India ACT. (Mukherjea and Akram, JJ.) UDOY CHAND MAHA-TAB v. AJIT KUMAR ROY. 80 C.L.J. 41

The newly enacted S. 168-A of the B.T. Act inserted by the Amending Act of 1940 is not rendered void to any extent by 5.107 (1) of the Government of India Act, 1935. It cannot be repugnant to the provisions of Ss. 51 and 60, C.P.Code, because of the saving provisions of its S. 4 (1) which withdraws the operation of the relevant provisions of the Code from the field covered by the new provision of the BT.Act to the extent to which the latter covers that field and thus saves the latter from being repugnant to the former. As regards the Putni Regulation of 1819, its provisions do not fulfil the requirements of S. 107 (1) of the Government of India Act at all. A putni enure is certainly a land tenure and the Regulation in "pith and substance" is one with respect to such land tenures. This is not one of the matters enumerated in the concurrent legislative list at all and consequently any repugnancy to its provisions is not made by S. 1 7 (1) a vitiating cause affecting the provisions of a Provincial Law. (Nasim Ali and Pal, Jf.) SATISH CHANDRA v. SUDHIR KRISHNA GHOSH. 201 I.C 24=15 R.C 110=5 F.L.J. (HC) 131=75 C.L.J. 190=46 C.W.N. 540=A.I.R. 1942 Cal. 429.

S. 168-A-Validity-Whether repugnant to existing Indian Law-Government of India Act. S. 107.

S. 168 A of the B.T. Act is a valid piece of legislation and is not void under S. 107 of the Government of India Act as being repugnant to any provision of an existing Indian Law to the extent that it limits sales in execution of decrees for rent to the property in arrears.

Per Sen, J.-(1) There is no conflict between S. 168-A of the B.T. Act and S. 51, C.P.Code, because these two diverse provisions occupy different fields. The B.T. Act provides its own special procedure, although most of it has been borrowed from C.P. Code, S. 168-A is merely an item of that special procedure and does not in any way encroach upon the domain in which S. 51, C.P.Code, functions. (2) There can be no conflict or repugnancy between any provision of C.P. Code and S. 168 A which deals with the special form of procedure under the B.T. Act, in view of the provisions of S. 4, C.P. Code. (3) Even if S. 168-A is repugnant to the B.T. Act as it stood at the time of the amendment, it is not void under S. 107 of the Government of India Act as the B.T.Act is not an existing Indian Law with respect to a matter enumerated in the concurrent list but it is a law with respect of item 21 of the Provincial Legislative List.

Per Pal, J.—(1) The Provincial Law in question in the present case is a provision contained in the Bengal Council Act XVIII of 1940, and as this Act in pith and substance is one with respect to Item No. 21 of the Provincial List and not with respect to any matter in the Concurrent List, it does not come within the mischief of S. 107 (1) of the Government of India Act. (2) If the rival existing Indian Law be taken to be S. 51, C P. Code, as adapted by S. 143 (2) of the B.T. Act, even the provision of the existing Indian Law will not be with respect to any matter in the Concurrent List as that will, in pith and substance be a part of the law relating to landlord and tenant, and consequently S. 107 of the Government of India Act will not be applicable. (3) As S. 51, C.P. Code, does not give to the decree-holder a right to execute his decree against all the properties of the judgment debtor but simply

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gives the procedure in execution, there is no repugnancy between this section and S. 168-A of the B.T. Act. (4) Even without the help of S. 4, C.P. Code, there will be no repugnancy between S. 51, C.P. Code and S. 168-A of the B.T. Act, as according to the recognised rules of construction the general provision of C. P. Code must give place to the spe ial provision contained in S. 168 A of the B. T. Act. (Sen and Pul. J.) BIR BIKRAM KISHORE v. TOFAZZUL HOSSEIN. 46 C W.N. 999= 204 I.C 168=16 R C 465=76 C L.J. 500=5 F.L.J. H C) 189=A.I.R. 1942 Cal. 587

S. 168-A (1) (a)—Applicability—Tenancy expiring before section coming into force.

To attract the proviso to S. 168-A (1) (a) of the B. T. Act, it is not necessary to show that the tenance expired after the section came into force, 49 C.W.N. 684 foll. (*Mukerjea and Ellis*, 1/) ISWAR RADHA BALLAV v. MAHIMA RANJAN ROY. 49 C. W.N. 629.

S. 168 A (1) (a) proviso—Applicability—"Expires"—"Application"—Meaning of—Rent decree obtained in 1935—Tenure annulled in 1935 by purchaser of superior interest in revenue sale—Execution case filed between 1931 and 1939 proving infructious—Application for execution against judgment-debtor's other properties made in 1942—If maintainable.

The word "expires" in S. 168-A (1) (a), proviso, of the B. T. Act, extends also to the expiry of tenancy that took place before the section came into force. The word "application" in the proviso refers to the particular application for execution against the other properties of the judgment-debtor, which, but for the proviso, would have been barred under sub-S. (1) (a). It may not be the first or initial application for execution and there may have been other applications filed before the expiry of the tenancy. The application may be one made after S. 168-A came into force, or it may be one commenced before, but pending at that time. The proviso does not apply where the term of the tenancy has expired by reason of purchase of the tenancy by the landlord in execution of the same decree. Where a tenure in respect of which a rent decree was obtained in 1930 was extinguished in 1935 as a result of annulment by a stranger who purchased the superior interest in revenue sale, and after several execution cases filed between 1931 and 1939 proving infructuous an application for execution against the other properties of the judgmentdebtor was made in 1942.

Held, that S. 168-A (1) (a), provise, of the B. T. Act, was attracted to the case and the application was maintainable. (Khundkar and Biswas, J.) AMRITA LAL CHATTERIEE v. MANINDRA NATH. 49 C.W.N. 389 = A.I.R. 1945 Cal. 300.

——S. 168-A (1) (a), proviso—Applicability— Patni tenure.

The expression "term of the tenancy" as used in the proviso to S. 168-A (1) (a) of the B. T. Act does not indicate that the proviso contemplates only a tenancy having a limited term. A zamindar who has obtained a decree for rent in respect of a patni tenure is entitled to avail himself of the proviso, if there has been a merger of the patni interest in the superior interest of the zamindar. (Mukherica and Blank, JJ.) UDAY CHAND MAHTAB v. KURORAM MUKHERJI. ILR. (1944) 1 Cal. 671 = 219 I.C. 277 = A.I.R. 1945 Cal. 99.

S. 168-A (1) (a), proviso—Applicability— Tenure not for fixed period—Extinction of tenancy by merger.

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The proviso to S. 168-A (1) (a) of the B. T. Act is not limited in its application to a tenancy for a particular period only. Merger may be one of the methods by which a tenancy can expire within the meaning of that proviso. (Mukherjea and Blank, JJ.) ATUL CHANDRA CHAKRAVARTHI v. Upendra Narayan. I.L.R. (1942) 2 Cal. 397 =202 I.C. 147=15 R.C. 297=75 C.L.J. 267=46 C.W.N. 684=A.I.R. 1942 Cal. 478.

-S. 168-A (1) (a), proviso—Applicability -Tenure sold in execution of decree.

The proviso to S. 168-A (1) (a) of the B. T. Act contemplates a case where the defaulting tenure did not exist at the initial stage when the decree was first sought to be executed. It does not apply where the tenure was sold in execution of the very decree, for the balance due under which the subsequent execution case was started. The words "before an application is made for execution of such a decree" as used in the proviso refer to the first or initial application for execution and not to the subsequent proceeding which is started by the landlord after the defaulting tenure is purchased by him in execution of the same decree. It would make no difference whether the tenure was sold before or after the section came into force. (Mukherjea and Blank, JJ.) ATUL CHANDRA CHAKRAVARTHI v. UPENDRA NARAYAN. I.L.R. (1942) 2 Cal. 397=202 I C 147=15 R.C. 297=75 C.L.J. 267=46 C.W.N. 684=A.I.R. 1942 Cal. 478.

-S. 168-A (1) (a) Proviso-"Application"-Meaning of-If refers to first or original application

The proviso to S. 168-A (1) (a) of the B. T. Act applies even if the application for execution mentioned therein is not the first or original application 49 C.W.N. 389 foll. (Mukheriea and Ellis, JJ.) ISWAR RADH 4 BALLAV v. MAHIMA RANJAN ROY. 49 C.W.N. 629.

-S. 168-A (1) (a), Proviso-"Application"-Meaning of -Tenancy expiring after section coming into force by sale in execution of another decree-Decreeholder applying for execution by sale of other properties before section coming into force-If debarred from benefit of proviso.

In cases in which the "term of the tenancy" expires after the commencement of the Bengal Tenancy Amendment Act, 1940, by the sale of the tenure or holding in execution of another decree the "application" referred to in S. 168-A (1) (a) proviso of the Bengal Tenancy Act must be held to refer to the particular application for execution against other property of the Judgmentdebtor which would have been barred under sub-S. (1) (a) but for the operation of the proviso. Accordingly in such cases the decree-holder will not be debarred from the benefit provided by the proviso S. 168 A (1) (a), although he had made application for execution by sale of other properties prior to the commencement of the Amendment Act whether those applications were fructuous or infructuous. (Mitter and Sharpe, IJ) Lakshan Chandra Roy v. Birfndra Kumar Singha. 48 C.W.N. 837=-A.I.R. 1945 Cal. 24.

-S. 168-A (1) (a), proviso—Purchase of holding by co-sharer landlord in execution of rent decree-Term of tenancy, if expires.

Where a co-sharer landlord obtains a rentdecree for his share of the rent in suit framed in

accordance with the provisions of S. 148-A of the B. T. Act and purchases the holding in execution, and the case comes within S. 22 (2) of the Act, the term of the tenancy expires on such purchase within the meaning of the proviso to S. 168-A (1) (a) of the Act. Another co-sharer landlord who has obtained a decree for his share of the rent for the period prior to such purchase is, therefore, entitled to attach and sell other properties of the judgment debtor. (Henderson J.) HARENDRANATH v. SAKIRADDI GAZI. 50 C. W.N. 85.

S. 168-A (1) (a) of the B. T. Act plainly and clearly prohibits execution by the attachment and sale of any property other than the entire tenure or holding to which the decree relates, and the proviso to cl. (a) withdraws this prohibition only when the defaulting tenancy which is the primary source of realisation of the decretal amount is no longer in existence. The words "term of the tenancy expires" in the proviso mean and refer to the extinction or cessation of the tenancy itself and not merely of the interest of the judgment-debtor in the tenancy. The proviso is not limited in its operation only to the cases where the defaulting tenancy is one for a fixed period, but extends to all classes of tenures or holdings. (Nasim Ali and Pal, JJ.) SATISH CHAN-DRA v. SUDHIR KRISHNA GHOSH, 201 I.C. 24=15 R.C. 110=5 F L.J. (H.C.) 131=75 C.L.J. 190=46 C.W.N. 540=A.I.R. 1942 Cal. 429.

-S 168-A (1) (a) proviso—Scope—Execution against other property of judgment-debtor-When permissible.

The word "expires" in the proviso to S. 168-A (1) (a) of the Bengal Tenancy Act must be interpreted to refer to expiry after the commencement of the amending Act of 1940, and the words "an application" to refer to the particular application which is otherwise barred under sub-S. (1) (a) but for the operation of the proviso. The proviso as a whole is to be taken as permitting the landlord to proceed against other property of the judgment-debtor if he can show that the tenancy has expired after the commencement of the amending Act and before the application made to proceed against such property. (Roxburgh and Blank JJ.) SWARNAMANJURI DASSI ". FAKIR CHANDRA 216 I.C. 292=17 R.C. 149=48 C.W.N. 220=77 C.L.J. 506=A I.R. 1944 Cal. 203.

-S. 168-A (1) (a) proviso-Term of tenancy-If may expire by merger.

Merger is one of the methods by which the tenancy can expire within the meaning of the proviso to S. 168-A (1) (a) of the Bengal Tenancy Act. (Mitter and Sharpe, J) LAKSHAN CHANDRA ROV v BIRENDRA KUMAR SINGHA. 48 C.W.N. 837=A.I.R. 1945 Cal. 24.

-S. 168-A (1) (b)-Applicability - Landlord decree-holder purchaser.

It is doubtful if S. 168-A (1) (b) of the B. T. Act applies where the purchaser is the landlord decreeholder himself. 48 C.W.N. 210, doubted. (Mitter and Waight, JJ.) JOGENDRA CHANDRA v. BHAWANI CHARAN. 49 C.W.N. 552.

-S. 168-A (1) (b) and (3)-'Purchaser'-If excludes decree-holder purchaser—Cash deBENGAL TENANCY ACT (VIII OF 1885).

posit by him of rent payable after date of suit—
If necessary.

The word "purchaser" occurring in cl. (b) of sub-S. (1) and in sub-S. (3) of S. 168-A of the Bengal Tenancy Act is not restricted to a third party purchaser but includes the decree-holder purchaser. A decree-holder purchaser is, therefore, bound to deposit under sub-S. (3) the rent that has become payable between the date of the institution of the suit and the date of the confirmation of the sale. A cash deposit by him is, however, not necessary. It is sufficient if he certifies to the Court that nothing is due or payable to him on that account. (Mukherita and Pal, JJ.) PHANI BHUSAN MUKERJEE v. PURNA CHANDRA BAGCHI. I L.R. (1944) 1 Cal. 297=214 I.C. 114=17 R.C. 20=48 C.W.N. 210=A.I R. 1944 Cal. 199.

S. 168-A (1) (b)—Retrospective effect.

S. 168-A (1) (b) of the B. T. Act creates a new obligation on the purchaser and also interferes with his vested right to have the sale confirmed on payment of the price he had offered at the sale and nothing more and it can, therefore, have no retrospective effect as it has not by plain words or by necessary implication been made retrospective. Consequently, where a tenure is sold in execution of a rent decree before the enactment of this section, the tenant continues to be liable to pay the rent that fell due from the date of the institution of the suit up to the date of the confirmation of the sale. (Mitter and Waight, J.) JOGENDRA CHANDRA 2. BHAWANI CHARAN. 49 C.W.N. 552.

——S. 168-A (2) (as amended by the Amendment Act XVII of 1940)—Applicability and scope—Decree for rent transferred for execution to Court in Bihar before Amending Act came into force—Rights of parties—If affected by Amending Act.

Sub-S. (2) of the new S. 168-A of the B. T. Act which was enacted by S. 5 of the Bengal Tenancy Amendment Act of 1940 does make the new section applicable to pending proceedings; but if execution proceedings were pending outside the jurisdiction of the Bengal Legislature, such proceedings can never be affected by the Act of the Bengal Legislature. Where a decree for rent obtained in Bengal had been transferred for execution to a Court in Bihar and proceedings were well on the way in the Court of Bihar before the Amending Act was passed in Bengal, such Amending Act can never take away the right of the parties before the Bihar Court to have their dispute determined according to the law administered by the Bihar Court. (Harries, C.J. and Manohar Lall, J.) JAGDAMBA PRASAD v. KALYANI PRASAD SINGH DEO, 1943 P.W.N. 70.

——Ss. 170 and 171—Right to deposit—Unrecognised transferee of non-transferable holding. HARAN CHARAN MANDAL v. HIRA LALNASKER [sec. Q D. 1936-40 Vol. I. Col. 3240.] 194 I.C. 172—13 R.C. 486—A.I.R. 1941 Cal. 88.

——S. 171—Applicability — Co-sharer tenant suing for contribution for amount paid under rent decree—If can claim interest.

A co-sharer tenant who pays the amount due under a rent decree and sues the other co-sharers for contribution is not entitled to claim interest under S. 171 of the Bengal Tenancy Act. This section was enacted for the benefit of persons whose interests are affected by the sale but who are not responsible for the rent. (Henderson. J.) NIRMAL CHANDRA v. NARESHCHANDRA. 48 C.W.N. 845.

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S. 171—Person making deposit—If necessary party to rent suit—Such person, if personally liable for rent.

By virtue of S. 171 of the B. T. Act, a person who makes a deposit to avert an intended rent sale becomes a mortgagee of the tenure, but his mortgage is postponed to the first charge of the landlord for rent. That being his position, he in his character as second mortgagee is a necessary party to a suit for rent by the landlord. As there is no privity of estate between such depositor and the landlord, he is not personally liable for the rent. (Mitter and Khundkar, JJ.) SAILENDRA NATH v. MADAN MOHAN MALLICK. 46 C.W.N.704.

——S. 171 (1)(b)—Statutory mortgage acquired by depositor—I/ available against lessee of putnidar.

The statutory mortgage acquired by a depositor under S. 171 of the B. T. Act will not be available against a lessee of the putnidar for a fixed term, who was not a party to the execution proceeding, as the interest created in favour of such a lessee is not a "charge" within the meaning of the section. (Pal, J.) JASHODA KUMAR MAJUMDAR v. KALINATA MAJUMDAR. 76 C.L.J. 475.

—— S. 174—Application under—Allegation of fraud—Application prima facie time-barred—Points for consideration—Limitation Act, S. 18.

Where an application presented under S. 174 (3) of the B. T. Act to set aside a sale on the ground of fraud is prima facie barred by limitation, the Court ought to, first of all, consider whether the applicant's case of fraud has been established, or not. If it is satisfied that the fraud alleged is established, it should then proceed to consider whether the case comes within S. 18 of the Limitation Act, that is to say, whether the auction-purchasers were parties to the fraud; if they were not, the application would be barred by limitation. Thirdly, if the auction-purchasers were parties to the fraud, the effect of that fraud would go on until knowledge of the sale was obtained by the applicant. If the auction-pur-chasers wished to show that, in fact, the applicant had knowledge of the sale at some earlier date than that alleged in the petition, the burden of proving it lies upon them. (Henderson, J.) JAGISWAR DAS v. DEB-NARAIN ROY. 46 C.W.N. 403.

S. 174—Application under—Nature of—Compromise—Whether can be recorded—C. P. Code, O. 23, R. 3.

An application under S. 174 of the B. T. Act is not a proceeding in execution within the meaning of O, 23, R. 4, C. P. Code. Therefore a compromise arrived at is the Course of such an application can be recorded under O. 23, R. 3 C. P. Code, by virtue of S. 141, C. P. Code, (Henderson, J.) KAMALA KANTA CHATTOPADHYA v. NIHARIKADEBI. 197 I.C. 70=14 R.C. 304=A.I.R. 1941 Cal. 559.

Ss. 174 (3) 174-A (5) and 167—Application to set aside sale disallowed by trial Court, allowed by appellate Court and ultimately disallowed by High Court—Confirmation of sale by trial Court while disallowing application—Effect on—Application under S. 167—Limitation—Starting point.

Where an application under S. 174 (3) of the B. T. Act for setting aside a sale is disallowed by the Munsif who confirmed the sale, is allowed by the District Judge in appeal, but is ultimately disallowed by the High Court in revision, the effect of the High Court decision is to restore the original order of the Munsif confirming the sale with effect from the date on which it is passed. Limitation for an application under S. 167 for annul-

ment of an encumbrance will, therefore commence to run from that date. (*Biswas*, *J.*) CHUNNU LAL v. AMLUK CHANDJI. 46 C W.N. 706.

The Court has no jurisdiction to extend the time fixed for payment of the decretal amount under S. 174 (3) of the B. T. Act. (Henderson, J.) DWARKA NATH v. PRAMATHA NATH. 49 C.W.N. 243.

——— S. 174 A—Confirmation of sale—Duty of Court—No application made under S. 174 (1).

If no application is made under S. 174 (1) of the B.T. Act to set aside the sale, it is not only open to the Court, but its statutory duty, to confirm the sale at the end of 30 days. (Biswas, J.) CHUNNU LAL v. AMLUK CHANDJI. 46 C.W N. 706.

——S. 178 Proviso (1)—Scope—Reclamation lease—Stipulation for interest contravening S. 67—Validity.

S. 178, proviso (1) of the B. T. Act is a limitation upon the entire section and not upon sub-S. (3) only. If therefore, a lease is granted bona fide for reclamation of waste lands, that proviso will apply and any stipulation for payment of interest, even though it contravenes S. 67 of the B. T. Act, will be valid and operative. (Mukherfea. J) SRIKANTA MRIDHA v., PRAFULLA CHANDRA GHOSH. 200 I.C. 235=14 R.C. 692=74 C.L.J. 139=A.I R. 1942 Cal. 133.

——Ss. 178 (1) (i) and 179 proviso—Scope and effect—Contract to pay interest on rent in terms inconsistent with S. 67—Such pre-Act and post-Act contract in respect of mourashi mukurari tenure in permanently settled area—How far valid.

A contract to pay interest on arrears of rent in terms which are inconsistent with the provisions of S. 67 is affected by S. 178(1) of the B. T. Act and the whole contract, the rate and the term relating to the calculation of interest, is void, and the landlord is entitled to claim interest only in terms of S. 67. But the substantive part of S. 179 (that is to say the first paragragph of that section) creates an exception to S. 178 (1)(i). The result is that a contract in respect of a mourashi mukurari tenure in a permanently settled area to pay interest in terms which impose a burden on the tenant greater than that provided for in S 67 is still valid inspite of S. 178 (1) (i) if the contract had been made after the passing of the B. T. Act. But such a post-Act contract is affected by the proviso to S. 179 which touches the rate only if it is higher than that mentioned in S. 67, but does not touch the agreement relating to the mode of calculating interest. There is thus an anomaly namely, that where as in pre-Act contracts in respect of a mourashi mukurari tenure in a permanently settled area both the rate of interest and the mode of calculation of interest as agreed upon by the parties are affected, in post-Act contracts only the first is affected, but not the second. This anomaly results from the words used by the Legislature in the proviso and so cannot be avoided. (Mitter and Blank, JJ.) NANDA LAL BANERJEE v. ASKARAM BABU. I.L.R. (1944) 2 Cal. 263 = 48 C.W.N. 321 = A.I.R. 1944. Cal. 310.

S. 178 (3) (e)—Applicability—Tenure-holders. S. 178 (3) (e) of the B. T. Act does not apply to all tenants, but only to raiyats. Tenure-holders are not included within the scope of this provision. (Khundkar and Biswas, J.). SARAT CHANDRA MITRA v. SARADINDU. 49 C.W.N. 462.

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——Ss. 179 and 52—Scope and effect—Post-Act and pre-Act agreement not to claim reduction of rent on account of diluvion—Validity. See B.T. ACT, Ss. 52 AND 179. 48 C.W.N. 321.

Ss. 179 and 52 (1) (b)—Tenant contracting out of his rights under S. 52 (1) (b)—Burden of proof.

It is clear from a reading of S. 52(1)(6) together with S. 179 of the B. T. Act, that the right given to a tenure-holder to apply for an abatement of rent on account of deficiency in the area of his tenure cannot be taken away by any contract except one which answers the description contained in S. 179. In order that a tenure may fall within S. 179, it must have been granted by a permanent mokarari lease and the lands must lie in a permanently settled area, the burden of proving which is on the landlord. A recital in the mokarari lease that the present estate had been redeemed from rent or revenue is not sufficient to show that it had been permanently settled. (Khundkar and Biswas, J.) SARAT CHANDRA MITRA v. SARADINDU. 49 C.W. N. 462.

——S. 179. proviso—Rate of interest—Rate mentioned in S, 67 at time of decree not when arrears fell due.

The word "recover" in the proviso to S. 179 of the B T. Act means "secure by legal process". The date when the arrears fell due is therefore of no importance. The landlord can get a decree for interest at that rate which was mentioned in S. 67 of the Act at the time when the decree is to be passed. (Mitter and Blank, //.) NANDA LAL BANERIEE v. ASKARAN BABU. I.L.R. (1944) 2 Cal. 263-48 C.W.N. 321-A.I.R. 1944 Cal. 310.

S. 182 (as amended in 1928)—Applicability—Actual use of land as homestead—If necessary.

S. 182 of the B. T. Act, as amended, by its terms, applies only to the homestead of a raiyat or under raiyat which he may hold otherwise than as a part of his raiyati or under raiyati holding and the language requires that the land should actually be used as a homestead or at least still be possessed of its homestead character when the section is sought to be invoked for its protection (Chakravartti. J) KALIPROSAD SAHA v. NAIHATI JUTE MILLS CO., LTD. 221 I.C. 561=50 C.W.N. 50.

S. 182 (as amended in 1928)—Applicability—Landlord, if must have status under Act—Raiyat acquiring rights of a raiyat in respect of homestead under old section—Position of.

S. 182 of the B. T. Act, as amended in 1928 requires that in order that the B. T. Act may apply to a home stead held by a raiyat or an under-raiyat otherwise than as a part of his holding, the landlord of the homestead must have a status under the Act and such a one that the tenant may be a raiyat or under-raiyat under him. Where the same is not possible, the section does not, attract the Act to the home-stead at all. In the case of a raiyat who held his homestead otherwise than as a part of his holding when the old S. 182 was in force and thus acquired the rights of a raiyat in recpect of his homestead tenancy, there being no question of any local custom or usage, his homestead will continue to be governed by the old section even after the amendment if he is still holding it as before. The amended section would not apply and the fact that the landlord of the home stead has no status under the B. T. Act would make no difference, in as much as the existence of such status was not a requirement under the old section and

the rights accrued without it. The position would be the same if the raiyati holding is situated not in the same village as the homestead or a contiguous village but in some other village, since the limitation as to the village is also an addition made by the the new section. (Chakravartti, J.) KALIPROSAD SAHA v. NAIHATI-JUTE MILLS CO., LTD. 221 I.C. 561=50 C.W.N. 50.

-S. 182 - Applicability - Raiyat having more than one homestead - Homestead not held for actual cultivation.

The homestead referred to in S. 182 of the B. T. Act need not be the only homestead of the raivat. The section applies even where the raiyat has more than one homestead. It is not a sine qua non for the applicability of the section that the homestead must be held by the raiyat for the purpose of actual cultivation. The requirements of the section will be satisfied if the homestead is one from which the raiyat may, if necessary, carry on agricultural operations in his rayati holdings, if and when the occasion arises. (Biswas, I) RUKNINI MAHESRI v. PRAHLAD CHANDRA ILR (1944) 1 Cal. 221=220 I C. 22=47 C.W.N. 702 =A I.R. 1945 Cal. 50.

-S. 182-'Homestead'-Meaning of.

The word "homestead" used in S. 182 of the B T. Act means the place where the raiyat acutally resides. If there is a piece of bastu land which is not held as a part of an agricultural tenancy and on which the raivat does not actually reside, that section would not be attracted. (Mitter, J.) RAMNAUH BANERJEE v. GIRISH CHANDRA SINHA. I L.R (1941) 1 Cal 278=196 I C 602=14 R C 263=45 C.W.N. 119 =A.1.R. 1941 Cal. 515.

-S. 182-"Homestead"-Question of fact.

The question whether the disputed premises are the homestead of a raiyat is mainly one of fact. If as a matter of fact the raiyat resides in those premises even though he is living elsewhere at times, it is open to the Court of fact to conclude that they are his homestead. (Biswas, J.) RUKMINI MAHESRI v. PRAHLAD CHANDRA. I.L.R. (1944) 1 Cal. 221 = 220 I.C. 22 = 47 C.W.N. 702 = A.I.R. 1945 Cal. 50.

-S. 182 (as amended in 1928)—'Landlord' If means original landloard or landlord for time being.

The landlord contemplated by S. 182 of the B. T. Act, as amended in 1928, is not the landlord who originally inducted the tenant into the homestead or was the landlord of the homestead at the time when the tenant first came to possess both homestead and a holding. The tenor of the amended section is that in cases where it applies, the position must be judged by reference to the landlord for the time being, except perhaps in cases where there has been a change in the landlord since the section became applicable and some such consideration as that a status once acquired by a tenant cannot be lost, intervenes. (Chakravariti, J.) KALIPROSAD SAHA v. NAIHATI JUTE MILLS CO., LTD. 221 I.C. 561=50 C.W.N. 50.

-S. 182—Tenant of homestead subsequently acquiring raiyati right in contiguous village-If acquires raiyati right ir homestead land. ANANTAMONI DASI v. BHOLA NATH. [see Q D. 1936-'40 Vol. I Col. 3240.] 195 I.C. 870=14 R.C. 146=A I.R. 1941 Cal. 104.

-S. 193-'Suit'-If includes execution proceed-

ings.
The term 'suit' in S. 193 of the B. T.Act is sufficiently wide to include execution proceedings. (Henderson, J.)

BENGAL TENANCY ACT (VIII OF 1885).

NIVANANI DEBI v. CHHARURAM DOLOI. 217 I.C. 117=17 R.C. 172=48 C.W.N.500=A.I.R. 1944 Cal. 416.

--- Chap. XIV-Execution proceedings-Revision-Locus standi of judgment-debtor-C. P. Code, S. 115.

A judgment-debtor who is a party to the execution proceedings under Chap. XIV of the B. T. Act is entitled to see that they are conducted correctly according to law. The Court conducting the sale should certainly hear and decide any objections he may make as to the procedure being adopted. It follows that prima facte the judgment debtor may move the High Court in revision to interfere if the procedure is illegal. In view of the discretionary nature of the power given in S. 115 C. P. Code, the Court might well take into consideration the fact that a person not substantially concerned as to the particular point was moving it, and might make that a reason for refusing to interfere. (Biswas and Roxburgh, JJ.) BIRHUTI BHUSAN DAS v. BEJOY CHAND MAHTAB. I L.R. (1942) 1 Cal. 359 = 202 I C. 434=15 R.C. 335=75 C.L.J. 186=A.I.R.1942 Cal. 481.

-Chap. XIV-Rent decree-Decree obtained in rent suit by mortgagee put in possession of tenure under (). 39, R. 9, C. P. Cede, -Claim in suit comprising arrears for period of his possession and prior period-Non-joinder in rent suit of purchaser at unconfirmed money sale held before rent decree-If affects character of decree.

A mortgagee entering into possession of a tenure on the basis of an order made under O. 39, R. 9, C. P. Code, becomes a landlord within the meaning of the B. T. Act, and a decree obtained by him in a rent suit against the tenants is a rent decree, although the claim in that suit comprises of arrears for the period of his possession as well as for the period prior to it. The nonjoinder in the rent suit of a purchaser of the tenure at a sale in execution of a money decree held before the rent decree but not confirmed till after the sale in execution of that decree, does not affect the character of the decree passed in the rent suit as a rent decree. The purchaser at the money sale acquires, therefore, no title to the tenure on the basis of his purchase. (Nusim Ali and Blank, J.) PASHUPATI NATH PAL 2. DURJOD-HAN ROY. I L R. (1942) 2 Cal. 546=204 I C. 349=15 R.C 514=46 C.W.N. 893=A.I.R. 1943 Cal. 160.

--- Chap. XIV-Rent decree-Suit for putni rent -Some of plaintiffs having fractional share in putni impleaded as defendants also-Frame of suit-If bad -Decree, if rent decree.

Where in a suit to recover arrears of a putni rent, the entire body of landlords are plaintiffs and the entire body of the putnidars are defendants, the frame of the suit is not bad merely because some the plaintiffs who have a fractional share in the putni are also impleaded as defendants. Consequently, the decree passed in the suit is rent decree as contemplated by the B. T. Act. (Nasim Ali and Pal, J.). KUMAR RAMENDRA NATH ROY v. BIBHABATI ROY. 46 C.W.N. 691.

-Sch. III, Art 3-Applicability-Dispossession by landlord through Court-Landlord not plaintiff's landlord at date of dispossession.

Art. 3 of Sch. III of B. T. Act applies to a case of dispossession by the landlord although by the machinery of the Court. It is not necessary that the dispossession should be by a person who was the plaintiff's landlord at the date of the dispossession. It is sufficient if the dispossession was by the landlord of the holding of

which the plaintiff seeks to recover possession. (Rau and Biswas, J.). KHATUN JINNAT SAHEBANI v. ISHA PROKASH GANGOOLI. I L R (1944) 1 Cal. 11 = 211 I C. 348 = 16 R.C. 520 = 77 C.L.J. 186 = A.I.R. 1944 Cal. 44.

——Sch. III, Art. 3—"Dispossession"—Possession taken through Court—Dispossession of agent in actual occupation—If constitutes dispossession of principal.

Art. 3. Sch. III of the B. T. Act will apply even if the landlord obtained delivery of possession through Court after having purchased the holding in a certificate proceeding for arrears of rent, and thereby dispossessed the tenant. Where a person is in possession of a holding through the agency of another by realising the usufruct from him, the dispossession of the agent by the landlord will constitute a dispossession of the principal within the meaning of the article. As possession may be acquired through agents, it may equally be lost through them. (Pal. J.) Sashi Kanta Acharlya v. Nayjan Bewa. 204 I.C. 34=15 R.C. 460=46 C.W N. 938=A.I.R. 1942 Cal. 611.

Sch III. Art. 2—Suit for rent by purchaser of Zamindary together with arrears of rents due from subordinate tenure-holders—Limitations. See under S. 3 (6) supra. (Rau and Biswas, II.) RAMAPATI CHATTOPADHYA v. ARABINDA KUMAR PAL. I.L R (1943) 1 Cal. 438=207 I C 44=16 R.C. 18=47 C.W.N. 366=A.I. R. 1943 Cal 217.

BENGAL VILLAGE CHAWKIDARI ACT (IV OF 1870). Ss. 26 and 27—Warrant issued without publication of list of defaulters—Legality—Defect, if cured by service of notice on defaulter.

The publication of the list of defaulters under S. 26 is a condition precedent to the issue of a warrant under S. 27 of the Bengal Village Chawkidari Act. The Panchayat has no jurisdiction to issue a warrant unless this condition has been fulfilled. The defect is one of jurisdiction and not a mere irregularity, and cannot, therefore be cured by a notice served personally upon the defaulter. (Henderson I) DHARANI DHAR JANA v. EMPEROR. I L.R. (1944) 1 Cal 309=218 I.C. 371=46 Cr.L.J. 498=47 C.W.N. 935=A.I.R. 1945 Cal. 48.

Ss. 27 and 34—Warrant for arrears including instalment not due—I egality.
S. 27 of the Bengal Village Chawkidari Act

S. 27 of the Bengal Village Chawkidari Act empowers the issue of a warrant only for the realisation of the arrears of Chawkidari tax. Clearly a warrant for the realisation of a sum which includes an instalment which is not due is altogether without jurisdiction. While S. 34 is good enough to cure irregularities, it certainly is not meant to legalise a warrant issued without jurisdiction. (Henderson, J.) DHARANI DHAR JANA v. EMPEROR. I.L.R. (1944) 1 Cal. 309=218 I C. 371=46 Cr.L.J. 498=47 C.W.N. 935=A.I.R. 1945 Cal. 48.

BENGAL VILLAGE LOCAL SELF-GOV-ERNMENT ACT (V OF 1919 S. 6)(3)— District Magistrate appointing member of Union Board—If empowered to cancel that appointment —Bengal General Clauses Act, Ss. 17 and 22.

BEN. VIL. LOCAL SELF-GOVT. ACT (1919).

Obiter.—A District Magistrate who appoints a member of a Union Board under S. 6 (3) of the Bengal V.llage Self-Government Act and notifies it in the Gazette, has power, by virtue of the provisions of Ss. 17 and 22 of the Bengal General Clauses Act, to cancel the appointment by a subsequent notification. (Mukherjea and Biswas, JJ.) ASIMUDDIN AHMED v. MAIZUUDIN KHAN. 206 I.C. 500=15 R C. 711=47 C.W.N. 326= A.I.R. 1943 Cal. 189.

S. 8—Election of President of Union Board—Jurisdiction of Civil Court. See BENGAL VILLAGE LOCAL SELF GOVERNMENT ACT, S. 17-A. A.I R. 1941 Cal. 115.

S 8—Election of President—Suit for declaration that rival candidate is not properly elected—Plaintiff, if entitled to declaration that he is President.

In a suit by the plaintiff for a declaration that his rival candidate is not properly elected as President of a Union Board the plaintiff is not entitled to a declaration that he is the President unless it has been found that under the rules made by the Local Government he has been duly elected as President. (Henderson, J.) GOLAM MORTUZA V. MANIRUDDIN AHMAD. 194 I.C. 116=13 R.C. 490=A,I.R.1941 Cal. 115.

——S. 17-A-Election of President of Union Board-Jurisdiction of Civil Court.

There can be no question that the Civil Courts have jurisdiction, unless their jurisdiction has been definitely taken away. There is no section in the Bengal Village Local Self-Government Act which takes away the jurisdiction of Courts to decide questions about the election of a President of a Union Board. S. 17-A is concerned only with the election of members of a Union Board. (Henderson, J.) GOLAM MORTUZA v. MANIRUD-DIN AHAMAD. 194 I.C. 116=13 R.C. 490=A.I. R. 1941 Cal. 115.

Ss. 17 A and 17-B-Election of President— Jurisdiction of Court-Rules by Local Government taking away such jurisdiction—If ultra vires.

Under Ss. 17-A and 17-B of the Village Self-Government Act the jurisdiction of the Courts to interfere with the election of members of a Union Board is expressly taken away. There is no such provision with regard to the election of Presidents. The proper inference, therefore, is that it was the intention of the legislature to preserve the jurisdiction of the Courts in connection with this matter. The rule making power under S. 101 of the Act is conferred on the Local Government to carry out the purposes of the Act, not to enable them to defy the Legislature. When the jurisdiction of the Courts is preserved by the Act itself, it is not open to the Local Government to take it away by rules made under the power conferred by this section. If and in so far as they purport to do so, they are ultra vires. (Henderson, J.) Keramatulla Ahmed v. Hari Mohan Roy. 50 C.W.N. 10.

Ss. 17-A and 17-B and Notification No. 908 L.S. G., dated 8th July, 1941—Suit for declaration that plaintiff was duly elected as President of Union Board—Jurisdiction of Civil Court.

## BEN. VIL. LOCAL SELF-GOVT. ACT (1919).

A civil suit for a declaration that the plaintiff was duly elected as President of the Union Board is not barred by Ss. 17-A and 17-B of the Village Self-Government Act or by the Notification No. 908, L. S. G. dated 8th July, 1941. (Akram and Blank, J.). RAHIMUD-DIN AHMED v. UMESH CHANDRA. 49 C.W.N. 223 = A.I.R. 1945 Cal. 362.

——S. 17-A (iii)—Injunction against appointed member—Jurisdiction of Court—Legality of appointment questioned.

S. 17-A (iii) of the Bengal Village Self-Government Act refers to appointed members as well as to elected members and ousts the jurisdiction of Court to issue an injunction as much in the case of disputed appointments as in that of disputed elections. The Civil Court has, therefore, no jurisdiction to issue an injunction restraining an appointed member of a Union Board, the legality of whose appointment is questioned, from functioning as such member. (Mukherjea and Biswas, JJ.) ASIMUDDIN AHMED v. MAZUDDIN KHAN. 206 I.C. 500=15 R.C. 711=47 C.W.N. 326=A.I.R. 1943 Cal. 189.

\_\_\_\_\_S. 17-C—Meeting held for election of President irregular—Effect.

The election of a President of a Union Board at a meeting held in contravention of the rules made by the Local Government as to the time and place of the meeting, is irregular and not void in view of the provisions of S. 17-C of the Village Self Government Act. (Henderson, J.) KERAMATULLA AHMED v. HARI MOHAN ROY. 50 C.W.N. 10.

—S. 37—Licensee not "Occupier"—Husband and wife co-sharers of zemindary—Gomastha using room in husband's building—Wife, if licensee in respect of room. Obiter.—A mere licensee is not an "occupier" under S. 37 of the Village Self Government Act. The person in question must have a right of some kind to be there. Where a husband and wife are co-sharers in a zamindary and their gomastha uses as his office a room in the husband's building the wife is not the licensee of her husband with regard to this room. The actual licensee is the gomastha. (Henderson, J.) RANI BROVA ROV v. SUBODH CHANDRA BISWAS. 47 C.W.N.533=77 C.L.J. 191=213 I.C. 352=17 R.C. 11=A.I.R. 1944 Cal. 112.

To claim the benefit under the Note to R. 2 of the Assessment Rules under S. 101 of (Ben. Act V of 1919), it is necessary that a servant must by his contract of service be required for the performance of his duty to live in a building owned by his employer and the provision of quarters should not be a matter of mere convenience to him. The word "convenience" occurring in the Note refers to the convenience of the employee or the servant, and it excludes the class of cases where the servant gets the accommodation as a reward or part of his remuneration. (Mukherjea and Blank, J.). C. J. BRACE v. UNION BOARD OF LILLOOAH. 209 I.C. 625=I.I.B. (1943) 2 Cal 546=16 R.C. 384=47 C. W.N. 534=A.I.E. 1943 Cal. 442.

It is clear from the proviso to R. 12 that R. 11 does not apply to a meeting convened for the election of a President. (Henderson, J.) KERAMATULLA AHMED B. HARI MOHAN ROY. 50 C.W.N. 10.

8. 101, B. 29, proviso (iii)—Meeting held for election of President failing for want of quorum—Whether can be adjourned.

#### BENGAL WAKF ACT (XIII OF 1934).

If a meeting held for the election of the President of a Union Board fails for want of a quorum, there is no procedure for its adjournment for a stated period. Under R. 29, proviso (iii), if further steps are to be taken in the matter, another meeting has to be convened. (Hunderson, J.) KFRAMATULLA AHMED v. IIARI MOHAN ROY. 50 C.W.N. 10.

BENGAL WAKFACT (XIII OF 1934), S. 6

"Descendants"—If include descendants of wakif's family.

Obiter.—The Word "descendants" in S. 6 (11) of the Lengal Wakf Act denotes the descendants of the Wakf only and not of his family. (Akram and Pal, JJ.) SYED SHAH MAJUBAL ISLAM v. COMMISSIONER OF WAKFS. I.L.R. (1943) 1 Cal. 457 = 77 C L.J. 70 = 210 I C. 520 = 16 R.C. 463 = 47 C.W.N. 315 = A I.R. 1943 Cal. 635.

-S. 6 (11)-"Family"-Meaning of.

Per Pal, J.—The word "Family" as used in the Bengal Wakf Act bears the ame meaning as in the Mussalman Wakf Validating Act. It means not only the collective body of persons who live in one house and under one head or manager inclusive of servants, but also persons descended from one common progenitor and having a common lineage. (Akram and Pal, JJ.) SYED SHAH MAJUBAL ISLAM v. COMMISSIONER OF WAKFS. I.L.R. (1943) 1 Cal. 457 = 77 C.L.J. 70 = 47 C.W.N. 315 = 210 IC. 520 = 16 R.C. 463 = A.I.R. 1943 Cal. 635.

S. 6 (11)—Net available income—If may be payable as salary.

Per Akram, I.—Obiter: The net available income mentioned in S. 6 (11) of the Bengal Wakf Act should not be payable solely as salary for the performance of any duty imposed. (Akram and Pal, Jf.) SYED SHAH MAJUBAL ISLAM v. COMMISSIONER OF WAKFS I.L.R. (1943) 1 Cal. 457=77 C.L.J. 70=47 C.W.N. 315=210 I.C. 520=16 R.C. 463=A.I.R. 1943 Cal. 635.

——S. 6 (11)—Wakf al-al aulad—Annual salary of mutwali—Whether benefit accruing to member of Wakit's family, if mutwalli is to be such member.

For the purpose of determining whether a wakf is a wakf al-al aulad as defined in S. 6 (11) of the Bengal Wakf Act, the annual salary of the mulwalli must be taken to represent the expenditure connected with the management of the estate and not a benefit intended by the wakf to accrue merely to the advantage of one of the members of his family when the mutwalli is to be such a member. (Edgley, J.) RADARY JAHAN BIEI v. DALIRUDDIN AHMAD. 47 C.W.N. 381.

S, 40—Appointment of mutwalli by Commissioner—If needs confirmation by Court.

The appointment of a mutwalli by the Commissioner of Wakfs under S. 40 of the Bengal Wakf Act is by the terms of that section "subject to any order of a competent Court," but this does not mean that the appointment needs confirmation in anticipation by a Civil Court before it is actually challanged. (Khundkar and Biswas, JJ.) MIRZA MUMTAZALI v. BANEWARI LAL. 48 C.W.N. 598.

——S, 46-A—Ex-parte Order of Commissioner amending Register altering classification of wakf—Whether final order.

An ex-parte Order of a Commissioner of wakfs on a petition filed by some interested persons amending the Register whereby the classification of a certain wakf was altered, falls within S. 46 of the Bengal Wakf Act and is of a purely administrative character. Such an order

## BENGAL WAKF ACT (XIII OF 1934).

is not a final order within the purview of S. 46-A of the Act which gives finality to a decision by the Commissioner with reference to the points specified therein only if any question relating there to had been definitely put in issue before him and had been decided by him judicially or at least in a semi-judicial manner. (Edgley, J.) BADARY JAHAN BIBI v. DALIRUDDIN AHMAD. 47 C.W.N. 381.

-Ss. 46 A and 92-Enrolment of wakf-Suit to revoke decision of Commissioner-If lies -Commissioner, if necessary party-His right to notice—Commissioner added as party—If can be treated as intervener—Irregularity in procedure.

A'decision' of the Commissioner and "an order

made under the Act" stand on different footings. When any wakf is enrolled by the Commissioner this enrolment may imply two things, namely, (1) a decision that the property is wakf and (2) an order of enrolment. No suit lies for setting aside the order. But the decision is always subject to revocation or modification by a competent Court. So far as this decision is concerned, the Commissioner discharges a quasi-judicial function and in a suit for revoking or modifying the decision he is not at all a necessary party. Rather it would be improper to add him as a party defendant in his capacity of the officer giving the decision. But he is entitled to a notice of the suit under S. 70 of the Bengal Wakf Act and is entitled to intervene under S.71 of the Act. When he comes in as intervener, the suit does not become a suit against him in respect of any act purporting to be done by him in his official capacity and no question of notice to him under S. 80, C. P. Code can arise. If, however, he is added as a party defendant, the procedure is irregular. But if he contests the claim on its merits he can be treated as an intervener under S. 71 of the Act. The irregularity in the procedure does not affect the merits of the Case or the jurisdiction of the court (Mukherjea and Pal. JJ.) COMMISSIONER OF WAKES BENGAL v. SHAHEBZADA MAHOMED Lahangir Shah. 214 I.C. 160=17 F 48 C.W.N. 157=A.I.R. 1944 Cal. 206. 214 I.C. 160=17 R.C. 31=

S. 70 - Applicability to appeal.
S. 70 of the Bengal Wakf Act does not apply to an appeal. (Lodge, J.) MUZAFAK AHMED V. INDRA KUMAR DAS. 211 I. C. 470=1 R.C. 546 77 C.L.J. 159=A.I.R. 1944 Cal. 40.

S. 70—Decree passed without Commissioner being made party—If void or voidable.

A decree or order passed in a suit or proceeding without the Commissioner of Wakfs being made a party is not void but voidable and the Commissioner must apply within one month of his coming to know of the suit or proceeding. (Lodge J.) MUZAFAR AHMED v. INDRAKUMAR DAS 211 I.C. 470=16 R.C. 546=77 C.L.J. 159=A I. R. 1944 Cal. 40.

-S. 70—Scope—Property not admitted to be

wakf-Notice if necessary.

S. 70 of the Wakf Act is not limited in its application to a suit in respect of property which is admittedly wakf. A notice to the Commissioner of wakfs under the section is necessary even if the claim that the property is wakf is contested. (Mukherjea and Sen JJ.) Benoy kumar Acharjee v. Ahammad ali. 202 I.C 76=15 R.C. 284=75 C.L.J. 33=46 C.W.N. 339=A.I.R. 1942 Cal. 467 (1).

#### BERAR INAM RULES (1859).

-S. 70 (2)—Wakf not enrolled under S. 44 -Notice if necessary. .

The fact that the wakf was not enrolled at the office of the Commissioner of Wakf under S. 44 of the Bengal Wakf Act does not render a notice under S. 70(2)unnecessary. (Mukherjea and Blank JJ.) GOURISHANKA SUKUL V. COMMISSIONER OF WAKES BENGAL. I.L.R. (1943) 2 Cal. 313=77 C.L.J. 339=207 I.C. 309=16 R.C. 52=47 C.W. N. 436=A.I.R. 1943 Cal. 240.

perty of judgment-debtor—Notice if necessary

-Remedy of Commissioner

A notice under S. 70 (2) of the B.T. Act is necessary only when the property is sold as wakf property and not when it is sold as the private property of the judgment-debtor who is not sued as a mutwalli or a representive of the wakf estate. In the latter case if the property really belongs to the wakf the purchaser does not acquire any title to the property as against the wakf and the remedy of the Commissioner is to file a suit as is provided for in S 72 and not to file as an application under S. 70 (5) of the Act. (Mukherjea and Blank, JJ.) GOURISHANKAR SUKUL v. COMMISSIONER OF WAKFS, BENGAL. I.L.R.(1943) 2 Cal. 313=77 C.L.J. 399=207 I.C. 309=16 R. C. 52=47 C.W.N. 436=A.I.R. 1943 Cal. 240.

-S. 73(2)—Applicability—Wakf not in direct

charge of Commissioner.

Per Khundkar J.—S. 73 (2) of the Bengal
Wakf Act applies although the Wakf is not in the direct charge of the Commissioner of Wakfs. (Mitter and Khundkar, JJ.) HAJI MAHOMED NABI v. Province of Bengal, I.L.R. (1942 1 Cal. 211=46 C.W.N. 59=201 I.C. 248=15 R.C. 148=A.I.R. 1942 Cal 343.

-Ss. 92 and 46-A Enrolment by wakf-suit to revoke decision of Commissioner-If lies. see BENGAL WAKF ACT, Ss.46-A and 92. 48 C.W.N. 157.

#### BERAR LAWS CODES RULES ETC. Berar Alienated Villages Tenancy Law.

Cotton Market Rules.

Inam Rules.

Land Revenue Code, (1928) Patels and Patwaris Law (1900).

Wasteland Rules (1865).

BERAR ALIENATED VILLAGES TENANCY LAW, S. 31 (1)-Electment of permanent tenant without inquiry into improvements-Legality.

A permanent tenant in Berar cannot be ejected from nis holding until an inquiry into improvemenrs has been made, whether the tenant has made a claim or not. (Binney, F.C.) GOVIND v. MUKUND. 1943 N.L.J. 432.

-S. 45-Suit under-Transferee under sale for recovery under Agriculturists' Loans Act—Liability of. See AGRICULTURISTS' LOANS, ACT, S. 5 AND LAND IMPROVEMENT LOANS, ACT, S. 7 (1) (c), 1942 N.

BERAR COTTON MARKET RULES, R. 56 (3)-Scope and applicability. EMPEROR v. P. R. MEHTA. [see Q.D. 1936-40 Vol. I Col. 3240.] 191 I.C. 54 = 13 R.N. 163=42 Cr.L.J. 66.

BERAR INAM RULES (1859)-Assignment of share in inam certificate-Failure of heirs-Devolution. SHRIRAM v. BANYA BAI. [see Q.D. 1936-40 Vol. I. Col. 508] 194 I.C. 454 = 13 R.N. 369.

#### BERAR INAM RULES (1859).

Effect of R. 3 upon it.

R. 3 of the Berar Inam Rules must be construed as declaring that the estate that is certified as having been granted is a restricted estate, but that it is larger than a life-estate, and has to be continued, after the death of the first certificate holder into his widow, lineal heirs, undivided brothers, etc. When one comes to collateral heirs of two removes one reaches the end of the rolationship to which the estate may pass, and further degrees of relationship are disallowed except under special orders. That makes this a restricted tenure and it is further restricted and differentiated from a fee simple tenure by conditions as to payment of legacy duty. In the case of Hyderabad Jagir, by custom, it is not personal to the grantee but continues to his descendants and R. 3 limits who those descendants are and declared that any one outside the degree of relationship mentioned therein will not take unless special orders are passed. (Stone, C. J. and Bose, J.) RAJE VINAYAKRAO v. KAJE SHRINIWASRAO. I.L.R. (1942) Nag. 526=197 I.C. 794=14 R.N. 197=1941 N.L.J. 503 = A.I.R. 1941 Nag. 334.

#### ---- R. 4-Successor-Meaning.

Though the term successor in R. 4 of the Berat rules is not of equal import to the term 'lieneal heirs' it is of a wider import. (Stone, C.J. and Bose, J.) RAJE VINAYAKRAO v. RAJE SHRINIWASRAO. I.L.R. (1942) Nag. 526=197 I.C. 794=14 R.N. 197=1941 N L.J. 503=A I.R. 1941 Nag. 334.

The words 'he will be allowed the benefits of CI. (2), of R. 5 but without the option of refusal' in R. 5 (5) of the Berar Inam Rules is a misprint for 'he will be allowed the benefits of CI. (3), Rule 5 but without the option of refusal'. The option in CI. (3) is one given in all cases of an inamdar and it consists in this the the grantee has the option to turn his restricted tenure into a free-hold. All he has to do is to consent to payment of a quit rent of a certain amount. Where an inam certificate stated that it was granted for mainte nance and under the column headed. 'Tenure and condition attached to the continuance of the grant' were the following remarks 'upheld under Inam Rule 5 S. (5) one-fourth assessment being levied on the next and three following successions until full assessment is

Held:—The grant was of an ordinary heritable estate of unlimited duration (the 'freehold' of the Inam Rules) the holder or holders after the fourth paying full assessment, and that all such heirs—those equal in right—would hold as co-tenants and any one of them could ask for partition which would only last for his lifetime. (Stone, C.J. and Clarke, J.) SITARAM SINGH v. CHUTTARANJAN. I.L.R. (1942) Nag. 405=199 I.O. 627=14 B.N. 288=1941 N.L.J. 558=A.I.B. 1942 Nag. 14.

The entry in Col. 10 of Form BB is definitely part of the record of rights and is binding on the Revenue Courts. Where it contained the following remarks 'Inam holding of class 3rd of rule 11 upheld under Cl. 2 of R. V of the Berar Inam Rules 1859 to main issue' it was held that in case of a claim to succeed to a deceased inam holder the enquiry was really one in pursuance of the record of rights rules—Proceedings or the change of name of inam holders are in fact

## BERAR LAND REVENUE CODE (1928).

mutation cases under the Berar Land Revenue Code. (Binney, F.C.) DATIATRAYA YADA RAO GOSAWI 2, TUKARAM SHANKAR MORE AND ANOTHER. 1942 N.I. J. 223.

BERAR LAND REVENUE CODE (1928), Ss. 24, 25, 38 and 159—/rregularity in prolamation—Ground for setting aside sale—Provision of law—Scope of revisional powers.

S. 24 of the Berar Land Revenue Code gives the requirement as to publication of proclamation. S. 25 does not save from being void the publication of proclamation in which a vital incident prescribed in the process of publication has been omitted. The inference is that a proclamation which is not completed in the prescribed is void without reference to the terms of S. 159. The omission of posting the proclamation at a place of public resort on or near the land concerned is a very serious defect that leaves the local publication anything but complete. In such a case the Revenue Officers have the power to set aside the sale, It is open to the Commissioner to undertake revisional proceedings under S. 38 suo notu with reference to such sales. (Burton, F.C.) RAMAWATAR v. NARAYAN-DAS. 1941 N.L.J. 555.

Ss. 32 and 110—Order certifying entry in mutation register—Appealability.

There is nothing in the Berar Land Revenue Code to exclude the operation of S. 32 in mutation cases and hence an appeal would lie from an order certifying an entry in the mutation register maintained under S. 111. (Binney, F.C.) NARAYAN MADHOJI MARATHA V, WASUDEO MADHOJI MARATHA. 1942 NLJ. 366.

Where the proceedings before a Collector are governed by rules under S. 70 (1) C. P. Code, as applied to Berar which are to be found in Berar Revenue Book Circular III-8, neither the Collector nor the Deputy Commissioner hearing appeals act as a Revenue Officer under U. P. Land Revenue Code. The provisions of S. 39 alone of the Code have been applied by R. 15 (3) and it cannot be inferred that S. 33 of the Code is attracted. Under R. 15 (1) an appeal lies from every order passed in exercise of the authority conferred by these rules. (Binney, F.C.) DAJIBA v. RAMDAYAL. 1948 N.L.J. 113.

S. 38—Scope of revisional powers. See BERAR LAND REVENUE CODE, SS. 24, 25, 38 AND 159. 1941 N.L.J. 555.

S. 41 (1) of the Berar Land Revenue Code does not throw the burden of showing that the land in dispute was not private land on Government. All it does is to make a simple statement of fact regarding the vesting of title. (Bose, J.) JANEFAL MOSQUE v. PROVINCIAL GOVERNMENT, C. P. AND BERAR. I.L.R. (1945) Nag. 359=1944 N.L.J. 285=A.I.R. 1944 Nag. 311.

——S. 55—Land settled, for grazing purposes— Land revenue in arrears—Proper course—Sale or cancellation of lease.

Land settled on fair assessment for grazing of the village cattle, should not be sold for arrears of land revenue. The only interest left to the defaulter in the grazing fields is the right to recover arrears of grazing fees which alone can be put to sale. The proper course is to cancel the lease under R. 3. (Binney, F. C.) SADASHIV v. RAMPHAN. 1944 N.L.J. 155.

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—S. 59 (4)—Tenant for agricultural purpose— Right to eject stranger in possession of structures erected for non-agricultural purposes.

Where a stranger erects structures for non-agricultural purposes on land granted to an occupant for agricultural purposes the latter is entitled under S. 59 (4) of the Berar Land Revenue Code to secure the former's summary ejectment. (Greenfield.) SHESHRAO v. NARAYAN. 1942 N.L.J. 158.

If possession goes into the hands of strangers in the case of an ante-alienation tenant, there is no continuity of possession within the meaning of either S. 73 or S. 72 of the Berar Land Revenue Code. (Stone, C. J. and Bose, J.) Shri Raghunath Swami Deosthan v. Doma. 1942 N.L.J. 431.

The wording of sub-S. (2) of S. 96, Berar Land Revenue Code, clearly shows that the advantage of the concession conferred by it is in favour of one who is the recognized izardar of the village and it is to him alone that the concession is made with respect to the entire village. Payment of half the amount of assessment is a right in the izara and not a right in any individual land in the izara. It is a right in the izara as a whole and hence a transferee of a part from the izardar cannot claim the benefit of the concession. (Puranik, J.) SAMBHASHIO NARAYAN v. KASHINATH NAGOJI. I.L.B. (1943) Nag. 278 = 206 I.C. 447=15 B.N. 261=1943 N.L.J. 121=A.I.B. 1943 Nag. 158.

Ss. 111 and 192—Correction of entry in Record of Rights—Suit for—Jurisdiction of Civil Court.

S. 111 of the Berar Land Revenue Code gives the Civil Courts jurisdiction to decide disputes relating to rights recorded in the Record of Rights, but it does not give them jurisdiction to correct an entry in the Record of Rights. S. 192 of the Code prohibits a Civil Court from entertaining any suit to obtain a decision on any matter which any revenue officer is, by this law empowered to determine, except as otherwise provided in this law. The entry to be made in the Record of Rights is a matter to be determined by the revenue officer, and the Civil Courts have no jurisdiction to decide what that entry shall be. (Pollock, J.) VISWANATHAPPA v. KEDAR NATH. 1945 N.L.J. 379.

S. 112 (2)—Dismissal of suit for failure to file certified copy of entry in record-of-rights—Propriety. It is not proper for a Court to dismiss a suit for failure to file a certified copy of the entry in the record-of-rights. The Court should give the party an opportunity to produce it. A claim should not be defeated by a mere technical flaw. (Gruer, 1.) BALASAHIB DEOSTHAN v. BAJRANG DAS. 1942 N.L.J. 396,

S. 129—Scope of power under—Reasonable access, meaning—Facts to be proved by objecting owner.

S. 129 of the Berar Land Revenue Code gives to the Revenue Officers the power to override civil rights in order to give cultivators reasonable access to their fields. Where access is only possible along boundary strips belonging to others it is obvious that reasonable access will ordinarily mean the most convenient line of approach. Before his objection can be considered the owner of the boundary strip which is the most convenient line of approach must show that the use of this strip will cause him much more inconvenience than

## BERAR LAND REVENUE CODE (1928).

would be caused by the use of an alternative line to the owners of the strips on that line. (Binney, F.C. LAXMANJI HANGAJI PATEL v. KASHIRAO SAMBHAJI 1943 N.I. J. 66

— S. 149—Proclamation signed by Sub-Divisiona. Officer not specifying place of sale—Sale held in Tahsio office—Validity.

S. 149 of the Berai Land Revenue Code requires that the place of sale should be specified in the proclamatior and it is obvious that sale proceedings will be vitiated if it is not clear from the proclamation where the sale will be held. When a sale is advertised to be held in a large town without specifying the place, the presumption is that it will be held at the office or place of business of the person advertising it. If, therefore, a proclamation signed by a Sub-Divisional Officer does not specify the place of sale and the sale is held not at his office but in the Tahsil office, the proceedings are void (Binney, F.C.) SHEIKH TAMIZ v. MAHEBUB KHAN 1943 N.L.J. 275.

S. 149—Sale proclamation not giving name of defaulter—When and if an irregularity justifying setting aside of the sale

Though S. 149 of Berar Land Revenue Code does not specify that the name of the defaulter should be stated in the proclamation, there is a place for the occupant's name in the form of proclamation published under R. 1 of S. 194 (2)(a) of the Act and hence it can be assumed that this is one of the particulars considered necessary. It is an irregularity to omit that name and would justify the setting aside of the sale if the circumstances lead to the inference that the low prices were partly due to that omission. (Binney, F.C.) SYED KASAM v. AMRU. 1943 N.I.J. 68.

3. 152—Applicability—Sale for recovering instalments fixed by Debt Conciliation Board.

Under S. 152 of the Berar Land Revenue Code every sale under Chapter XII must be stayed if the amount due and the costs, which are recoverable under S. 152 as part of the arrear, are paid before the sale is complete. The section is not confined in its application to proceedings for recovery of land revenue. It also applies to proceedings for recovery of instalments due through an agreement under the Debt Conciliation Act. (Binney, F.C.) MULTANMAL v. SWARUPCHAND. 1943 N.L.J. 248

The deposits required by S. 155 of the Berar Land Revenue Code must be made either in the treasury or in Court and cannot legally be accepted by an officer after both Treasury and Court have closed for the day. (Binney F.C.) WASUDEO v. ABHIMAN. 1943 N.L. J. 247.

----S. 155-Right to apply under-Creditor who had agreed with debtor for conciliation of debt and obtained a charge over debtor's property.

Where a Co-operative Society being a creditor agrees with his debtor before the Debt Conciliation Board to conciliate the debt due to him and obtains a charge over the property of the debtor for the payment of the amount due and the agreement between the parties is duly registered, the Co-operative Society is a person having an interest in the property (of the debtor) by virtue of a title acquired before the sale within the meaning of S. 155 of the Berar Land Revenue Code and is hence entitled to apply under the section and make the necessary deposit. (Binney, F. C.) Distributed.

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CO-OPERATIVE SOCIETY NO. 175 v. KASHINATH APPAJI KOSHTI. 1942 N.L.J. 216.

-S. 155-Right to apply under-Person who has filed a suit for pre-emption.

As a pre-emptor who has filed a suit for pre-emption but has not obtained a decree or paid the purchase price before the date of the sale does not hold "an interest in the property by virtue of the ritle acquired before sale' he cannot apply for setting aside the sale. (Binney, F. C.) DIPCHAND v. MAROTI. 1943 N.L.J. 118.

Ss. 159 and 155—Discretion under S. 159— Limits to exercise of—Deposit beyond time fixed by S. 155-If a ground to refuse confirmation.

S. 159 of the Berar Land Revenue Code no doubt gives a discretion to refuse confirmation of the sale for good reasons. But this discretion cannot be used to override mandatory provisions of another section of the Code. Hence if the deposit required by S. 155 of the Code to be made within a particular time is not so made that cannot be a ground for the exercise of the discretion to refuse confirmation of a sale. (Binney, MOHANLAL v. MST. ANASUYABAI. 1942 N.L.J.

## -S. 159—Exercise of discretion under— When justified.

Mere suspicion of failure to proclaim a sale of property is sufficient justification for the exercise of the discretion given in S. 159, Berar Land Revenue Code, when the property was purchased by a Village Officer at a low price. (Binney, F.C.) SHRIDAR NAGORAO v. WAMAN SHIVARAMJI. 1943 N.L.J. 507.

-S. 159-Power of setting aside sale-Ground See BERAR LAND REVENUE CODE, Ss. 24, 25, 38 AND 159. 1941 N.L.J. 555.

-S. 159-Revenue sale-Collusion between village officers in regard to-Purchase by village

patel—Liability to be set aside.

Where though a revenue sale was perfectly legal under the Berar Land Revenue Code it was shown that the village officers colluded to get that particular field sold so that one of them the patel could purchase it for an inadequate price held, that (i) the patel far from having acquired an equity as auction purchaser had acquired a definite disqualification (ii) that the fraud of the village officers was a fraud to which Government itself was indirectly a party and that therefore the auction sale must be set aside. (Greenfield, R. A.) VENKATA SUBBAYYA v. KESHO PANDURANG. 1941 N.L.J.52.

# **S. 159**—Setting aside sale—When justified.

It is accepted law that only exceptional circumstances justify interference with a Court sale other than under the authority of Ss. 155 and 156. The reasons which have to be recorded must be sound. Where irregularites in the publishing of the sale are alleged in an application under S. 159 or emerge in the course of the proceedings they must be examined as critically as if they had formed the basis of an application under 156. It is of course essential that it should be proved that substantial injury has been caused by such irregularities. (Binney F. C.) RAM RRISHNA v. RAGIRKHAN. 1944 N.L.J. 59.

-S.161—Title of purchaser—When accrues— Date of sale or confirmation,

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The title of a purchaser at a sale held under the provisions of the Berar Land Revenue Code does not accrue until the date of confirmation and it does not relate back to the date of the sale (Bose, J.) KISAN LAL v. NAMYMDEO. I.L.R. (1944) Nag. 90=211 I.C. 525=16 R N. 209=1943 N.L.J. 433=A.I.R. 1943 Nag. 299.

-Ss. 162 and 192 (k)—Appropriation of surplus sale proceeds by Revenue Court for Crown debts in spite of prohibitory order from Civil Court-Jurisdiction of Civil Court to question.

The Civil Court has no jurisdiction to question the appropriation of surplus sale proceeds for other arrears payable to the Crown made by the Revenue Court under S. 162 of the Berar Land Revenue Code in spite of a prohibitory order from it under O. 21, R. 52, C. P. Code, particularly when such arrears were payable to the Crown. (Puranik, J.) JAGANNATH v. PROVIN-CIAL GOVERNMENT C. P AND BERAR. I.I.R. (1945) Nag. 496=1945 N.I.J. 111=A.I.R. 1945

-S. 164(a)—Applicability—Recovery of commission in respect of sale for arrears of land revenue.

Where on a sale for arrears of land revenue the defaulter deposits the amount due along with the commission and the sale is set aside on the ground of an irregularity and the defaulter is permitted to withdraw the commission the auction purchaser can recover it under S. 164(a) in as much as it is apportionable as costs in respect of the case. (Burton F. C.) LAXMIBAI NARAYAN 1941 N.L.J. 228.

-S. 183—Co-occupants also mortgagor and mortgagee-Sale of a portion of mortgaged property-Claim to pre-empt by co-occupant mort-

gagee-Amount payable.
Where two person persons were occupants of the same survey number and where also in the relation of mortgagor and mortgagee and the mortgagor sold a portion of the mortgaged property free from encumbrance and the mortgagee co-occupant claimed to pre-empt on payment of a sum representing the balance after deducting the fair price the sum which could be allocated in respect of the mortgage debt to the plot sold, held that he was not so entitled to calculate the amount payable and the interest transferred was only the equity of redemption for which the fair price was fixed and which should be paid. (Stone C. J.) Kondo v. Sarubal. 1942 N.L. J. 370.

## -S. 183 and C. P. Debt Conciliation Act-Pre-emption in case of transfer in conciliation of debt.

Where in the settlement of a debt by the Conciliation Board certain property of the debtor was transferred to the creditor, it is not desirable to encourage applications for pre-emption in respect of such transfers. (Stone. C. J.) DHANRAJ v. VITHOBA. 1941 N.L.J. 623.

-S. 183—Right of pre-emption—Occupant of survey number foreclosed also occupant of another subdivision,

Under S. 183 of the Berar Land Revenue Code, the occupant of the survey number forcelosed cannot claim pre-emption simply because he is also the occupant of another sub-division of that survey number, It is some

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other occupant who was not the occupant of the survey number foreclosed that can claim pre-emption. (Puranik, J.) RAMKRISHNA TUKARAM v. NAMDEO SONAJI. I.L.R (1944) Nag. 848=210 I.C. 387=16 R.N. 154=1943 N.L.J. 568=AI.R. 1944 Nag. 31.

—S. 183 (1)—Defendant's vendor having interest in sub-division of survey number and also interest in trees standing in plaintiff's sub-division—Sale by him of both—Plaintiff's right to pre-emption in respect of trees.

The plaintiff was an occupant of sub-division No. 23-1 in Survey No. 23. The defendant's vendor owned the other sub-division No. 23-2 and had a half-interest in trees standing in the plaintiff's sub-division. He sold to the defendant his interest in both. The plaintiff's claim for pre-emption was decreed in respect of Survey No. 23-2 but dismissed in respect of the trees, On appeal.

Held,(i) that the Survey No 23 did not cease to exist by reason of its sub-division, and the defendant was, therefore, an occupant in that survey number within the meaning of S. 183 (1) of the Berar Land Revenue Code; (ii) that as trees are deemed to be part of the land on which they are situate under S. 46 of that Code, the defendant's vendor who had a half-interest in those trees had an interest in the Survey No. 23 in so far as those trees were concerned, and the plaintiff had, therefore, a right to pre-empt the half-share in the trees which was sold, (Bose, J.) RADHAKISAN v DAULAT. I.L.R. (1945) Nag. 239=1944 N.L.J. 204=A.I R. 1944 Nag. 197.

——S. 183 (2)—Suit under—Power of Court to increase the figure of value.

The Court is not bound by S. 183 (2) of the Berar Land Revenue Code, to accept the price paid, if it is below the market value. If the price is fixed decidedly above the market value, it is not fixed in good faith. The same is equally true if the price is much below the value of the land. Where the price fixed in a sale deed was very low and it was so fixed on an understanding that the transaction was really to be a mortgage and not a sale, on an application for pre-emption the Court could go into the question of fair price, and direct the pre-emptor to pay the nominal price mentioned in the sale to the vendee and the balance to the vendor. (Grille, J.) SHEOLAL PANDU v. YEDU VYANKAT SING. I.L.R. (1942) Nag. 584—198 I.C. 402—14 R.N. 222—1941 N.L.J. 491—A.I.R. 1941 Nag. 353.

S. 184—Scope—Buildings, if covered by section.
S. 184 of the Berar Land Revenue Code which speaks of 'survey numbers' and 'land' contemplates only agricultural land and has nothing to do with buildings. (Gruer, J.) LAXMAN PANDHARI v. MUNNUSINGH. I.L.R. (1942) Nag. 315=200 I.C. 297=14 R.N. 330=1942 N.L.J. 218.

\_\_\_\_\_S. 184 (2)—'Consolidation'—Interpretation— Mere convenience if a criterion.

The word 'consolidation' has not been defined in the Berar Land Revenue Code. The word 'consolidate' implies that there are no intervals between these parts of the body; nor is the discontinuity a negligible one. There is no reason for holding that the legislature intended the word 'consolidation' in S. 184 (2) to be used in a loose sense and to do so would lead to difficulties. The general rule is to allow pre-emption in case of exchange and the exception should be strictly applied. Mere convenience of cultivation is neither the criterion

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nor is it sufficient. The safer rule is to confine 'consolidation' to configuity. (Gruer, J) LAXMAN PANDHARI: MUNNUSINGH. I L.R. (1942) Nag 315 = 200 I.C. 297=14 R.N. 330 = 1942 N.L.J. 218.

The fair price as contemplated by S. 184 (3) of the Berar Land Revenue Code would be the market value of the property exchanged. (Gruer J.) LAXMAN PANDHARI v MUNNUSINGH. I.L.R. (1942) Nag. 315=200 I.C. 297=14 R.N. 330=1942 N.L. J. 218.

—S. 192 (1), Proviso—Construction—Suit involving question of interpretation of sanad—Jurisdiction of Civil Court to try, Shriniwas RAO v. Secretary of State. [see Q.D. 1936—'40 Vol. I, Col. 3241.] ILR. (1941) Nag. 107—191 I.C. 619—13 R N. 199.

The appointment of a mahar has to be made in accordance with the custom of the village subject to the provisions of Rule 2. Under the Rules, revenue officers have for the first time been made responsible for checking appointments made by patels. It is their duty when vacancies occur whether on the death or removal of a mahar or at the beginning of a rotatory period to see that appointments are made according to the present rules. Neither custom nor previous decisions can override the rules and these do not permit the appointment of a person who is unable to work or the appointment of a substitute except in a leave vacancy. (Binney F. C.) Modya v. Anusuya. 1943 N.L.J. 291.

R. 5 of Village Mahars Rules—Appeal.

An appeal lies against an order passed by a Tahsildar under R. 5 of the Village Mahars Rules under S. 194 (2) (g), Berar Land Revenue Code. Such an order is not passed by one of the revisional authorities empowered by S. 38 and must be considered as an original order. (Binney, F. C.) SHIONYA v. GOMYA. 1943 N.L.J. 361.

— Ch. XIV—Pre-emption—Sale by father manager of Hindu joint family—Minor members—If vendors—If can sue for pre-emption.

Where a Hindu father manager of joint family sells family property in his own name and in the name of his minor son as well, the latter can under Ch. XIV of the Berar Land Revenue Code pre-empt. Addition of the minor's name in the sale-deed does not make him a vendor. (Stone, C.J. and Bose, J.) DAMODAR v. NARAYAN. I.L.R. (1942) Nag. 325=195 I.C. 671=14 R.N. 54=1941 N.L.J. 296=A.I.R. 1941 Nag. 199.

BERAR PATELS AND PATWARIS LAW (1900)—Claims of families rejected in past—Whether can be re-opened.

The claims of families which had been rejected in the past after full and fair consideration, should not be re-opened at any subsequent vacancy. A change in case-law will not justify reconsideration. (Binney, F.C.) RAMCHANDEA NAGOJI v. BHAGWANT SHAMRAO. 1948 N.L.J. 289.

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—Dismissal of patel—Procedure -Appeal

In Berar in matters of dismissal of patels, the practice is to seek sanction of the Commissioner after the enquiries are complete. A hearing is usually given by the Commissioner to the village officer and then when the proceedings are returned the Deputy Commissioner passes the formal order. Hence the order is virtually that of the Commissioner and an appeal against it cannot therefore lie to him, as a Court cannot hear an appeal against an order which has been passed by it after full consideration. The remedy of the village officer is to appeal to the Revenue tribunal. (Binney, F.C.) Roghoji Ganpat Patil v. Dewaji Symbhaji Kunbi. 1942 N.L.J. 597.

—Hereditary claims by Muslims to offices—Law applicable—Rule of seniority—Adoption, if recognized.

Mahomedan Law does not recognize adoption. Where hereditary claims are made by Muslims to village offices, it is the accepted practice in Berar to apply the rule of seniority. (Binney, F.C.) HAKUMDDIN v. GULAM MOHIUDDIN. 1941 N.L.J. 554.

challenged in appeal—Vacancy, if deemed to have been filled up.

A vacancy in the office of a patel can only be deemed to have been filled up when a final order binding upon the parties is passed. It cannot be said to have been filled up when the appointment made to it is being challenged in appeal. (Raghavendra Rao, H.M.) BHASKARRAO v. HIMMATRAO. 1944 N.L.J. 343.

Review of order—No application by aggrieved person—Permissibility of review.

It is of course true that an application from an aggrieved person is necessary before a review can be undertaken under O. 47, R. 1, C. P. Code. But there is a distinction between matters which fall within the purview of the C. P. Code, and those which fall within the Patels and Patwaris Law. Under that law, when administrative questions arise review must be permitted when the necessity is made clear. (Roughton, F.C.) NARAYAN v.BABURAO. 1945 N.I.J. 399.

S. 5—Adoption made by widow of former patel after his death and after appointment of his successor—Adopted son—If qualified to be appointed at next vacancy.

A son adopted by a widow of a former patel after the latter's death and after a successor to him has been appointed to the patelki, is qualified to be appointed patel when the next vacancy arises in preference to the son of the late incumbent. The words "and shall not appoint a woman if a male relative of the late incumbent of the office exists" used in S. 5 (3) (c) of the Berar Patels and Patwaris Law, no doubt, postpone the rights of a woman to those of a male relative; but they do not affect the rights of the adopted son who claims, not through her deceased husband into whose family he has been adopted. It follows that the right of the adopted son will be determined according to the law of inheritance applicable to the family into which he has been

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a lopted. (Burton, R.M. and Roughton, H.M.) LAXMAN v. TUKARAM. 1943 N.L.J. 255.

5. 5-Appointment by Commissioner contrary to ruling 96-Propriety.

An appointment made by the Commissioner contrary to ruling 96 which is binding upon him, is improper and cannot be maintained. (Binney, F. C.) GULAB v. SHANKAR, 1944 N.L.J 138.

S. 5—Appointment of malik patwari—Candidate representing brunch which has waived preferential claim on account of seniority in agreeing to partition—It has preferential claim over one who is a nearer heir to deceased incumbent.

A candidate who by the law of inheritance is a nearer heir to the deceased incumbent has a preferential claim to the office of malik patwari held by him over another who represents a branch which had definitely waived any preferential claim on account of seniority in agreeing to the partition among the family. (Binney, F.C.) Dattatraya v. Bhujangarao. 1944 N.L. J. 237

S. 5-Appointment of patel—Claim not made regularly—Duty to consider.

In a proceeding for the appointment of a patel, the Revenue Court should not reject the claim of a person on the ground that it is not made in a regular way. (Binney, F.C.) MAHADEO v. MOTI RAM. 1943 N.L.J. 362.

S. 5—Appointment of patel for period of five years in 1866—Claim to rotation not put in at end of period—Effect.

The practice of appointing patels for a period of five years began in 1866. The position at the expiry of that period was that rotation was discouraged to such an extent that it amounted to practical prohibition. No importance can therefore be attached to the failure to put in a claim to rotation on the expiry of that period. (Greenfield, F. C.) VITHAL JANOJI v. HARI BALWANT. 1943 N.L.J. 538.

——S. 5— Appointment to non-watandari office— Principle of equity—Exercise of discretion—Revision— —Interference.

It is a reasonable principle of equity to appoint the son, or perhaps even some more distant relation, of a non-watandar village officer who has served Government faithfully and well. But as the appointment of a non-watandar village officer is a matter of discretion, it is a fundamental principle that after all rights of appeal have been exhausted a Court will not interfere in revision, where no questions of law are involved and the only question is with regard to the exercise of a discretion unless there has been a grave misuse of that discretion. This is all the more true when all the lower Courts are agreed. (Greenfield.) DATTATRAYA z, PRALHAD NARAYAN. 1945 N.L.J. 319.

-S. 5—Claims of senior branch against junior family continuously in office.

No hard and fast rule can be applied in cases where it is necessary to weigh the lapse of time against the claims of seniority. The decision must be taken on merits. It would, therefore, require very strong reasons to justify interference in revision with the decision of the final court of appeal refusing to oust the junior family after 80 years' continuous office on the strength

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of the claim of the senior branch. (Binney, F.C.) SURYABHAN v. SHANKAR. 1943 N L.J. 187.

-Ss. 5 and 7—Claim to rotation—Re-opening of -Retrospective application of case-law.

A claim to the introduction of rotation in a patelki cannot be re-opened by applying case-law retrospectively. (Binney F.C.) SITARAM v. DEVI-DAS. 1943 N.L.J. 294.

-S. 5—Effect of postponed adoption on succession

to watandar Patel or Patwari.

The effect of a postponed adoption (i.e.) adoption to a Watandar Patel or Patwari which is made after the office held by him has been filled by appointment of another member of the family in the case of a village where there is no rotation is, that on the death of the member so appointed the watan would go back to the adopted son in preference to the son of the appointee. where there is rotation, on the death of the watandar in the midst of his turn of office, the next rotatory patel would come into office, if there is no adoption by the widow of the deceased patel before the final order appointing a successor is passed. If there is an adoption made before such final order, then the adopted son would succeed to the unexpired term though he be a minor and would continue to be so for the unexpired period of rotation. Where the next rotatory patel steps in for the unexpired portion of the turn of a deceased patel and completes such turn and also completes his own turn, he would continue to work till the end of his life. He is not supposed to vacate at the end of his turn. A son adopted after the expiry of the term can claim against a person who was not appointed on his own merits, but he cannot claim against a person who was appointed on his own merits, as they existed at the time of the appointment. The appointment of a major to complete a term in preference to an existing minor does not settle the question of title between them. The question remains to be settleed when the minor attains majority. But the appointment of a major when the minor has not come into existence in a final decision of title and is permanent. (Greenfield, R. A.) RADHAKRISHNA v. Dinkar. 1942 N.L.J. 168.

-S. 5-Government Patwari-Appointment-Discretion-Relationship to prior incumbent-If of any value.

The appointment of a Government Patwari is matter of discretion and the Berar Patels and Patwaris Law does not recognise any claim based on relationship to the previous incumbent of the office. Any such recognition is also a matter of discretion. (Greenfield, R. A.) HARISH CHANDRA v. JAISHIRAM. 1942 N.L. J. 55.

-S.5-Person appointed under misconception as to custom, holding office for brief period-If obtains hold on watan.

A person who is appointed to be malik patel under a misconception as to the custom in regard to inheritance as between the sons of two wives, and who performs the duties of a patel for a very brief period, cannot be said to have obtained a firm hold on the watan. (Greenfield.) KESHEORAO v. SHEORAO. 1945 N.L.J. 311.

-8. 5-Resumption of jagir-Appointment of patel-Law of inheritance prior to resumption-If applicable.

If a jagir is resumed, and the jagirdar falls out of the picture, the law of inheritance must be held to continue to govern the appointment of a patel with effect from the time prior to the resumption of the jagir. (Roughton, F.C.) BABARAO v. KUBERRAO. 1945 N.L.J. 499.

-S. 5-Right of substitute patwari to interfere in disputes between malik, his successor and Government.

The provisions of the Berar Patels and Patwaris Law no doubt give the substitute or agent very considerable security of tenure, but it would be contrary to first principles to allow a subsitute to have any right of interference in a matter which lies solely between malik, his successor, and Government. (Greenfield R.A.) VITHAL SONAJI v. BHIKAJI RAJARAM. 1942 N.L.J. 54.

-S. 5—Scope and applicability.

S. 5 of the Berar Patels and Patwaris Law makes no distinction between appointments for life or in rotation. There is no warrant for holding that S. 5 does not apply at all to offices held and to be filled in rotation and that at the expiry of one family's period of rotation the person of the other family who held office in its last turn automatically and ipso facto steps into that office again so that no appointment is required to be made. (Burton.F. C.) NAMDEO BALIRAM v.PARASHRAM. 1942 N.L.J. 27.

-Ss. 5 (3) (a) (b) and 16 (as amended)-Preferential rights of members of family of dismissed officer other than his lineal descendants and co-parceners—If must be considered.

The provisions of S. 5(3)(a) and (b) of the Patels and Patwaris Law are not entirely disturbed by S. 16 of that law as amended in 1934, but only to the extent that the claims of lineal descendants and co-parceners of the suspended or dismissed officer may be disregarded. The right of the remaining members of his family must, therefore, be considered for appointment in preference to outsiders. (Burton, F.C.) P. SAKHARAM v. BHIKU JANU. 1944 N.L.J. 290.

S. 5 (3) (a)—Rules as to appointment of person fittest from the point of view both of Government and village community-When applicable.

The rule as to the selection out of the claimants to the patelki enquiry and appointment of the fittest person from the point of view of both Government and village community is applicable only to cases "where there are several persons having equal rights under the law of inheritance. (Binney, F.C.) VINAYAK SURYABHAN PATEL v. YADAO RAO AMRIT RAO. 1942 N.L.J. 286.

----S. 5 (3) (c)-"Male relative of the late incumbent"-Interpretation.

The words "male relative of the late incumbent" in S. 5 (3) (c) of the Berar Patels and Patwaris Law, must be interpreted to mean just what they say, viz., a male relative according to the law of inheritance applicable to the family. (Burton, F. C.) RENUKABAI v. 1945 N.L.J. 595. VYANKATESH.

5.5 (3) (c)—Substitute not having ghali-fications appointed—Subsequent appointment as

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principal—Absence of qualifications if material— Duty of Revenue Officer in regard to appointments.

According to Cl. (c) of sub-S. (3) of S. 5 of the Berar Patels and Patwaris Law the qualifications required of a substitute to the office of patel are exactly the same as those required in regard to principals and where there have been sufficient reasons for appointing an unqualified person as a substitute, the same reasons will apply to his appointment as a malik in the same post in the same village. In such matters a revenue officer unlike a Civil Court is required to base his decision on principles of right and equity and on considerations of administrative convenience and not merely on rules. (Greenfield. R.A.) CHOUDAJIRAO v. UTTAMRAO. 1942 N.L.J. 62.

——S. 6—Appointment of substitute—Several maliks.

The Patels and Patwaris Law makes no provision for the appointment of a substitute where there are several maliks. Whenever there is a change of malik, the new malik can exercise his right of nomination, but the old maliks cannot make fresh nominations. As long as the substitute remains the nominee of the majority, he cannot be ousted. There is no difference in the principle involved whether or not the su stitute is a malik. When each candidate has equal support, it is equitable that the status quo should be maintained. (Binney, F.C.) VINAYAKRAO v. DEORAO. 1943 N.L.J. 288.

S. 6 (2)—Nomination by Jagirdar—Rule of seniority.

A Jagirdar in making a nomination under S.6 (2) of the Patels and Patwaris Law has to have regard to the same matters as are specified in S.5 (3) (a) and (b) and must follow the rule of seniority as well as other principles which have been applied by case law to successions to khalsa villages. (Binney, F.C.) JAGANNATH v. SAHEBRAO. 1944 N.L.J. 78.

-----S. 6-A-Appointment of malik and patel-

Voice of each sharer.

In an Izara village each sharer has a voice in the appointment of the malik and patel which carries weight according to the interest he possesses or represents in the village. (Binney, F.C.) LAXMAN PUNJA RAO v. RAM RAO. 1943 N.L.J. 153.

S. 6-A and Waste Land Rules, Cl. (vi)— Co-sharer nominated as malik and patel—Obliga-

tion of personal service.

S.6-A of the Patels and Patwaris Law makes it clear that all co-sharers have a say in the nomination of the malik and patel. A co-sharer nominated as malik and patel under sub-Ss. (1) and (2) of that section must work in person. Cl. (vi) of the Waste Land Rules is not affected by anything expressly provided in the Patels and Patwaris Law. If he is unable to do so, he can be removed. (Binney, F.C.) TARACHAND v. SHANKAR. 1943 N.L.J. 292.

S. 6-A-"One of their number"-Interpretation.

The words "one of their number" in S. 6-A of he Berar Patels and Patwaris Law refer to one

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of the recorded proprietors or patels as the case may be and cannot be read as including a nominee who is not a recorded proprietor or patel. If the Deputy Commissioner for any good or sufficient reason considers it proper to ignore the nomination he can appoint only one of such proprietors or patels. (Raghavendra Rao, H.M.) BHAGWANJI v. RAMCHANDRA. 1944 N.L.J. 352.

If a patel who receives the emoluments from Government does not pay his co sharer his share thereof, the Revenue Court to which the patel is subordinate can order that the amount due should be deducted by Government for payment to the co-sharer. This is in accordance with the general principle that what a person is empowered to do can be done by an authority superior to that person. (Greenfeld, R.A.) ANANDRAO v. BAPURAO. 1945 N.L.J. 401.

The natural interpretation of the words "the sharers having the largest share" in S. 6-A (1) of the Patels and Patwaris Law is that the nomination rests not with the largest share-holder, but with the sharers whose interests represent the largest share in the village. (Binney, F.C.) LAXMAN v. RAM RAO. 1943 N.L.J. 376.

If a co-sharer agrees to the appointment of another co-sharer as malik and patel on the understanding that he would not be liable for his share of the patel's allowances, the mutual agreement between the parties cannot under S. 6-A(3) of the Patels and Patwaris Law be varied as between them. There is nothing in this provision or in clause VI of the Waste Land Rules, 1865, to justify the recovery from him of the emoluments of a deputy appointed by the co-sharer who is malik and patel. (Binney, F. C.) GANPAT v, SHAMRAO. 1943 N.L.J. 406.

S. 7—Appointment of substitute patel—Rotation—Desirability.

There were two maliks in a village and they could not agree about their substitute. One person was appointed as a substitute on behalf of one of them till the other malik produced a better substitute. The other malik died and was succeeded by a distant cousin who applied to work in person. Held, that the ten-yearly rotation should be introduced between the two families and that as neither family had an obvious claim to the first period, the proper course was to maintain the status quo. (Binney, F.C.) VENKATESH v. MT. RADHABAI. 1944 N.L.J. 150.

heir—Scheme of rotation—If comes to an end.

If a person in office dies without a visible or apparent heir who could take his place in the scheme of rotation, the scheme of rotation ceases to exist. There is no provision in the Patels and Patwaris Law which provides for a scheme of rotation being kept alive or being considered to be kept alive indefinitely to provide for the possible contingency of an heir being available or

being made available at a later date. (Burton WASUDEO v. MADHAO. 1945 N.L.J. 560.

-S. 7—Decisions made after Resolution of 1905—Rule of res judicata.

The rule of res judicata must apply to all decisions however erroneous, if made after the publication of the Resolution of 1905. (Binney, F.C.) VISHVANATH v. PUNDLIK. 1943 N.L.J. 562.

-S. 7—Enquiry into claim of family to rotation-Failure to move Resident in revision against prior adverse order-Value of.

In an enquiry into the claim of a family to rotation in the office of patelki, weight should not be given to a failure of the family to move the Resident to exercise his revisional powers against a previous adverse order of the Commissioner. A distinction should be drawn between the failure to exercise a right of appeal, and the failure to move a higher Court in revision. In the former case there is a definite right of which no use has been made. In the latter, the applicant has no right even to have his application considered. (Greenfield, R.A.) BAPUJI v. RAMCHANDRA. 1945 N.L. J. 567.

-S. 7—Patwaris—Rotation — Desirability— Substitute, one of the maliks-Nature of his position.

Though it may be administratively inconvenient to introduce rotation between so large a number of families as seven, it is more inconvenient to have seven malik patwaris continually disputing as to who should represent them. Further there is no community of interest between them such as might induce them to agree to a nomination. Hence rotation should be introduced. The legal position with reference to the substitute is that even if he were one of the maliks, he is not appointed in his own right as malik patwari but as a representative of the maliks. (Greenfield.) MANIKRAO v. MOTIRAM. 1941 N.L.J. 451.

-S. 7-Rotation-Proved claims-If override administrative convenience.

The Chief Commissioner's Resolution of 1905 emphasises the desirability of doing full justice to the claims of watandari families when they have been unjustly abrogated in the past. The trend of decisions since then has been that proved claims override considerations of administrative convenience. In point of fact the administrative inconvenience attaching to rotation is comparatively slight now that the period of rotation is 10 years. Normally, a family whose claims are admitted after having been excluded for a very long period secures the first period of rotation. (Greenfield, R.A.) MOTIRAM v. KISAN. 1945 N.L.J. 402.

-S. 7—Rotation system—Buldana District. In the Buldana District the authorities did not discourge the rotation system between 1866 and 1872. (Rinnev, F.C.) Ananda v. Sultan Khan. 1943 N.L.J 425.

-S. 7-Rotation vacancy-Minor, whether can be appointed.

The omission of the words "subject to the condition of personal fitness" in S. 7 of the Patels and Patwaris Law made in 1934 gives no option to the appointing officer to refuse to appoint a assumed.

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minor in a rotation vacancy. (Binney, F.C MAHADEO v. MOTIRAM, 1943 N.L.J. 362.

-S. 7 (1)—Scope and meaning of. S.7 (1) distinguishes between two classes ( appointment, one for life and the other for term of not less than 10 years in the case (

rotation. The plain meaning of the whole sul section is that a person appointed in a turn ( rotation to represent the watan family or a sul division thereof is appointed for the period of that turn and not for life. (Burton, F.C. Namdeo Baliram v. Parashram. 1942 N.L.J. 2

-S. 7 (3) (b)—More than one malik patwa watandars-Introduction of rotation-If prope Where there are more than one malik patwa watandars, it is a fit case for the introduction rotation which can be sanctioned under S. (3) (b) of the Berar Patels and Patwaris Law. is in fact to meet such cases that the section h been enacted. (Raghavendra Rao, MAHADEO v. RAMRAO. 1943 N.L.J. 254.

-Ss. 17 and 18-Appointment of non-watar dar patwari-Revision.

An application for revision in respect of : appointment of a non-watandar patel or patwa is competent under the Patels and Patwaris Lav (Roughton, F.C.) DINKAR SHANKAR v PANDI RANG. 1943 N.L. J. 537.

-S. 21—Rules under—R. 10—Basis of rule Malik's nomination not in accordance with rule If entitled to consideration.

R. 10 of the rules framed under S. 21 of the Berar Patels and Patwaris Law is based on th principle that the watan belongs to the family ( sub-division and not to the individual. Hence when a malik does not care to conform to tl rules with regard to nomination of a substitu there is no reason why the interests of the mal should be taken into consideration at all. (Binne F.C.) LAXMAN v. WAMAN. 1942 N.L.J. 161.

-S. 21-R. X of Rules framed under-1 legitimate son, if member of watan family.

An illegitimate son cannot be considered to be member of the watan family for the purpose of R. X the Rules framed under S. 21 of the Berar Patels as Patwaris Law. (Roughton, F.C.) KHUSHAL RAO BAJIRAO. 1945 N.L.J. 489.

-S. 21-Rules under R. 10-'Same family'. Meaning of.

R. 10 of the rules framed under the Berar Pate and Patwaris Law requires the substitute to be of t same family or sub division of the family as the prinpal. This is a narrower expression than that occurring in S. 5 of the law. The use of the words "the sam instead of "the family" suggests that the family co cerned consists of the persons descending through mal from the original head of the family. In this sense, man's family means the stock to which he belong that is, the family tree which exhibits the various ma lines of descent from the head of the family. (Burto F C.) HASANMIYA v. ASHIK BAHADUR KHA 1945 N.L.J. 345.

-S. 21—Rules under—R. 10—'Sub-division' Meaning of-Instances when sub-division can

## BERAR WASTE LAND RULES (1865).

There has been no definition of the term 'subdivision' in the Berar Patels and Patwaris law. It is only used in the above and in the rules framed thereunder in connection with separated rights to hereditary offices of two or more families or two or more sub-divisions of the same family'. The trend of practice is to consider that a family has been sub-divided where there has been separation of the right of service. Sub-division can be assumed when there has been rotation, joint officiation of the separation of shares recorded in the early papers. It can also be assumed, where (as in many Deshmukh famil es) the elder branch has waived its rights to the office. In these cases a branch would be considered as sub-divided from the main watan family (Binney, F.C.) LAXMAN v. WAMAN. 1942 N.L.J. 161,

In view of the provisions of S. 21-A of the Berar Patels and Patwaris Law, the clauses of that law and the rules framed thereunder relating to the appointment of substitutes do not apply to the appointment of a substitute (or deputy) by the patel of an Izara village. (Burton, F.C.) RAGHUNATH v. WAMAN. 1945 N. L.J. 369.

BEBAR WASTE LAND RULES (1865), R. 11-Deputy approved by taluga officer-If entitled to continue in office after death of patel.

R. 11 of the Waste Land Rules of 1865 does not contemplate or require that the deputy approved by the taluga officer shall retain his appointment for life and that on the death of the patel whose deputy he is he has the right to continue in office irrespective of the wishes of the succeeding patel. (Burton, F.C.) RAGHUNATH v. WAMAN. 1945 N.L.J. 369.

-Cl. 11 -Lease of village-Effect on prior watandari rights.

Cl. 11 of the Waste Land Rules leaves no room for any claim that on the village being leased under those Rules any watandari right in the patelship could survive or could be created or recognised. (Burton F.C.) VITHOBA v. ROKDAJI VINAYAK. 1945 N.L.J

BIHAR [AND ORISSA] ACTS, LAWS, ETC. Bihar Agricultural Income-tax Act (VII of 1938)

[And Orissa] Board of Revenue Act (I of 1913

[And Orissa] Co-operative Societies Act (VI of 1938)

Cotton Cloth and Yarn Dealers (Licensing and Control), Order (1944)

Court fees (War sur-charge amendment)
Act (IX of 1941)

District Board Election Rules (1939)

Essential Food Grains (Possession and Storage) Order (1943)

[And Orissa] Excise Act (II of 1915) " Amendment Act Excise (VIII of 1940)

Food and Drugs Adulteration Act (II of 1919) Land Registration ,,

(VII of 1876) Mining Settlement Act (IV of 1913)

BIHAR AGRIC. INCOME-TAX ACT (1938),

Bihar Money Lenders Act (III of 1938)

Money Lenders (Regulation of Transactions) Act (VII of 1939).

[And Orissa] Municipal Act (VII of 1922)

Municipal Election Rules (1937) Municipal Survey Act (I of 1920)

Natural Calamities Act (1 of 1934)
[And Orissa] Private Irrigation Works
Act (V of 1922)

Public Demands Recovery Act (VI of 1914).

Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (IX of 1938). Tenancy Act (VIII of 1885).

[And Orissa] Village Administration Act (III of 1922).

BIHAR AGRICULTURAL INCOME-TAX ACT (VII OF 1938)-Interest on arrears of income-If agricultural income.

Interest on arrears of rent is part of the assessee's agricultural income within the meaning of S 2 (1) (a) of the Income-tax Act, and must be included under the agricultural income of the assessee assessable to agricultural income-tax. (Fazl Ali, C.J., Manohar Lali and Beevor, JJ.) Dalip Narayan v. Province of Bihar. 23 Pat. 485=1944 I.T.R. 37=217 I.C. 380=1944 P.W. N 535=11 B.R. 233=26 P.L.T. 43=A.I.R. 1944 Pat. 353 (S B.).

-Validity of Act—Repugnancy to Permanent Settlement Regulation-Latter, if "Act of Parliament"—Power of Provinces to levy tax on agricultural income from permanently settled estates—Government of India Act, S. 108 (2) (a); List I, Entry 54 and List II, Entry 41.

The Permanent Settlement Regulation (I of 1793) is not an Act of Parliament within the meaning of S. 108 (2) (a) of the Government of India Act. It was only an enactment of a subordinate legislative authority which derived its own authority from an Act of Parliament. The Bihar Agricultural Income-tax Act is not therefore invalid on the ground that the previous sanction of the Governor-General was not obtained before its introduction in the Bihar Legislature. Before applying the rule of construction that general words in a later statute should not be held to repeal earlier legislation upon a particular matter, it must be found that both pieces of legislation deal with the same subject-matter. Regulation I of 1793 relates to the subject of Jama to be settled in respect of each estate, while the Bihar Agricultural Incometax Act operates upon the income derived from land used for agricultural purposes. The two enactments do not deal with the same subjectmatter. The Bihar Act does not in any way whittle down or derogate from the assurances given to zamindars and land-holders by Regulation I of 1793 and there is no ground for confining the operation of the Act to income from estates settled otherwise than under the Permanent Seitlement Regulation. Entry No. 54 of the Federal Legislative List with regard to "taxes on income other than agricultural income" and entry No. 41 of the Provincial Legislative List with regard to "taxes on agricultural

income" are complementary to each other and the tax imposed by the Bihar Act is, within the limits of the power vested in the provinces, a general measure of property taxation. (Gwyer, C.J., Varadachariar and Zafrulla Khan, JJ.) HULAS NARAIN SINGH v. PROVINCE OF BIHAR. 21 Pat. 521=46 C.W.N. (F.R.) 22=8 B.R. 573=I.L.R. (1942) Kar. (F.C.) 1=1942 A.W.R. (F.C.) 15=1942 P.W.N. 109=1942 O.A. 149=1942 I.T.R. 115=199 I.C. 1=1942 M.W.N. 316=23 Pat. L.T. 275=14 R.F.C. 7=75 C.L.J. 123=5 F.L.J. 1=A.I.R. 1942 F.C. 8=(1942) 1 M.L.J. 607 (F.C.).

—Validity of Act—Definition of 'Agricultural income in Act wider than that in Income-tax Act in some respects and narrower in other respects—How far affects its validity—Road cess collected under Bengal Cess Act for District Board—Whether assessed and collected by "officers of the Crown as such"—Government of India Act. S. 311

(2); List II, Entry 41.

The Bihar Agricultural Income tax Act is not ultra vires the Bihar Legislature and was validly enacted. The validity of the entire Act cannot be questioned on the ground that the definition of "agricultural income" adopted by the Act is in some respects wider and in other respects nar rower than the definition of that expression in S. 2 (1) of the Indian Income-tax Act. The fact that the definition in the Act is narrower cannot render the Act invalid. Inasmuch as entry No. 41 of List II of the Seventh Schedule to the Government of India Act empowers the Provincial Legislature to make laws with respect to taxes on agricultural income generally, a Provincial Legislature is entitled to impose a tax on some categories of agricultural income and not impose it on others. Local cesses or rates imposed upon lands within municipal limits which are used for agricultural purposes are not assessed and collected in the Province of Bihar by officers of the Crown as such, and income, if any, derived from such of these lands as are revenue-free would fall within the purview of the Bihar Act, VII of 1938, though such income is not agricultural income within the definition of that expression in the Indian Income-tax Act. But, even assuming the existence of such land in the Province of Bihar, the Act would be only inoperative so far as it includes such income. This would not affect the validity of the rest of the Act if it was otherwise validly enacted. The definition of agricultural income in the Bihar Act should be so read as to confine its operation to income which can be properly classified as "agricultural income" within the meaning of the definition in the Income-tax Act, and in respect of which alone the Provincial Legislature was competent to legislate. Road cess levied upon land outside municipal limits in Bihar under the Bengal Cess Act, 1880, is assessed and collected not by the District Board but by the Collector, and the Collector in performing these functions acts as an officer of the Crown as such and not as a delegate or functionary of the District Board. The capacity in which the Collector assesses and levies the cess is not affected by the destination of the proceeds of the cess when collected. A person who is invested by the Board of Revenue with powers of a Collector under S. 100 of the Bengal only of such income.

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Cess Act is in the same position as a Collector and also acts as an officer of the Crown as such. (Gwyer, C. J., Varadachariar and Zafrulla Khan J.) HULAS NARAIN SINGH v. PROVINCE OF BIHAR. 21 Pat. 521=46 C.W.N. (F.R.) 22=8 B.R 573=I.L.R. (1942) Kar. (F.C.) 1=1942 A.W.R. (F.C.) 15=1942 P.W.N. 109=1942 O.A. 149=1942 I.T.R. 115=199 I.C. 1=1942 M. W.N. 316=23 Pat. L.T. 275=14 R.F.C. 7=75 C.L.J. 123=5 F.L.J. 1=A.I.R. 1942 F.C. 8= (1942) 1 M.L.J. 607 (F.C.).

——S. 2 (a)—Act if ultra Vires—Levy of tax on revenue free estate in Municipalities and permanently settled Estates—Legality—Omission to tax all kinds of agricultural income—Omission to obtain Governor's sanction before introduction of Rill.

The Bihar Agricultural Income-tax Act is ultra vires in so far as it purports to tax income from revenue-free estates in a municipality, but this does not affect the remainder of the Act which applies to all other income rightly within its scope. In so far as it deals with other agricultural income, the Act is intra vires inasmuch as the offending portion of the Act is severable from the remainder of the Act.

No real distinction can be drawn between the expressions 'rent or revenue' in Sec. 2 (1) of the Indian Income-tax Act, and 'rent or income' in Sec. 2 (a) of the Bihar Agricultural Income-tax Act and it cannot be said that by the use of the words 'rent or income' in Sec. 2 (a) of the Bihar Agricultural Income-tax Act, the Provincial Government are taxing something more than is permissible by the definition of agricultural income in Sec. 2 (1) of the Indian Income-tax Act.

The expression 'local rate' in Sec. 2 (1) of the Indian Income-tax Act is wide enough to cover cess which is a term used in Bihar for local rates levied on immovable property for the benefit of local authorities. That being so, the addition of the words 'local cess' in the definition of 'agricultural income' in Sec. 2 (a) of the Bihar Act does not in any way extend the field of taxation. As cess in Bihar is assessed and collected by officers of the Crown as such, there is no real difference between the two definition as far as the assessment and collection of cess is concerned.

The income of a raiyat is income derived from land by agriculture and clearly falls within the definitions given both in the Income-tax Act and Bihar Agricultural Income-tax Act. Income of tenure holders of revenue-free land also falls within the definition given in both the Bihar Agricultural Income-tax Act and the Incometax Act and therefore the Bihar Agricultural Income-tax Act cannot be held to be ultra vires because it taxes the aforesaid incomes.

The omission to include Cl. (c) of Sec. 2 (1) of the Income-tax Act in the definition contained in the Bihar Agricultural Income-tax Act cannot make the the latter Act ultra vires, because the greater must include the less, and if the Provincial Government are entitled to 'ax all agricultural income as defined in S. 2 (1) of the Income-tax Act, then they are entitled to tax a part only of such income.

The tax imposed on agricultural income of Zamindars of permanently settled estates by the Bihar Agricultural Income-tax Act, 1938, is in no way an infringement of the rights granted to zamindars by the Permaneut Settlement Regulations. The Act does not in any way purport to affect, vary or repeal any provision in the Permanent Settlement Regulations and therefore cannot be said to be ultra vires on this ground.

Although the Governor's previous sanction under Section 209 (3) of the Government of India Act was not obtained before enacting the Bihar Agricultural Income-tax Act, as the Governor assented to the Bill, having regard to Section 109 (2) (a), the Bihar Act cannot be said to be invalid by reason of Section 200 (3). (Harries. C. J., Fazl Ali and Manohar Lall JJ.) JHALAK PRASAD SINGH v. PROVINCE OF BIHAR. 20 Pat. 573=7 B.R 818=1941 I.T R 386=194 I.C. 663=4 FL J. (H.C.) 178=14 R.P. 17= 1941 P.W.N. 689 (S.B.)=22 P.L.T. 863=A.I. rightly be regarded as income. It is for the in-R. 1941 Pat 306.

-S. 2 (a)—Agricultural income—Cess received by proprietor of estate from tenure-holders and raivats-If agricultural income or rent-Tax-

There can be no question that the cess payable by the proprietor of an estate under the provisions of the Bengal Cess Act are proper deductions from their gross income as such deductions are expressly provided for by S, 6 (b) of the Bihar Agricultural Income-tax Act. The cesses received by the proprietor from their tenureholders and raiyats cannot, however be regarded as part of the rent for the purposes of the Agricultural Income-tax Act and therefore taxable. But it can be taxed if it can be regarded as part of the agricultural income of the proprietor. It is clear from the provisions of the Cess Act that the cess received by the proprietor who is the only person liable to pay the cess due to the local authorities and the only person entitled to the cess payable by the tenure-holders and raiyats, is income derived from land used for agricultural purposes and does form part of this income. It is part of his agricultural income and is liable to be taxed under the Bihar Agricultural Income-tax Act. It makes no difference whether the cess money is received by reason of an agreement or by reason of a right given by statute. (Harries, C. J., Fazl Ali and Manohar Lal, JJ.) PROVINCE OF BIHAR v. PRATAP UDAI NATH SAHI DEG 20 Pat. 699=194 I C. 203=1941 I.T.R. 313=13 R P. 677=4 F.L.J (H.C.) 109=7 B.R. 723=1941 P.W.N. 354=22 Pat. L. T. 485=A I.R. 1941 Pat. 289 (S.B).

Bankar is income derived from the sale of wood from jungles. Lahkar is income from letting lands and trees for cultivation of lac, and phalkar is income from the fruit of jungle trees and bushes. Where the bankar is derived from virgin jungles or jungle land not actually cultivated, it cannot be said to be income derived from agricultural land or from agriculture, and therefore it cannot be assessed under the Bihar Agricultural Income-tax Act. Lac does not seem to be the result of any cultivation but is the creation of a particular insect when placed on parti-

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cular trees. Where nothing is done beyond placing the insect on the trees, lahkar cannot be regarded as agricultural income taxable under the Act. In the case thalkar or income derived from wild jungle fruit trees the fruit gathered is not the result of cultivation but on the contrary it is the result of the absence of cultivation, Phalkar is not therefore agricultural income taxable under the Act. (Harries, C. J., Fazl All and Manchar I all, JI.) PROVINCE OF BIHAR v. PRATAP UDAI NATH SAHI DEO 20 Pat. 699=22 Pat L.T. 485-194 I C 203=1941 I TR. 313=1949 B.P. 677-A.F. I. (H.C.) 100-194 13 RP 677=4 F.L.J. (HC) 109=7 B.R 723 =1941 P.W N 354=A.I R. 1941 Pat. 289(S.B.)

-S 2 (a) - Salamis-If income.

Salami cannot be regarded as income, as a matter of law Prima facie it is not income. Salami may in certain cases be regarded as payment of rent in advance and in such cases salami can come-tax authorities to show that there exist facts which would make the salami income. In the absence of evidence of such facts, non-recurring premia and salamis paid to a proprietor once only as consideration for the settlement of agricultural land at the time of the granting of a lease cannot be held to be income within the meaning of the Bihar Agricultural Income-tax Act. (Harries, C. I. Fazl Ali and Manohar Lall. 11.) PROVINCE OF BIHART. PRATAP UDAI NATH SAHI DFO 20 Pat 699=194 I.C. 203=194 I.T. 313=13 R.P. 677=4 F.L.J. (H.C.,) 109 =22 Pat I.T. 485=7 B.R. 723=1941 P.W.N. 354=A.I.R. 1941 Pat. 289 (S.B.)

-Ss. 6 and 7-Total agricultural income-Computation and Assessment-Mode of.

When an assesse is being taxed on his total agricultual income calculation should be made by adding up his gross receipts from all the Villages and by deducting from it the total expenditure which is allowed to him by S. 6 of the Bihar Agricultural Income Tax Act. The difference will be his total agricultural income which will be assessable if it exceeds Rs. 5,000. If the income of the assessee is also derived from land which is in his actual cultivation or which is let out by him on produce rent, the income which he gets is still agricultural income though in such a case the Act provides by S. 7 a mode of calculating the income and also provides for similar deductions as in a case falling under S. 6 provided the deductions are not allowed twice over. But the gross income must be added up and also the proper deductions as stated above.

S. 6 (a) of the Act does not warrant the splitting up of the assessee's agricultural estate into groups and limiting the deductions to the actual income from each group. The assessee is entitled to claim deduction of the payments made by him under S 6. (a) and (b) of the Act against his total agricultural income from his entire estate and the entire amount of Government revenue, cesses and malik are paid by him can be deducted under S. 6 (a) and (b) of the Act. (Harries, C.J. Fazl Ali and Manohar Lall, JJ.) PROVINCE OF BIHAR V. HARIHAR PRASAD NARAIN SINGH. 21 Pat. 571=200 J C. 787=15 R.P. 19=8 B.R. 744 =23 Pat. L T. 515=1942 J.T.R. 391=A.I.R. 1942 Pat. 276 (S.B.).

-S. 6 (c)—Cess—Collection charges—Right of assessee to deduct.

Rent under S. 6 (c) of the Bihar Agricultural income-tax Act does not include cess though cess is recoverable as rent under the Tenancy Act. An assessee is not therefore entitled to the deduction of 12.5 per cent. of the amount of cess as collection charges on the total amount of cess collected by him. (Fazl Ali, C.J., Manohar Lall, and Beevor, JJ.) PROVINCE OF BIHAR v. DALIP NARAIN SINGH 23 Pat. 486—11 BR 233—26 P.L.T 43=1944 P.W.N. 535=1944 I.T R.37= 217 I.C. 380=A IR 1944 Pat. 353 (S.B.).

-S. 6 (c)-"Rent"-If includes interest on rent.

Rent in S. 6 (c) of the Bihar Agricultural Income-tax Act means rent only and does not include interest thereon. (Harries, C.J., Fazl Ali, and Manohar Lal, JJ.) RAM RAN VIJAY PRASAD SINGH v. PROVINCE OF BIHAR. 21 Pat. 488=202 I.C. 128=8 B R. 856=15 R.P. 94=1942 I.T.R. 446=23 Pat. L.T. 652=A.I.R. 1942 Pat. 435 (F.B.)

—S 6 (c)—Total amount of the "rent which accrued due in the provious year"—Meaning of

"Rent which accrued due in the previous year," in S. 6 (c) of the Bihar Agricultural Income-tax Act, can only mean rent which actually fell due and first became pavable in that year, and cannot mean all rent which was then payable though part of it had actually fallen due in earlier years. (Harries, C.J., Fazl Ali, and Manohar Lall, JJ.)
KAMESHWAR SINGH BAHADUR v. GOVERNMENT OF BIHAR. 21 Pat 508=204 I C. 321=15 R P 214= 9 B.R. 136=1943 P.W.N. 30=1943 I.T.R. 150 (F.B.)=A.I.R. 1943 Pat 1,

-S. 6 (f)-"Expense incurred on the maintenance of any irrigation or protective work, etc."-Interestand talbana on irrigat on tax-Claim to deduction Sustainability.

Though the deduction of irrigation tax is allowed under S. 7 (2) (d) of the Bihar Agricultural Income-tax Act, interest and talbana on irrigation tax are penalty for non-payment and do not form part of the irrigation tax, and hence interest and talbana on the irrigation tax cannot be deducted under S. 6 (f) of the Act. (Swanzy.) RAM RAN VIJOY PRASAD SINGH v. PRO-VINCE OF BIHAR. 11 B.R. 135.

-S. 8-Scope-Maintenance paid to saijadanashin by custom.

The wording of S. 8 of the Bihar Agricultural Income-tax Act is wide enough to cover reasonable maintenance allowed by custom to a sajjadanashin who is a religious preceptor. (Swanzy.) SHAH HAMID HUSSAIN v. PROVINCE OF BIHAR: 11 B.R. 293.

S. 8 (1)-"Trust"-What amounts to-Holder of impartible estate establishing and maintaining religious and charitable institutions-Will expressing wish that successors should maintain them and spend income as he did-If creates trust -Exemption-Right to.

The assessee was holding an impartible estate and was maintaining certain charitable, religious and educational institutions, which had from time to time been established and maintained by his predecessors. A previous holder executed a will which provided, interalia: "My predecessors and I have from time to time established and convenient machinery for collection of the tax Q.D.--26

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I at present support various religious and charitable institutions in various parts of the country and it is my wish and I direct my executrix and executor and whoever may be in the enjoyment of my property either as my heir or under the provisions of this my will, do preserve and maintain and support such institutions in the manner I am doing and to avoid all difficulty in the matter, I have annexed hereto a schedule giving the names of the institutions aforesaid and the amount which I spend yearly for their respective support" It was found that the assessee was in fact maintaining the institutions ramed in the schedule and spending actually on those more than the total sum stated by the testator. The assessee claimed exemption from agricultural income-tax is respect of the sums thus spent by him under S. 8 of the Bihar Agricultural Income-tax Act, elleging that the income was derived from land held by him on trust. No land was, however, set apart for the mainte-nance and support of the institutions. Nor was the income from any particular property earmarked for those objects.

Held, that the clause in the will was merely an expression of a pious wish of the testator that those following him should carry on the charitable and religious work which he had been and was actually doing, and did not create a trust for that purpose. The assessee was not therefore a trustee holding under a trust and the income of the Act. (Harries, C.J., Fazl Ali and Manohar Lall, JJ.) RAM RAN VIJAY PRASAD SINGH v. PROVINCE OF BIHAR. 21 Pat. 488=202 I.C 128=8 B.R. 856=15 R.P. 94=1942 I.T.R. 446=23 Pat.L.T. 652=A.I.R. 1942 Pat. 435 (F.B.).

11 - "Beneficiaries" - If includes single beneficiary.

The word "beneficiaries" in S. 11 of the Bihar Agricultural Income-tax Act though in the plural replication in the plural includes the singular and it applies even where the beneficiary is a single person. (Fazl Ali, C.J., Manohar Lall and Beevor, II.) LAL CHOUDHRY v. PROVINCE OF BIHAR. 23 Pat. 393=218 I.C. 23=11 B.R 236=1945 I.T R 309=(1944) P.W.N. 180=A.I.R. 1944 Pat. 352 (S.B.).

-S. 11 Explanation-,,Beneficiary"-"Partion"-Meaning of-Scheme of Act.

The object of the explanation to S. 11 of the Bihar Agricultural Income-tax Act is to make it clear that the word "beneficiary" in this section refers only to persons actually entitled to receive a part of the agricultural income and not to persons who might indirectly be entitled to some benefit by reason of that income. The word "portion" in explanation to S. 11 should not be read as equivalent to an aliquot part or share so that the extent of the beneficiary's income would vary with any variation in the total income. There is no reason why a person entitled to a fixed sum out of fluctuating agricultural income should be exempt from agricultural income-tax thereon while a person entitled to a fluctuating share would be liable to such a tax.

The whole scheme of the Act is to provide

and for this purpose the tax is assessed on the person who holds the land, whether the agricultural income derived from that land is his income or the income of others. (Sinha and Beevor, JJ.) JAGDISH CHANDRA DEO v. DHANDATI SINGH DEB. 23 Pat. 414=1945 I.T.R. 64=11 B.R 172=217 I.C. 211=17 R.P. 168=1944 P.W.N. 296=A.I.R 1944 Pat. 280.

-- S. 11-Property held by assessee-Portion of agricultural income payable to beneficiary -Whole income - Taxability in hands of assessee.

Though there may be a beneficiary entitled to portion of the income from agricultural property in the possession of an assessee, the latter is assessable on the entire agricultural income of such property received by him without any deduction for the amount payable or paid to the beneficiary. (Fasl Ali, C.J., and Manohar Lall, and Beever, JJ.) LAL CHOUDERY v. PROVINCE OF BIHAR. 23 Pat. 393=218 I C. 23=1945 I.T.R. 309=11 B.R. 236=(1944) P.W.N. 180=A.I.R. 1944 Pat. 352 (S.B.).

-S. 11-Property held by receiver-Income from-Assessment of owner of property in respect of income-Propriety.

Where a receiver appointed by the Court is in possession of properties from which agricultural income is derived, he holds the property for the benefit of the owner. The receiver cannot be treated as the agent of the owner being an officer of the Court, which appointed him. Hence it is the receiver who must be assessed in respect of the agricultural income from the property held and managed by him and not the owner of the property. (Fazl Ali, C. J., and Manohar Lal and Beevor, JJ.) LAL CHOUDHRY v. PROVINCE OF BIHAR. 23 Pat. 393=218 I.C. 23=1945 I.T R. 309=11 B. R. 236=(1944) P.W.N. 180=A.I.R. 1944 Pat. 352 (S.B.).

S. 12—Applicability—Executor holding estate as legatee.

S. 12 of the Bihar Agricultural Income-Tax Act does not apply, if a person holds the estate as a legatee and not as an executor although he may be the executor of a will. (Sinha and Beevor, JJ.) Jagdish Chandra Dfov Dhandati Singh Deb. 23 Pat. 414=217 I C. 211=1945 I T R. 64=11 BR. 172=17 R.P. 168=1944 P.W.N. 296=A.I.R. 1944 Pat. 280.

-S. 12-"Each such person" - Meaning of. The words"each such person" in S 12 of the Bihar Agricultural Income Tax Act refers to to the person jointly interested in the land or the agricultural income derived there from, and this section cannot mean that an administrator is personally responsible for the agricultural income-tax and yet cannot deduct that tax from the amounts payable to the persons by whom that tax is payable. (Sinha and Beevor, II.) JAGDISH CHANDRA DEO v DHANPATI SINGH DEB. 23 Pat. 414=217 I.C. 211=1945 I.T R. 64=11 B.R. 172=17 R.P. 168=1944 P.W.N. 296= A.I.R. 1944 Pat. 280.

Ss. 24 (3) and 25—Order in revision by Commissioner of Agricultural Income-tax—Power of Board of Revenue to revise—Reference ligh Court-Competency.

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Where an assessment is made under the Bihar Agricultural Income-tax Act by the Agricultural Income-tax Officer, and an appeal is preferred under S. 22 of the Act to the Assistant Commissioner and a revision is heard by the Commissioner under S. 24, the order passed by the Commissioner is final under S. 24 (3) and the Revenue Board has no power to revise the order. Nor can the Board make a reference to the High Court under S. 25 of the Act where the question is not one of law but one of fact, vis., whether the assessee is a trustee only and therefore exempt under S. 8, and when the question arises not from the order under S. 24 but out of the assessment and appellate orders. (Middleton.) Jagdish Dass v. Government of Bihar. 9 B.R. 298.

-S. 25—Reference—Duty of Board--To state

findings of fact and law.
\_ Under S. 25 of the Bihar Agricultural Income-Tax Act, the Board must draw up, a statement of thecase and refer it with its own opinion thereon to the High Court. Not only must the Board state the case but it is directed also to give its own opinion thereof. In stating a case care must also be taken to set out clearly what are the findings of fact and what are the conclusions of law based on such facts. The two should not be confused, for it must always be remembered that the High Court is bound by the findings of fact but not by the conclusions of law which may be based on such facts. (Harries, C.J., Fozl Ali and Manohar Lall, JI.) PROVINCE OF BIHAR v. HARIBHAJAN DAS. 200 I.C. 857=15 R.P. 17= 8 B R 742=23 Pat. L.T 523=1942 I.T.R. 399 =A.I.R. 1942 Pat. 267 (S.B.).

-S 25-Reference to High Court-Competency-Question arising out of assessment and appellate orders-Question whether assessee is trustee only and exempt under S. 8-If can be referred. See Bihar Agricultural Income-tax Act, Ss. 24 (3) and 25. 9 B.R. 298.

-S. 25-Reference under-Findings of fact —If binding on High Court.

In dealing with a reference under S. 25 of the Bihar Agricultural Income-Tax Act, the High Court is not a Court which can find facts. It must accept the findings of fact of the authority stating the case always provided there is evidence to support such findings. (Harries, C.J., Fast Aliand Manohar Lall, JI) PROVINCE OF BIHAR V HARIBHAJAN DAS. 200 I.C. 857=15 R P. 17=8 B.R. 742=23 Pat. L.T. 523=1942 I.T.R. 399= A.IR. 1942 Pat. 267 (S.B.).

-S. 25 (2)—Scope of inquiry under—Contention that whole Act is ultra vires-If can be raised.

On a reference to the High Court under S 25 (2) of the Bihar Agricultural Income-tax Act, the assessee cannot raise the contention that the Act is ultra vires the powers of the Bihar Pro-vincial Legislature. The High Court special bench is a tribunal expressly set up by the Act to hear references under S. 25 of the Act, and an argument that the whole of the act is ultra vires cannot be urged before a tribunal which owes its very existence and jurisdiction to the Act itself. The question can be more appropriately and effectively raised in a suit challenging an assess-

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(Harries, C.J. Fazl Ali and Manohar Lall, JJ.) PROVINCE OF BIHAR v. PRATAP UDAI NATH SAHI DEO 20 Pat. 699=194 I.C. 203=1941 I.T.R. 313=1941 PW N. 354=7 B R 723=4 F.L.J. (H.C.) 109=13 R P. 677=22 Pat.L.T. 485=A.I.R. 1941 Pat. 289 (S.B.).

**-S.** 26 (6)—Scope and effect—Decision of High Court on reference—Binding nature of.

Cases decided by the High Court under S. 25 of the Bihar Agricultural Income-tax Act are binding upon the income-tax authorities under S. 25(6) of the Act. They will not be entitled in the case of a conflict of authorities to follow decisions of other Courts or to rely on their own experience. (Harries C.J., Fazl Ali and Manchar Lall, J.) PROVINCE OF BIHAR v. PRATAP UDAI NATH SAHI DEO. 20 Pat. 699=194 I.C. 203=1941 I.T.R. 313=1941 P.W.N. 354=7 B.R. 723=4 F.L.J. (H C.) 109=13 R P. 677=22 Pat. L.T. 485=A I R. 1941 Pat. 289 (S B ).

BIHAR BOARD OF REVENUE-Jurisdiction-Scope of.

The Board of Revenue is not a Court of first instance but a Court of appeal and revision. Consequently it, should be approached only when it is desired to have an order passed by the Court of first instance set aside either in appeal or in revision. (Sathe, J.M.) ALLIANCE BANK OF SIMLA LTD. v. SARDAR IQBAL SINGH. 1941 O.A. (Supp.) 610=1941 R.D. 677=1941 A.W.R. (Rev.) 670.

----Resolution of Retrospective effect Order under Bihar Act IX of 1938 becoming final Subsequent resolution of Board, Application of-Pro-

priety.

It is contrary to accepted principles that a decision or Resolution of the Board of Revenue should be given retrospective effect, i.e., he made applicable to an order which had become final before such decision or resolution was passed. (Middleton.) RAJJAN SINGH v. MATHURA PRASAD. 9 B.R. 242.

-Revision—Finding of fact—Interference— Absence of jurisdiction or gross injustice—If ground of interference.

The Bihar Board of Revenue is always ready to interfere in cases where there is want of jurisdiction or where gross injustice has been done, even though the findings are findings of fact. (N F Peck.) BHOLA PRASAD v. LALDHARI KANDU. 7 B.R. 410=1941 P.W.N. 428.

BIHAR AND ORISSA BOARD OF REVE-NUE (ACT I OF 1913)-Revisional powers-Extent of Questions of fact—Interference. See BENGAL ACT I of 1829. 1941 P.W.N. 311.

-S. 6—Powers of Board—Question of fact

-Interference.

The powers of the Board of Revenue to interfere in revision are very wide. It has power to interfere on questions of fact in order to prevent gross abuse or gross injustice. (Middleton.) Awadh Singh v. Basudeo Singh. 7 B.R. 688.

-S. 6-Review-Powers of Board-Extent

of—Grounds.

The B. and O. Board of Revenue has very wide powers of review conferred upon it by S. 6 of the Bihar and Orissa Board of Revenue Act; they are not, however, powers which the Board will exercise lightly. Review by the Board as

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the highest Revenue Court should be granted only in exceptional cases where a serious error has been undoubtedly committed. The mere fact that one member of the Board might take a different view either of the law or of the facts if he heard the original application, is no sufficient reason for him to review the order of his predecessor. (Middleton.) SHYAM SUNDER KUER v. Dwarika Singh. 1941 P.W.N. 326.

-S 6-Review-Powers of Board of Revenuc-Grounds-Questions of fact

The powers of the Board of Revenue to review its orders are clear and unfettered, such powers being conferred on the Board by S. 6 of the Bihar and Orissa Board of Revenue Act. As a matter of practice, however, the Board would be reluctant to review its orders save in very exceptional circumstances, more so on questions of fact. The mere fact that one member of the Board might take a different view of the case, if he heard it originally, from that taken by his predecessor, is no ground whatever for review. (Middleton) RAM KESHWAR SINGH v. DEOKI SINGH. 1941 P.W N. 311=7 B.R.684.

BIHAR JAND ORISSA] CO-OPERATIVE SOCIETIES ACT (VI OF 1935) S 4 (2) – Scope and effect—If retrospective—If revives liabilities or proceedings atready dead under old Act-Award under new Act after liability had ceased to exist before new Act-Validity.

S. 4 (2) of the Bihar and Orissa co-operative Societies Act is not retrospective in the sense that it revives liabilities and proceedings which have ceased to exist. It is a saving clause which can keep alive that which had life under the old Co-operative Societies Act of 1912, but cannot give life to something which was already dead or which had never existed at all under the old Act. Under S. 39 of the Co-operative Societies Act of 1912, the registration of a society was cancelled on 8-1-1932. After the Bihar Act (VI of 1935) came into force on 29-6-1935, the lignida or under S. 44 (3) of the new Act determined the amount due by a past member, and certificate proceedings were then started against that member-

Held. (1) that the member in question ceased to be a member on 8-1-1932 when the society ceased to exist and his liability for the debts of the society ceased on 7-1-1934 and for his own debts on 7-1-1935, in view of S 23 of the Act. Since he was neither a member nor a past member at the time the award was made against him, the award made against him must be held to be without jurisdiction; since no proceedings at all were started against him under the old Act, he had a right of immunity before the new Act came into force and nothing in the new Act could deprive him of that immunity. (Middleton.) DAMODAR THAKUR v. RAKTOO MAHTON, 7 B.R.

Ss. 7 (3) and 54-Order of apportionment -Right to object to-Debtor failing to prove that he has ceased to be member-Debtor shown to have applied to creditor for reduction of liability -Plea that nothing in due-Sustainability.

An apportionment order under S. 54 of the Bihar and Orissa Co-operative Societies Act is not one of the orders which under S. 7 (3) of the

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Act cannot be called in question on any ground except on that of want of jurisdiction. Where except on that of want of jurisdiction. the debtor against whom ment order is made is unal an apportionis made is unable to prove that he has ceased to be a member of the society and is shown to have applied to the society for reduction of his liability, he cannot object to the apportionment order and say that nothing was due from him. His liability is created by a bye-law having the force of law. (Middleton) RAJ KARAN SINGH v. JEHANABAD CENTRAL CO-OPERATIVE BANKING ASSOCIATION. 8 B.R. 642.

-S. 23—Scope—If refers to debts due by

member to Society.

S 23 of the Bihar and Orissa Co-operative Societies Act merely deals with a liability of a past member for the debts of a society in winding up, and has no reference whatever to a debt of a member of a Society to the Society. (Wort, J.) BARHITOLA D. CO-OPERATIVE SOCIETY v. SHAMBHU-NATH SINGH. 23 Pat. L.T. 104.

-S. 24-A—Scheme adopted and approved by Registrar-Effect-Decree obtained by creditor

subsequent to scheme-Executability.

A composition arrived at in pursuance of the provisions of the Bihar Co-operative Societies Act does not stand on the same footing as a private agreement where pending a suit by a creditor against a Co-operative Society, a scheme of composition is adopted approved by the Registrar, that binds the plaintiff in the suit who is a party to the scheme. If he continues the suit and obtains a decree, the decree cannot be executed and the scheme can be pleaded in bar of execution. The creditor's remedy is to obtain satisfaction of the decree in the manner provided for in the scheme. (Rowland and Shearer, II.)
MAHAMAYA OJHAIN v. LAHERIA SARAI CENTRAL
CO-OPERATIVE BANK, LTD. 194 I.C. 468=13 R.P.
727=7 B.R. 780=1941 P.W.N. 531=A.I.R. 1941 Pat. 497.

Ss. 32 and 44 (3) (c)—Jurisdiction of liquidator to determine liability or to enforce

same after expiry of period of two years.

S. 32 of the Bihar and Orissa Co-operative
Societies Act is not merely a time-limitation section, but is a clear statement that no liability exists after a period of two years from the date of a member's death. A liquidator has therefore no jurisdiction to determine the liability of a past member under S. 44 (3) (c) of the Act after the expiry of the time limit specified by S. 32 or to attempt to enforce that non-existent liability. (Middleton.) LIQUIDATOR, SISWAN CO-OPERATIVE SOCIETY v. LACHO SINGH. 10 B.R. 546.

-S. 43—Jurisdiction of Registrar—Debt of past member to Society-Award-If invalid or without jurisdiction on ground of claim being barred by limitation or res judicata by reason of

prior award.

The Registrar of Co-operative Societies has clearly no jurisdiction over a person who neither is nor has been a member of a Co-operative Society; but he has jurisdiction over a past member, under S. 43 of the Co-operative Societies Act. It cannot be said that his award is

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the award was a second award in respect of the same debt which was the subject-matter of a prior award. These points are clearly within the Registrar's jurisdiction and the fact that he falls into an error of law in deciding them does not make his award any the less valid. (Wort, I.)
BARHITOLA D. CO-OPERATIVE SOCIETY v. SHAM. BHUNATH SINGH. 23 Pat.L.T.104.

-S. 48—Award against estate of deceased

member-If nullity.

An award under the Co-operative Societies Act is not a decree, although it resembles a decree. Where an award is made against the estate of a deceased member of a Co-operative Society under S. 48 of the Act, it is not a nullity, because the Act makes definite provision for an award against the estate of a deceased member. Such an award cannot be held to be a nullity on the analogy of a decree against a dead man being a nullity. (Middleton.) RAMCHANDRA SINGH v. CENTRAL CO-OPFRATIVE BANK, NAWADA. 1941 P. W.N. 536=7 B R. 930.

-Ss. 48 (9) and 57 (3)—Scope—Award of Assistant Registrar not appealed from-Liability to be challenged in certificate proceedings in

execution.

An award made by an Assistant Registrar which is not appealed from to the Registrar, becomes final under S. 48 (9) of the Bengal and Orissa Co-operative Societies Act; and under S. 57 (3) it is not liable to be challenged, set aside, modified, reversed or declared void in any Court upon merits or upon any ground whatsoever except want of jurisdiction. A certificate officer cannot therefore strike off execution proceedings taken out upon such an award on the mere ground that the certificate debtor had mortgaged his house as collateral security for a loan for a period of 12 years from 1939 and that therefore the certificate-holder could not have recourse to the certificate procedure simply because he could not get possession of the house. (Middleton.) BIHAR AND ORISSA POSTS AND TELEGRAPHS Co-operative Society, Ltd. v. Azharul Haque. 10 B.R. 41.

-S. 54-Order under-If part of award-Finality.

An order of apportionment by the Registrar under S 54 of the Bihar and Orissa Co-operative Societies Act is not part of award under S. 48, so as to clothe it with finality under S. 48 (9) of the Act. The two things are entirely different. The apportionment order under S. 54 is nowhere declared in the Act to be final and cannot therefore be regarded as final in the sense that it cannot be challenged in any Court. (Middleton.)
RAMAUTAR MAHTON v. CENTRAL CO-OPERATIVE BANK. 7 B.R. 686.

-Ss. 54 and 55-Relative scope and effect-Deceased member-Apportionment of estate-Award within two years of death-Requisition for certificate to enforce award made after two years-If barred.

S. 54 of the Bihar and Orissa Co-operative Societies Act only applies to sums recoverable from registered societies under S. 48 and other without jurisdiction merely on the ground that sections, but not to sums due to a society from the claim was barred by limitation or because its members. S. 54 is subject to S. 55 which is

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virtually a proviso to it. The effect of S. 55 is that the estate of a deceased member for the debts of a registered society as they existed on the death of the deceased would continue for a period of two years from such date. If an apportionment of the estate of the deceased member is made under S. 54 of the Act, his heirs are not liable for a longer period than two years from the date of his death. Where, though an award was made within two years of the death, the requisition for a certificate to enforce the award is not made within two years of the death, it is clearly barred by time. (Middleton.) RAMCHANDRA SINGH V. CENTRAL CO-OPERATIVE BANK, NAWADA. 1941 P.W.N. 536=7 B.R. 930.

—S. 57 (2)—Applicability—"Touching the affairs of the society"—Award against member—Certificate for enforcement under Public Demands Recovery Act—Attachment of house—Objection to attachment overruled—Suit to restrain liquidator from selling and to raise attachment—Leave of Registrar—If condition precedent.

The realisation of a sum due to a Co-operative Society is an affair of the society, and unless such debt is realised "the affairs of the society cannot be wound up under S. 44 (7) of the Cooperative Societies Act. A dispute between the parties as to the manner of enforcement of payment, (a certificate having been obtained under the Public Demands Recovery Act for enforcing an award made by the Registrar) is a dispute touching the business of a society according to the Act. The Registrar of Co-operative Societies made an award against the plaintiff, who was a member of a Co-operative Society which went into liquidation, in respect of a sum of Rs. 1,200 and odd. To enforce the award the liquidator took proceedings under the Bihar and Orissa Public Demands Recovery Act for the realisation of the amount, and the certificate officer attached a house belonging to the plaintiff. The plaintiff's objection to the attachment based on various grounds was overruled and the plaintiff thereupon filed a suit to restrain the liquidator from selling the house and to obtain release of the house from attachment. Leave of the Registrar was not obtained and it was pleaded that therefore S. 57 (2) of the Bihar and Orissa Co-operative Societies Act was a bar to the maintainability of the suit.

Held, that the object of the suit was to prevent the liquidator who was proceeding as liquidator to realise the debt due to the society from realising the debt in question by sale of the house and therefore the suit must be held to be one on a matter touching the affairs of the society. The dispute being one touching the business of a registered society, it was a suit touching the affairs of the society and could not be instituted or proceeded with under S. 57 (2) of the Act except by leave of the Registrar. (Harries, C.J. and Fazl Ali, J.) DOMI RAM v. LIQUIDATOR. NAWADAH B. CO-OPERATIVE SOCIETY. 197 I.C. 215=22 Pat L.T. 947=8 B.R. 172=14 R.P. 286=A.I.R. 1942 Pat. 148.

——S. 57 (2)—Liquidator taking proceedings against member on award issued by Registrar—Suit by member against liquidator without Registrar's sanction—Maintainability.

## BIHAR COTTON CLOTH ETC. ORDER (1944).

The liquidator is empowered by S 44 (3) (a) of the Bihar and Orissa Co-operative Societies Act to take proceedings to execute an award issued by the Registrar against a member of the Co-operative Society in liquidation. If the member is aggrieved by the liquidator's action, he may apply to the Registrar to interfere with the liquidator's act under S. 56 or to grant leave for the institution of a suit under S. 57 (2) of the Act. A suit by him against the liquidator is not maintainable in the absence of the Registrar's sanction for its institution. (Agarwala, J.) LIQUIDATOR, NAWADAH BAZAR CO-OPERATIVE. SOCIETY v. DOMI RAM CHAUDHARY. 193 I.C. 142=7 B R. 585=22 Pat L.T. 465=1941 P.W. N. 373=13 R.P. 549=AIR. 1941 Pat. 438.

S. 57 (2)—"Other legal proceeding"—If includes appeal preferred before liquidation of society—Absence of leave to proceed with appeal

-Effect.

Pending an appeal from a decree in a suit against a Co-operative Bank the Bank went into liquidation. The liquidator was made a party respondent on the application of the appellant who also applied to the Registrar of Co-operative Societies for leave to proceed with the appeal under S. 57 (2) of the Bihar and Orissa Co-operative Societies Act, but received no such leave.

Held, that the appeal was not maintainable and was therefore liable to be dismissed. (Manohar Lall and Sinha. JJ.) SHAMJI LIRE v. CENTRAL CO-OPERATIVE BANK, LTD. (1944) P.W.N. 172.

S. 57 (3)—"Defect of jurisdiction"—Order determining liability of past marsher after arbity.

determining liability of past member after expiry of two years from date of his death—If can be

declared void or ignored.

A wrong decision on a question of limitation may not amount to a defect of jurisdiction under S. 57 (3) of the Bihar and Orissa Co-operative Societies Act; but an order determining a liability after the expiry of two years from the death of a past member of a Society, when the Act says that there is no liability at all after the expiry of such period, is an order without jurisdiction and therefore it can be declared void and ignored. (Middleton,) Liquidator, Siswan Co-operative Society v. Lacho Singh. 10 B.R. 546. BIHAR COTTON CLOTH CONTROL ORDER (1943) Cl. 13 (1) (e)—"In his possession or under his control."—Meaning of—Co-proprietors—Liability of one for act of another.

of one for act of another.

The phrase "under his control" in cl. 13 (1) (e) of the Bihar Cotton Cloth Control Order may be wider than the phrase "in his possession," but there are definite limits to the phrase "under his control," and it is clear that not everything found on premises belonging to a man is necessarily under his control. Nor can one co-proprietor be held liable for the act of another co-proprietor. (Beevor, J.) RAM NARAIN KEDIA v. EMPEROR. (1945) P.W.N. 383. A.I.R. 1946 Pat. 30. BIHAR COTTON CLOTH AND YARN DEALERS (LICENSING AND CONTROL) CRDER (1944) Ss. 3 and 8—Prosecution under Canction—Necessity—Cotton Cloth and Yarn Control Order, 1943, Cl. 23 sope.

Cl. 8 of the Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order, 1944, does not create an offence; it has to be read along with, and as supplemental to, the Cotton Cloth and Yarn Control Order of 1943 passed by the Central Government. A prosecution for an offence under S. 8 of the Provincial Order cannot be

launched without the previous sanction of the Provincial Government. A conviction in a prosecution without such sanction is illegal. But a conviction under Cl. 3 of the Provincial Order for refusing to issue a cash memo, is not vitiated by the absence of sauction of the Provincial Government to the prosecution. (Merrdith and Sinha, JJ.) MANOHAR LALL v. EMPEROR. 24 Pat. 487 = A.I R. 1945 Pat 477.

-Cl. 8-Scope and object-Prosecution for contravention-Sanction of Provincial Government-Necessitv.

The object of Cl. 8 of the Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order (1944), is to make it clear that the mere issue of a licence is not intended to exempt the licensee from the operation of the Central Government's Cotton Cloth and Yarn Control Order (1943) and to make it clear that he is bound to keep his prices within the limits fixed by the Textile Commissioner. No prosecution for contravention of Cl. 8 of the Bihar Order of 1944 can be started without the sanction of the Provincial Government. (Agarwala and Mered th. Jf.) KAPILDEO PANDE v. EMPEROR. 24 Pat. 257 = (1945) P.W.N. 143 = 26 P.L.T. 85=A.I.R. 1945 Pat. 375.

BIHAR COURT-FEES (WAR SUR-CHARGE AMENDMENT) ACT (IX OF 1941), S. 2—Scope—Pending proceedings—If affected—Application for probate presented before Act with Court-fee payable under law then in force—Grant subsequent to Act—Additional fee, if payable. See Court-fees Act, Ss. 4 And 19-I. 23 Pat. 672.

BIHAR DISTRICT BOARD ELECTORAL RULES (1937), Rr. 4 (2) and 30-Scope-Name of voter and candidate included in two rolls in same district-Effect-If disqualifies him as voter or candidate-Decision of returning officer-Finality.

The fact that the name of a voter or candidate for election is borne on two electoral rolls in the same district in contravention of R 4 (2) of the Bihar District Board Electoral Rules is not a valid ground for holding that he is not a qualified voter or a qualified candidate for election. The decision of the Returning Officer on the point is made conclusive under R. 30 (3) of the said Rules. (Sinha and Pande, Ji.) RAMCHANDRA c. JADUNANDAN. 24 Pat. 415 = A.I.R. 1945 Pat. 403.

-B. 30 (3)-Decision of Returning Officer-Finality of. See BIHAR DISTRICT BOARD ELEC-TORAL RULES, RR. 4 (2) AND 30. 24 Pat. 415.

Rejection of nomination paper on technical ground-Publication of name of successful candidate after new rules—Election petition under new rules-Maintainability.

The election of the petitioner the only candidate after rejection of the respondent's nomination paper took place on 19-4-1939, before the new rules but the publication of his name in the Gazette took place only on 16-8-1939, i. e., after the new rules were notified in the Gazette. 29-8-1939, within 14 days of the publication of the name of the petitioner in the Gazette the respondent filed an election petition under the new rules before the District Judge (as election comnissioner) as the election Commissioner attackng in the main the rejection of his nomination paper by the returning officer. The election

## B. C.-FEES WAR SUR-CH. AMENDT. ACT(1941) BIHAR ESSEN. FOOD GRAINS ORDER (1943).

Commissioner, on 16-1-1942 held that the rejection of the respondent's nomination paper was wrong, and held the election of the petitioner void as it had resulted from the improper rejection of the nomination paper of the respondent. Against this order, the petitioner moved the High Court, alleging that the respondent's remedy was not an election petition but a suit and that the election Commissioner had no jurisdiction to entertain the election petition.

Held. (1) that the difference in the description of the electoral circle as given in the nomination paper from what ought to have been given was so slight that it could not possibly have caused any confusion as to the identity of the electoral circle number and the rejection of the nomination paper by the returning officer was therefore wrong and improper; (2) that, by necessary intendment, the new rules must apply to those elections, in which the names of the successful candidates had not been published in the Gazette before 8-7-1939; (3) that the only right which a defeated candidate had was to have his dispute determined by an election tribunal, and it was only in the absence of an election tribunal having been set up by the Provincial Government that he would be forced to go to a Civil Court; (4) that it was an essential condition to the exercise of the rights which were the creation of statute that they should be determined in the manner prescribed in the Statute to which they owed their existence, and in such a case there was no ouster of the jurisdiction of the Civil Courts for they never had any; (5) that it was not for the petitioner, the successful candidate, to complain or to insist that his opponent, should have gone to a Civil Court and not to an election tribunal; and (6) that the District Judge, as election. Commissioner, had therefore full jurisdiction to entertain the election petition. (Manohar Lall, J., on difference of opinion between Meredith and Chatterji, JJ.) ABDUL RAZAK v. KULDIP NARAIN 22 Pat. 577=214 I C. 59=17 R.P. 22=10 B.R. 614=A.1.R. 1944 Pat. 147.

BIHAR ESSENTIAL FOOD GRAINS (POSSESSION AND STORAGE) ORDER (1948), S. 3-Construction and Scope-Person found in possession of rice loaded in carts-Offence.

S. 3 of the Bihar Essential Food Grains (Possession and Storage) Order does not make it an offence for a possessor to be in possession of more than 25 standard maunds of rice which are found loaded in carts unless such possession amounts to hearding. The words "in any premises occupied by him" qualify the word 'keep' as well as the word 'store.' (Shearer, J.) DINA NATH BANIA v. EMPEROR. (1945) P.W.N.

-- Cls. 3 and 5-Scope-Storing food grain in room not alleged or found to be occupied by person storing-Offence.

A person who is found to be engaged in getting and storing an essential food grain in a room in a house, but who is neither alleged nor found to be the occupier of that room cannot be held to be guilty of the offence of contravening the Bihar Essential Food Grains (Possession and Storage) Order 1943. (Varma and Shearer, J.) CHHOTAN v. EMPEROR. 24 Pat. 831 = (1945) P.W.

BIHAR AND ORISSA EXCISE ACT (II OF 1915), S. 19 (4)—Construction—"Any person or class of persons"—If mean public generally—Power of Local Government to enforce total prohibition under S. 19 (4).

The phrase "any person or class of persons in S. 19 (4) of the Bihar and Orissa Excise Act must be considered as a whole and should not be split up, so as to take the words "any person" separately as meaning every one in the province or in any particular part thereof. The phrase, taken as a whole and given its natural meaning means not the public-generally in the province or in any particular area therein, but means any person or class of persons designated by name or description. The words "any person" cannot mean any or all persons in the province or any part thereof. The Local Government under S. 19 (4) of the Act can prohibit by notification the possession of any intoxicant by any designated person or class of persons; the words of the sub-section are not wide enough to empower the Local Government by notification to prohibit the public generally from being in possession of intoxicants or any form thereof. S. 19 (4) is an exception to the other provisions of S. 19, and the powers contained therein are intended to meet special cases such as habitual drunkards addicts, classes of persons addicted to drink or drug or such like. It was never the intention of the Legislature to confer on the Provincial Government the power to enforce total prohibition of alcoholic liquor or intoxicating drugs throughout the province or in any particular district. The main object of the Act is to collect excise duties, though it undoubtedly contains provisions for the regulation and governance of the trade in intoxicants as well as imposition and collection of duties upon such intoxicants. But powers of regulation and governance of a trade do not, however, give the Provincial Government a right totally to prohibit all trade in intoxicants unless there are express words in the statute giving such a power. (Harries, C. J., Fazl Ali, Varma, Manohar Lall and Shearer, JJ.) KANHAI SAHU v. EMPEROR. 20 Pat. 181=7 B.R. 375=192 I.C. 307=42 Cr.L.J. 273=13 R.P. 486=21 Pat.L.T. 1042=1940 P.W.N. 948= A.I.R, 1941 Pat. 53 (S.B.).

S. 19 (4) as amended in 1940—Notification under—Bona fide traveller'—Person proceeding from non-prohibited area to prohibited area booking return ticket intending to return home after short stay.

A person proceeding from one non-prohibited area to another prohibited area booking return ticket which the intention of returning to the non-prohibited area after a short stay in the prohibited area is not a bona fide traveller proceeding from one non-prohibited area to another non-prohibited area within the meaning of the Notification No. 3914-L.S.G. issued on November, 18, 1940 by the Governor acting under S. 19 (4) of the Bihar and Orissa Excise Act as amended by the Bihar Excise (Amendment) Act, 1940. Possession of country liquor by such a person in the prohibited area will be contrary to the terms of the notification and will be an offence under S. 47 (a) Bihar and Orissa Excise Act. (Harries,

BIHAR & ORISSA EXCISE ACT (II OF 191

C.J. and Fazl Ali, J.) EMPEROR v. BHOLA PRASAD 21 Pat. 178=197 I.C. 618=8 B.R. 249=1942 P.W.N. 47=43 Cr.L.J. 220=14 R.P. 359=5 F.L.J. (H.C.) 34=A.I.R. 1942 Pat. 351.

——S. 19 (4) as amended in 1940—Notification under—Legality.

Notification N. 3914-L S.G. issued on November 18, 1940, by the Governor acting under S. 19 (4) of the Bihar and Orissa Excise Act as amended by the Bihar Excise (Amendment) Act, 1940, is legal and effective. The latter Act, in so far as it enables prohibition to be enforced in parts of the province is not ultra vires, the powers of the Provincial Legislature and the Governor who had before 1940 partial by proclamation issued under S. 93, Government of India Act, 1937, assumed all the powers vested in the Provincial Legislature. (Harries, C.J. and Fazl Ah, J.) Emperor v. Bhola Prasad. 21 Pat. 178=197 I.C. 618=8 B.R. 249=1942 P.W. N. 47=43 Cr.L.J. 220=14 R.P. 359=5 F.L.J. (H.C.) 34=A.I.R. 1942 Pat. 351.

There is no reason why in theory or principle an Excise Act should not have a double object, the benefit of the revenue and the improvement of the public health or morals by a greater control of the liquor trade, and there is nothing in the Bihar Excise Act of 1915 which leads to the inference that the Legislature did not intend to deal with the question of Prohibition in the excise legislation. On the other hand, the language of the Act leads to a different inference altogether. (Gwyer, C.J., Varadachariar and Zafrulla Khan JJ.) Bhola Prasad v. Emperor. 21 Pat. 1587=44 P.L.R. 261=76 C.L.J. 1=43 Cr.L.J. 481=1942 M.W.N. 378=46 C.W.N. (F.R.) 32=1942 O.W.N. 411=1942 A.Cr.C 122=14 R.F.C. 19=1942 A.L.W. 469=I.L.R. (1942) Kar. (F.C.) 21=199 I.C. 322=1942 A.W.R. (F.C.) 10=1942 O.A. 144=23 P.L.T. 253=1942 P.W.N. 129=8 B.R. 555=5 F.L.J. 17=A.I.R. 1942 F.C. 17=(1942) 2 M.L.J. 6 (F.C.).

——S. 19 (4)—Scope—If ultra vires—Bihar Government Notification dated 10—12—1940—If ultra vires—Possession by person of ganja weighing three annas on 30-10-1941—Offence.

Bihar Excise Amendment Act VII, of 1940 is ultra vires, provincial Government in so far as it dealt with dangerous drugs, and hence the Excise Act of 1915 still remained unaffected by the Amendment Act. Hence the possession by a person of ganja weighing three annas on 31-10-1941, cannot be held to be an offence in as much as the notification of the Bihar Government dated 30—12—1940 purporting to apply to all perons in a particular area is ultra vires, while "any person" in S. 19 (4) of the original Act of 1915 would mean only any designed person. (Agarwala, J.) SHIVA PRASAD MARWARI V. EMPEROR. 24 Pat.L.T. 91—210 I.C. 563—16 R.P. 207—45 Cr.L.J. 281—10 B.R. 297—A.I.R. 1943 Pat. 358.

S. 19 (4)—Scope—Powers of Provincial Government to enforce total prohibition—Notification No 1600, L.S.G., dated 26-3-1939—Validity

BIHAR AND ORISSA EXCISE ACT (1915).

-If ultra vires-Breach of-Offence-S. 47 (a).

The Notification dated 26-3-1939, No. 1600 L.S.G. issued by the Provincial Government of Bihar is ulter vires the powers of that Government under S. 19 (4) of the Bihar and Orissa Excise Act, and such a notification cannot be made under S. 19 (4). Consequently there can be no conviction under S. 47 (a) of the Act for being in possession of country liquor in contravention of that notification. To sustain a conviction for breach of a notification under S. 47 (a), the notification must be one which the Provincial Government were empowered by stutute to make. Hunter were empowered by statute to make. (Harries, C.J. Fazl Ali, Varma Manohar Lall and Sheaver, JJ.) Kanhai Sahu v. Emperor. 20 Pat 181=7 B.R. 375=192 I C. 307=42 Cr.L.J.273=13 R.P. 486=21 Pat L.T. 1042=1940 P.W.N. 948=A. I.R. 1941 Pat. 53 (S.B.).

-S.19 (4) as amended in 1940-Validity. See Bihar Excise (Amendment) Act, 1940. 5 F.L.J. 17=A.I.R. 1942 F.C. 17=(1942) 2 M. L.J. 6 (F.C.)).

-S. 47 (a)—Possession of liquor in contravention of Notification of 26-3-1939—Offence-Conviction—Sustainability. See Bihar an Conviction—Sustainability. See BIHAR AND ORISSA Excise Act, S. 19 (4). 20 Pat. 181=1940 P.W.N. 948=A.I.R. 1941 Pat. 53 (SB.).

-Ss. 57 and 89 and R.143-Applicability and scope—Excise license—Transfer and sublease—Money payable under—Recoverability—Contract Act, S. 65—Applicability.

The plaintiff who had obtained a license from the Government for two excise shops entered into an arrangement with the defendants under which the latter were put in charge of the shops on condition that they would pay to the plaintiff the advance license fee which he had paid to Government, the value of the stock on hand and also a profit of Rs. 35 per month. The defendants were also put in charge of the furniture of the shops which the defendants were to hand over to the plaintiff at the end of the year. The defendants conducted the shop till the end of the year, but did not pay the plaintiff his dues. The plaintiff therefore brought a suit for recovery of the amount of advance, the value of the stock and the amount of profit for one year at the rate of Rs. 35 per month. In the alternative he claimed an account from the defendants.

Held, (1) that the arrangement amounted to a transfer and perhaps also to a sub-lease and was therefore void under R. 143 of the rules framed under S. 89 of the Bihar and Orissa Excise Act; (2) that the transfer amounted to an offence punishable under S. 57 of the Act; (3) that the plaintiff could not therefore recover the dues on the basis of the void agreement; (4) that S. 65 of the Contract Act did not apply and the plaintiff was not entitled to recover from the defendants even the advance money and the value of of the stock the benefit of which they had received, as the Court would not aid persons in enforcing the performance of an illegal contract or assist them to recover property given under such an illegal contract when they are themselves in pari delicto in procuring that illegally. (Agarwala and Chaiterii, JJ.) Hadibandhu Behera

BIHAR EXCISE (AMENDMENT) ACT (1940).

v. GOPAL SAHU. 22 Pat. 334=210 I.C. 279=16 R.P. 171=10 B.R. 230=A.I.R. 1943 Pat. 374.

-S. 61 (c)-Scope-If affects general liability or liability under Penal Code.

Agarwala J.—The liability imposed by S. 61(c) of the Bihar and Orissa Excise Act does not affect the liability under the general law, and in particular the liability under Ss. 161 and 220, I.P. Code (Agarwala and Varma, JJ.) AFZALUR RAHMAN v. EMPEROR. 22 Pat. 76=A.I.R. 1943 Pat. 229.

-S. 89 and R. 143—Scope—Agreement transferring Excise license-Legality. See BIHAR AND ORISSA EXCISE ACT. Ss. 57 AND 89 AND R. 143. 22 Pat. 334.

-S. 96-Applicability-Offence under S. 220 I. P. Code.

S. 96 of the Bihar and Orissa Excise Act does not apply in the case of an offence which is not one under that Act or under any other law relating to the excise revenue, but is an offence under Ing to the excise revenue, but is an otherce under S. 220, I. P. Code. (Groyer, C. J., Varadacharıar and Ameer Ali, J.) AVZALUR RAHMAN V. EMPEROR. 22 Pat. 349=6 F.L.J.7=206 I C 232=47 C.W.N. (F.R.) 5=9 B.R. 310=15 R.F.C. 22=24 P.L.T. 139=44 Cr. L J. 466=1943 P.W.N. 147=I.L.R. (1943) Kar. (F.C.)2=(1943) M.W.N. 315=A.I.R. 1042 F.C. 18-1042 2 M. L 162 (F.C.)

— S. 96—Scope—Sessions Court—No bar on. Agarwala, J.—S. 96 of the Bihar and Orissa Excise Act merely imposes a bar on a Magistrate taking congnizance of any charge without the sanction of the Local Government, unless the complaint is laid within six months of the act complained of. It imposes no bar, on a Sessions Court. ((Agarwala and Varma, JJ.) AFZALUR RAHMAN v. EMPEROR. 22 Pat. 76=A.I.R. 1943 Pat. 229.

1943 F.C 18=1943, 2 M.L.J. 62 (F.C.).

BIHAR EXCISE (AMENDMENT) ACT (VIII OF 1940)—If uitra vires—Government of India Act, Ss, 100, 108 and 297 (1).

The Bihar Excise (Amendment) Act of 1940, in so far as it enables partial prohibition to be enforced in parts of the province, is not ultra vires the powers of the Provincial Legislature and the Governor who had before 1940 by proclamation issued under S. 93, Government of India Act, 1935, assumed all the powers vested in the Provincial Legislature. S. 100 and Art. 31, List II of of Sch. VII Government of India Act give Provincial Legislatures power to legislate with respect to the production, manufacture, possession etc., of intoxicating liquors. The power is not confined to merely the regulation or restriction of such manufacture, production or possession etc. It is impossible to say that prohibiting possession of certain forms of intaxicating liquor in specified areas is anything more than legislation with respect to possession or transport of such intoxicating liquor in such areas. The Bihar Excise (Amendment) Act of 1940 is not invalid for want of the Governor-General's sanction to its introduction or enactment, owing to the provisions of S. 108 (2) (b) of the Government of India Act. This section merely limits the power of Provincial Legislatures to repeal or amend Governor-General's Acts or Ordinances enacted

#### BIHAR EXCISE (AMENDMENT.) ACT (1940)

or promulgated under Ss. 42 to 44 of the Government of India Act. The Bihar and Orissa Excise Act of 1915 which was amended was in no sense a Governor-General's Act or even an Act of the Governor-Goneral in Council. It was an Act of the Bihar Legislative authority which at that time required the assent of the Governor-General for its validity under S. 5 India Councils Act. Even if the prohibition of export from the province or the import into the province of intoxicating liquors is one of the objects of the Bihar and Orissa Excise Act, 1915 as amended, it does not become invalid by reason of anything contained in S. 297 (1), Government of India Act. This section does not deal with intoxicating liquors but merely limits the power of the Provincial Legislature to legislate with respect to trade and commerce within the province and with respect to the production, supply and distribution of commodities. Intoxicating liquors are not included in the general terms "trade or commerce" or "producution, supply and distribution of commodities". In any event, the amending Act of 1940, in so far as it enables partial prohibition to be introduced, does not restrict legitimate import into, or export, from the province, and, therefore, cannot infringe upon the provisions of S. 297 (1), Government of India Act even if they applied to liquor. S. 11 of the Bihar and Orissa Excise Act as amended by the Government of India (Adaptation of Indian Laws) Order, 1937 strongly suggest that S. 297 (1), Government of India Act was never intended to apply to dangerous articles such as intoxicating liquors or narcotic or dangerous drugs. (Harries, C. J. and Farl Ali J.) EMPEROR v. BHOLA PRASAD. 21 Pat. 178=197 I.C 618=8 B.R. 249=1942 P.W.N. 47 =43Cr. L.J. 220=14 R.P. 359=5 F.L.J. (H.C.) 34=A.I.R. 1942 Pat. 351.

Ss. 108 and 297 (1); List II Entry No. 31.

The Bihar Excise (Amendment) Act, 1940, which amended S. 19 (4) of the Bihar and Orissa Excise Act, 1915, was a valid Act and was within the powers conferred upon the Provincial Legislature by S. 100 (3) of the Government of India Act and entry No. 31 of the Provincial Legis-lative List A power to legislate "with respect to intoxicating liquors" would, unless the meaning of the words used is restricted or controlled by the context or other provisions of the Act, include the power to prohibit intoxicating liquors throughout the Province or in any specified part of the Province. The words "that is to say, the production, magnufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs" which follows "intoxicating liquors and narcotic drugs" in Entry No. 31 of the Provincial Legislative List, are explanatory of illustrative words and not words either of amplification or limitation. These words are apt to cover the whole field of possible legisla-tion the subject including the power to prohibit. The Amending Act of 1940 does not contravene the provisions of S. 297 (1) (a) of the Government of India Act, which refers only to legislation with respect to entry No. 27 and entry No. 29 in the Provincial Legislative List and has no application in respect to anything in entry No. 31. The Bihar and Orissa Excise Act of 1915 is not a Governor-General's Act within the meaning of

#### BIHAR HOUSE RENT CONTROL ORDER (1942)

S. 108 (2) (b) of the Government of India Act and the Act of 1940 which amended it did not therefore, require the previous sanction of the Governor-General. (Gwyer, C.J., Varadachariar and Zafrulia Khan, J.). BHOLA PRASAD v. EMPEROR. 21 Pat. 587=44 P.L.R. 261=43 Cr. L.J. 481=1942 M.W.N. 378=46 C.W.N. (F.R.) 32=1942 O.W.N. 411=1942 A.Cr. C. 122=14 R.F. C. 19=1942 A.L.W. 469=I.L.R. 1942) Kar. (F.C.) 1190 J.C. 322=1042 A.W. R. (F.C.) 10-1042 21=199 I C. 322=1942 A.W.R. (F.C.) 10=1942 O.A. 144=23 Pat L.T. 253=1942 P.W.N. 129=8 B.R. 555=5 F.L.J. 17=A.I.R. 1942 F.C. 17=76 C.L.J. 1=(1942) 2 M.L.J. 6. (F.C.)

BIHAR AND ORISSA FOOD AND DRUGS ADULTERATION ACT (II OF 1919), S. 3 (1)-Exemption from liability-Right to claim-Absence of labels on un-opened tins—Effect— S. 14.

In the case of a prosecution under S. 3 (1) of the Bihar and Orissa Food and Drugs Adulteration Act, the only exception which can be availed of in order to escape liability is contained in S. 14 of the Act. But in the absence of anything to indicate that the un-opened tins were labelled S. 14 cannot apply and there can be no exemption from liability. (Varma, J.) RAMCHAND RAM v. GAYA MUNICIPALITY. 1945 P.W.N. 26=26 P.L.T. 17=11 B.R. 462=A.I.R. 1945 Pat. 264.

-S. 3 (1)—Master's liability for servant's act -Partnership-Servant of firm selling adulte-rated ghee-Liability of partner.

Although in certain set of circumstances, chiefly in the case of licensees, a master is liable for the act of his servant, on the theory that the master has control over the acts of his servant, where a firm consists of several partners, and a servant of the firm sells ghee which is not genuine, it cannot be held that a partner who does not sit in the shop and actually carry on the business, is guilty of an offence under S. 3 (1) of the B. and O. Act II of 1919, and liable to conviction under it even on the theory that a partner is an agent for the other partners. (Varma, J) RAMCHAND RAM v. GAYA MUNICIPALITY. 1945 P.W.N. 26=26 P.L. T. 17=11 B.R. 462=A.I.R. 1945 Pat. 264.

S. 14—Applicability—Right to claim exemption under—Absence of labels on un-opened tins -Effect, See Bihar and Orissa Food and Drugs ADULTERATION ACT. S. 3 (1). 1945 P.W.N. 26.

BIHAR HOUSE RENT CONTROL ORDER (1942), S. 12 — Applicability — "Tenant" — Person whose tenancy had been determined and against whom decree in electment had been passed before order came into operation—If "tenant."

The word "tenant" in S. 13 of the Bihar House

Rent Control Order, must be confined to persons who are either tenants under a tenancy agreement or are statutory tenants by reason of the provisions contained in S. 4 or S. 12 of the order itself. A person whose tenancy had not only been terminated before the coming into operation of the order but against whom a decree in ejectment had been passed cannot be held to be a "tenant." It is impossible to say that an ex-tenant against whom a decree in ejectment has been passed can still be regarded as a tenant within the meaning of S. 13 of the Bihar House Rent Control Order. (Varma and Shearer, J.).) GANESHDAS RANGOPAL v. JAMUNA. 24 Pat. 449=1945 P.W.N. 448= A.I.R. 1945 Pat. 385.

-(as amended in 1943), S. 13-Scope-Ratio pective operation-Suit in electment in respect of bust.

#### B. & O. LAND REGISTRATION ACT, (1876).

ness premises instituted before Amendment—If affected -Right of action-If taken away-Order, if remedial piece of legislation.

The question whether a statute, be it a remedial statute or not, operates retrospectively is a matter which must be determined by the language used by the Legislature. There is nothing in the Bihar House Rent Control Order as amended in 1943, leading or tending to lead to the conclusion that it was the intention of the Legislature to take away from a plaintiff a right of action which had already accrued to him and on which he had instituted a suit before the Order was amended so as to apply to business premises.

Quarre: Whether the Bihar House Rent Control Order can, properly speaking, be described as a remedial statute. (Varma and Shearer, IJ.) MATRU-MALL SATNARAIN v. MT. RAMI. 24 Pat. 454=A. IR. 1945 Pat. 463.

-(as amended in 1943), S. 13-"Tenant"-Tenant served with notice to quit and declining to varate -Suit filed in ejectment before amendment-Right to protection of amended order as "tenant".

A person whose tenancy by agreement had been terminated by a valid notice to quit, who had in spite of that notice declined to vacate the premises and against whom in consequence a suit in ejectment had been instituted is not a "tenant" within the meaning of that word as it occurs in S. 13 of the Bihar House Rent Control Order, as amended in 1943. (Varma and Shearer, J.) MATRUMALL SATNARAIN v. MT. RAMI. 24 Pat. 454=A.I R. 1945 Pat. 463.

BIHAR [& ORISSA] LAND REGISTRATION ACT (VII OF 1876) S. 55—Rival claims by reversioner of last male holder and by person claiming to be adopted son and legatee under unprobated will-Possession not satisfactorily proved by either-Procedure.

Where on the death of a Hindu widow, claims are made in Land Registration proceedings by a reversioner of the widow's husband and by a person claiming to be an adopted son and a legatee under an unprobated will, and neither party satisfactorily proves possession, it will be open to the Collector to record the name of the reversioner who has a better title than the person claiming under an unprobated will. The right of the reversioner to possession may be summarily determined under S. 55 of the Land Registration Act and possession delivered to him. (Middleton.) DOLDAR NARAIN SINGH v. BALBADRA JHA. 9 B.R. 219.

BIHAR (AND ORISSA) LOCAL FUND AUDIT ACT (II OF 1925), S. 11—Scope—If overrides S. 9 of the Public Demands Recovery Act-Order under S. 11-If final and conclusive.

The mandatory provisions of the Bihar and Orissa Public Demands Recovery Act must apply even to certificates under the Local Fund Audit Act. The Local Fund Audit Act cannot override the mandatory provisions of the Public Demands Recovery Act. If the Legislature had intended that orders under S. 11 of the Local Fund Audit Act should be final and conclusive, they could easily have said so. Where in respect of a surcharge order under the Local Fund Audit Act after an appeal under S. 11 of the Act is ejected, a certificate under the Public Demand Recovery Act is requisitioned and the debtor files objections under S.9 of the latter Act -Section if applicable to claims on those hands

## BIHAR MONEY-LENDERS' ACT, (III OF 1938)

it is not only open to the certificate officer to investigate the objections, but he is bound by law to do. (Middleton, J.) SITAB CHAND v. EXAM. NER OF LOCAL FUND ACCOUNTS. 8 B.R. 732.

BIHAR AND ORISSA MINING SETTLE. MENT ACT(IV OF 1920), S. 25 (1) (x)—Byelaws—Construction—"Nuisance"—Meaning of.

A Mines Board of Health constituted for a Mining Settlement area under the Bihar and Orissa Mining Settlement Act framed among others, two bye-laws, one of which defined "nuisance" as including "any act. omission, place or thing which in the opinion of the Medical Officer of Health is injurious to the public health." The second bye-law provided that "No person shall commit a nuisance, or allow a nuisance to con-

tinue on his premises.

Held, that though the definition of "nuisance" in the first bye-law was unreasonable in so far as it makes the Medical Officer of Health the sole judge of nuisance and left no option to the Court but blindly to act upon his opinion, since the definition was not exhaustive, the Court must in each case find out whether there has been any nuisance affecting the public health; (2) that in the second by e-law, the word "nuisance" must be taken to mean nuisance affecting the public health. (Chatterji, J.) JHARIA MINES BOARD V. CARTAR ADDHARONI. 194 I C. 403=14 R.P. 9=42 Cr L.J 578=7 B.R. 760=1941 P.W.N. 539=A. I.R. 1941 Pat. 482.

BIHAR MONEY-LENDERS' ACT (III OF 1938)-Applicability - Mortgage suit - Puisne Mortgagee money-lender impleaded as defendant

-Right to claim benefit of Act.

The Bihar Money-Lenders' Act is intended to give relief to needy debtors as against moneylenders. Where puisne mortgagees who are themselves money-lenders are impleaded as defendants in a mortgage suit on the first mortgage, and a decree is passed, though the Puisne mortgagees are judgment-debtors, they connot claim the benefit of the Act as they are themselves moneylenders. (Harries, C.J. and Fazl Ali, J.) PRAYAG I AL v. PALAKDEO NARAIN SINGH. 202 I.C. 634=9 B.R. 32=15 R.P. 134=1942 P.W.N. 173=23 Pat, L.T. 359=A.I.R. 1942 Pat. 419.

-Applicabality-Pronote.

The Bihar Money-Lenders' Act does not apply to snits based on promissory notes. (Fazl Ali, C.J. and Sinha, J.) NARSING PRASAD SINGH v. RAMCHARI-TAR SINGH. 24 Pat. 195 = A.I.B. 1945 Pat. 297. -8. 2 (f)-"Loan"-Amount taken by co-sharer

in excess of his share of collections,

Where by an arrangement between two co-sharers a common partwari should divide the collections from the tenants half and half and send to each his share, but the patwari instead makes over the entire amount to one of them, the latter is liable to pay the share of the other not as a loan but on account of the fact that he has received the money from the patwari on trust for or for the use of the other. The provisions of the Bihar Money-Lenders Act have, therefore, no application to such a case. (Harries, C.J.t, and Manohar Lall, J.) ADIT NARAYAN SINGH v. BINAPANI. 193 I.C. 110=7 B.R. 578=13 R.P. 543=22 P.L.T 501=A.I.R. 1941 Pat. 449.

-S. 7:-Grant of relief to enforce earlier bonds

## BIHAR MONEY-LENDER'S ACT, (III OF 1938), BIHAR MONEY LENDER'S ACT (III OF 1938)

Where the plaintiff is granted a relief to enforce the earlier bonds also and in fact the Court passes a decree to enforce the earlier bonds as a part of the relief given to the plaintiff to enforce the mortgage bond in suit, S.7 of the Bihar Money-Lenders Act is equally applicable to the claims on the earlier bonds. (Harries, C.J., and Manohar Lall, J.) Tika Sao v. Hari Lal. 195 I C. 428=7 B.R. 924=14 R.P. 122=A.I.R. 1941 Pat. 276.

-S. 7—Construction—Amount of Loan—Meaning of-Bond for past liability-Amount of loan-What is. From the concluding portion of S. 7 of the Bihar Money-Lenders Act, it is clear that two classes of cases are contemplated: (1) loan advanced and (2) loan based on a document. The section in not meant to limit the amount of in-terest in all cases to the "amount of loan adva-nced." The words "the loan" in the passage "if the loan is based on a document," mean the loan in respect of which the suit is brought, and must, when taken with the definition in S. 2 (5) be held to include a bond executed for past liability, which liability may be in respect of principal as well as interest. In the case of such a bond the amount for which it is executed, is "the amount of loan" within the meaning of S. 7. Although the expression "the amount of loan mentioned in or evidenced by such document." may suggest that to determine the amount of loan one must go behind the document, it could never have been the intention of the legislature, while enacting S 7 to override the provisions of the Contract Act or the Evidence Act. (Chalterji and Meredith, II.) MADHO PRASAD SINGH v. MAKUTDHARI SINGH. 193 I.C. 661=13 R.P. 637 = 7 B.R. 641=22 Pat.L.T. 317=A.I.R. 1941 Pat.

S. 11-Appeal-Order determining instalment-Not appealable as an order under C. P. Code, S. 47. DHANUKDHARI SINGH v. RAM-RATAN SINGH. [see Q.D. 1936—'40 Vol. I Col. 544.] 193 I.C. 670—7 B.R. 646—13 R.P. 642— A.I.R. 1941. Pat. 1.

-S. 11-Applicability-Claim case under Encumbered Estates Act.

S. 11 of the Bihar Money-Lenders' Act refers only to suits and does not apply to claim cases under the Encumbered Estates Act, as these latter are not suits. (Lee.) TIKAIT JAGDISH NARAIN SINGH v. SEWAKI RAM. 11 B.R. 405.

-S. 11-Discretion of Court under-Circumstances to be considered in fixing and ordering instalments. Dhanukdhari Singh v. Ramratan Singh. [see Q.D. 1936—'40 Vol. I, Col. 545.] 193 I.C. 670=7 B.R. 646=13 R.P. 642=A.I.R. 1941 Pat. 1

S. 11—Notification exempting banks registered under Company's— Act of 1913 Banks registered under Act of 1882-If included in notification.

Where a Government notification exempting certain institutions from the operation of S. 11 of the Bihar Money-Lenders Act refers in specific terms to joint Stock Banks registered under the Indian Companies Act of 1913, that cannot be taken to include Banks registered under some other Act, Viz., the old Act VI of 1882. (Fazl Ali, and Meredith, II) CHOTA NAGPUR BANKING ASSOCIATION, LTD. v. RADHA GOBINDA SINGH. 194 I.C. 649=14 R.P. 12=7 B.R. 813=A,I,R. 1941 Pat. 561.

-8.12-Discretion-Order refusing to fix smaller number of instalments-Interference in revision.

The Court under S. 12 of the Bihar Money-Lenders Act of 1938 has a discretion in fixing the number and amount of the instalments, having regard to the interests of the judgment-debtor and the decree-holders and other matters such as the amount of the decree and the number of years it would take for the decree to be satisfied. Where the lower Court after taking these matters into consideration refuses to fix a smaller number of instalments, it cannot be said that the Court has failed to exercise the discretion which the Act confers on it, and the order cannot therefore be interfered with in revision. Rowland, J.)
SUKH DAYAL v. PAWAN JAI KUMAR JAIN. 1941 P.W.N. 507=198 I.C. 656=14 R.P. 481=8 B.R. 439=A.I.R. 1942 Pat. 35.

-S. 12-Exercise of powers-Discretion of Court. JAIGOBIND SINGH v. LACHMI NARAIN RAM [see Q.D. 1936-'40 Vol. I, Col. 546.] 21 Pat.L.T.

-- S. 13-Applicability-Decree in favour of bank—If exempted from Act. See GOVERNMENT OF INDIA ACT (1935) S. 100. 22 Pat.L.T. 522.

- Ss. 13 and 14-Order for sale without fresh proclamation—Jurisdiction of Court—Waiver of fresh proclamation before application under S. 13 Effect of.

S. 14 of the Bihar Money-Lenders Act makes it clear that after the property has been valued or such portion of it as is sufficient to satisfy the decree, a sale proclamation of the actual property to be sold must be drawn up, and in it must be stated the value of the property as determined by the Court under S. 13. The waiver of a fresh sale proclamation in the earlier stages of the case before an application under S. 13 was made, cannot possibly be construed as a waiver of an entirely new sale proclamation which S. 14 requires. The Court has no right or jurisdiction what so ever to direct an immediate sale without first directing the issue of a fresh sale proclamation containing the matters set out in S. 14 of the Act. (Harries, C.J, and Manohar Lall, J.) GUNJARI MAHATANI v. NIL KAMAL PANDE, 193 I.C. 176= 7 B.R. 590=13 R.P. 556=A.I.R. 1941 Pat. 418. S.13-Valuation of property without notice to judgment-debtor-Right of latter to ask for

fresh valuation. Under S. 13 of the Bihar Money-Lenders Act, a notice expressly stating that the Court would value the property must be given to both the parties. If a valuation takes place without a notice served on the judgment-debtor, the latter is entitled to ask the Court to value the property afresh. (Harries C.J., and Dhavle, J.) MEHI SAHU v. HARI LAL SAHU. 199 I.C. 256=8 B.R. 533=23 Pat L.T. 336=14 R.P. 566=1942 P. W. N. 201-A J. P. 1408 Pat 202 W.N. 201=A.I.R. 1492 Pat. 282.

-S. 15-Construction and scope-Holding in possession of usufructuary mortgagee—If wholly liable to be sold in execution of decree.

Under S. 15 of Bihar Money-Lenders Act, the exemption from execution sales is not confined to land in the possession of the judgment-debtor. The section cannot be taken to be excluding land which has been parted with by the judgmentdebtor to a sudbharnadar (usufructuary mort-gagee). S. 15 does not speak of land in the BIHAR MONEY-LENDERS ETC., ACC, (1939).

possession of the judgment-debtor. It exempts from sale one acre of the land comprised in the holding. It cannot be held that because a holding is in the possession not of the judgment-debtor but of his sudbharnadar the whole of it can be brought to sale in executing of a decree. (Dhavle, J.) SARWAN CHAUDHURY v. CHANTARPA THAKUR. 22 P.L.T. 934=7 B.R. 752 (2)=194 I.C. 369= 13 R.P. 710=1941 P.W.N. 552=A.I.R. 1941 Pat. 484.

-S. 15-Scope-Power of Court-Application for instalments in payment of decree amount —Maintainability. JUGESHWARI PRASAD V. KAMALA PRASAD [see Q.D. 1936-40 Vol. I. Col. 547.] 193 I C. 224=7 B.R. 595=13 R.P. 605. BIHAR MONEY-LENDERS (REGULA-TION OF TRANSACTIONS) ACT, (VII OF 1939).—Applicability — Suit on handnote.

The Bihar Money-Lenders Act of 1939 does not apply to a suit based upon a hand-note. (Harries, C.J. and Manohar Lall, J.) BABU LAL SINGH v. RAMN ARAIN RAM. 197 I.C. 659=8 B.R. 267=1942 P.W. N. 31=14 R.P. 333=22 Pat. L.T. 1006=A.I.R. 1942 Pat. 138.

-S. 2—"Debtor"—Includes judgment-debtor LAL PARI v. JANKI RAI. [see Q.D. 1936-40 Vol. I, Col. 3246] 20 Pat. 108=191 I.C. 580=13 R.P. 328=7 B.R. 232.

-S, 2 (f)—Applicability—Loan—Security bond in respect of future and contingent liability-If mortgage to secure loan.

A mortgage created by a security bond when there has been no advance of any kind to the executant is not a mortgage to secure a loan as defined by the Bihar Money-Lenders Act. A bond bearing interest in respect of a future and contingent liability does not fall under S. 2(f) of the Act. (Harries C.J., and Manohar Lall, J.) BHULAN PRASAD SINGH v. RUP NARAIN SINGH. 195 I.C. 664-7 B.R. 955-14 R.P. 142-22 Pat. L.T. 12=A.I.R 1941 Pat. 233.

-S. 3-Government notification dated 19th July, 1939-'Year'-Meaning of.

The word 'year' in the notification dated 19th July, 1939, issued by the Provincial Government under S. 3 of the Bihar Money-Lenders Act, should be taken in its ordinary connotation to be the period from 1st January to the following 31st December. (Agarwala, J.) AJIT KUMAR MAITRA v. joy Narayan Agarwalla. 199 I.C. 86=23 P.L.T. 760=8 B.R. 493=14 R.P. 531=5 F.L.J. (H.C.) 186=A.I.R. 1942 Pat. 443.

-S. 4—Applicability—Considerations.

In order to apply S. 4 of the Bihar Money-Lenders Act, 1939, what is to be seen is whether the plaintiff is registered and if he is not registered whether he is entitled to the benefit of the notification issued by Provincial Government by reason of his total advances in the course of a year being not exceeding Rs. 500. It is immaterial that sometime during the year his advances were less than that amount. (Agarwala, J.) AJIT KUMAR MAITRA v. JOY NARAYAN AGARWALLA 199 I.C. 86=23 P.L.T. 760=8 B.R. 493=14 R.P. 531=5 F.L.J. (H.C.) 186=A.I.R. 1942 Pat. 443.

S. 4 — Applicability—Notification — Scope and object of—"Year"—Meaning.

BIHAR MONEY-LENDERS ETC., ACT, (1989).

By a notification issued on 19th July 1939 the Local Government exempted from the operation of S. 4 of the Act persons who in the course of a year have not advanced more than Rs. 500. The reason for the exemption as stated in the notification itself, was to avoid the necessity for the registration of persons who merely made casual advances to friends and so on, provided that the transactions of this nature did not exceed Rs. 500 in any one year. That was the test prescribed by the Local Government for the purpose of deciding whether a person should be exempted from registration. Ordinarily year means a period from 1st January to the following 31st December and there is no reason why in deciding whe ther a person is of that class to which the notification was intended to apply, this definition of year which is given in the General clauses Act, should not be enforced. In this view of the matter, a person who has advanced more than Rs. 500 during the period between January to December, 1939, is not exempt from registration although the amount advanced by him after the date when the Act came into force, that is to say, after 3rd May 1939, is less than Rs. 500. (Agarwala, I.) RAI SHYAM BAHADUR v. RAMESHWAR PRASAD. 203 I.C. 95=9 B.R. 59=15 R.P. 156=A.I.R. 1942 Pat. 441.

-S. 4-1f ultra vires.

The Bihar Money-lenders Act of 1939 deals with money-lending generally and it is only in particular cases that it touches the question of money-lending transactions evidenced by the Nogotiable Instruments Act. S. 4 of the Act is therefore, not ultra vires of the Provincial Legislature on the pith and substance rule. (Agarwala, J.) AJIT KUMAR MAITRA v. JOYNARAYON AGAR-WALLA. 199 I.C. 86=23 P.L.T. 750=8 B.R. 493 =14 R.P. 531=5 F.L.J. (H.C.) 186=A.I.R. 1942 Pat. 443.

-Ss. 6 and 8—Compound interest on loan advance ed before Act-Power of Court to relieve-Discretion-Exercise of.

The Bihar Money-Lenders Act prohibits compound interest only on loans advanced after the commencement of the Act. There is no such prohibition with regard to loans advanced before the commencement of the Act. But S. 8 of the Act gives a discretion to the Court in the case of a loan advanced before the Act, to re-open the transaction and take an account and relieve the debtor of all liability in respect of interest in excess of the rates specified in the section. The section, however, does not lay down any conditions under which the Court may exercise its powers; it gives a wide discretion. But this discretion cannot be exercised arbitrarily. (Chatteriand Meredith, IJ.) MADHO PRASAD SINGH v. MAKUTDHARI SINGH. 7 B.R. 641=13 R.P.637= 193 I.C. 661=22 Pat. L.T.317=A.I.R. 1941 Pat.

S.7-"Amount of loan mentioned in or evidenced by such document"—Meaning.

The words "the amount of loan mentioned in or evidenced by such document" in S. 7. of Bihar Act (VII of 1939) must be read as referring to the loan upon which the suit is brought, i.e., the last document. (Chatterji, Meredith and Sinha, JJ.) DEONANDAN PRASAD SINGH v. RAM PRASAD SINGH. 23 Pat. 618=(1944) P.W.N. 223 =A.I.R. 1944 Pat. 303 (F,B.).

BIHAR MONEY-LENDERS ETC., ACT, (1939). [] BIHAR MONEY-IFNDERS ETC., ACT (1939).

-S. 7—Applicability and scope—If governs entire

Act. S. 7 of Bihar Money-lenders (Regulation of Transactions) Act governs all the the provisions of the Act, and in no case can a court pass a decree for and amount of interest greater than the amount of principal less any sum which has the period preceding the institution of the suit. (Harries, C.I., and Manohar Lall I.) HANUMAN SINGH V. GAYA SINGH 20 Pat. 177=7 B.R. 602=13 RP 582=193 I C. 381=21 Pat. L T. 826=A.I.R. 1941 Pat. 145. been paid or recovered on account of interest for

in appeal arising -S. 7.—Applicability

from decree made before section.

-S. 7—Applicability — Transferee from

debtor.
S.7 of the Bihar Money-Lenders Act (VII of 1939) makes no distinction between the debtor and any transferee from him. In fact it makes no reference to the debtor. The only conditions laid

down for the application of the section are that the suit must be brought by a money-lender in respect of a loan advanced. (Meredith and Chatterji, JJ.) BISHUNIAL SINGH v. JAGARNATH SINGH. 22 Pat 148=207 I.C. 159=16 R.P. 4=9

B.R. 375=A.I.R. 1943 Pat. 185.

-Ss 7 and 8 -Bond in respect of old debt with interest-Interest awardable-Power

Court to re-open accounts.

S. 7 of the Bihar Money-Lenders Act of 1939 is to be read with reference to the definition of "loan" in S. 2 (f) of the Bihar Money-Lenders Act, 1938. Loan includes a transaction on a bond bearing interest executed in respect of past liability. The effect of S.7 is that the moneylender cannot get a decree for more interest than the amount of loan mentioned in the bond. under S. 8 (b), the Court has power subject to proviso (1) to re-open the account notwithstanding the bond which is an agreement purporting to close previous dealings and to create a new obligation. (Rowland, I.) JADUNANDAN PRASAD PANDEY v. MAHESHWAR NARAIN SINGH. 196 I.C. 473=14 R.P. 198=8 B.R. 27=A.I.R. 1942 Pat. **4**9.

S. 7—Construction—"Amount of the loan advanced"—"Amount of the loan mentioned in such document"—Loan to manager of Hindu joint family under mortgage—Part found to be not for family necessity—Amount of loan—If whole amount or only that found binding on

family.

In a suit on a mortgage bond executed by the father and manager of a Hindu joint family, a finding that out of the sum due under the bond only a portion of it is binding on the joint family, does not imply that as between the lender and the borrower there was not a valid contract of loan under which the whole amount could be re-covered from the borrower by having recourse to his separate properties and from his share of the joint family property, it being found as a fact

that the whole amount stated in the bond was really advanced. The other members of the family who impeach the validity and binding character of the transaction as against the family are no doubt entitled to rely on the rules of Hindu Law and to limit their liability to the binding portion of the debt; but on that portion interest will be calculated in accordance with the terms of the contract, except when the Court finds reason to reduce the contract rate. If and so far as the other members claim the benefit of S 7 of the Money lenders Act of 1939, the limitation on the amount of interest can only be imposed in terms of the section and not by reading into it any rule derived from the personal law of the parties. In determining the fiability of the other members for interest under S. 7 of the Act, therefore, the maximum payable up to the date of the institution of the suit cannot be held to be the amount held to be the debt binding on the joint family out of the amount borrowed under the hond, but it must be held to be the amount found to have been actually advanced. Where the defendants, the mortgagor, his sons and grandsons are sued as representing one family, and there is one debt for which the claim is brought there is no question of distinct and separate interests of the various defendants. Where the amount has been advanced to the father alone but is effective for creating a charge against the whole family in respect of a part of the amount only, the words "the amount of the loan advanced," or "the amount of the loan men-tioned in such document," must obviously mean the whole amount which passed, as that was the loan. The fact that a part of it is not effective loan. The fact that a part of it is not effective to create a charge on the family property is a different matter. (Gwyer, C.J. Sulaiman and Varadachariar, JJ.) LACHMESHWAR PRASAD SHUKUL V KESHWAR LAL CHAUDHURI. 1940 F. C.R. 84=I L.R. (1941) Kar. (F.C.) 1=191 I.C. 659=1941 O.L. R. 82=1941 A.W.R. (F.C.) 39=1941 M.W.N. 136=1941 O.A. 224=22 Pat L.T. 119=45 C.W.N. (F.R.) 66=1941 O.W. N. 372=1941 P.W.N. 133=7 B.R. 362=3 F.L.J. 73=73 C.L.J. 51=53 L.W. 373=13 R.F.C. 4=1941 A.L. W. 255=20 Pat. 429=A.I.R. 1941 F.C. 5=(1941) 1 M.L. (Supp.) 49. (1941) 1 M.L.J. (Supp ) 49.

——S. 7—"Loan advance"—Meaning of—Suit in respect of—Part of loan advanced barred by limitation—Effect of.

Where a part of the loan advanced is time-barred, that part should be deemed not to have been advanced for purposes of S. 7 of the Bihar Money-Lenders Act, and the loan advanced can be taken to be only the part which is realisable. (Verma and Manohar Lall, JJ.) HAKIM SAYYID FIDA ALI v. BHUNESHWARI KUAR. 20 Pat. 770=199 I. C. 566=8 B.R. 600=14 R.P. 602=23 Pat. L.T. 431=A.I.R. 1942 Pat. 73.

\_\_\_\_\_S. 7\_"Loan based on a document"—Meaning-Hand-note for Rs. 1,000 originally lent-Subsequent renewals-Last note for Rs. 2,909-8-0-

Loan for purposes of S.7.

Where a hand-note was executed on 1-1-1935 or Rs. 2909-8-0, in renewal of an earlier note which itself was in renewal of a still earlier one, the original loan dating back to 12—11–1124, under which the amount advanced was only Rs. 1,000, the amount of the loan for purposes of S. 7 of the Bihar Money-lenders Act, assuming

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that the Act applies to a suit on a hand-note, is Rs. 2,909-8-0 for which the hand-note on which the suit is based was executed. The liability under the original hand-note having been altered from time to time by the execution of fresh hand-notes after the amounts had been adjusted between the debtor and the creditor, the amount originally advanced cannot be considered to be the loan based on the document within the meaning of S.7 of the Act. (Harries, C.J and Manohar Lall. J.) BABULAL SINGH v RAMNARAIN RAM. 197 I.C. 659=8 B.R 267=1942 P.W.N. 31=14 R.P. 333=22 Pat.L.T. 1006=A. I.R. 1942 Pat. 138.

-S. 7-"Loan"-Settlement of accounts by borrowing afresh—Nature of. JAI GOBIND SINGH v. LACHMI NARAIN RAM. [See Q D. 1936—'40 Vol. I Col. 551.] 21 Pat L.T. 1109.

\_\_\_\_S 7\_Mortgage suit—pendente lite interest \_Power of Court to refuse—C. P. Code, O 34. Rr. 2 4, and 11.

S. 7 of the Bihar Money-Lenders Act does not deal with the interest payable after the date of the mortgage suit. Pendente lite interest is governed by O. 34, R. 4, C. P. Code. Under that rule read with O. 34, R. 2, the Court in passing a preliminary decree is bound to grant interest up to the date of such decree O. 34, R. 11 does not affect the Court's power to allow pendente lite interest under O. 34, R. 2. Under that rule the Court has a discretion in the matter of awarding pendente lite interest but has no power refuse such interest altogether. (Harries, C.J. and Chatterji. I) SUKHRAJ RAI v. RATINATH PANJIARA. 196 I.C. 677=8 B.R. 83=21 Pat. 167 =A.I.R. 1942 Pat. 102.

S. 7—Scope—Mandatory nature of.

S. 7 of the Bihar Money Landers Act is mandatory. It debars the Court absolutely from making a decree for an amount of interest for the period preceding the the institution of the suit which to gether with the interest already paid would amount to more than the loan advanced or if the loan is based on a document, the amount of the loan mentioned in or evidenced by such document. (Chatterji, Meredith and Sinha, JJ.) DEONANDAN PRASAD SINGH v. RAM PRASAD SINGH. 23 Pat 618=(1944) P.W.N. 223=A.I.R. 1944 Pat. 303 (F.B.).

-Ss. 7 and 8—Scope—If override Ss. 32 and 77 Negotiable Instruments Act-Rights of holders in due

course-if affected.

The Bihar Money Lenders Act as a whole was within the competence of the Provincial Legislature and is not therefore invalid. Although nothing in the Act can override the provisions of the Negotiable Instruments Act so far as the latter relates to rights and liabilities independent of contract, provisions in the Money Lenders Act affecting contractual rights will override such provisions of the negotiable instrument act as also deal with contractual rights. That Part of the Negotiable Instruments Act which can be affected is the part dealing with rights and liabilities as between parties in immediate relation. ship. Therefore where the suit is between the parties in immediate contractual relationship, the provisions of Ss. 7 and 8 of the Bihar Act VII of 1939 will override those of Ss. 32 and 79 of the Negotiable Instruments Act. Holders in

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due course are protected. (Chatterji, Meredith and Sinha, JJ.) DEONANDAN PRASAD SINGH V. RAM PRASAD SINGH. 23 Pat 618=1944 P.W.N 223=A.I.R.1944 Pat. 303 (F.B.).

-S. 8-Applicability-"Loan"-Procedure. S. 8 of the Bihar Money Lenders Act applies only in the case of suits brought by a money lender in respect of a loan advanced by him before the commencement of this Act The word "loan" must be taken to be the original loan and not the final transaction; and the proper course in apply. ing the section is to take the amount of the original loan advanced, calculate interest on that sum up to the date of suit and give a decree for the amount left unpaid as so ascertained, if anything is still found due. If on making this calculation, it is found that the interest already paid exceeds the interest so calculated, the creditor connot be called to repay the amount so paid in excess, nor can the amount of the principal of the loan be reduced; in other words, the decree must in any event include the principal sum unless it is found that anything has already been repaid towards the principal. Having applied S. 8 in this way, if the Court considers that it should be applied, the Court has then to consider whether any further reduction is necessary under S 7 of the Act. (Chatterji, Meredith and Sinha, JJ.) Deo-NANDAN RRASAD SINGH v. RAM PRASAD SINGH. 23 Pat. 618=(1944) P.W.N. 223=A.I.R. 1944 Pat. 303 : F B.).

-S. 8—Premissive not mandatory—Discre-

tion and duty of Court.

S. 8 of Bihar Act (VII of 1939) is permissive and not mandatory. Before applying it the Court should first consider whether the circumstances of the case are such as to justify its application and should give reasons for applying the section. It should not be applied arbitrarily and need not be applied at all. (Chatterji, Meredith and Sinha, JJ.) DEONANDAN PRASAD SINGH v. RAM PRASAD SINGH. 23 Pat. 618=(1944) P.W.N. 223=A.I.R. 1944 Pat. 303 (F.B.).

-S. 8-Re-opening of loan transactions-Principles.

Where in the case of a loan transaction the greater portion of the indebtedness is interest which has been bearing interest on itself the Courts will re-open the transaction and reduce the rate of interest. But where the transaction is not one in place of earlier indebtedness consisting largely of interest, the Court will not generally re-open the transaction. (Harries, C.J. and Fazi Ali, J.) Prayag Lal. v. Patakdeo Narain Singh. 202 I.C. 634=1942 P.W.N 173=9 B. R. 32=15 R.P. 134=23 Pat.L.T. 359=A.I.R. 1942 Pat. 419.

-S. 8—Scope and effect of—Suits on promissory notes—Interest—If can be scaled down-Powers of Provincial Legislature. See Government of India Act (1935), S. 100. 19 Pat. 974.

-S. 8. Proviso—Scope and effect of—Payments made and appropriated towards interest before Act-If can be re-opened-Excess interest

-If can be used in reduction of principal.

The proviso to S. 8 of the Bihar Money-Lenders (Regulation of Transactions) Act lays down that if any amount has been paid in excess of the specified rate, the creditor cannot be required to reduce the amount of the principal of the loan to

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the extent of that excess in spite of clauses (a) and (b) of S. 8. In the case of payments made before the Act where the creditor was entitled to charge interest at the rate specified in the bond, if on calculation the interest due to him be found to be in excess of what was paid to him actually, the creditor could appropriate those payments towards interest under the law. After the appropriation had been made the amounts so appropriated cannot be used to reduce the principal under S. 9, according to the proviso to S. 8 of the Act. (Harries, C.J. and Fazl Ali, J.) IAGATMAYA KUMARI V RAM BAHADUR PRASAD 22 Pat.L.T 293=7 B R. 561=193 I C 561=13 R.P 607=1941 P.W.N. 307=A.I.R. 1941 Pat. 459.

S. 9—Scope and operation of—If subject to S. 7. Where the court has exercised the discretion under S. 8 and reduced the interest to 9 per cent or 12 per cent. as the case may be and if the limit provided by S. 7 has not been reached and there is still an excess out of the amount left by the debtor with his vendee for payment to the creditor, then the creditor would be entitled to recover that excess in addition to the amount which he may otherwise be entitled to recover, but always within the limit fixed by S. 7. S. 9 does not come into operation when the court does not choose to re-open the transaction (Harries, C.J. and Manohar Loll, J.) HANUMAN SINGH v. GAYA SINGH. 20 Pat 177=7 B.R. 602=13 R.P. 582=21 Pat.L.T. 826=193 I.C. 381=A.I.R. 1941 Pat 145.

-S. 10-Question of instalments-If can be determined in suit.

It is not necessary to postpone consideration of the question of instalments until the stage of the execution proceedings. The question may be determined in the suit under S. 10 of the Money-Lenders Act. (Meredith and Chatterji. JJ.) BISHUNLAL SINGH v. JAGARNATH SINGH. 22 Pat. 148=207 I.C. 159=16 R.P. 4=9 B.R. 375=A.I. R. 1943 Pat. 185.

-S 11—Appeal—Order fixing instalments—

Appealability.

An order fixing instalments under S. 11 of the Bihar Money-Lenders Act is not subject to appeal. (Fazl Ali and Meredith, JJ.) CHOTA NAGPUR BANKING ASSOCIATION, LTD. 7. RADHA GOBINDA SINGH. 194 I.C. 649=14 R.P. 12=7 B.R. 813=A.I.R. 1941 Pat. 561.

-S. 13—Applicability—Decree in suit on promissory note—Execution—Valuation of property—Power of Court to fix.

There is no foundation for the view that the valuation of property provided for by Sec. 13 of the Bihar Money-Lenders Act cannot be fixed in execution cases relating to decrees upon promissory notes. S. 13 has nothing to do with promissory notes. It relates to procedure in execution only. (Chatterji, Meredith and Sinha JJ.) Deonandan Prasad Singh v. Ram Prasad SINGH. 23 Pat. 618=(1944) P.W.N. 223=A.I. R. 1944 Pat. 303 (F.B.).

-S. 11—Applicability—Decree in suit on promissory note-Instalments-Power of Court

to allow.

The Bihar Money Lenders Act as a whole, is a valid legislation and the fact that a suit is upon a promissory note is no reason for not applying the provisions of the Act which do not conflict

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with those of the Negotiable Instruments Act. Allowing instalments under S. 11 of the Bihar Act would not prevent the holder of a promissory note from recovering the full sum due under its terms, in execution of his decree, if the decree so provides, S. 11 deals merely with procedure in execution. It does not enable the Court to go behind the promiscory note or to scale down the decree passed in a suit on a promissory note. S. 11 can therefore be applied even in cases of decrees in suits on promissory notes. (Chatterji, Meredith and Sinha, JJ.) DEONANDAN PRASAD SINGH v. RAM PRASAD SINGH. 23 Pat. 618= (1944) P.W.N. 223=A I.R. 1944 Pat. 303 (F.B.).

-S 11-Applicability-Decree on basis of promissory note passed before Act-Application under S. 11 for instalment- Dismissal on ground that Act does not apply to suit on promissory note —Propriety.

Where a decree had been passed on the basis of a promissory note before the enactment of the Bihar Money-Lenders Act, an application by the judgment-debtor under S. 11 of the Act for instalments cannot be dismissed on the ground that the Act does not apply to a suit on a promissory note. The liability on the promissory note had become merged in the decree debt on the passing of the decree before the act and the Court should therefore consider whether the case is one in which it should exercise its powers under S. 11 of the Act. (Agarwaia, J.) Gopai Prasad v. Ramprasad Gupta. 22 Pat L.T. 752=7 B.R. 655=194 I.C. 104=1941 P.W.N. 372=13 R.P. 652=A.I.R. 1941 Pat. 377.

-S. 11-Applicability-Purchaser of mortgaged property—Has right to apply. Lat Part v. Janki Rat. [sce O D 1936-40 Vol I, Col 3246] 20 Pat. 108=191 I.C. 580=13 R.P. 328=7 B.R. 232.

-S. 11 - Discretion - Judgment-debtor voluntarily fixing date and amount of payment-

Interference by Court.

When the judgment-debtor has himself by voluntary agreement fixed the date and the amount which he can pay, the Court does not exercise a wise discretion in interfering with the arrangements made by the parties. Where the judgment-debtor paid a part of the decretal amount and agreed to pay the balance by a certain date, but having failed to pay the balance on the date agreed upon, applied for instalments under S. 11 of the Money Lenders Act,

Held, that the Court was wrong in the circumstances of the case in exercising its discretion to order the balance of the decretal amount to (Agarwala, J.) Binraj be paid in instalments. MARWARI v. MATHURI RAI. A.I.R. 1941 Pat.

512.

-S. 11—"Judgment-debtor"—Question as to -When to be raised-Donee of attached property made party judgment debtor in execution-Order for instalment at donee's instance-Revision-Plea that order is without jurisdiction as donee had no locus standi to apply-Sustainability.

Where a judgment-debtor whose property bas been attached transfers the property by way of gift to another, and the donee is made a party judgment-debtor in execution proceedings, and

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at the instance of the donee an order for payment by instalments is made under S. 11 of the Bihar Money-Lenders Act of 1938, the decreeholder cannot in revision raise the objection that the order fixing instalments is without jurisdiction on the ground that the donee had no locus standi to apply under S. 11, not being a judgment debtor. The decree-holder having failed to raise the plea that the donee was not a judgmentdebtor in the Court of first instance, cannot be permitted to raise the plea in revision in the face of the order making the donce a judgment-debtor. That order too could not be attacked in revision as the proper time to raise such a question was the time when that order was passed. It would be too late to re-open that question in revision. (Rowland, J.) SUKH DAYAL V. PAWAN JAI KUMAR JAIN. 1941 P.W.N. 507=8 B.R. 439=198 I.C. 656=14 R.P. 481=A.I.R. 1942 Pat. 35.

—S. 12—Discretion—Duty of Court to take into consideration matters specified and to give reasons—Failure to give reasons—If justifies interference in revision by High Court. See C. P.

CODE, S. 115. 23 Pat.L.T. 194.

-S. 13—Applicability and scope—Decree on promissory note — Valuation—If mandatory— Duty of Court to fix value of proberty before sale — Application by judgment-debtor to fix valuation on date of sale—Dismissal—If justified —Revision—Interference by High Court.

There is no foundation for the view that valuation of the property as required by S. 13 of the Bihar Money-Lenders Act cannot be fixed in execution cases arising from decrees on promissory notes. The section does not deal at all with promissory notes. Therefore even in the case of execution of a decree on a promissory note the execution Court is bound to make valuation of the property under S. 13, which is mandatory. If it does not determine the valuation, it fails to exercise a jurisdiction under S. 13, and its order is liable to be set aside in revision by the High Court. The Court is not justified to refuse an application by the judgment-debtor for valuation on the ground that the application was delayed and made only of the date of sale. S. 13 imposes a duty on the Court and the duty must be carried out before the sale is held. There can be no question of the judgment-debtor waiving be no described of the Judgment-declor warning his rights by refraining from making an application. (Meredith, J.) LAL BAHADUR SINGH v. BISHWANATH PRASAD SINGH. 198 I.C. 204—8 B.R. 335—1942 P.W N. 28—14 R.P. 412—23 P.L.T. 14—A.I. R. 1942 Pat. 237.

Ss. 13 and 14—Applicability and scope—Purchaser of mortgaged property impleaded in suit on mortgage—Decree—Right to apply under S. 13. LAL PARI v. JANKI RAI. [see Q.D. 1936—'40 Vol. I, Col. 3246], 20 Pat. 108—191 I.C. 580—13 R.P. 328—7 B.R. 232.

-Ss. 13 and 14-Construction-Order determining value of property to be sold in execution— No second appeal—C. P. Code, S. 47.

No second appeal lies against an order passed by the executing Court under S. 13 (1) of the Bihar Money-lenders Act (VII of 1939) determining the value of the property to be sold in execution of a decree. It is clear that the legislature has provided for only one appeal from BIHAR MONEY-LENDERS ETC., ACT, (1989).

such orders and such orders are not intended to have the force of "decree." Ss. 13 and 14 of the Act cannot be construed so as to make the valuation determined by the executing Court amount to an order conclusively determining any of the rights of the parties so as to attract the provisions of S. 47, C. P. Code, read with S. 2 (2) C. P. Code. The question of valuation is essentially one of fact and not of law. (Varma and Sinha, JI.) Kedar Nath v. Banwari Rai, 23 Pat. 427-219 I.C. 96=11B.R. 344=(1944) P.W.N 177=A.I.R. 1944 Pat. 292.

-Ss 13 and 14-Scope and effect-Decree in respect of loan-Execution-Procedure-C. P. Code, O. 21, R. 66-Application of-If without Iurisdiction-Waiver by judgment-debtor-Effect.

Once the executing Court has applied S. 13 of the Bihar Money lenders (Regulation of Transaction) Act, it acts without jurisdiction if it fails to act in accordance with S. 14 and to issue a fresh proclamation as required by that section. But although the decree under execution may be a decree passed in respect of a loan, a Court does not act without jurisdiction in proceeding under O. 21. R. 66, C. P. Code, if its attention is not drawn to the special nature of the decree requiring a special procedure before the sale took place. In such a case an applica-tion under O. 21, R. 90, C. P. Code, to set aside, the sale may also be barred by the proviso to O. 21, R. 90, as amended by the Patna High Court. Where a judgment-debtor, having a right to demand that the execution procedure should be according to the Money-lenders Act, accepts a sale proclamation made under O. 21, R, 66. C. P. Code, to be a valid one he must be deemed to waive his right; and he cannot afterwards be allowed to re-open and re-agitate the same objection and urge it as a ground for setting aside the sale under O. 21, R. 90. C. P. Code. (Rowland and Reuben. IJ.) KAMLESHWARI PRASAD v. MAHADEO SAHAI. 22 Pat. 631=211 I.C. 609=10 B.R. 425=16 R.P. 259=25 Pat. L.T. 74=A.I.R. 1944 Pat. 98.

-Ss. 13 and 14-Scope and effect-Valuation under-If impediment to ordinary execution sale-Right of decree holder to appointment of receiver for selling property by private treaty. See C. P. Code. S. 51 (d). 23 Pat. L.T. 191. -S 13-Scope-Non-compliance-If renders

sale void or a nullity.

Under S. 13 of the Bihar Money-Lenders Act of 1937, the Court is not entitled to hold a sale without previously valueing the property. But non-compliance with this provision, though it would be a ground for setting aside the sale, does not render the sale void or a nullity. In other words the sale is only voidable. There is nothing in S. 13 to warrant the Court in holding that failure to value the property goes to the root of the Court's jurisdiction to hold the sale so as to make it a complete nullity. (Fazl Ali and Meredith, JJ.) Sheo Dayal Narain v. Moti Kuer. 21 Pat. 281=8 B.R. 720=200 I.C. 782=15 R.P. 9=1942 P.W.N. 202=23 Pat. L.T. 139= AI.R. 1942 Pat. 238.

S. 13—Second appeal—Order under—If decree. See C. P. Code, S. 47, 23 P.L.T. 14.

S. 13—Second appeal—Order as to valuation-If subject to second appeal.

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Quaere: Whether an order under S. 13 of the Bihar Money Lenders Act is open to second appeal. (Chatterji, Meredith and Sinha, IJ)
DRONANDAN PRASAD SINGH TO RAM PRASAD SINGH DEONANDAN PRASAD SINGH 23 Pat. 618=(1944) P.W.N. 223=A.I.R. 1944 Pat. 303 (F.B.)

-S. 13 — Valuation — Onus — Judgmentdebtor applying for re-valuation—Duty of— Valuation based on cess-re-valuation papers of 12 or 14 years ago—Sustainability.

Where a judgment-debtor comes forward and asks for a fresh valuation on the ground that he has had no notice of the prior ex parte valuation. it is for him to show that the valuation already made is wrong and to produce the necessary papers showing the correct annual income. relies on cess revaluation papers which it is open to him to do, it is plainly incumbent on him to show to the satisfaction of the Court how the figures in these papers had been modified by recent proceedings. It is not proper for the Court to fix the value on the cess revaluation papers of twelve or fourteen years ago minus a ten per cent. reduction, especially when owing to agrarian troubles including commutation and rent reduction, the income of the Zamindars have been reduced by thirty to forty per cent. and more. The onus is on judgment-debtor who has obtained an order regarding instalments on certain representations regarding the income to show that they are not inconsistent with any representations since made by him or to explain away the inconsistencies to the satisfaction of the Court. (Harries. C. J. and Dhavle, J.) Drynandan Prasad Singh v. Kaniz Fatma. 202 I.C. 481—15 R.P. 121—9 B.R. 5—23 Pat. L.T. 376 =A.I R. 1942 Pat. 413.

-Ss 13 and 14-Valuation of property-Duty of Court.

Before a sale to which the Bihar Money-Lenders Act applies, can take place, valuation of the property must be made in accordance with the provisions of S. 13 of that Act. If such valuation be not made, it is impossible to comply with the provisions of S. 14 of the Act. (Harries. C. J. and Manohar Lall. J.) BRIERAJ KUMARI V. RADHA IIWAN RAI. 197 I.C. 303=8 B.R. 190= 14 R.P. 294=A.I.R. 1942 Pat. 275.

S. 14—Sale bad under—Application by judament-debtor to set aside—If barred by failure to appeal from order accepting bid and recording part-satisfaction—res judicata.

If a sale is bad under S. 14 of the Bihar Money Lenders Act it is open to the judgment-debtor to ask the Court by means of a regular petition to hold that the sale was not binding on the parties. The fact that the property was sold for a smaller amount than that mentioned in the for a smaller amount than that mentioned in the sale proclamation as the value the property, and the judgment-debtor has not preferred an appeal from the order accepting the bid and recording partial satisfaction of the decree does not pre-clude him from doing so. The principle of constructive res judicata has no application in the circumstances of the case. (Fagl Ali, C.J. and Chatterji. I.) JAISRI STINGH V. RAJENDRA NATH MISRA. 217 I.C. 219=11 B.R. 178=17 R.P. 181=A.I.R. 1944 Pat 392.

S. 15—Applicability—"Holding" "Raiyat" Meaning of—If same as in Bihar Tenancy Act. Q.D.—28

## B. & O. MUNICIPAL ACT, (VII OF 1922).

There is no reason which compels a Court to apply the definition of "holding" and of "raiyat" given in the Bihar Tenancy Act to the words "holding" and "raiyat" used in the Bihar Money Lenders Act. Once it is conceded that the land held by a judgment-debtor is exclusively his, and can be sold to satisfy his debts, though it may not be a "holding" as defined by the Bihar Tenancy Act, it is clear that the land is held by him or his "holding" for purposes of the Money-Lenders Act. Similarly the word "raiyat" in the Money-Lenders Act has a wider meaning than that given to it under the Tenancy Act and denotes actual cultivators or agriculturists as opposed to zamindars, tenure-holders, ijardars, etc. The land held by the judgment-debtor formed part of a larger area held by a number of cosharers; the co-sharers divided the land amongst themselves without taking the necessary steps to create vis-a-vis the landlord distinct tenancies to each portion so divided. But it was held exclusively by each co-sharer.

Held, that for the purposes of S. 15, the judgment-debtor was a raivat cultivating a holding. (Harries, C. J. and Dharle. J.) RAMAPRASAD SINGH v. SAJAN MAHTO. 21 Pat. 357=204 I C. 399=15 R.P. 216=9 B.R. 143=A.I.R. 1943 Pat.

## -S. 15-Applicability-Mortgage decree.

A final mortgage decree for sale is not a decree for payment of money but it is a decree for the sale of specific property. There being no reference to such a decree in S. 15 of the Bihar ence to such a decree in S. 15 of the Bihar Money-Lenders Act, 1939, it cannot be held that the intention of the Legislature was that even when there was a mortgage decree for the sale of the property, an agricultural debtor was entitled to claim exemption under the provisions of the Act. Under the ordinary law, a mortgagee is entitled to enforce his decree to its fullest extent and there is no doubt that if this right was Intended to be overridden to any extent, the intention of Legislature would have been expressed in clear language. Therefore, a transaction like simple mortgage resulting in a decree saction like simple mortgage resulting in a decree for sale is not affected by the provisions of S. 15 of the Act. (Fazl Ali, C.J., Chatterji and Sinha, J.). LACHMAN DUSADH v. SUCHIT RAI. 22 Pat. 672=1943 P.W.N. 179=210 I.C. 367=16 R.P. 173=24 Pat.L.T. 371=10 B.R. 232=A.I.R. 1943 Pat. 406 (F.B.).

S. 15-Mere equity of redemption-If exempted.

Under S. 15 of the Bihar Money-Lenders Act, what is exempted is land in the possession of the debtor which would give him a means of subsistence, and not rights in the nature of purely mortgagor's rights. It cannot be said that a person who owns a mere equity of redemption and is not in possession or entitled to possession can be described as an agricultural debtor within the meaning of this section. (Harries, C.J., and Manohar Iall, I.) BADRI MAHTO v. LOCHAN SAH. 198 I.C. 821=8 B.R. 465=14 R.P. 505=A.I.R. 1942 Pat. 264.

BIHAR (AND ORISSA) MUNICIPAL ACT (VII OF 1922) S. 3 (9)-Holding-Parti land or land with house in dilapidated conditions excluded,

## B. & O. MUNICIPAL ACT, (VII OF 1922).

"Holding" as defined by S. 3 (9) of the Bihar and Orissa Municipal Act includes parti land or land with a house on it in a dilapidated condition. There is nothing in the definition to exclude such land. (Dhavle, J.) COMMISSIONERS OF THE PANNA CITY MUNICIPALITY V. KAPUR CHAND LALL. 201 I C. 8-8 B R 764=15 R.P. 25=23 Pat.L.T. 407=A I.R. 1942 Pat. 417.

——S 82 (1) (a) Applicability and construction—Hindu anverned by Davabhaga owning house in Municipality—House occupied by son—Joint assessment of father and son—Legality—If ultra vires—"Occupier."

Under S 82 (1) (a) of the Bihar and Orissa Municipal Act, joint assessment is permissible where two persons are in joint possession of a holding under certain circumstances. Possession or occupation of the holding must be beneficial to the assessee; the assessee or joint assessees of the holding must be entitled to the exclusive use and enjoyment of the holding as of right and not on sufferance. Plaintiff No. 1 was the father and plaintiff No 2, was his son, the parties being governed by the Davabaga School of Hindu Law Both of them were jointly assessed to Unnicipaltax under S. 82 (1) of the Bihar and Orissa Municipal Act, on the ground that the son lived in a house of his father.

Held, that plaintiff No. 2, the son, was not a co-parcener with father, plaintiff No. 1, either in the estate which he would inherit from his ancestor or which is his self-acquired property and since he was living in the house on sufferance depending upon the sweet will of his father, he was not an "occupier," the assessment on him was illegal and ultra vires. It did not, however follow that the assessment on the father was also ultra vires. The assessment on the father was valid. (Manohar Lall and Beevor, II.) Commissioners, Darbhanga Municipality v. Jyotindranath. 23 Pat. 862=1945 P.W.N 115=A.I.R. 1945 Pat. 153.

S. 86-Latrine-tax-Formality not observed-Assessment, if ultra vires.

Under S. 86 of the Bihar and Orissa Municipal Act, where the holdings in question do not contain dwelling-houses, latrines, urinals or cesspools, latrine tax can be imposed only if "in the opinion of the Commissioners at a meeting, a latrine, urinal or cesspool is required." In other words, this formality must be observed as a condition precedent to the imposition of the latrine tax. Otherwise, the assessment is ultra vires and without jurisdiction. (Harries, C.J., and Chatterfi, J.) Shiva Prasad v. The Commissioners of Darbeanga Municipality. 196 I.C. 370=14 R.P. 192=8 B.R. 15=A.I.R. 1942 Pat. 81.

——Ss. 98 (1) and (2)—Relative scope— Holdings having no habitable buildings—If exempt from tax.

S. 98 (1) of the Bihar and Orissa Municipal Act covers holdings with buildings of a character outside S. 98 (2) or holdings without any buildings on them at all. There is nothing to show that the Act exempts from taxation holdings merely because they may have no habitable buildings on them. (Dhavle, I.) Commissioners of the Patna City Municipality v. Kapur Chand Lall. 201 I.C. 8=8 B.R. 764=15 R.P. 25=23 Pat.L.T. 407=A.I.R. 1942 Pat. 417.

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——Ss. 107 and 115—Relative scope—Failure to give notice under S. 107 (2)—Effect on assessment.

S. 115 of the Bihar and Orissa Municipal Act clearly applies only to cases where a new list or a revised list is issued. The section cannot by its terms apply to a case where a list has been prepared or revised and subsequently it is found that property has been omitted from the list which should have been included or property has become assessable which was not assessable when the list was prepared or revised. These two latter cases are expressly dealt with in S 107 of the Act which presupposes an existing list which has been published under S. 115. and that since such publication it has been found that property has been omitted from the list which should have been included or property has subsequently become assessable. If it is proposed to assess such property, a month's notice must be given to the person interested of any alteration the commissioners propose to make and of the date on which the alteration will be made. The omission to give the statutory notice makes the assessment ultra vires and not in accordance with law. (Harries, C. I., and Manchar Lall, I.) ADDUL KHADAR KHAN 71. CHAIRMAN, PURI MUNICIPALITY. 21 Pat. 309-8 Cut. LT. 89-205 I.C. 379=15 R.P. 281=24 Pat.L T. 117=9 B.R. 225=A.I.R. 1943 Pat. 76.

——S 107 (1) (f)-Score—Application for reduction of valuation of holdina—Decision of Municipality—Iurisdiction of Civil Court to question or review.

S. 107 (1) (f) of the Bihar and Orissa Municipal Act contemplates a reduction on the application of the owner or occupier, of the valuation of any holding which has been wholly or partly demolished or destroyed or the value of which has diminished from any cause. In the case of such holdings, the person liable to pay the tax can, in view of Ss. 116 to 119, only obtain reduction by applying under Cl. (f); and if the Municipality should deal with such an application in accordance with Law, no objection can be taken to the decision of the Municipality in the Civil Court. The valuation of all holdings is a matter for the Municipality and not for the Civil Court under S. 119. If an assessment is not reduced under S 107, the owner remains liable except in case of remissions under S. 110 or S. 111 but apart from that his liability cannot be questioned in the Civil Court. (Dhavle, J) COMMISSIONERS OF THE PATNA CITY MUNICIPALITY v. KAPUR CHAND LALL 201 I C. 8=8 B.R. 764=15 R.P. 25=23 Pat.L.T. 407=A.I.R. 1942 Pat. 417.

-----S. 108-Notice-Duty of transferee to give notice of transfer.

Under S. 108 of the Bihar and Orissa Municipal Act it is the duty of the transferee of a holding, no less than that of the transferor, to give notice of the transfer to the Chairman of the Municipality. (Dhavle, J.) COMMISSIONERS OF THE PATNA CITY MUNICIPALITY v. KAPUR CHAND LAIL. 201 I.C. 8=8 B.R. 764=15 R.P. 25=23 Pat.L.T. 407=A.I.R. 1942 Pat 417.

S. 115—Applicability—Preparation of list or revision of list—Subsequent omission or inclusion of property in list—If covered by S. 11

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See Bihar (and Orissa) Municipal Act, Ss. 107 AND 115. 21 Pat. 309.

-S. 115 (2)—Applicability—Illegal enhancement of assessment-If can be looked into in revision of assessment as legal-Notice-Necessity. PANCHANAN MUKHARJI v. COMMISSIONER OF CUTTACK MUNICIPALITY. [see Q.D. 1936-'40 Vol. I, Col. 531.] 7 B.R. 143.

——Ss. 116 and 117—Applicability—Amendment of valuation list. PANCHANAN MUKHARJI v COMMISSIONER OF CUTTACK MUNICIPALITY. [see Q.D. 1936 '40 Vol I, Col 532.] 7 B R. 143.

—S 116—Scope—Failure to avail of remedy under—If bar to objection to assessment by way

of suit.

There is no warrant for holding that a person who does not seek his remedy under S. 116 of the Bihar and Orissa Municipal Act cannot be allowed to raise any objection to the assessment. The section provides only an alternative remedy; if a person is found to be not occupying any hold ing within the Municipality, the mere fact that he did not seek his remedy under S 116 will not clothe the Municipality with any jurisdiction to make an assessment which it otherwise does not possess. (Manohar Lall, and Reevor, JJ.) Com-MISSIONERS, DARBHANGA MUNICIPALITY v. JYOTIN-DRANATH 23 Pat. 862=1945 P.W.N. 115=A.I. R. 1945 Pat. 153.

S 116 (3) (r)—Scope—Decision of Municipal Committee—Finality—Nature and extent

of.
The finality given to the decision of the committee under S 116 (3) (r) of the Bihar and Orissa Municipal Act is the finality between the assessee and the Commissioners. When the party has not gone to the Committee, and there is no decision of the committee, there can be no finality which would bar a suit in the Civil Court. (Manohar Lall and Beevor, JJ) COMMISSIONERS, DARBHANGA MUNICIPALITY v. JYOTINDRANATH. 23 Pat. 862=1945 P.W.N. 115=A.I.R. 1945 Pat. 153,

S. 117-"Heard and determined"-Meaning-Objections disposed of without hearing assessee-assessment-Legality of. PANCHANAN MUKHARJI v. COMMISSIONER, CUTTACK MUNICIPALITY. [see Q.D. 1936—'40 Vol. I, Col. 532.] 7 B.R. 143.

\_\_\_\_\_S. 117—Scope—Appellate tribunal—Constitution of—Resolution of Municipality appointing seven members as appellate committee-Four out of seven selected as tribunal to hear particular case and hearing same—Tribunal legally constituted.

A Municipality, by a resolution, appointed seven members to act as an appellate committee under S. 117 of the Bihar and Orissa Municipal Act and amongst those seven persons were persons who were elected for the ward in which the house of the plaintiff (assessee) was situate. Out of these seven four only sat on the particular appellate tribunal who dealt with the plaintiff's matter, and not one of the members was in any way connected with the ward in question.

Held: that appellate tribunal in the case was a perfectly legal and properly constituted body and was clearly within the spirit of S. 117 of the Bihar and Orissa Municipal Act. The Resolution of the Municipality was nothing more than the

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appointment of seven persons to form a rota from which three or more should be selected for any particular appeal as and when required; the resolution did not in substance mean that for each appeal all seven must sit. Hence the assessment was neither illegal nor ultra vires on the ground that the appellate tribunal was illegally constituted. (Harries C.J., and Manohar Lall, J.) Abbul. KADAR KHAN v CHAIRMAN PURI MUNICIPALITY. 21 Pat. 309=8 Cut.L.T. 89=205 I.C. 379=15 R. P 281=9 B.R 225=24 Pat.L.T. 117=A.I.R. 1943 Pat. 76.

-S 119-Scope-Assessment-Decision of Municipality-Jurisdiction of Civil Court to inter-

fere -If barred.

Civil Courts have jurisdiction to inquire into the question whether a person sought to be assessed to a Municipal tax was an occupier of a holding within the Municipality concerned. As the jurisdiction of Municipality to assess a person depends upon the decision whether that person is an occupier, the Municipality cannot give itself jurisdiction to assess a person who is not an occupier by a wrong decision on facts. Under S. 119 Bihar and Orissa Municipal Act, interference by the Civil Court cannot be considered as barred either explictly or implicitly. (Manohar Lall COMMISSIONERS, DARBHANGA TOTINDRANATH. 23 Pat. 862= and Beevor, IJ.) MUNICIPALITY V. JYOTINDRANATH. 1945 P.W N. 115=A.I.R. 1945 Pat. 153.

-S 119-Scope-Assessment ultra vires-Assessee's right of suit.

S. 119 of the Bihar and Orissa Municipal Act contemplates that the assessment is made in accordance with the provisions of the Act, and if the assessee is to raise any objection to that assessment he must have recourse to the proceedings laid down in the Act. But where the assessment itself is ultra vires, the assessee need not take any proceedings under the Act, and can at once bring a suit in the Civil Court. In such a case the fact that the assessee failed to take the specific grounds raised in the suit in the petition of objection filed by him under S. 116 is immaterial, as he cannot be in a worse position than if he had filed no objection at all under that section. (Harries, C. J., and Chatterji, J.) SHIVA PRASAD v. THE COM. MISSIONERS OF DARBHANGA MUNICIPALITY. 196 I. C. 370=14 R.P. 192=8 B.R. 15=A.I.R. 1942 Pat. 81.

-S. 123—Scope—Non-service of notice under

-Effect on right to sue for arrears of tax.

The notice under S. 123 of the Bihar and Orissa Municipal Act only affects the Municipality's right to levy arrears by distress and sale under S 124, and not its right to sue under S. 130. The liability to pay tax in respect of a holding does not arise from the notice under S. 123 at all, but from the earlier sections of the Act. There is no reason for holding that the right of the Municipality to sue for arrears is dependant on the service of a notice under S. 123. (Dhavle, J.) COMMISSIONERS OF THE PATNA CITY MUNICIPALITY v. KAPUR CHAND LALL. 201 I.C. 8=8 B.R. 764=15 R.P. 25=23 Pat.L.T. 407=A.I.R. 1942 Pat. 417.

Ss. 124 and 125—Form of warrant not prescribed by Government-Municipality, if debarred from realising tax.

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If the Provincial Government has prescribed a form of warrant the Municipality would be obliged to use that form. But the mere fact that ic form has been prescribed does not mean that the Municipality is debarred from realising the tax at all or that it is not to realise it by a warrant of distress although by S. 124 of the Bihar and Orissa Municipal Act it has been authorised to do so. (Agarwala, J.) MANGLESHWAR PRASAD v. SHEONATH PRASAD. 203 I C 60=15 R P. 163 =44 Cr.L.J. 60=9 B R. 52=A.I.R. 1943 Pat 4

-Ss. 124 and 125—Warrant—Construction— Seizure of property of any other person--If authorised.

The material portion of a warrant directed to the tax daroga of the Municipality was in these words:-"This is to authorize you to distrain the movable property of the said warrantee wherever may be found within the Municipality.....or movable property....which may be found within the holding specified in the margin.... If distress cannot be made of sufficient property of the said warrantee you are to certify the same to us in returning the warrant."

Held, that the latter clause in the first sentence authorized the seizure of movable property belonging to any one other than the defaulter inspite of the omission to state specifically after the words "movable property" in that clause the the words "of any other person" and that the omission to require a certificate in the case of property seized on the premises in respect of which the default occurred and belonging to a person other than the defaulter could not affect the operative part of the warrant. (Agarwala, I)
MANGLEHWAR PRASAD v. SHEONATH PRASAD. 203 I.C. 60=16 R.P. 163=44 Cr.L.J. 60=9 B.R. 52= A.I.R. 1943 Pat 4

S. 185-Power of Municipality to levy fees
Nature of-Omission by them to levy fees from stall-holders on public road-If proves custom ex-

onerating them from paying fees.

The powers conferred on the Municipality empowering them to impose taxes or levy fees are permissive powers, and the Municipality is not bound to exercise those powers. The mere fact, therefore that the Municipality has not levied fees on the stall-holders on a public road before, does not provide a basis on which it can be held that a custom has grown up exonerating stall-holder from paying the fees which the Municipality may subsequently decide to levy. (Agarwala, I.) Commissioners, Patna Munici-Pality v. Sham Hamid Hussain. 199 I.C. 95 =8 B.R. 497=14 R.P. 534=A.I.R. Pat. 360.

-S. 192—Sentence—Imprisonment in default of payment of fine-If can be rigorous-Penal

Code, S. 67.

A person committing an offence under S. 192 of the Bihar and Orissa Municipal Act is liable to be fined but is not liable to imprisonment otherwise than in default of payment of the fine. Therefore, by reason of S. 67, I. P. Code, the imprisonment to be awarded in default of payment of the fine must be simple, and cannot be rigorous. (Agarwala, J.) PARASNATH RAI v. MUNICIPAL CORPORATION OF RANCHI. 7 B.R. 731=194 I.C. 213=13 R.P. 695=42 Cr.L.J. 533=1941 P.W.N. 591=A.I.R. 1941 Pat. 401.

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-S. 198-Jurisdiction - Magistrate with second class powers-If empowered to act under. A Magistrate with second class powers is not a Magistrate who can deal with the matter under S. 198 of the Bihar Municipal Act. If he deals with a matter under S. 198, his order is without jurisdiction (Dhavle, J.) CHAIRMAN BIHAR MUNICIPALITY V. RAMNANDI KUER 197 I.C. 74 =1941 P.W N. 459=8 B.R. 145=43 Cr L.J. 110 =22 Pat L.T. 510=A.IR. 1941 Pat. 548.

- S. 198-Proceeding under-Nature of-If "prosecution"-Conviction or acquittal-If can be

recorded—Cr. P Code, S 245. In a proceeding under S. 108 of the Bihar and Orissa Municipal Act, there can be no question of conviction or acquittal. The preceeding under the section is not a prosecution and S. 45, Cr. P. Code does not apply to a proceeding under S. 198. (Dhavle, J.) CHAIRMAN, BIHAR MUNICIPALITY V. RAMNANDI KUER. 197 I.C. 74=1941 P.W N 459=22 Pat.L.T. 510=8 B.R. 145=43 Cr.L.J. 110=A.I.R. 1941 Pat. 548.

-S. 276 (2)—Refusal to renew licence— Powers of chairman—Duty to give reasons for refusal—Omission to state reasons—Effect.

The power of a Chairman of a Municipality to

refuse a renewal of a licence under S. 276 (2), B & O. Municipal Act, is limited. He cannot refuse to renew a licence granted under the bye-laws for any cause other than failure of the licensee to comply with the conditions of the licence or with any provision of rules made under the Act. The chairman should, however, state the ground on which he refuses to renew the licence, in order to enable the Court to see whether the Municipality acted with or without jurisdiction. The Court cannot make a presumption that the application for renewal was rejected on proper grounds. If no reason is given, the Municipality might find their order set aside on the ground that they had acted arbitrarily. (Harries, C.J. and Fazi Ali, J.) MAHOMED ISRAIL v. PATNA CITY MUNICIPALITY. 21 Pat. 449=204 I.C. 488 =15 R.P. 220=9 B.R. 164=A.I.R. 1943 Pat. 34.

-Ss. 282 (1) and 291 (j), (as amended in 1934)—Bye-laws under—Scope—Druggist's shop -Licence-fee before amendment- If annual fee or for all time-Amendment-Effect-Liability of druggist's shop registered prior to amendment to pay annual licence-fee-Amendment-It ultra CUTTACK MUNICIPALITY SURFNDRA vires. NATH SAHU. [see Q. D. 1936—'40 Vol. I, Col. 3246]. 191 I.C. 495—13 R.P. 325—7 B.R. 209.

-S. 375-Construction and scope-'Sonction'

-Consent-If can be implied.

S. 375 of the Bihar and Orissa Municipal Act does not provide for any form of sanction and speaks merely of consent. Such consent may be implied from the facts and circumstances of the case. (Meredith, J.) SATRUCHANA BEHERA v. EMPEROR. 10 Cut. L.T. 55=A.I.R. 1944 Pat. 328.

-S. 383—Prohibitory order—What amounts to-Expression of opinion-If amounts to order, An order made by the District Magistrate on an application presented by the Hindus of a locality protesting against the renewal of a licence to carry on a beef and meat shop, stating that "I do not think there is any real necessity

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for a beef shop in the locality. In my view, the licence should not be renewed for the next year' is not a prohibitory order within the meaning of S. 383 of the B. and O. Municipal Act. It is merely an expression of the view of the District Magistrate and it leaves it open to the Municipality to deal with the application for renewal as they might deem proper. (Harries, C.J. and Fazl Ali, J.) MAHOMED ISRAIL v. PATNA CITY MUNI-CIPALITY. 21 Pat. 449=204 I.C. 488=15 R.P. 220=9 B.R. 164=A.I.R. 1943 Pat. 34. BIHAR MUNICIPAL ELECTION RULES

(1937), R. 13 (1)-Scope-Chairman-If bound to make formal appointment in writing.

R. 13 (1) of the Bihar Municipal Election Rules does not require the Chairman of a Municipality to make an appointment in writing. The rule is not intended to deal with the manner of appointment at all; it only lays down which authority is to appoint a person to prepare the electoral rolls. (Dhavle, J.) BRIJBEHARI v. EM-PEROR. 194 I.C. 108=7 B.R. 690=22 Pat.L.T 443=1941 P.W.N. 248=13 R.P.657=42 Cr. L.J. 508 = A.I.R. 1941 Pat. 539.

BIHAR (AND ORISSA) MUNICIPAL ELECTION RULES (1937), Rr. 20 and 18 (2) -Person entered in final electoral roll by mistake-11

qualified for election as Commissioner.

Under R. 18 (2) read with R. 20 of the Bihar and Orissa Municipal Election Rules of 1937, a person is qualified to be elected as a Commissioner if his name is entered in the final electoral roll, even though he is not qualified to vote under R. 6 and his name is entered in the roll by mistake, provided the person who entered his name in the electoral roll was empowered to decide whether that name should be entered or not. The fact that in coming to his decision a mistake has been made, does not affect the jurisdiction of the registering authority to decide the question. (Agarwala, J.) NAND LAL GUPTA 7. COMMISSIONERS OF THE ARRAH MUNICIPALITY. 198 I.C. 834=8 B.R. 468=14 R.P. 507=A.I.R. 1942 Pat. 259.

BIHAR (AND ORISSA) MUNICIPAL SURVEY ACT, (I OF 1920), S. 11—Entry in Municipal Survey papers that municipality is owner and occupier of certain private road—Presumption of correctness.

An entry in Municipal Survey papers that the Municipality is the owner and occupier of a certain private road, gives rise to the presumption that at the time the Settlement Officer made the entry he was satisfied that that road had become vested in the Municipality either by reason of the owner of it having consented to this under S. 61 of the present Bihar and Orissa Municipal Act or under S. 30 of the previous Act, or in some other way. The fact that the Municipality has been maintaining this road is a strong piece of evidence in support of the correctness of the entry. (Agarwala. J.) Commissioners, Patna Municipality v. Sham Hamid Hussain. 199 I. entry. (Agarwala, J.) C. 95=8 B.R. 497=14 R.P. 534=A.I.R. 1942 Pat. 360.

BIHAR ORISSA AND NATURAL CALAMITIES ACT (I OF 1934) S. 8-Scope and effect of-If annuls prior mortgage.

S. 8 of the Bihar and Orissa Natural Calamities Act does not purport to annul in any way a

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previous mortgage. All that it purports to provide, is that the loan of the Government shall be the first charge on any building erected or repaired with the aid of such loan, that is to say, at its best, such a loan shall have priority over any other loan which may have encumbered the property previously. (Fazl Ali, C.J. and Imam, J.) RAHMAT ALI v. ABDUL KABIR. 1944 P.W. 7.) RAHMAT ALI V. ABDUL. N. 531=A.I.R. 1945 Pat. 120.

BIHAR AND ORISSA PRIVATE IRRIGATION WORKS ACT (V OF 1922), 8.5— Collector's powers-Invasion of private rights-If authorized—Permission from owner of field for taking earth-Necessity. See BIHAR AND ORISSA PRIVATE IRRIGATION WORKS ACT, S. 42 (d). 22 Pat L.T. 753=1941 P.W.N. 190=A.I.R. 1941 Pat. 300.

-S. 38 (1) and (3)—Power of Collector to fix Parabands when none existed before.

The Collector has no power under S. 38 (1) of Bihar and Orissa Act (V of 1922) to fix a Parabandi where none existed before. In the case of irrigation works constructed or acquired under Ss. 32-A and 32-B, this can be done under S. 38 (3), but there is no such power under S. 38 (1). (Middleton.) PARBATI KUMRI v. MAHOMED SALEEM. 10 B.R. 341.

-S. 38 (1)—Scope—Powers of Collector to fix parabandi where none existed before.

S. 38 (1) of the Bihar and Orissa Private Irrigation Works Act does not give power to fix a parabandi (system of rotation) where no parabandi exists. S. 38 (3) provides for a new system where none existed before; Cl. (1) equally obviously provides for revision of an existing system. It would be dangerous to assume that Cl. (1) also provides for an entirely new system where none existed, unless it is so expressed with unmistakable clearness. It would be straining the language to hold that cases where the system of rotation is not clearly entered in the record of rights include a case where it is not entered at all. It is clearly one of ambiguity in the entry and not a complete absence of entry. (Middleton.) Babu Lal Bihari Saran Singh v. Mutuk-dhari Singh. 8 B.R. 415.

S. 42 (d)-Applicability-Owner of field refusing permission for earth to be dug from field and preventing same being taken-Offence-Powers of Collector under S.5.

Under S. 5 of the Bihar and Orissa Private Irrigation Works Act, read with Ss. 3 and 4, the Collector has power to order any necessary repair work to be done; but the section does not in terms authorize the invasion of any private rights. The person executing the work should obtain the consent of those from whom he requires permission to take earth from their lands and other facilities. No offence can be said to be committed under S. 42 (d) of the Act by a person who refuses permission for earth to be dug from his culturable field and in preventing the earth from being taken. (Rowland, J.) BHAROSA SINGH v. KAMLA PATI. 195 I.C. 260=7 B.R. 888 =22 Pat.L.T. 753=14 R.P. 99=42 Cr.L.J. 712= 1941 P.W.N. 190=A.I.R. 1941 Pat. 300.

PUBLIC BIHAR (AND ORISSA) MANDS RECOVERY ACT (IV OF 1914) -Sale under-What passes-Landlord purchasing, holding of tenant in execution sale under rent decree-

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Land settled with another as lessee—Certificate proceedings for arrears of subsequent years—Sale in—What

passes to purchaser.

Where a landlord after having purchased his tenant's holding at a sale in execution of his rent decree in respect of arrears of rent for certain years and after settling the lands with another as tenant, takes out certificate proceedings under the Public Demands Recovery Act in respect of arrears of rent for subsequent years the certificate sale passes to the purchaser only the landlord's interest which at the time of the sale is clearly subject to the rights acquired by the person settled on the lands as lessee; the purchaser at the certificate sale cannot therefore claim any better title in the lands than that possessed by the landlord at that date. (Harries, C.J., and Fazil Ali, J.) KANIK MANDAL v. MEDNI RAI. 201 I.C. 560=15 R.P. 56=8 B.R. 806=23 Pat.L.T. 213=A.I.R. 1942 Pat. 317.

S.7—Scope—Amendment of certificate by adding guardian ad litem to minors—Fresh notice—Necessity—Coming into force of S. 158-A of Bihar Tenancy Act—Effect on application by private landlord.

A certificate was obtained by a private landlord against certain tenure-holders, and the certificate was filed on 11-8-1938, On 10-12-1938, S. 158-A of the amended Bihar Tenancy Act come into force by which Ch. XIII of the B.T. Act was repealed, thus depriving private landlords of the privilege of recovering rent by certificate procedure. On 31-3-1939, the certificate was amended by the appointment of a guardian adlitem for some minors who had been impleaded as majors. The guardian ad litem was already a party in his individual capacity.

Held, (1) that after the amendment of the certificate, a fresh notice to the guardian ad litem must be issued under S. 7 of the Public Demands Recovery Act, in his capacity as guardian in addition to the notice already issued to him in his individual or personal capacity; (2) that once Ch. XIII.A of the Bihar Tenancy Act was repealed by the new S. 158.A, it was no longer legal, on the requisition of a private landlord, to issue a notice under S. 7 of the Public Demands Recovery Act. (Middleton.) KAMESHWAR SINGH v. RAJKISHORE LAL. 1941 P.W.N 441.

-S. 8—Charge in respect of public demand—It prevails over prior mortgage or sale in pursuance of it. S. 8 of the Bihar and Orissa Public Demands Recovery Act is not directed to the particular case of a claim for arrears of rent, but is a general provision intended to apply to any case in which a public demand is being enforced. It applies to a public demand which is not secured upon any property and it affects all the debtor's immovable property in the district. The charge conferred by Cl. (b) of S. 8 cannot of its own force take precedence of a previous mortgage or interfere with the remedy of the mortgagee or impair the title acquired by the auction-purchaser at a mortgage sale even if the sale be held after service of the notice under S. 7 of the Act. On the contrary under S. 26 (1) a sale under the certificate vests in the purchaser only the right title and interest of the certificate debtor athe time of the sale. (Sir George Rankin.) ISHWARI PRASAD SINGH v. KAMESHWAR SINGH. 22 Pat. 539=207 I.O. 587=16 R.P.C. 53=47 C.W.N. 918

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=1943 P.W.N. 184=10 B.R. 19=A.I.R. 1943 P.C. 102=70 I.A. 73=I.L.R. (1943) Kar. (P.C.) 101=(1943) 2 M.L.J. 143 P.C.

— S. 9-Scope—It abrogated by S. 11, Local Fund Audit Act. See BIHAR AND ORISSA LOCAL FUND AUDIT ACT, S. 11. 8 B.R. 732.

S. 25—"conclusive"—Meaning of—Order under S. 23—Appealability—S. 60.

The word "conclusive" in S. 25 of the Bihar and Orissa Public Demands Recovery Act does not mean non appea able. An order under S. 23 cannot therefore be regarded as one not subject to appeal, merely because of the provisions of S. 25, especially in view of the clear and definite provision in S. 00 of the Act which says that all orders except one are appealable. There is thus no contradiction between S. 25 and S. 00. (Middleton.) Liquidator, Dhundhwa Co-operative Society v. Phagu Sao. 8 B.R. 26=1941 P. W.N. 743 (2).

—Ss. 28 and 31—Period of 30 days—Power of Court to extend—Application to set aside sale made within 30 days—Compensation money paid beyond time—Effect—Jurisdiction to set aside sale—Office accepting challen pled by debtor without including compensation money—If ground for setting aside sale—Mistake made by officer of Court—Effect of.

A mere casual act by an officer of the Court who makes a mistake cannot be treated as the Court's act, so as to give the Court jurisdiction to make an order which it has no jurisdiction to make. The Court has no jurisdiction to extend the period of 30 days laid down in S. 31 of the Public Demands Recovery Act; and where the certificate debtor does not deposit the penalty or compensation provided for by S. 28 of the Act within the period of 30 days, the sale cannot be set aside although he has deposited the demand amount and interest within the period of 30 days, and although the challan filed by the debtor without including the compensation money is accepted by the office of the ceruficate officer. sale was held on 6-7-1940 and within the 30 days, the debtor applied under S. 28 of the Bihar and Orissa l'ublic Demands Act depositing the amount of the demand and interest, but not the penalty or compensation of Rs. 5 payable under S. 28. The challan was accepted by the office and treated as correct and the case was treated as fully satisfied and on 6-8-1940, the certificate officer made an order "sale set aside. Realised in full." Subsequently it was discovered that the compensation of Rs. 5 had not been paid, and a notice was issued to the debtor to show cause why the sale should not be confirmed. On 6-12-1940, the debtor turned up and paid the penalty amount of Rs. 5, but his petition was dismissed by the certificate officer who held that he had no power to set aside the sale when the full amount had not been deposited within the prescribed period. This order was upheld by the Deputy Collector, but the Commissioner reversed it on the ground that the certificate debtor had been misled by the mistake of the office.

Held, in revision by the Board of Revenue that the responsibility for writing out the challan lay with the debtor and not with the certificate officer or his office, and the mere fact that the challan was accepted by the office under a

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mistake did not entitle the debtor to have the sale set aside and the mistake did not at all prejudice the debtor. (Swanzy.) Mahomed Sher All v. Anwar Ahmad. 8. B.R. 842.

-S. 29-Application beyond 60 days-Maintainability—Section if applies to appellate or revisional Court.

An application under S. 29 of the Bihar and Orissa Public Demands Recovery Act made after the expiry of sixty days from the date of the sale cannot be entertained unless the certificate officer is satisfied that there are reasonable grounds for so doing and condoning the delay. S. 29 applies not only to an order of the certificate officer but also to an order by an appellate or revisional Court. (Middleton.) LALJI SINGH v. DEGNA-

RAIN PATHAK. 10 B.R. 596.

S. 29—Certificate issued after death of debtor-Sale-Legality-Application to set aside sale nled by heirs four years after sale—Alleyation that they had no knowledge af sale—Sale if

can be set aside.

A certificate sale took place in June, 1937. The certificate debtor was a Mahomedan widow, who had died before the issue of the certificate. The petitioners, who were two widowed daughters of the debtor applied in January, 1941, to have the sale set aside alleging that their brother had cheated them by allowing the property to go to sale. The petitioners alleged that they had no knowledge of the sale until they got notice in a land registration case.

Held, (1) that the certificate filed against the debtor was void ab initio, and the sale affected the interests of the petitioners who were therefore entitled to have the sale set aside; (2) that in the absence of evidence or even allegation to show that the petitioners were aware of the sale earlier, the application for setting aside the sale must be admitted though filed about 4 years after the sale. (Swanzy.) Hafizan v. Ragho Sao. 8 B.R. 873.

-S. 29-Certificate sale-Can be set aside in part.

There is no reason why a certificate sale should not be set aside in part under S. 29 of the Bihar and Orissa Public Demands Recovery Act. (Middleton.) Bundi Singh v. Saidul Haque. 10 B.R. 543.

-S. 29—Construction—Order setting aside sale—Payment of whole certificate debt-If condition precedent.

According to the proper construction of S. 29 (1) (b) of the Bihar and Orissa Public Demands Recovery Act, the certificate debtor or debtors should pay the amount actually due from him or them before the merits of the application under S. 29 to set aside the sale are even considered by the Court. In any case, before any orders setting aside the sale are passed under the

(Peck.) NURUL HASAN v. ABDUL QUDDUS, 1941 P.W.N. 241. -S. 29-Material irregularity-Amount of

interest differently entered in office copy of sale proclamation and in copy served on judgment-lebtor—Effect of—Sale—If vitiated.

The mere fact that the interest due under the certificate as mentioned in the office copy of the ale proclamation was different from the amount of the Bihar and Orissa Public Demands Reco-

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entered in the copy served on the certificatedebtor is not a material irregularity vitiating the sale. It is at the most a petty irregularity, and could not possibly affect the amount of bid so as to cause substantial injury to the debtor. Unless it is established that the property was sold for a low price as a result of a material irregularity a sale cannot be set aside under S. 29 of the Bihar and Orissa Public Demands Recovery Act. (Middleton.) Kashinath Singh v. Tashir Ahmad. 8 B.R. 6=1941 P.W.N. 663.

-S. 29—Material irregularity—Non-affixture of copy of sale proclamation in office of certificate officer-Effect of-Substantial injury.

The object of publication of the sale proclamation in the certificate office is that professional bidders and the public may know what is coming up for sale and the absence of bidders may very well cause substantial injury. It is certainly an irregularity when no copy of the sale proclamation is affixed to a conspicuous part of the certificate office as required by statutory R. 26 of Sch. II of the Act. Where in such a case property yielding an income over Rs. 2,000 is sold for Rs. 800, it must be held that substantial injury is caused by the material irregularity, and the sale must be set aside under S. 29. (Middleton.) FATMA BEGUM v. NATHUNI LAL. 7 B.R. 617.

-S. 29-Material irregularity-Notice under S. 7 not signed by certificate officer but impressed with facsimile of signature of some officer-Effect on sale.

Where the notice under S. 7 of the Bihar and Orissa Public Demands Recovery Act is not signed by the certificate officer or by any ministerial officer authorised by him in that behalf, and the notice, instead of being so signed as required by the rules, is only impressed with a rubber stamp purporting to be a facsimile of the signature of some officer, it must be held that the sale held in pursuance of such a notice is vitiated by grave material irregularity. A rubber stamp is not a signature and therefore the sale is liable to be set aside under S. 29 on the ground of material irregularity, especially when the whole proceeding is found to have been put through without the knowledge of the certificate debtors and caused them considerable material loss. (Lee.) RAJBANS SAHAI v. CHANDRA MADHO SINGH. 11 B.R. 184.

-S. 29—Right to apply under—Subsequent purchaser-If person "whose interests are affected by the sale."

A person who is a subsequent purchaser is not a person whose interests are affected by the sale either at the time of the sale or within sixty days thereof so as to entitle him to apply under S. 29 of the Public Demands Recovery Act to set aside the sale. (Middleton.) BIBI UMATUL FATMA v. MAHOMED TAUHEED. 9 B.R. 250.

—S. 29—Scope of inquiry — Certificate Officer—Power to enquire into proportionate liability of each of several debtors—Functions of Revenue Court.

The question before the certificate officer in proceedings for setting aside a sale under S. 29

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very Act of 1914 is to see that the whole certificate dues are paid up before the sale is set aside and not to enter into questions as to what amount is due from each or any particular certificate-debtor. This is more so in a case where it is admitted that each and every certificate debtor is jointly and severally hable for the whole of the debt. It is not the function of the certificate Court to be led into a discussion in a case of joint liability as to the principle on which particular liability should be laid down. Nor is it the function of the certificate officer to pass such orders as would lead the Courts to which he is subordinate to discuss complicated matters of liability, obligation and equity which are the proper functions of the Civil Court and not of the Revenue Court. (Peck.) NURUL HASAN v. ABDUL QUDDUS. 1941 P.WN. 241.

-S. 29-Where the entire dues of the certificate are not only not deposited but not even an offer to do so is made by the applicants to set aside a certificate sale until a very late stage

the application is unsustainable.

Before the merits of an application under S. 29 of the Public Demands Recovery Act can even be considered by the Court, the certificate debtor or debtors should pay the amount actually due from him or them. In any case, before any orders setting aside the sale are passed under S. 29, the certificate dues should be paid. Where the liability of all the certificate debtors is joint, it is necessary that all the dues of the certificate should be paid up before the sale can be set aside or before the application should even be considered on the merits. (Swanzy.) BIJOY CHANDRA CHATTERJI v. SITARAM BANERJE. 9 B.R. 159.

Setting aside—Finding of substantial injury—

Necessity for.

In the absence of a finding by the certificate officer that he was satisfied that the applicant under S. 29 of the Public Demands Recovery Act had sustained substantial injury from a material irregularity, no sale can be set aside under the proviso (a) to S. 29. (Middleton.) DEODUT Missir v. Dharnidhar Missir. 9 B.R. 134.

-S. 43—Limitation—Computation—Adverse order on appeal by Collector—Revision to Com-missioner and Board unsuccessful—Starting

point of limitation.

Under S. 43 of the Bihar and Orissa Public Demands Recovery Act, limitation has to be computed from the date of the adverse order of the Collector which determines the matter against the plaintiff; when such order has been passed by the Collector on appeal there is no further appeal but only revision. A suit beyond six months of the Collector's order is therefore barred by limitation under S. 43, though it is within six months of the orders passed in revision by the Commissioner and the Board of Revenue. (Rowland and Chatterji, JJ.) Sheoraj Dhari Singh v. Kameshwar Singh. 200 I.C. 309=8 B.R. 668=14 R.P. 647=23 Pat.L.T. 263=A.I.R. 1942 Pat. 378.

-Ss. 45 and 46—Scope of—Suit to declare certificate sale fraudulent and void-If barred. S. 46 of the Bihar and Orissa Public Demands

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is based upon a fraud and which is for a declaration that a certificate sale was a fraudulent one and void on the ground of the purchase being a collusive one and on behalf of the real certificate debtors. Such a suit comes under the proviso to S. 45 and is not therefore barred by any rule in S. 46. (Harries, C.J., and Monohar Lall, J.) Banarsi Das v. Bhawani Kuer. 202 I.C. 57=15 R.P. 83=8 B.R. 843=23 Pat.L.T. 364=A.I.R. 1942 Pat. 386.

46-Scope-"Duly filed"-Allegation that part of demand is illegally included—Suit in

Civil Court-Maintainability.

There is no basis for the argument that a certificate cannot be deemed to have been duly filed within the meaning of S. 46 of the Bihar and Orissa l'ublic Demands Recovery Act, merely because a portion of the alleged debt was not due The question of the precise amount of demand due is a question for the decision of the certificate officer and of the superior officers, and if no defect of procedure is alleged or proved, a suit in the Civil Court challenging the certificate proceedings on the ground that a portion of the demand has been illegally included is barred under S. 46 of the Act, because it relates to a matter referred to in S. 46. (Rowland and Chat-Singh. 200 I.C. 309=8 B.R. 668=14 R.P. 647=23 Pat. L.T. 263=A.I.R. 1942 Pat. 378.

-S. 60-Appeal-Order under S. 25-Appeal lies.

An appeal lies against an order passed by the certificate officer under S. 25 of the Bihar and Orissa Public Demands Recovery Act. (Middleton.) S. A. Quddus, Liquidator, Bandoh Cooperative Society v. Ram Kuer. 10 B.R. 318.

-Ss.60 and 63—Scope—Appeal and Review-Distinction—Review—If open in case of error of law. See BIHAR AND ORISSA DEMANDS RECOVERY ACT, S. 63. 10 B.R. 41.

ORISSA PUBLIC DEMANDS RECOVERY ACT, S. 25. 8 B.R. 26.

S. 62—Order setting aside sale in certificate case—Revision—Interference—Error of law—If ground—Equity and justice—If to be considered. After a holding was sold under the Public De-

mands Act and purchased by the landlord, one of the four certificate debtors applied for restoration under Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, but that application was dismissed mainly on the objection of the landlord who pleaded that the land was still in possession of the tenant. Another debtor then applied to have the sale set aside under S. 29 (2) of the Public Deamands Recovery Act and the sale was set aside on the merits on the ground of irregularities or non-service of summons. The landlord applied to the Board of Revenue in revision under S. 62 of the Public Demands Recovery Act.

Held, that in view of the landlords's case in restoration proceedings that the land was still in the possession of the tenant, it would be most Recovery Act expressly exempts from the ope-inequitable and result in gross injustice if the gration of Ss. 25 and 45 of the Act a suit which sale were to be set aside, though there may be B. & O. PUB. DEMANDS RECOV. ACT (1914).

grounds in law for setting it aside. (Swanzy.) RAM RAN VIJOYA PRASAD SINCH v. RAJANI KANTA LAL. 11 B.R. 132.

—S. 63—"Mistake or error"—Dismissal of case on ground that party was absent—Subsequent discovery that party was present—Power to restore on review—Reasons—If to be recorded.

When a certificate case was dismissed as the result of a mistake of fact, namely, on the ground that the applicant was absent, but it subsequently turns out that the party was present, the certificate officer has power to review the order of dismissal and to restore the case. S. 63 of the Bihar and Orissa Public Demands Recovery Act is wide enough to cover such a case. There is nothing in S. 63 which makes it incumbent on the officer to give his reasons in writing. (Swansy.) Shiva Shanker Sahay v. Mahomed Yahiya. 11 B.R. 120.

—S. 63—"Mistake or error"—Meaning of—Error of law—Remedy—Appeal and not review. The words "mistake or error either in the making of the certificate or in the course of any proceeding" must be interpreted to mean some defect of proceeding, and do not include a mistaken view of law. An appeal under S. 60 is the proper remedy in the case of a mistake of law and not a review. (Middleton.) BIHAR AND ORISSA, POSTS AND TELEGRAPHS CO-OPERATIVE SOCIETY, LTD. v. AZHARUL HAQUE. 10 B.R. 41.

S. 63—Scope—Powers of certificate officer—Power to set aside sales contrary to S. 29.
Orders under S. 63 of the Bihar and Orissa

Orders under S. 63 of the Bihar and Orissa Public Demands Recovery Act should only be passed in exceptional cases, and it is quite clear from the wording of the section that in passing an order under S. 63 the certificate officer must come to a finding that some mistake or error has occurred in the course of the proceedings: S. 63 no doubt gives wide powers to the certificate officer but it certainly does not give him power to pass an order contrary to the mandatory section of the Act governing the transaction involved. A sale can be set aside only under S. 29 of the Act on the applicant complying with certain conditions. Where the conditions are not complied with the certificate officer cannot adopt some procedure of his own under S. 63 of the Act to set aside a sale. There must be some mistake or error to justify an order under S. 63, and the error or mistake must be one that is apparent immediately, such as some clerical mistake or clear mistake of dicition. (Peck.) Nurul Hasan v. Abbul Quddus. 1941 P.W.N. 241.

—Sch. II, R. 6—Discretion—Peon serving notice by affixture under direction of certificate officer—If illegal—Proceedings, not vitiated.

It cannot be held that the discretion to serve the notice under S. 7 of the Bihar and Orissa Public Demands Recovery Act in the manner prescribed by R. 6 of Sch. II to the Act rests with the serving officer or peon and not with the certificate officer. A certificate officer has power to direct the peon to serve the notice in the manner laid down by R. 6 if he cannot find the certificate debtor. The fact that the peon adopts the procedure laid down in Sch. II, R. 6, under instructions of the certificate officer would not render the proceedings illegal or irregular. (Middleton.)

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BIHAR RESTORATION OF BAKASHT LANDS AND REDUCTION OF ARREARS OF RENT ACT (IX OF 1938)— Abatement— Death of applicant before hearing-Failure to substitute heirs—Effect on application—Order for restoration—Legality.

No proceeding can be carried on in the name of a dead man without substitution. Where an applicant for restoration of bakasht lands dies before the hearing and no substitution or amendment of the application is made the Court has no jurisdiction to order restoration on such application. (Middleton.) MAHOMED ABDUL MAJID v. KAMALDHARI LAL. 8 B.R. 227.

----Applicability to bhaoli lands.

The Bihar Restoration of Bakasht Lands Act is not inapplicable to bhaoli lands. It does apply to such lands. (N. F. Peck.) MAHOMED NAIM v. RAM LAL GOPE. 7 B.R. 498.

"Rent"—If includes cess—Definition of rent" in Bihar Tenancy Act—Applicability.

The Rent Reduction Act of 1938 does not purport to deal with cess at all and the artificial definition of "rent" in the Bihar Tenancy Act, as including cess, does not apply to the Rent Reduction Act, and therefore for the purpose of Act IX of 1938, cess is not rent. (Agarwala J.) RAM RANBIJAY PRASAD SINGH V. INDARDEO SAHAL. 199 I.C. 251=8 B.R. 531=14 R.P. 565=22 Pat. L.T. 996=A.I.R. 1942 Pat. 119.

Rent Reduction Officer — Jurisdiction to reduce rent of holding in the absence of application by person in occupation.

A holding of about 18 bighas of land with a rent of Rs. 75 was settled in the name of one L. After a time L surrendered the holding and about three years later T got his name mutated for half the original holding, viz, 9 bighas on a rent of Rs. 38. L alone applied for reduction of a holding of 18 bighas with a rent of Rs. 76. There was no application by T, nor was there any application for reduction of the rent of Rs. 38. The Rent Reduction Officer passed an order reducing the rent from Rs. 38 to Rs. 19—6—0 in the name of T.

Held, that the order was without jurisdiction. (Middleton.) HIRDAY NARAIN JHA v. TIMA MANJHI. 7 B.R. 816.

— Review—Order of Collector — Finality— Subsequent ruling by Board of Revenue—If ground for review.

The orders of the officer appointed to discharge the duties of the Collector under the Bihar Restoration of Bakasht Land and Reduction of Arrears of Rent Act are final and cannot be re-opened on the strength of a subsequent ruling of the Board of Revenue. (Middleton.) AMIROL HAQUE v. MATHURA DAS. 7 B.R. 419=1941 P.W.N. 244.

Scope - Purchase by co-sharer - If excluded.

A purchase by a co-sharer is not excluded under the Bihar Act IX of 1938. (Middleton.) INDRADEO PRASAD SINGH v. RAMBARAN SINGE. 7 B.R. 754.

—8. 3—Applicability and scope—Lands in land-tords possession by virtue of compromise—Title not traced from Court sale—If can be restored.

A holding was owned by two groups of cosharers, H and M. The H group obtained a decree for arrears of rent, put up the holding for sale and purchased it in May, 1933. Later the M group sued the tenants and the H group of landlords for two years' rent, obtained a rent decree against the tenants and a money decree against the H group of landlords, and brought the holding to sale themselves purchasing it in 1937. Later, the H group brought a title suit against the M group which ended in a compromise dividing the lands between the two groups half and half.

Held, in an application for restoration, that though the H group had apparently been in possession since 1933, their title to the half share allotted to them under the compromise was different from their title under the sale of 1933, which became eliminated by the sale in favour of the M group and since the H group had no continuity of title, they were not in possession by virtue of the Court-sale and hence the land in their possession could not be restored. The fact that they never lost possession was irrelevant. (Middleton.) AJODHYA SINGH v. BAIJNATH PRASAD SINGH. 1941 P.W.N. 665.

-S. 3—Applicability—Decree for arrears of rent—Sale of raiyati holding in execution—Purchase by co-sharer landlord-Application for restoration-Maintainability.

S. 3 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act only speaks of a decree for arrears of rent; it makes no difference between rent decrees and money decrees. Purchase by a co-sharer landlord of a riyati holding at a sale in execution of a decree for arrears of rent is not excluded by the Act on application for restoration in such a case is maintainable. (Middleton) NARSINGH NARAIN v. RUDRA NATH. 7 B.R. 749=1941 P.W. N. 377.

-S. 3—Applicability—Holding purchased by landlord-Delivery of possession not effected-Application by tenant for restoration-Maintainability.

A holding cannot be regarded as being in the possession or under the control of the landlord after he has purchased it but before he has applied for or obtained delivery of possession, so as to entitle the tenant to file an application for restoration under S. 3 of the Bihar Act IX of 1938 RAM ASHRAYA SINGH v. KHABSU-(Middleton.) 8 B.R. 17=1941 P.W.N. 740.

lord's heirs not impleaded-Effect.

In an application by the tenants under S. 3 of the Bihar Act IX of 1938, it is their duty to find out the names of all the heirs of one of the landlords whom they know to be dead, and to make them parties to their application. If they do not take the trouble to find out the names of such heirs and make them parties, their application is

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-S. 3—Application containing names of all tenants-Signature by one only-If bad.

Where all the tenants concerned are named in the application, but only one signed, it is only reasonable to assume that he signed for all, especially when no objection was taken to it in the lower Court. (Middleton., INDRADEO PRASAD SINGH v. RAMBARAN SINGH. 7 B.R. 754.

S. 3—Bakasht lands wrongly described as raiyati in sale proclamation-Co-sharer landlord. if estopped from claiming same as bakasht afterwards.

The fact that a co-sharer landlord describes a land as raiyatt land in the sale proclamation for sale of the holding for arrears of rent will not estop him from afterwards saying that the lands are bakasht, when, the lands are such, A description in a sale proclamation will not confer on any person a status which he does not possess under the law. (Middleton.) RAMPRATAP SINGH v. RAMPRATAP SINGH. 7 B.R. 895.

-S. 3—Scope—Several co-sharers—Restoration of possession in respect of share of one landlord-Permissibility.

Bihar Act IX of 1938 does not authorise restoration of land proportionate to the interest of one set of co-sharer landlords ignoring another set of co-sharer land-lords. (Middleton.) AJODHYA SINGH v. BAIJNATH PRASAD SINGH. 1941 P.W.N. 665.

-S. 3—Single application in respect of three distinct sales held on different dates-Maintainability.

A single application for restoration in respect of three khatas or holdings sold on different dates under decree, for different arrears is irregular and defective. There must be three separate applications although the parties in the three holdings are the same as also the points at issue and although there is no prejudice to the opposite party. (Middleton.) RAMPRATAP SINGE v. RAMPRATAP SINGE. 7 B.R. 895.

lord-Maintainability.

An application for restoration is not maintainable against the transferee of a purchasing land-lord. The words "said landlord" in S. 3 (1) of Bihar Restoration of Bakasht Land Act mean the landlord who purchased the holding, and under S. 3 (1) at the time of the application for restoration by the raiyat, the land must be in the possession of the same landlord who purchased the holding. (N. F. Peck.) MANZAR HASSAN v. SUKHLAL GOPE. 7 B.R. 415.

S. 3 (1) - Application for restoration UER. 8 B.R. 17=1941 P.W.N. 740.

against landlord—Latter pleading settlement of lands with his sons—Latter also claiming under gift of earlier date—Names of sons entered in P. Register only after application—Effect.

On 20-3-1939, an application for restoration was made under S. 3 of the Bihar Restoration of Bakasht Lands Act impleading AR as landlord. He entered appearance and pleaded that he had gifted the lands to his sons before 19—4—1938. The sons also contended that they got the lands defective. (Middleton.) AMAR RAI v. BALDEO by gift on 7-2-1939 and therefore the application was not maintainable. It was found that tion was not maintainable. It was found that

the names of the sons were recorded in Register D only on 23-1-1940.

Held, that the application was correctly filed against AR and was competent. (Middleton.)
AZIZUR RAHMAN v. LACHHMI SINGH. 7 B.R. 511.

-S. 3 (1)-"Raiyat"-"Landlord"-Meaning

of.
The word "raiyat" in S. 3(1) of the Bihar
Restoration of Bakasht Lands and Reduction of Rent Act includes the whole body of the raivats and the word "landlord" in S. 3 (1) includes the whole body of landlords. (N. F. Peck.) Mahomed Naim v. Ram Lal Gope. 7 B.R. 498.

-S. 3 (1)—"Said landlord"—Meaning of. The expression "said landlord" in S.3 (1) of the Bihar Restoration of Bakasht Lands Act means that the application only lies against the purchasing landlord, i.e., that restoration can only be obtained from the landlord who purchases the holding. (Middleton.) AZIZUR RAHMAN v. LACHHMI SINGH. 7 B.R. 511.

price-Necessity for.

Under S. 3 (2) (ii) of the Bihar Restoration of Bakasht Lands Act, it is obligatory on an applicant to state the date on which and the amount for which a holding was sold. An application which does not state the separticulars is defective. (Middleton.) RAMPRATAP SINGH v. RAMPRATAP SINGH. 7 B.R. 895.

—S. 3 (3)—Limitation—Amendment altering character of opplication—If permissible after expiry of time fixed by S. 3 (3).

An application filed within the time prescribed by S. 3 (3) of the Bihar Act IV of 1938 may be amended after the expiry of that period under certain circumstances; but an amendment which makes the application an entirely new application cannot be premitted. Where the Khata number in a village in the original application is cut out and the date of sale is altered by means of an amendment, that entirely alter the character of the application and cannot be permitted afters the expiry of the time limited by S. 3 (3). (Middleton.) RAM RANVIJAY PRASAD SINGH v. NARSINGH. 1941 P.W.N. 436=7 B.R. 756.

-Ss. 3 (3) and (4)—Limitation—Application within time-Adding name of party omitted after

expiry of period-Permissibility.

An application for restoration of Bakasht lands can be amended after the expiry of the period mentioned in S. 3 (3) of Bihar Act, IX of 1938. If the application was filed within the period mentioned in S. 3 (3) an amendment or remedying of defects subsequently is not barred. The omission of a name of a party from the applica-tion is a defect falling under S. 4 of the the Act and can therefore be remedied after the period mentioned in S. 3. (Middleton.) RUDRA NATH MISSIR v. NARSINGH NARAIN SINGH. 9 B.R. 359.

-S. 3 (3)—Limitation—Application made in time-Amendment after period of limitation-Permissibility.

There is no warrant for holding that an appli-cation under S. 3 of the Bihar Restoration of Land and Reduction of Arrears of Rent Act must | Grounds.

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be in all respects complete before the expiry of the period mentioned in the section. Collector can entertain an incomplete application and when has done so within the time limited, he can allow an amendment or a remedying of the defects after the period of limitation. provided it was entertained within that period. (Middleton.)
AMIRUL HAQUE v. MATHURA DAS. 7 B.R. 419= 1941 P.W.N. 244.

-Ss. 3 (3) and 4-Limitation-Application for restoration against one landlord only-Other landlords brought on record after one year--Application-If barred.

A tenant applying under S. 3 of the Bihar Restoration of Lands and Reduction of Rent Act must, under S. 3 (3), file the application within one year from the date on which the section came into force. It is necessary for the applicant to bring in the whole body of the landlords upon the record within the period of one year prescribed. Where the application originally is filed against one landlord only and the remaining landlords are not brought on the record until after the expiry of one year, the application is beyond time and must fail. An amendment of the application under S. 4 does not affect the period of limitation laid down in S. 3 (3). (N. F. Peck.) MAHOMED NAIM v. RAM LAL GOPE. B.R. 498.

landlord impleaded after expiry of time fixed by

S. 3 (3) - Effect. S. 3 (3) of the Bihar Act IX of 1938 fixes a special period and an application for restoration under S. 3 must be made within that time impleading thereto, all the landlords. The time fixed by S. 3 (3) cannot be extended on the analogy of S. 22, Limitation Act which applies only to suits. Where, therefore, an application is made under S. 3 of Bihar Act IX of 1938 within the time limited by S. 3 (3) impleading as party respondent only one landlord and another landlord is impleaded only after such period has expired, the Revenue Court acts without jurisdiction in entertaining and acting on such an application. (Varma, J.) Sheobadan Sonar v. Bihari Sao. 1944 P.W N. 499.

S. 5-Scope-Mandatory-Failure to give notice-If fatal.
Under S. 5 of the Bihar Act IX of 1938, it is

mandatory to give notice of the application and of the date fixed for hearing and to send with the notice a copy of the application; failure to comply with these directions is fatal to the maintainability of the application. (Middleton.) Ter-BHUAN ROY v. RAMPATI AHIR. 7 B.R. 891=1941 P.W.N. 432.

-S. 6-Nagdi plot cultivated on behalf of petty landlord or by settlee-Restoration of.

Where a nagdi plot has been settled bona fide, and it appears that the plot has been cultivated on behalf of a petty landlord or has been cultivated by a settlee it cannot be restored under Bihar Act IX of 1938. (Swanzy.) SAHODRA KUZE. v. Harihar Singh. 9 B.R. 7.

–S. 6–Objection by landlord to restoration ands,

S. 6 of Bihar Act IX of 1938 enables a landlord to object to restoration either on the ground of himself cultivating the holding with his own stock or by his own servants, or on the ground that the holding is in the possession of a third party. If the holding is in the possession of a person falling under Ss. 6(1)(a) or 6(1)(d), the land is not liable to be restored. (Middleton.) Mah-BUBUR RAHMAN v. DEOLAL SINGH. 7 B.R. 794.

-S. 6-Plot not in possession of purchasing landlord-Restoration of-Sale or surrender for consideration-If settlement.

A sale or surrender for consideration by a londlord of his rights under S. 22 of the Bihar Tenancy Act to a superior landlord is not a settlement for purposes of Bihar Act IX of 1938. Certain landlords purchased the occupancy rights in three bhauli plots in 1932. In a subsequent partition in 1937 among the landlords these plots were allotted to another co-sharer; in February 1938, the landlords who purchased the occupancy rights sold the rights which they had under S. 22 of the Bihar Tenancy Act to the co-sharer in whose pati the plots fell. The tenant filed the application for possession, in July 1939, contending that the sale of February 1939, was a settle-ment which, having been made after March, 1938, could not affect his right to restoration.

Held, that the transaction could not be considered to be a settlement and since the plots were not in the possession of the purchasing landlords at the time the application was filed, the application for restoration could not be allowed. (Swanzy.) SAHODRA KUER v. HARIHAR SINGH. 9. B.R. 7.

S. 6 (1)—Plea of petty landlord—Burden of proof—Nature of evidence to be let in.

If a landlord under S.6 (1) of the Bihar Restoration of Lands Act takes the objection that he is a petty landlord he must show by evidence that he is a petty landlord. Merely to swear to an affidavit stating the amount of cess paid by all the shareholders, without any attempt to show what particular amount of cess any particular landlord paid or even what would be his share worked out on any particular basis, would not be sufficient to prove the allegation that the landlords are petty landlords. (N. F. Peck.) Mahomed Naim v. Ram Lal Gope. 7 B.R. 498.

-Ss. 6 (1) and 6 (2), proviso—"Third

person"—Meaning of.
The expression "third person" in S. 6 (1) (d) and in S. 6 (2), proviso cannot be construed as meaning any one other than the purchasing landlord and the original tenants. S. 6 (1) (d) refers to such third person being in possession and can thus only include persons with whom a settlement has been made by the landlord. (Middleton.) AZIZUR RAHMAN v. LACHHMI SINGH. 7 B.R. 511.

-Ss. 6 (1) (d) and 11-Settlement after date mentioned in S. 6 (1) (d)—Notice of application for restoration to settlement holder-Necessity—Ex parte restoration order—Objection under S. 11-Competency-Fraud-Proof.

On 6-12-1939 the tenants obtained an ex parte order for restoration under the Bihar Restoration of Bakasht Lands Act, alleging in their application that the landlord had settled the

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lands in question with an unknown third party in 1939, i.e., after the date mentioned in S. 6 (1) (d) of the Act. No notice was given to the settlement holder and the tenants got possession delivered on 14—1—1940. In May 1940, the tenants got a remission of rent under S. 112-A (c) of the Bihar Tenancy Act after a local inquiry. In November, 1940, the settlement holder applied under S. 11 of the Bihar Restoration of Bakasht Lands Act, alleging that he came to know of the restoration only on 3-11-1940 and claimed the benefit of S. 18 of the Limitation Act on the ground that he was kept out of knowledge of delivery of possession by fraud. He set up a settlement under a registered deed dated January, 1937.

Held, (1) that there was no obligation on the Restoration Officer to issue notice on the alleged settlement holder under the proviso to S. 6 (2) (d) of the Restoration Act if the settlement was not made within the time mentioned in S. 6 (1) (d); (2) that the settlement alleged to have been made was not bona fide; (3) that there was no satisfactory proof of any fraud practised on the settlement holder such as would bring his objection under S. 11 of the Act within the purview of S. 18, Limitation Act. (Middleton.) RAJENDRA PRASAD v. LAKHI PRASAD. 9 B.R 216.

—Ss. 6 (1) (d) and 9 (2) (a) (iv)—Settlement and restoration—Distinction—"Restoration" -Restoration or settlement before Act-Effect of.

A holding that was sold measured 6231 acres. The landlord pleaded that before Act IX of 1938 was passed he had restored 30 bighas (18.75 acres) to the judgment debtors, but there was no proof of the same.

Held, that all the settlements before the Act should be regarded as settlements under S. 6 (1) (d) of the Act and therefore the maximum area to be restored was 15.58 acres under S. 9 (a) (iv) of the Act.

Obiter: There is nothing in the Act to justify a distinction between settlement and restoration. If before the passing of the Act a landlord allowed an ex-tenant to regain or to retain possession of part or all of a holding which had been sold up and become Bakasht Malik, it would not have been referred to as restoration of Bakasht, but would be referred to as a settlement. (Middleton.) v. Raghubar Sinha. 9 Krishna Chandra B.R. 101.

#### -S. 7-Notice-Service on all landlords-If essential.

S. 7 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act clearly contemplates due service of notice on all the landlords named in the application. If notices are not served on all the landlords or not properly served on any, the Restoration Officer has no jurisdiction to decide the case ex parte. There were several landlords mentioned in an application by the tenants. A notice was issued on one landlord only; but after his name the word "wagaira" (and others) was mentioned and the notice was served on a servant of the one landlord mentioned.

Held, there was not complete service on all the landlords named in the application and the Restoration Officer had no jurisdiction to proceed

ex parte. (Middleton.) Md. Habibur Rahman v. Dewan Gope. 7 B.R. 649.

Ss. 8 and 9—Conditional order of restoration— Date fixed for payment of 1st instalment of money-Non-deposit-Effect of-Deptsit after expiry of time Jurisdiction to pass order for restoration.

Where an order for restoration is passed under the Bihar Restoration of Lands Act, stating that the lands should be restored on the payment of a certain amount in five annual kists, the 1st instalment to be deposited on a fixed date, the order is a sort of conditional order which automatically lapses as soon as the date fixed is passed without either the deposit being made or additional time asked for. The application for restoration on which the order is made automatically stands rejected. On failure of the tenant to deposit the 1st instalment unless an application for time is made and granted, the Restoration Officer has no jurisdiction thereafter to pass an order for restoration on the ground that the deposit has been made subsequently. (Middleton.) RAMDHAN PURI v. JAGERNATH SAHAY. 7 B.R. 505=1941 P.W.N. 454.

-Ss. 8 and 9-Order fixing amounts payable by tenant and fixing date for payment of instalments-Effect and nature of.

An order fixing the amounts payable by a tenant under Ss. 8 and 9 of the Bihar Act IX of 1938 and fixing a date for payment of an instalment is a conditional order which would automatically lapse as soon as the date fixed has passed without the deposit being made or additional time asked for. A tenant who so allows the order to lapse without paying the instalment in time or applying for extension of the time cannot subsequently claim any restoration. (Middleton.) PEYARE MAHTON v. BIBI BINTUL FATIMA. 9 B.R. 241.

-S. 8—Portion only of decretal amount realised by sale—Amount paid by tenant for restoration of land
—If has effect of satisfying entire decree—Right of landlord to realise balance.

There is no express provision in the Bihar Restoration of Bakasht lands and Reduction of Arrears of Rent Act as to what is to be done in a case where a portion only of the decretal amount has been realised by the sale of a holding. In such a case the payment made by the tenant under S. 8 of the Act for the restoration of the land cannot be taken to have the effect of satisfying the entire decree. The landlord decree-holder will therefore, be entitled to proceed for the halance. He cannot however realise more than the decretal amount. He can execute his decree for such amount only as remains unpaid after deducting from the decretal amount the amount which has been paid by the tenant in the proceedings regarding the restora-tion of lands, after making allowance for the costs of the decree. (Fazl Ali, J.) HARI MAHTON v. JAMAL HOSSAIN. 199 I.C. 24=8 B.R 482=14 R.P. 525=23 P.L.T. 571=A.I.R. 1942

-S. 8 (1)—Burden of proof—Plea of "petty landlord"-Onus-Duty of landlord to adduce evidence.

Under S. 8 (1) of the Bihar Restoration of

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the date of the hearing of the application and put forward the ground that he is a petty landlord. If he makes that objection, he must show by evidence that he is a petty landlord. Where all that is done is to file an affidavit sworn to by the Patwari of the landlord stating that the landlord is a petty landlord without any attempt being made to show what particular amount of cess any particular landlord paid that would not be sufficient proof. (N. F. Peck.) HASSAN v. SUKHLAL GOPE. 7 B.R. 415. Manzar

-S. 8 (1) (b) proviso - 'Costs necessarily incurred etc .- Meaning of .

If an order for delivery of possession could not be obtained without incurring certain expenses, such expenses are costs necessarily incurred in connection with the application for delivery of possession within the meaning of the proviso to S. 8 (1) (b) of the Bihar Act IX of 1938. (Middleton.) Prasadi Mahton v. Baijnath SAHAI. 9 B.R. 163.

-S. 8 (1) (b) proviso-Scope-Amount payable under S. 8 (1) (b) (1)—Amount paid by raivat in cash subsequent to sale-If to be given credit to in calculat-

S. 8 (1) (b) provise of the Bihar (Act IX of 1938), makes no provision for adjusting any payment made in cash or out of Court, and such payments cannot therefore be credited under S. 8 (1) (b) (i). A raiyat therefore cannot get credit for an amount subsequently paid by him in cash when the sale price of the holding was not enough to satisfy the decree, in calculating the amount to be paid by the raisat under S. 8 (1) (b) (1). (Middleton.) PRASADI MAHTON v. BAIJNATH SAHAI. 9 B.R. 163.

-S 9-Calculation of area-Individual khatas -If to be taken as separate holdings.

For the purpose of calculating the area under S. 9 of Bihar Act IX of 1938, each individual khata has to be treated as a separate holding. The mere fact that there was only one decree execution proceeding or one application will not khatas one holding. (Middleton.) SURENDRADEO NARAIN v. DEOKI SINGH. 8 B.R. 149.

 S. 11—Application under—Limitation Act, S. 18-Applicability. See Limitation Act, S. 18 7 B.R. 1003.

-S. 12—Scope and effect of—Sale of holding-Purchase by landlord and delivery of possession-Decree for money in respect of period between sale and delivery of possession-Subsequent restoration of land to tenant under Act—Effect of—Decree for money—If altered into one for rent-Liability to reduction under S. 15 (a). See BIHAR RESTORATION OF BAKASHT LANDS AND REDUCTION OF ARREARS OF RENT ACT. S. 5. 22 Pat. L.T. 998.

-S. 12 (b)-Scope and effect-Restoration of land-Subsequent application for reduction of rent-Competency.

Though S. 12 (b) of Bihar Act IX of 1938 revives all such rights as the raiyat had in respect of the land and the incidents thereof before its sale the section does not bar acquisition of new rights: A raiyat can therefore apply for reduction of tent Bakasht Land Act, the landlord has to appear on after restoration of the land to him under Act

IX of 1938, although the Act was not in force at the time of the sale of his holding for arrears of rent. (Swanzy.) SOBHAN SINGH v. HARBANS PANDEY. 9 B.R. 138.

— S. 13 (1)—"Deposit with the Collector"— Meaning of—Sub-treasury closed on due date— Deposit next day—Validity.

The expression "deposit with the Collector" in S. 13 (1) of Bihar Act (IX of 1938), does not mean deposit with the naziri. In a sub-division the normal way of doing this is to deposit in the sub-treasury. If the sub-treasury is closed on the due date, a deposit made on the next day on which it is open is valid. (Middleton.) Surpat Singh v. Nabi Mandal. 10 B.R. 643.

——Ss. 15 and 16—Applicability and Scope— Proceeding for recovery of arrears pending— Application under S. 16—Maintainability.

S. 15 of the Bihar Act IX of 1938 applies only to occupancy holding for the arrears of rent of which there is a suit or proceeding pending, and not to an occupancy holding for the arrears of rent of which there is no pending suit or proceeding. It is therefore not correct to say that S. 15 comprehends all occupancy holdings and that S. 16 consequently does not apply to any occupancy holding. Where a proceeding is pending for recovery of the arrears of an occupancy holding the holding is one to which S. 15 (b) applies and to which S. 16 cannot apply; and an application under S. 16 is not maintainable. (Agarwala and Shearer, JJ) KAMESHWAR SINGH BAHADUR v. RAMESHWAR SINGH. 21 Pat. 704=1942 P.W.N. 205=205 I.C. 136=15 R.P. 247=9 B.R. 197=24 P.L.T. 113=A.I.R. 1943 Pat. 66.

S.15 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act has no application to an occupancy holding in respect of which produce rent and not money rent is payable. Such a holding comes within S. 16 of the Act and an application for reduction of rent of such a holding can properly be made under S. 16 of the Act. (Harries, C.J., and Varma J.) SREE KANT LAL v. AJOHEVA SINGH. 194 I.C. 99 = 7 B.R. 698=1941 PW N. 234=22 Pat, L.T. 374=13 R.P. 653=A.I.R. 1941 Pat. 390.

Per Full Bench, (Shearer, J., contra.)—Upon a proper construction of S. 15 and S. 16 of the Bihar Act IX of 1938 an occupancy holding bearing cash rent comes within S. 16 of the act if the raiyat is not entitled to relief under S. 15. (Fazl Ali, C.J., Chatterii and Shearer, JJ.) KAMESHWAR SINGH BAHADUR v. ARIUN MISSIR. 24 Pat. 66=26 P.L.T. 95=1945 P.W.N. 87=A.I.R. 1945 Pat. 35 (F.B.).

——Ss. 15 and 16—Applicability—Occupancy holding with cash rental—Right of tenant to apply for relief under S. 16.

S. 15 of Bihar Act IX of 1938 applies to occupancy holdings at a cash rent and such an occupancy holding with a cash rental is not contemplated by S. 16 of the Act. Such occupancy Rent Reduction Officer. If the judgment debtor

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tenants are given relief under S. 15 of the Act and cannot apply under S. 16 (1) of the Act. If they can obtain no such relief under S. 15, they cannot fall back on S 16. (Harries, C.J., and Manohar Lall, J.) KAMESHWAR SINGH BAHADUR V DHUNMAN GOPE. 21 Pat. 794=1942 P.W.N. 208=205 I.C. 111=15 R.P. 243=24 Pat.L.T 94=9 B.R. 194=A.I.R 1943 Pat. 73.

Ss 15 and 20-Applicability-Post-sale stage of execution.

Reading Ss. 15 and 20 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act together, it would seem that where the rent of an occupancy holding has been reduced under S. 112-A (1) (d) of the Bihar Tenancy Act, the landlord shall not even in an execution proceeding be entitled to recover from the raiyat any arrears of rent in excess of the rate allowed by the Rent Reduction Officer. There is nothing in these sections to confine their operation to stages of execution proceedings previous to the sale, and a judgment-debtor cannot be refused relief merely on the ground that the execution sale has already taken place: provided, of course, that the execution proceeding is still pending. The executing Court has power to act in accordance with S. 15 (a) of the Act, although the judgmentdebtor's application is made after the expiry of 30 days from the date of sale. The executing Court clearly does not become functus officio merely on the expiry of the 30 days from the sale -that stage is only reached when the sale is confirmed and the execution case dismissed as on full satisfaction. (Dhavle, J.) P.C. LAL CHOUD-HURY v. BILTO MAHTO. 7 B.R. 941=195 I.C. 490 = 14 R P. 131=1941 P.W.N. 603=A.1.R 1941 Pat. 572.

S.15—Decree for rent and cess — Reduction of rent subsequently in proceedings under S.15—Decree for cess—If also reduced. See BENGAL CESS ACT, S.41. 21 Pat. 628.

—S. 15 (a)—Applicability—Execution proceedings—Sale held but not confirmed—Rent reduced after sale in favour of decree-holder but before confirmation—Amount to be deposited by judyment-debtor under S. 174 of Bihar Tenancy Act.

The mandatory provisions of S. 15 (a) of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act are made applicable to proceedings for the execution of a decree by S. 20. The proceedings in execution do not terminate with the sale so that before the sale is confirmed the proceedings still continue to be proceedings in execution. Where therefore, after a sale of a holding in execution of a rent decree in favour of the decree-holder but before its confirmation, the judgment-debtor obtains an order reducing the rent payable under S. 112-A (1) (d) of the Bihar Tenancy Act, he is not bound to deposit the full amount for which the sale was held when he applies to have the sale set aside under S. 174 of the Bihar Tenancy Act. He is required to deposit only such amount as the decree-holder is entitled to recover on account of arrears of rent as was finally determined by the Rent Reduction Officer. If the judgment debtor

deposits more, he is entitled to withdraw the excess amount. (Manohar Lall, J.) SUKHRAJ ROY v. KESHAB MOHAN THAKUR. 8 B.R. 108=197 I.C. 175=1941 P.W.N. 749=A.I.R. 1942 Pat. 262.

-S. 15 (a)—Applicability—"Rent"—If includes damages for use and occupation—Decree for damages for compensation for use and damages for period between sale and delivery of possession—If liable to reduction.

S. 15 (a) of the Bihar Act IX of 1938 clearly deals only with rent and not with damages or profits for use and occupation. Where after the sale of a holding for arrears of rent and purchase by the landlord, the landlord obtains a money decree against the ex-tenant for the period between the date of the sale and the date of delivery of possession to the landlord such decree amount is not rent which can be reduced under S. 15 (a). The relationship of landlord and tenant comes to an end and ceases to exist when the holding is sold for arrears of rent; and what would be payable by the occupant is only damages for use and occupation and not rent. The fact that the land is subsequently restored to the tenant under Bihar Act IX of 1938 does not have the effect of converting the suit and decree for damages for use into one for rent under S. 12 ot the Act. As there is no claim for rent and as no decree for rent is passed S. 15 (a) cannot apply. (Agarwala, J.) RAM RAN BIJAY PRASAD SINGH v. AMI TEWARY. 199 I.C. 676=8 B.R. 607=14 R.P. 609 =22 Pat. L.T. 998=A.I R. 1942 Pat. 131.

S. 15 (c)—Construction and scope—Landlord if altogether deprived of right to interest on arrears of rent on reduction.

S. 15(c) of the Bihar Act IX of 1938 has not the effect of depriving the landlord altogether if his right to interest on the arrears of interest when the rent has been reduced under the Act. The section has to be read as meaning only that he is not entitled to interest "on the amount of the arrear so reduced," i.e., on the difference between the original rent and the reduced rent. The addition of the words "on the amount of arrears so reduced" after interest in S. 15 (c) clearly indicates that the Legislature did not intend to deprive the landlord of interest to which he is expressly declared to be entitled by S. 67 of the Bihar Tenancy Act. It is clear that landlord is to get interest only on the basis of the reduced rent. (Agarwala, J.) RAM RANBIJAY PRASAD SINGH v. INDARDEO SAHAI. 199 I.C. 251=8 B R. 531=14 R.P. 565=22 Pat.L.T. 996=A.I.R. 1942 Pat. 119.

-S. 15 (c)—Construction—"The amount of the arrears as so reduced"-Meaning of-Right of landlord to interest on amount of reduced rent and on amount knocked off.

There can be no doubt that the words "the amount of the arrears as so reduced" in S. 15 (c) of Bihar Act IX of 1938 refer to the reduced amount, that is to say, the amount which is payable as a result of the rent reduction proceedings. A decree-holder landlord is not therefore entitled to interest on the reduced amount. Nor is the decree holder landlord entitled to interest on the amount of arrears of rent which has been knocked off as a result of the rent reduction proceedings. Interest on the amount knocked off or disallowed R.P. 653=A.I.R. 1941 Pat. 390,

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is merely accessory to the principle disallowed and when the principal itself is not recoverable the interest too is not recoverable. (Harnes, C.J. and Fazl Ali, J.) INDERDEO SAHAI v. RAM RANBI J.Y PRASAD SINGH. 21 Pat. 628=203 I.C. 418=9 B.R. 80=15 R.P. 172=24 P.L.T. 46 =A.I.R. 1942 Pat. 470.

-S. 16-Applicability-Occupancy holding with cash rent.

S. 16 of the Bihar Act IX of 1938 definitely refers only to holdings which are not referred to in S. 15, and cannot therefore include any occupancy holding paying cash rent. (Middleton. Dronarain TEWARI v. KAMESHWAR SINGH BAHADUR. 8 B.R. 760.

-S. 16—Application under-Erroneous order on -If null and void-Executing Court-If can ignore wrong order.

The fact that the order passed by a Rent Reduction Officer on an application for reduction of rent under S. 16 of the Bihar Act IX of 1938 is wrong does not necessarily make it an order without jurisdiction. If there is no inherent want of jurisdiction, and the application is one which the Rent Reduction Officer has jurisdiction to entertain, the fact that he finds the facts wrongly cannot make his order null and void; the order of the Collector reducing the rent cannot be ignored and effect must be given to it in execution proceedings. The executing Court execution proceedings cannot ignore an order with jurisdiction, however erroneous the order may be. (Harries, C.J, and Varma, J.) SREE KANT LAL v. AJODHYA SINGH. 194 I.C. 99=7 B.R. 698=1941 P.W.N. 234=22 Pat.L.T. 374=13 R.P. 653=A.I.R. 1941 Pat. 390.

-S 16-Occupancy raivat-No suit or proceeding pending for recovery of arrears of rent-Right to apply under S. 16 without applying under S. 112-A, Bihar Tenancy Act.

Quaere.-Whether an occupany raiyat against whom no suit or proceeding is pending for recovery of arrears of rent of his holding is entitled to make an application under S 16 of Bihar Act IX of 1938 without having applied for settlement or reduction of rent under S. 112-A of the Bihar Tenancy Act. (Agarwala and Shearer, JJ.) KAMESHWAR SINGH BAHADUR V RAMESHWAR SINGH. 21 Pat. 704=1942 P.W.N. 205=205 I. C. 136=15 R P. 247=9 B.R. 197=24 P.L.T. 113 A.I.R. 1943 Pat. 66.

-S 16 (1)-Applicability-Relationship of land lord and tenant-If should subsist at time of application for reduction.

There is no warrant for holding that the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act has no application if the relationship of landlord and tenant has ceased to exist when rent reduction proceedings are commenced. If a relationship of landlord and raivat existed between the parties during the period in which the rent sought to be reduced accrued, then it matters not whether such relationship is subsisting when application is made under S. 16 (1) of the Act to reduce the arrears due to the exlandlord. (Harries, C.J., and Vorma, J.) SREE KANT LAL v. Alodhya Singh. 194 I.C. 99=7 B R. 698=22 Pat.L.T. 374=1941 P.W.N. 234=13

reducing decretal amount and granting instalment— Absence of prior application for stay—furisdiction of executing Court to execute original decree and hold sale.

Where an application is made under S. 16 of Bihar Act IX of 1938 to reduce the rent\_due under a decree for arrears of rent, the Rent Reduction Officer is fully empowered to reduce the decretal amount due to convert the decree into an instalment decree. Under S. 19 of the Act, the moment the Rent Reduction Officer has reduced the arrears and granted instalments, execution of the original decree cannot proceed. The executing Court has to give effect to the order which is made with jurisdiction. Whether or not a previous application had been made to stay proceedings under S. 17 of the Act, pending the result of rent reduction proceedings, further execution cannot proceed once the Rent Reduction Officer has made an order reducing rent and granting instalments, and the executing Court has no jurisdiction to sell the judgment debtor's property in execution of the decree as it originally stood. (Harries, C.J., and Varma, J.) SREE KANT LAL v. AJODHYA SINGH. 194 I.C 99=1941 P.W.N. 234=7 B.R 698=22 Pat. L.T. 374=13 R. P. 653=A.I.R. 1941 Pat. 390.

Upon a true construction of S. 18 (2) (a) of Bihar Restoration of Bakasht Lands Act and Reduction of Arrears of Rent Act, the Collector must dismiss the application of a tenant under S. 16, unless the tenant has complied with the three requirements of S. 18 (2) (a) (i), (ii) and (iii). A tenant who has not complied with all the three has no right to claim a reduction of rent. (Harries, C.J., and Varma, J.) SREE KANT LAL v. AJODHYA SINGH. 194 I.C. 99=7 B.R. 698=22 Pat. L.T. 374=1941 P.W.N. 234=13 R.P. 653=A.I.R. 1941 Pat. 390.

——S. 22—Commissioner's powers of Interference— Order under S. 69, Bengal Tenancy Act, at variance with evidence—Interference.

In view of S. 22 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, a Commissioner has no power to revise orders of the Restoration Officer under S. 69 of the Bengal Tenancy Act, unless the latter has acted without jurisdiction or there has been some material irregularity. Where the Restoration Officer accepts self-contradictory statements at at their face value and brushes aside documents, and passes an order at variance with the evidance his order is without jurisdiction and must be held to be perverse so as to justify interference in rivision. (Middleton.) DIPA SINGH v. BANWARI SINGH. 8 B.R. 93.

S. 22—Finding of fact—Interference—Powers of Commissioner.

A finding of fact should not be interfered with in revision by the Commissioner unless it can be characterised as perverse. The mere fact that the Commissioner considers that the Restoration Officer had not sufficient reasons for believing the genuineness of an alleged settlement cannot justify his interference with a finding of fact by the Restoration Officer. (Middleton.) SARJUG SINGH v. SHEO SHANKAR MAHTON. 8 B.R. 28.

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- S. 22—Finding of fact—Interference—Powers of Commissioner.

Unless a finding of fact arrived at by the Restoration Officer is perverse or contrary to the evidence, and can be said to be absolutely untenable, the Commissioner is not justified in upsetting a pure finding of fact in revision, merely because he thinks that there was no sufficient reason for the lower Court to reject a document. (Middleton) MAHOMED MOBIN v. KEDARNATH THAKUR. 8 B.R. 42.

Where in a case under the Registration of Bakasht Lands Act, the Registration officer has entirely disregarded important evidence and ignored the recitals in a document of settlement, the commissioner is entitled in revision to interfere on questions of fact. The circumstances being exceptional, such interference is justified and the Board of Revenue will not allow a second revision on that ground. (Middleton.) MAHABIR SINGH v. RAMDAS ROUT. 8 B.R. 330.

5. 22-Revision—New point—Plea of nonfoinder of parties—If can be raised for first time in second revision to Commissioner.

Where a point as to non-joinder of parties is taken for the first time in second revision before the Commissioner, he is justified in declining to allow it to be raised. (Middleton.) Surendradeo Narain v. Droki Singh. 8 B R. 149.

——— S. 22—Revision—Powers of Board of Revenue— Power to interfere in cases of non-joinder or other defects in application.

In cases under the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, it in open to the Board of Revenue in revision to consider whether the defects or omissions in an application, such as non-joinder, are so substantial that the application should be regarded as not maintainable and an order grauting restoration is therefore without jurisdiction. (Middleton.) DASO KOERI V. RUPA MAHTO. 7 B.R. 630=1941 P.W.N. 246.

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Rules under—R. 123—Not retrospective.
R. 123 of the new rules under the Bihar Tenancy Act cannot be given restrospectice effect. (Middleton.) MAHOMED YUNUS v. BISHESHWAR SINGH. 1941 P.W.N. 746=8 B R. 314.

S. 5-Co-sharers landlords—Person inducted on land by one of them—Rights of.

A person who is inducted upon the land belonging to a number of co-sharers by one co-sharer without the consent or authority, express or implied, of the former is not a raiyat in respect of the entire land and cannot acquire occupancy right in it by being in possession for 12 years or upwards. (Fasl Ali, C.J., Chatterji and Sinha, JJ.) KANIZ FATMA v. HOSSAINUDDIN AHMAD. 22 Pat. 382=207 I.C. 353=16 R P. 21=9 B R. 401=1943 P.W.N. 161=24 P.L.T. 175=A.I.R. 1943 Pat. 194 (F.B.).

S. 13—Purchase of share of tenure—Notice not given to landlord—Purchaser not impleaded in rent suit—Decree, if affect his interest.

There is nothing in the Bihar Tenancy Act to suggest that the title of the transferee is not complete until the landlord receives rotice of the transfer. The mere fact that the Court does not

carry out the directions contained in S. 13 of the Act cannot affect the title of the transferee, nor can his failure to deposit the landlord's fee. If, therefore, in a rent suit against the recorded tenants, the landlord does not implead the transferee who has purchased a share in the tenure, the decree does not affect his interest. (Fasl Ali. C.J. and Agarwala, J.) CHANDRA SEKHAR MESSIR V. JAGARNATH SINGH. 24 Pat. 148=1945 P.W.N. 338=A.I R. 1945 Pat. 313.

——S. 13—Scope—Sale of tenure in execution—Confirmation of sale and delivery of possession to purch Subsequent sust against original tenant for rent—Execution—Sale of tenure in execution of such decree—Legality.

The effect of S. 13 of the Bihar Tenancy Act is that on an involuntary sale of a permanent tenure being confirmed by the Court, title in the tenure passes to the purchaser at the sale, and the transfer is complete not with standing that the landlord's transfer fee has not been deposited or paid. The liability of the original tenant for payment of rent comes to an end on confirmation of the sale. Therefore any proceedings for rent after the completion of the transfer must be against the transferee, and any decree passed in a suit against a person other than the transferee cannot confer on the landlord any right to ignore the interest of the transferee. Where, after a tenure had been sold in execution and possession thereof had been delivered to the purchaser after confirmation of the sale, a landlord sues the original tenant for rent and obtains a decree, he cannot, in execution of such decree, bring to sale the tenure which had passed to the purchaser in execution before the suit. (Agarwala and Imam, JJ.) PRABHABATI v. LALJI MAHTON. 23 Pat. 356=216 I.C. 273=11 B.R. 130=17 R.P. 136=1944 P.W.N. 144=A.I.R. 1944 Pat. 252.

S. 21—Applicability—Ghairmazrua land—Settlement for residential purpose after T.P. Act—Entry

showing possession of occupant-Value of.

S. 21 of the Bihar Tenancy Act has no application to the case of land which is not settled with a person as a raiyat; where the land is ghairmasrua land with a house and sehan on it and is settled after the T.P. Act for residential purposes, there being no registered instrument, an entry in the record-of-rights showing a person as being in possession of the land with the house and sehan on it, falls outside the purview of record-of-rights under Ch. X of the Bihar Tenancy Act, and no inference of permanent tenancy can be drawn. Such an entry is not meant to be a decision as to the rights of the landloid and tenant respectively (Harries, C.J., and Dhavle, J.) RAM RAN BIJAYA PRASAD SINGH v. RAMJIVAN RAM. 200 I.C. 769=8 B.R. 727=15 R.P. 11=23 Pat. L.T. 294 A.I.R. 1942 Pat. 397.

——Ss. 22 Expl. and 112-A—Applicability—Holding owned by Hindu father—Father and sons forming joint family—Sons purchasing holding in their names— Right to apply for reduction of rent.

It is only an occupancy raiyat who can apply for reduction of rent under S. 112-A of the Bihar Tenancy Act. In the case of holding which is owned by a Hindu father, his undivided sons who form a joint family with him must be deemed to have an interest in the proprietary right of their father. They cannot therefore have occu-

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pancy right as well in the holding by reason of their having purchased the holding in their individual names in the absence of proof that the purchase was made out of self-acquired property or that the family had separated. Explanation to S. 22 of the Act cannot save the undivided sons of the proprietor. (Middleton.) Shibanath Sahu v. Suraj Mohan Thakur. 8 B.R. 538.

— (as amended in 1907 S. 22 (2)—Co-sharer in possession after purchase of holding in execution of rent decree—Satus of—Decree for money payable by him to co-sharers—Execution—Limitation—Sch. III, Art. 6 Bihar Tenancy Act—Applicability—Provincial Small Cause Courts Act, Sch. II Art. 8—Order in execution of decree against co-sharer—Second appeal—Maintainability—C.P. Code, S. 102.

A co-sharer landlord in possession under S. 22 (2) of the Bihar Tenancy Act (as amended in 1907), having purchased an occupancy holding in execution of a decree for rent in his favour against the tenant, is not a tenant under his cosharers, and what is payable by him to them is not rent. A suit against such a co-sharer by the other co-sharers for what is payable by him under S. 22 (2) of the Act, is not a suit for rent as contemplated by Art. 8 of Sch. II of the Provincial Small Cause Courts Act, and is therefore cognizable by the Court of Small Causes. No second appeal lies in such a case. An application for execution of the decree in such a suit is governed by the general law of limitation and not by Art. 6 of Sch. III of the Bihar Tenancy Act. (Agarwala. J.) Rajkishore Prasad Narain Sinch v. Mojibul Rahman. 201 I.C. 795=15 R.P. 79=8 B.R. 836=23 Pat. L.T. 348=A.I.R. 1942 Pat. 391.

-S. 22 (2)-Applicability.

S. 22 (2) only applies where the tenant acquires a good title as a landlord also. Harries, C I., and Manahar Lall, I.) BISESHWAR DASS v. SASHINATHIHA. 22 Pat. 133 = 208 I.C. 129=16 R.P. 54=10 B.R. 31=A.I.R. 1943 Pat. 289.

—(as amended in 1907), S. 22 (2)—Scope Cosharer landlord purchaing raiyati—Sub-letting of land to settled raiyat—Latter, if acquires occupancy rights at once.

A settled raiyat, to whom a co-sharer landlord who has purchased an occupancy holding sub-lets the land or any portion of the land comprised in the holding, at once acquires a right of occupancy in it, whether or not the custom of transferability exists in the village in which the holding is situated. Status and rights of co-sharer landlord purchasing raiyati holding prior to 1907 and the effect of subsequent partition allotting that land to another co-sharer, considered. (Meredith and Shearer, II.) Anand Singh v. Medni Singh. 23 Pat. 291—(1944) P.W.N. 183.

——S. 22 (3)—Construction—Occupancy holding—Purchase by thicadar—Effect—Thicadar selling right to co-sharer landlord—Rights and status of latter—Cannot resist claim of other co-sharers to share by partition. HARIHAR PRASHAD SINGH v. HIT LAL SINGH. [see Q.D. 1936—40. Vol. 1, Col. 558.] 192 I.C. 502=7 B.R. 472=13 R.P. 491.

— (as amended in 1934), S. 23 (2)—Scope and effect of—Erection of buildings if impairs value of land or renders it unfit for purposes of

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tenancy-Residence of raiyat-If included in

purpose of tenancy.

Under S. 23 (2) of the Bihar Tenancy Act, as amended in 1934 it is no longer open to the Courts to speculate or to receive evidence to show that the erection of buildings (not merely a dwelling house as in S. 76) for the domestic or agricultural purposes of the raiyat and his family is or is not an improvement, or does or does not impair the value of the land, or does or does not render it unfit for the purposes of the tenancy. The section says in the broadest terms that it shall not be deemed to impair the value of the land materially or to render it unfit for the purposes of the tenancy. The question as to what proportion of the area of the tenancy is occupied by the structures erected thereon is no longer a point on which such a case has now to be decided. The purposes of an agricultural tenancy include the erection of a building for the domestic purposes of a raiyat and the residence of the raiyat is covered by S 23(2) (c). (Rowland and Chatterji, JJ.) SAHDEO SINGH v. JADU MISTER. 199 I.C. 631-8 B.R. 551-1942 P.W.

N. 84=14 R.P. 598=A.I.R. 1942 Pat. 370.

(as amended in 1938), S. 23-A (b)—Scope—If ultra vires or inoperative by reason of repugnancy to S. 37. Contract Act—Government of India Act, S. 100.

S. 23-A (b) of the Bihar Tenancy Act as amended in 1938 deals with a provincial subject and is not ultra vires or inoperative by reason of any actual repugnancy to an All India Act, viz., S. 37 of the Contract Act. (Rowland and Chat-NARAYAN SINGH. 21 Pat. 336=8 B.R. 519=14 R.P. 548=5. F.L.J. (H.C.) 79=199 I.C. 182=1942 P.W.N. 66=23 P.L.T. 143=AI.R. 1942 Pat. 296.

-(as amended in 1938). S 26-A.—Applicability -Homestead land-S. 182-Object and scope of.

It is well settled that a tenant who is not a raiyat in respect of a piece of homestead land, but is so in respect of the agricultural land which he holds in the village, and the homestead land is held otherwise than as part of the tenant's holding as a raiyat, must be regarded as holding the homestead land in accordance with the provisions of the Bihar Tenancy Act in the absence of any local custom or usage. S 26 A of the Act read with S. 182 of the Act would apply to the homestead land in the same way as it is applicable to land held by a raiyat. The land would therefore be transferable under S. 26-A. (Sinha and Das, JJ.) G, M. PRASAD SAHI v. PRIKHA. 24 Pat. 366=1945 P.W.N. 468=A.I.B. 1945 Pat. 428.

-S. 26-A (as amended in 1938)—Applicability to under-raiyat—Right of under-raiyat to

transfer land.

Occupancy holding in S. 26-A of the Bihar Tenancy Act refers to the holding of an occupancy raiyat and not the land of an under-raiyat having a right of occupancy. S. 26-A does not confer any right of transfer on an under-raiyat even when read with S. 48-B of the Act. (Rowland, J.) Abass Khan v. Mahomed Hussain. 195 I.C. 866=14 R.P. 168=7 B.R. 981=22 Pat. L.T. 749=A.I.R. 1941 Pat. 593. -S. 26-B (as amended in 1938).-Scope-

Title extinguished by rent sale in execution of decree before 1934—If revived. See Bih. Ten. Act, S. 26-N. 22 Pat. 370 (F.B.).

-S. 26-B-Scope-Transfer after 1-1-1923 Landlord not recognising—Deposit of transfer fee-If makes transfer binding on landlord— Questions of title--Jurisdiction of Revenue Court to decide.

The procedure for payment of a landlord's transfer-fee under S. 26-B of the Bihar Tenancy Act cannot be uttlised to compel the landlord to recognise a transfer which he had not previously recognised. Where a landlord has not recognised a transfer effected after 1-1-1923, it is not hinding on him without notice as provided by the proviso in S. 26-B. He cannot be compelled to recognise a transfer by a tenant whom he had never recognised or accepted as a tenant. A Revenue Court is not the proper forum to decide contested questions of title such as whether a transfer is a real transaction or only a nominal one, or whether the transferee and his heirs had been in possession. (Middleton.) GAWRI SHANKAR RAM v. GIRJA PRASAD SINGH. 7 B.R. 940.

-S. 26-N—Applicability—Rent decree fully executed prior to section coming into force.

Though S. 26-N which was introduced into the Bihar Tenancy Act by the (Amendment) Act, 1934, was expressly made retrospective, it could not possibly affect rent decrees which had been obtained and which had been fully executed previous to the section coming into force. The section will apply to all cases which had not been the subject-matter of litigation or which were actually the subject-matter of litigation when the Amending Act came into force, namely, on 10th June, 1935. It can have no application whatsoever when the transferee had been lawfully ejected before the Amending Act came into operation. The section cannot, therefore, affect the rights of a purchaser who had purchased the property in execution of a rent decree and obtained possession before the Amending Act actually came into force. (Harries, C.J., and Manohar Lall. J) RAJA JHA v RAMCHANDRA JHA. 7 B. R 720=194 I.C. 199=13 R.P. 674=1941 P.W.N. 450=22 Pat.L.T. 505=A.I.R. 1941 Pat. 455.

-S. 26-N (as amended in 1934)—Scope and effect—Rent sale in execution of rent decree before Act—Purchaser's right—If affected— Rights already extinguished—If can be revived— S. 26-B, proviso.

Neither S. 26-N of the Bihar Tenancy Act as amended in 1934 nor the proviso to S. 26-B of the Act as amended Sin 1938, which replaced the old section 26-N, though expressly made retrospec-tive can affect any title which had already been acquired under a rent sale held in execution of a valid rent decree under the Bengal Tenancy Act then in force. An occupancy holding which was not transferable without the landlord's consent under the law then in force (Bengal Tenancy Act), was purchased by the plaintiff under a registered sale deed of 10—6—1917, but the plaintiff did not get his name entered in the landlord's sherists. In 1932 the landlord sued the recorded tenant's heir and obtained a rent decree against that heir and brought the holding to sale in execution of that decree. Defendant 2 purchased the holding at the sale and purported to take delivery of possession in 1934. In 193

defendant 1 obtained a money decree against defendant 2 and in execution attached the hold-ing. The plaintiff on the basis of his purchase preferred a claim which was disallowed in 1938 and he then brought a suit under O. 21. R 63, C. P. Code, to establish his right to the holdings.

Held, that the defendant No. 2 having purchased the disputed holding before the Bihar Tenancy Amendment Act of 1934, came into force at a rent sale held in execution of a valid rent decree under the Bengal Tenancy Act then in force, he was not entitled to take the benefit of old S. 26-N of the Act or the proviso to S. 26-B of the Act as amended in 1938. The plaintiff's title having been already extinguished by the rent sale of 1933, his suit must fail. (Fazl A:i, C.J. SAR CHITIST AND CHINTAMAN MANDER V. SIA RAM MANDAL. 22 Pat. 370=207 I.C. 209=16 R.P. 17=9 B.R. 383=24 P.L.T. 150=1943 P.W.N. 101=A I.R. 1943 Pat. 189 (F.B). -S. 29-Applicability-Rent agreed upon in

course of proceeding for settlement of fair rent. A rent agreed upon in the course of a fair rent settlement proceeding cannot have the force of a rent fixed under S. 29 of the Bihar Tenancy Act especially when there is no registered contract (Swanzy.) GAJO SINGH v. SATGURU SADAN. 9 B.R. 142.

-(as amended in 1937), Ss. 29 and 112-A (1) (a)—"Enhancement"—Rent increased by compromise in suit-Effect-Cancellation as enhancement under S. 112-A (1) (a)—Jurisdiction of Rent Reduction Officer.

The question whether an increase in rent of a holding is an enhancement under S 29 of the Bihar Tenancy Act is a question of fact, or a mixed question of fact and law to be determined by the authority competent to cancel enhancement under S. 112-A (1) (a) of the Act. The Rent Reduction Officer, appointed to discharge the functions of the Collector under S. 112-A, has jurisdiction to consider and decide that question. He has jurisdiction to decide wrong as well as right. If he decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the deci sion, however wrong, cannot be disturbed. Where the rent of a holding is increased as the result of a com promise in a suit, it cannot be said that the rent settled by the compromise is not an enhancement under S. 29 of the Bihar Tenancy Act. On the other hand the Rent Reduction Officer would be perfectly justified and would be within jurisdiction in treating the increased rent as an enhancement and cancelling it under S. 112 A (1) (a) (Sinha and Pande, JJ.) PRABHU v. DOMA. 24 Pat. 434.

S. 29 first proviso—Applicability and scope -Illegal enhancement paid for more than three years.—If becomes legal.

The 1st proviso to S. 29 of the Bihar Tenancy Act refers only to Cl. (a) of S. 29. An extra levy which is illegal does not become legal under the proviso when it has been paid for three years. The proviso only provides that if an enhanced rent has been actually paid for three years there is no need for the contract of enhancement being in writing and registered. (Middleton.) SH HAMID-UD-DIN v. FIRANGI SINGH. 8 B.R 775. SHAH

-S. 29 proviso (i)—Scope and effect of— Enhancement exceeding two annas in the rupee paid for theree years—If made legal—Starting point under S. 112 A (d).

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Proviso (i) to S. 29 of the Bihar Tenancy Act does not apply to an enhancement exceeding two annas in the rupee, but only applies to make a contract which is not in writing registered, en-forceable if the enhancement has been paid for three years. It does not say that an enhancement exceeding two annas in the rupee is legal as soon as it has been paid for three years. Such an enhancement can therefore be disregarded for purposes of S. 112-A (d) of the Bihar Tenancy Act. (Middleton.) JAGAT PRASAD SINGH v. KULDIP SINGH. 8. B.R 694.

-S. 38 (as amended by Act VIII of 1937) -Repeal of-Effect-Suit for rent-Claim to abatement on ground that land is covered with

sand-Power of Court to grant relief.

Up to the amendment of the Bihar Tenancy Act in 1938 by the Amendment Act VIII of 1937 which repealed S. 38 of the Bihar Tenancy Act, an occupancy tenant had the right to maintain a suit for abatement of rent on the ground that his holding or a portion of it was covered with sand, and both occupancy raiyats and other tenants could in a suit for rent against them, claim relief on the same ground relying on the rule of justice equity and good conscience under which Courts have always the power to grant relief on this ground in suits for rent. The repeal of S. 38, by the Amending Act of 1937, has only deprived an occupancy raiyat of his right to obtain relief of abatement by suit, but the right of every tenant of agricultural land including occupancy raiyats to obtain relief be way of abatement in a suit for rent against him has not been affected by the Amendment Act. (Agarwala, 1.) SHEONANDAN PRASAD SINGH v. KRISHNA CHANDRA. 197 I.C. 694-8 B.R. 271-14 R.P. 342-22 Pat.L.T. 789 =A.I.R 1941 Pat. 611.

-Ss. 40 and 112—Commutation—Chaulaba rent-Right to commutation-Interference regards rotes and calculation in commutation.

Chaulaba rents can be commuted and the tenants are entitled to apply and have such rents commuted. If such commutation is refused, the Board will interfere in revision. But the Board will not interfere as regards the rates and calculations which result only in very small differences. (Middleton.) DILCHAND MAHTON v. SHAH MD. SAJJAD. 8 B.R. 438.

-S. 40-Commutation of rent-Evidence of realisation-Decrees for rent-Value of.

Rent decrees may be some evidence of realisation in cases of commutation of rent but the value of such evidence must in any case, be appraised, and when the decrees are based on cropcutting experiments made in a few plots for one year only, clearly the value of such evidence as to realisation is practically nil. The question is one of fact. (Middleton.) Alakh NARAIN SINHA v. DAHU MAHTON. 10 B.R. 180.

-S. 40-Scope-Illegal realisation by landlord-If can be taken into account—Application of past prices to ascertain cash values of previous realisations-Proprietv.

All illegal realisation by the landlord cannot be taken into consideration in commutation proceedings under S 40 of the B.T. Act. Where a landlord who was under the record-of-rights entitled only to half, has been consistently realising 9/16 of the produce, the 1/16 is an illegal realisation

and should not the taken into account. It is not correct under S. 40 to apply past prices for ascertaining the cash value of previous realisations; as that would be inequitable the tenants. (Middleton.) SAHODRI v. SH. ABDUL RAUF. 1941 P. W.N. 491.

-S. 40 (4) - Applicability and Scope - Manhunda rent-Determination of rent operating as reduction of

cash equivalent of produce rent—If illegal.
S. 40 (4) of the B. T. Act applies to Manhunda rent and it is not illegal to determine a rent which in effect is a reduction on the cash equivalent of the produce rent as fixed by the document creating the Manhunda rent. There is no warrant for holding that a Revenue Court cannot under the guise of commutation vary a contract between the landlord and the raiyat. A raiyat cannot contract himself out of his right to apply for commutation, and if the provisions of the law for effecting commutation make it compulsory (as they do) to have regard to certain factors which may result in a reduction of the rent, the landlord cannot plead that this reduction is illegal. (Middleton.) DWARKADHISH PRASAD SINGH v. KARTIC MISIR. 8 B.R. 177.

-S. 40 (4) (c) - Rent decree of Civil Court-Admissibility as evidence of realisation-Value of such

A Civil Court decree for rent is not inadmissible as evidence of realisation in a rent commutation matter. Such a decree is admissible as some evidence of realisation, although realisation by rent decree is only a very rough guide for fixing a commuted rent. There is nothing illegal or improper in considering a rent decree in such light. (Middleton.) BASDEO SINGH v. LACHH-UMAN KISHORE SARAN. 10 B.R. 376.

-S. 40 (6) (as amended in 1938)—Collector's order-Finality-Revision-Interference-When justified.

Where an appellate order is declared by-law to be final, the superior revenue authorities, such as the Commissioner and the Board of Revenue cannot interfere in revision either on the ground of any error of law or on the ground that the order has proceeded on a wrong view of fact. But the Board or the Commissioner may interfere with an order which is, of itself, without jurisdiction. Revision is in the discretion of the revising Court and no party has a prescriptive right to have an order modified in revision. Under S. 40 (6) of the Bihar Tenancy Act as amended in 1938, the decision of the Collector in a commutation case, and that of the prescribed authority on appeal are final, and unless they are without jurisdiction, cannot be interfered with in revision by the Commissioner. (Middleton) BHATU MAHTON v. AHSANUL ZAFAR. 10 B.R. 335.

-S. 40 (6)—Scope—Order rejecting landlord's objections to commutation-Appealability-Remedy.

Under S. 40 (6) of the Bihar Tenancy Act, an appeal lies from an order under S. 40 (3) commuting rent and not from an order rejecting the landlord's objection to commutation. Where in a commutation case, the landlord objects on the ground that the applicant is not in possession and is not entitled to commutation, and the objection is rejected by the Revenue Officer, there is no

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The proper remedy of the landlord is a tion. revision. application to the Commissioner. (Middleton.) SIDHESWAR SINGH v. RAM KIRPAL SINGH. 8.B.R 329.

-S. 40-A-Scope-If overrides S. 112-Revenue Officer invested with power to reduce rent-Jurisdiction to reduce rent commuted under S. 40 by compromise.

S. 40-A of the Bihar Tenancy Act cannot be read as overriding the provisions of S. 112; S. 112 is quite independent of S. 40-A. S. 40-A only prohibits further reduction of rent within 15 years at the instance of the tenant just as much as it prohibits enhancement of the rent within 15 years at the instance of the landlord when tent had been commuted under S. 40, except under certain conditions. Under S. 112, if it becomes necessary in the interests of public order or of the local welfare, the Provincial Government has the authority to invest a Revenue Officer with the power to settle all rents without exception, including even rents which have been commuted under S. 40. A Revenue Officer so invested with power to reduce rent has jurisdiction to reduce the rent of a holding which was commuted either under S. 40 or by agreement between the tenant and the landlord between the 1st day of January, 1911, and the 31st day of December, 1936. Where in a proceeding under S. 40 of the Act, the rent was reduced according to a compromise between the landlord and the tenant and the Revenue Officer drew up a schedule under S. 40 stating that it would take effect from 1st September, 1933, the order of commutation is one under S. 40, though the compromise may have been the basis as to the extent of the commutation. If the rent is reduced according to the principles laid down in the clauses mentioned in S. 40-A, there is substantial compliance with the section and the order of reduction cannot be said to be without jurisdiction. (Fazi Ali, C.J. and Imam, J.) YASIN v. TARAMAHTON. 24 Pat. 597= A I R. 1946 Pat. 15.

-S. 48-Applicability-Occupancy holding-Raiyat carving out portion and settling same with tenant under registered patta for non-agricultural purposes—Suit by heirs of raivat against successor of tenant—Rent payable—Rate fixed by Act or rate fixed in patta—Transfer of Property Act—

Applicability.

The applicability of the Bihar Tenancy Act depends upon the nature of the original tenancy and not on the character of the parcels which go to compose the land forming the tenancy. The provisions of the Act will apply if the lease is for agricultural purposes and not because the land is agricultural. The land in dispute was the occupancy holding of M, who was the occupancy raiyat thereof. M settled a part of the land with defendant No. 1 who was the manager of an institution. He entered into possession under a registered patta, dated 14th November, 1918, agreeing to pay an annual rental of Rs. 32. The holding, out of which, the land was so settled was at the time an agricultural holding. M died without issue. The plaintiffs, who were the heirs of M, brought a suit in 1938 against the 1st defendant and the 2nd defendant, the present manager of the institution, for recovery of arrears of rent contending that they sued in their capacity as co-sharer landlords, and that the suit was governed not by S. 48 of the Bihar Tenancy Act but by the T. P. Act. The defendants pleaded that the plaintiff's predecessor having been found to have been in possession as the raivat of right of appeal to the Collector from such reject an occupancy holding, S. 48 of the B. T. Act

plied. It was found that the object of the tenancy ereated in 1918 in favour of the 1st defendant was not for agricultural purposes, though the nature of the original tenancy was undoubtedly agricultural.

Held, (1) that the case was governed by the Bihar Tenancy Act, the holding being an agricultural holding; (2) that the 2nd defendant was an under-raiyat under the plaintiffs; and (3) that he was liable to pay rent not at the jama of Rs. 32 fixed under the patta of 1918, but only at the rate provided by S. 48 of the Bihar Tenancy Act. (Manohar Lall and Chatterji, JJ.) JADO SINGH V. BISHUNATH LALL. 196 I C. 849=22 Pat L.T. 821=14 R.P. 257=8 B.R. 127=A.I.R. 1942 Pat.

Ss. 48-A and 48-B (as amended in 1938) -Applicability and scope-Under-raigat in possession for more than 12 years—Service of notice of ejectment-Subsequent suit-Death of tenant -Amendment Act coming into force-Effect-Accrual of occupancy rights-Retrospective operation-Rights of legal representative to continue in

possession. S. 48-A of the Bihar Tenancy Act, as amended by Act XI of 1938, is clearly retrospective and applies to all persons who have held as underraiyats and who have not been ejected when the Act came into force. A notice served under S. 49 of the Act cannot extinguish the under raiyat's interest, it merely furnishes a cause of action for an ejectment suit. Until the tenant is ejected in execution of a decree his rights cannot be extinguished. S. 48-A is expressly made retrospective and would apply to pending actions. Where it is found that the tenant was in continuous possession of the disputed land as an underraiyat for more than 12 years before the service of notice under S. 49, he must, by operation of S. 48-A, be deemed to have acquired a right of occupancy in the land before the notice was served on him under S. 49, and no decree in ejectment can be passed against such tenant after the coming into force of the Amendment Act, though the suit was filed before, and pending at the time of the coming into force of the Amendment Act of 1940. The service of a notice under S. 49 in such a case is quite ineffective. The fact that the tenant dies during the pendency of the suit would make no difference, when he has under S. 48-A acquired occupancy rights before the date of the suit. S. 48-B of the Act as amended would apply, and on the tenant's death his interest in the land devolves upon his heirs as if the land had been held by him as an occupancy raiyat. The landlord would not be entitled to a decree for possession as against the heir who is impleaded as the deceased tenant's legal who is impleaded as the deceased tenant's regar representative on his death. (Fazl Ali, C.J. Chatterji.and Sinha, JJ.) SADHU SHARAN SINGH v. DEONATH SARAN RAI. 22 Pat. 411=207 I.C. 401=16 R.P. 33=9 B.R. 419=24 P.L.T. 197= 1943 P.W.N. 109=A.I.R. 1943 Pat. 206 (F.B.). -S. 48-A, (as amended by Act XI of 1938)-Scope and effect-Decree for ejectment-Appeal-

-Accrual of occupancy rights. Where during the pendency of an appeal from a decree in an ejectment suit, S. 48-A of the Bihar Tenancy Act as amended by Act XI of

S. 48-A, coming into force pending appeal-Effect of

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must be deemed to have acquired occupancy rights in the land in dispute if he has continuously held the land as an under-raivat for more than 12 years before the suit. The fact that notice to quit was given to the tenant (defendant) during that period would not prevent the accrual of occupancy rights. (Agarwala, J.) JAI NARAIN RAUT v. DHANESHARI. 192 I.C. 181=13 R.P. 415=7 B.R. 328=A I.R. 1941 Pat. 222.

-S. 48-A-(as amended in 1938), Scope-Retrospective operation—Government of India Act, S. 292-Construction and scope-If affects applicability of

S. 48.4, B. T. Act. S. 48-A of the Bihar Tenancy Act, as amended in 1938, is retrospective. The object of that section was to quiet titles which are more than 12 years old and to ensure that if during these twelve years the under-raiyats have not been the ejected, they shall have the right to remain on the land as if they were occupancy tenants. In the application of the section to pending litigations, there is no distinction between cases where the decree of the lower Court is affirmed by the appellate Court and those in which it is reversed nor does S. 292 of the Government of India Act of 1935 prohibit the giving of retrospective effect to S. 48-A of the Bihar Tenancy Act. There is nothing in S. 292 to suggest that there was any intention to curtail the power of the Indian legislature or other competent authority to decide in what manner a new law should ope rate as against the existing rights. All that S. 292 provides is that the existing law shall remain in force until it is repealed and not that the rights which have accrued under that law shall continue to be exercised even after the date of the repeal. S. 292 can obviously have no application to a case where pending appeal the question of the applicability of S. 84-A of the new Bihar Tenancy Act arises after the old law has been changed and the new section has come into operation. If the Legislature can make new laws and unmake old laws, it can also create new rights as well as take away rights already accrued. S. 48-A of the Bihar Tenancy Act was intended to be given effect to in the case of all under-tenants whose rights were in dispute at the time the section came into force irrespective of whether they had been holding lands since before its enactment or otherwise. (Harries, C.J., and Fazl Ali, J.)
BHAGWATI PRASAD v. SAHADEO UPADHAYA. 195
I.C. 339=14 R.P. 116=7 B.R. 918=4 F.L.J.
(H.C.) 146=1941 P.W.N. 216=22 Pat.L.T. 356
= A.I.R. 1941 Pat. 413.

-S.48-A-Scope-Retrospective operation-Underraivat in continuous possession for 12 years-Notice to quit - Amending Act coming into force-Effect-Electm nt suit-Maintainability

S. 48-A of the Bihar Tenancy Act as amended in 1938, is clearly retrospective and applies to all persons who have held as under-raiyats for twelve years continuously and who have not been ejected when the Act came into force. Even if the landlord had served a notice to quit on the under-raiyat before the amended Act came into force, the suit for ejectment must fail if before the notice to quit the under-raiyat had been in

possession for twelve years.

Quaere: Whether S. 48-A will apply to a case where the under-raivat has been ejected before 1938 comes into force the defendant under-raiyat the amending Act came into force. Harries, C.

J. and Fazl Ali, J.) RAM CHARITAR SAH v. Doma Mian. 1942 P.W.N. 75.

-S. 51—Presumption—Application of—Rent Reduction case—Rent shown in Terij Laggite of 1903 supported by Attested Rent of 1915—Presumption-Rent when first became payable-S 112-A.

The presumption arising under S. 51 of the Bihar Tenancy Act applies not only in respect of a particular succeeding year when it is proved that rent was realised for the immediately preceding year at a particular rate, but also to each successive year one after another, until its operation is arrested by proof on the part of the tenant that the conditions of the tenancy were altered in the mean while. Where the evidence for the landlord, consisting of the Terij Laggite of 1903, which is accepted by the Rent Reduction Officer as genuine specifies the rate of rent which tallies with the attested rent in 1915, that would be sufficient to show that the rents were not changed between those dates, and unless this is rebutted by the tenant, it must be held that the rent has been traced back to 1903. The landlord's evidence supported by the Attestation Note and the presumption under S.51 of the Bihar Tenancy Act would be sufficient to show that the rent first became payable in 1903 or before that year. In proceedings under S. 112-A of the Act, that year must therefore be taken to be the year when the rent first became payable. (Swanzy.) RAJ KISHORE PRASAD NARAIN SINGH v. BISHUN SAHAI SINGH. 8 B.R. 865.

-S. 52 (as amended in 1938)-Applicability—Suit for rent.-Claim to abatement on ground of diluvion—Right to relief—Burden of

proof.
Where in a suit for rent of a holding the defendant-tenant pleads that a portion of the holding having diluviated, he is entitled to a proportionate abatement of rent, the case falls under S. 52 of the Bihar Tenancy Act which gives statutory recognition to the principle which has been recognised by Courts in India that a tenant whether he be an occupancy raiyat or otherwise, is entitled to abatement of rent if the whole or part of the land held by him is diluviated. This relief cannot be denied on the ground taht S. 38 of the Act which gave an occupancy raiyat a right to file a suit for abatement has been repealed by the Amending Act of 1937. The burden of proof is of course on the tenant who has to prove measurement and ascertainment and to show the exact area diluviated in each year. (Rowland and Manohar Lall, II.) SITAL PRASAD v. SURENDRA NATH. 196 I.C. 558=14 R.P. 208=8 B.R. 36=22 Pat.L.T. 795=A.I.R. 1942 Pat. 70.

S. 53—Rent—Instalments—When due. Each instalment of rent is considered to fall due on the last date of the period in respect of which it is payable. Rent is not considered as accruing from day to day. (Agarwala and Rowland, JJ.) CHHATAR SINGH v. SYED SHAH QASIM GHANI. 192 I.C. 213=13 R.P. 444=19 Pat. 824=7 B.R. 344=1940 P.W.N. 994=A.I.R. 1940 Pat. 673.

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When the Register D contains the names of both the proprietor of an interest, the person who is in actual possession must be considered to be the landlord entitled to receive rent. The expression "third person" in the latter part of the section evidently refers to a person other than the one who is recorded in Register D. and cannot mean a person who would be entitled to receive rent according to that Register. (Fazl Ali, C.J. and Agarwala, J.) JADOOPOTEDAR v. CHAMPABATI. 23 Pat. 858=1945 P.W.N. 11=219 I.C. 155=11 B.R 355 = A.I.R.1945 Pat. 157.

-S. 60 -Scope and effect of-Rent receipt by mortgagee-Effect of Bengal Land Registration Act. S. 79.

The effect of S. 60 of the Bihar Tenancy Act read with S. 79 of the Land Registration Act, is that the moment a tenant produces a receipt granted by a person who is a registered proprietor, manager, or mortgagee of a certain estate or his agent authorised to receive rent that receipt should be sufficient discharge for rent, (Fazl Ali, C.J. and Agarwala, J.) JADOOPOTEDAR 7'. CHAMPABATI. 23 Pat. 858 = 1945 P.W N. 11= 219 I.C. 155=11 B.R. 355=A.I.R. 1945 Pat. 157.

-S. 60—Suit for rent by assignee of rent— Assignee not a registered proprietor—Suit, if barred—Bengal Land Registration Act, S. 78.

An assignment of the rents of a holding does not amount to a transfer of proprietary interest in the holding, and if the assignee sues for rent he does not sue as a proprietor. Therefore neither S. 78 of the Land Registration Act nor S. 60 of the Bihar Tenancy Act will be operative to bar the suit by reason of the assignee not being a registered proprietor. (Rowland, I.) RAMSEWAK KURMI v. THAKURJI MAHARAJ. 196 I.C. 552=14 R.P. 206=8 B.R. 34=A.I.R. 1942 Pat. 41.

-S. 60—Suit for rent by assignee of rent— Payment by tenant to registered proprietor-If valid discharge.

In a suit to recover rent by an assignee of the rents of a holding which is held under a proprietor, payment by the tenant to the registered proprietor will be a valid discharge for rent under S. 60 of the Bihar Tenancy Act. The fact that the rents have been assigned will not operate to create a new tenancy the raivats not being a party to the transaction and in the absence of any devolution of the proprietary interest. (Rowland, J.) RAMSEWAK KURMI v. THAKURJI MAHARAJ. 196 I.C. 552=14 R.P. 206=8 B.R. 34=A.I.R. 1942 Pat. 41.

-S. 65—Applicability—Conditions of—Claim by co-sharer for rent due to another co-sharer-Latter not party to suit—Decree—If rent decree.

S. 65, Bihar Tenancy Act, can be applied only if the rent is claimed by the person to whom it is due and in the manner provided by the Act. Though the mere fact that a wrong or excessive claim is made will not necessarily affect the character of the decree, where the claim is in respect of something which is due not to the claimant but to some other person, S. 65 cannot apply. and a decree in such suit will not be a rent decree and a sale in execution of such decree will not be a sale under the Tenancy Act, but only one under the ordinary law not carrying with it any of the incidents of a sale under the Act. (Fazi Ali, C.J. and Agarwala J.) JADU-PAŢI SAHAY v. LALCHAND. 23 Pat. 912=219 LO. 377=11 B.R. 398=A.I.R. 1945 Pat. 146.

<sup>-</sup>S. 60—Proprietor as well as mortgagee recorded in D. Register-Right to receive rent-"Third person" -Meaning of.

-S. 65-Rent decree against recorded tenant Sale in execution after recognition by landlord of another as tenant-Legality as against person recognised as tenant-Latter not party to rent

decree-Effect.

Where a decree for rent is obtained by a landlord against the recorded tenant and a person who had purchased the holding in execution of a money decree if recognised as a tenant by the landlord prior to sale in execution of the rent decree of the landlord, the holding cannot thereafter be sold in execution of the rent decree. The effect of the recognition by the landlord is that a fresh tenancy is created between the landlord and the purchaser under the money decree and unless that tenancy is subject to conditions which would prevent the relationship of landlord and tenant from coming into operation immediately the holding cannot be sold in execution of the decree to which the parchaser under the money decree was not a party. (Agarwala, J.) RAM KISHUN LAL v. JUGAL KISHORE LAL. 199 I.C. 670=8 B.R. 615=14 R P. 610=23 P.L.T. 165=1942 P.W.N. 108= A.I.R. 1942 Pat. 312.

-S. 65-Rent decree-Purchaser in execution not annulling encumbrance-Right to prio-

rity.

The mere fact that a purchaser in execution of his availed himself of his a rent decree has not availed himself of his statutory right to annul the encumbrances does not, in any way, affect the priority conferred on him by S. 65 of the Bihar Tenancy Act. (Agarwala. J.) CENTRAL CO-OPERATIVE BANK v. wala, J.) Central Co-operative Bank v. Kashi Sahu. 193 I.C. 108=13 R.P. 545=7 B.R. 577=A.I.R. 1941 Pat. 243

(as amended in 1937), S. 67-Scope-If

retrospective.

The new S. 67 of the Bihar Tenancy Act does not apply to decree passed before 29th December 1937, as it is not expressed to be retrospective. (Agarwala and Rowland, JJ.) CHHATAR SINGH v. SYED SHAH QASIM GHANI. 19 Pat. 824=192 I.C. 213=7 B.R. 344=1940 P.W.N. 994=13 R.P. 444=AI.R. 1940 Pat. 673.

----S. 67 (as amended by Act VIII of 1937)—Scope—If retrospective—Vested rights under old S. 67—If cut down.

S. 67 of the Bihar Tenancy Act as amended by Act VIII of 1937 cannot be given retrospective operation so as to cut down the rights given by the old S. 67 which was repealed by the Amend-ing Act of 1937. There is nothing in the new S. 67 to suggest that it was intended to apply to rights accrued before it came into force. (Harries, C. J. and Fazl Ali, J.) JAGMOHAN. SINGH v. RAMNANDAN PRASAD NARAYAN SINGH. 20 Pat. 556=13 R.P. 526=1941 P.W.N. 295=192 I.C. 851=7 B.R. 493=22 Pat.L.T. 219= A.I.R. 1941 Pat. 253.

-S. 67—Scope—Right to interest on arrears of rent-If taken away by S. 15 (c) of Act IX of 1938. See Bihar Restoration of Bakasht Land AND REDUCTION OF ARREARS OF RENT ACT, S. 15 (c). 22 Pat.L.T. 996.

-S. 69—Applicability—Dispute between rival landlords—Possession in dispute—Proceedings under S. 69—Propriety.

It cannot be said that S. 69 of the Bihar Tenancy Act should never be resorted to when

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two landlords are disputing; but in a case where two rival landlords are manoeuvering for possession, it would be improper to use the section on the application of one landlord whose possession is disputed with some reason and who is clearly trying to create evidence of possession. To take proceedings under S. 69 in such a case is a misuse of the section. (Middleton.) DWARKA
SINGH v. SURAJ KALI KUER. 10 B.R. 296.

S.69—Applicability—Genuine dispute as to
existence of relationship of landlord and tenant—

Tenants not offering evidence of rent receipts or payment of rent-Right to apply-Proceedings taken-If can be quashed by Commissioner.

Where there is a genuine dispute whether the relationship of landlord and tenant exists between the parties and the alleged tenants do not offer any evidence that they had got any rent receipts or had ever been sued for rents since the survey and settlement, the tenants have no right to apply and proceedings under S. 69 of the Bihar Tenancy Act cannot be maintained. In such a case, the Commissioner has jurisdiction to quash the proceedings taken by the Sub-Divisional Officer. (Middleton.) SHEOBARAN CHAU-DHURY V. RAMSEWAK PANDEY. 7 B.R. 931.

S. 69—Applicability—Title suit—questioning status of tenant—Application by latter under

5.69-Maintainability.

The sub-divisional officer has no jurisdiction to entertain an application under S. 69 of the Bihar Tenancy Act, where a title suit by the landlord is pending which definitely questions the status of the applicant as a tenant and therefore his right to apply under S. 69. (Middleton.) CHANDRIKA CHARAN RAI v. GAJADHAR SINGH. 10 B.R. 167.

-S. 69—Application by some landlords only-Maintainability-Jurisdiction of Court to order-Obiection to maintainability of application not pressed-

Duty of Court to consider.

An application under S. 69, Bihar Tenancy Act, must be by all the landlords; an application which is filed only by some of the landlords is defective and an order on such a defective application is without jurisdiction. Where an objection is raised to a defective application, the Court of first instance is bound to consider such objection even though the objection is not pressed before it. (Swanzy.) NARSINGH NARAIN SINGH v. BHATTU KURMI. 11 B E. 106.

—Ss. 69 and 70 (3)—Application for division of crops by tenant after cutting part—If to be rejected—Application entertained by Sub-Divisi nal officer-Annulment of proceedings by

Commissioner-If justified.

There is no warrant for holding that when a tenant who has cut a part of the crop applies for division of the remainder the application is not maintainable; that is no ground for annulling the p occeedings on the application entertained by the Sub-Divisional Officer who has discretion whether to allow or disallow the application. (Middleton.) DEOSARAN MAHTON v. ISHWARDHARI SINGH. 7 B.R. 859.

-S. 69—Discretion of Revenue officer-Rejection of application on ground that part of holding has not been included in application.

The Revenue officer has full discretion under S. 69 of the Bihar Tenancy Act and he is entitled to reject an application made to him under \$.69 on the ground that the application is only in

respect of part holdings only and hence not maintainable even though the excluded part is not cultivable at all. There is no obligation on him to apply S. 71 (3) of the Act even if he thinks that the crops had been removed from the excluded parts. It is open to him to hold that part of the holding has not been included and that the application is not maintainable. (Middleton.) GAJADHAR SINGH v. CHANDRIKA CHARAN ROY. 8 B.R. 420.

S. 69 and 70—Discretion of Sub-Divisional Officer—Report of sarpanch—Decision on—Inter-

ference by Commissioner.

A sarpanch who was appointed under S. 69 (1) of the Bihar Tenancy Act to divide the produce reported that he had divided the produce and that the landlord refused to take his share and asked for directions. The Sub-Divisional Officer issued instructions and the sarpanch then submitted a fresh report stating that the crop showed signs of damage and pilferage. The Sub-Divisional Officer disregarded this portion of the second report and accepted the khasra. The Commissioner held that the proceedings were irregular on the ground that no reasons were given for believing the first report and not believing the second.

Held, in revision by the Board: (1) that there was no ground on which the Commissioner could interfere with the order of the Sub-Divisional Officer as there was no lack of jurisdiction and there was no material irregularity in not exercising the discretion to refuse to accept the khasra; (2) that though the Sub-Divisional Officer might not have given reasons in full, it did not amount to a material irregularity in coming to a decision whether to accept a report or not, unless it was in gross defiance of the ordinary rules of evidence or procedure; (3) that the Commissioner should not interfere with an order declared by law to be final when there was neither lack of jurisdiction nor a material irregulatity in the application of the law; (4) that the Commissioner was therefore not justified in setting aside the proceedings, and that the same should be restored. (Middleton,) Jai Narayan Lal v. Baldeo Prasad. 9 B.R. 191.

S. 69—Revision—Order by Commissioner without notice to party—Revision by Board of Revenue—Interference.

The Board of Revenue will not interfere in revision with an order passed by the Commissioner without service of notice on a party, when that party has not been prejudiced by such irregularity. His order cannot be held to be bad in law merely on the ground that he thought it unnecessary to serve notice on the party, (Swanzy.) BANWARI LAL v. BHOLA NATH SINGH. 11 B.R. 167.

——— S. 69—Revision—Order of Sub-divisional Officer
—Jurisdiction of Commissioner and Board of Revenue
to interfere.

An order by the sub-divisional officer in an application under S. 69 of the Bihar Tenancy Act is final and cannot be interfered with by the Commissioner or the Board of Revenue in revision, even if it be erroneous in law or based on a wrong view of the facts. (Swanzy.) BALDEO PRASAD v. BHAJAN SINGH. 11 B.R. 281

8. 69—Revision—Powers of Board—Commissioner setting aside order as being without jurisdiction—Death of party during pendency of case

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before Commissioners—Heirs not impleaded—Order of Commissioner—If to be set aside.

Where an order has been set aside by the Commissioner as being without jurisdiction, the Board will not interfere with the Commissioner's order and revive the order passed without jurisdiction merely because at the time of hearing of the case before the Commissioner one of the parties had died and his heirs had not been brought on the record. (Swanzy.) BANWARI LAL v. BHOLA NATH SINGH. 11 B.R. 167.

S. 69-Revision-Powers of Commissioner and Board of Revenue to revise order of Sub-

Divisional Officer.

Neither the Board of Revenue nor the Commissioner has power to revise an order made by a sub-divisional officer in a proceeding under S. 69 of the Bihar Tenancy Act unless there has been a defect of jurisdiction. Where, however both parties have applied to the commissioner for revision on merits and also apply to the Board for revision on merits of the commissioner's order modifying that of the sub-divisional Officer it can be held that they have submitted to the jurisdiction of the superior revenue authorities and on that assumption the Board could pass the orders which seem to it proper. (Middleton.) KASHI SINGH v. SANT SARAN LAL. 10 B.R. 148.

The Commissioner, in dealing with cases under 5. 69 of the Bihar Tenancy Act, should not interfere with the orders passed by a Sub-Divisional Officer, unless that Revenue Officer has acted without jurisdiction or has been guilty of such irregularity as could have caused gross injustice. If the order of the Sub-Divisional Officer has been passed with full jurisdiction and is not unreasonable in the circumstances, the Commissioner should not upset or reverse it. (Middleton) RAM NARAIN SINGH v. RAJOOKHAN. 10 B.R. 239.

——S. 69—Revision - Powers of superior Revenue Courts to interfere—Dispute as to relationship of landlord and tenant—Jurisdiction of Revenue Court.

It is settled law that a Revenue Court has no jurisdiction to pass orders under S. 69 of the Bihar Tenancy Act, if there is a genuine dispute as to the relationship of landlord and tenant, and it is also settled law that if an order is declared by law to be final, the superior revenue authorities cannot interfere with it in revision except on the ground that the order was passed without jurisdiction. (Middleton.) MAHOMED YAHIA KHAN z. NONHOO MAHTON. 11 B.R. 7.

——8.69 and 70—Scope—Proceedings under-Effect of—Suit for rent in Civil Court—Maintainability—No final order by Collector—Civil Court —If can ignore proceedings.

When there have been proceedings under Ss. 69 and 70 of the Bihar Tenancy Act in respect of certain years before the Collector, no suit for rents of those years is maintainable in the Civil Court. Once the Collector passes a final order under S. 70 (4) of the Act it cannot be ignored by the Civil Court. A landlord's suit for rent asking that the proceedings under Ss. 69 and 70 should be ignored is not an application to the Civil Court under S. 70 (6) to enforce the Collector's order as a decree, and the Civil Court is not entitled to ignore the proceedings under Ss. 69 and 70 of the Act. Even if no final order has

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been passed in the proceedings under S. 70 (4), the Civil Court would still be precluded from giving a decree for rent ignoring the proceedings. The remedy of the landlord in such a case is to apply to the Collector to pass a final order. (Meredith, J.) SOMAR SINGH v. BANKE BIHARI LAL. 198 I.C. 390=8 B R. 409=14 R.P. 455= 23 Pat. L.T. 51=A.I.R. 942 Pat. 375.

-Ss. 69 (1) (a) and (b)—Scope—If manda-

Cls. (a) and (b) of S. 69 (1) of the Bihar Tenancy Act lay down the conditions precedent to the Collector making an order to divide the produce and must be complied with before proceedings are taken under the section. (Middle-

notice under.

There is no particular form of notice prescribed under S. 70 (2) of the Bihar Tenancy Act; nor is there any thing in S. 70 (2) which requires that notice should be served personally upon the parties; and no particular method serving the notice is prescribed. All that is necessary is that the parties should in one manner or another he given notice of the fact that the amin is about to make an appraisement. (Meredith, J.) Somar Singh v. Banke Behari Lal. 198 I.C. 390=8 B.R. 409=14 R.P. 455=23 Pat. L.T. 51=A.I.R. 1942 Pat. 375.

Ss. 70 (4) and (5)—Application for division of crops-Allegation that crops had been removed-Power of Deputy Collector to deal with Deputy Collector remarking that no action had been taken and advising party to seek remedy in Civil Court-If final order-Suit-Bar of.

The Collector considering a report under S. 70 (4) of the Bihar Tenancy Act has power to deal with an allegation that the crops have been removed and it is his duty to deal with it and apply the provisions of S. 71 (3) of the Act. It is of course open to the Deputy Collector or to the Collector to refer any question to the Civil Court for decision under S. 70 (6). To advise the parties to the dispute that they may seek any remedy open to them in the Civil Court does not amount to a reference to the Civil Court. Where the Deputy Collector disposes of the allegation that crops have been removed by saying that no action had been taken by the party making the allegation and that he may seek his remedy in the Civil Court, his order is a final order under S. 70 (5) of the Act. No suit will therefore lie. (Agarwala and Shearer, JJ.) Anzar Hussain v. Sham Sing. 1944 P.W.N. 273.

-S. 71 (3)—Applicability—Jurisdiction of Sub-Divisional Officer in proceedings under S. 69.

S. 71 (3) is merely a rule for the guidance of such Courts as are competent to try a rent It does not apply to proceedings under S. 69 of the Act before a Sub-Divisional Officer who has never been vested with any power to try rent suits. Where such an officer finds in proceedings under S. 69, that there was removal of the crops by the tenants and that division would therefore be unfair to the landlords, he has no jurisdiction to constitute himself a Civil Court and to try the money claims of the applicants for rent in cash computed in the manner laid down in S. 71 (3) and give a money decree. If he proceeds in that manner, the whole proceedings are

null and void. (Lee.) JAI PRAKASH NARAIN SIN v. QAMRUDDIN. 11 B.B. 340.

S. 71 (3)—"Divided"—Meaning and eff

of—Duty of sub-divisional officer.

The word "divided" in S.71 (3) of the Bil Tenancy Act cannot be restricted to crops divic by the officer appointed under S. 69 (1) if the is reliable evidence regarding divisions not ma under S. 69 at all. It is irrelevant to consider t divisions made in any preceding year. All that necessary is that the sub-divisional officer shot ascertain, if possible, the fullest divided cro from similar lands in the neighbourhood for t same harvest. (Middleton.) KASHI SINGH SANT SARAN LAL. 10 B.R. 148.

-S. 86-Deed of surrender-Need for reg

tration.

A deed of surrender of an occupancy holdi need not be registered if there are facts de he the deed itself from which the inference can drawn that there was an implied surrender fact. An unregistered ekrarnama effecting surrender may therefore be taken in evidence proof of the surrender. (Agarwala, J.) Sing ESHWAR JHA v. AJAB LAL MANDAR. 7 B.R. 1 13 R.P. 256=190 I.C. 756=A.I.R. 1941 P

-S. 102 (b)-Ghairmazrua Khata-Recor of-rights showing possession of successor original tenant—Tenancy created for resident purposes-Value of entry as regards right tenant.

In the case of a tenancy for residential pu poses the land being ghairmazrua khata of t malik, the record-of-rights showing the possi sion of the widow succeeding to the origin tenant cannot be taken to define her righ because she is not an agricultural tenant and t record-of-rights deals only with rights of ag cultural tenants. (Harries, C.J. and Dhavle, RAM RAN BIJAYA PRASAD SINGH v. RAMJIV RAM. 200 I.C. 769=8 B.R. 727=15 R.P. 11= Pat. L.T. 294=A.I.R. 1942 Pat. 397.

- S. 103—Record-of-rights — Entry Presumption of correctness-Rebuttal-One p of entry—If can be used to rebut another part.
Under S. 103 of the Bihar Tenancy Act,
entry in a record-of-rights gives rise t
presumption as to its correctness, and it is of by evidence that, that presumption is liable to rebutted. One part of the entry cannot be us to rebut another part of it. A plot was record in the record-of-rights as the bakasht of plaintiff (proprietor). In the remarks column to the column to the remarks column to th however, there was an entry that so far as t trees on the plot were concerned half the inter belonged to plaintiff and half to P, the ancest of the defendants who claimed that the land v their bhaoli kasht holding. The entry did 1 describe P as a tenant of the land.

Held, that the entry in the remarks column on the at all imply that P had any interest in the disputed plot, and was not in any way inconstent with P not having acquired some interest the trees by agreement or otherwise withe having acquired any interest in the land on whi the trees stand. (Agarwala, J.) RAM RI BIJAYA PRASAD SINGH v. NAUBAT RAI. 200 281=8 B.R. 656=14 R.P. 644=23 Pat. J.T. =A.I.R. 1942 Pat. 346,

Q.D.-31

—S. 104 (g)—Proclice and Procedure Manual, Rr. 81 and 123—Appeal beyond time— Power of Collector to admit—Discretion to excuse delay—"Heard and disposed of"—Meaning of.

The words "heard and disposed of" in K. 81 of the Practice and Procedure Manual are wide enough to cover all matters of procedure including that of limitation. The Collector has strictly speaking no discretion to extend the period of limitation for an appeal in a matter under S.112-A, B.T. Act laid down by R. 123 read with S. 104 (g) of the Bihar Tenancy Act. R. 81 does not give the Collector a discretion to admit an appeal filed beyond the time prescribed. (Swanzy.) DWARKA PANDEY v. SHAH HAMIDUDDIN AHMAD. 9 B.R. 25.

\_\_\_\_\_S. 104-H\_Civil and Revenue Courts\_

The Civil Court cannot sit in judgment upon the findings of the Revenue Officers, nor can it set aside their orders (except in suits under S. 104-H of the Bihar Tenancy Act) passed with jurisdiction. (Meredith, J.) RAM SUNDER RAUT v. BHAGWAN SINGH. 199 I.C. 154=8 B.R. 503=14 R.P. 545.

S. 104-H—Scope of—Suit by landlord for declaration of illegality of reduced rent roll fixed by revenue officer and for enhancement of rent to old rates—If falls under section. See Court Fees Act, S. 7(12) (c) AND SCH. II, ART. 17 (iii). 22 Pat. L.T. 453.

S. 107 (2)—Scope—Non compliance—Effect— Decision by Special Judge—Finality and binding charucter—Omission to prepare schedule and to make note in entry in record-of rights—If detracts validity or binding character of decision.

Under S. 107 (1) of the Bihar Tenancy Act, the decision of the Special Judge in proceedings under Ss. 105, 105-A and 106 of the Act, has the force and effect of a decree of a Civil Court in a suit between the parties; and is final and conclusive in regard to the matters decided, subject to Ss, 108 and 109-A. The mere fact that no schedule of rents was prepared as required by S. 107 (2) and that no note was made in the record-ofrights of the rent settled cannot detract from the validity and binding character of the decision so as to leave the matter at large. Nor is the party in whose favour the decision is given debarred from enforcing the rights which were determined in his favour by a decision passed on contest by reason of the omission to prepare a schedule or to make a note as required by S. 107 (2). The only effect of the non preparation of the schedule is only that the record-of-rights finally prepared under S. 103-A. (2) has not been altered. It retains the presumption of correctness and therefore it is incumbent on the party seeking to enforce his rights under the decision of the Special Judge to prove that the entry in the record-of rights is not correct [as it has not not been altered in accordance with S. 107 (2)]. He can prove it by evidence including the decision of the Special Judge which has the force and effect of a decree of Civil Court. (Rowland and Manohar Lall, JJ.)
RAM RAN BIJOY PRASAD SINGH v. BALESWAR
OJHA. 198 I.C. 282=14 R.P. 418=8 B.R. 406 =22 Pat. L.T. 771=A I.R. 1941 Pat. 609.

Ss. 109-C, 110 and 112-A-Fair rent settlement proceedings—Compromise filed in course of—

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Rent agreed in-When effective-When first becomes payable.

Under S. 109-C of the Bihar Tenancy Act, a revenue officer may, if satisfied that the rent agreed upon is fair and equitable but not otherwise, settle such rent as fair and equitable, and S. 113 will apply to a rent so settled. A compromise filed in the fair settlement proceedings is ineffective until accepted by the settlement officer under S. 113, the rent takes effect from the next fanancial year. (Swancy.) Gajo Singh v. Sature University of the settlement of the settlement of the same of the settlement of the settlement of the settlement of the settlement of the same of the settlement of the set

—S. 109 (d)—Burden of proof—Landlord showing generally that rent was settled in particular year— Onus of proving exception.

Where the landlords in a rent reduction case have shown satisfactorily that generally speaking the rents of the village first became payable in a particular year, the onus is on the tenants to show that there have been exceptions and that the rents did not alter between that year and a later year. (Swanzy.) Manohar Mod v. Shah Md. Sajjada. 9 B.R. 98.

S. 112—Government Notification dated June 19, 1937—Occupancy raiseds—If include sharahmoian

raiyats

The expression "occupancy raiyats" in the Government Notification dated June 19, 1937 issued under S. 112 of the Bihar Tenancy Act, means "raiyats having a right of occupancy" That is to say, it was meant by Government to exclude raiyats not having that status. It was not meant to exclude raivats such as raivats at fixed rates of rent, who have a higher status which, though being different in some of its incidents, nevertheless does include occupancy rights. The expression 'occupancy raivats' will cover therefore, the case of sharahmoian raiyats since they have occupancy rights and more. The Notification must, therefore, be taken to give the Rent Reduction Officer power to deal with any illegal enhancement of the rents of sharahmoian raiyats (Meredith, J.) RAMSUNDER RAUT v. BHAGWAN SINGH. 199 I.C. 154=8 B.R. 503=14 R.P. 545.

——Ss. 112 and 112-A—Jurisdiction—Application by tenant for reduction of rent—Landlord not made party and notice not served on him—Order of reduction—Validity—If can be given effect to by Court executing decree for rent.

The Kent-Reduction Officer has no jurisdiction to reduce the rent in proceedings under Ss. 112 and 112-A of the Bihar Tenancy Act, where the landlord is not made a party to such proceedings and no notice has been served upon him. An order of reduction or settlement of rent in such circumstances is without jurisdiction and does not bind the Civil Court and has to be ignored by a Court executing a decree for rent at the instance of the landlord. (Manohar Lall, J.) NAND KISHORE LAL v. BASDEO SINGH. 199 I.C. 222=23 P.L.T. 159=8 B.R. 532=14 R.P. 563=A.I.R. 1942 Pat, 258.

Ss. 112 and 112-A Jurisdiction Application for reduction of rent—Plea that application is barred by order under S. 112—Validity of order under S. 112—If can be gone into.

Where the rent of the original katta which has been sub-divided has unquestionably been reduced under S, 112 of the Bihar Tenancy Act, and

it is recorded in proceedings under S. 112 that the parties were present, the mere fact that the name of a deceased tenant appears in the proceedings would not make them invalid. The order under S. 112 operates as a bar, in view of S. 113, to a reduction under S. 112-A (d). An officer acting under S. 112-A, has no jurisdiction to enter into the question of the validity of the prior order under S. 112. (Middleton) BIBI IFATULNISSA BEGUM v. JEHAL DAS. 8 B.R. 726.

. It is not for the Civil Courts to sit in judgment on the decision of the Rent Reduction Officer. If the latter acted with jurisdiction, they were bound by the amount of rent which he found. But, on the contrary, if he had no jurisdiction to reduce the rents, then the Civil Courts could ignore entirely the orders of the Rent Reduction Officer. (Harries, C.J. and Fazi Ali, J.) BHAGWAN SINGH v. RAM SUNDAR. 202 I. C. 97=8 B.R. 848=15 R.P. 89=23 P.L.T. 635=A.I.R. 1942 Pat. 388.

The expression occupancy raiyats used in the notification dated 19th June 1937 issued under S. 112 of the Bihar Tenancy Act, must be given, the same meaning as it has in the Bihar Tenancy Act, and cannot also include sharahmoian tenants. (Harries, C.J. and Fazt Ali, J.) BHAGWAN SINGH v. RAM SUNDAR. 202 I.C. 97=3 B.R. 848=15 R.P. 89=23 P.L.T. 636 =A.I.R. 1942 Pat. 388.

S. 112—Review—Proceedings under S. 112—Reduction of rent by Deputy Collector on ground that holdings were occupancy—Reversal on appeal—Second appeal dismissed—Subsequent review by trial Court—Legality—Jurisdiction of Civil Court to declare ultra vires.

In proceedings instituted by the authorities under S. 112 of the Bihar Tenancy Act, the Deputy Collector having jurisdiction over the area in which the suit holdings were situate reduced the rents of the tenants. Though it was hotly contested before him that he had no jurisdiction to reduce the rent as the holdings were not occupancy holdings but fixed rate holdings, reduced the rents. The landlords appealed under S. 194 to the Assistant Settlement Officer, who held that the holdings were fixed rate holdings and the Deputy Collector's order reducing the rents was without jurisdiction and reversed the order of that officer. The tenants then appealed to the Settlement Officer who also upheld the landlord's plea and affirmed the decision of the Assistant Settlement officer. The tenants did not appeal or take any further action, but the Assistant Settlement Officer passed an order reviewing his earlier order and held that the holdings were not fixed rate holdings and reduced the rents as if they were occupancy holdings, and he gave as his reason for reviewing the previous order that he had received a circular from the Settlement The landlords sued in the Civil Court for a declaration that the order passed on review, reducing the rents was ultra vires and of no effect.

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Held, (1) that the order passed by the Assistant Settlement Office reviewing his prior order was one which he could never in the circumstances make, and it was an order made wholly without jurisdiction and, therefore, ultra vires, null and void; (2) that the suit of the landlords must therefore be decreed by the Civil Court which could interfere as the order of the Revenue Court was without jurisdiction. (Harries, C.J. and Manohar Lall, J.) DHUPLAL SINGH V. RAMDHANI DUSADH. 24 Pat L.T. 125=211 I.C. 80=10 B. R. 326=16 R.P. 197=A.I.R. 1943 Pat. 353.

S. 112—Scope—If controlled or overridden by S. 40-A—Revenue Officer invested with power to reduce rent—Jurisdiction of—Reduction of rent commuted as the result of compromise between landlord and tenant—Legality of. See BIHAR TENANCY ACT, S. 40-A. 24 Pat. 597.

——S. 112-A—Applicability—Kabuliyat creating holding—Provision against enhancement of rent—Application by raiyat for reduction—If barred.

A provision in a kabuliat of 1914 creating a holding to the effect that the rent cannot be enhanced does not bar an application by the tenant or raiyat for reduction of rent under S. 112-A of the Rihar Tenancy Act, unless enhancement and reduction are both prohibited, it cannot be said that rent is fixed so as to bar an application for reduction. (Middleton.) BAIJNATH PRASAD SINGH v. JONG BAHADUR. 1941 P.W.N. 476 = 8 B.R. 222 (2).

S. 112-A of the Bihar Tenancy Act provides for the reduction of the rent of an occupancy holding, and relief under the section can only be given on an application of an occupancy raiyat in respect of the holding in which he has occupancy rights. A homestead is not an occupancy holding. A person holding an area of land settled exclusively for building purposes at a special rate of rent is not an occupancy raiyat who can apply for or get relief under S. 112-A. (Middleton.) HISHESWAR RAM v. RAM RAN BIJOY PRASAD SINGH. 8 B.R. 301.

——S. 112-A—Applicability—Right to apply under. See BIHAR TENANCY ACT, Ss. 22, EXPL. AND 112-A. 8 B.R. 538.

---- S. 112-A-Construction-Collector-If bound to cancel enhancements.

S. 112-A of the Bihar Tenancy Act cannot be construed as meaning that all enhancements must be cancelled. Under the section the Collector may cancel enhancement; it is not the case that he must do so. (Midulaton.) BUDHU SINGH v. RAMBILASH SINGH. 7 B.R. 913=1941 P.W N. 588.

land only-Effect of.

Where after the rent of a holding had been settled under S. 105 of the Binar Tenancy Act, the holding was sold and purchased by the landlord, the rent settled previously ceases to exist, and the date of such settlement cannot be taken to be the date when the rent became payable for purposes of S. 112-A of the Act. Where further the Civil Court, subsequently fixes the rent on the application of the landlord at the same figure as that fixed under S. 105, but decides that the landlord is to get rent of culturable lands only that is a different rent from that fixed earlier. Therefore the crucial date for purposes of S. 112-A is the date of the

settlement by the Civil Court. (Middleton.) RAM RAN BIJOY PRASAD SINGH v. SHEOPUJAN RAI. 8 B.R. 506.

Ss. 112-A and 113-Jurisdiction-Settlement or reduction within period mentioned in S. 113-Fresh application to reduce rent-furisdiction to entertain.

It is clear that S. 112-A of the Bihar Tenancy Act gives the Collector jurisdiction to proceed either on an application or on his own motion, but he can only proceed on his own motion if the Governor by notification directs a settlement of the rents of the occupancy holdings referred to. If the Collector proceeds on his own motion, in the absence of a notification or to deal with the rent of a tenant who is not an occupancy raiyat or on the application of some one who is neither an occupancy raiyat nor a landlord there is an inherent lack of jurisdiction. There is, however, nothing in the section which deprives the Collector of jurisdiction to receive and deal with an application of an occupancy raiyat by reason of the fact that the rent of the holding has been settled or reduced within the period specified in S. 113. No doubt, if it is proved that the rent of the holding, has been settled or reduced within such period, the Collector or Revenue Officer acting under S. 112-A cannot give the tenant any relief, but it is for the Collector or the Revenue Officer to consider, whether the facts give him jurisdiction to grant the relief, and the fact that he finds the facts wrongly cannot make his decision wholly null and void. (Manohar Lail and Beevor, JJ.) BADRI DAS GOENKA v. RAJKUMAR SINGH. 24 Pat. 120=(1945) P.W.N. 66=A.I.R. 1945 Pat. 272.

represented remission by landlord-If can be entertained in revision.

Whether a reduction of rents which is taken as a new settlement by the rent reduction officer is in reality a reduction or only represents a remission by the landlord is a question of fact, and must be raised at the earliest opportunity before the Rent Reduction Officer and should not be allowed to be raised for the first time before the Board of Revenue in revision. That is not a matter on which the Board will exercise its powers of revision over proceedings under S. 112-A of the Bihar Tenancy Act. (Peck.) RAI RADHA KRISHNA v. RADHIKA KUER. 1941 P.W.N. 593.

-S 112-A-New plea-Question of fact-Question as to applicability of section on the ground of holding being a tenure-If can be entertained in revision.

Whether a holding is an occupancy holding or only a tenure and so not governed by S. 112-A of the Bihar Tenancy Act is a matter of fact which should be proved in the original Court. It is idle to advance such a plea at the stage of revision before the Board of Revenue. With such a matter of fact the Board is not concerned by way of revision. (Peck.) RAI RADHA KRISHNA v. RADHIKA KUER. 1941 P.W.N. 593.

-S. 112-A-Non-joinder-Objection as to-When to be taken-Omission to raise plea in trial Court-Plea raised in appeal—Sustainability. See C. P. CODE, O. 1. R. 13, 11 B.B. 342.

-8. 112-A-Procedure-Rent reduction proceed-

ings-Normal procedure governing.

If no reduction can be given in rent reduction proceedings under S. 112-A of the Bihar Tenancy Act, the best thing to do is obviously to reject the applications for reduction of rent without going in to all the points raised, such as whether all the landlords have been made parties or whether prices have risen enormously and so on. But the normal procedure must be followed, he procedure to be generally adopted being, as far as is

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applicable, that laid down in the C. P. Code. A suit or a petition cannot be dismissed without hearing the plaintiff or the petitioner allowing him to produce evidence. (Swanzy.) RAGHUNATH BAJPAI ABDUL AZIZKHAN. 11 B.R. 165.

-S, 112-A-Proceedings under-Scope-Notice to opposite parties-Necessity-Failure to give notice-

Effect.

Proceedings for rent reduction are no doubt summary, but it is contrary to all principles to pass any order to the deteriment of a party without giving him any notice and without giving him an opportunity to be heard. An order passed without notice must be set aside. (Middleton.) MD. YUSUF v. PANCHI LAL RAUT. 7 B.R. 914.

-S. 112-A-Raiyat at fixed rent-Right to apply for reduction of rent.

A raiyat at a fixed tent can have the rights of an occupancy raivat, and if he does acquire occupancy rights, he is entitled to apply for reduction under S. 112-A of the Bihar Tenancy Act. (Middleton.) BAIJ-NATH PRASAD SINGH v. JONG BAHADUR. 1941 P. W.N. 476=8 B.R. 222 (2).

-Ss. 112-A and 113-Relative scope and operation of-S. 112-A-If excluded from operation of S. 113.

S. 112-A of the Bihar Tenancy Act is not excluded from the operation of S. 113 of the Act. S. 113 by its very words, applies to the rent of a holding settled under Ch. X. (Middleton.) BUDHU SINGH v. RAMBI-LASH SINGH. 7 B.R. 913=1941 P.W.N. 588.

S. 112-A-"Rent"- Rate of rent"-Distinction Collector's power to reduce rate of rent.

"Rent" under the Bihar Tenancy Act is not the same thing as, but different from, "rate of rent." S. 112-A makes no mention at all of rates of rent, While the Collector is authorised to reduce rent in certain cases, he has no power at all to reduce "rates of rent." (Middleton.) FAUJDAR SINGH v. PRABODH KUMAR MITRA. 9 B.R. 178.

-S. 112-A-Revision-Commississioner's power to interfere suo motu-Procedure-Notice to parties.

No doubt the Commissioner has power to interfere in revision in rent reduction cases ? without there being an application therefor, but in such a case he should issue a notice on the parties concerned stating that he is cotemplating doing so. (Middleton.) NIRMAL KUMAR v. JAGERNATH MAHJON. 8 B.R. 598.

-S. 112-A-Revision - Interference- Jurisdiction of Board and Commissioner.

Neither the Commissioner nor the Board of Revenue has jurisdiction to interfere in proceedings for reduction of rent except when there is a defect of jurisdiction. (Swanzy, J.) RAGHUNATH BAJPAI v. ABDUL AZIZ-KHAN. 11 B.R. 165.

-S. 112-A—Revision—Question when rent became first payable—Finality—Interference.

The question as to the date when a rent became first payable under S. 112-A of the Bihar Tenancy Act is a question of fact and the finding on that by the lower appellate Court is final and cannot be interfered with in revision. (Middleton) CHURAWAN MAHTON MD. MANIR AHSAN. 8 B.R. 118.

-S. 112-A (as amended)—Scope—If exhaustive-Abatement of rent-Civil Court's jurisdiction to grant relief under general law-If taken away.

Though by repeal of S. 38 of the Bihar Tenancy Act of 1885 an occupancy raiyat may have lost his right to obtain abatement of rent under

that particular section, and by enactment of S.112-A in the amended Act a remedy by way of an application to the Collector may have been substituted for it, there is nothing in the amendment which abrogates the rule of equity, justice and good conscience under which Civil Courts have always granted relief to a tenant. Apart from the specific provision in the Tenancy Act, a tenant is, under the general law, entitled to claim abatement of rent if the holding is not the same as it was when he was inducted on it, either by reason of diluvion or by reason of deterioration of the soil by deposit of sand or other causes. There is no clear provision in the Act taking away the power once exercised by the Civil Courts, and the mere fact that S. 38 of the old Act has been repealed cannot affect such power as could be exercised and was exercised independently of that section. (Fazl Ali, C.J. and Sinha, J.) Khushi Lal Jha v. Kanak Lal Mahto 211 I.C. 413=16 R.P. 238=24 Pat. L.T. 440=10 B.R. 381=22 Pat. 300=A.I.R. 1944 Pat. 13.

—Ss. 112-A and 113—Scope—Refusal of reduction under S. 112-Effect of—Subsequent application for reduction under S. 112-A (1)—

Competency.

Where in proceedings under S. 112 of the Bihar Tenancy Act, reduction of rent is refused and the existing rent is settled, it is a clear bar for 15 years to the application of S. 112-A of the Act. Except on the grounds specified in Cl. (c) of S. 112-A (1) a reduction under Cl. (d) of S. 112-A (1) is clearly barred. (Middleton.) RAM CHARAN KOERI v. SAJEEWAN PRASAD SINGH. 8 B.R. 221.

S. 112-A (as amended in 1934)-Succes-

sive applications under-Maintainability.

Where an application under S 112-A of the Bihar Tenancy Act, as amended in 1934, has been disposed of on the merits a subsequent application is barred under S. 113. (Middleton.) JAIGOBIND CHOUBEY v. SHYAM BIHARI SINGH. 7 B.R. 994.

S. 112-A—Successive applications—Maintainability—Splitting up of holding—Application for reduction of rent by one tenant—Rejection as applicant not in possession—Fresh application by

another tenant having right-If barred.

Where a holding has been split up and an application by a tenant for raduction of rent under S. 112-A of the Bihar Tenancy-Act is rejected on the ground that the applicant is not in possession of the holding, such rejection would be a bar to a second application by the same tenant; but it would not necessarily bar a fresh application for reduction of rent by a tenant who is entitled to apply, he being in possession. (Middleton.) PARMESHWARI NAND v. HARIHAR PRASAD. 9 B.R. 360.

—S. 112-A—When rent first became payable—Presumption under S. 51—Use and value of in rent reduction case—Rent specified in Terij Laggite of 1903 confirmed by attested rent in 1915—Effect of. See BIHAR TENANCY ACT, S. 51. 8 B.R. 865.

——S. 112-A—Year of commutation—Order not giving reason for taking particular year—If ground for interference in revision—Presumption as to basis of order.

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Where it is found from the schedule to the order of the Rent Reduction officer that he took different years of commutation in different cases it must be presumed that he did this on some system of account on the evidence produced in the cases before him. When the order further shows that in certain cases he referred to the landlord's jamabhandhi it is safe to assume that he took the various dates from that paper, especially when the landlord was aware of the procedure followed and raised no objection. The landlord cannot in revision object to the order on the ground that no reason is given for taking a particular year as the date of commutation, and the Board will not interfere with the order on that ground in revision. (Middleton.) HARIHAR Prasad Singh v. Nathuni. 8 B.R. 805.

—S. 112 A (1) (a) (b) and (d)—Applicability and Scope—Case falling under Cl. (a) or Cl. (b)—If can be dealt with under Cl. (d).

It is not correct to hold that if a case falls under either Cl. (a) or Cl. (b) of S. 112-A (1) of the Bihar Tenancy Act, it cannot be dealt with under Cl, (d). Cl. (d) empowers reduction of the rent of any occupancy holding on account of a fall in prices during the currency of the existing rate, and there is nothing to indicate that the clause does not apply to cases in which the rent has been enhanced or commuted. On a plain reading of the section, it must be held that it is open to an occupancy raiyat to apply under Cl. (d) even if the circumstances are such that he could have applied under Cl. (a) or Cl. (b). (Middleton.) Foujdar Rout v. Nagnarain Singh. 8 B.R. 191.

S. 11?-A(d)—If can be applied.

S. 112-Å (a) of the Bihar Tenancy Act does not apply to a case under S 105, because it applies only to enhancements under Ss. 29 and 30 of the Act, and an application for settlement of rent under S. 105 is entirely different from a suit for enhancement of rent under S. 30. But where an application under S. 112-Å (a) has been amended, the Rent Reduction Officer would be justified in applying S 112-Å (d) of the Act. (Middleton.) G. B. Solano v. Jangi Singh. 1941 P.W.N. 247=7 B.R. 752 (1).

——S. 112-A (a) and (d)—Illegal enhancement—Ignoring of—If amounts to cancellation of enhancement.

An illegal enhancement of rent can be ignored under S. 112-A (a) of the B. T. Act for the purpose of applying Cl. (d) of S. 112-A. Such ignoring of an illegal enhancement does not amount to a cutting off or cancellation of an enhancement for the purpose of S. 112-A of the Bihar Tenancy Act. (Middleton.) SAUDAGAR SINGH v. CHANPRESHWAR PRASAD NARAIN SINGH. 1941 P W N. 473.

—— (as amended in 1937). S. 112-A (1) (a)— Jurisdiction—Rent increased by compromise in suit—Cancellation as enhancement—Legality. See BIHAR TENANCY ACT, Ss. 29 AND 112-A (1) (a). 24 Pat. 434.

S. 112-A (a) and (d)—Scope—Successive applications under different sub-clauses—Competency—Order reducing enhanced rent—Subse-

quent order cancelling enhancement and restoring rent-Legality of.

A Court has no right to enhance a rent which had been lawfully reduced under S. 112-A (d) of the Bihar Tenancy Act. Such rent cannot, by reason of S. 113, he enhanced for fifteen years. Assuming that a tenant may apply succesively under the different sub-sections of S. 112-A, it cannot be held that a second decision cancelling an enhancement of rent under S. 112-A (d), and restoring the original rent would completely destroy the effect of a prior decision under S. 112 A (d) reducing the enhanced rent to a figure below the original rent. The second order cancelling the enhancement amounts in effect to an enhancement of rent and hence is an order without jurisdiction and ineffective by reason of the earlier order reducing the rent. If only one application can be made by the tenant under S. 112-A, then the order on the subsequent application would necessarily be without jurisdiction and the prior order reducing the rent stands and no Court can grant a decree for rent in excess of that reduced rent. (Harries, C.J. and Fazl Ali, J.) BENGALI SAHU v. GUDRI TANTI. 200 I.C. 215= 8 B.R. 654=14 R P. 641=23 Pat L.T. 189=

 $\cdot$ S. 112-A (1) (b) and (d)—Applicability— Application filed under Cl. (b)—Disposal as one under Cl. (d)-Jurisdiction

Where an application is filed under Cl. (b) of S. 112-A (1) of the Bihar Tenancy Act, the Rent Reduction Officer has no jurisdiction to treat it as one under S. 112-A (1) (d) and deal with it. He must dispose of it as one under Cl. (b) itself. (Middleton.) RAMA PRASAD v. RAM RANBIJAYA PRASAD SINGH. 1941 P.W.N. 741.

-S. 112-A (b) — Applicability — Material date-Date of commutation order.

For purposes of S. 112-A (b) of the Bihar Tenancy Act, the crucial date is the date of the commutation order. An order of commutation was passed on 12-12-1936, directing that the commuted rent would take effect from fasli 1344, i.e., September-October, 1936. In appeal the rent was reduced but the order that it should take effect from 1344 was maintained.

Held, that the rent was clearly commuted between the dates mentioned in Cl. (b) of S. 112-A, and the clause therefore applied. (Middleton,) SAH RADHAKRISHNA v. BANDHU

MAHTON. 8 B.R. 448.

A.I R. 1942 Pat. 394.

-S. 112-A (b)—Date of commutation—Date of final order or date from which commutation is directed to take effect—Material date.

Clause (b) of S. 112 of the Bihar Tenancy Act refers to the date when the rent was commuted and the date of commutation for the purposes of cl. (b) is the date of the final order of commutation, although the commutation is by the order, directed to take effect from a previous year. The date from which it is to take effect is not the material date. (Middleton.) JAGAT KISHORE PD. NARAIN SINGH v. NAKHOO MAHTON. 1941 P.W. N. 488=8 B.R. 405.

S. 112-A (b)—Scope—Commutation order passed in 1937 but directed to take effect from October, 1936—If falls under section.

For purposes of S. 112 (b) of the Bihar Tenancy Act, the commutation order under S. 40

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must have been passed between 1st January, 1911 and 31st December, 1936. The crucial date is the date of commutation order and not the date from which it was to be given retrospective effect. An order of commutation made in 1937, though directed to take effect from October, 1937, does not come within S. 112-A (b). (Middleton.) RAM BACHAN SINGH v. RANJIT NARAIN SINGH. 1941 P.W.N. 487=7 B.R. 801.

 $-8.112 \cdot A(1)(b)$  and (d)-Scope-If mutually

exclusive.

There is no warrant for holding that no relief can be granted under Cl. (d) of S. 112-A (1) of the Bihar Tenancy Act in cases where Cl. (b) of the sub-section will apply. Cl. (d) plainly means that any class of occu. pancy rent can be reduced at any time, and there is nothing to justify the inference that the legislature did not intend that Cl. (d) should apply to cases to which Cl. (b) also applied. There is nothing in the section to justify the inference that C1. (d) ought to be interpreted as though it were preceded by the words "subject to the provisions of Cls.(a) and (b)" or "in cases other than in which rent has been enhanced or commuted. (Middle. ton.) MAHOMED YUNUS v BISHESHWAR SINGH, 1941 P.W.N. 746= 9 B.R. 314.

-S 112 A (c)—Amount of remission to be granted . -Question as to-Decision on-Finality-Revision-Competency.

The question of the amount of remission to be granted under S. 112 A (c) of the Bengal Tenancy Act is a pure question of fact and the finding of the lower appellate Court thereon is final; an application for revision cannot therefore be entertained. (Middleton) CHUR-WAN MAHTON v. MD MANIR AHSAN. 8 B.R. 518.

-S 112-A (1) (c) and (d)—Jurisdiction—Application under Cl. (c)-Jurisdiction to give relief under cl. (d) suo motu.

Where an application for reduction of rent is for relief both in form and substance, under S. 112-A (1) (c) of the Bihar Tenancy Act, the Rent Reduction Officer has no jurisdiction to grant relief suo motu under cl. (d) of S. 112-A (1). (Middleton.) FAUJDAR SINGH v. PRABODH KUMAR MITRA. 9 BR. 178.

Application under S. 112 A (1) (c) and (d)—furisdiction—to reduce rent under Cl. (d).

Though the tenants apply for reduction of rent only under Cl. (c) of S. 112-A (1) of the Bihar Tenancy Act, the Rent Reduction Officer has power to order reduction under cl. (d). Government Notification No. 6164-R dated 17-8-1938, gives the Rent Reduction Officer jurisdiction to reduce rents on his own motion. (Middleton.) DEONITI PRASAD SINGH v. MANGER GOPE. 9 B.R. 418.

-S. 112-A (c)—Onus of proof.

In order to attract the operation of S. 112-A (c) of the Bihar Tenancy Act, the onus is not upon the landlord to show that the land was of good quality but upon the tenant to prove that the land was of bad quality. (Manchar Lall, J.) SUKHRAJ RAI v. DIP NARAIN PANDEY. 197 I.C. 160=8 B.R. 153=A.I.R. 1942 Pat. 266 (2).

-S.112-A (c) and (d)—Procedure—Jurisdiction -Application for reduction under Cl. (c)-Relief under Cl. (d) - Power of Court to grant.

Where the application for reduction is filed both in form and substance under Cl. (c) of S. 112-A of the Bihar Tenancy Act, there is no jurisdiction in the Court to grant relief under Cl. (d) of the section when there has been no amendment or an application by the tenants

in that behalf. (Middleton.) GOPAL MAHTON v. 

Court-Prior applications under S. 112-A (d) dismissed for default-Subsequent application under S. 112 (c)-Court treating same as under Cl. (d) and allowing reduction-Legality.

Where two applications for reduction under S. 112-A (d) of the Bihar Tenancy Act, filed by the tenants have been dismissed for default, they cannot claim that a subsequent application by them under S. 112-A (c) should be treated as under Cl. (d) and allowed. If the Court treats such an application as under Cl. (d) without any request for amendment and allows reduction under Cl. (d), it acts without jurisdiction and its order is liable to be set aside in revision. (Middleton.) BABU LAL SAH v. JAGDEO SINHA. 8 B.R. 635.

-S. 112-A(1)(c)(ii)—Rent commuted during period of high prices-Reduction of-Subsequent reduction under S. 112-A (1) (c) (ii)-If harred.

Rents which had been previously reduced under S. 112 were reduced under S. 112-A (1) (c) (ii) of the Bihar Tenancy Act. It appeared that the rents were high having been commuted during a period of high prices. The Assistant settlement officer made a local inspection which justified his Conclusion.

Held, that it could not be said that the reductions were given only on the grounds mentioned in Cl. (c) (ii) of S. 112-A (1) and that the rents were reduced only because of the landlords' neglect of irrigation matters: and consequently there was no sufficient reason to interfere with the findings which led to reduction under Cl. (c) (ii) of S. 112-A. (Middleton) DEONITI PRASAD SINGH v. MANGER GOPE. 9 B.R. 418.

-S. 112-A (c) (ii) proviso-Order allowing 25 per cent remission-Kemission-Appeal-Power of appellate Court to interfere.

Where the Rent Reduction Officer allows a remission of 25 per cent. under cl. (c) (i) of S. 112-A of the Bihar Tenancy Act, the ordinary remedy of the landlord is under the proviso to cl. (c); but he is also entitled to an appellate order in his favour if he can persuade the appellate Court to hold that the remission should not have been granted at all. (Middleton.) SHARAFAT HUSSAIN v. SURAJDEO RAI. 8 B.R. 599.

-Ss. 112-A (d) and 178 (3)-Applicability-Agreement between landlord and tenant made before coming into force of S. 112-A that rents agreed upon should not be varied-Application for reduction of rent - Competency-

It is settled law that a person may have at the same time in respect of the same land a right of occupancy and also the right of a raiyat holding at a fixed rate. An entry in the record of rights showing the tenant as kaerni and not as sharahmoyian is not, therefore, actually inconsistent with the status of a tenant as both agreed that the rent can neither be enhanced nor reduced, an application for reduction under S. 112-A. (d) of the Bihar Tenancy Act is incompetent. Nor will S. 178 (3) apply when there is a contract between the parties not to vary the rents agreed upon, made before the amending Act which brought S. 112-A into S. 178 (3) (f) of the Act. (Middleton.) BRAJNANDAN PRASAD SINGH v. SHANKER GOPE. 8 B.R. 416.

-S. 112-A (d)—Applicability—Condition precedent to.

Before S, 112-A (d) of the Bihar Tenancy Act can be

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of staple food crops during the currency of the present rent. If this condition precedent is not fulfilled, there can be no reduction under Cl. (d) of S. 112-A. (Middleton.) RAMDHANI SINGH v. LOCHAN SINGH. 8 B.R. 783.

-(as amended in 1938) S. 112-A (d)—Applicability-Part of holding submerged-Application for reduction of rent of part not submerged-Maintainabi-

When the rent of a holding has abated under S.52-A (1) of the Bihar Tenancy Act, it cannot be reduced under S. 112-A (d). An application for the reduction of the rent of a part of a holding when the other part is under water and the rent there of is abated is therefore not maintainable. (Middleton.) ROBINSON v. PAR-MESHWAR JHA. 8 B.R. 310.

-S. 112-A, (1)(a)—"Currency of the present rent"-Construction of-Holding sold and restored-Subsequent reduction of rent-Effect.

The words "currency of the present rent" in S.112-A I (d) of the Bihar Tenancy Act refer to the period which is to be considered in respect of the fall in prices and should be interpreted as the period between the first settlement of rent and the time of the order of the reduction of rent of a holding which has been restored after a sale. The holding and the rent are the same as before the sale and the restoration, is in no sense a new settlement. The holding is restored with the same rights as before, (Swanzy.) SOBHAN SINGH v. HARBANS PANDFY. 9 B.R. 138.

-S. 112-A(1)(d)-"Current prices"-Procedure for working out reductions.

Though the expression "current prices" is not defined in the Bihar Tenancy Act, the proper thing to be done in reduction cases is to take the average of that last complete year for which figures are available at the time of the order of the Rent Reduction Officer. (Middleton.) RAM NARFSH SINGH v. SHEO PRASAD GUPTA. 1941 P.W.N. 589.

-S. 112-A (d)—Date from which rent first became payable-Crucial date for purposes of comparison and reduction.

For the purposes of S. 112 A (d) of the Bihar Tenancy Act, the crucial date is the date from which the first rent becan e rayable; where a decree of the High Court gave a decree for year fasli 1314, different from the previous rent, the rent fixed clearly becomes payable in fasli 1314. That year has therefore to be taken for purposes of comparison and reduction under S. 112-A (d) (Middleton.) MAJIN-UD-DIN AHMAD v. LOKE-NATH PANDEY. 7 B.R. 939.

S. 112-A (d)—Date from which a rent first became payable—Crucial date—Decree of Civil Court fixing rent from a prior year—Effect—Retrospective effect of order.

For the purposes of Cl. (d) of S. 112-A of the Bihar Tenancy Act, the crucial date is the date from which the rent first became payable. When a Civil Court has given a decree in 1935 for rent from the year 1927 at a rent different from the former rent, the new rent must be held to have first become payable from 1927. There is no reason for holding that there can be no retrospective effect in an order under which a rent becomes rayable. Such orders are frequently passed in commutation and rent reduction cases. (Middleton.) RAMAW-TAR LAL v. MANGAL PRASAD SAH. 8 B.R. 85=1941 P·W,N. 739 (2).

- S. 112-A (1) (d) - Date when rent first beinvoked, it has to be shown that there has been a lull came parable—Rent fixed by compromise in pro-not due to temporary causes, in the average local prices ceedings under S, 109 in 1915—Altegation that civil

suits were decreed on such basis with effect from 1915—Failure to prove—Effect—Crucial date.

In certain cases cash rent was settled by compromise in proceedings under S.  $109(\epsilon)$  of the Bihar Tenancy Act in 1915. It was alleged, but not proved, that there were Civil suits pending and that they were decreed at the cash rent so settled by compromise with effect from 1911,

Held, that in the absence of proof of such allegation, the year 1915 must be taken as the year when the rent first became payable. (Peck.) THAKUR PRASAD v. BRAHMDEO PANDEY. 1941 PW N. 660.

S. 112-A (1)(d)—Discretion of Collector—Alteration in area of holding by transfers of portions—Consideration of rate of rent as compared with rent itself—If illegal—Discretion to refuse reduction of rent.

In the case of holdings the areas of which have altered for instance, by transfers of portions of holdings it is not illegal for the Collector or Rent Reduction Officer to consider the rate of rent as compared with the rent itself, just as in the case of holdings which are spiit up by a collectorate partition. Courts would be justified in ignoring small differences in area which can be presumed to be due to slight errors in survey or area extraction in one or other of two surveys. Under S. 112-A (1) the Collector has a discretion to refuse to reduce rents in cases where reduction is obviously inequitable. This discretion may well be exercised in cases in which the difference in area or rent is of little or no importance. (Swanzy.) SHARFUDDIN AHMAD v. NANHKU MAHTON. 9 B.R. 181.

——S. 112-A (d)—Jurisdiction—Application under S. 112-A (e)—No application for amendment—Jurisdiction of Rent Reduction Officer to act suo motu and to reduce under Cl. (d).

Where applications for reduction are filed under S. 112-A (e) of the Bihar Tenancy Act, and no application is made to amend them, the Rent Reduction Officer has no jurisdiction to act suo motu and give relief under Cl. (d) of S. 112-A. (Middleton.) RAJA PRASAD SINGH v. PANO KUMRI. 8. B.R., 53=1941 P.W.N 739 (1).

S.112-A (d)—Rent dating from period of cheap price—Temporary rise in prices in one year of famine—If to be taken into account.

of famine—If to be taken into account.

Where the rents date from a period of cheap prices in which there occurs only one year of famine when the prices go up temporarily, for the purposes of at application under S. 112-A of the Bihar Tenancy Act, such a temporary rise in one year should be disregarded as the rents clearly date from period of lower prices. (Middleton.) KARU MAHTON v. SHAH MUSTAFA 8 B.R. 541.

——S. 112 A (d)—"Rent"—When first becomes payable—Illegal enhancement in 1900 and paid till 1909 and then cut off—Starting point under S.112-A (d)—1900 or 1909.

The rent of a holding is what is lawfully payable and an illegal enhancement which had been paid for several years and which has since been cut off, does not become part of the rent. Where the legal rent has remained the same since 1900, it must be held to have become payable in 1900 for purposes of S. 112-A (d) of the Bihar Tenancy Act. The fact that there was an illegal enhancement in 1900 and that it was being paid from 1900 till 1909, when it was cut off, is no ground for holding that the rent became first payable in 1909. (Middleton.) SHAH HAMID UD-DIN v. FIRANGI SINGH. 8 B.R. 775.

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S 112-A (1) (d)—Rent, when first became payable—Landlord alleging mass or remission—Rent receipts not mentioning mass—Effect.

It was alleged that from 1924 which was taken to be the year from which the rent first became payable, that some remission or mat had been given each year and the landlord produced laggits to show that mat was given. The rent receipts, however, did not mention any mat any where.

Held, that in the absence of any mention of reduction or maft in the rent receipts, the case as to maft could not be accepted, and the rent must be taken to have first became payable from 19.74 and the rent was rightly reduced under S 112-A (1) (d) of the Bihar Tenancy Act. (Peck) RAIR VDHVKRISHNA v. RAMCHARITAR SINGH. 1941 PW N. 688.

——S. 112-A (1) (d)—Rent—When first becomes payable—Rent fixed in suit for assessment
of rent—Landlord accepting it from year prior to
date of decree—When rent first becomes payable
—Date of decree or date of acceptance.

Where in a suit brought by a landlord against persons in possession of his land upon which they had encroached for assessment of rent of the land in dispute and for compensation for use and occupation for faslis 1336 and 1337, the Court fixes the rate of rent and allows compensation for use and occupation at the same rate; and the landlord accepts the rent so decreed from a date prior to the date of the decree fixing the rent, the rent first becomes payable for purposes of S. 112-A (1) (d) of the Bihar Tenancy Act, from the date on which the landlord so accepts the rent decreed and not from the date of the decree in the suit by which the rent is fixed. The rent has to be reduced under Cl. (d) of S. 112-A (1) of the Act reckoning the year from which the landlord accepts the rent as the year when the rent first 

——8.112-A (d)—Right to apply—applicant not occupancy raiyat at time of 'applying—Accrual of occupancy rights subsequently—If ground for arant of application.

grant of application.
Under S. 112-A (d)

Under S. 112-A (d) of the Bihar Tenancy Act, only an occupancy raivat can apply for reduction of rent. An application by a person who at the time of filing there of was not an occupancy raivat is incompetent and cannot be granted even though occupancy rights might accrue to him by the time an order is made on it. (Middleton.) SADHU ISWAR v. AKHOV KUMAR MANDAL. 8 B.R. 644.

——S. 112-A (d)—Starting point—illegal enhancement paid for three years—If to be taken into account. See Bihar Tenancy Act, S. 29, Proviso (i). 8 B R. 694.

——Ss. 112-A (d) and 113—Scope—Cancellation of enhancement of rent out of Court—If bar to reduction under S. 112-A (d).

A cancellation of enhancement of rent out of Court is no bar to a reduction of rent under S. 112-A (d) of the Bihar Tenancy Act. S. 113 only bars further reduction of a rent which has been settled or reduced under Ch. X of the Act. (Middleton.) ALIZAMAN KHAN v. GUJAR SINGH. 10 B.R. 298.

——Ss. 112-A (d) and 113—Scope—Reduction of rent refused under S. 112—Effect—Application for reduction—Bar of.

Where in proceedings under S. 112 of the Bihar Tenancy Act, reduction of rent is refused on the finding that the rent had been existing

1297 Fasli, that amounts to a settlement which under S. 113 bars a reduction under S. 112-A (d) of the Act. That is a bar for 15 years to the application of S. 112-A. except on the ground of alteration in the area or any of the grounds specified in S. 112-A (v), (Middleton.) RAMCHARAN KOERI v. SAJEEWAN PRASAD SINGH. 1941 P.W.N. 662.

\_\_\_\_S. 112-A(d)—Starting point—Rent enhanced in 1900, but restored to original figure in 1909—

Crucial date.

Rents were enhanced from 1900, but this enhancement was cut off at the settlement and the rent prevailing in 1900 was attested in 1909 and

had been paid since.

Held, that rent was what was lawfully payable and therefore the illegal enhancement was not a part of the rent, the legal rent having remained the same since 1900, the currency of the present rent dated from 1900 and not from 1909, for purposes of S. 112-A (d). (Middleton.) BASUDEV SINGH v. SHAH HAMIDUDDIN AHMAD. 8 B.R. 681

-S. 112-A(d)—Starting point—Rent when first becomes payable-Rent commuted in 1922-Collectorate partition in 1922 apportioning rent among several landlords-Effect of.

Rents were commuted in 1911, and in a collectorate Batwara under the Bengal Estates Partition Act, the holdings were partitioned among different maliks in 1922. The Rent Reduction Officer held that new rents and new holdings were created in 1922 by the Batwara and that the rent first

became payable from 1923.

Held, that the fact that the tenants who originally paid certain rents to a certain landlord now paid the same total rent to more than one set of landlords did not amount to a breach in the continuity of the rent, and it could not be said that the currency of the present rent dated from the time when the rent was split up among more than one proprietor. The starting point there was 1911 and not 1923. (Middleton.) JHARI SINGH V. RAMESHWAR PRASAD SINGH 8 B.R. 653.

-S. 112-A(d)—Successive applications—Competency-First application dismissed for default-Second application allowed ex parte-Setting aside by Collector -Remand by Commissioner for re-hearing in the pre-

sence of both parties-Propriety

An application under S. 112-A (d) of the Bihar Tenancy Act was rejected by the Rent Reduction Officer, in the absence of the applicant who was however allowed to make a second application and the same was granted in the absence of the landlord. The Collector in appeal set aside the order holding that the lower Court had no jurisdiction to entertain the second application. Commissioner in revision remanded the case for rehearing in the presence of both parties,

Held, in revision by the Board of Revenue. that the Commissioner's order was proper and cannot be held to be without jurisdiction. (Middleton.) SAKHI (SINGH. 8 B.R. 32. SAKHI CHAND v. LACHMI NARAYAN

-S. 112-A (d) (ii)-"Rent" Illegal enhancement such as abwab-Payment of for some years-Effect of.

Rent is what is legally payable and an illegal enhancement such as an abuab is not a part of

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same and has not changed from 1300 F., the fact that abwabs were paid illegally in the meanwhile is no ground for holding that the rent has altered or changed. Therefore no reduction is allowable in such a case. (Swanzy.) SAIDUDDIN v. DOMAN SINGH 9 B.R. 293.

(as amended in 1937), S. 112-A (2)— (Swanzy.)

Limitation - Application under Cl. (b) of S. 112-A (1)

filed on 2-3-1939-If barred.

An application under Cl. (b) of S. 112-A (1) of Bihar Tenancy Act, which is filed on 2-3-1939 is not barred under Cl. (2) S. 112-A of the Bihar Tenancy Act, as amended by Act VIII of 1937, which came into force on 10-3-1938. (Middleton.) RAMA PRASAD V. RAM RANBIJAYU PRASAD SINGH. 1941 P.W.N.

 $-\mathbf{S}$ .  $\mathbf{112} ext{-}\mathbf{B}$  — Appellate order — Finality of — Interference by Commissioner of Board of Revenue-Grounds.

The orders of an appellate Court in rent reduction cases are final and neither the Commissioner, nor the Board of Revenue has jurisdiction to interfere with such orders either on facts or on law unless perhaps the order is one without jurisdiction. The decision may be wrong, but if the Court has jurisdiction to so decide, it cannot be interfered with. (Middleton.) RAMDHAN PURI v. RAMBHAJJU SINGH. 10 B.R. 385.

-S. 112-B-Limitation for appeal-Delay in filing —Discretion of Court to excuse. See LIMITATION ACT, S. 5. 9 B.R. 360.

S. 112-B-Revision-Order by Collector in appeal-Interference in revision by Commissioner or Board of Revenue-Jurisdiction-Practice and Procedure Manual, Rr. 76 and 77-Scope.

Neither the Bihar Tenancy Act nor any other statute confers on the Commissioner or the Board of Revenue a specific power to revise orders passed under S. 112-A of the Bihar Tenancy Act or orders passed on appeal under S. 112-B of that Act. Where an express provision of a statute declares a particular order to be final, and such an order is passed within the statutory powers of the officer making it, no superior authority can set aside such order on the ground that it is erroneous in law or proceeds on a wrong view of fact. Items 3 and 4 in R. 76 of the Bihar Practice and Procedure Manual do not recognise a power of interference in cases where the superior authority thinks a decision erroneous. R. 77 expressly reserves cases where the proceedings have become final by law and says that in such cases the Board of Revenue has no jurisdiction to revise or alter the order. Where the Collector has made an order in the exercise of jurisdiction, whether rightly or wrongly there is no power in the Commissioner of the Board to revise such an order or to set it aside even if it is erroneous in law. (Rowland. J.) RADHAKRISHNAJI v. RAMKHELAWAN Singh. 1943 P.W.N. 253.

subordinate Revenue Officers.

It is clear from S. 112-B, Bihar Tenancy Act, that the order of the Collector or the prescribed authority on appeal from an order under S. 112. A, is final, and the Act contains no provision for revision of that appellate order by the Commissioner or the Board of Revenue the rent. Where the legal rent has remained the assuming that the Board of Revenue, as the bighes

revenue authority, possesses a general power of super-intendence over the proceedings of subordinate revenue authorities, such power does not include a power to judicially interfere with an order which is declared by law to be final. Such power is confined to preventing subordinate revenue officers from exercising a jurisdiction not conferred on them or compelling them to exercise a jurisdiction which they have omitted to exercise. It does not include a power to interfere on the ground of error of law or error of fact. (Fazl Ali, C.J. and Agarwala, J.) RADHA KRISHNAJI v. RAMKHELAWAN SINGH. 24 Pat. 234 = 26 P.L.T. 51=1945 P.W.N. 83=A.I B. 1945 Pat. 179.

S. 113—Applicability and Scope—Proceedings under S. 112—Rent not reduced as it was considered fair—Application under S. 112-A—Bar of.

Even when the rent is not reduced in proceedings under S. 112 of the Bihar Tenancy Act because the rent is considered fair, it amounts to a settlement, because the maintaining of the existing rents is a form of settlement under S. 104-A. Hence such settlement is a bar under S. 113 to an application under S. 112-A. (Middleton.) BANSROPAN SAH v. BRIJNANDAN SINGH. 8 B.R. 360.

S. 113—Applicability and Scope—Proceedings under S. 112—Settlement of rent by maintaining existing rentals—Subsequent application under S. 112-A—Maintainability.

Where there has been a settlement of fair rents under S. 112 of the Bihar Tenancy, Act an application under S. 112-A of the Act is barred by S. 113. S. 104-A (d) clearly provides for settlement of rent by maintaining the existing rentals recorded in the record of rights as one of the methods by which rent may be settled. Even when the existing rents are maintained and entered, it amounts to a settlement and S. 113 operates as a bar to an application under S. 112-A. (Middleon.) RAJKUMAR CHAUDHRY v. DULHIN BACHOKUER. 8 B.R. 334.

——S. 113—Applicability—Order cancelling enhancement—Subsequent review and cancellation of rent roll and order maintaining existing rent—Order without furisdiction—If bar to reduction of rent under S, 112-A.

The tenants applied in 1935 for cancellation of enhancements made in 1913 under S. 105 of the Bihar Tenancy Act, and the Assistant Settlement Officer cancelled the enhancements under S.112, but later on, the landlord having raised objection, he revised the order of cancellation and maintained the existing rents by cancelling the rent roll under S.104-E, and he advised the tenants to apply under S.112-A.

Held, that the Assistant Settlement Officer having been empowered in Notification No. 2817—II. T—34 R, dated 19—6—1937, only to deal with cases of money rent which first became payable on or after 1—1 -1920, and on or before 31—12—1933 any decision under S. 112, whether positive or negative was clearly without jurisdiction, and S. 113 of the Bihar Tenancy Act would not therefore operate as a bar to reduction under S. 112-A of the Act. (Swanzy.) JAGMANAN SAHU v. MAHOMED SAFI. 8 B.R. 888.

S. 113—Application—Application under S. 112—Dismissal for default—Subsequent application for reduction under S. 112-A—If barred,

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S. 113 of the Bihar Tenancy Act does not operate as a bar to a fresh application for reduction of rent under S. 112-A, when the prior application for reduction was dismissed for default owing to the absence of the applicant and not on the merits. The maintenance of the existing rent is no doubt one method of settling a rent, but when there is no adjudication that the existing rent is fit to be maintained as in the case of a dismissal for default, there is no settlement of rent under S. 112, which would operate as a bar under S. 113. (Middleton.) HARIHAR PRASAD SINGH v. KASHI SINGH. 9 B R. 153.

—S. 113—Scope—Bhaoli holding—Rent Commuted to eash rent—Subsequent sale of holding for arrears of rent—Restoration under Bihar Act IX of 1938— Power of Collector to settle rent—Enhancement of rent—Date from which enhancement is barred.

Restoration under Bihar Act IX of 1938 is not a new settlement, and the Collector at the time of restoration has no power to settle the rent, but only to apportion the rent in a case in which only part of the holding is restored. Where the rent of Bhaoli holding is commuted to cash rent and some years later, the holding is sold for arears of rent and then restored under Act IX of 1938, S. 113 of the Bihar Tenancy Act would bar enhancement of rent not from the date of the restoration but from the date of the commutation. (Swanzy.) SOBHAN SINGE v. HARBANS PANDEY. 9 B.R. 138.

S. 116—Applicability — Conditions. "Lease for term of years" — Meaning. LALA RAJBALI LAL v. PARTAPPUR Co., LTD. [see Q. D. 1936-40 Vol. I. Col. 570] 191 I C. 296=13 R.P. 293=7 B.R. 170.

S. 121—Applicability—Land held on bhaoli rent.
S. 121 of the Bihar Tenancy Act applies to land held on bhaoli rent. (Fazl Ali, C. J.) GOBIND MAHTO v. CHANDRA EHAN PRASAD SINGH. 216 I.C. 128=17 R P. 125=1945 P.W.N. 277=11 B.R. 110=A.I.R. 1945 Pat. 123.

There is nothing in S. 121 of the Bihar Tenancy Act to restrict its operation to arrears of rent payable in cash or to make an exception in favour of arrears of rent payable by division of the produce. The section permits distraint of crops for the realisation of produce rents in the same manner as for the realisation of cash rents. (Varma and Rowland, J.) SAJIWAN PRASAD SINGH v. KARAMDHARI SINGH. 196 I.C. 174=14 R.P. 182=8 B.R. 5=A.I.R. 1942 Pat. 193.

S. 121-Holding held on batai rent-Actual cush rest recoverable.

In a proceeding under S. 121 of the Bihar Tenancy Act, the actual cash amount paid by the tenant in the preceding years is not a decisive factor if the holdings are held on batai rent. The actual cash amount recoverable in each year will depend upon the prevailing prices and all that has to be seen is whether the landlord is claiming more than his due share of the rent. (Faul Ali, C.J.) GOBIND MAHTO v. CHANDRA BHAN PRASAD SINGH. 216 I.C 128=17 R.P. 125=1945 P.W.N. 277=11 B.R. 110=A.I.R. 1945 Pat. 123.

S. 121-Nature of proceeding-Order in-

The High Court will not interfere in revision with an order of the Munsif in a proceeding for distraint under S. 121 of the Bihar Tenancy Act. Such a proceeding should not be regarded as a suit and it is not judicial in the sense that the Court proceeds in the absence of the

tenant and the landlord comes and gives his evidence ex parte and upon that all that the Court is required to do is to carry the distraint out. (Fazl Ali, C.J.) GOBIND MAHTO v. CHANDRA BHAN PRASAD SINGH. 216 I.C 128=17 R.P. 125=1945 P.W.N. 277=11 B.R 110=A.IR. 1945 Pat. 123.

Ss 143 (2) and 162—Rent decree—Execution— 0, 21 R. 13. CP Code—Applicability.

O. 21 R 13 C.P.C. would prima facie apply to a rent suit, by reason of the provissions of S. 143 (2) of the Bihar Tenancy Act. There is nothing in S. 162 of the Act to suggest that that rule was intended to be made inapplicable. That section merely provides that when an application is made under S. 235 which corresponds to O. 21, R. 11(2), C.P.C. certain additional particulars are to be given in the execution petition. It does not say that even though a prayer for attachment is made the description or specification of the properties to be attached which is required by R. 13 is to be dispensed with. Therefore, O. 21, R. 13, C.P.C. is applicable to a rent execution and the necessary particulars of the property to be attached must be given in the application for execution. (Fazl Ali C.J. and Chatter ji J.) KHODAIJIUL KUBRA v. UGRAH SINGH. 23 Pt. 103=218 IC. 265=18 R.P. 20=11 BR. 274=A I.R. 1944 Pat.

——(as amended in 1937), S 143 (2)—Scope and effect—C P.Code—Applicability of. See BIHAR TENANCY ACT (AS AMENDED IN 1937), S. 163-A. A.I.R. 1944 Pat. 54 (F B.).

——S. 148 (g)—Scope and effect—Right of judyment-aethor under—Non-service of notice—If vitiates whole sale,

S. 148 (g) merely gives a right to the judgment-debtor to pay up the whole decretal amount within 45 days from the date of the decree or the date of the service of notice upon him of the decree, and if any execution is levied against him before that date, he is not to be saddled with the cost of executing the decree before that date. If, however, execution is levied without any notice being issued to the judgment-debtor as required by the section, the judgment debtor can complain to the Court about the non-receipt of notice and about his willingness to pay the decree amount. In that even the cost of execution would be in the discretion of the officer conducting the sale and he may deprive the decree-holder of all costs of execution. But the whole sale is not bad for want of jurisdiction. Manchar Lal, 1) DWARIKA v. SIRI KISHUN. 23 Pat: 431 = 218 I C 30 = 11 B.B. 237 = 1944 P.W.N. 70 = A.I.R. 1944 Pat. 343.

S. 148 (g) of the Bihar Tenancy Act is merely-directory and not mandatory; and it does not go to the jurisdiction of the Court executing a decree. Non-service of the notice required by the section does not debar the executing Court from exercising its undoubted jurisdiction to sell the property; nor does it entitle the judgment debtor to ignore the sale as a nullity and to have it set aside on that ground. (Manohar Lal, J.) DWARIKA v. SIRI KISHUN. 23 Pat. 431=218 I.C. 30=11 B.R. 237=1944 P.W.N. 70=A.I R. 1944 Pat. 343.

The service of notice under S. 148 (g) of the Bihar Tenancy Act is not a condition precedent to the starting of an execution case by a decree-holder or to the executing Court obtaining jurisdiction to proceed with the execution itself. Hence an application for execution, in which no notice is taken out under S. 148 (g), is still one in accordance with law and would save limitation.

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(Sinha and Das, ff.) BIBI SAVEEDA KHATOON v. BISHUN DEO SINGH. 24 Pat. 153 = 26 P.L.T. 188 = 1945 P.W.N. 61 = A.I.R. 1945 Pat. 268.

——S 148-A—Rent suit—Co-sharer landlords made pro forma defendants—If bound by decree and execution—If can treat same as nullity,

There is no warrant for holding that co-sharer landlords who are joined as pro forma defendants in a rent suit are entitled to treat the suit and execution of the decree therein as a nullity. (Dharle, J.) CHANDRA MAHTON v. EMPEROR. 197 I C. 63=22 Pat.L.T. 388 = 1941 P.W.N. 91=A.I.R. 1941 Pat. 546=43 Cr.L. J. 101=8 B.R. 135.

——S. 153—Applicability—Second appeal—Maintainability—"Decided a question relating to title, etc."

—Meaning and effect of—Plea raised but not decided—Bar of second appeal.

S. 153 of the Bengal Tenancy Act, when it refers to a decision of a question relating to title to land or of a question of the amount of rent, in terms refers to what is decided by the Court and not to what is pleaded by the narties. Even if there is a dispute as to title or as to the area of the holding on the pleadings, that will not take the case out of the pleadings, unless the judge has decided that dispute. Where the defendant admits that rent was due from him at the jama claimed, but only disputes the area of the holding as stated in the plaint. and the Court decrees the suit leaving open the question of the area of the holding, there is no decision of any question relating to the area of the holding or the amount of the jama, which would take the case out of S. 153, B.T.Act. A second appeal is therefore barred, if the other conditions are satisfied. (Meredith, J.) DAROGA SONAR v. JADUPATI SAHARF. (1944) P.W. N. 130.

- S. 153-Applicability to suit for rent by cosharer landlord framed according to S. 148-A.

S. 153. Bihar Tenancy Act, applies to a suit for rent by a co-sharer landloid under the Act framed in accordance with S. 148-A of the Act. (Merchith, J.) DAROGA SONAR v. JADUPATI SAHAY, (1944) P.W.N. 130.

8. 153—Scope—Application to set aside sale in execution of decree for rent below Rs. 50—Allegation of fraud not proved or pressed—Order refusing to set aside sale—Appeal—Maintainability.

An order refusing to set aside a sale in execution of a rent decree in a suit for an amount less than Rs. 50, is not open to appeal, when the question decided is only a question relating to the regularity of the proceedings in publishing and conducting the sale and is not a question of fraud. The mere circumstance that some vague and general allegations of fraud are made in the application and not proved or pressed at the trial, is immaterial. An appeal in such cases is barred under S. 153, Binar Tenancy Act. (Fast Ali. C. J. and Sharer, J.) KAMESHWAR v. JAGDAMBI. 24 Pat. 473 = A.I.R. 1945 Pat. 446.

S. 153, Explanation—Setting aside sale for irregularity—Fraud in conducting sale—Appeal—If lies.

It is reasonably clear that the Legislature did not intend that there should be an appeal in petty cases where a sale had been set aside on the ground of irregularity, whether the irregularity be occasioned by fraud or negligence in publishing and conducting the sale. Fraud in publishing or conducting the sale is not meant to be kept separate from irregularities in the publication and conduct there of for the purposes of the Explanation to S. 153 of the Bihar Tenancy Act. (Faul Ali, C.J. and Agarwala,

J.) AJODHYA SINGH v. KAMESHWAR SINGH. 24 Pat. 227 = A.I.R. 1945 Pat. 288.

-S. 155—Notice—Validity—Misuse complained of incomplete at time of issue of notice—Does not render notice defective. SHYAM JHULAN PRASAD SINGH v. SATRUHAN PRASAD SINGH. Free Q.D. 1936 -'40 Vol. I, Col. 3248 | 192 I.C. 200 = 13 R.P. 425 =

7 B.R. 341=1941 P.W.N. 43.

S, 155 (1)—Contents of notice—Express demand to quit land in the alternative-Not essential SHYAM JHULAN PRASAD SINGH v. SATRUHAN PRASAD SINGH. [see Q.D. 1946-40 Vol. I, Col. 3248.] 192 I.C. 200=13 R P. 425=7 B.R. 341=1941 P.W.N. 43.

-S. 155 (1)—Notice—Notice issued by Court and stated to be issued by Court-Landlord's name appearing as being the applicant seeking issue of notice-Validity. SHYAM JHULAN PRASAD SINGH v. SATRU-HAN PRASAD SINGH. Fee Q.D 1936-40 Vol. I, Col. 3248.] 192 I.C. 200=13 R.P. 425=7 B.R. 341=1941 P.W.N. 43

-S. 158-A-(as amended in 1938)-Scope --Pending applications by private landlords-If affected. See BIHAR PUBLIC DEMANDS RECOVERY ACT S. 7. 1941 P.W.N. 441.

-S. 158-A (3)—Appointment of certificate officer -If to be by name-Conferment of powers ex-officio -Sufficiency.

Under repealed S. 158-A (3) of the Bihar Tenancy Act, it would not be illegal for the Local Government to confer the special powers of a certificate officer ex officio, a notification appointing, for purposes of S. 153-A, the officer performing the functions of a certificate officer in a certain sub-division of a District to be a certificate officer for the recovery of arrears of rent due to a named certificate holder, is perfectly legal and is sufficient authority for that certificate officer to perform the functions of a certificate offier under S. 158-A (3). (Middleton.) TILESHWAR KUER v. KAMESHWAR SINGH. 10 B.R. 186.

S. 158-B-Landlord being joint Hindu family - Rent suit-Decree and sale-Minor not joined in suit and execution-Minor represented in suit by father and in execution by karta-Sufficiency.

In the case of a joint Hindu family, which is the landlord, the fact that there was a minor member of the family who did not join either in the suit for rent or in the execution proceedings, would not prevent a decree and a rent sale. Where the minor was represented by his father in suit, and the karta of the family appeared in the execution proceedings, there is sufficient and substantial representation of the entire body of landlords for the holding to pass under the sale under S. 158 B of the Bihar Tenancy Act. TIRJUGI PRASAD SINGH v. PREMSUKH DAS. 8 B.R. 479=199 I.C. 18 =14 R.P. 521=A I.R. 1942 Pat. 392.

——Ss. 158-B (2), 163 (5) and 163-A, (as amended in 1938)—Construction and scope— Pending application for execution—If governed by. Bigan Singh v. Syed Shah Zaffer Hussain. [see Q.D. 1936—'40 Vol. I, Col. 575.] 191 I.C. 436=13 R.P 319=7 B.R. 214.

S. 161-"Encumbrance"-Meaning Per Chatterji, J.—The term encumbrance as defined in S. 161 of the Bihar Tenancy Act includes mortgage or other limited assignment. (Fasl Ali, C.J. Manohar Lall and Chatterji, J.). PRITHVI CHAND LAI. v. PRABHABATI JI. 23 Pat. 31=212 I.C. 504=10 B.R. 525=16 R.P. 299=1944 P.W.N.37=A.I.R. 1944 Pat. 41 (F.B.).

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-S. 163 (2) (b)-Scope-Option of decree. holder—Duty of Court to value entire tenure—C. P. Code, O. 21. R. 64—Applicability. Under the clear terms of S. 163 (2) (b) of the

Bihar Tenancy Act the Court is bound to value the whole tenure before ordering its sale in execution of a decree for arrears of rent. S. 163 (2) clearly provides that the whole of the tenure is to be valued. The decree-holder has an option to ask for the sale of the entire tenure or fora portion of a tenure. If he desires to sell the entire tenure the Court cannot force him to sell only a portion of the tenure under O. 21, R. 64, C. P. Code. The option is with the decree-holder and the provisions of the C. P. Code, cannot apply when the provisions of S. 163 of the Tenancy Act are clear. (Manohar Lall and Shearer, 11.) Sonu Lai v. Bartram Keightley. 22 Pat. 628=1943 PWN 182=211 I.C. 614=10 B.R. 428=16 R.P. 258=24 P.L.T. 384=A.I.R. 1944 Pat. 101.

-S. 163 (5)—Applicability—Does not Control sub. (7. (2) (b).

Sub-clause (5) of S. 163, Bihar Tenancy Act, only comes into operation when the property to be sold is a holding and by valuing it or a part thereof the entire decree will be satisfied by the proceeds of the sale thereof. Sub-clause (5) does not control sub-clause (2) (b). (Manohar Lall and Shearer, JJ.) SONU LAL v. BARTRAM KEIGHTLEY. 22 Pat. 628=211 I.C. 614=10 BR. 428 =16 R.P 258=1943 P.W.N. 182=24 P.L.T. 384=A.I.R. 1944 Pat. 101.

-S. 163-A-Applicability-Sale of tenure-Decree-holder-If can be compelled to purchase tenure at price fixed in proclamation of sale.

S 163-A, Bihar Tenancy Act does not apply where the property sought to be sold is not a holding or a portion of a holding; and a decreeholder seeking to sell a tenure cannot be compel-led to purchase the tenure at the price fixed in the sale proclamation. (Manohar Lall and Shearer, JJ.) Sonu Lalv. Bartram Keightley. 22 Pat. 628=211 I.C. 614=10 B.R. 428=16 R. P. 258=1943 P.W.N. 182=24 P.L.T. 384=A.I. R. 1944 Pat. 101.

-S. 163-A-Construction and scope-Decruholder refusing to bid up to amount fixed in sale-proclamation—Procedure—Duty of Court—Dismissal of execution application—If justified.

S. 163-A of the Bihar Tenancy Act only provides that a holding shall not be sold for a price lower than that specified in sale proclamation. There is nothing in the section which can force the decree-holder to bid up to the amount fixed by the sale proclamation in default whereof the execution application must be dismissed. Where in execution of a rent decree the property is put up for sale, but the amount bid by the decreeholder is less than the amount fixed by the Court in the sale proclamation and the decree-holder refuses to raise his bid up to that amount, the Court will not be justified in dismissing the execution on that ground. The duty of the executing Court in such a case is to issue a fresh sale proclamation at the expense of the decree-holder and advertise the property again, and to call for a fresh set of hidders. (Monohar Lall, I.) RAM RAN BIJAYA PRASAD SINGH v. LACHMI SINGH. 200 I.C. 621=8 B.R. 702=15 R.P. 1=23 Pat.L. T. 352=A.I.R. 1942 Pat. 365,

——S. 163-A—Decree-holder only bitder not bidding up to amount specified in sale proclamation—Dismissal of execution—Propriety.

The executing Court is not justified in dismissing the execution case merely because the decree-holder who was the only bidder refused to bid up to the amount specified in the sale proclamation. There is nothing in S. 163-A of the Bihar Tenancy Act to warrant such dismissal. The Court ought to give the decree-holder an opportunity to take out a fresh sale proclamation, or to take such further steps as he thinks proper; and if hafalls to take any further steps, it would, of course, be open to the Court to dismiss the execution case. (Fazl Ali, C.J. Manohar Lall and Chatteriee, JJ.) RAM RAN VIJAY PRASAD SINGH v. KISHUN SINGH. 23 Pat. 61=211 I.C. 593=10 B.R. 429=16 R.P. 250=25 P.L.T. 35=1944 P.W.N. 33=A.I.R. 944 Pat. 54 (F.B.).

S. 163-A—If ultra vires—Repugnancy to 0. 21, R. 66 (2), proviso, C. P. Code—Government of India Act. S. 107 and Sch. VII, list II, Item 21.

S. 163-A which was inserted in the Bihar Tenancy Act by the Amending Act of 1937 is not repugnant to the proviso to O. 21, R. 66 (2), C. P. Code, which was added by the Patna High Court, and is, therefore, not void under S. 107 (1) of Government of India Act The true effect of S. 143 (2), Bihar Tenancy Act is that the Code of Civil Procedure will apply only so long as there is no provision of this Act. In other words, if there is no provision of this Act, the C. P. Code, will apply, but once a 'provision is made in the Act no matter when, provided it is enacted by a competent authority, the C. P. Code, will not apply. If this is the true effect of S. 143 (2) of the Act, this was the "existing Indian Law" at the time S. 163-A of the Act was enacted. In this view no question of repugnancy of S. 163-A of the Act arises. Then again there is the saving clause in S. 4 (1), C. P. Code, the effect of which is that there being no specific provision to the contrary, nothing in the Code will affect the provision of S. 163-A, Bihar Tenancy Act which prescribes a special form of procedure. S. 163-A of the Bihar Tenancy Act refers to a matter covered by item 21 of the Provincial Legislative List. The Act, as its preamble shows, is an enactment "relating to the law of landlord and tenant" S. 163-A finds place in Ch. 13 of the Act which, as it now stands, is headed "Judicial Procedure for the Recovery of Rent by suit". It is clear therefore that S. 163-A is a matter of procedure for the recovery of rent by suit. The expression "the Collection of rents" in Item 21 of the Provincial Legislative List is wide enough to include recovery of rent by suit. The provision of S. 163-A of the Bihar Tenancy Act does not fall under item 4 of the concurrent Legislative List, which refers to "Civil Procedure". The Act is a special law which has its own provisions relating to procedure in rent suits. Procedure in rent suits under the Act can hardly be said to be "Civil procedure." For the aforesaid reasons, S. 163-A of the Bihar Tenancy Act is not void. (Fasl Ali, C.J. Manohar Lall and Chatterji, JJ.) RAM RAN VIJAY PRASAD SINGH v. KISHUN SINGH. 23 Pat. 61=211 I.C. 593=10 B.R. 429=16 R.P. 250=25 P.L.T. 35=1944 P.W.N. 33=A.I.R. 1944 Pat. 54 (F.B.).

Government of India Act.

Per Chatterji, J.—(Obiter): As S. 163-A of the Bihar Tenancy Act puts a limitation on the power of the Court executing a rent decree to sell a holding or a portion of a holding for a price lower than that specified in the sale proclamation, it may come under item 2 of kathas, 9 dhurs, A claim petition was put in under

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the Provincial Legislative List. (Fazl Ali, C.J., Manohar Lall and Chattriet, JJ.) RAM RAN VIJAY PRASAD SINGH v. KISHUN SINGH. 23 Pat. 61=211 I.C. 593=10 B.R. 429=16 R.P. 250=25 P.L.T. 35=1944 P.W.N. 33=A.I.R. 1944 Pat. 54 (F.B.).

——S. 163-A—Scope—Sale in contravention of—Void or voidable.

S. 163-A of the Bihar Tenancy Act contains a clear statutory prohibition against the sale of a holding for a price less than the value fixed for it in the sale proclamation, and unless a case falls within one of the two provisos to the section, the Court has no power to sell at any price below that fixed. A sale in contravention of S. 163-A is therefore void and not merely voidable. (Agarwala, I) RAJENDRA PRASAD v. GANESH PRASAD SINGH. 1942 P.W.N. 174.

——S. 163-A—Second clause—Applicability— Decree holder unwilling to bid up to valuation of Court—Procedure—Dismissal of execution case—Propriety.

An executing Court is not justified in dismissing an execution case on the ground that the decree-holder is not willing to bid up to the extent of valuation fixed by the Court. The only courses open to the Court in such a case are either to re-sell the property or to proceed under S. 165-A (2) Bihar Tenancy Act. (Manohar Lall, J.) SVED RAFIQUL RAHMAN v. NAWAZIS HUSSAIN. 200 I.C. 885=15 R.P. 23=8 B.R. 741=1941 P.W.N. 680 (1)=A.I.R. 1942 Pat. 266 (1).

——S. 167—Question whether landlord purchaser has taken steps to annul encumbrance when to be raised—
If can be raised or agitiated in second appeal.

The question whether a landlord auction-purchaser has or has not taken steps to annul the encumbrances under S. 167 of the Bihar Tenancy Act is a pure question of fact and cannot be agitated in second appeal. Nor can such question be raised for the first time in second appeal. TIRJUGI PRASAD SINGH v. PREMSUKH DAS. 8 B.R. 479=199 I.C. 18=14 R.P. 521=A.I.R. 1942 Pat. 392.

S. 169 (1) (c)—Auction-purchaser—Liability of for rent between date of sale and its confirmation. CHHATAR SINGH v. SYED BHAH QASIM GHANI. [see Q.D. 1936-40 Vol. I. Col. 3248.]. 192 I.C. 213=13 R.P. 444=7 B.R. 344=1940 P.W.N. 994.

—S. 169 (1) (c)—Sale—Effect of on charge for rent—Extent to which it is extinguished. CHHATAR SINGH v. SYED SHAH QASIM GHANI. [see Q.D. 1936—'40 Vol. 3249.] 192 I.C. 213—13 R.P. 444—7 B.R. 344—1940 P.W.N. 994.

—S 170 (1)—Applicability—Rent decree—Suit for arrears of rent in respect of original holding and new holding left after sale of part of original holding —Decree—If rent decree—Attachment of new holding —Claim under O. 21, R. 58. C. P. Code—Competency.

The respondents originally held, 1 bigha 13 kathas, 10 dhurs under the petitioner at an annual rent of Rs. 49 and odd. The latter sued them for arrears of rent of fasli 1340, to the twelve annas kist of 1343 and obtained a decree in execution of which, 1 bigha, 9 kathas, 2 dhurs of the holding bearing a rent of Rs. 45 and odd were sold under S. 162-A of the Bihar Tenancy Act, leaving a holding of 4 kahtas, 8 dhurs, bearing an annual rent of Rs. 5-10-9. The petitioner again sued the defendants for the rent of the original holding for four annas kist of 1343 to 1345 and for the rent of the new holding for 1346. This was decreed on 14—12—1939 and in execution of the decree, he attached the holding of 4 kathas, 9 dhurs. A claim petition was put in under

O. 21, R. 58, by a person chaining under a *bharma* bond executed by the defendants. The lower Court held that the decree was a money decree and hence S. 170 (1) of the Act did not apply and therefore the claim petition under O. 21, R. 58, was maintainable and allowed the claim petition.

Held, that though the amounts due as arrears of rent in respect of the original holding and the new holding had been mentioned in one lump sum and were being executed for as one sum, the decree must still be regarded as a decree for arrears of rent and was therefore not a money decree. It was open to the landlord to sue the tenant in one suit for arrears of rent due in respect of the two tenancies and it was possible in such suits to get a decree which would operate as a rent decree against the separate tenancies S. 170 (1) of the Bihar Tenancy Act applied and hence the claim under O. 21, R. 58, C. P. Code, was not maintainable. (Reuben, J.) KAVASTHAPAFHSALA v. DEBI PRASAD THAKUR. 1944 PW.N. 323.

—S. 171 A—Applicability—Mortgagee liable to pay part of rent and mortgagor undertaking to pay balance—Case if falls under S. 171-A.

S. 171-A, Bihar Tenancy Act, applies only to a case where a mortgagee is required by the terms of the contract between him and the mortgagor to pay the arrears of rent for which the decree was obtained. Where the mortgagee is not required to pay the entire amount of the rent for which the decree for arrears of rent has been obtained, but only a part of the rent due to the landlord, a portion of the rent being payable by the mortgagor himself, the section has no application. (Manohar Lall, J.) UCHESWAR JHA v. NETLAL SHAW. 1944 P.W.N. 97.

S. 171-A—Construction—Penalty—When to be imposed.

The terms of S. 171-A Bihar Tenancy Act, are quite clear and must be strictly and fairly construed. The penalty provided by sub-cl. (a) followed by actual dispossession under sub-cl. (b) cannot come into operation unless the terms of the section are complied with. (Manchar Lall, f.) UCHESWAR JHA v. NETLAL SHAW. (1944) P.W.N. 97.

—S. 173 (2) and (3)—Scope and effect—Rent sale—Purchase by ludgment-debtor in another's name—If void—Suit by purchaser—Plea of benami purchase by ludgment-debtor—Sustainability—C. P. Code, S. 66.

Sub-cl. (2) of S. 173, Bihar Tenancy Act should be read along with sub-Cl. (3), which establishes a sort of rule of factum valet and throws upon the decree-holder or any other person interested in the sale, the burden of making an application to have the judgment-debtor's actual purchase set aside. A purchase by a judgment-debtor at a sale in execution of a decree is not void but only voidable and remains valid until set aside. It is open to a judgment-debtor to plead and prove in a suit against him by the ostensible purchaser, that he was in fact the purchaser and that he purchased the property in the name of the plaintiff. S. 66 C. P. Code, is of no avail to the benamidar purchaser. (Faal Ali, C. J. and Sinha, J.) JAMUNA PRASAD v. BULAKI LAL. 24 Pat. 279 = A.I.B. 1945 Pat. 390.

S. 173 (d)—Applicability—Contract between landlord and tenant not to vary rent agreed upon—Contract made before Amending Act bringing S. 112-A into operation—Effect of. See BIHAR TENANCY ACT, SS. 112-A (d) AND 173. 8 B.R. 416.

S. 174 (1)—Applicant under S. 37-A of Bengal Agricultural Debtors' Act—If entitled to deposit for setting aside subsequent rent sale

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An applicant for relief under S. 37-A of the Bengal Agricultural Debtors' Act whose property has been sold in execution of a money-lecree against him, is a person whose interest is affected by a rent sale of that property reid subsequent to his application, and he is therefore, entitled to make a deposit under S. 174 (1) of the Binar Tenancy Act for setting aside the rent sale, His right to make the deposit does not depend upon the inerits of his application under S. 37-A. (Henderson, J.) Pyari Mohan Bhowmick & Sudhansu Mohan. 49 C.W.N. 171.

—S. 174 (1)—Sale in execution of mortgage decree—Purchaser of equity of redemption applying under S. 37-A of Bengal Agricultural Debtors' Act—If entitled to make deposit.

A pincinser of the equity of redemption who has filed an application under S. 37-A of the Bengal Agricultural Dubtors' Act is a person whose interest is affected by the sale of the property in execution of the mortgage decree, and he is, therefore, entitled to make a deposit under S. 174 (1) of the Bihar Tenancy Act tor setting aside the sale. (Henderson, J.) SASADHAR SAMANTA v. BHOLANATH KONAR. 49 C.W.N. 170.

S. 177-A—Applicability—Money execution— House of judgment-debtor—Exemption from liability to sale,

S. 177. A of the Bihar Tenancy Act is not inapplicable to money executions. The section gives exemptions which are not, in terms at any rate, confined to rent executions. It follows from the proviso to C1. (b) of the section that the houses of raiyats and underraiyats are saved from execution sales when the execution relates to decrees for arrears of rent due in respect of lands other than the sites of the houses. Execution against the site of a house on a decree for arrears of rent due in respect of other land is obviously a money execution as distinguished from a rent execution and it is precisely in such cases that S. 177-A (b) exempts houses from sale. What S. 177-A (b) saves, however, if a house belonging to the raiyat and occupied by him as such. It must therefore be clearly found that the house in fact is occupied by the raiyat. (Dhavle, J.) BIKRAMA LAL v. RAM RAN BIJAYA PRASAD SINGH. 194 I.C. 226=13 R.P. 687=7 B.R. 733=A.I.R. 1941 Pat. 508.

—S. 177-A (b), (as amended in 1937)—
"Occupied by him"—Meaning. BAIJNATH RAM
MARWARI v. RAM KUMAR SINHA. [see Q.D. 1936-40
Vol. I Col. 579.] 191 I.C. 128=7 B.R. 147=22
Pat. L.T. 109.

S. 178-B, (as amended by Act VIII of 1937)—Scope—If retrospective—Arrears of rent accrued due before passing of Act and sued for before section came into force—If affected—Ducree for 50 per cent. of produce—Jurisdiction of Court to make.

New legislation cannot take away accrued rights unless such intention is manifest and clear from the terms of the legislation. S. 178-B of the Bihar Tenancy Act, introduced by Act VIII of 1937 cannot be construed as having a retrospective effect. It does not in any way prohibit the Courts from decreeing a greater proportion of the produce in respect of rent accrued due before the passing of the Amendment Act. All that the section means is that after the passing of the Act a landlord shall not be entitled to more than nine-twentieths of the produce and there is nothing in the section to suggest that the landlord's rights which had already accrued were to be affected in any way. S. 178-B does not therefore apply to arrears which had accrued due before the section came into force. In

such a suit therefore the Court can decree to the landlord not only nine-twentieths but fifty per cent, of the produce of the land. (Harries, C.J. and Fazl Ali, J.) JAGMOHAN SINGH v. KAMNANDAN PRASAD NARA-YAN SINGH. 20 Pat. 556=192 I.C. 851=13 R.P. 526=1941 P.W.N. 295=7 B.R. 493=22 Pat.L.T. 219=A.I.R. 1941 Pat. 253.

----(as amended in 1937), S. 178-B-Scope-Wit ultra vives or in conflict with Permanent Settlement Regulation.

S. 178. B of the Bihar Tenancy Act as amended in 1937, is not invalid or ultra vires by reason of any conflict or supposed conflict between it and the Permanent Settlement Regulation of 1793. (Rowland and Chitterii, J.). DEEN MAHOMED MIAN v. HULAS NARAVAN SINGH. 21 Pat. 336=199 I.C. 182=1942 P.W.N. 66=23 P.L.T. 143=8 B.R. 519=14 R.P. 548=5 F.L.J. (H.C.) 79=A.I.R. 1942 Pat. 296.

——S. 178 B—Validity—If operative in respect of permanently settled estates.

There can be no question that a contract between a landlord and a tenant for payment of rent in respect of agricultural land irrespective of the form in which it might be clothed is a contract relating to agricultural land and is excluded from the scope of entry No. 10 of the Concurrent List in the Government of India Act. It follows that the subject-matter of S. 178 B, Bihar Tenancy Act, even in respect of permanently settled estates, does not fall within the purview of entry No. 10 and no question of repugnany to, the provisions of any existing Indian law can thus arise S. 178-B is therefore within the competence of the Bihar Legislature and is validly enacted and is operative as much in respect of lands comprised within the permanently settled estates as in respect of lands outside these estates. (Gwyer C. J. Varadachariar and Zafrullah Khan, HULAS NARAIN SINGH v. DEEN MAHOMED MIAN, 22 Pat. 428=206 I.C. 387=6 F.L.J. 68=1942 M.W.N. 354=47 C.W.N. (F.B.) 31=15 R.F. C. 29=I.L.R. (1943) Kar. (F.C) 17=1943 P.W.N. 190=9 B.R 342=A.I.R. 1943 F.C. 9.

S. 180—Occupancy rights—Diara lands—Raiyat holding area under hukumnama—Part of area submerged—Occupancy rights—Accrual of.

Where a tenant holds diara lands under a hukumnama he remains in continuous possession of the entire area covered by the hukumnama even though some of the lands are submerged and some of them pay no rent. Under S. 180 of the Bihar Tenancy Act, a tenant holding the lands for 12 continuous years would acquire occupancy rights. The mere fact of submersion of a portion of the lands would not destroy the raiyat's right to acquire occupancy rights. The right to acquire occupancy subsists even while the land is under water. (Middleton.) FAUJDAR SINGH v. PRABODH KUMAR MTRA. 9 B.R. 178.

——S. 180—Scope—Diara land—Diluvion—Nonbayment of rent by tenant without right of occupancy— Effect—Forfeiture of rights—Occupancy raiyat and son-occupancy raiyat—Difference.

It is well-settled that when, in consequence of its being submerged or otherwise, land ceases temporarily obe capable of use and enjoyment, the owner of the and does not lose his rights in it. There is no reason vhy an occupancy raiyat, who has a right of property in its holding, should lose that right merely because the and diluviates, though in order to preserve that right e is bound to continue to pay rent (may be a purely ominal or quit rent) for the period while it remains

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under water and is incapable of being worked to profit. But a raiyat who has no right of occupancy in his holding stands on a different footing. When a tenant of diari land who has not yet acquired a right of occupancy in it, ceases to perform his part of the contract payment of rent) he forfeits any right to the land. It is wholly immaterial that the reason for his failure to pay rent was that the land went under water and he was therefore unable to cultivate it and pay the rent. He cannot claim any right to hold it on re-appearance. (Fast Ali, C.J. and Shearer, J.) RAMBUJHAWAN v. RAMRANBIJOV PRASAD SINGH. 24 Pat.444=27 P. L.T. 7=R. 1945 Pat. 475.

——S. 180—Scope and effect of—Acquisition of occupancy right by tenant—If extinguished on transfer by him—Transfere's right to claim occupancy.

S. 180 of the Bihar Tenancy Act does not contemplate that the occupancy right which has been already acquired by a tenant under the terms of that section is extinguished automatically when the land is transferred and that every successive transferree must before he can claim occupancy right, prove that he himself has been in occupancy right, prove that he himself has been in occupancy of the land continuously for twelve years. A transferree for a tenant who had acquired such right is also entitled to be treated as an occupancy tenant. (Fast Ali, C.J. and Sinha, J.) MAHABIR v. JADUNANDAN. 24 Pat. 389 = 1945 P.W.N. 333.

See BIHAR TENANCY ACT, S. 26-A. 24 Pat. 366.

——S. 188—Applicability—Joint tenants claiming abatement of rent.

Quaere; Whether S. 188 of the Bihar Tenancy Act applies to a case of co-sharer tenants asking for abatement of rent. (Fazl Ali, C.J. and Sinha. J.) KHUSHI LAL JHA v. KANAK LAL MAHTO. 22 Pat. 300=211 I C. 413=16 R P. 238=24 Pat. L.T. 440=10 B.R. 381=A.I.R. 1944 Pat. 13.

——S. 188—Scope—Notice under S. 155—Suit by some of the co-sharer landlords for ejectment after expiry of notice—Maintainability. SHYAM JHULAN PRASAD SINGH. [see Q.D. 1936—40 Vol. I Col. 3249.] 192 I.C. 200 = 13 R.P. 425 = 7 B.R. 341=1941 P.W.N. 43.

——S. 187—Scope—Service of notice—Irregularity in—Effect on proceedings. See BIHAR TENANCY ACT, CH. VII-B, RR. 115 AND 117. (1945) P.W.N. 221.

S. 189 of the Bihar Tenancy Act confers on the Provincial Government the power to frame rules; the rules however, must be consistent with the Act, and any rule inconsistent with the Act must be regarded as ultra vires. S. 189 does not authorise the framing a rule conferring a power of revision on the Board of Revenue and the Board of Revenue therefore cannot have a power of revision under any rule framed by the Provincial Government. (Fazl Ali, C. J. and Agarwala, J.) RADHA KRISHNAJI v. RAMKHELAWAN SINGH. 24 Pat. 234 = 26 P.L.T. 51 = (1945) P.W.N. 83=A.I.R. 1945 Pat. 179.

——— S. 195 (6)—Scope and effect — Operation of Patni Regulation—If excluded.

The effect of S. 195 (s) of the Bihar Tenancy Act is that it does not exclude the operation of the Patni Regulation. If there is any specific provision of the Regulation, it will prevail notwithstanding anything in

the Bihar Tenancy Act. (Fazl Ali, C.J., Manohar Lall and Chatteri, J.). PIRTHYI CHAND LAL v. PRABHABATI JI. 23 Pat. 31=212 I C 504=10 B R. 525=16 R.P. 299=1944 P.W.N. 37=A.I.R. 1944 Pat. 41 (F.B.).

Chap. VII — Under-raiyat — Acquisition of status—Land not agricultural at time of accupation— Is subsequent conversion into agricultural land—If makes occupier under-raiyat.

Where land was not agricultural at the time of its original occupation but was a dense orchard infested with monkeys and the occupier was allowed to clear some portion of the land for the benefit of the owner of the orchard, his subsequently converting the land into agricultural land will not make him an under-raiyat. (Munchar Lall, J.) PHULCHAN D. D. NATEE MIKZA. 199 I.C. 421=14 R.P. 574=8 B.R. 564=23 P.L. T. 678=A.I.R. 1942 Pat. 325.

— Ch. VII-B, Rr. 115 and 117—Scope—Non-compliance—Effect—Kent Keduction Proceedings—Notice not served on landlord thirty days before date fixed for settlement—Service on ijaxalar of landlord—Order reducing rent—If without jurisdiction—S. 187.

Where in Rent Reduction Proceedings on the application of tenants under S. 112-A, Bihar Tenancy Act, the notices of the applications are not served thirty days before the date fixed for settlement, there is only an irregular service of notice, which cannot render the order reducing the rent ultra vires or without jurisdiction. The fact that notices are served on the ijaradars of the landlord who were in possession and on servants of the landlord who were authorised to look after the proceedings, but who did not hold, any written authority as required by S. 187 of the Act, will not render the proceedings invalid or affect the jurisdiction of the Rent Reduction Officer. (Fazl Ali, C.J. and DWARKA NATH SEN v. DHANOO Chatterji, J.) GOPE. (1945) P.W.N. 221 = A.I.R. 1945 Pat. 320. -Sch. III, Art. 2—Applicability—Agricultural lease-Test to decide-Nature of lands or purpose of tenancy.

The question whether a lease of lands is governed by the Bihar Tenancy Act or not turns on the nature of the lands leased and not on the purpose of the tenancy. Under a registered kabuliyat the lessee was given the right to collect the rents of lands which were in the main agricultural lands. He was also authorised to cultivate bakasht lands and appropriate the proceeds to himself. In a suit for arrears of thica rent,

Held, that a suit for rent was govened by Art. 2 of Sch. III of the Bihar Tenancy Act, and the claim for rent beyond three years would be barred.

Per Rowland, J.—The lease was of agricultural lands and the lessee was a tenure holder under the Bihar Tenancy Act. The predominant object of the lease was the collection of rents and it was a tenure.

Per Chatterii, J.—The lease was for agricultural purposes and therefore the suit for rent came within the provisions of the Bihar Tenancy Act, and was governed by the three years' rule in Art. 2 of Sch. III. (Rowland and Chatterii, J.). HAJI SHEIKH MAHOMED HASAN KHAN v. SHEIKH MAHOMED AKHTAR HASAN KHAN. 21 Pat. 469=202 I.C. 223=8 B.R. 861=15 R.P. 99=A.I.R. 1942 Pat. 474.

—Sch. III, Art. 2—Applicability—Thica lease for collecting rent—Nature of lease—Suit for arrears of rent—Limitation—Lease granted by Receiver—Position of lessee.

A thica lease of a village for the purpose of collecting rents does not create a tenancy within the purview of

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the Bihar Tenancy Act. Such a lease is excluded from the scope of the Act and it is not a lease for agricultural purposes. A suit for arrears of rent due on such a lease is not governed by Art. 2 of Sch. 3, Tenancy Act, but Art. 116, Limitation Act. When the lease has been granted by a Receiver appointed by the Court under S. 146, Cr. P. Code, the position of the lessee, so long as he remains in possession, is not different from that of a lessee from the true owner. (Fatt Ali, C.J., and Manohar Lall and Chatterii, J.J.) MAHESHWARI PRASAD VARMA v. DULHIN MANRAJO KUER. 23 Pat. 185=212 I.C. 473=10 B.R. 514=16 R.P. 294=25 P.L.T. 19=1944 P.W.N. 6=A.I.R. 1944 Pat. 87 (F.B.).

——Sch. III, Art. 3—Applicability—Conditions—Order under S. 145, Cr. P. Code, in landlord's favour—Suit for possession by tenant—Limitation—Limitation Act, Art. 47.

Art. 3 of Sch. III of Bihar Tenancy Act applies to a suit by a raiyat against a landlord who has dispossessed him qua landlord. For the application of this article two conditions are necessary, viz., that the plaintiff has been dispossessed and that the dispossession has been by his landlord as such. If these two conditions exist, the suit is of the class intended to be covered by this Article and as this Act is a special Act, it will govern in preference to the provisions of the general law of limitation. When an order under S. 145. Cr. P. Code, is made affirming the possession of the landlord and forbidding the tenant from disturbing that possession, nobody is dispossessed at all. Further even if the order is regarded as dispossession of the tenant, it is not dispossession by the landlord as such. It follows from that that in no case can an order under S. 145 be regarded as dispossession by a landlord for the purpose of Art. 3 of Sch. III of Tenancy Act. Consequently, a suit by the tenant to recover possession from the landlord in such circumstances is governed not by this article but by Art. 47 of the Limitation Act. (Agarwala, J.) UDAIBHAN SINGH v. PARAS PANDI. 8 B.R. 413=198 I.C. 347=14 R.P. 453=A.I.R. 1942 Pat. 287.

——Sch. III, Art. 3—Applicability—Money decru against tenant in favour of landlord—Execution— Purchase of tenant's land by landlord—Delivery through Civil Court—Tenant continuing in possession —Subsequent dispossession by landlord—Suit by tenant for possession—Limitation.

Where a landlord purchases in auction the lands of his tenants in execution of a money decree against them and fails to get possession through the Civil Court, and the tenants continue in possession, but long after, the sale and Civil Court delivery of possession he dispossesses the tenants, such dispossession must be held to be a dispossession in his capacity as a landlord and not as auction-purchaser. A suit by the tenants for recovery of possession of the lands from the landlord is governed by Art. 3 of Sch. III of the Bihar Tenancy Act for purposes of limitation. (Harries, C.J., and Manohar Lall.) BIBI AYESHA v. SRIPAT SINGH. 2. Pat. 517.

Sch. III, Art. 6—Applicability—Co-sharer it possession under S. 22 (2)—Decree against for amoun payable to other co-sharers—Execution—Limitation See BIHAR TENANCY ACT. S. 22 (2). 23 Pat. L.T. 348.

——Sch. III, Art, 6—Applicability—Rent dicreterovision for payment in instalments—Execution—Limitation—Limitation Act, Art. 182 (7).

An application to execute a decree for rent made in suit between landlord and tenant to whom the provision

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of the Bihar Tenancy Act apply, is an application falling under Art. 6 of Sch. III of that Act, notwithstanding that the decree is an instalment decree. The decree does not cease to attract the provisions of Sch. III of the Act by reason of the fact that by consent of parties the decree amount is made payable in instalments. Art. 182 (7) of the Lim. Act does not apply. (Chatteris and Shearer, J.J.) KEDARNATH v. PARSIDHSINGH. 24 Pat. 222=A.I.k. 1945 Pat. 398.

-Sch. III, Art. 6—Scope—If controlled by S. 15 Limitation Act. See LIMITATION ACT, S. 15. 1941 P.W.N. 183.

BIHAR (AND ORISSA) VILLAGE ADMINIS-TRATION ACT (III OF 1922), S. 27-Applicability and Construction-Power of Chaukidar to arrest.

S. 27 of the Bihar and Orissa Village Administration Act does not require that in fact stolen property must be found in the possession of a person before he can be arrested by a Chaukidar. What the section requires is that any person found in possession of anything which may reasonably be suspected to be stolen property, or a person who may reasonably be suspected of having committed an offence with reference to such thing is liable to be arrested by a Chaukidar, (Meredith and Imam, J.) HIRDAY v. EMPEROR. 24 Pat. 501= A.I.R. 1946 Pat. 40.

-S. 34-President causing Chaukidar to levy distress-Separate distress warrant-Necessity.

S. 34 Of Bihar and Orissa Village Administration Act empowers the President of a Union Board to cause the Chaukidar to levy the amount by distraint without issuing to the Chaukidar any special authority in writing; that is to say, the words "authorized in writing by the president' apply not to the Chaukidar but to any other person. A separate distress warrant is, therefore, not necessary when the president being present causes the Chaukidar under S. 34 to levy distress. (Rowland, J.) SHEO SAHNI v. EMPEROR. 210 I.C. 531=16 R.P 204=10 B.R. 295=45 Cr.L.J. 279 =A.I.R. 1943 Pat. 432.

—— Ss. 53 (2) (b) and 57 (2)—Effect of—Pancha-yat—If "Court". See CR. P. CODE, S. 435. 1940 P. W.N. 973—A.I.R. 1941 Pat. 169.

Ss. 53 (2) (b) and 77—Panchayat—Stay of proceedings in criminal case—Power of Sub-Divisional Magistrate to order. See CR. P. CODE, S. 435 (4). 1940 P.W.N. 973 = A.I.R. 1941 Pat. 169.

-S. 68—Right of trial by Magistrate—When to be claimed.

Under S. 68 of the Village Administration Act which confers upon an accused person a right to be tried by a Magistrate, instead of by a Panchayat, the claim of the right to be tried by a Magistrate must be made when he appears in answer to a summons; and it cannot be made at any later stage. (Agar wala, J.) GONI MAHTON v. EMPEROR. 193 I.C. 491=13 R.P. 614=42 Cr.L.J. 434=7 B.R. 606=1940 P.W.N. 973= A.I.R. 1941 Pat. 169.

-S. 76-Scope-If mandatory-Discretion of Panchayat to accept or ignore compromise. See CR. P. CODE, S. 345 (6). 1940 P.W.N. 973=A.I.R. 1941 Pat. 169.

BIHAR VILLAGE COLLECTIVE RESPONSI-BILITY ACT (VI OF 1943), S. 7-Applicability-Failure to perform protective duty as required by village headman-Headman not authorised by District Magistrate-Effect-Offence -S. 5-If controlled by

S. 5 (b) of the Bihar Village Collective Responsibility Act has to be read with S.7, which clearly and specifically Q.D,-33

refers to a direction given under cl. (b) of S. 5. What is made punishable under S. 7 is the failure to discharg5 any protective duty imposed by a direction under S. e (b). Unless there is an order of authorisation by the District Magistrate by virtue of which the villag headman can perform the duties given to the Distric Magistrate by S. 5 (b) of the Act, failure to obey the direction of the village headman is not an offence which can be punished. A direction by the village headman without any authorisation by the District Magistrate is not legally valid and failure to comply with such direction is not an offence under S. 7. (Das and Ray, JJ.) JANGLI MIAN v. EMPEROR. 24 Pat. 626=(1945) i. W.N. 380=A.I.R. 1946 Pat. 79.

BIHAR WARDS MANUAL (1941), R. 22, proviso -Applicability of in construing R. 23.

The proviso to R. 22 of the Bihar Wards Manual cannot be read into R. 23 and is not applicable inconstruing R. 23. (Lee.) TIKAIT JAGDISH NARAIN SINGH v. SEWAKI RAM. 11 B.R. 405.

-R. 23, proviso—Applicability—Calculation of 'accumulated interest" under R. 23 - Mode of.

The expression "accumulated interest as determined" in Board's Executive Instruction 23 in the Bihar Wards' Manual cannot be read as meaning accumulated interest as determined under Executive Instruction 22 provise. The provise at the end of Instruction 22, cannot be applied to the calculations of accumulated interest under Instruction 23. It would be quite inequitable to so apply it. (Lee.) TIKAIT JAGDISH NARAIN SINGH v. HAKIM SINGH. 11 B.R. 452.

BOARD OF REVENUE—Bihar and Orissa—Scope of jurisdiction-See BIHAR AND ORISSA BOARD OF REVENUE ACT (I OF 1913).

#### BOMBAY ACTS ETC.

Abkari Act (V of (1878). Agricultural Debtors' Relief Act(XXVIII of 1939). Bhagdaro and Narwadari Act (V of 1862). Borstal Schools Act (XVIII of 1929). Children Act (XIII of 1924). City Municipal Act (III of 1888). City Police Act (IV of 1902) City Rationing Regulation (1943). Civil Courts Act (XIV of 1869) Co-operative Societies Act (VII of 1925). Cotton Contracts Act (IV of 1932). Court of Wards Act (I of 1905). District Local Boards Act (VI of 1923). District Municipal Act (III of 1901). District Police Act (IV of 1890). Finance Act (1932). Hereditory Offices (Watan) Act (III of 1874). High Court Circulars. High Court Rules (A. S.) (1936). ", (Insolvency) (1910). High Court Rules (1936) (Original Side). Increase of Court-Fees Act (XV of 1943). Industrial Disputes Act (XXV of 1938). Jail Manual. Khoti Settlement Act (I of 1880). Land Revenue Code (V of 1879). Land Revenue Rules (1921). Land Tenures. Local Boards Act (VI of 1923). Markets and Fairs Act (IV of (1862).
Motor Vehicles Tax Act (XXXIV of 1935)

Municipal Boroughs Act (XVIII of 1925)

BOMBAY ABKARI ACT, (V OF 1878).

Native Shares & Stock-brokers Association Rules.

Pleaders Act (XVII of 1920). Prevention of Adulteration Act (V of

Prevention of Gambling Act (IV of 1887). Primary Education Act (XII of 1938). Prize Competition Tax Act (XI of 1939). Rationing Order (1943).

Rents, Hotel Rates and Lodging House rates (Control) Act (VII of 1944).

Rent Restriction Act (XVI of 1939).

Rent Restriction Order (1942).

Retail Trade Control and Licensing Order (1942).

Revenue Jurisdiction Act (X of 1876). Salt Act.

Securities Contracts Control Order (VIII of 1925).

Shops and Establishments Act (XXIV of 1939).

Small Holders Relief Act (VIII of 1938). Tobacco Duty (Town of Bombay) Act (IV of 1857).

Town Planning Act (I of 1915). Village Panchayat Act (IX of 1920).

Village Police Act (VIII of 1867). Weights and Measures Act (XV of 1932).

BOMBAY ABKARI ACT (V OF 1878)-Object of-Prohibition against sale of liquor on credit Contract in breach of-Enforceability. See CONTRACT ACT, S. 23. I.L.R. (1943) Kar. 350.

as amended by Sind Act XXVI of 1940). S. 3-A-Person given money in advance for supplying article-If a vendor.

It cannot be said that a person does not sell because he is given money in advance for an article which he is to order for the customer and he hands back to the customer, with the article he has obtained or sells, any change that may be due. Neither S. 3 (A) nor any other section of the Bombay Abkari Act contemplates or allows such a person to escape under the plausible plea that he is not a vendor, but an agent only. (Davis, C.J.) KASSIM ALLAHDAD v. EMPEROR. 211 I.C. 410-45 Cr.L.J. 390=16 R.S. 210=A.I.R. 1944 Sind 32.

S. 4—Scope and effect of—Powers of Provincial Government and of Collector in regard to grant of licenses for tapping and drawing toddy from trees.

S. 4 of the Bombay Abkari Act relates only to control in reference to establishment and not to the power to grant licenses for tapping and drawing toddy from toddy-producing trees; such power is controlled only by the rules made under the Act. It cannot therefore be contended that S. 4 makes the Provincial Government the supreme authority in relation to the granting of such licenses and that by virtue of the section the Collector is bound to obey the orders of the Provincial Government with reference to the granting of such licenses. Ss. 4 to 8 relate only to the appointment of officers and to control in reference to establishment and to nothing else. The Provincial Government is the ultimate authority in regard to import, export and transport by virtue of the provisions of Ss. 9 to 13 of the Act and not by virtue of S. 4 at all. It is further plain from Ss. 35 and 35-A that the powers of Abkari officers can be controlled only by rules made under these sections and not by any orders issued under S. 4. No orders can be issued under S. 4 overriding the rules. (Blackwell, 1942 Bom. 1.

BOMBAY ABKARI ACT, (V OF 1878).

/.) RATAN SHAW NUSSERWANJI v. GEOFFREY WILLIAM MCELHINNY. I.L R. 1942 Bom. 259= 198 I C. 849=14 R.B. 339=43 Bom. L.R. 896= A.I R. 1942 Bom. 1.

S. 7 (as amended by Act VI of 1940) Applicability and scope-Notification prohibiting possession of intoxicants issued under old Act-Decision of High Court declaring same ultra vires-Subsequent amending Act validating Rules and Notification under original Act-If validates or revives Notification declared ultra vires-Statute-Retrospective operation —Rulo. EMPEROR v. SAVER MANUAL DANTES. [see Q.D. 1936—'40 Vol. I, Col. 3249.] I.L.R. (1940) Born. 777—191 I.C. 85—42 Cr.L.J. 74. -S. 1± (1)-Duty of Collector under to issue licenses to tap toddy-Toddy Tapping Rules, Rr. 2 and 9 to 13.

The use of the word "may" in R. 2 of the Bombay Foddy Tapping Rules of 1928, which under S. 64 of the Abkari Act have the force of law, does not indicate that the Collector has an absolute discretion to grant or refuse a licence. The word "may" in R. 2 is merely used with the object of enumerating the purposes for which tapping licences can be issued, namely, by supplying toddy to shops, tree-foot booths, hawkers or for domestic consumption, and to indicate that they may not be assued for any other purposes. It does not mean that the Collector has a discretion to grant or refuse a licence if applied for in respect of one of the designated purposes. Having regard to the use of the word "shall" in Rr. 9 to 13 of the Rules, no question of the exercise of any discretion by the Collector in the granting of a licence arises, provided that the requirements of the rules are complied with, but a statutory duty to issue a licence is imposed by S. 14 (1) of the Act read in conjunction with the rules. (Blackwell, J.) RATANSHAW NUSSERWANJI v. GEOFFREY WILLIAM McELHINNY. I.L.R. (1942) Bom. 259=198 I.C. 849=14 R.B. 339=43 Bom. L.R. 896=A.I.R. 1942 Born. 1.

-S. 14 (1)-Scope-If controlled by S. 4-Collector-Discretion of to grant or refuse licence-Duty to grant licence when application complies with requirements of rules.

By virtue of S. 14(1) of the Bombay Abkari Act there is an implied power conferred upon the Collector to grant licences for tapping and drawing toddy from toddy-producing trees. S. 14 read in conjunction with the rules under the Act for the tapping of toddy contemplates that sush licences shall be granted in accordance with the rules to enable the duties imposed to be levied. The implied power conferred upon the Collector under S. 14 (1) to grant or refuse a licence is limited by the rules. He would, for example, have power to refuse a licence if the application were not in the form prescribed by R. 4 of the Rules for tapping. But, if the requirements of the rules are complied with, there is a statutory duty imposed upon the Collector to grant a licence and this statutory duty is not affected by anything contained in S. 4 of the Act. There is no justification for holding that the Collector under S. 14 (1) has an absolute discretion to grant or refuse a licence. (Blackwell, J.) RATANSHAW NUSSERWANJI v. GEOFFREY WILLIAM. McElhinny. I.L.R. (1942) Bom. 259=198 I.C. 849=14 R.B. 339=43 Bom.L.R. 896=A.I.R.

# BOMBAY ABKARI ACT, (V OF 1878).

—S. 14-B(2)—Construction and scops—Notification prohibiting possession by any person in Sind of charas—If ultra vires.

The words "any person or class of persons" in S. 14-B (2) of the Bombay Abkari Act cannot be construed as meaning by the public generally. They mean only any specified person or any specified class of persons. The primary purpose of the Abkari Act is to secure revenue combined indeed, with the regulation and control of the trade in drinks and drugs; but the power to control and regulate, though it might be made to serve the cause of social betterment, does not include the power to abolish the trade altogether. Hence, a notification by the Government of the Province of Sind, purporting to be made under S. 14-B (2) of the Act, prohibiting the possession by any person within the Province of Sind of charas, is ultra vires. (Davis, C.J. and Weston, J.) Emperor v. Dholaram Holaram. I.L.R. (1941) Kar. 431=199 I.C. 101=14 R.S. 167=43 Cr.L.J. 468=A.I.R. 1941 Sind. 221.

S. 30—Construction and scope—If empowers or

regulates grant of tapping licences.

S. 30 of the Bombay Abkari Act is not the section under which licences to tap and draw toddy are granted. They are granted under S. 14. The meaning of S. 30 is that such licences, if granted, shall be granted on payment of such fees, and subject to such restrictions and conditions and shall be in such form as the Provincial Government may direct in rules and orders which are not to be inconsistent with Act. (Blackwell, J.) RATANSHAW NUSSERWANJI v. GEOFFREY WILLIAM MCELHINNY. I.L.R. (1942) Bom. 259 = 198 I.C. 849=14 R.B. 339=43 Bom.L.R. 896 = A.I.R. 1942 Bom. 1.

——Ss. 35 and 35-A—Rules under—Effect of on power to grant licences—Order under S. 4—If can override rules.

Ss. 35 and 35-A of the Bombay Abkari Act make it plain that the powers of Abkari officers can be controlled only by rules made under these sections and not by orders issued under S. 4. Rules under S. 35 are, subject to the power given by the proviso, subject to privious publication, and even in the case of the proviso rules must be made and not merely orders issued. It is clear that orders cannot be issued under S. 4 overriding the rules. (Blackwell, J.) RATANSHAW NUSSERWANJI v. GEOFFREY WILLIAM MCELHINNY. I.L.R. (1942) Bom. 259=198 I.C. 849=14 R.B. 339=43 Bom.L.R. 896=A.I.R. 1942 Bom. 1<sub>e</sub>

—S. 45 (c)—Abkari license—Sale of liquor
—Servant of licensee canvassing orders for liquor
—Liquor measured and bottled at licensed premises and taken by servant and delivered at purchaser's house—If sale in contravention of clause
prohibiting sale at any place except licensed premises—Offence—Sale of Goods Act Ss. 21 and
23. See SALE of Goods Act, Ss. 21 and
23. See SALE of Goods Act, Ss. 21 and
25. See SALE of Goods Act, Ss. 21 and
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-S. 54 (b) - Applicability - Conditions of.

Before S. 54 (b) of the Bombay Abkari Act can come into operation there must be an offence committed under the Act, an article must be liable to confiscation under S. 54 (a) and that article must be dealt with in the manner specified along with, or in addition to the other articles sought to be confiscated. (Beaument, C.I. and

BOM. AGRIC. DEBTORS' RELIEF ACT. (1989).

Wadia, J.) EMPEROR v. SALAMAT MARZBAN.
I.L.R. (1942) Bom. 254=200 I.C. 879=43 Cr.
L.J. 730=15 R.B. 60=44 Bom.L.R. 239=A.I.

R. 1942 Bom. 154 (2).

—S. 54 (b)—Construction—"Article liable to confiscation under cl. (a)"—Meaning of—Sale of beer without license—Raid—Liquor found in kitchen and godown of house of accused = Confiscation—Legality.

The expression "an article liable to confiscation under cl. (a) occurring in Cl. (b) of S. 54 of the Bombay Abkari Act, cannot be construed as meaning an article which may become liable to confiscation under Cl. (a) on the commission of the offence which brings S. 54 into operation. The only sound way of construing the clause is to take the words literally, and to hold that the only articles which are liable to confiscation under Cl. (b) are articles lawfully imported, transported, manufactured, had in possession or sold along with something which had actually at the time become liable to confiscation. The accused was charged and convicted under S. 43 (1) (i) of the Bombay Abkari Act, for having sold without license two bottles of beer and a bottle of rum to a bogus customer who was sent by the police. The place was raided by the police who seized the bottles sold and also found a large quantity of liquor in the kitchen adjacent to the place where the sale took place and in a godown at the back of the house of the accused. In convicting the accused the magistrate also passed an order under S. 54, confiscating the liquor found in the kitchen and the godown.

Held, that the liquor in question found in the kitchen and godown was never had in possession along with the bottles sold after they became liable to confiscation, having been seized by the police after the sale when the liability to confiscation arose, and therefore the liquor in the kitchen and godown could not legally be confiscated. (Beaumont, C. J., and Wadia, J.) EMPEROR v. SALAMAT MARZBAN IRANI. I.I.R. (1942) Bom. 254 = 200 I.C. 879 = 43 Gr.I.J. 730 = 15 R.B 60=44 Bom.L.R. 239 = A.I.R. 1942 Bom. 154 (2).

\_\_\_\_\_S.60—Construction—Discretion and duty of Commissioner.

S. 60 of the Bombay Abkari Act cannot be read 2s giving the Commissioner of Excise an absolute unfettered discretion to grant or refuse a licence. The section means that the Commissioner in the case of an appeal is substituted for the Collector, and the Commissioner is then charged with the duty of considering the application for the licence in the light of the Act and the rules made thereunder in exactly the same way as the Collector is charged. To hold otherwise would be to give the go by to the Act and the rules, (Blackwell, J.) RATANSHAW NUSSERWANJI v. GEOFFREY WILLIAM MC-ELHINNY. I.L.B. (1942) Bom. 259 = 198 I.C. 849 = 14 R.B. 339 = 43 Bom.L.B. 896 = A.I.B. 1942 Bom. 1. BOMBAY AGRICULTURAL DEBTORS' BE-

LIEF ACT (XXVIII OF 1939), S. 2 (6) (a) (iv)—
'Income' —Meaning of —Net income or gross income.
The word "income' used in the definition of "debtor,"
in S. 2(6) (a) (iv) of Bombay Act XXVIII of 1939,
means net income and not gross income. (Lokur and
Rajadhyaksha, JJ.) KEKHUSHRU EDULJI v. JINA-

BHAI. 47 BOM. L.R. 445=A.I.R. 1945 BOM. 383.

S. 37—Applicability—Suit under S. 15-D Dekkhan Agriculturists Relief Act—Transfer to Board.

There can be no doubt that a mere suit for accounts under S. 15-D, D.kkhan Agriculturists' Relief Act, (where a debt is admitted or established, the only question being as to the amount) is a suit involving a question as to the recovery of a debt. and therefore

BOV. ABRIC. DEBFORF REGIEF AOF, 1939).

within the compulsory provisions for transfer contained in S. 37 of the Banbay Agricultural Debtors' Relief Act. (Beaumont, C.J., and Wassoodew, J.) In re REFERENCE UNDER O. 46, C.P. CODE (1908) I.L. R. (1913) Bun. 331 = 233 f.U. 379 = 16 R.B. 121 = 45Bon. L.R. 115 = A I.R. 1313 Bom. 250.

transaction -S. 37 -Construction-Suit on alleged brone side to be mortgage and by the other to be sale-Transfer to Board-Condition precedent to.

The Scheme of Bombay Act XXVIII of 1939 is that pending suits should not be transferred under S. 37 of the Act, until the Court has determined that the debtor is a debtor within the meaning of the Act, therefore, in a suit relating to a transaction which is said by one side to be a mortgage and by the other side to be a sale, that question must be decided by the Court before it can transfer the suit to a Debt Adjustment Board under S. 37. (Beaumont, C.J., and Wassoolew, J.) In re REFERENCE UNDER O. 46, C.P.Code (1908) I.L.R. (1943) Bom. 391=209 I.C. 379=16 R.B. 121=45 Bom.L.R. 445 = A.I.R. 1943 Bom. 250.

-8.37—Material date—Transfer of proceedings to Board-Ascertainment of debts-Date of act or date

When S. 37 of the Bombay Agricultural Debtor's Relief Act refers to the transfer of suits and execution applications to the Debt Adjustment Board, it means that the debtor's debts must not exceed Rs. 15,000 on 1-1-1939; the material date for the purposes of S, 37 is 1st January, 1939, i.e., the date on which the Act came into force, and not the date of the order of the Court on the application for transfer of the proceedings to the Board. (Lokur, J.) RANGO RAM CHANDRA v. NARAYAN RAYAJI. I.L.R. (1944) Bom. 300=45 Bom.L.R. 437=219 I.C. 110=A.I R. 1944 Bom. 243 (2)

\$.37—Revision — "Final" — Meaning—Order under-Jurisdiction of High Court to interfere in revision. See C.P.CODE, S, 115. 46 Bom.L.R. 711. sion. See C.P.CODE, S. 115.

-S. 37—Scope—If to be read with Ss. 73 and 85 -Proceedings pending at time of establishment of Board -If to be stayed-Jurisdiction to deal with. See BOMBAY AGRICULTURAL DEBTORS' RELIEF ACT, S. 73. 46 Bom.L.R. 715.

-Ss. 37 and 73-Scope-Suit against Agriculturist debtor-- furisdiction of Court-If ousted on

making of application under S. 17.

It cannot be held that on an application being made under S. 17 of the Bombay Agricultural Debtors' Relief Act, S. 73 of the Act comes into operation and that the Court's jurisdiction is ousted. Where a suit has already been filed, the relevant section is S. 37, and in respect of pending suits the jurisdiction remains in the Court to determine whether the applicant is a debtor within the meaning of the Act and whether his debts are below the amount of Rs. 15,000. The decision of the Court on these questions is final under S. 37. (Kania, J.) DADIBA ARSIWALA v. THAKURJI RAMJI. I.L.R. (1943) Bom. 41 = 204 I.C. 388=15 R.B. 318=44 Bom. L R. 865=A.I R. 1943 Bom. 19.

-8.73—Applicability—Suits and execution applications filed before and pending at time of establish. ment of Debt Adjustment Board-If affected-Proce-

dure-Ss. 37 and 85.

S. 73 of the Bombay Agricultural Debtors' Relief Act does not apply to suits or applications for execution which are pending on the date on which a Debt Adjustment Board is established for that particular area. To hold otherwise would conflict with S. 85 which expressly says that pending proceedings shall be continued. S. 73 would apply to all suits and applications for execution

# BOM. BORSTAL SCHOOLS ACT, (1929).

filed after the establishment of a Board in any particular area, and if after the filing of a suit or of an application tor execution in such area an application is made to the Debt Adjustment Board, the Court would be bound to stay further proceedings. But as regards suits filed prior to the establishment of the Board, and which were pending at the date of the establishment of the Board, S. 37 read with S. 85 provides that it is for the Court to decide whether the defendant is a debtor within the meaning of the Act and whether his debts do not exceed Rs. 15,000 and if the Court so finds, it is bound to transfer the suit or application to the Board. (Wadia and Ratathayaksha, J/.) RANCHHAD DAHYA v. MUSAJIBHAI. 218 I.C 434=18 R.B. 54=46 Bom, L.R. 715=A.I.R. 1945 Bom. 58.

-S. 73-"Court"-"Suit or proceeding"-Meaning of -Order under S. 37-Revision to High Court-Is barred.

The word "Court" in S. 73 of the Bombay Agricultural Debtors' Relief Act means the special Court referred to in S. 2 (4) (a) of the Act. "Suit or proceeding S. 73 apply only to suits or proceedings of an original nature and does not include a revision application filed in the High Court under S. 115, C.P.Code. The section therefore does not bar a revision application to the High Court against an order under S. 37 of the Act by a Court transferring execution proceedings pending before it to the Debt Adjustment Board. (Wadia and Rajashyaksha, Jf.) VINAYAK PANDURANG RAO 9, SESHADASACHARYA. I.L.R. (1944) Bom. 558=46 Bom.L.R. 711=A.I.R. 1945 Bom. 60.

-S. 73-Scope-Pending suit-Application under S. 17 Jurisdiction of Civil Court-If ousted. Su BOMBAY AGRICULTURAL DEBTORS' RELIEF ACT,

SS. 37 AND 73. 44 Bom.L.R. 865.

-S. 85-Scope-If governs S. 73-Proceedings instituted before establishment of Board-If to be stayed-Jurisdiction of Court to deal with-If affected. Su BOMBAY AGRICULTURAL DEBTORS' RELIEF ACT, S. 73. 46 Bom.L.R 715.

BOMBAY BHAGDARI AND NARWADARI ACT (V OF 1862), S. 1-Scope-Decree in contravention of-Executability-Powers of executing Court to refuse execution. See EXECUTION. 44 Bom.L.R. 907.

-S 1-'Scizure'-Meaning of.

"Seizure', in S. 1 of the Bombay Bhagdari and Narwadari Act includes taking into possession or taking possession under a warrant or legal right. (Broomfield and Macklin. [J.] BAI SURAJ v. HARIBAI, I.L.R. (1943) Bom. 19=205 I.C. 577=15 R.B. 376= 44 Bom.L.R. 907=A.I.R. 1943 Bom. 54.

BORSTAL SCHOOLS BOMBAY (XVIII OF 1929), Ss. 12 and 21, proviso-Scope-Order for detention-Alteration-Power of

High Court in appeal or revision.

Where the trial Court has substituted an order for detention in a Borstal School for a sentence of transportation or imprisonment, the High Court cannot interfere with that order in appeal or revision and alter it to some other order. In view of the proviso to S. 21 of the Borstal Schools Act, such an order can only be altered by the Government under S. 12 of the Act. (Broomfield and Wassoodew, J.). EMPEROR v. Bal-WANT JIVAN. 199 I.C. 85=43 Cr.L.J. 475=14 R.B. 351=44 Bom.L.R. 48=A.I.R. 1942 Bom.

78. -S. 21, proviso-Scope and effect of-Order for detention by magistrate in lieu of imprisonment-High Court's power to alter in revision, See BOMBAY BOMBAY CHILDREN ACT, (XIII OF 1924).

Borstal Schools Act, Ss. 12 and 21, Proviso 44 Bem. L R. 48

BOMBAY CHILDREN ACT(XIII OF 1924).

Ss. 22 and 27—Scope—Youthful offender—Conviction for murder—Proper Order—Sentence of imprisonment—Legality—Conviction—If proof of his being unruly or depraved.

A Court convicting a youthful offender of the offence of murder cannot sentence him to imprisonment by reason of the proviso to S. 27 of the Bombay Children Act. The fact that he is convicted of murder cannot, as a general rule, and without further inquiry into hisantecedents, be taken as proof that he is of unruly or depraved character as to be unfit to be sent to a certified or a reformatory school. Such a finding must, in the majority of cases, be based upon inquiry into the antecedents of the child in question. A sentence of imprisonment cannot therefore he legally passed upon a youthful offender for the offence of murder. (Leba and Typhii, II.) DINO RAMZAN v. EMPEROR. I.L.R. (1944) Kar 272.

Ss. 26 and 27 (1)—Accused 14-15 years of age convicted of murder—Power of Court to pass sentence of imprisonment—Proper course.

As under the Penal Code the Court cannot impose on an accused who is a girl of 14/15 years of age a sentence of imprisonment while convicting her of the offence of murder, he has no power to do so under S. 27 of the Bombay Children Act by reason of the Proviso which follows Cl. (1) of the section. The Court must deal with her in the manner provided in S. 26 of that Act. (Lobo and O'Sullivan, JJ.) MT. RAJAN v. EMPEROR. I.L.R. (1944) Kar. 260=216 I.C. 205=46 Cr.L.J. 141=17 R.S. 69=A.I.R. 1944 Sind 198.

S. 27—Scope—Powers of Magistrate to inflict penalties prescribed by section.

S. 27 of the Bombay Children Act does not confer upon the Court powers which it does not otherwise possess; it does not confer fresh powers upon magistrates. A magistrate therefore cannot do any of the things specified in S. 27 unless he is authorised to do so by some other law. (Davis, C.). KUNDAN TILIUMAL V. EMPEROR. I.L.R. (1942) Kar. 288=203 I.C. 646=44 Cr.L.J. 127=15 R.S. 87=A.I.R. 1942 Sind 162.

S. 46 of the Bombay Children Act, if taken as an independent code, apart from the provisions of the rest of the code, might mean that the Juvenile Court, when established, was to have exclusive jurisdiction over cases at which the attendance of a child is required. But it is necessary to notice also the other sections of the Act Reading the Act as a whole, the jurisdiction of the Children's Court is not exclusive; the other Presidency Magistrates can try cases in which children are concerned. (Reaumont, C.J. and Wassondew, I.) EMPEROR 7. DAMODAR GOPAL. I.I. R (1943) Bom, 88=15 R B 280=44 Cr L J 126=203 T C. 643=44 Bom L R. 804=A I R. 1942 Bom. 341.

BOMBAY CITY MUNICIPAL ACT (III OF 1883)—Scope—If governed or controlled by Municipal Taxation Act. See MUNICIPAL TAXATION ACT (XI OF 1881). 45 Bom.L.R. 914.

"Owner," as defined in S. 3 (m) of the City of Bombay Municipal Act includes an agent or trustee who receives rent on account of an owner. The managing

BOMBAY CHILDREN ACT, (XIII OF 1924).

trustee of a Trust is therefore an owner within the meaning of S. 3. (Beaumont, C.J., and Raiadhyaksha, J.) EMPEROR " MAHOMED EIJAS. 45 Bom L R. 899=210 I.C. 412=16 R.B. 252=45 Cr.L.J. 261=A I.R. 1944 Bom 18.

S 3 (m)—"Receives the rent"—Meaning of— P rson parting with right to receive rent of premises— If conner—Liability to conviction under Ss. 257 (1) and 375.

The expression "receives the rent" in S. 3 (m) of the City of Bombay Municipal Act, is not used in a technical sense. The Court has to see whether the person charged with an offence under the Act is one who receives the rent of the premises. If he is not entitled to receive the rent at all and does in fact not receive it, he cannot be said to be an owner. An owner who has parted with the right to receive the rent, and cannot recover it is not an owner within the meaning of the Act and cannot be convicted under Ss. 257 (1) and 375 of the Act. (Beaumont C.J., and Marklin, J.) EMPEROR 7. NOOR MAHOMED JAN MHOMED, 196 I.C. 95=42 Cr.L J. 811=14 R.B. 99=43 Bom. L.R. 598=A.I.R. 1941 Bom. 304.

S. 3 (w)—"Street"—Meaning—Well-laid out passage intended as a thoroughfare, but later abondoned and becoming blind alley—Passage used by occupants of buildings on either side and by public generally for access thereto from main road—"Il street."

The definition of "street" in S. 3 (w) of the City of Bombay Municipal Act is not an exhaustive but an inclusive and enlarging definition, and does not exclude the ordinary popular and natural meaning of the word "street" where that would be properly applicable; the definition is intended to enlarge its meaning so as to make the word qua the statute, embrace ways and means which would not otherwise come within it. It is not necessary that before a road lined with houses can be a street, the public should have possessed a right of passage or access over it or must have passed and had acress over it uninterruptedly for a period of twenty vears. It is also misleading to suggest that a piece of land, merely hecause it is in front of a house, and may have another house on the other side, is a street within the meaning of the Act. The question must be dealt with as a question of fact on the evidence adduced in the particular case. A well-laid out passage running between two rows of buildings and used by the tenants and occupants of those buildings and by the public generally for access to the buildings from the main public road and made up as a road, which was originally laid out as part of an intended thoroughfare, though the extension of the same was subsequently abandoned and it became a blind alley, is a "street" as defined by S. 3 (w) for purpose of Municipal Administration, notwithstanding the finding that the public have not acquired any right of passage or access over it either by dedication or uninterrupted user for twenty years. (Reaumont, C J. Lokur and Raiadhyaksha, 11.) EMPEROR 7. PROVIDENT INVESTMENT CO.. I.T. BOMBAY. 210 I.C. 629=16 R.B. 276=45 Cr.L.J. 274=45 Bom. L.R. 965=A.I.R. 1943 Bom. 435 (F.B.).

Ss. 3 (y) 305 and 471.B—"Private street"— Prosecution for failure to comply with notice under S. 305—Burden of proof.

In a prosecution for an offence under S. 471 read with S. 305 of the Rombay City Municipal Actistic burden of proof is on the Municipality to show that the streetlin question is a "private street" within the meaning of S. 3 (y). In order to prove that it is a

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"private street", it is incumbent on the Municipality to prove, at any rate prima (acie, the negative proposition that no works of the necessary kind enumerated in S. 3 (x) of the Act have been carried out in the street prior to the date on which the Act came into operation, i.e., 14—9—1888. (Brownfield and Wasscodew, JJ.) EMPEROR v. BYRAM KHODADAD IRANI. 205 I.C. 358—44Cr.L.J. 384—15 R.B. 380—45 Bom.L.R. 60—A.I.R. 1943 Bom. 68.

(as amended in 1928), Ss. 143 and 144 — Construction and relative scope—"Used solely for public purposes and not used or intended to be used for purposes of profit"—If mean beneficially occupied.

Ss. 143 and 144 of the City of Bombay Municipal Act are clear in their meaning. The scheme is first to exclude the buildings and lands exclusively occupied for "charitable purposes." The exemption is limited to what is contained in S. 143 (1) (b). This however, does not mean that if a building in fact was exclusively occupied for charitable purposes, if it was owned by His Majesty, if would fall under sub-sec. (b) of S. 143 (1). The question whether a building exclusively occupied for charitable purposes was owned by a co-owner or by a private individual is immaterial, because the words of S. 143 (1) (a) are general and irrespective of ownership. S. 143 (1) (b) deals with only a small portion of the lands and buildings which are vested in His Majesty, Cl. (b) in terms deals with two things. (1) Vesting of the property in His Majesty, and (2) the particular use of the buildings or lands. The exemption under S. 143 is granted only when (1) the property is vested in His Majesty, (2) it is used solely for a public purpose and (3) it is not used or intended to be used for purposes of profit. Unless all the three qualifications meet the case, it is not covered by Cl. (b) of S. 143 (1), and such land or building would be liable to general tax as land, or building owned by any other individual. All this however, must be considered only after sub-sec. 1 (a) is considered and held inapplicable. If the case falls under S. 143 (1) (a), no further question of exemption or the extent thereof arises. The words "used solely for public purposes and not used or intended to be used for purposes of profit," added in S. 143 (1) (b) by the Bombay Act X of 1928, cannot be read as having the same meaning as the words "benefically" occupied used in S. 144 (2). It is wrong to hold that merely because a property is vested in His Majesty and is beneficially occupied, it is exempt under S. 143 (1) (b). (Kania, J.) MUNICIPAL CORPORATION OF THE CITY OF BOMBAY P. PROVINCE OF BOMBAY. I.L.R. (1943) Bom. 670=213 I.C. 106=17 R.B. 7=45 Bom.L.R. 914 =A.I.R. 1944 Bom. 8.

(as amended in 1928) Ss. 143 (1) (a) and 143 (1) (b)—Scope and distinction—Questions for consideration.

The correct distinction between S. 143 (1) (a) and S. 143 (1) (b) is the purpose for which the building or land is occupied and the question of ownership is not the first important factor. Once the building or land is held to be exclusively occupied for charitable purposes, it is immaterial who is the owner. If it is not so occupied, the next question is whether the building or land is vested in His Majesty. If so, the question arises whether the same is used solely for public purposes Every public purpose is not a charitable purpose. If it is shown that the building or land vested in His Majesty was solely occupied for a public purpose, the last question will be whether it was not used or intended to be used for the purpose of profit. If it is so used it is not covered by the exemption. If all these three features exist, the assessment will be as provided in S. 144

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and the amount will be ascertained by the machinery provided in S. 144 (2) and (3). (Kania, J.) MUNICIPAL CORPORATION OF THE CITY OF BOMBAY v. PROVINCE OF BOMBAY. I.L.R. (1943) Bom. 670=213 I.C. 106=17 R.B. 7=45 Bom. I.R. 914=A.I.R. 1944 Bom. 8.

Ss. 222 (1) and 265—Applicability—Crown—If bound by.

The Crown is bound by Ss. 222 (1) and 265 of the City of Bombay Municipal Act, Reading all the sections of the Act relating to water supply, it must be said that it would be impossible to carry them out with reasonable efficiency unless Government is bound by them although one cannot say that they are meaningless unless they bind the Crown. If they cannot operate efficiently and smoothly unless the Crown is bound, the Crown must be held to be bound by necessary implication. (Beaumont C. J. and Raiadhyaksha, J.) PROVINCE OF BOMBAY v. MUNICIPAL CORPORATION OF THL CITY OF BOMBAY. I.L.R. (144) Bom. 95=211 I.C. 484=16 R.B. 309=45 Bom. L.R. 945=A.I. R. 1944 Bom. 26.

Ss 257 (1) and 375—"Owner"—Meaning of-Person parting with right to collect rent—Liability to conviction. See BOMBAY CITY MUNICIPALITIES ACT, S. 3 (M.) 43 BOM.L.R. 598.

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BOMBAY CITY MUNICIPAL ACT, SS. 222 (1) AND 265. 45 BOML R. 945.

——S. 275—Non-compliance— Conviction—Notice under S. 278 (2)—If condition precedent. See BOMBAY CITY MUNICIPAL ACT, S. 471. 45 Bom.L.R. 899.

———S. 278 (2)—Scope—Notice—Obligation of Commissioner to issue.

S. 278 (2) of the City of Bombay Municipal Act does not make it obligatory on the Commissioner to issue any notices. It gives to the Commissioner a discretion to give notice or not. (Beaumont, C.J. and Raiadhyaksha, J.) EMPEROR v. MAHOMED ELIAS. 210 I.C. 412=16 EB. 252=45 Cr.I.J. 261=45 Bom.I.R. 899=A.I.R. 1944 Bom. 18.

(as amended in 1916) S. 390 (1)—Scope—Offence of working factory without permission—Nature of—Prosecution—Limitation—S. 514—Applicability.

S. 390 (1) of the Bombay City Municipal Act constitutes two quite independent offences; (1) establishing a new factory in which mechanical power is intended to be employed without permission; and (2) working such a factory, that is to say, a factory in which mechanical power is intended to be employed without permission. While the establishment of a factory without permission is an offence committed once and for all when the factory is established, the working of a factory without permission is an offence which arises on every day on which the factory is so worked. S. 514 does not apply to a prosecution in respect of such an offence and is not a bar to a prosecution. Beaumont, C. J., and Wassodew, J.) EMPEROR v. KARSANDAS GOVINDJI 44 BOMLR. 756=203 I.O. 592=15 R.B. 278=44 Cr. L.J. 120=A.I.B. 1942 Bom. 326.

S. 471—Burden of proof. Prosecution for failure to comply with notice under S. 305—Onus. St. BOMBAY CITY MUNICIPAL ACT, SS. 3 (y). 305 AND 71-B. 45 Bom.L.B. 60.

S. 471—Conviction for non-compliance with S. 275—Notice under S. 278 (2)—If condition precident.

It is not necessary that before a person can be convicted under S. 471 of the City of Bombay Municipal Act, for not complying with the provisions of S. 275 of

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the City of Bombay Municipal Act, that he should be served with a notice under S. 278 (2) (Beaumont. C J, and Rajadhyaksha, J.) EMPEROR v. MAHOMED ELIAS. 210 I.C. 412=16 R B. 252=45 Cr.L.J 261=45 Bom.L.R. 899=A.I.R. 1944 Bom. 18

261=45 Bom. L.R. 899=A.I.R. 1944 Bom. 18
——S. 514 Applicability—Offence under S. 390 (1)
—Prosecution — Limitation. See BOMBAY CITY
MUNICIPAL ACT, S.390 (1). 44 Bom L. R. 756.
BOMBAY CITY POLICE ACT (IV OF 1902).
S. 9 (1) (a)—Scope—Agent of society for presention of cruelty to animals—Appointment in 1934 as Additional Police Officer by Commissioner of Police—Duration of —Subsequent vesting of power of appointment in Lo. al Government and re-vesting in Commissioner—Arrest by such Police Officer without warrant in 1940—Legality.

Where an agent of the society for the prevention of cruelty to animals was appointed in 1934 as an additional Police Officer for the purposes, inter alia. of S 3 of the Prevention of Cruelty to Animals Act by the Commissioner of Police, who at the time was empowered under S. 9 (1) of the City of Bombay Police Act, to make such appointment, and no time for the duration of the appointment is specified, the appointment would continue during the life of the agent or until the appointment is revoked by competent authority. The fact that subsequently in 1.38 the power of appointing additional Police Officers was taken away from the Commissioner and vested in the Local Government, the Local Government again delegating the power to the Commissioner in 1938, would not cause the original appointment to lapse or make it invalid. Since the agent was an additional Police Officer for the purposes of S. 3 of the Prevention of Cruelty to Animals Act, he continued to be so, notwithstanding the fact that at one period of his appointment the Commissioner of Police ceased to have power to appoint additional Police Officer; and if he arrests an offender under S. 3 of the Prevention of Cruelty to Animals Act without warrant in 1940, such arrest is legal, because under S. 33 (1) of the City of Bombay Police Act. he could arrest without warrant. (Beaumont, C. J. and Sen, J.) EMPEROR v. DHULA JETHA. 198 = I.C. 259 = 43 Cr.L.J. 341 = 14 R.B. 297 = 43 Bom.L.R. 958 = A.I.R. 1942 Bom.

----S. 22(1)(f) (i) and (g)—Rules under, Rr. 4 and 7—Construction and scope—Absence of keeper of restaurant during non-prohibited hours—If offence.

The rules under S. 22 (1) (f) (i) and (g) of the City of Bombay Police Act do not and cannot require a license to be obtained for the keeping open of a place of public entertainment of the B class character for the non-prohibited hours, ie., between 5-30 AM. and 9-30-P.M. and R 7 of rules only means that the keeper of a restaurant of that class should not absent himself during the period covered by the licence, viz., between 9-30 P.M. and 5-30 A.M. The natural construction of rr. 4 and 7 is that the necessity of the keeper of the restaurant being present in the premises only applies to the period covered by the license, i.e., the prohibited hours. (Beaumont, C.J. and Wadia J.) EMPEROR v. KOPPALKAR. I.L.R. (1942) Bom. 231=201 I.C. 265=43 Cr. L.J. 642=15 R.B. 69=44 Bom. L.R. 228=A I.R. 1942 Bom. 190.

——S 22(1)(f)(i) and (g)—Rules under R 6—Scope—If ultra vires—Licence under—If to be taken as covering non-prohibited hours.

R. 6 of the rules framed under S. 22 (1), (f) (i) and (g) of the City of Bombay Police Act, in so far as it is in effect compels the keeper of a place of public entertainment of class B to obtain a license for hours which are not prohibited, f.e., the hours between 5-30a.M. and

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9-30 P M. is ultra vires the Act under which the rules are made, as it goes too far. Though the effect of r. 6 is to insist on a person who wants to keep his premises open during the prohibited hours, also obtaining a license to keep it open during the non-prohibited hours, a license held under the rule will cover only the prohibited hours after 9-30 P M. Beaumont, C J and Wadia, J.) EMPEROR v. KOPPALKAR IL.R (1942 Bom. 231 = 201 I.C 266=43=Cr L.J. 642=15 R B. 69=44 Bom. L R. 228=A.I R 1942 Bom. 190.

S. 27, (as amended in 1938)—Order of externment—Revision—Juridiction of High Court—Commissioner of Pelice—It "Court"—Cr. P. Code, S. 439.

The Commissioner of Police, Bombay acting under S. 27 of the City of Bombay Police. Act of 1902 as amended in 1938 and making an order of externment under S. 27 (1) (a) of the Act, acts as an executive officer and is not a Court sub-ordinate to the High Court. A revision application to the High court direct against such an order does not lie and the High Court has no jurisdiction to interfere with the order in revision. (Broomfold and Divatia, J.). EMPFR R. ALLADATA 196 I.C. 537=14 R.B. 133=43 Cr. L.J. 25=43 B. m.L. R. 702=A.I.R. 1941 Bom. 334.

S. 27(2-A) (as amended in 1936) Construction—"Convicted more than twice"—Conviction on several counts at joint trial in repe t of same transac tions—If single conviction or separate convictions for purposes of S. 27 (2 A).

There is no justification for holding that the convictions referred to in S. 27 (2A) of the City of Bombay Police Act, as amended in 1936 must be convictions arising in the course of separate transactions, or convictions passed on separate dates. Where offences under Ss 457 and 380, I.P. Code, are committed in the course of the same transaction, a conviction at a ionint trial for these two offences, must be taken to be not one conviction but two convictions for the purpose of S. 27 (2-A) of the City of Bombay Police Act. It must, however, be said that the Legislature did not contemplate that the practice of some Magistrates of convicting accused persons on more than one count in respect of the same transaction would involve two convictions within the meaning of S. 27 (2-A). The obvious intent of the section seems to be that a man is not to be externed under it unless on more than two occasions he has shown that he does not intend to live within the law. (Reaumont, C.J. and Macklin, J.) EMPEROR v. CHHOTAIAL. I.L.R. (1941) Bom. 690=197=I.C. 577=14 R.B. 232=43 Cr L. J. 210=43 Bom. L.R. 834=A.I.R. 1941 Bom. 367.

Where there are two or more convictions for offences committed in the course of the same transaction, they cannot be treated as more than one conviction for the purpose of S. 27 (2-A). If in fact there are more than two convictions for separate offences, the case falls under S. 27 (2-A), though it would normally be harsh to make an order of externment when all the offences have been in fact committed at one and the same time and as part of the same transaction, if the commissioner has nothing else to go upon. (Beaumont, C.J. and Sen J) EMPEROR v. ISHVARLAL. 196 I.C. 442=14 R.B. 129=43 Bom. L.R. 511=42Cr.L.J. 869=A.I.R. 1941 Bom. 310.

S. 27 (2.A)—Order of Commissioner under-Grounds for—If acts judicially or in administrative capacity.

### BOM. CITY POLICE ACT, (IV OE 1902).

In deciding whether to make an externment order in a case falling within S. 27 (2.A) of the City of Bombay Police Act, the Commississoner of Police is acting in an administrative capacity and not in a judicial capacity. He may know a great deal more about the person to be externed than the Court which convicted him knew. The Commissioner is not bound only by the evidence given in Court, and may consider himself justified in making the order of externment in the public interst, although the actual offences of which the accused person has been convicted were not of a serious character. (Beaumont, C. J. and Sen, J.) EMPEROR v. ISHVARLAL CHHAGANLAL. 196 I.C 442=14 R.B. 129=42 Cr. L.J. 869-43 Bom. L.R. 511=A.I.R. 1941 Bom. 310.

——S. 27 (2-A)—Scope—Conviction under Bombay Children Act of 1924—If can be made basis of externment order.

A conviction under the Bombay Children Act of 1924 as it stood before it was amended in 1936, constitutes technically a conviction on which an externment order under S. 27 (2 A) of the City of Bombay Police Act may be based. But to make such an order, taking into account a conviction under the Children Act of 1924, is opposed to modern views and is in defiance of the spirit of the Bombay Children Act as amended in 1936. (Beaumont, C. J., and Macklin, J.) EMPEROR v. CH-HOTALAL. 43 Bom L.R. 834=I.L.R. (1941) Bom. 690=197 I.C. 577=43 Cr. L.J. 210=14 R.B. 232=A.I.R. 1941 Bom. 367.

Under S. 57 of the City of Bombay Police Act, which requires a Police Officer to reduce into writing the statement made by an informant and to take the signature of the informant and to sign it, the Police Officer is not bound to take down in writing any information relating to the commission of the offence, in a case where there is no informant and the alleged offence is committed in the presence of the investigating Officer himself, because he has the information himself. The Police Officer is not bound to write his own statement and sign it under S. 57 of the Act. (Wadia and Lokur, J.) EMPEROR. v. JAYANTILAL JAGJIVAN. 213 I.C. 174-45 Cr. L.J. 691-17 R.R. 47-46 Bom. L.R. 196-A.I.R. 1944 Bom. 139.

S. 63—Scope—Statements to Police by witnesses during investigation—Use of at trial—Limit to—Power of judge to question witnesses on such statements.

Under S. 63 of the City of Bombay Police Act, which is in the form which S. 162, Cr. P. Code, took before it was amended in 1923 and is a good deal less wide than the amended S. 162, Cr. P. Code, the right to cross-examine a prosecution witness on his statements made to the Police is a privilege conferred on the defence. It is not competent to the judge to call for the police statement and to put to the witnesses questions founded on those statements. To do so is a clear breach of the provisions of S. 63 of the Bombay City Police Act. (Beaumont, C. J., Wadia and Sen, J.). EMPEROR v. KASAMALLI MIRZALLI. I.L.B. (1942) Bom. 384=199 I.O. 202=14 B.B. 357=44 Bom. I. R. 27=43 Cr. I. J. 529=A.I.R. 1942 Bom. 71 (F.B.)

S. 66—Applicability—Documents referred to in S. 54 of the Income-tax Act—Power of police to seize on search.

Though S. 66 of the Bombay City Police Act does not in terms enable the police officer to seize anything, there is no doubt that the police officer conducting the search under S. 66 is entitled to take possession of that for L.R. 511-42 Or. L.J. 869= A.I.R 1941 Bom. 310.

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which he is authorized to search. The police are therefore entitled to seize on a search under S. 66. S. 66 cannot be held to be inapplicable so far as documents referred to in S. 54 of the Income-tax Act are concerned, All that S. 66 of the Bombay City Police Act means is that the police officer must be satisfied that the person in possession of the document or thing in question will not produce it of his own accord, or under the compusion of a summons. If he is so satisfied, then he may search and the seizure of a document at such search is perfectly legal. (Beaumont, C. J., and Sen, J.) EMPEROR v. OSMAN CHOTANI. I.L.R. (1942) Bom. 767=15 R.B. 244=203 I.C. 365=44 Cr. L.J. 7=1942 I T.R. 429 = 44 Bom. L.R. 618=A.I.R. 1942 Bom. 289.

\_\_\_\_S. 112 (d)—Applicability—"Loitering"—Meaning of See Cr. P. Code S. 403 (2). 46 Bom.L.R. 564.
\_\_\_S. 128—Enquiry under—Scope of—Matters to be considered by Court.

All that the Court can do in a case under S. 128 of the City of Bombay Police Act is to consider whether the order of the Commissioner of Police was legal; and if it was whether it has been broken and, if so, what is the proper punishment. It is not open to the Court to consider the reasons which induced the Commissioner of Police to make the order. Although it is competent for the Court on a charge being preferred under S. 128 against a man who has been externed and has disobeyed the order of externment to consider whether the order of externment made by the Commissioner of Police was legal, that is to say, whether the case fell within the terms of S. 27 (2-A) of the Act, it is not legitimate for the Court in awarding sentence to take into consideration the number of previous convictions (i. e., those justifying the deportation order) and the importance or the gravity of the offence in respect of each such convictions as disclosed by the quantum of punishment which the Court may have awarded in the case. (Beaumont C. J. and Sen, J.) EMPEROR v. ISHVARLAL CHHAGANLAL. 196 I.C. 442=14 R.B. 129=42 Cr. LJ. 869=43 Bom. L.R. 511=A.I.R. 1941 Bom. 310.

——S. 128—Sentence—Mitigation — Grounds—Accused guilty of breach of order only once—If ground for light sentence.

An order of externment under S. 27 (2-A) is made in the public interest, and it is a serious offence to ignore that order. Though the Court in determining the sentence under S. 128 of the Act is entitled to take into account whether it is only a first offence or whether the accused has returned in breach of the order more than once wrongfully, the mere fact that the order has only been ignored once, is not a good reason for imposing a light sentence. (Beaumont C. J., and Sen, J.) EMPEROR v. ISHVARLAL CHHAGANLAL. 196 I.O. 442=14 R.B. 129=42 Cr. L.J. 869=43 Bom. L.B. 511=A.I.R. 1941 Bom. 310.

S. 128—Sentence—Reason for accused to break order of externment and return to Bombay.

In imposing sentence on a conviction under S 128 of the City of Bombay Police Act on a charge of breach of an order of externment under S. 27 (2-A), the reason which may have prompted the accused to return to Bombay in breach of the order, is a factor which may be taken into account. If the accused proves conclusively that he had some reason unconnected with any criminal intent, that is a matter which may be taken into consideration in mitigation of the offence. (Beaumont C. J. and Sen, J.) EMPEROR v. ISHVARLAL CHHAGANLAL. 196 I.C. 442=14 B.B. 129=43 Bom. I.R. 511=42 Cr. I.J. 569= A.I.R. 1941 Bom. 310.

# BOMBAY CITY RATIONING REGULATION (1943) Cl. 1-A (1)—Scope—If exhaustive.

Every kind of baker's bread, whatever be its weight or variety is a "rationed article" for the purpose of the Bombay Rationing Order. Only "baker's bread" as defined Cl. 1-A (1) of the City of Bombay Rationing Regulation can be manufactured and can be supplied against the surrender of a ration ticket as provided in Cl. 43 of the Regulation, every other kind of baker's bread is also a rationed article, and unless specifically authorised it cannot be supplied without a bread ticket. It cannot be said that unless loaves conform to the weights given in the definition of "baker's bread" in the Regulation they are not rationed articles. (Divatia and Lokur JJ.) EMPEROR v. MERWAN KHODADAD I.L.B. (1944) Bom 566 = 216 I C. 268 = 46 Cr. L.J. 17 R.B. 144 = 46 Bom. L.R. 488 = A.I.R. 1944 Bom. 318.

——C1. 43—Scope and effect—Supply of bread with out surrender of ration document—Offence—Bombay Rationing Order, Cl.6.

Cl. 43 in Ch. VII of the City of Bombay Rationing Regulation issued by the Government of Bombay under Cl. 12 of the Bombay Rationing Order (1943), enjoins the wholesale or retail distributor to supply the holder of a bread ticket bread only up to the quantity of units printed on the bread ticket. It follows, therefore, that if he supplies any quantity either without a bread ticket or in excess of the quantity mentioned in the bread ticket, he contravenes the provisions of the Regulation and as those provisions are prescribed under the Bombay Rationing Order, he must be held to contravene the provisions of Cl. 6 of the Bombay Rationing Order also. The proprietor of a bakery who supplies bread without the surrender to him of a ration document contravenes the provisions of the Bombay Rationing Order, 1943. (Divatia and Lokur, JJ.) EMPEROR v. MERWAN KHODADAD. I.L.R. (1944) Bom. 566=216 I.C. 268=46 Cr. L.J. 157=17 R.B. 144=46 Bom. L.R. 488 =A.I.R. 1944 Bom. 318.

BOMBAY CIVIL COURTS ACT (XIV OF 1869), S. 24.—Scope—Suit to declare decree for over Rs. 5,000 void and unenforceable—Jurisdiction of second class Subordinate Judge. See COURT FEES ACT, S. 7 (IV) (C) AND SCH, II, ART. 17 (V). 47 BOM.L.B. 386.
BOMBAY CIVIL COURTS ACT (XII OF

1869) S. 32—Applicability—Suit against Governor-General—Claim in respect of contractual obligation of Government Railway — Cognizability by Small Causes Court—Jurisdiction of Judicial Commissioner's Court of Sind. See SIND COURTS ACT, S. 37. I.L.R. (1941) Kar. 238.

BOMBAY CO-OPERATIVE SOCIETIES ACT (VII OF 1925), S. 26—Scope—Deposit due to member —Attachability.

What is exempted from attachment at the instance of a creditor of a member of a Co-operative Society under S. 26 of the Bombay Co-operative Societies Act is only the share or interest of a member in the capital of the society or any provident fund established under S. 41 of the Act. Hence, if moneys are due to a member from a Co-operative Society by way of deposits made by him or otherwise, the creditor is not prevented from attaching those amounts. (Somayya, J.) NARAYANA-SWAMI AIVAR v. ALAMELU AMMAL. 1945 M.W.N. 534=58 I.W. 416=(1945) 2 M.L.J. 217.

S. 54—Applicability—"Touching the business of the society"—Distute between member and non-members as to terms of contract of sale of house situate in society—If falls under Act.

# BOMBAY CO-OP. SOCIETIES ACT, (1925).

S. 54 of the Bombay Co-operative Societies Act applies only when there is a dispute. inter alia, between members "touching the business of the Society". The plaintiff who was the owner of a property in Co-operative Housing Society entered into a contract with the defendant for sale of his house to the latter for a sum of Rs. 25,000. Disputes arose between the parties relating to the contract. The plaintiff was a member, but the defendant was not a member of the Housing Society which was governed by the Bombay Co-operative Societies Act. The Registrar of Co-operative Societies referred the dispute to arbitration being of opinion that the dispute fell within the purview of S.54 proceedings and of the Act. Pending the arbitration before the award was made, the plaintiff sued for a declaration that the arbitration poroceedings were null and void and for an injunction to restrain the arbitrators from proceeding with the arbitration.

Held, (1) that S. 54 of the Act did not apply as both parties were not members of the Co-operative Housing Society and as the dispute was not one touching the business of the Society but merely one relating to the terms of the agreement of sale between the parties; (2) that if the arbitration proceedings were concluded and an award made, the plaintiff would have no opportunity of attacking the award in a Court of law by a reason of S. 56 of the Act and therefore the proceedings in arbitration should be restrained by an injunction, as the balance of convenience lay in so restraining the same. (Lobo, J.) UTTAM CHAND v. ALUMAL I.L.R. (1943) Kar. 504=212 I.C. 545=16 R.S. 266=A.I.R.

1944 Sind 107.

——Ss. 54 to 64—Scope and

——Ss. 54 to 64—Scope and effect—Arbitration in cases under Act—Jurisdiction—to deal with—Civil Court's jurisdiction—Arbitration Act, S. 33.

The Bombay Co-operative Societies Act sets up, in Ss. 54 to 64, a special Court with a special jurisdiction and special powers to try matters referred to in S. 54, There is nothing in the Indian Arbitration Act which is inconsistent with these sections of the Bombay Co-operative Societies Act. In cases falling under the Bombay Act, both the question of the validity of an arbitration agreement and the question of the validity of the award referred to in S. 33 of the arbitration Act are to be decided by the special Court set up under the Co-operative Societies Act and not by a Civil Court as provided in S. 33 of the arbitration Act. (Chagla, J.) G.I.P. RAILWAY EMPIOYEFS CO-OPERATIVE BANK, LTD. v. BHIKAJI MERWANJI. I.L.R. (1943) Bom. 320—209 I.C. 413—45 Bom.L.R. 676—A I.R. 1943 Bom 341.

Ss. 54 and 57—Scope—Dispute between society and non-member—Award—Jurisdiction to make—Submission to jurisdiction if validates award—Jurisdiction of Civil Court to decide suit to declare award null and void.

Under S. 54 of the Bombay Co-operative Societies Act the Registrar is empowered only to deal with disputes beween members and past members, etc., and no power is given to the Registrar to settle disputes between a society and a person not a member of it. The Registrar has no jurisdiction to make an award against a person who is not a member and if an award is made in such a case, it is ultra vires and a nullity and the jurisdiction of the Civil Court cannot be ousted under S. 57 of the Act. It can declare the award null and void in a suit. Nor is such an award validated by submission to the jurisdiction of the Registrar on the part of the non-member. (Broomfeld and Lotur, I).

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BOM. COTTON CONTRACTS ACT, (IV OF 1932).

KARASHIDDAYYA SHIDDAYYA \*\* GAJANAN URBAN, CO-OPERATIVE BANK, LTD. I L R (1943) Bom. 400=212I C. 204=16 R B 332=45 Bom, L R. 553=A I.R. 1943 Bom, 288.

——S 54-"Servant"—Meaning and interpretation—If restricted to high and important official or servant actually in employment at time of initiation of proceedings.

There is now arrant for restricting the term "servant" in S. 54 of the Bombay Co-operative Societies Act so as to include only high and important officials of a society and to exclude menial servants or to limit the term only to such servants as at the time of the initiation of the arbitration proceedings are actually in the employment of the society, (Chagla, I. G. I. P. RAII WAY EMPLOYEES CO-OPERATIVE BANK LTD. 7. BHIKAJI MERWANJI. I.L. R. (1943) Bom. 320=209 I.C. 413=45 Bom. L.R. 676=A.I.R. 1943 Bom. 341.

——S 54—"Touching the business of a Society"—Meaning—Dispute between Society and dismissed servant.

It would not be right to give a restricted meaning to the words "touching the business of a society" in S. 54 of the Bombay Co-operative Societies Act. "Business" is a very wide term and it is not synonymous with the objects of a society. The expression "touching the business of a society" mean affecting the business of a society or relating to the business of a society; and it cannot be said that when a society employs or dismisses a servant, it does not do comething which relates to its business. Though it may not be one of the objects of a society to employ or dismiss its servants, it is something which it does in the ordinary course of its business. Whatever is done in the ordinary course of business certainly relates to or affects the business. A dispute between a society and a dismissed servant of the society whose grievance is that he has been wrongly dismissed or that he is entitled to damages is a question which comes within the purview of S. 54 of the Act, because it does touch the business of the society. (Chagla. J.) G.I P. RAILWAY EMPLOYEES CO-OPERATIVE BANK, I.T.D. v. BHIKAJI MERWANJI I.L.R. (1943) Bom. 320 = 209 I.C. 413 = 45 Bom.L.R. 676 = A.I.R. 1943 Bom. 341.

BOMBAY COTTON CONTRACTS ACT (IV of 1932). So, 4(1) 5 and 6—Bye-laws of East India Cotton Association under Bombay Cotton Contracts Act.—If saved under S. 46, Arbitration Act—Time for making award extended by Chairman of Association—Award of umpire—Validity. See Arbitration Act, S. 46, 45 Bom.L.R. 392.

Ss. 5 and 6—East India Cotton Association Rules. R. 96—Construction and scope of— Contract by member of East India Cotton association—Death of member—Contract carried out by heir—Suit to recover money due on—Arbitration proceedings—If condition precedent to suit—Validity of bye-law.

It is not obligatory upon a plaintiff who seeks, as personal representative of his deceased father to recover from the defendant a sum of money alleged to be due by the defendant in respect of contracts made by his deceased father and carried out by the plaintiff, to submit claim made by him to arbitration in accordance with the bye-laws of the East India Cotton Association; nor is the obtaining of an award in his favour a condition precedent to the institution of any suit by him in respect of the transactions. The second part of

BOM. DIST. LOCAL BOARDS ACT, (1923).

Art. 96 of the Rules of the East India Cotton Association, which provides that the obtaining of an award shall be a condition precedent to the commencement of legal proceedings is a provision of a very serious character, ousting as it does the right of a person to resort to a Court of law, and cannot be treated as a bye-law and cannot be relied on as a valid bye-law barring a suit. (Blackwell, J.) Chirantilal Ramchandra v. Jatashankar N Joshi I L.R. (1942). Bom. 744 = 15. R.B. 213 = 203 I C. 322 = 44 Bom. L.R. 692 = A.I.R. 1942 Bom. 297.

BOMBAY COURT OF WARDS ACT (I OF 1905),

Scope and effect of—If decides question of title to property.

The Court of Wards Act was not intended to decide questions of title. Property under the Act does not vest in the Court and there is no vesting order. The Act relates to the superintendence and management of estates. (Davies, C. J. and Weston, J.) Assudibat v. Haribai I.L.R. (1943) Kar. 227=210 I.C 35 = A.I.R. 1943 Sind

BOMBAY DISTRICT LOCAL BOARDS ACT (VI OF 1923), S. 42--Applicability—Suit by Local Board—Compliance with S. 42 (2), BHUMBHO METHARAM v. DISTRICT LOCAL BOARD, HYDERABAD, [see Q.D. 1936—'40 vol. I Col. 3251]. 191 I.C. 768—13 R.S. 170.

—S. 42 (2)—Scope—Excuted and executory contracts—Omissions to comply with requirements—Effect—English common law rule—Exceptions—Application of. BHUMBHO METRARAM v. DISTRICT LOCAL BOARD, HYDERABAD [see Q. D. 1936—'40 Vol. I. Col. 3251] 191 I.C. 768—13 R.S. 170.

S. 136 (2), (as amended in 1935)—Applicability—"Anything done or purporting to have been done in pursuance of this Act", etc.—Meaning of Sub-overseer and member of Local Board—Latter also Chairman of Works Committee—Obtaining payment by submission of false bill in name of bogus contractor—If protected.

Where an act alleged to be criminal is done by a public servant in his official capacity, that is, if it is an act which it is his duty to do as such public servent under the law governing the case, he is protected, although, by reason of the fact that he has done the act fraudulently or dishonestly or in any other manner contrary to law, he may have committed a criminal offence. On the other hand, if the offence charged involves an act or acts which the accused is not required to do and which are outside his official duties, the liability to prosecution is unfettered. If the official capacity of the accused is involved in the very Act complained of, then the prosecution cannot be launched without compliance with the requirements of the statute. The accused, V and S who were respectively the sub-overseer of a District Local Board and the elected member of the Board and also Chairman of the Works Committee were charged with cheating and falsification of accounts and abetment there of under Ss. 420 and 477-A read with S. 114, I. P. Code, on the ground that they had dishonestly taken false measurements of certain works of repairs on a road under their charge and fraudulently obtained from the President of the Local Board a sum of money by tendering a bill with a measurement

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sheet containing the false measurements attached to it duly signed by the first accused and countersigned by the second accused. The accused pleaded S. 136 (2) of the Bombay Local Boards Act, as amended in 1935, and S. 197, Cr. P. Code in bar of the prosecution. It was found that the 1st accused as sub-overseer, was bound to supervise the works, take measurements and enter them in a measurement book and to report to the Board through the Works Committee of which the 2nd accused was the Chairman, the progress of the works in his charge and their measurements for the purpose of making payment to the contractor. The overseer was obliged to sign the bill submitted by the contractor in authentication of the measurements given in it and the charges made. The work in question was entrusted to a contractor by the Board and the contractor had preferred a bill under his signature for the amount stated therein. The bill was signed by accused 1 and counter-signed also by accused 2, as Chairman of the works Committee. The signing of the bill and attaching a measurement sheet thereto and submitting the bill for payment was part of the official duty of the overseer. The Act of conuter-signing the bill in authentication of the measurement and therefore the charges made was part of the official duty of accused 2 as Chairman. The bill was eventually sanctioned and paid by the Board on account of the authentication thereof; and the money was in fact obtained on the guarantee provided by the counter-signature and the accompaniment to the bill consisting of the measurements of the actual work done, for which the bill was preferred. It was found that the contractor who submitted the bill was a bogus contractor, that the measurements mentioned in the bill and noted in the measurement sheet attached to the bill were false and that the two accused had combined to draw the amount dishonestly from the Board.

Held, (1) that assuming that there had been fraudulent and dishonest entry in the bill and its accompaniment, the accused were certainly "purporting to Act," though not actually acting "in pursuance of the Act," with in the meaning of S. 136 (2) of the Bombay Local Boards Act, and the Act complained was therefore protected by S. 136 (2); (2) that the 2nd accused was also entitled to protection under S. 197, Cr. P. Code as he was a statutory public servant according to S. 135 of the Bombay Local Boards Act, and the Act complained of was done or purported to be done by him in the exercise of his official duty. As a member, he was not removable without the sanction of the Local Government under S. 31 of the Act, and sanction of the Government was therefore necessary under S. 197, Cr. P. Code, in the case of the 2nd accused. (Broomfield and Wassoodew, JJ.) Emperor v. VISHNU TATYABA. I.L.R. (1941) Bom 191=193 I.C. 229=13 R.B. 323=42 Bom. L.R. 1193=42 Cr.L.J. 441=A.I. R. 1941 Bom. 85.

If the act alleged to be criminal is done by a public =13 R.E servant in his official capacity, that is, if it is an ac Bom. 66.

# BOM. DISTRICT MUNICIPAL ACT, (1901).

which it is his duty to do as such public servant under the law governing the case, he is protected by S. 136 (2) of the Bombay District Local Boards Act, although by reason of the fact that he has done the act dishonestly or fraudulently or in any other manner contrary to the law, he may have committed a criminal offence. On the other hand, if the offence charged involves an act or acts which the accused is not required to do and which are outside its official duties, the liability to prosecution is unfettered. But when the prosecution falls under the new proviso in S. 136 (2). S. 136 (2) itself will not apply, and no question of its application or the protection given by it can arise. (Davis, C. J. and Weston, J.) NABI BAKHSH v. EMPEROR. I.L.R. (1942) Kar. 557=199 I.C. 198=14 R.S. 172=43 Cr.L.J. 514=A.I.R. 1942 Sind 45.

The addition of a new proviso to S. 136 (2) of the Bombay District Local Boards Act recognises for the purpose of time and notice, a distinction between public prosecution and private prosecutions. The purpose of the proviso is to exclude from the protection of the section prosecutions by the crown-prosecutions by or under the order of the Provincial Government. A prosecution instituted by the Public Prosecutor is a prosecution instituted by the Provincial Government within the meaning of the proviso and to such a prosecution S. 136 (2) will not apply. (Davis, C.J. and Weston, J.) NABI BAKHSH v. EMPEROR. I.L.R. (1942) Kar. 557=199 I.C. 198=14 R.S. 172=43 Cr.L.J. 514=A.I.R. 1942 Sind 45.

BOMBAY DISTRICT MUNICIPAL ACT (III OF 1901)—Applicability—Suit against school Board under Primary Education Act—Notice—Necessity.

A suit against a School Board constituted under the Bombay Primary Education Act for damages for wrongful dismissal of a teacher is maintainable without a notice under S. 167 of the Bombay District Municipal Act. S. 167 of the latter Act does not apply; the section does not apply to all suits against a municipality. It does not apply to a suit for anything done or purported to be done under any other act, e.g., the Primary Education Act. (Davis, C.J. and Weston, J.) SHAFI MD. SADATURIO v. MUNICIPAL SCHOOL BOARD, SHAHDADPUR. I.L.R. (1942) Kar. 553=207 I.C. 93=16 R.S. 6=A.I.R. 1943 Sind 98.

—S. 46—Employee under Municipality—Dismissal—When wrongful—Suit for damages—Cause of action—Essentials to be proved. GOKAK MUNICIPALITY v. RAJARAM SHRIDHAR. [see Q.D. 1936—'40 Vol. 1, Col. 3251]. I.L.R. (1941) Bom. 123=191 I.C. 749=13 R.B. 195.

S. 46—Rules under, Appendix G, Part I, Cl. (c)—Market value—Fixation—Finality.

Cl. (c) of Appendix G, Part I of the Municipal Rules must be taken to refer to the continued payment of the annual fee on the basis of the Market value oliginally fixed, in the absence of clear expression that the market value is to be altered from time to time. (O'Sullivan, J.) AJIT SINGH v. KARACHI MUNICIPALITY. A.I.B. 1942 Sind 116.

S. 48—Construction—Bye-laws—Essentials—Necessity for resolution of Municipality after sanction of Commissioner. EMPEROR v. SHIRINBAI SORABJI. [see Q.D. 1936—'40 Vol. I, Col. 3252.] 192 I.C. 816—13 R.B. 299—42 Cr.L.J. 331—A.I.R. 1941 Bom. 66.

<sup>——</sup>S. 136 (2)—Applicability—Protection under—When available—Prosecution falling under proviso to S. 136 (2)—Effect,

### BOM. DIST. LOCAL BOARDS ACT, (1923).

sheet containing the false measurements attached to it duly signed by the first accused and countersigned by the second accused. The accused pleaded S. 136 (2) of the Bombay Local Boards Act, as amended in 1935, and S. 197, Cr. P. Code in bar of the prosecution. It was found that the 1st accused as sub-overseer, was bound to supervise the works, take measurements and enter them in a measurement book and to report to the Board through the Works Committee of which the 2nd accused was the Chairman, the progress of the works in his charge and their measurements for the purpose of making payment to the contractor. The overseer was obliged to sign the bill submitted by the contractor in authentication of the measurements given in it and the charges made. The work in question was entrusted to a contractor by the Board and the contractor had preferred a bill under his signature for the amount stated therein. The bill was signed by accused 1 and counter-signed also by accused 2, as Chairman of the works Committee. The signing of the bill and attaching a measurement sheet thereto and submitting the bill for payment was part of the official duty of the overseer. The Act of conuter-signing the bill in authentication of the measurement and therefore the charges made was part of the official duty of accused 2 as Chairman. The bill was eventually sanctioned and paid by the Board on account of the authentication thereof; and the money was in fact obtained on the guarantee provided by the counter-signature and the accompaniment to the bill consisting of the measurements of the actual work done, for which the bill was preferred. It was found that the contractor who submitted the bill was a bogus contractor, that the measurements mentioned in the bill and noted in the measurement sheet attached to the bill were false and that the two accused had combined to draw the amount dishonestly from the Board.

Held, (1) that assuming that there had been fraudulent and dishonest entry in the bill and its accompaniment, the accused were certainly "purporting to Act," though not actually acting "in pursuance of the Act," with in the meaning of S. 136 (2) of the Bombay Local Boards Act, and the Act complained was therefore protected by S. 136 (2); (2) that the 2nd accused was also entitled to protection under S. 197, Cr. P. Code as he was a statutory public servant according to S. 135 of the Bombay Local Boards Act, and the Act complained of was done or purported to be done by him in the exercise of his official duty. As a member, he was not removable without the sanction of the Local Government under S. 31 of the Act, and sanction of the Government was therefore necessary under S. 197, Cr. P. Code, in the case of the 2nd accused. (Broomfield and Wassoodew, JJ.) Emperor v. VISHNU TATYABA. I.L.R. (1941) Bom 191=193 I.C. 229=13 R.B. 323=42 Bom. L.R. 1193=42 Cr.L.J. 441=A.I. R. 1941 Bom. 85.

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# BOM. DISTRICT MUNICIPAL ACT, (1901).

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S. 136 (2)—Applicability—Protection under—When available—Prosecution falling under proviso to S. 136 (2)—Effect.

BOM. DISTRICT POLICE ACT, (IV OF 1890).

——Ss. 59 and 60—Scope—Powers of Municipality to impose sanitary cess in the form of rate on building or land.

S. 59 (b) (niii) of the Bombay District Municipal Act and Cl. (c) of the Proviso to that section are merely enumerative and do not restrict the powers of the Municipality in the choice of the basis on which the taxes can be levied. The power conferred upon a Municipality by S. 60 (a) (iv) are sufficiently wide to permit it to impose the general sanitary cess in the form of a rate on building or land and there is no inconsistency in the rules framed by a Municipality to that effect; and such a levy is not ultra vires. (IVassordew, J.) SHIDRAO v. NARAVANRAO v. MUNICIPALITY OF ATHNI. 204 I.C. 352=15 R B. 315=44 Bom.L R. 849=A.I. R. 1943 Bom. 21.

S. 59 (x-a)—Construction—"May"—Meaning of—Terminal tax—Power to impose. NAROTT MDAS HARJIVANDAS & CO. v. BULISAR TOWN MUNICIPALITY. [co. Q D. 1936—'40 Vol. I Col. 3252 ] 192 I.C. 635=ILR (1941) Bom. 97=13 R.B. 268=A.I.R. 1941 Bom. 11.

——Ss. 70 and 113—Permission to put up projection aranted on payment of fee—Assessment for continuing projection—Levy of—Legality.

S. 70 (1) of the Bombay District Municipalities Act, only empowers the municipality to levy a fee for the granting of permission to put up projections and not to levy a fee for the continued use of a projection. Ss. 113 and 70 of the Act do not contemplate any agreement between the municipality and the grantee but a written permission to be issued on the terms laid down under S. 113 and on payment of the prescribed fee. Once the fee is paid, permission issued and the projections erected in accordance with the regulations set out under S. 48 (1) (n) of the Act, the matter is at an end. The levying of the fee prescribed under Cl. (c) of Part I, Appendix G of the Municipal Rules for the continued use of the projection is, therefore, ultra inres. (O'Sullivan, J.) AJIT SINGH v. KARACHI MUNICIPA-LITY. A.I.R. 1945 Sind 116.

S. 86—Revision—Order in appeal by Magistrate—If open to revision—Persona designata. See C. P. CODE, S. 115. 43 Bom.L. R. 333.

S. 87—House tax and general sanitary tax—First charge—Suit to recover—I imitation. See LIMITATION ACT, ART. 132. 44 Bom L R. 849.

BOMBAY DISTRICT POLICE ACT (IV OF 1890), S. 34—Temporary withdrawal from duty—Offence.

There is no doubt that S. 34 of the Bombay District Police Act covers both permanent and temporary withdrawal from his duties by a police officer. It is a very serious offence for a man employed in the police force to withdraw himself from his duties even for a day without the permission of his superior officers. (Loho and O'Sullivan. 11.) \*FMPFOR v. MOHANIAI. WADHUMAL. I.L.R (1943) Kar. 530=211 I C 473=45 Cr.L.J. 400=16 R.S. 212=A.I.R. 1944 Sind 50.

S. 51—Scope—Police officer obeying Court summons to appear and give evidence—Right to protection under S. 80 (3).

There are no words in S. 51 of the Bombay District Police Act which would cover the giving by a police officer of evidence on eath when summoned as a witness by the Court. Cl. (f) of the section contemplates a direct duty imposed upon a police officer as such; it does not cover a case where he is merely obeying a summons by a Court to appear before it and giving evidence. He is not then discharging any dark investigation.

BOM. DISTRICT POLICE ACT, (IV OF 1890).

upon him by any rule, order or direction given under the Act so as to entitle him to claim protection under S. 80 (3) of the Act. S. 80 (3) must be read with S. 51 which deals with duties of police officers. (Davis, C.J., and Tyahii, J.) MAHOMED SIDIK v. EMPEROR I L.R. (1944) Kar. 197=219 I.C. 307 = A.I R. 1945 Sind 48.

S. 80 (3)—Applicability—Protection under—When available—Police officer giving evidence in Court on oath on being summoned as witness—If protected—S. 80 (3) if be read with S. 51. See BOMBAY DISTRICT POLICE ACT. S. 51. I.L.R. (1944) Kar. 197.

——S 61 (1) (f)—Construction—"In any other way whatsoever"—Person inviting people and giving dinner to caste people in public street—Obstruction—Offence.

S. 61 (1) (f) of the Bombay District Police Act must be read as a whole in one part only and not in two parts or three parts separately. Under that section, a person is not entitled to obstruct a street by exposing things for sale in or upon any stall and so forth in the street, and that type of obstruction is prohibited apart from any regulation made by the District Magistrate, The general words "any other way whatsoever" must be read ciusdem generis with the words which have gone before.

Obstruction of a street by inviting people to sit in it for a length of time is of the same genus as obstructing it by leaving vehicles or animals or packages in the street. Hence a person who gives a caste dinner in the street outside his residence, and thus causes obstruction is liable to conviction under S. 61 (1) (1) of the Bombay District Police Act. (Beaumont, C.J. and Wadia, J.) EMPROR v. DHARMAPPA. I.L. R. (1942) Bom. 235=200 I.C. 344=15 R.B. 35=43 Cr.LJ. 701=44 Bom.L.R. 241=A.I.R. 1942 Bom. 150.

——S. 61-D—Conviction — Sustainability—Charae of being reputed thieves—Previous convictions not proved.

Previous convictions of the accused for theft or house-breaking may be sufficient evidence of bad character, when such evidence is admissible, to sustain the charge that they are "reputed thieves." But where the previous convictions are not properly proved and it is not known for what offences these convictions are, the convictions of the accused under S. 61.D of the Bombay District Police Act are liable to be set aside. (Pavis, C.J.) ROCHI BHOJOMAL 7. EMPEROR. I.L.R. (1941) Kar. 189=192 I.C. 203=13 R.S. 190=42 Cr.L.J. 256=A.I.R. 1941 Sind 16.

S. 61-D—Convictions — Requisites for— Person found in suspicious circumstances—Liability to conviction.

To sustain a conviction under S 61-D of the Bombay District Police Act three conditions are required; (1) lving or loitering in any street or vard or other place, (2) being a reputed thief and (3) inability to give a satisfactory account of himself. There is nothing in the section which punishes a man for being found under suspicious circumstances, (Davic, C.J.) HAROON AHMED v. FMPFFOR. I.L.R. (1941) Kar. 3?2=14 R.S. 92=43 Cr.L.J. 112=197 I.C. 69=A.I.R. 1941 Sind 208.

S. 61-D-"Reputed thief"—Meaning of.
It cannot be said that a man is a reputed thief merely because he has been found at night in the company of

# BOMBAY FINANCE ACT, (1932).

previous convictions. The words "reputed theif" in S. 61-D of the Bombay District Police Act are used deliberately and have the ordinary meaning that attaches grammatically to those words. (Davis, C.J.)
HAROON AHMED v. EMPEROR. I.L.R. (1941) Kar. 322-14 R.S. 92-43 Cr.L.J. 112-197 I.C. 69-A.I.R. 1941 Sind 208.

-S. 61-E-Burden of proof-When shifts to accused—Duty of prosecution to prove that property in possession of accused is stolen property.

Under S. 61-E of the Bombay District Police Act, before an accused person can be called upon to account for the possession of property, it is necessary that the Magistrate should be satisfied that there is reason to believe that the property is stolen property. There must be evidence, amounting to proof, to the satisfaction of the Court that the accused possessed a thing of which it could be predicated after judicial consideration by the Court that it may be reasonably suspected of being stolen. It is only then and not until then, that the burden of proof innocence shifts to the accused. (Davis, C.J. and Weston, J.) MAHOMED VASI ABDUL GHANI v. EMPEROR. I.L.R. (1941) Kar. 554=199 I.C. 137=14 R.S. 185=43 Cr.L.J. 528 =A.I.R. 1942 Sind 50.

-S. 80 (1)—Applicability—Illegal acts done with knowledge of their illegality-It protected-"Good faith."

S. 80 (1) of the Bombay District Police Act does not extend a general protection to a police officer for all acts in good faith under colour of his office; the protection is limited to any act done in good faith in pursuance or intended pursuance of any duty imposed or any authority conferred on him by any provision of Act or any rule, order or direction lawfully made or given thereunder. The section must, however, be read with S. 51 of Act, which by its wording extends the protection to acts done under other laws. S. 80 (1) read with S. 51 is intended to protect illegal acts. But S. 80 (1) is not intended to apply to illegal acts which are done with the knowledge that they are illegal. S. 80 (1) cannot apply to a case where a Sub-Inspector of Police with open eyes breaks the law, and he is not entitled to invoke the protection of S. 80 (1); he cannot be said to act in good faith when he knowingly breaks the law. A man is answerable under the law for his own acts. He cannot plead the unlawful order of his official superior as his defence. (Davis, C.J.) HAJI MAHOMED KHAN v. EMPEROR. I.L.R. (1942) Kar. 94 = 202 I.C. 681=15 R.S. 58 43 Cr.L.J. 888=A.I.R. 1942 Sind 106.

BOMBAY FINANCE ACT (1932 as amended in 1939), S. 24-B-Scope and effect of -Urban immovable property tax-If annual charge or land revenue under Income-tax Act.

S. 24-B of the Bombay Finance Act, as amended in 1939, does not create an annual charge upon the property. It operates to create a charge should the owner of the property fail to pay the urban immovable pro perty tax. The tax is not an annual charge or land revenue within the meaning of S. 9 of the Income-tax Act. (Leach, C.J. and Lakshmana Rao, J.) MAMAD. KEYI v. COMMISSIONER OF INCOME TAX, MADRAS. I.L.R. (1944) Mad. 399=211 I.C. 426=16 R.M. 528=1944 I.T.R. 484=56 L.W. 526=1943 M.W.N. 551=A.I.R. 1944 Mad. 10=(1943) 2 M.L.J. 364.

-S. 26 (1)—Urban Immoveable Property Tax-Incidents of -Lessee of land erecting buildings for own use and occupying them-Liability of.

land leased it to the defendant on 21-10-1937 for a

# Bombay hereditary offices act, (1874).

period of 10 years on a monthly rental of Rs, 167 for the purpose of constructing motor garages and show-rooms for his own use; and under the lease the Municipal and other professional taxes where to be paid by the defendant-lessee. Subsequently the Bombay Finance (Amendment) Act which came into force on 30-3-1939, imposed Urban Immovable Property tax under the Bombay Urban Immovable Property Tax Act. Disputes arose between the lessors and the lessee who had erected buildings on the Land as to the liability for the tax. The lessee after paying the Tax sought to deduct it from the rent payable to the plaintiffs-lessors, who he contended, were liable for the tax.

Held, that the Urban Immovable Property tax was leviable on the defendant lessee who had constructed the buildings and was the owner thereof as also the actual occupier of the buildings and lands. It was primarily his liability and he was not entitled to deduct the amount of the tax from the rent payable to the plaintiffs. (Raradhyaksha, J.) MOTOR HOUSE, GUJARAT, LTD. v. Nalvarlal. 219 I.C. 61=46 Bom.L.R. 693= A.I.R. 1945 Bom. 54.

BOMBAY HEREDITARY OFFICES (WATAN) ACT (III OR 1874), S. 2-'Watandar' - Meaning of.

A "watandar" as defined by the Bombay Watan Act is a person having a hereditary interest in a watan, 'interest" meaning not only an interest in the property but an interest in the office also. (Broomfield and Macklin, JJ.) VENKATARAO SHRINIVASARAO v. BASAVPRABHU LAKHAMGOUDA. 211 I.C. 12=16 R. B. 255=45 Bom.L.R. 754=A.I.R. 1943 Bom. 348.

\_\_\_\_\_S. 2-Watan lands-Permanent lease of-Duration-Death of grantor-Effect-Claim to permanent tenancy against successor-Sustainability.

A permanent tenancy of watan lands ceases on the death of the grantor, and the grantee becomes a tenant on sufferance or on acceptance of rent from him a tenant from year to year. The grantee cannot base his claim to permanent tenancy on the original grant. The fact that the tenant is described as a permanent tenant in the record of rights is not conclusive. The presumption arising from the entry in the record of rights is at once rebutted by the fact that the original grant has ceased to be effective on the death of the grantor and the fact that the tenant cannot have been legally a permanent tenant. If the tenant is to resist the claim of the succeeding watandar to eject him successsfully, he must show that either that the succeeding watandar can be deemed to have ratified his predecessor's arrangement and treated him as a permanent tenant or that in some way he has acquired a right of permanent tenancy by prescription. As against a watandar an ordinary tenant cannot acquire a title to permanent tenancy by adverse possession merely by reason of his having continued in undisturbed possession for more than 12 years from the death of the grantor (lessor). The mere fact that the successor has accepted an unchanged rent, the same as that fixed in the grant of his predecessor for several years or that he does not put an end to the tenancy cannot be taken as an indication that he is a permanent tenant or is regarded as such by the successor. (Broomfield and Macklin, JJ.) VENKATARAO SHRINIVASARAO v. BASAVPRABHU LAKHAMGOUDA. 211 I.C. 12=16 R B. 255 = 45 Bom.L,R. 754 = A.I.R. 1943 Bom. 348.

-S. 4 — Applicability — Office of Kazi — If The plaintiffs who were owners of certain piece of hereditary-Alteration by holder of inam service lands -If prohibited.

# BOMBAY HIGH COURT CIRCULAR (Cr.) BOMBAY HIGH COURT BULES (A.S.)

The office of a Kazi is not a 'hereditary office" within the meaning of the Bombay Watan Act and does not tall within the meaning of S. 4 of that Act. It is not an office neld for the performance of duties referred to in S. 4, and hence an alienation of Kazi inam service land by a holder of the office is not prohibited. (Chagda, J.) PATALI BEGUM v. YESHWANT THOTE. 47 Bom. L.R. 112. Bom. 317.

-S. 5—Watan property—Liability in the hands of son for father's debts. See C.P. CODE, S. 53. 43 Bom.L.R. 232.

-S. 13-Applicability-Conditions--Protection-When available.

The protection afforded by S. 13 of the Bombay Watan Act does not arise unless at as established that the Watan lands in question had been assigned as remuneration for services under 8, 23 of the Act. (Beaument, C. J. and Sen, J.) RAMABAI SHRINIVAS v. GOVERNMENT OF BOMBAY. 194 I.C. 431 = 13 R. B. 371 - 43 Bom.L.R. 232 - A.I.R. 1941 Bom. 144.

-S. 36-Scope-Death of watandar-Elder son dying sonless without having his name entered in Pali Register-Entry of name of younger-Latter adopting son and relinquishing watan right to adoptive son-Subsequent adoption by widow of elder son-Suit by latter for declaration of right to ownership of watan service and claim to be nearest heir of deceased representative wat indar. See HINDU LAW-ADOPTION. 47 Bom.L.R. 121.

BIBAY HIGH COURT CIRCULAR CRIMINAL No. 160-A (1934)-' Papers exhibited in the proceeding"-Meaning of.

Quaeret-Whether the expression "papers exhibited in the proceeding" in Bombay High Court Criminal Circular No. 160-A, framed under S. 554, Cr.P.Code. in 1934, covers the whole record or is confined to papers which are exhibited in the evidence of witnesses so as not to include copies of depositions or orders of the Court? (Beaumont, C.J. and Sen, J.) PARASHURAM DETARAM v. HUGH GOLDING COCKE. I.L.R. (1942) Bom. 71=198 I.C. 114-14 R.B. 283=48 Cr.L J. 306=43 Bom.L.R. 961=A.I.R. 1942 Bom. 26.

-No. 160-A (1934) -Scope-If exclusive-Power of Court to allow inspection of record-If taken away. See CR.P.CODE, SS. 548 AND 554. 43 Bom.L.B. 961.

-No. 1257 OF 1940-Scope-If mandatory-Non-deposit costs of paper book-Judge if obliged to dismiss appeal-Power to excuse delay.

Bombay High Court Circular No. 1257 of 1940 relating to the deposit of costs of the paper book of the appeal has not the effect of a rule under the C.P.Code, and it does not make it obligatory on the appellate Judge to dismiss an appeal for failure to deposit the costs without leaving any option to consider the merits of the reason for not depositing the costs. The Judge has power to excuse the delay on proper terms if he is satisfied that the non-payment was due to sufficient reasons. (Divatia, J.) NINGAPPA NARSINGAPPA v. CHANDRA JAK-KAPPA. 201. I.C. 653-15 R.B. 103-44 Bom.L.B. 367=A.I.R. 1942 Bom. 198.

BOMBAY HIGH COURT RULES (Appellate Side, 1936). Appendix E-Appeal-Attorney instructing advocate of original side in appeal-Costs of -Taxation-Rule.

An attorney may instruct a counsel on the original side to appear on the appellate side of the High Court and the rules allow him to do so. The attorney is therefore entitled to be paid and must have his costs

taxed. The costs of the attorney are to be taxed in such a case on the scale allowed by Appendix E to the Appellate Side Rules by analogy in that appendix, (B. aumont, C. J. and Sen, J.) DOSSABHOY JAMSESTJI v. EDULJI SORABJI. 195 I.C. 387=14 R.B. 38=43 Bom.L.R. 836=A.I.R. 1941 Bom. 192.

--- R. 130-Applicability - Appeal-Preliminary defection as to sufficiency of Court-fee-Order for payment of additional Court-fee within fixed time-Non fuyment-Dismissal of appeal-Costs-Power to award -Scale of fees.

Where at the hearing of an appeal, the respondent raises a preliminary objection as to the sufficiency of the Court-fee paid on the memorandum of appeal, and the Court, upholding the objection, directs the appellant to pay additional Court-fee within a time fixed, but the appel(ant fails to comply with that order, the Court in making an order rejecting the appeal, can order the appellant to pay the respondent costs of the hearing of the preliminary objection notwithstanding that the memorandum of appeal is ultimately rejected, R. 130 of the Appellate Side Rules of the Bombay High Court should be applied to the case and advocate's fee should be taxed under that rule. (Beaumont, C.J. and Sen, J.) KASHI RAM SENU V. RANGLAL MOTILAISHET. I.L. R. (1941) Bom. 477 = 195 I.C. 894=14 R.B. 84=43 Bom.L.R. 475-A.I.R. 1941 Bom. 242.

--- R. 143-Applicability--- Memo of cross-objections filed beyond time-Registration refused by Registrar -Application to Court to excuse delay-Refection-Right to refund of Court-fee on memo, of cross-objections.

Where the registration of a memorandum of crossobjections preferred by a respondent beyond time is refused by the Registrar as being out of time and the Court subsequently rejects an application by the respondent to excuse the delay and declines to execuse the delay, the effect is merely to uphold the refusal of the Registrar. The case falls within the plain terms of R. 143 of the Appellate Side Rules of the Bombay High Court and there must be an order for refund of the Court fee paid on the cross-objections. (Beaumont, C. J. and Wadia J.) AMRITLAL MOHANLAL v. SPECIAL LAND ACQUISITION OFFICER, AHMEDABAD, 199 LC. 798=14 R.B. 391=44 Bom.L.R. 137=A.I.R. 1942 Bom. 125 (1).

-App. E. Rr. I and VI-Advocate's fee-Computation-Suit for injunction-Valuation-Principles. Appendix E of the Appellate Side Rules of the Bombay High Court does not refer to the value for purposes of Court-fee or jurisdiction. It bases the amount of the advocate's fee on the amount of the subject matter in the suit. The true rule to be derived from the terms of Appendix E is that the advocates's fee should be computed on the value of the subject-matter in dispute, where that value can be ascertained by the Taxing Officer from materials on the record. In the case of an injunction it may frequently be quite impossir ble to ascertain that value e.g., in a suit for an injunc tion to restrain interference with a right of way. In such a case the proper course is to allow the minimum fee. But if the materials on record enable the Taxing Officer to say what is the value of the subject matter in dispute, he should base the advocate's fee on that value subject to the qualification the that value of the subjectmatter should never be regarded as greater than the amount necessary for ascertaining the pecuniary jurisdiction of the Court. The Taxing Officer should never base the advocate's fee on an amount in excess of the pecuniary jurisdiction of the Court which tried the suit, BOMBAY HIGH COURT INSOLVENCY RULES | BOMBAY HIGH COURT RULES (O. S.). (Beaumont, C.J., Wassoodew and Sen, JJ.) RAMA KALINGA MAHAR v. BALAPA KALINGA, I.L.R. (1942) Bom. 520=201 I.C 681=15 R.B. 104= 44 Bom. L.R. 459 A.I.R. 1942 Bom. 203.

-(Insolvency) R. 52 B (2)- Affidavit in opposition to insolvency notice—It to be filed by debtor personally - Affidavit by constituted attorney-Sufficiency. MORARJEE GOKULDAS & CO. v SHOLAPUR SPINNINIG AND WEAVING CO, LTD. [See Q.D. 1936-'40 Vol. I Col. 3253.] I.L.R. (1941) Bom. 89 = 13 R.B. 282 = 192 I.C. 698 = A.I.R. 1941 Bom.

R. 52 B (2)-Set off-Validity-Insolvency notice by several judgment-creditors—Set off available against one only -- If effective answer to notice. MORARJEE GOKULDAS & CO. v. SHOLAPUR SPIN-NING AND WEAVING CO., LTD. [see Q.D., 1936-'40 Vol. I Col. 3253.] I.L.R. (1941) Bom. 89=13 R.B. 282—192 I.C. 698=A.I.R. 1941 Bom. 37.

BOMBAY HIGH COURT INSOLVENCY RULES R. 180 (b)—Rate of commission—Material date for ascertaining—Date of payment of amount or date of sanctioning of scheme or composition.

The commission payable to the official Assignee under R. 180 (b) of the Bombay Insolvency Rules must be charged at the rate existing on the date of payment of the amount and not at the rate existing on the date of the sanctioning of a composition or scheme of arrangement in pursuance of which the amount is paid. The appropriate time for ascertaining the correct rate of commission on the amount to be charged is the date of payment and not when the liability to pay the amount is declared. (Beaumont, C.J. and Kania, J.) OFFI-CIAL ASSIGNEE OF BOMBAY v. MOTILAL CHAMPA-LAL. 202 C.I. 560=15 R.B. 170=44 Bom. L.R. 591=A.I.R. 1942 Bom. 272.

BOMBAY HIGH COURT RULES (Original Side 1936) - Costs - Taxation - Fees of three counsel as between party and party-When to be allowed-Discretion of taxing master.

According to the English practice, which is applicable in the Bombay High Court, the Taxing Master has a discretion to allow the fees of more than two counsel and he can therefore allow fees of three counsel. But it is an unusual expense and therefore it requires a very strong case to induce the Court to sanction the fees of more than two counsel as between party and party. The test is whether the case was one in which a reasonable and prudent man, acting with ordinary prudence, would not have ventured to come into Court without three counsel. When there is no dispute as to fact, the taxing master is not justified in allowing fees of three counsel merely on the ground that matter was of consi derable importance when the point of law, though important was within a comparatively narrow compass. (Blackwell, J.) BYRAMJI JEEJEEBHOY v. PROVINCE OF BOMBAY, (No. 2). I L.R. (1942) Bom. 829 = 203 I.C. 603=44 Bom. L.R. 687=15 R.B. 258= A.I.R. 1942 Bom. 312.

-Practice-Evidence - Commission to examine witness-Deposition of witness-When becomes evidence in the case. See C. P. CODE, O. 26, RR. 7 AND 8. 44 Bom.L.R. 609.

-R. 138-Scope and effect of-Reply to counterclaim-Duty to put in written statement in reply. BAI DAYAMBAI v. MAHOMED ALLI EBRAHIMJI, [see Q.D. 1936 '40 Vol. I Col. 3253.] 191 I.C. 463=13 R.B. 185.

-R. 491—Scope—If abrogates O. 21, R. 89, C.P. Code, See C.P. CODE, O. 21, R. 89. 45 Bom.L.R, 683. L.B. 682 = A.I.R. 1942 Bom. 310.

-R. 534—Discretion of Judge—Taxation under rule-If conclusive as to liability of client to pay amount fixed-R. 895.

The taxation of a bill of costs under R. 534 of the Bombay High Court Rules does not determine the liability of the client to pay, and he is entitled to challenge his liability on a summons under R. 895 after taxation has taken place. The power of a Judge to direct taxation under R. 534 is discretionary. When an application is made ex parte for a common form order of taxation, the Court may direct the solicitor to issue a summons and may hear what the client has to say in the matter. If the Court thinks that there is a serious dispute as to the fact or terms of employments of the solicitor, the Court may refuse to make an order for taxation and leave the attorney to file a suit; and in that suit the solicitor's right to recover can be first determined, and the amount to be recovered can be determined subsequently by taxation. (Beaumont, C.J. and Kania J.) CHITNIS AND KANGA v. WAMAN RAO. I.I.R. (1941) Bom. 223=193 I C. 449=13 R.B. 322=43 Bom.L.R. 76=A.I.R. 1941 Bom. 99.

The Taxing Master of the High Court has power under R. 534 of the Bombay High Court Rules to tax an attorney's bill on the original side in respect of work done in the motussil. (Beaumont, C.J. and Kania, J.) CHITNIS AND KANGA v. WAMAN RAO. I.L.R. (1941) Bom. 223=193 I.C. 449=13 R.B. 322= LL.R. 43 Bom. L.R. 76=A.I.R. 1941 Bom. 99.

-R. 534-Power of Taxing Master under-Costs incurred on appellate side-If can be taxed-Attorney's bills-Discretion of Judge to direct taxation.

An order for taxation on the original side cannot be made under R. 534 of the Rules of the Bombay High Court in respect of costs incurred on the appellate side of the High Court. Under that rule a Judge has discretion to direct attorney's billes to be taxed in any case (except the Appellate Side) and where a bill is taxed, the attorney can apply by summary process for payment under R. 895. (Beaumont, C.J. and Kania, J.) CHITNIS AND KANGA v. WAMAN RAO. I.L.R. (1941) Botm. 223—193 I.C. 449—13 R.B. 322—43 Bom. L.R. 76=A.I.R. 1941 Bom. 99.

-R. 534—Scope—Attorney and client—Agreement to pay costs on original side scale in appellate side matter-Remedy of attorney-Order for taxation-Jurisdiction to make - Suit for costs. SMETHAM BYRNE AND LAMBERT v. DARASHAW. [866 Q.D. 1936-'40 Vol. I Col. 3253.] 191 I.C. 596=13 R.D. 186.

-R. 562-Attorney-Bill of costs-"Instructions for Brief"-Looking up the law-"Ascertainment of legislative practice in various places-Right to remuneration.

In Bombay, where the English practice is followed, no remuneration is allowed to attorneys for looking up the law, under the head "Instructions for Brief" in the Bill of costs. Legislative practice in various places is a question of fact. Where a suit involves the question as to whether the levy of a particular tax is legal or not attorneys are entitled to remuneration under the item "Instructions for Brief" for ascertaining the legislative practice with regard to taxation in various parts of India and elsewhere. (Blackwell, J.) BYRAMJI JEEJEE-BHOY v. PROVINCE OF BOMBAY. I.L.B. (1942) Bom. 829=15 R.B. 217=203 I.C. 279=44 Bom.

Bom. 90.

# BOMBAY HIGH COURT RULES.

Meaning of—Chamber summons adjourned into Court-If Court matter.

Wadia, J.—R. 503 or the Bombay High Court Rules gives a wide discretion to the taxing master to take various factors into consideration in respect of suits as well as matters, and it cannot be held that the word "matter" in the rule should be construed as referring only to appeals, arbitrations, accounts and motions, being the four matters expressly mentioned in item 14 of the Table of Fees. A chamber summons adjourned into Court cannot be described merely as an interlocutory application or as a chamber matter. It becomes really a Court matter. (Beaumont, C. J. and Wadia, J.) SHAMDASANI v. CENTRAL BANK OF INDIA. LID. IL.R. (1941) Bom. 606=199 I.C. 513=14 R.B. 368=43 Bom. L.R. 655=A.I.R. 1942 Bom 90

R. 567—Matter originating in chambers and adjourned into Court—Refresher fee—Power to allow—Taxing master not asked to allow additional brief fee—Power of Court to increase.

R. 567 of the Rules of the Bombay High Court in terms only authorises the payment of refreshers on the hearing of a suit or appeal which extends to more than one day, and there is no express power to allow refreshers on an adjourned summons. Counsel's fees are no doubt disbursements, but a refresher fee in a matter other than a suit or appeal cannot be regarded as a reasonable disbursement within the meaning of item 60 of the Table of Fees in the Rules. It is, however, open to the taxing master in his discretion to allow an additional brief tee, if he thinks that for some reason or another the solicitor had not been able to calculate, and had not in fact correctly calculated the length of time the case was likely to last. But where the taxing master was not asked to increase the brief fee having regard to the unexpected length of time the case had taken, the Court cannot increase the fee or ask the taxing master to do so by sending the case back to him. (Beaumont, C. J. and Wadia, J.) SHAMDASANI v. CENTRAL BANK OF INDIA LTD. I.L.R. (1941) Bom. 606=199 I.C. 513=14 R.B. 368=43 Bom. L.R. 655 = A.I.R. 1942 Bom. 90.

—(Original Side), R. 571—Costs—Allocatur -Practice—Preliminary allocatur in respect of undisputed items—Final allocatur after review by judge—If to be deferred till result of appeal.

When there are objections to a bill of costs, the taxing master can issue a preliminary allocatur, if he is asked to do so, dealing with undisputed items in the bill taxed by him. When there is a summons to review taxation before a judge, the taxing master can issue his final allocatur as regards disputed items after the matter has heen disposed of by the judge in chambers and he is not bound to wait the result of an appeal from the order of the chamber judge. Nor can he be directed to forbear from issuing the allocatur on the ground that the review of tax is still pending before the appeal Court. (Beaumont, C. J. and Chagla, J.) SHAM-DASANI v. CENTRAL BANK OF INDIA LTD. 207 I.O. 549 = 15 R.B. 37 = 45 Bom. L.R. 379 = A.I.B. 1948 Bom. 184.

R. 895—Scope—Liability to pay amount taxed under R. 534—If can be disputed. See BOMBAY HIGH COURT RULES (ORIGINAL SIDE.) R. 534. 43 Bom. L.R. 76.

Table of Fees to be taken by Attorney. Item 14—Chamber summons adjourned for hearing into Court—"Instructions fer brief"—Jurisdic-

BOMBAY INCREASE OF C.-FEES ACT, (1943),

tion of master to allow fees for -"Final trial" - Meaning of.

There is no sufficient reason for confining the words 'final trial' in item 14 of the "Table of Fees to be taken by the Attorneys" in the rules of the High Court of Bomoay to the nual trial of a suit. A matter which originates in Chambers and is then adjourned to be a sard in Court would fall within the item, if there is a null trial or hearing. The wording of the item does not draw a distinction between chamber matters and natters heard in Court. The essential thing is that there should be a final trial. There is therefore no sufficient reason for confining item 14 either to suits or to matters heard in Court. The taxing master has jurisdiction to allow an amount for "Instructions for brief" in a matter arising on a chamber summons which is adjourned to be heard in Court. (Beaumont, C.I. and Wadia, I.) SHAMDASANI v. CENTRAL BANK OF INDIA, LTD. I.L.R. (1941) Bom. 606 = 199 I.O. 513=14 R.B. 368=43 Bom. L.R. 655=A.I.B. 1942

---Item 14—Discretion of taxing master as to quantum—Interference by Court—Grounds—Instructions for brief"—Meaning of.

The Court normally does not interfere with the discretion of the taxing master as to the quantum of fees allowed for "instructions for briet" under item 14 of the lable of Fees to be taken by the Attorneys in the Rules of the Bombay High Court, unless he has misdirected himself. It the taxing master fixes a high amount by taking into account the length of time occupied by the hearing, he misdirects himself. "Instructions for briet" do not mean the same thing as "Instructions for Counsel." Instruction given, probably orally, to counsel in the course of the hearing cannot be included in "instruction for brief." (Beaumont, C. J. and Wadia, J.) SHAMDASANI v. CENTRAL BANK OF INDIA, LTD. I.L.R. 1941 Bom. 606 = 199 I.C. 513=14 R.B-368=43 Bom. L.R. 655=A.I.R. 1942 Bom. 90.

Items 40 and 41—Construction—Allowance of Rs. 15 for 1st hour of each day—If justified—Midday adjournment—If to be included in calculating hours of attendance.

In the Rules of the Bombay High Court, Table of Fees to be taken by the Attorneys, the meaning of items 40 and 41 is perfectly plain. All that the taxing master has to do is to reckon the number of hours of attendance irrespective of whether they took place on the same day or in the same week or in the same month. Having completed the first hour for which a sum of Rs. 15 is allowed under item 40 all subsequent hours are allowed at the rate of Rs. 10. There is not the slightest justification for saying that a sum of Rs. 15 is to be allowed for the first hour each day of the hearing. Further in counting the hours of attendance, the midday adjournment of Court is not to be included. An attorney cannot be entitled to be paid for attendance in Court when the Court is not sitting. (Beaumont, C. J. and Wadia.J.) SHAMDASANI v. CENTRAL BANK OF INDIA, LTD. I.L.R. (1941) Bom. 606=199 I.C. 518 =14 R B. 368 = 43 Bom. L.R. 655 = A.I.B. 1942 Bom. 90.

—Item 60—"Reasonable disbursements"—Refresher fee to counsel in chamber summons adjourned to Court—If permissible. See BOMBAY HIGH COURT RULES (ORIGINAL SIDE), R. 567. 43 Bom. L.R. 655.

BOMBAY INCREASE OF COURT-FEES ACT (XV.OF 1943)—Scope—If retrospective—Application for probate made and Court-fee paid

BOMBAY HIGH COURT INSOLVENCY RULES | BOMBAY HIGH COURT RULES (O. S.). (Beaumont, C.J., Wassoodew and Sen, J.) RAMA KALINGA MAHAR v. BALAPA KALINGA. I.L.R. (1942) Bom. 520=201 I.C 681=15 R.B. 104= 44 Bom. L.R. 459 A.I.R. 1942 Bom. 203.

-(Insolvency) R 52 B (2)- Affidavit in opposition to insolvency notice—It to be filed by debtor personally - Affidavit by constituted attorney-Sufficiency. MORARJEE GOKULDAS & CO. v SHOLAPUR SPINNING AND WEAVING CO, LTD. [See Q.D. 1936-'40 Vol. 1 Col. 3253.] I.L.R. (1941) Bom. 89 = 13 R.B. 282 = 192 I.C. 698 = A.I.R. 1941 Bom.

-R. 52 B (2)--Set off-Validity-Insolvency notice by several judgment-creditors—Set off available against one only -- If effective answer to notice. MORARJEE GOKULDAS & CO. v. SHOLAPUR SPIN-NING AND WEAVING CO., LTD. [see Q.D., 1936-'40 Vol. I Col. 3253.] I.L.R. (1941) Bom. 89=13 R.B. 282—192 I.C. 698=A.I.R. 1941 Bom. 37.

BOMBAY HIGH COURT INSOLVENCY RULES R. 180 (b)—Rate of commission—Material date for ascertaining—Date of payment of amount or date of sanctioning of scheme or composition.

The commission payable to the official Assignee under R. 180 (b) of the Bombay Insolvency Rules must be charged at the rate existing on the date of payment of the amount and not at the rate existing on the date of the sanctioning of a composition or scheme of arrangement in pursuance of which the amount is paid. The appropriate time for ascertaining the correct rate of commission on the amount to be charged is the date of payment and not when the liability to pay the amount is declared. (Beaumont, C. J. and Kania, J.) Offi-CIAL ASSIGNEE OF BOMBAY v. MOTILAL CHAMPALAL 202 C.I. 560=15 R.B. 170=44 Bom. L.R. 591=A.I.R. 1942 Bom. 272.

BOMBAY HIGH COURT RULES (Original Side 1936)—Costs—Taxation—Fees of three counsel as between party and party-When to be allowed-Discretion of taxing master.

According to the English practice, which is applicable in the Bombay High Court, the Taxing Master has a discretion to allow the fees of more than two counsel and he can therefore allow fees of three counsel. But it is an unusual expense and therefore it requires a very strong case to induce the Court to sanction the fees of more than two counsel as between party and party. The test is whether the case was one in which a reasonable and prudent man, acting with ordinary prudence, would not have ventured to come into Court without three counsel. When there is no dispute as to fact, the taxing master is not justified in allowing fees of three counsel merely on the ground that matter was of consi derable importance when the point of law, though important was within a comparatively narrow compass. (Blackwell, J.) BYRAMJI JEEJEEBHOY v. PROVINCE OF BOMBAY, (No. 2). I L.R. (1942) Bom. 829= 203 I.C. 603=44 Bom. L.R. 687=15 R.B. 258= A.I.R. 1942 Bom, 312.

-Practice-Evidence - Commission to examine witness-Deposition of witness-When becomes evidence in the case. See C. P. CODE, O. 26, RR. 7 AND 8. 44 Bom.L.R. 609.

-R. 138—Scope and effect of—Reply to counterclaim-Duty to put in written statement in reply. BAI DAYAMBAI v. MAHOMED ALLI EBRAHIMJI. [see Q,D 1936 '40 Vol. I Col. 3253.] 191 I.C. 463=13 R.B. 185.

-R. 491—Scope—If abrogates O. 21, R. 89, C.P. Code. See C.P. CODE, O. 21, R. 89. 45 Bom. L.R. 683. L.B. 682=A.I.R. 1942 Bom. 310.

-R. 534-Discretion of Judge-Taxation under rule—If conclusive as to liability of client to pay amount fixed-R. 895.

The taxation of a bill of costs under R. 534 of the Bombay High Court Rules does not determine the liability of the client to pay, and he is entitled to challenge his liability on a summons under R. 895 after taxation has taken place. The power of a Judge to direct taxation under R. 534 is discretionary. When an application is made ex parte for a common form order of taxation, the Court may direct the solicitor to issue a summons and may hear what the client has to say in the matter. If the Court thinks that there is a serious dispute as to the fact or terms of employments of the solicitor, the Court may refuse to make an order for taxation and leave the attorney to file a suit; and in that suit the solicitor's right to recover can be first determined, and the amount to be recoverd can be determined subsequently by taxation. (Beaumont, C.J. and Kania J.) CHITNIS AND RANGA v. WAMAN RAO. I.L.R. (1941) Bom. 223=193 I C. 449=13 R.B. 322=43 Bom.L.R. 76=A.I.R. 1941 Bom. 99.

-R. 534-Mofussil work-Taxation of bill of costs on original side-Power of Taxing Master.

The Taxing Master of the High Court has power under R. 534 of the Bombay High Court Rules to tax an attorney's bill on the original side in respect of work done in the motussil. (Beaumont, C.J. and Kania, J.) Chitnis and Kanga ν. Waman Rao. I.L.R. (1941) Bom. 223=193 I.C. 449=13 R.B. 322= 43 Bom. L.R. 76=A.I.R. 1941 Bom. 99.

-R. 534-Power of Taxing Master under-Costs incurred on appellate side-If can be taxed-Attorney's bills-Discretion of Judge to direct taxation.

An order for taxation on the original side cannot be made under R. 534 of the Rules of the Bombay High Court in respect of costs incurred on the appellate side of the High Court. Under that rule a Judge has discretion to direct attorney's billes to be taxed in any case (except the Appellate Side) and where a bill is taxed, the attorney can apply by summary process for payment under R. 895. (Beaumont, C.J. and Kania, J.) CHITNIS AND KANGA v. WAMAN RAO. I.L.R. (1941) Bom. 223—193 I.C. 449—13 R.B. 322—43 Bom. L.R. 76=A.I.R. 1941 Bom. 99.

534—Scope—Attorney and client—Agreement to pay costs on original side scale in appellate side matter—Remedy of attorney—Order for taxation— Jurisdiction to make—Suit for costs. SMETHAM BYRNE AND LAMBERT 7. DARASHAW. [see Q.D. 1936-'40 Vol. I Col. 3253.] 191 I.C. 596=13 R.D.

-R. 562-Attorney-Bill of costs-"Instructions for Brief"-Looking up the law-"Ascertainment of legislative practice in various places-Right to remuneration.

In Bombay, where the English practice is followed, no remuneration is allowed to attorneys for looking up the law, under the head "Instructions for Brief" in the Bill of costs. Legislative practice in various places is a question of fact. Where a suit involves the question as to whether the levy of a particular tax is legal or not, attorneys are entitled to remuneration under the item "Instructions for Brief" for ascertaining the legislative practice with regard to taxation in various parts of India and elsewhere. (Blackwell, J.) BYRAMJI JEEJEE-BHOY v. PROVINCE OF BOMBAY. I.L.B. (1942) Bom. 829=15 R.B. 217=203 I.C. 279=44 Bom.

## BOM. INDUSTRIAL DISPUTES ACT (1938).

before Act came into force—Grant of probate after Act—Increased fee—If payable— Court Fees Act, S. 19 (i).

The Bombay Increase of Court Fees Act of 1943 which came into force on 1-1-1944, has no retrospective operation and does not apply to valuations made or to the fees which have already been paid before that date. Under S. 19 (i) of the Court-Fees Act, the Court fee in respect of a probate is paid not only before the grant itself is issued, but before any order for the grant to issue is made. It is paid when the application for probate is taken on file and that is the material date for ascer tainment of the fee. Where the application was filed before 1-1-1944, and the fee leviable under the law then in force was paid the mere fact that before the order for the grant of probate is made Bombay Act XV of 1943 comes into force would not render the applicant liable for the increased fee prescribed by the new (Stone, C. J. and Chagla, J.) JERBAI B. KAPADIA, In re. 46 Bom. L.R. 768 - A.I.R. 1945 Bom .I.

BOMBAY INDUSTRIAL DISPUTES ACT (XXV OF 1938) S. 28 (1) and (2)—Construction—"Other industrial matter—Meaning of—Dismissal of employee—If industrial dispute.

Sub-S. (1) of S. 28 of the Bombay Industrial Disputes Act gives the right of claiming a change to the employers in respect of an industrial matter which is mentioned in Sch. II, the words of sub-S. (2) are very wide and give the employee a right to claim a change in the standing orders "in respect of any other industrial matter. The dismissal of a workman is an industrial matter within the meaning of S. 28 (2). It is impossible to read into S. 28 (2) a reference to Sch. II so as to qualify the expression "other industrial matter," (Beaumont C. J. and Kania, J.) KHATAU MAKANJI SPINNING AND WEAVING CO., LTD. v. S. R. DESHPANDE. I L.R. (1943) Bom. 734 = 209 I.C. 166 = 16 R.B. 105 = 45 Bom. L.R. 657 = A.I.R. 1943 Bom. 332.

\_\_\_\_\_S. 62—Scope and effect of—Strike—When illegal—Scheme of Act.

The scheme of the Bombay Industrial Disputes Act is that matters in dispute between the employer and the employees should be placed before a conciliator so that Government may have an opportunity of considering his view and endeavouring to get the parties to come to a reasonable arrangement. The effect of S. 62 is that a strike is illegal if started before the standing orders have been settled, or if no notice is given under S. 28, or if the notice is given and the proceedings under S. 28 have not been completed; and where the proceedings have been completed, a strike is illegal if it is commenced more than two months after the completion of such proceedings. The scheme of the Act is that conciliation proceedings shall be taken with a view to avoid strikes, if possible. (Beaumont, C.J. and Kania, J.) KHATAU MAKANJI SPINNING AND WEAVING CO., LTD. v. S. R. DESHPANDE. I.L.R. (1943) Bom. 734=209 I.C. 166=16 R.B. 105=45 Bom.L.R. 657=A.I. R. 1943 Bom. 332.

——Ss. 66 and 67—Applicability and Scope— Participation in strike which is subsequently declared illegal—Offence.

Ss. 66 and 67 of the Bombay Industrial Disputes Act are intended to punish an illegal instigation to an illegal strike, provided it is declared to be illegal by the Industrial Court, whether the illegal Act is committed before or after the declaration. The object of the section

# BOM. KHOTI SETTLEMENT ACT (1880).

is to penalise those employees who go on strike without resorting to the remedies provided by Ss. 26, 27 and 2 of the Act. The intention is to make penal not merel the joining or taking part in a strike after it has been declared illegal but also the participation in it prior to the declaration of illegality. Participation in a strike which is afterwards declared illegal is punishable unde the Act. (Wadia and Lobur, JJ.) EMPEROR to KHANDUBHAI K. DESAI. I.L.R. (1944) Bom. 335 = 212 I.C. 259 = 45 Cr.L.J. 565 = 16 R.B. 373 = 46 Bom.L.R. 104 = A.I.R.1944 Bom. 126.

BOMBAY JAIL MANUAL-Force of-Courts if bound by rules in.

The courts are concerned with the provisions of the Cr.P. Code, in giving directions as to how sentences of imprisonment are to run and not with the provisions of the Bombay Jail Manual, (Davies C.J., and Lobo, J.) EMPEROR v. FAZUL KHUSH MAHOMED. I.L.R. 1941 Kar. 63=196 I.C. 891=43 Cr.L.J. 105=14 R.S. 93=A.I.R. 1941 Sind 190.

R. 392—Scope—Validity of. See CR.P. CODE, S. 397. 44 Bom.L.R. 807.

BOMBAY KHOTI SETTLEMENT ACT (I OF 1880), Ss. 4 and 7—Scope—Bombay Land Revenue Code, S. 39—Application of. See BOMBAY LAND REVENUE CODE, S. 39. 47 Bom.L.B. 376.

——Ss. 17, 18 and 20—Scope—Entry in bothhat as to rent—Amendment with consent of managing khot alone—If ultra vires—Suit to declare same void—Maintainability—Entry when final and conclusive.

The words "parties affected thererby,' in S. 18 (2) of the Bombay Khoti Settlement Act mean all the tenants and all the co-sharers in the khotki who are affected, so that once an entry is made in the survey records, e.g., in the botkhat, as regards the payment of rent by an occupancy tenant to the khot under S.17 of the Act, it cannot be changed or altered except in the cases specified in S. 18 (3), unless all the parties, whether privileged occupants or co-sharers in the khotki, who are affected by the change, give their written consent to it before Recording Officer. The Recording Officer would be acting without jurisdiction if he amends or alters an entry with regard to the rent payable without the consent of all the co-sharers it the khotki. An entry made with the consent of the managing khot alone is ultra vires and therefore it is not final and conclusive under S. 20. A suit to have the entry declared void cannot be barred under S. 20. (Lokur. J.) DATTA-TRAYA VASUDEV v. PARASHRAM ANANT. I.L.R. (1944)Bom. 77=218 I.C. 417=18 R.B. 29=46 Bom.L.R. 363=A.I.R. 1944 Bom. 218.

— S. 20—Scope and effect—Entries in settlement registers—If conclusive—Correctness—Jurisdiction of Civil Court to inquire into.

Entries made in botkhats or settlement registers in accordance with a Government resolution are final and conclusive and the Civil Court has no jurisdiction to inquire into the question as to whether the amount of rent was correctly entered or not. (Stoze, C. J. and Divatia, J.) BHIKAJI YESHWANT v. SECRETARY OF STATE. 47 Bom. L.R. 843.

Where the name of a co-sharer of a Sharakati inam village, in which the Government and the inamdars shave each a share in the revenues of the village, is not

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registered as a sharer in village form No. 3, and he is not recognised as a managing inamdar, he cannot maintain a civil suit to recover his own share direct from a khatedar of the village. He must sue the managing inamdar for an account and recover his share in the land revenue which may have been recovered or which may have been negligently omitted to be recovered by the managing inamdar. (Macklin and Lokur, Jl.) SITARAM SADASHIV v. VITHAL. 47 Bom. L.R. 376 = A.I.R. 1945 Bom. 364.

BOMBAY LAND REVENUE CODE (V OF 1879)—Sale under—Effect of—If different from sale by Civil Court—Award against Manager of joint Hindu family in respect of jamily debts—Sale under Land Revenue Code—What passes.

A sale under the Bombay Land Revenue Code in execution of an award under the Bombay Co-operative Societies Act has the same effect as a sale by a Civil Court. Where an award is made against the manager of a joint Hindu family as such in respect of a debt borrowed by him from a co-operative society in his capacity as manager and the entire family porperty is sold in execution under the Land Revenue Code the interests of all the members of the family pass by the sale as in the case of a sale by a Civil Court. (Broomfeld and Divatia, J.). MULGUND CO-OPERATIVE CREDIT SOCIETY v., SHIVLINGAPPA ISHWARAPPA, I.L.R. (1941) Bom. 682=197 I C. 428=14 R.B. 215=43 Bom.L.R. 807=A.I.R 1941 Bom. 385.

S. 37—Construction—"Except in so far as any right of such person may be established"—If refer only to "lands" or to all previous expressions.

The words "except in so far as any rights of such persons may be established" in S. 37 of the Bombay Land Revenue Code, govern all the previous expressions in the section and not merely "lands". (Wadia and Divatia, JJ.) NARHARSINGJI ISHAVRSINGJI V. SECRETARY OF STATE. I.L.R. (1941) Bom. 226 = 195 I.C. 640=14 R.B. 49=43 Bom.L.R. 167=A.I.R. 1941 Bom, 161.

——S. 37—Construction—"Which are not the property of individuals"—Meaning—If refer only to "lands".

The words "Which are not the property of the individuals, etc., in S. 37 of the Bombay Land Revenue Code cannot be interpreted as referring only to all lands wherever situated" and as having no reference to all the previous expressions. That would be an erroneous construction. The words "which are not the property of individuals," correctly construed would apply to roads, bridges, beds of the sea, lakes, tanks, etc. The legislature could not have intended that only lands are capable of being owned by individuals and not roads, bridges, ditches, nallas, lakes, tanks, canals etc (Wadia and Divatia, IJ.) NARHARSINGJI ISHVARSINGJI v. SECRETARY OF STATE. I.L.R. (1941) Bom. 226=195 I.O.640=14 R.B. 49=43 Bom L.R. 167=A.I.B. 1941 Bom. 161.

S. 37—Construction—Which are not the property of individuals, etc.—If apply to "all public roads lanes" etc.—Private ownership on high way or public road.

There is no warrant or basis for holding that the words "which are not the property of individuals," etc., in.S. 37 of the Bombay Land Revenue Code do not apply to the opening words of the section, namely, "all

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public roads lanes and paths." Such a construction is bised on the erroneous view that there cannot be any public right over private property, and on the basis that roads, etc., which are used by the public must be taken to be Government property. The existence of a high, way or a public road is not inconsistent with the ownership of a private person in the soil. (Widia and Divation, 1/1.) NARHARSINGJI ISHVARSINGJI v. SECRETARY OF STATE. I.L. R. (1941) Bom. 226=195 I.C. 640=14 R.B. 49=48 Bom.L.R. 167=A.I.R. 1941 Bom. 161.

— S. 37—Scope and effect of—Private ownership in soil of highway or public road—If barred or taken away. See HIGHWAY—PUBLIC ROAD, I.L.R. (1941) Bom. 226—43 Bom.L.R. 167—A.I.R. 1941 Bom. 161.

S. 39-Applicability-Khoti village.

Though S. 39 of the Bombay Land Revenue Code does not apply to a khoti village under S. 39 of the Khoti Settlement Act, it makes no difference because analogous provisions are contained in Ss. 4 and 7 of the Khoti Settlement Act. (Macklin and Lokur, JJ.) SITARAM SADASHIV v. VIIHAL. 47 Bom.L.R. 376=A.I.R. 1945 Bom. 364.

——Ss. 48 and 66—Applicability and scope—Conversion of land to non-agricultural use—Right of Gov. ernment

In a case where agricultural land is converted to non-agricultural use without previous permission of the Government, the latter is entitled not only to levy a fine as provided in S. 66, but also the enhanced agricultural assessment under S. 48 of the Bombay Land Revenue Code for the whole period during which it has been so used. (Divatia and Lokur, J.). NAVROJI N. VAKIL v. GOVERNMENT OF BOMBAY. 47 Bom.L.R. 361.

——S. 48—Scope of—Inam village—Veehan salami lands—Quit rent and salami settled at survey settlement—Effect—Use of lands as building sites—Right to levy enhanced assessment.

From the mere fact that before survey settlement in an mam village salami was leived and paid on certain veehan salami lands according to the area cultivated, it cannot be safely inferred that they were granted for agricultural purposes. Where it is clear that the tenants were liable to pay only quit rent and that the rest of the assessment was agreed to be remitted, the contract must be taken to include the remission of all the assessment in excess of the salami. Where at the survey settlement both the assessment and the salami were settled, the inamdar is presumed to have agreed to remit all assessment in excess of the settled salami and the inamdar cannot there after claim enhanced assessment on the ground that the lands have been utilised as building sites. (Lokur, J.) PARSHOTTAM CHHAGAN-LAL v. KUBERDAS. 46 Bom.L.R. 607—A.I.R. 1945 Bom. 15.

Ss. 48. 65 and 66—Applicability—Inamvillage—Kadin lands.

Ss. 48, 65 and 66 of the Bombay Land Revenue Code do not apply to Kadim lands in an alienated inam village. (Lokur, J.) PARSHOTTAM CHHAGANLAL v. KUBERDAS. 46 Bom.L.R. 607 = A.I.R. 1945 Bom. 15.

Ss. 55, 65 and 66—Building Fine—Inam-Veehan salami lands—Conversion into building sites after survey settlement—Right of inamdar to levy fine.

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Building fine under Ss. 65 and 66 is not assessment but is either a royalty for permission or a penalty for building without the necessary permission, where veehan salami lands in an inam village are converted into building sits, after the introduction of survey settlement; the fact that at the settlement the quit rent and salami were settled and fixed, would not poeclude the inamdar from claiming building fine under Ss. 65 and 66. (Lokur. J.) PARSHOTTAM CHHAGANLAL V. KUBERDAS. 46 Bom.L.R. 607=A.I.R. 1945 Bom 15.

Under S. 61 of the Bombay Land Revenue Code, the Government is entitled to adopt the remedy of summary eviction if any person remains on any land after he has ceased to be entitled to do so under any of the provisions of the Act. (Divatia and Macklin, 1/1.) SECRETARY OF STATE v. CHIMANLAL JAMNADAS. I.L.R. (1942) Bom. 357=201 I.C. 420=15 R.B. 76=44 Bom.L.R. 295=A.I.R. 1942 Bom. 161.

S. 65—Applicability to alienated land. BAI KABA v. RAMNIKLAL SUNDERLAL. [see Q.D. 1936—'40 Vol I. Col 3254.] 191 I.C. 145.

—S. 65 and R. 82—Enhanced assessment— Land used and assessed for building purposes— Owner erecting new buildings of greater value— Power of Collector to levy enhanced assessment.

S. 65 of the Bombay Land Revenue Code and R. 82 of the rules issued under the Act provide for altered assessment being levied where land is converted from agricultural to non-agricultural purposes. But neither those provisions nor any other provision would authorize or entitle the Collector to levy enhanced assessment when, upon land already used and assessed for building purposes, the owner proceeds to erect now buildings though the new buildings may be of greater value. (Beaumont, C.J., and Wassoolew, J.) CHANDULAL VADILAL v. GOVERNMENT OF BOMBAY, I.L.R. (1943) Bom. 128 = 206 I.C. 570=15 R.B. 419=45 Bom.L.R. 197=A.I.R. 1943 Bom. 138.

——Ss. 65 and 66—Inam village—Kadin-lands. See Bombay Land Revenue Code, Ss. 48, 65 and 66, 46 Bom.L.R. 607.

——S. 65—Scope—Permanent tenant under S. 83— User of land for non-agricultural purposes—Permission of Collector—Necessity for. BAI CABA v. RAMNIKLAL SUNDERLAL. [see Q.D. 1936—'40 Vol. I. Col 3254.] 191 I.C. 145.

——S. 66—Conversion of land to non-agricultural use—Rights of Government. See BOMBAY LAND REVENUE CODE, SS. 48 AND 66. 47 BOM.L.R. 361.

—S. 68—Scope—Grant of land for certain period—Holder continuing in possession after expiry of period—Effect—Notice under S. 202—If order of eviction—No appeal from order—Suit in Civil Court—Maintainability—Bombay Revenue Jurisdiction Act, S. 11.

Under S. 68 of the Land Revenue Code the Government have the power to grant lands to occupants on certain terms and conditions; and if a grant is made for a certain period the Government would, under the combined effect of Ss. 61, 68 and 202 of the Code, be entitled to resume the lands at the expiration of that period. If any occupation thereafter of the land would

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be a wrongful occupation rendering the holder to summary eviction, and if the Government decide to evict such person they can do so by giving a notice under S. 202. Such a notice is not a mere communication to hand over possession, but is a decision that the occupant is bound to hand over possession of the lands. It is a decision though it takes the form of a notice under S. 202, and therefore S. 11 of the Bombay Revenue Jurisdiction Act applies. If no appeal is preferred against the order, a suit in the Civil Court is barred. (Divatia and Macklin. II.) Secretary of State v. Chimanlal Jamnabas. I.L.R. (1942) Bom. 357—201 I.C. 420—15 R.B. 76—44 Bom.L.R. 295—A.I.R. 1942 Bom. 161.

—S. 83—Applicability—Dewasthan Inam land—Presumption of permanent tenancy—If arises. INJAL DEVI v. BHUJYA AVAJI. [see Q.D. 1936—'40 Vol. 1 Col. 3254.] I.L.R. (1941) Bom. 119=13 R.B. 261=192 I.C. 581=A.I.R. 1941 Bom. 29.

——S. 83—Permanent tenancy arising under— Enhancement of rent—Right of landlord—Custom iu Satara District—Rent equal to assessment— Right to enhancement—Onus.

It is clear that in the Satara District a local custom prevails by which a landlord is entitled to enhance the rent in the case of a permanent tenancy arising by the operation of S. 83 of the Bombay Land Revenue Code. The custom is well known and has been judicially recognised and it is not necessary that it should be proved in each particular case. Where the tenant pays rent equivalent to the assessment, it is not sufficient to rely on the ordinary local custom, and it is necessary for the landlord to go further and prove the local custom to enhance the rent in the case of the purticular kind of tenure. (Broomfield and Macklin, JJ.) Shripad v. Nagu Kushaba. I.L.R. (1943) Bom. 143=210 I.C. 474=16 R.B. 215=45 Bom.L.R. 109=A.I.R. 1943 Bom. 301.

S. 83—Presumption of permanent tenancy—Condition—Satisfactory evidence of commencement of tenancy—What amounts to—Evidence that tenancy commenced between two years—If proof of origin.

A presumption of permanent tenancy will arise under S. 83 of the Bombay Land Revenue Code only if there is no satisfactory evidence of the date of the commencement of the tenancy. A definite date or year must be proved for the purpose of proving commencement. In order to prove the origin of the tenancy, there must be evidence to the satisfaction of the Court about the year in which the tenancy originated. It is not sufficient to show that the tenancy had its origin at some date within a period of twenty years or that it commenced some where between two years and the presumption of permanent tenancy is not rebutted by such proof. (Divatia, J.) RAMA APPA v. TIPPAYA APPAYA. 206 I.C. 487=15 R.B. 415=45 Bom.L.R. 186=A.I.R. 1943 Bom. 95.

S. 83—Presumption under—Conditions. SHANKARRAO DAGADUJIRAO v. SAMBHU. [see Q.D. 1936—'40 Vol. I. Col. 3254.] I.L.R. (1941) Bom, 107=73 C.L.J. 612=I.L.R. (1940) Kar.

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(P.C. 380=43 Bom.L.R. 1=(1941) 1 M.L.J. 427 (P.C.).

S. 84-Notice to quit-Service by post-Permissibility and sufficiency.

S. 84 of the Bombay Land Revenue Code says nothing about service of notice by post; but notice by post is permissible. If a notice under S. 84 is proved to have been properly directed and posted (especially if registered), it must be presumed to have reached the addresssee to whom it is directed in the ordinary course of postal business unless the contrary is proved. (Broomfield and Macklin, JJ.) Venkatrao Shrinivasrao v. Basauprabhu Lakhamgouda. 211 I. C. 12=16 R.B. 255=45 Bom.L.R. 754=A.I.R. 1943 Bom. 348.

——Ss. 86 and 87—Scope—If controlled or affected by O. 34, R. 14, C. P. Code—Mortgage and lease back—Rent note by mortgagor—Sale by Collector to recover rent—If invalid—C. P. Code, O. 34, R. 14—Applicability of.

There is nothing in the provisions of the Bombay Land Revenue Code to suggest that the powers of assistance which the Collector has under Ss. 86 and 87 of the Land Revenue Code are in any way fettered by the provisions of O. 34, R. 14, C. P. Code. O. 34, R. 14, C. P. Code, cannot apply to a sale held by the revenue anthorities under S. 86 of the Bombay Land Revenue Code. Where a mortgagee lets the mortgagor into possession of the property mortgaged to him under a rent note, he becomes a superior holder and the mortgagor is an inferior holder under the Land Revenue Code and the mortgagee is entitled to apply to the Collector for sale of the property as a means of recovering the rent under the rent note. If the Collector makes an order for sale and the sale takes place, such sale is not invalid by reason of O. 34, R. 14, C. P. Code, and is binding on the mortgagor. (Beaumont, C.J. and Wadia J.) RAMA SANKAYYA v. MAHADEVA ANANT. I.L.R. (1942) Bom. 608=202 I.C. 593 =15 R.B. 174=44 Bom. L.R. 597=A.I.R. 1942 Bom. 278.

—S. 121—Applicability—Dispute as to boundary between Native State territory and British Indian territory.

The procedure provided in the Bombay Land Revenue Code (Ss. 118 to 121), for fixing boundaries is inappropriate to the procedure that would have to be adopted when in effect the dispute involves a decision as to the boundary between Native State territory and British Indian territory. S. 121 of the Land Revenue Code which is an integral part of the provisions relating to boundary disputes in the Code cannot be applied to disputes of this kind. The provisions of the Land Revenue Code will apply only to disputes relating to boundaries wholly situated in British India. (Wadia and Macklin, J.). SARJERAO APPAJIRAO v. GOVERN-MENT.OF THE PROVINGE OF BOMBAY. II.R. 1943 Bom. 534-213 J.C. 248-17 R.B. 40-45 Bom.I.R. 810-A.I.R. 1943 Bom. 427.

Ss. 137 and 151—Relative scope—General right of priority for Crown debts—If taken away by S. 151.

The Crown has a general right of priority in respect of debts due to the Crown over other debts due to

# BOM. LAND REVENUE CODE (1879).

unsecured creditors, S. 137 of the Bombay Land Revenue Code confers rights of priority upon Government claims recoverable under Ch. XI of the Land Revenue Code; S. 151 of the Act does not take away the general right of the Crown to preference when the debt is recoverable as an arrear of land revenue, (Weston, J.) JUMOMAL v. TANWARMAL HEMUMAL, LL.R. 1942 Kar 473 = 206 I.C. 116 = 15 R.S. 161 = A.I.R. 1943 Sind. 30.

S. 151—Scope—If curtails or takes away rights conferred by S. 137. See BOMBAY LAND REVENUE CODE, SS. 137 AND 151. I.L.R. (1942) Kar. 473.

Seizure of goods by Collector—If seizure under legal process. See LIMITATION ACT, ART. 29. 44 Bom. L.R. 668.

\_\_\_\_S. 154-Money in Court-Power of distraint.

Money in the custody of a Court cannot be distrained by the Crown under S. 154 of the Bombay Land Revenue Code. There is nothing in the Bombay Revenue Jurisdiction Act which prohibits a Court from dealing with the property of a land revenue defaulter which is in its custody. The ordinary rule is that money in the custody of the Court cannot be distrained; and there is no difference in principle whether the distrainin authority is another Court or the Collector. (Weston, J.) JUMOMAL v. TANWARMAL HEMUMAL. I.L.R. (1942) Kar. 473 = 206 I.C. 116 = 15 R.S. 161 = A.I.R. 1948 Sind. 30.

——Ss. 202 and 203—Scope—Powers of Government to issue notice of eviction without previously passing order—Such notice—If decision or order under S. 203—Notice—If should expressly mention section.

It is clear that Government can pass an order for eviction of a person who is wrot gfully in possession of land by giving him a notice as prescribed by S. 202, Bom ay Land Revenue Code. Such a notice in fact amounts to a decision or order contemplated by S. 203. It is not necessary that before a notice under S. 202 is given the Government should actually pass an order and communicate it to the party concerned. It is open to the Government to pass an order in the form of a notice and to serve it on the party concern ed and if that is done, the Government must be deemed to have complied with the provisions of the Land Revenue Code. Nor is it necessary that the notice should ment on that it is given under S. 202, if it is clear on the wording thereof that it is under that section and under no other provision of law. The Government possesses larger powers than a private landlord. While a private landlord has no power to summarily evict a tenant who is holding over the Government have that power, and at the termination of the period for which a particular right had heen granted by Government to any person, it is open to Government to give him a notice to vacate it and if the holder still remains in possession after its expiry, he must be deemed to be holding the land in wrongful possession. That being so, the Government would be entitled to give a notice as required by S. 202 of the Land Revenue Code. (Divatia and Macklin, II.) SECRETARY OF STATE v, CHIMANLAL JAMNADAS. I.L.R. (1942) Bom. 357=201 I.C. 420=15 R.B. 76= 44 Bom.L.R. 295=A.I.R. 1942 Bom. 161.

S. 211—Applicability—Sanad issued under S. 65 based on agreement and fixing non-agricultural assessment for fixed term—Right of Government to enhance assessment or cancel sanad before expiry of term,

#### BOM. LAND REVENUE RULES (1921)

S. 211 of the Bombay Land Revenue Code does not apply to a sanad or document embodying terms and conditions agreed to between the Government and the occupant. It is not therefore competent to the Government to modify the terms of a sanad issued under S. 65, or cancel it before the expiry of the term fixed if it embodies certain terms and conditions which are agreed to between the Government and the occupant; and the Government cannot claim the right to enhance the non-agricultural assessment beyond what is fixed in the sanad. (Divatia. J.) GOVERNMENT OF BOMBAY v. MATHURDAS LALJIBHAI. 202 I.C 301 = 15 R. B. 153 = 44 BOM L.R. 405=A.I.R. 1942 BOM. 256.

——S. 211—"Subordinate Revenue Officer"—Collector granting Sanad as Agent for Secretary of State— Commissioner has no power to cancel.

Under S. 211, Bombay Land Revenue Code, the Commissioner can in revision call for the paper in order to satisfy himself as to the legality or propriety of any decision or order passed by, and as to the regularity of the proceedings of, a subordinate revenue officer. But there is nothing in that section which empowers the Commissioner to cancel an agreement made by the Collector not as a subordinate officer of the Commissioner, but as agent for the Secretary of State, and entered into by the Collector in that capacity with third parties, e.g., a sanad granted by the Collector acting on behalf of the Secretary of State. (Beaumont, C. J. and Rala-dhyaksha, J.) GOVERNMENT OF BOMBAY v. AHMEDABAD SARANGPUR MILLS CO., LTD. 46 Bom. I.R. 413—219 I.C. 50—A.I.R. 1944 Bom. 244.

——S. 213—Printed map of wards of city prepared by Government—Admissibility in evidence. See EVI-DENCE ACT. SS. 36, 83 AND 87. 44 Bom.L.B. 295.

BOMBAY LAND REVENUE RULES (1921), R. 43—Building Sites—Grant of on restricted tenure—Permissibility.

It is not the law that building sites cannot be granted on restricted tenure under the Bombay Land Revenue Rules. Under R. 43, there may be grant on an inalienable tenure. (Broomfield and Macklin, J.) PRABHAKAR BHASKAR v. KRISHNARAO MOROBA. 203 I C. 443=15 R.B. 236=44 Bom.L.R. 718=A.I.R. 1942 Bom. 317.

BOMBAY LAND TENURES—Inam land—Jat inam sheri land—Sale in execution of all right, title and interest of inamdar—What passes—Sale—If restricted to rights as occupants apart from rights as inamdar to recover assessment.

Where all the right, title and interest of an inamdar in jat inam sheri lands are brought to sale in execution of a decree against him on a mortgage comprising the full right of the inamdar in the inam land, the sale passes to the purchaser not only his right as occupant in the land but also his right as inamdar to recover assessment from the tenants. The distinction between his rights as inamdar and as occupant with respect to the same land is only a national distinction and not a distinction in fact, (Divatia, J.) SADASHIV RAMCHANDRA v. AMRITRAO GOVIND. 202 I.C. 348=15 R B. 8=44 Bom.L.R. 141=A.I.R. 1942 Bom. 123.

BOMBAY LOCAL BOARDS ACT (VI OF 1923)

—Election Rules, R. 47—Scope and effect—Power of
Collector to reject nomination paper accepted by Returning Officer.

# BOMBAY LOCAL BOARDS ACT (VI OF 1923).

R. 47 of the Election Rules framed under the Bombay Local Boards Act relates merely to the interpretation of rules in case of doubt. The interpretation of a rule means the explanation of its meaning, the resolution of any doubt which attaches to its meaning, and is clearly not intended to confer upon the Collector the right to hear appeals against the orders of Returning Officers accepting nomination papers which right is not otherwise conferred by the Rules. This power of interpretation given under R. 47 was never intended to confer upon the Collector the power to reject nomination papers accepted by the Returning Officer and to direct him to declare a particular person in consequence elected a member of the Board. No right of appeal is given against the acceptance as opposed to the rejection of a nomination paper. (Davies, C.J., and Weston, J.) PIR BAKHSH KHAN v. DARVA KHAN. I.L.R. 43 Kar. 845—210 I.C. 19 = A.I.R. 1943 Sind. 233.

S. 19—Judge acting under—If Court or prsona designata—Revisional powers of High Court. See C. P. CODE, S. 115. I.L.R. (1943) Kar. 345.

——S. 19—Jurisdiction—Application by person not qualified to vote at election—Competency—Jurisdiction of Judge to entertain and hear.

A candidate to an election who is not a duly qualified voter under S. 19 (1) of the Bombay Local Boards Act has no inherent right to question the validity of an election, though he is closely interested in it. A candidate who is not qualified to vote at the election has therefore no right to question an election by means of an application under S. 19. If such a person makes an application it is incompetent, and the Judge has no jurisdiction to entertain and hear such an application. (Davis, C.). and Weston. J.) PIR BAKHSH KHAN v. DARYA KHAN ILR. (1943) Kar. 345—210 I.C. 19—A.I.R. 1943 Sind. 233.

An Octroi, like a customs duty, has certain features which differentiate its nature from a tax. A tax can be and is usually imposed without difficulty on a person because he is the owner of some species of property such as income, a house, or a motor car; whereas an octroi and customs duty, though a tax, are limited in scope to a levy or a duty on the import of goods or animals into some town, place or country or a levy or duty on the goods or animals. As such the collection of the duty is affected at the point of entry, either by refusing entry or by seizure, or by penalties imposed on any person attempting to introduce the animals or goods and at the same time evading payment of the duty. There are difficulties in imposing personal liability for such a duty, since it is the animals or goods in relation to location which causes the duty to arise and not property in relation to ownership. S. 72 of the Bombay Local Boards Act of 1923 applies to amounts, recoverable under Ch. VIII of the Act, and where no written demands or bills are issued under S. 104, S. 72 cannot apply and no suit can lie at the instance of the Local Board against the defaulters. Even after the amending Act of 1938, the Local Board has no power to file suits under S. 72, unless a current account is kept. S. 104 applies only to cases where current account is maintained. (Stone, C. J. and Divatia, J.) DISTRICT.
LOCAL BOARD, RATNAGIRI v. SHANTARAM. 17 Bom. L.R. 898 = A.I.R. 1946 Bom. 117.

BOMBAY MAMLATDARS COURTS ACT (II OF 1906), S. 18 (3)—Application—Revisional application under S. 23—Application to bring on legal representation of decased party—Limitation—C.P. Code, O. 32—Application of.

Where in a revisional application under S. 23 (2) of the Bombay Mamlatdars Courts Act, the applicant dies, his legal representative can be brought on record, even though the application to bring him on record is made beyond the period of one month prescribed by S. 18 (3) of that Act. O. 32, C. P. Code, cannot apply to such a proceeding. (Chagla, J.) HAFASJI IBRAHIM v. MANGALGIRJI. 47 Bom.L.R. 845.

BOMBAY MARKETS AND FAIRS ACT IV OF 1862), S. 1—Scope—If conflicts with S. 139, Bombay District Municipal Act—Establishment of Cattle Market on private land within Municipality without sanction of District Magistrate—Offence EMPEROR v. NAJMUDDIN IBRAHIM SAHIB. [see Q.D. 1936-'40 Vol. I Col. 630.] 191 I.C. 121=13 R.B. 155=42 Cr.L. J. 84.

BOMBAY MOTOR VEHICLES TAX ACT (XXXIV OF 1935), S. 12—Breach of rule 25 of the Bombay Motor Vehicles Tax Rules—Manager of Company owning vehicle—Liability of.

It cannot be held that a mere manager of a company which owns a motor car is liable for breach of rule 25 of the Motor Vehicles Tax rules which requires the token to be carried on the car. He is not in law in possession or control of the car. (Beaumont, C. J. and Wassoodew, J.) EMPEROR v. K. P. K. SHETTY. 205 I.C. 227=15 R.B. 360=1943 Comp. C. 75=44 Cr.L.J. 363=45 Bom.L.R. 69=A.I.R. 1943 Bom. 69.

BOMBAY MUNICIPAL BOROUGHS ACT XVIII OF 1925) S. 3 (2)—"Building"—Fence consisting of wooden planks attached to posts embedded in earth—If wall or enclosure.

A fence six feet in height consisting of wooden planks attached to posts embedded in the earth on the boundaries of an open piece of ground adjacent to a house is not a "building" as defined by S. 3 (2) of the Bombay Municipal Boroughs Act. It is neither a wall nor an enclosure merely because it screens off completely the outer view. Hence the erection of such a fence without the permission of the Municipality is not an offence under S. 123 (7) of the Act. (Broomfield and Wassoodew, J.). EMPEROR v. HASANBHAI. 199 I.C. 417=14 R.B. 383=43 Cr.L.J. 559=44 Bom. L.R. 45=A.I.R. 1942 Bom. 94.

S. 3 (15) (8)—Public securities — Provident fund of municipal employees—Investment in debentures issued by Municipality—If justified—Trust Act, S. 20.

A Borough Municipality governed by the Municipal Boroughs Act is competent to invest the Providen Fund amounts of its employees in any public securitiest including debentures issued by itself under the Local Authorities Loans Act, 1914. It is not necessary that they should be invested only in public securities as defined by S. 20 of the Trusts Act. The debentures issued by the Municipality are public securities as defined by S. 3 (15) (e) of the Bombay Municipal Boroughs Act. (Lokur and Bavaekar, JJ.) AHME-DABAD MUNICIPALITY v. GOVERNMENT OF BOMBAY. 47 Bom.L.R. 867.

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-S. 3 (20)-"Tax"-"Fee"-Levy, whether tax or fev-Test-Object of levy-Relevancy as a guide.

A "tax" and "fee", when imposed by the legislature or local bodies are both burdens or charges upon persons and property and the object of both is to raise money for a public purpose or to serve some public object. The object for which a fee or tax is levied by a public body would not serve necessarily as a guide for saying whether an imposition is a "fee or a "tax". The object is not the determining factor in observing the formalities for the levy. (Wasseedew, J.) SORABJI FIORMOSJI v. BROACH BOROUGH MUNICIPALITY. 195 I.C. 754=14 R.B. 76=43 Bom L.R. 533=A.I.R. 1941 Bom. 268.

S. 15—Scope—Powers of Judge under—Order unseating candidate on ground of being disqualified under S. 12—Jurisdation to make—Recision—Power of High Court—Persona designata.

A Judge holding an election inquiry under S. 15 of the Bombay Municipal Boroughs. Act has no power to unseat a candidate on the ground that the candidate was disqualified for election by reason of S. 12 of the Act. The inquiring authority has no right to pass orders except in accordance with the express terms of S. 15 (3). Under S. 15 (3) (a) the judge is bound to unseat a candidate who has been guilty of corrupt practices. But in any case to which Cl. (a) does not apply, the Judge simply scrutinises the votes and awards the election to the candidate who has the greatest number of valid votes. If there is corrupt practice, the candidate is unseated. If there is no corrupt practice, the Judge simply scrutinises the votes, decides which votes are valid, counts up, and declares the result accordingly. There is no power to set aside an election on the ground that the candidate was never qualified to be elected. If the Judge unseats a candidate on the ground that he is disqualified by reason of S. 12, he acts beyond his powers and his action though the action of persona desagnata is subject to revision by the High Court. (Macklin, J.) HIFZUIRAHEMAN ANSAR-SAHEB v. HASANSAHEB ABANSAHEB. 214 I.C. 11 =17 R.B. 74=46 Bom. L.R. 371=A.I.R. 1944 Bom. 203.

——S. 34 (2) and 58 (f)—Suspension of Municipal servant—Right of latter to pay during period of suspension. See MASTER AND SERVANT—SUSPENSION OF SERVANT. 44 Bom L.R. 814.

S. 58 (f)—Power of Municipality to dismiss servants—Jurisdiction of Civil Courts to review dismissal.

There can be no doubt that the action of a Municipality in dismissing its servants under the authority delegated under the Bombay Municipal Boroughs Act is not open to review in a Court of law, provided that the Municipality has reasonably acted within its powers, that is, that the grounds of dismissal are proved, that the inquiry against the servants is conducted in accordance with the principles of natural justice, and that the servants are given reasonable opportunity of being heard in their defence. Whether such opportunity was given or not must depend upon the circumstacces and facts proved. A dismissal cannot be challenged on the ground that the evidence did not warrant a drastic action like dismissal, for, on that point the Municipality is the sole judge. Where the procedure adopted in dismissing a Municipal servant was faultless, there can be no review of the Municipality's Act in a Civil Court. BOM. MUNICIPAL BOROUGHS ACT (1925).

(Wassoodew, J.) PADMA KANT MOT(LAL v. AHMEDA-BAD MUNICIPAL BOROUGH. I.L.R (1943) Rom. 1 =15 R.B. 293=204 I C. 216=44 Bom. L.R. 814 =A.I.R. 1943 Bom. 9.

S. 63—Construction and scope—Public well getting filed up int casing to be used as public well—If vests in Gvernment or continues in Municipality—"Belong"—Meaning of.

All the properties specified in sub-S. (2) of S. 63 of the Bombay Municipal Boroughs Act are properties of a public character and include public wells. When property of the nature specified in S. 63 ceases to be used for the purpose which led to its being vested in a municipal borough, as for example, when a public well ceases to be used as a public well by getting filled up, the land does not vest in the Provincial Government. The scheme of the Act is that property used for a public purpose, as specified in S. 63, is to vest in the Municipality, and if it ceases to be used for the publi: purpose, the municipality can sell it with the consent of the commissioner and the proceeds will form part of the municipal fund. There is nothing in the Act which suggests that Government has any interest in the matter. There is nothing inherently unjust or unreasonable in the Legislature having provided that property once vested in the municipality shall for all times be held for the benefit of the local public.

The word "belong" denotes ownership. (Reaumont C.J. and Wadia, J.) THE BOROUGH MUNICIPALITY OF AHMEDABAD v. GOVERNVENT OF BOMBAY I.L. R. (1942) Bom 463=201 I.C 329=15 R B. 66=44 Bom.L R. 354=A.I.R. 1942 Bom. 183.

S. 63—Scope—Public street—Lease by municipality with sanction of Government—Rent path by lessee shired by Government and Municipality—Lessee using adjoining land unauthorisedly—Municipality recovering rent from lessee in respect thereof—Right of Government to claim share.

When property of the nature described in S. 63 of the Bombay Municipal Boroughs Act ceases to be used for the purpose which lead to its vesting in the Municipal Borough, such land does not, on the cessor of such user, revert to the Government, but remains the property of the Borough Municipality. The plaintiff, a borough Municipality with the previous sanction of the Commissioner granted a lease of a portion of a public street to a company for three years on condition that the lessee should pay Rs. 25 per month to Government and Rs. 25 to the Municipality per month as rent as well as the assessment of the land. Subsequently it came to the notice of the plaintiff that the lessee had erected a wooden cabin unauthorisedly on the adjoining part of the street which was not included in the lease and there was an agreement between the plaintiff and the lessee that the latter should pay the former a sum of Rs. 10 per month for the use of this piece of land on which the cabin was put. This continued for some time and after the cabin was removed by the lessee, the Municipality wrote to the Commissioner for retrospective sanction of the lease of the site over which the cabin stood and which was used by the lessee. No reply was received to this, but the Deputy Collector wrote to the Municipality asking the Municipality to pay half the amount which it had collected from the lessee in respect of the site of the cabin. The Municipality paid the amount under protest and sued the Government for refund and for a declaration that the land in question was public street land. It was found that the cabin had been put

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up without interfering with the sub-soil and that the erection of the cabin did not involve the use of the sub-soil at all.

Held, (1) that even if the land was unauthorisedly used by the lessee, it did not cease to be vested in the Municipality and at no time did it revert to the Government either during or after the user thereof by the lessee; (2) that the Government had no right to recover any part of the rent realised by the plaintiff municipality for the unauthorised Occupation of the public street; and (3) that in the absence of any agreement between the Government and the Municipality as regards sharing the rent of the lease or of any statutory provision under which the Government could claim a share in the amount, the Government was not entitled to claim any amount recovered by the Municipality (Diratia und Weston, J.) MUNICIPAL BOROUGH OF AHMEDABAD > BOMBAV GOVERNMENT: 46 Bom. LR. 643—A.I.R. 1945 Bom. 37.

-S. 63 (2) (c)—Construction—Municipality's—right to sub-soil in streets—Cess pools—Right to dig.

The legal effect of the statutory vesting of a street in a municipality is not to transfer to the municipality the ownership of the sub-soil upon which the street rests; the street, qua street vests in the municipality that is, the surface and only so much of the soil below the surface as is necessary to enable the muni ipality adequately to maintain and manage the street as a street. When therefore under S. 63 of the Bombay Municipal Boroughs Act, there is vested in a municipality all public streets and the pavements stones and other materials thereof and also all trees, erections, materials, implements and things provided for in such streets, there vests in the municipality the streets, qua streets, the surface soil and not the subsoil or only so much of the sub-soil as is necessary to maintain the surface of the streets as such. It would of course, include the right to dig gutters in the sides of the streets, to lead away surface water to drain the streets or to provide the streets with the necessary bed or foundation, but it cannot, on any reasonable interpretation be taken to include the right to dig cesspools in the sides of the streets for the convenience of neighbouring householders and the profit or convenience of the municipality, Cl. (c) of S. 63 (2) was never intended to recognise the existence of or vest in the municipality cesspools dug in the sides of public streets for the benefit not of the public streets, but of houses which, happen to adjoin them. It cannot be said that cesspools dug on the sides of roads, having no direct connection whatever with drains or sewers are included in the term "works" used in its context in Cl (c) of S. 63(2). (Davies, C. J. and O'Sullivan, J.) HYDERA-BAD MUNICIPALITY v. PROVINCE OF SIND. (1943) Kar. 411=210 I.C. 568=16 R.S. 151= A.I.R. 1943 Sind 254.

Ss. 73(x) and 91—Ahmedabad Municipal Rules R. 344—Scope—Ultra vires.

S. 37 (x) of Bombay Municipal Boroughs Act deals only with a general water rate or a special water rate. Those rates may be imposed in the form of rate assessed on buildings and lands or in any other from including that of charges for supply of water. But what is imposed must be a rate, and not an arbitrary lump sum. It is clear that a lump sum imposed arbitrarily by the standing committee of a Municipality on certain trade and not on the district generally and not depending on the value of the property assessed is not a rate, and is not authorised under S, 73 (x) or S. 91 of the

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Act. R. 344 of the Ahmedabad Municipal Rules, providing for lump charges instead of a special water rate in the case of water supplied without meter in the case of a trade, is therefore ultra vires. (Beaumont, C.J. and Sen, J.) MOTIRAM KESHAV DAS v. AHMEDABAD MUNICIPAL BOROUGH. 202 I.C. 847=14 R.B. 37=44 Bom.L.R. 280=A.I.R. 1942 Bom. 177.

——S. 90 (1)—License fee—Power to charge—No bye-law requiring license for trade—Levy of license fee—Legality.

Under S. 90 (1) of the Bombay Municipal Boroughs Act, the question of charging fees in respect of a license must arise only when a license is granted and a license could only be granted if the law requires a license to be granted. Where there is no section in the Act or any bye-law requiring a license in certain trades, the Municipality can frame the necessary bye-law requiring any trade to be carried on under a license and may by rule prescribe license fees. But when no bye-law has been framed requiring a particular trade to be carried under any license, the Municipality cannot enact a rule prescribing a license fee in respect of such trade and charge license fees in respect of the same. If it levies the levy is illegal. (Wassoulew, J.) SORABJI HORMASJI v. BROACH BOROUGH MUNICIPALITY. 195 I C. 754=14 R.B. 76=43 Bom.L.R. 533=A.I.R. 1941 Bom. 268.

Ss.98 and 99—Scope--If control or limit operation of S. 203. See BOMBAY MUNICIPAL BOROUGHS ACT, S. 203. 44 Bom. L.R. 890.

——Ss. 10 5 and 203—Construction and scope—Distress for taxes—Limitation—Suit under S. 203 barred by time—If bars remedy by distress. SURAT BOROUGH MUNICIPALITY 7. SARIFA. [see Q.D. 1936—40 Vol. I, Col. 3255.] I.L.R. (1940) Bom. 830—192 I.C. 719—13 R.B. 286—A.I.R. 1941 Bom. 53.

In an appeal under S. 110 of the Bombay Municipal Boroughs Act the question of the assessment itself can be challenged. (Wadia and Macklin, J.) MUNICIPAL BOROUGH OF AHMEDABAD v. ARYODAYA GINNING AND MANUFACTURING CO. LTD. I.L.R. (1941) Bom. 658=14 R.B. 252=197 I.C. 833=43 Bom.L.R. 816=A.I.R. 1941 Bom. 361.

——8. 110—Magistrate actions under—Position and powers of—Power to take evidence or additional evidence.

A Magistrate acting under S. 110 of the Bombay Municipal Boroughs Act and hearing an appeal is an ordinary Court and not a persona designata and has power to take evidence and to allow additional evidence, oral and documentary, to be led before him, though the section does not specifically confer such power on him. (Wadia and Macklin, IJ.) MUNICIPAL BOROUGH OF AHMEDABAD v. ARVODAYA GINNING AND MANUFACTURING CO., LTD. 43 Bom. L.R. 816=IL.R. (1941) Bom. 558=14 R.B. 252=197 I.C. 833=A.I.R. 1941 Bom. 361.

8. 111 — Construction — "Decision upon any appeal"—Meaning—Interlocutory order—Revision.

There is no reason why the words "decision upon any appeal" in S. 111 of the Bombay Municipal Boroughs

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Act should be interpreted differently from the words "case decided" in S. 115, C.P. Code. There is nothing in the language of S. 111 of the former Act which necessarily implies that the decision of the appeal referred to in that section means the final decision. Interlocutory orders passed by a Magistrate under S. 110 of the Act can therefore be revised under S. 111. (Wadia and Macklin, J/.) MUNICIPAL BOROUGH OF AHMEDABAD v. ARYODAYA GINNING AND MANUFACTURING CO., I.T.D. 43 Bom. L.R. 816=I.L.R. (1941) Bom. 658=14 R.B. 252=197 I.C. 833=A.I.R. 1941 Bom. 361.

——S.114—Cesspool—Right of municipality to dig.

Under the Bombay Municipal Boroughs Act, when streets are vested in the local authority, it is the surface soil and not the subsoil that vests. Streets are vested in the municipality as streets. A claim to the right odig cesspools in public streets does not on the face of it.

cesspools in public streets does not on the face of it appear reasonable. (Divies, C.J. and O' Sullivan J.) Hyderabad MUNICIPALITY PROVINCE OF SIND, I.L.R. (1943) Kar. 411=210 I.C. 568=16 R.S. 151=A.I.R. (1943) Sind. 254.

S. 114—Power of Municipality to stop up public street—If overs power to authorise permanent obstruction by private individuals.

The power conferred upon the Municipality for the purposes of the Bombay Municipal Boroughs Act to "stop up" streets under S. 114 of the Act cannot be extended to cover a case where the Municipality authorizes or rather purports to authorize certain individuals to build a wall across a public street for their own purposes. The "stopping up" of a street does not mean its obstruction in the orinary sense of that word. To stop up" a street means that the street shall no longer be used as a street; but this is a special power conferred under S. 114 of the Act and to be exercised only subject to the previous sanction of the Commissioner. (Davie, C.J., and Weston, J.) CHELLARAM VERHOMAL v. EMPEROR. I.L.R. (1942) Kar. 90=200 I.C. 741=15 R.S. 3=43 Cr. L.J. 714=A.I.R. 1942 Sind. 91.

S. 114 (2)—Construction and scope—Powers of acquisition under—Necessity for care in exercise of

Stone, C.J.—S. 114 (2) of the Bombay Municipal Boroughs Act places in the hands of those who have the control of the inception and alteration of schemes for laying out and making new public streets etc., wide powers of confiscatory nature, while they are apparently at the same time endowed with powers of dispensation which will greatly enhance the value of any land or building abutting upon the new street which they do not choose to take. These compulsory powers which enable acquistions, to be made which have no continuity of plan or scheme for the construction of houses and buildings to form the new street, should be very carefully exercised. (Stone, C. J. and Divatia, J.) AMRATLAL v. LAND ACQUISITION OFFICER, AHMEDABAD. 47 BOM.L.B. 95=A.I.B. 1945 Bom. 502.

Having regard to the terms of S. 105 of the Evidence Act, the burden is upon an accused who relies upon the permission given to him by S. 123 (5) of the Bombay Municipal Boroughs Act to prove that he comes within the terms of that sub-section, i,c., that the building not inconsistent with any provision of the Act or any bye-law, and is thereby relieved of the liability which its otherwise upon him under S. 123 (7). The fact that the exception is included in the body of the statute

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itself does not shift the onus on to the prosecution. (Beaumont, C.J., and Macklin, J.) EMPEROR v. DAHYABHAI SAUCHAND. 195 I.C. 825=14 R.B. 82=42 Cr. L.J. 783=43 Bom. L.R. 519=A.I.R. 1941 Bom. 273.

In order to bring himself within the provisions of S. 123 (5) of the Bombay Municipal Boroughs Act, an accused person has the burden on him to prove that his work was not inconsistent with any of the provisions of the Act or bye-laws. But that presupposes that a question has arisen as to whether he has committed a breach of any provision of the Act or bye-laws. It is obvious that an accued person cannot go through every section of Act and every bye-law and prove affirmatively that he has not committed any breach of that section or that bye-law. The true view is that as soon as the Municipality has notice that the accused is going to rely on S. 123 (5), it must allege what provisions of the Act or bye-law the accused has broken according to it, which disentitles him to rely on S. 123 (5). When that allegation is made, the burden is on the accused to prove that he has not committed the breach of that Act or bye-law alleged. Unless fhe Municipality alleges a breach of some specific provision of the Act or bye-law, there is no Issue upon which any question of burden of proof can arise, (Beaumont C.f. and Sen, J.) EMPEROR v. BHIKHABHAI MOTIRAM. 43. Bom. L.R. 877=198 I.C. 120=14 R.B. 282=43 Cr.L.J. 313=A.I.R. 1942 Bom, 28,

Ss. 127 and 128—Construction—Municipality—Rights in the subsoil of streets—Right to dig cess-pools.

Neither S. 127 nor S. 128 of the Bombay Municipal Boroughs Act can be read as giving the Municipality any rights in the sub-soil of the streets or as entitling it to dig cess-pools. S. 127 merely gives the Municipality the power, and a very necessary power, to survey and control any cess-pools which may exist, and cannot be construed as giving to the Municipality expressly or by necessery implication rights in the sub-soil of streets, which it does not otherwise possess, while S. 128 by its omission of cesspools in a section which gives the Municipality rights in the subsoil which it might not otherwise possess for the purpose of carrying drains, sewers and so on under a public street, by implication excludes any such right so far as cess-pools are concerned. Daveis, C. J. and O Sullivan, J.) HYDERABAD MUNICIPALITY v. PROVINCE OF SIND. J.L.R. (1943) Kar. 411=210 I.C. 568=16 R.S. 151=A.I.R. 1943 Sind. 254.

- ——S. 152 (1) (a)—Construction—Setting up stall—What amounts to—Lorry on wheels with goods for sale. EMPEROR v. HASAM MAMAD. [see Q.D 1936-40 Vol. 1 Col 3255.] 13 R.B. 119=191 I.C. 465=42 Cr.L.J. 164.
- ——S. 512 (1) (b)—"Any other thing"—Meaning of—Hand cart with merchandise left standing in street—If covered by S. 152 (1) (b). EMPEROR v. HASAM MAMAD. [see Q.D. 1936-40 Vol. I Col. 3256.] 13 R.B. 119=191 I.C. 465=42 Cr.L.J. 164.

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S. 159—Ingredients of offence—Conviction— Essentials to be proved—Secretary of mill—Liability

In a prosecution under S. 159 of the Municipal Boroughs Act, it has got to be proved, firstly, that the accused is a person who has the building or land under his control; secondly, that he allowed the offensive liquid or other matter to run upon any street, land or space and thirdly, that the liquid or matter was or was likely to become offensive. In the absence of definite proof and finding on these points, the Secretary of a mill cannot be convicted under S. 159. The mere fact that the accused denies that he is the Secretary and that the Magistrate holds that he is, would not be sufficient to record a conviction. It has to be proved by evidence that the Secretary is a person who has the building or land of the mill under his control. There is no presumption that the Secretary as such is in control of the premises so as to render him liable under S. 159. (Broomfield and Wassodew, J.) EMPEROR v. CHAMPAKLAL CHUNILAL. 194 I.C. \$45=13 R.B. 370=42 Cr.L.J. 571=43 Bom. L.R. 110=A.I.R. 1945 Bom. 156.

——S. 186 (2)—Imposition of daily penalty— Penalty in anticipation of repetition of offence— Legality.

The words of S. 186 (2) of the Bombay Municipal Boroughs Act are not so clear as to express a definite intention of the Legislature that an order of fine for further continuance of the nuisance must necessarily be passed in the same order as that which records the first conviction. Therefore on the principle that a person should not be punished in anticipation of the commission of an offence, it is necessary in every case where a fine for continuance of the offence is sought to be imposed, for a fresh prosecution to be instituted. (Davies, C. J. and Weston, J.) TULSIOMAL TEKCHAND v. EMPEROR, I.I.B. (1942) Kar. 5 = 200 I.C. 340 = 14 R.S. 214 = 43 Cr.L.J. 700 = A.I.R. 1942 Sind 78.

——Ss. 198 and 204 (2), proviso—Scope—Proceedings for purchase of land—Compromise providing for payment of money to conver of land—Absence of sanction by Municipal resolution—Effect—Decree in terms of—If ultra vires—Suit by rate-payer to set aside—Competency.

It cannot be disputed that a rate-payer in a Municipality has such an interest in the affairs of the Municipality as would entitle him to come to Court and sue for an injunction restraining the Municipality from misapplying its funds; nor can the Municipality be protected from such a suit merely because it has taken the precaution to use a Court for the purpose of carrying out its object of misapplying Municipal funds and has obtained the sanction of the Court to a consent decree ultra vires the powers of the municipality. It cannot be said that the rate-payer is not competent to sue to set aside the consent decree because he is not a party to such decree. A compromise arising out of proceedings under S. 198 of the Bombay Municipal Boroughs, Act relating to purchase of land requires sanction by a Municipal resolution in view of the proviso to S. 204 (2) of the Act. Hence a consent decree or compromise to which no sanction has been obtained as required by the proviso to S. 204 (2) and which embodies an agreement between the Municipality and the owner of land that a certain sum of money should be paid to the latter for the land to be purchased by the Municipality, is ultra vires the powers of the Municipality. Hence

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suit to set side such a consent decree or compromise, as a result of which a rate-payer suffers loss or damage, not only lies but should succeed. (Davis, C. J. and O'Sullsvan, J.) LACHIMANDAS v. CHANDUMAL. I.L.R. (1944) Kar. 53=A.I.R. 1944 Sind 150.

S. 204 (3), proviso—Scope—Compromise in proceedings under S. 198—Sanction—Necessity - Form of sanction. See BOMBAY MUNICIPAL BOROUGHS ACT, SS. 191 AND 204 (2), PROVISO. I.L.R. (1944) Kar. 53.

- S. 203-Construction-"Process"-"Such process"-Meaning of-Ss. 98 and 99.

The process for recovery of octroi dues by a Municipality other than by a suit is indicated in Ss. 98 and 99 of the Bombay Municipal Boroughs Act. There can be no doubt that if a current account has been kept as required by S. 99, a suit will lie for recovery of municipal dues such as octroi duty. If no such current account is kept and if no process is issued under S. 98 to recover the octroi duty, it is lawful for a Municipality to sue the person liable to pay the same in any Court of competent jurisdiction. It is true that the right is given under S. 203 of the Act to a Municipality to sue only a person liable to pay. But the liability to pay, in order that the first clause of S 203 may come into operation, may arise independently of Ss. 98 and 99, and in considering the application of the 1st clause of S. 203, the Court has to consider whether that liability has arisen under the Act. The section does not impose a restriction on the capacity of a Municipality to sue to recover its dues. The operation of the 1st clause is not restricted to the process of recovery permissible under Ch. VIII. The word "process" in that clause implies summary process generally. The words "such process" in the second clause merely refer to the generality of summary remedies conferred by the statute. A Corporation like an individual has a right to enforce its claim by suit unless that right is expressly limited or the limitation clearly implied. The language of S. 203 doce not restrict the Municipality's right of suit in respect of octroi dues. A suit to recover octroi dues is therefore maintainable and will lie against the person liable to pay the same. (Wassodew, J.) CITY MUNICIPALITY BHUSAWAL v. HINDUSTAN CONSTRUCTION CO., BOMBAY. 204 I.C. 563=15 R.B. 386=44 Bom. L. R. 890 = A.I.R. 1943 Bom. 30.

——S. 203—Scope—Suit for recovery of Municipal dues—Maintainability.

S. 203 of the Bombay Municipal Boroughs Act provides an alternative remedy for recovery of Municipal dues by suit. That alternative remedy can be adopted "in lieu of any process of recovery allowed by or under that Act," provided the person sued "is liable to pay." It can also be resorted to in case of failure to realise by process the whole or any part of any amount recoverable under the provisions of Ch. VIII of the Act. (Wassoodew, J.) CITY MUNICIPALITY, BHUSAWAL v. HINDUSTAN CONSTRUCTION CO. BOMBAY. 204 I.O. 563=15 R.B. 336=44 BOM.L.B. 890=A.I.B. 1943 BOM. 30.

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S. 206 of the Bombay Municipal Boroughs Act does not apply to suits based on contracts and in the case of such suits therefore no notice is necessary. It cannot be said that a Municipality or an officer of the Municipality committing a breach of contract entered into by the Municipality does the act or purports to do it, in

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pursuance of the provisions of the Act within the meaning of S. 206. (Walia and Sen, J/.) MANDLIR R. BOROUGH MUNICIPALITY OF IALGAON. I.L.R. (1943) Bom 680 = 213 I.C. 375 = 17 R B. 51 = 45 Bom.I.R. 1059 = A.I.R. 1944 Bom. 97.

BOMBAY NATIVE SHARES AND STOCK BROKERS' ASSOCIATION—Membership held by Hindu co pare ener—Particulity Card purchased with foint family funds and profits and losses treated as family assets and liabilities—Liability of helder to account for value of earl at fartition.

A membership card of the Bombay Native Shares and Stock Brokers' Association is not by itself property in the legal sense of the term. It cannot be inherited. transferred or bequeathed. But it does not follow that it is not a valuable right or an asset. It confers on the holder a right to do broker's business in the Stock Exchange. Even under its rules it can be sold by the Association and valued in terms of money. The card is not partible property but its money value can, in certain cases be divided. Where such a card is purchased in the name of a Hindu co-parcener with joint family funds, as between the members of the co-parcenary the money value of the card belongs to the family. Since it has been purchased by joint family moneys and the profits and losses of the business done on that card have gone into and out of the family purse, the member in whose name the card stands should at a family partition be held accountable for the value of the card on the date of severance of the family, though the card itself cannot be partitioned in the sense that it should be a-signed to the share of any co-parcener other than the one in whose name it stands. (Dreatia and Sen. 11.) CHAMPAKLAI, CHIMANIAL 7. AMUBRAI DAHYABHAI, IL.R. (1944) Pom. 619 = 219 I C. 323 = 1945 Comp. C. 83 = 46 Bom. L.R. 625: A.IR. 1945 Bom. 28.

BOMBAY NATIVE SHARE AND STOCK BROKERS' ASSOCIATION RULES (1939), R. 16—Construction and scope—If creates right in legal representative of deceased member.

The wording of R. 12 of the Bombay Native Share and Stock Broker's Association Rules is clearly permissive, and the nomination referred to in the rule has under R. 16. to be considered by a ballot. It is only a recommendation and does not create any right (Kania, J.) FRAMROZ DADABHOY MADAN, In re. 43 Bom. L. R. 943=198 I.C. 291=14 R.B. 291=A.I.R. 1942 Bom. 33.

——Rr. 36 (h) and 38—Construction—Right of membership of association—If property—Probate duty—If leviable.

No probate duty is payable in respect of a membership card of the Bombay Native Share and Stock Brokers' Association. In view of the clear and unambiguous words of Rr. 36 (h) and 38 of the Rules of the Association, it must be held that the right of membership is not property which passes on succession or can be dealt with by will as the property of the deceased. It is a personal right which comes to an end on the death of the holder of the card, and is not property on which probate duty can be levied. (Kania, J.) FRAMROZ DADABHOV MADAN, In rc. 43 Bom.L.B. 943=198 I.C. 291=14 R.B. 291=A.I.R. 1942 Bom. 33.

Br. 46 and 167. Scope and effect of Sharebroker—Suit for losses sustained in transactions of constituent—Cause of action—Express averment as to in-

#### BOM. PLEADERS ACT (XVII OF 1920).

curring of liability and payment in respect of losses—If essential—Cause of action.

In a claim for indemnity, e.g., a claim by a sharebroker for recovery of losses sustained by him in respect of transactions entered into for his constituent, the plaintiff must aver that he has sustained the losses for which he claims to be indemnified. Where the plaint contains an allegation that the plaintiff was carrying on business as a certified share, stock and exchange broker in the Bombay Native share and Stock Broker's Association and had entered into certain contracts on behalf of the defendant (his constituent) for which contract notes had been sent to him, and those contract notes state that they are subject to the rules and regulations of the Native share and Stock Brokers' Association, it does certainly disclose a cause of action. It is not necessary that there should be an express averment that the plaintiff incurred liability in respect of the transactions of the defendant and that he made payments in respect of the losses incurred in respect of the transactions of the defendants. (Beaumont, C. J. and Somiee, J.) PROMATHA NATH MULLICK v. BATLIWALA AND KARANI. I.L.R. (1942) Bom. 655 = 202 I.C 166 = 15 R.B. 136=44 Bom.L.R. 475=AI.R. 1942 Bom.

BOMBAY PLEADERS ACT (XVII of 1920), Ss. 3 and 4—Pleader removed from practice for misconduct and Sanad cancelled—Subsequent readmission to practice—Procedure—Form of order to be made—Issue of new sanad bearing date of such issue.

Where a pleader is removed from practice for professional misconduct and his sanad is cancelled, such cancellation is equivalent to destruction or making it void. When he is subsequently re-admitted to practice, the proper order to be made is to pass an order that he be readmitted to the roll and be permitted to take out a new sanad. Such sanad will bear the date on which it is taken out. (Stone, C.J. and Divatia, J) LAXMAN GANESH RASTE, In re. I.L.R. (1944) Bom. 713=219 I.C. 459=46 Bom.L.R. 703=A.I.R. 1945 Bom. 39.

BOMBAY PREVENTION OF ADULTE-RATION ACT (V OF 1925), S. 13—Scope—Charge under S. 4 (1) (b) and (c)—Particulars—Summons—Form and contents of—Essentials. EMPEROR v. SHAMLAL JAMNADAS. [see Q.D. 1936 40 Vol. I Col. 3256.] 192 I.C. 277=13 R.B. 252 =42 Cr.L.J. 271=A.I.R. 1941 Bom. 19.

BOMBAY PREVENTION OF GAMBLING ACT (II OF 1887), S. 4—Conviction—Conditions for—Express proof of profit or gain made by occupier of house—Necessity.

To sustain a conviction under S. 4 of the Bombay Prevention of Gambling Act, it is not necessary to prove expressly that the person charged with keeping a common gaming house made a profit or gain out of the gambling carried on in that house. A mere expectation or hope of profit would be sufficient to make the house a common gaming house and the occupier liable for keeping such a house. (Divatia and Lokur, J.) EMPEROR v. CHIMANLAL SANKAL CHAND. 47 Bom. I.R. 75=A.I.B. 1945 Bom. 305.

——(IV OF 1887), S. 4 (a)—Sentence—Fine— Amount—Discretion—First offence—Imprisonment Desirability.

## BOM. PRIMARY EDUCATION ACT.

It cannot be held that lack of means on the part of the accused is not a special reason justifying the imposition of the less than the maximum fine under the proviso to S. 4 (a) of the Bombay Prevention of Gambling Act. The vice of a fine as a means of punishment is that its severity necessarily depends on the financial position of the accused. The Court has discretion to impose a sentence of imprisonment or fine; and where the accused is shown to be gambling on a large scale, and may be presumed to he making a good deal of money out of it, it may be that the only punishment, likely really to act as a deterrent, would be imprisonment. Prima facie, however, it is undesirable to impose a sentence of imprisonment for a first offence. (Beaumont, C.J. and Sen. J.)

EMPEROR v. KARSANDAS NANJI. 201 I.C. 508=
15 R B. 107=43 Cr.L. J. 759=44 Bom.L.R. 443=
A.I.R. 1942 Bom. 206 (2).

\_\_\_\_S. 5—Offence under—If cognizable. See Penal Cope, S. 342 I.L.R. (1942) Kar. 94= A.I.R. 1942 Sind. 106.

S. 6 (2)—Deputy Superintendent—If to be empowered by name.

The wording of S. 6 (2) of the Bombay Prevention of Gambling Act requires that when a Deputy Superintendent of Police is especially empowered by Government under this Sub-section he should be specially empowered by name. (Davies. C.I. and Weston. I.) EMPEROR v. UDHO. I.L R. (1943) Kar. 20=206 I C 331=15 R.S. 178=44 Cr.L.J. 502=A.I.R. 1943 Sind. 107.

S. 7—Presumption under—Nature and extent of—Rebuttal—Burden of proof.

Where a house is searched on the authority of a warrant duly issued under S. 6 of the Bombay Prevention of Gambling Act, and gambling is found going on in the house and instruments of gaming are also found therein, the presumption under S. 7 of the Act that there was a common gaming house arises and this dispenses with the necessity of direct evidence that the gambling is carried on for the profit of the keeper of the house. Even the purpose of the occupier of the house, e.g., the purpose of profit or gain, is to be presumed under S. 7, and once that presumption is attracted, it is for the accused to rebut it. (Divatia and Lokur J.). FMPEROR v. CHIMANIAL SANKAL CHAND 47 Bom.L.B. 75=A.I.B. 1945 Bom. 305.

BOMBAY PRIMARY EDUCATION ACT (XII OF 1938)—School board—Status and position of—If can sue and be sued—Act, if subsidiary to District Local Boards Act or District Muncipal Act.

A school board constituted under the Bombay Primary Education Act has a separate and independent existence and is, in fact and in law, a corporation, and can sue and be sued despite the absence of a common seal. It functions under the provisions of the Act and the Rules made thereunder. It is not therefore a good defence to a suit against a school Board to plead that the Local Authority, the District Local Board or the District Municipality must be sued. Nor can it be said that the Act is a subsidiary Act to the principal Act the District Local Board Act or the District Municipal Act. (Davies, C.J., and Weston, J.) Shafi Md. Sadaturio 2, Municipal School Board Shahdadpur. I.L.R. (1942)

BOM. PRIMARY EDUCATION ACT.

Kar. 553=207 I.C. 93=16 R.S. 6=A.I.R. 1943 Sind. 98.

(IV OF 1923, as amended by Act XII of 1938) S. 26 (E)—Scope—Retrospective operation.

S. 26 (E) of the Bombay Primary Education Act as amended by Act XII of 1938, is retrospective in the sense that it applies to suits instituted after that Act came into force. (Chagla, J.) DISTRICT SCHOOL BOARD OF BELGAUM D. MAHOMED MULLA. 47 Bom.L.R. 323 = A.I.R. 1945 Bom. 377.

——S. 27 and r. 34 (6)—Power of school Board to dismiss teachers—"Full inquiry"—Meaning of—Court's power to interfere with dispetion of Board.

Under r. 34 (6) of Rules framed under S. 27 of the Primary Education Act, a school Board has the power to dismiss a teacher for serious misconduct or gross inefficiency and after full inquiry. The term "full inquiry" only means that the inquiry must be conducted in accordance with the principles of natural justice; the teacher dismissed must know the charge against him and must have full and reasonable opportunity to meet it. It is not for the Court to subsitute its own judgment and discretion for that of the School Board. (Davis C.J. and Weston, J.) Shaff Md. Sadaturio v. Municipal School Board, Shahdadpur. I.l.R. (1942) Kar. 553=207 I.C 93=16 R.S. 6=A.I.R. 1943 Sind 98.

——S. 27—Rules under, R, 55 (2)— Effect of—Employee—If have absolute right to continue to hold office till fifty-five.

R. 55 (2) framed under S. 27 of the Bombay Primary Education Act does not give a right of service till the age of fifty-five or imply that an employee cannot be dismissed or retired before that age except for misconduct. The rule is certainly not a teem of the contract of employment. A Broach of Rule does not give the employee any cause of action. (Broomfield and Wasscodew, J.) DISTRICT SCHOOL BOARD OF NORTH KANARA v. PARAMESHWAR GATTU. I.L.R. (1943) Bom. 411=45 Bom.L.R. 480=213 I.C. 11=17 R.B. 1=A.I.R. 1943 Bom. 268.

BOMBAY PRIZE COMPETITION TAX ACT (XI OF 1939)Ss. 2 (2) and 6-Prize competition—Skill or contention or strife—If essential element—Scheme of prizes for benefit of eharity—Failure to get license—Offence.

The accuced who was the secretary of a charitable society promoted a scheme in conection with that society which was described as a Novon Gifts Scheme. A large unmber of tickets, in the from of a receipt for a donation of two annas to the charity, were issued in books of Forty. They were all numbered but four of them had the same number and together formed, a full donation receipt. In each book one full donation receipt was guaranteed a prize of two rupees if it happened to be of the winning number. There were other prizes including one of Rs. 2500. All the prize-winning numbers were selected before hand and lodged with a bank. The accused however did not obtain a license from the Collector under S. 4 of the Bombay Prize Competition Tax Act, his application for license having been refused.

Held, (1) that the scheme in question fell within the definition of a "prize competition" under S. 2 (2) of the Bombay Act XI of 1939, as the persons who purchased the tickets or receipts and were induced to do so were seering or endeavouring to gain at the same time; (2),

### BOM. RENTS ETC. (CONTROL) ACT (1944).

that contention or strife or skill was not an essential element and was not a necessary part of the definition of a "prize competition"; (3) and the accused who had promoted the scheme without a license contravened the provisions of the Act and was liable to conviction under S. 6 of the Act. (Brownfield and Lokur, JJ.) EMPEROR v. NILK ANTH BALAJI. I.L.R. (1943) Bom. 96 = 205 I.C. 397 = 15 R.B. 370 = 44 Cr.L.J. 407 = 45 Bom., L.R. 56 = A.I.R. 1943 Bom. 72.

BOMBAY RAIONING ORDER (1948), Cl. 6.—Applicability—City of Bombay Rationing Regulation Cl. 43—Contravention—If contravention of Cl. 6, RATIONING REGULATION, CL. 43, 46 Bom.L.R. 488.

——Cls. 6, 7 and 9—Construction and scope— Supply of rationed article without surrender of ration document—If prohibited.

Cls. 6 and 7 of the Bombay Rationing Order, 1943 read together, make it an offence under R. 81 (2) (4) of the Defence of India Rules, either to obtain or to supply a rationed article except under and in accordance with the provisions prescribed by or under the Bombay Rationing Order. Cls. 7 and 9 read together, prohibit the obtaining of a rationed article with-out a ration document and that document must at that time, he available for lawful use and must be lawfully used. Cl, 9 does not in terms apply to a distributor but only to the persons seeking to obtain a rationed article. But this does not lead to the inference that the supply of a rationed article without the surrender of a ration document is not prohibited. For, according to the Scheme of the Bombay Rationing Order, while the obtaining of a rationed article without a ration document is prohibited by a clause in the order itself, the prohibition of the supply of a rationed article without the surrender of a ration document is left to be dealt with by Regulations. (Divatia and Lokur, JJ.) EMPEROR v. Merwan Khodadad. I.L.R (1944) Bom. 566 = 216 I.C. 268 = 17 R.B. 144 = 46 Cr.L.J. 157 = 46 Bom.L.R, 488=A.I.R. 1944 Bom. 318.

BOMBAY RENTS, HOTEL RENTS AND LOD-GING HOUSE RATES (CONTROL) ACT (VII OF 1944)—Scope—If ultra vires—Government of India Act (1935), Ss. 93 and 107 (2).

Bombay Act (IV of 1944) is not ultra vires on the ground that the Governor has no power to legislate retrospectively. The Governor acting under S. 93 of the Government of India Act has power to legislate retrospectively as also the Provincial Legislature. Both the Provincial Legislature and the Governor, acting under S. 93, Government of India Act, have power to legislate with retrospective effect, in respect of a matter concurrent field, i.e. enumerated in List III of Sch. VII to the Act, when the Governor-General has given his assent. (Stone, C. J. and Kania, J.) IIIRJI LAXMIDAS 2. FRANCIS FERNANDEZ. 47 Bom. I.R. 294. = 1945 F.L.J. 119 = A.I.B. 1945 Bom. 352.

——Ss. 9 and 14—Scope—If void as being contrary to proviso to S. 93, Government of India Act. See GOVERNMENT OF INDIA ACT, S. 93, PROVISO 47 Bom. L.R. 294.

5. 14 (1)—Construction—Order refusing Certificate—Appeal to Collector—Competency.

### BOM. RENT RESTRICTION ACT (1939).

The right of appeal to the Collector from an order of the Controller, conferred by S. 14 (1) of Bombay Act VII of 1944, is not confined to an order granting a certificate under the proviso to S. 9 (1) of the Act. The words used in S. 14 are general and should be given full effect to and the general words used are wide enough to cover a decision of the Controller refusing a certificate. (Kania, A.C.J. and Chagla, J.) (NAVNIT-LAL CHUNILAL v. BABURAO (No. 2). I.L.B. (1945) Bom. 82=46 Bom. L.R. 787=A.I.B. 1945 Bom. 137.

BOMBAY RENT RESTRICTION ACT (XVI OF 1939), S. 3—Scope and effect of—Jurisdiction of Small Cause Court—Ejectment suit. See PROVINCIAL SMALL CAUSE COURTS ACT, S. 16. 47 Bom.L.R. 344.

# - S. 4(2)-Purpose of lease-Determination - Test.

To determine whether the subject-matter of a demise is "let separately for the purpose of being used principally for business or trade." the lease itself must be the governing factor; but the lease can be considered and construed in conjunction with the relevant surrounding circumstances, which must be the physical nature of the premises and how they were in fact used at the date of the lease. (Stone, C.J. and Kania, J.) ISMAIL DADA BHAMANI v. BAI ZULEIKHABAI. I.R. (1944) Bom. 361=46 Bom. L.R. 244=A.I.R. 1944 Bom. 181.

S. 4 (4)—"Tenant"—If includes sub-tenant.
A sub-tenant is a "tenant" as defined by S. 4
(4) of the Bombay Rent Restriction Act, as a sub-tenant is included in the definition of tenant.
(Beaumont, C.J.) Punam Chand Velral v.
Bombay Cloth Market Co., Ltd. I.L.R. (1943)
Bom. 480=207 I.C. 300=16 R.B. 24=45 Bom.
L.R. 240=A.I.R. 1943 Bom. 141.

# S. 11—" and performs the other conditions of the tenancy"—Meaning of.

The words "and performs the other conditions of the tenancy" in S. 11 of the Bombay Rent Restriction Act mean ful fils all the other duties imposed by the tenancy on the lessee. There is no room for the application of the ejusdem generis doctrine. (Sione, C.J. and Kania, J.) ISMAIL DADABHAMANI v. BAI ZULEIKHABAI. I.L. R. (1944) Bom. 361=46 Bom.LR. 244=A.I.R. 1944 Bom. 181.

S. 11—Applicability—Lease of premises for storing timber for business—Covenant against subletting—Breach—Notice to quit on or before certain date—Validity—Liability of lessee to ejectment—Right to benefit of S. 11.

The appellant took on lease certain open plots of land in a Timber Market on leases from the predecessor-intitle of the respondent. The demised premises were comprised in a lease deed dated 11-10-1933, the term of the lease commencing on 1-9-1932 and ending on 31-8-1935. The purpose of the lease was storage of timber for business: onc of the clauses in the lease enjoined the lessee not to underlet or assign the demised premises without the the consent in writing of the lessor. In spite of this covenant the appellant the premises without the consent of the lessor and continued to do so till the date of suit. After the expiry of the term of the lease, the appellant

# BOM. RENT RESTRICTION ORDER (1942).

held over with the result that a monthly tenancy was thereby constituted on 28-12-1942, the lessor's interest in the demised premises was sold to the respondent and an intimation there of was sent to the appellant informing him that possession of the property had been delivered to the purchaser and that the latter had become entitled to the rents as from 1st January, 1943 on the same day the purchaser (respondent) gaye the appellant a notice to quit, calling upon him to quit, vacate and deliver peaceful possession of the premises on or before 31-1-1943. The appellant having failed to surrender possession was sued in ejectment. He pleaded that he was protected by S. 11 of the Bombay Rent Restriction Act and secondly, that in any case he was not liable to ejectment because the notice to quit was bad in law.

Held. (1) that although S. 11 of the Bombay Rent Restriction Act applied to the premises demised the appellant was not entitled in this suit to take advantage of the protection afforded by it because he had failed to perform the other conditions of the tenancy in that he had broken the covenant not to sublet without the consent in writing of the lessor; (2) that the notice was not bad in law. it having been sent by the proper person, viz., the purchaser who on the date of the notice became the landlord; (3) that the form of the notice was also proper; on or before 31—1-1943 being the date on which the tenancy expired. it was a good notice to quit. (Stone, C.J. and Kania, J.) ISMAIL DADA BHAMANI v. BAI ZULEIKHA BAI. I.L.R. (1944) Bom. 361=46 Bom. L.R. 244=A.I.R. 1944 Bom.

# ——S. 11—Applicability—Subletting by tenant—If ground for ejection order.

Mere sub-letting of the premises or part thereof is not by itself a good cause for making an ejectment order and taking the case out of S. If of the Bombay Rent Restriction Act which protects a tenant from eviction. Where the original tentant is a party and opposes eviction, the Court is not at liberty to make an eviction order merely because there has been under-letting. (Beaumont, C.J.) Punam Chand Velraj v. Bombay Cloth Market Co., Ltd. I.L.R. (1943) Bom. 480=207 I.C. 300=16 R.B. 24=45 Bom,L.R. 240=A.I.R. 1943 Bom 141.

—— S. 11—Construction—"His own occupation"— Meaning of.

The words "his own occupation" in S. 11, Bombay rent Restriction Act, mean occupation of the landlord himself and all persons who are dependent on him. (Divatic and Lokur, JJ.) INSTITUTE OF RADIO TECHNOLOGY v. PANDURANG BABURAO. 47 Bom. L.R. 825.

S. 11—Scope—If controls or affects S. 41, Presidency Small Cause Courts Act, See PRESIDENCY SMALL CAUSE COURTS ACT, S. 41. 47 BOM.L.B. 825.

# BOMBAY RENT RESTRICTION ORDER (1942) Cls. 8, 9 and 12—Scope—If ultra vires.

Cls. 8 and 9 of the Bombay Rent Restriction Order and Cl. 12, so far as it operates in regard to Cls. 8 and 9, are invalid as infringing S. 14 of the Defence of India

# BOM. RETAIL TRADE CONTROL ORDER(1942) | BOM. SALT ACT (II OF 1890).

Act, 1939. (Stone, C.f., Kania and Divatia, ff.) HAVELIRAM SHEFTY D. MAHARAJA OF MOROVI. I.L.R. (1944) Bom. 187-218 I.C. 81-17 R.B. 178-46 Bom. L.R. 877 = A.I.R. 1945 Bom. 88 (F.B.).

RETAIL TRADE CONTROL AND LICENSING ORDER (1942) S. 3-Scope-Purchase of large quantity of controlled article in single transaction-No offence.

S. 3 of the Bombay Retail Trade Control and Licensing Order deals with sale or storage for sale in retail quantities. Where a person buys a large quantity of a controlled article, vis., 250 maunds of turdal in a single transaction, his act does not offend against the provisions of S.3, (Wadia and IVeston, JJ.) EMPEROR v. PORSHOTTAM DEVJI. I.L.R. 1944 Bom. 429=217 I.C. 373=46 Cr.L.J. 354=46 Bom.L.R. 449=A.I. R. 1944 Bom. 247.

BOMBAY REVENUE JURISDICTION ACT (X OF 1876), S. 4-Scope-Claim based on saranjam grant -Plea by defendant that lands are not saranjam-Suit-If barred.

Where the suit is substantially to recover possession of lands on the ground that they are part of the plaintiff's saranjam and that Government was not justified in resuming them, the bar under S. 4 of the Bombay Revenue Jurisduction Act applies. Though the defendant's case is that the lands ceased to be saranjam long ago and at the date of the suit they are khalsa lands, if the plaintiff claims them in the suit as saranjam lands, the claim comes within the bar of S. 4. No relief even of a declaratory nature can be granted to the plaintiff in such suit. (Stone, C. J. and Divatia, J.) DAULATRAO MALOHRAO v. GOVERN-MENT OF BOMBAY. 47 Bom L.R. 214 = A.I.R. 1945 Bom. 310.

-S 4, Proviso-Scope-Claim to actual land held wholly or partially exempt from land revenue-If falls under.

The proviso to S. 4 of the Bombay Revenue-Jurisdiction Act does not cover the case of a claim to actual land which as a matter of fact is held wholly or partially exempt from payment venue. All that it covers is a claim to hold land wholly or partially exempt from land revenue as distict from a claim to hold it under a liability to pay land revenue. (Wadia and Macklin, JJ.)
SARJERAO APPAJIRAO v. GOVERNMENT OF THE I'ROVINCE OF BOMBAY. I.L.R. (1943) Bom. 534=
213 I.C. 348=17 R.B. 40=45 Bom.L.R. 810= A.I.R. 1943 Bom. 427.

-S. 11—Applicability—Notice under S. 202 of Bombay Land Revenue Code—Failure to appeal—Civil Suit—Bar of. See Bombay Land Revenue Code, S. 68. 44 Bom.L.R. 295,

without jurisdiction—If need to be set aside— Bar under S. 11-If arises.

An order which is ultra vires does not invoke the bar of S. 11 of the Bombay Revenue Jurisdiction Act. Where a Revenue Officer purports to do an act or to pass an order which is invalid, his action does not operate to raise a bar under S. 11. The principle is well-established that where an authority which purports to pass an order is acting without jurisdiction, the pur-

ported order is a mere nullity, and it is not necessary for anybody, who objects to that order. to apply to set it aside. He can rely on its invalidity when it is set up against him, although hs has not taken steps to set it aside. An order which is a nullity does not give rise to any right whatever, not even to a right of appeal. This principle applies to S. 11 of the Bombay Revenue Jurisdiction Act also. (Peaumont, C.J., Wassondero and Sen, JJ.) Abdullamiyan Abdulleri Man v. Government de Bombay. J.L. R. (1942) Bom. 717=202 I.C. 321: 15 R.B. 154=44 Bom. L.R. 577=A.I.R. 1942 Bons. 257.

---- S 11--Scope--() ccupant of Government land claiming right by long possession-Notice by Collector under S. 202, Land Revenue Code-If illegal -- Pailure to appeal -- Suit in Civil Court-Bar of.

If a person claims to remain in possession of Government land merely on the strength of his rong possession in the past though without any rightful title in him, Government have the right to assert their ownership which has not been divested by any act of the occupant, and they have a right of resumption so long as the occupant does not prove any acquisition of right in him by adverse possession against Government. The giving of a notice by Government under S. 202 of the bombay Land Revenue Code to the occupant cannot be regarded as an invalid or ultra vires act. It may be an incorrect Order liable to be set aside on appeal under S. 203. But merely because it is incorrect, it cannot be said to be invalid or illegal in law. It would not be a case where the notice or order is vitiated by want of power, excess of jurisdiction or any other illegality, so as to take it out of the operation of S. 11 of the Bombay Revenue Jurisdiction Act when no appeal has been preferred against it. (Diratia and Macklin, JJ.) Secretary of State v. Chimanlal Jamnadas. 1.L.R. (1942) Bom. 357=201 I.C. 420:::15 R.B. 76=44 Bom. L.R. 295=A.I.R. 1942 Born. 161.

BOMBAY SALT ACT (II OF 1890), S. 3 (o) -Construction and scope-Removal or possession of contraband salt from custom station by cartman engaged by another-Liability of carimon-Ss. 38 (1) and 47 (a).

S. 3 (o) of the Salt Act cannot be read as imposing vicarious liability upon the master or principal without destroying or in any way affecting the direct liability of the servant or agent who is actually in possession of or remove salt. The real effect of S. 3 (0) is that where it is proved that the person in possession of or removing salt is a servant or agent, then the possession or removal shall be deemed to be that of the master and principal to the exclusion of the liability of the servant or agent. Here wherea person hires cart belonging to another to convey contraband salt from a custom station, the cartman cannot be convicted under Ss. 38 (1) or 49 (a) of the Act. (Beaumont, C.J., and Sen, J.) EMPEROR V. LAXMAN KRISHNA. 198 I.C. 437=14 R.B. 323=43 Cr.L J. 369=43 Bom. L.R. 869=A.I.R. 1942 Bom. 25.

S. 47 (a) and (c)—Applicability and construction—Possession of contraband salt—When offence—Removes or transports—Meaning of.

### BOM, SEC. CONTRACTS CONTROL ACT (1925).

S. 47 (c) of the Bombay Salt Act deals with possession of contraband salt, and to constitute an offence under the sub-section, knowledge or belief that it is contraband salt is necessary. But under S. 47 (a) it is an offence merely to manufacture, remove or transport salt, not merely contraband salt. The word, "removes" and "transports" are used in S. 47 (a) interchangeably, and there is no justification for the the view that "removal" refers only to salt removed from the salt works of Government under S. 28 of the Act' (Beaumont, C.J. and Sen, J.) Emperor v. Laxman Krishna. 198 I.C. 437=14 R B. 323=43 Cr.L.J. 369=43 Bom. L. R. 869=A.I.R. 1942 Bom. 25.

BOMBAY SECURITIES CONTRACTS CONTROL ACT (VIII OF 1925), S. 6—Applicability and scope of Contract for purchase or sale of securities—What amounts to.

S. 6 of Bombay Act VIII of 1925 relates only to contracts for the purchase or sale of securities. A document which merely gives intimation to a constituent of contracts of purchase or sale effected by a share broker as the constituent's broker and for land on account of the constituent is not a contract of purchase or sale of securities under the Act. (Beaumont, C.J. and Somjee, J.) PROMATHA NATH MULLICK v. BATLIWALA AND KARANI, I.L.R. (1942) Bom. 655=202 I.C. 166=15 R.B. 136=44 Bom. L.R. 475=A.I.R. 1942 Bom. 224.

BOMBAY SHOPS AND ESTABLISH-MENTS ACT (XXIV OF 1939)—Rules under R. 12 (10)—Scope—"Employer"—Owner keeping shop himself without employing any one—Omission to maintain visit book—Offence.

R. 12 of the Rules made under the Bombay Shops and Establishments Act is mainly enacted for the benefit of Employees, and some of the sub-rules there of would not apply if there are no employees in a shop. Under R. 12 (10) every employer, including the owner of a shop kept and conducted by himself without employing any one, has to maintain a visit book And though the maintenance of a visit book is not of much consequence in the case of a shop where no persons are employed, the owner, if he does not maintain a visit book, is guilty of a technical breach of R. 12 (10). (Beaumont, C.J. and Sen, J.) EMPEROR v. MAHOMED KASSAM PANWALLAI. I.L.R. 1942 Bom. 107=198 I.C. 226=48 Cr.L.J. 321=14 R.B. 295=43 Bom.L.R. 952=AI.R. 1942 Bom. 39.

—S. 2 (5) and (6)—Scope—If to be read together—"Employer"—"Establishment, etc."—Shop kept and conducted by owner himself—Owner employing no one in shop—If employer. See Bombay Shops and Establishments Act, Ss. 5 and 30. 43 Bom. L.R. 952.

S. 4 (1) (a)—Owner of shop—If person occupying position of management.

The owner of a shop who keeps his shop himself cannot be said to be a person occupying a position of management within the meaning of S. 4 (1) (a) of the Bombay Shops and Establishments Act. (Beaumont, C.J. and Sen, J.) EMPEROR v. MAHOMED KASSAM PANWALLA. I.L.R,

BOM. SMALL HOLDERS RELIEF ACT (1938). (1942) Bom. 167=198 I.C. 226=43 Cr.L.J. 321 =14 R.B. 295=43 Bom.L.R. 952=A.I.R. 1942 Bom. 39.

Ss. 5 and 30—App'icability—One-man shop conducted by owner himself—'Employer'—Owner of shop conducting and keeping without employing any one—Liability for contravention of S. 5—S. 2(5) and (6)

S. 5 of Bombay Shops and Establishments Act, is not inapplicable to a one-man shop i.e., a shop kept and conducted by the owner himself without employing any one. The mere fact that he does not employ any one in his shop does not exclude him from the term "employer," in S. 30 of the Act, so as to exempt him from liability for contravention of S, 5 of the Act. There is nothing in S.5 whatever to suggest that it does not apply to a one-man shop. The prohibition enacted therein includes any shop. Reading the definition of "employer" in S. 2 (5) together with sub-Cl. (6) of S. 2 "employer" means a person having charge of or owning the business of a shop. To hold that it is implicit in the word "employer" that somebody should be employed is to disregard the definition contained in the Act; and there is no justification for restricting the meaning which the Legislature has seen fit to give the word "employer" for the purposes of the Act, it being open to the Legislature to make its own dictionary for the purpose of any particular Act, although the meaning may not be the one normally attached to the word in the English language. (Beaumont, C.J. and Sen J.) EMPEROR v. MAHO-MED KASSAM PANWALLA. 43 Bom. L.R. 952 = I.L.R 1942 Bom. 167=198 I.C. 226=43 Cr. L.J. 321=14 R.B. 295=A.I.R. 1942 Bom. 39.

The word "enactment" in S. 5 (1) of the Bombay Shops and Establishments Act clearly includes rules made under a statutory power vested in Government and therefore includes the rules framed under the Bombay Tobacco Duty Act of 1857. (Beaumont C. J. ani Sen J.) EMPEROR v. BABAJI SHIVRAM. I.L.R. (1942) Bom. 614 = 201 I.C. 774—43 Cr. L.J. 780 = 15 R.B. 125—44 Bom. L.R. 446 = A.I.R. 1942 Bom. 220.

S. 17 and R. 12 (4)—Applicability—Persons employed by day and not by week or month.

There is nothing in S. 17 or R. 12 (4) of the rules, of the Bombay Shops and Establishments Act to suggest that they do not apply to establishments which employ persons only from day to day and not on weekly or nonthly terms. (Wadia and Wasseodew J.). EMPEROR v. HASANALI, GULAMALI. 198 I.C. 710. = 14 R.B. 353=43 Cr. L. J. 422=44 Bom. L.R. 50=A.I.R. 1942 Bom. 79.

——S. 30—"Employer"—Owner keeping and conducting shop himself without employing any one—Liability of. See BOMBAY SHOPS AND ESTABLISHMENTS ACT, SS. 5 AND 30. 43 Bom. L.R. 952.

BOMBAY SMALL HOLDERS' RELIEF ACT (VIII OF 1938), S. 9 (1)—Construction—Right to relief—Psyment of rent of current year—Sufficiency—Non-gayment of arrears—If bar to relief.

Under S. 9 (1) of the Bonibay Small Holders Relief Act all that has to be paid by a tenant before the 15th of May is the rent due, not down to June 30, but for the year ending June 30. The fact that the rent due for previous years has not been paid is irrelevant; and the omission to pay rent in previous years does not defeat the tenant's claim to protection under the Act. Boumont, C.J.) MURARRAO NARSINGRAO v. GOVIND SANTU

BOM. TOWN TOBACCO DUTY ACT (1857).

44 Bom. L.R. 847=204 I.C. 329=15 R.B. 311= A.I.R. 1943 Bom. 26.

Where one of several joint tenants makes a payment or tender within the prescribed period and expresses his willingness to hold the land, such tender and expression of willingness operate for the benefit of all the joint tenants. It is not necessary that all the joint tenants should pay and express willingness. (Beaumont C.J.) MURARRAD NARSINGRAD D, GOVIND SANTU. 204 I.C. 329=15 R.B. 311=44 Bom. L.R. 847=A,I.R 1943 Bom. 26.

EOMBAY TOBACCO DUTY (TOWN OF BOM-BAY) ACT (IV OF 1857), as amended in 1938, S. 11—Licence—"Rules framed thereunder"—Meaning of.

Where a licence granted under S. 11 of the Bombay Tobacco Duty Act as amended in 1938, contains a reference to the Act and the "rules framed thereunder" the "rules framed" mean rules which have been framed, and the expression does not cover rules not at present in existence, but which may be framed at a future date. (Beaumont, C., I. and Sen J.) EMPEROR v. BABAH SHIVRAM. I.L.R. (1942) Bom. 614=201 I.C. 774 =43 Cr. L.J. 780=15 R.B. 125=44 Bom. L.R. 446=A.I.R. 1942 Bom. 220.

S. 11—Licence under—Power of Government to alter terms and conditions during currency of licence. Where the Government have issued a lience under S. 11 of the Bombay Tobacco Duty (Town of Bombay) Act for a particular year authorising the licence to keep his premises open up to midnight they are not entitled, after such issue, to alter the terms and conditions of fhe licence so as to cut short the hours for which the premises may be kept open, during the currency of that licence, in the absence of a clear reservation in the licence to that effect. (Beaumont, C.J. and Sen, J.) EMPEROR v. BABAJI SHIVRAM, I.L.R. (1942) Bom. 614—201 I.C. 774—43 Cr. L. J. 780—15 R.B., 125—44 Bom, L.R. 446—A.I.R. 1942 Bom. 220.

BOMBAY TODDY TAPPING RULES (1928)

Rr. 2 and 9 to 13—Construction and scope— "May" and "shall"—Effect of—Discretion of Collector to grant or refuse tapping licence—If exists. Sc. BOMBAY ABKARI ACT, S. 14 (1). 43 Bom. L R 896.

BOMBAY TOWN PLANNING ACT (I OF 1915) S. 15-"Building"—Screen of corrugated iron sheets.

The meaning of a "building" for purposes of S. 15 (1) (a) of the Bombay Town Planning Act is sufficiently wide to include a screen made of corrugated iron sheets Such a screen is a "wall" and therefore a "building" (Wadia and Weston JJ.) EMPEROR v. BUDHABHAI SAKARBHAI, I.L.R. (1944) Bom.445=217 I.C. 34—17 R.B, 152=46 Cr. L.J. 183=46 Bom. L.R 477=A.I.R. 1944 Bom. 290.

BOMBAY VILLAGE PANCHAYATS ACT (IX OF 1920), S. 27—Right to collect taxes from occupants of sites in village market—Contract of lease—If ultra vires—Suit to recover money due under—Maintainability—Contract Act, S. 65.

A village panchayat is incompetenat to form out the right which it has under the Bombay Village Panchayats Act to collect taxes or dues from persons who occupy sites in the village market. As agreement leasing the right to collect these dues is therefore ultra vires and

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void. But a village panchayat is entitled to recover the money due to it under such an agreement in a suit under S. 65 of the Cortract Act. (Brownfiell and Divatia, J/.) GOVIND KESHAY 7. YESHWANT PANDHARINATH. I.L.R. 1941 Bom. 666=14 R. B 249=197 I.C. 825=43 Bom. L.R. 800=A.I.R. 1941 Bom. 378.

BOMBAY VILLAGE POLICE ACT, (VIII OF 1867), S. 14—Procedure—Proceedings before Police Patel—Accused's right to appear by pleader—Personal attendance of accused if can be dispensed with—Cr. P. Code, S. 340.

A Police Patel acting under S. 14 of the Bombay Village Police Act is a Criminal Court within the meaning of S. 340, Cr. P. Code, and an accused person has therefore a right to appear through a pleader in proceedings under S. 14 of the Act. But the Police Patel has no discretion to dispense with the presence of the accused. (Beaumont, C. J. and Sen, J.) WARUBAI KRIPARAM V. SHIVSHANKAR BALMUKUND. 201 I.C. 688=43 Cr.L.J. 786-15 R.B. 148-44 Bom.L.R. 442=A. I.R. 1942 Bom. 205 (2).

BOMBAY WEIGHTS AND MEASURES ACT, (XV OF 1932), S. 22 - Inspector - Power of manual assistant to inspect weights and measures.

There is nothing in the rules framed under the Act empowering any one other than a properly appointed inspector to Inspect weights and measures. A manual assistant, not being an Inspector, is not authorised to perform any of the acts referred to in the Weights and Measures Act. (O'Sullivan, J.) GULABRAI SANTDAS v. EMPEROR. 212 I.C. 163=16 R.S. 249=45 Cr. L.J. 550=A.I.R. 1944 Sind 89.

BOUNDARIES — Fixation of—Tidal and navigable river given as boundary—Boundary line is at medium water mark. Narottamdas II Arivandas & Co. v. Bulsar Town Municipality. [see Q.D. 19.50-40 Vol. Col. 3257.] I.L.R (1941) Bom. 97=192 I.C. 635=13 R.B. 268=A.I.R. 1941 Bom. 11.

BROKER—Commission Right to. See Contract Act. S. 219.

BUDDHIST LAW (Burmese)—Administration of estate of deceased spouse—Proper person to administer.

The widow or widower is the proper person to administer the estate of a deceased spouse estate. The widow or widower usually has possession of whole of the estate at the time of death of the other spouse and is in most cases entitled to the whole or a large part of it. It would, therefore require very special reasons to justify the grant of letters of administration to any other person (Mosely and Sharpe, JJ.) U Tun Yin v. U BA HAN. 194 I.C. 439=13 R.R. 309=A.I.R. 1941 Rang. 133.

——(Burmese)—Adoption—Act of shinbyuing Evidentiary Value.

The act of shinbyuing does not necessarily show that this work of merit is performed specifically because of the relationship of parent and child. (MyaBu and Mosely, II.) U MAUNG

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GYI v. MAUNG SHWE THEE. 196 I.C. 144=14 R.R. 71=A.I.R. 1941 Rang. 183,

——(Burmese)—Adoption—Apatitha form— Apatitha child living apart from parents—Right to inherit—Proof of joint living—Necessity.

An apatitha child who lives apart from his or her parents is not entitled on the surviving parent's death to inherit. The rule of law is established that merely because the circumstances of the case point to a separation having been more desirable the proof of joint living cannot be dispensed with in seeking to establish a claim to inheritance on the ground of apatitha-adoption. (Roberts, C. J. and Dunkley, J.) MA TIN AYE V. KHIN KHIN GYE. 198 I.C. 37=14 R.R. 154=A.I.R. 1941 Rang. 265.

----(Burmese)-Adoption-Buddhist monk-If can adopt.

A Buddhist monk cannot validly adopt. A Pongyi being bound by the Vinaya, cannot adopt. (Dunkley and Blagden, JJ.) MA KYIN SEIN v. MAUNG KYIN HTAIK. 1940 Rang.L.R. 783=193 I.C. 507=13 R.R. 251=A.I.R. 1941 Rang. 87.

—Adoption Keittima—Proof of — Overwhelming positive evidence of adoption—Natural father gifting property to adopted son and styling him as son—If can affect conclusion from positive evidence.

Where there is overwhelming positive evidence in favour of a Keittima adoption the fact that the natural father describing himself as father and the adopted boy as his son in a deed of gift, gives the latter a share in his property cannot overthrow the conclusion from positive evidence. (Ba U. J.) M. R. M. M. MEYAPPA CHETTYAR v. MA NYUN. 1941 Rang.L.R. 742=A.I.R. 1942 Rang. 68.

——(Burmese)— Adoption—Keittima form— Proof of publicity and notoriety.

According to the law of Burma no formal ceremony is necessary to constitute adoption. Whether there is or is not a ceremony of adoption, there must be proof of publicity; if the ceremony of adoption is public then publicity may be established by proof of that fact alone; but if it be private, then there must be proof of publicity and notoriety in addition in order to establish the existence of the relationship. The fact of adoption may be inferred from a course of conduct inconsistent with any other supposition; but in that case the publicity or notoriety of the relationship must be satisfactorily proved. Evidence of isolated private conversations in which the adoptive parent is alleged to have made remarks indicating that she had made an adoption, does not amount to evidence of publicity or notoriety such as is required in a case of this kind. (Roberts, C.J. and Dunkley, J.) MA TIN AYE v. DHIN KHIN GYI. 198 I.C. 37:=14 R.R. 154=A.I.R. 1941 Rang. 265.

—(Burmese)—Adoption— Keittima Enjoyment of profits—Performance of funeral rites— Inference of parent and child relationship if justified.

### BUDDHIST LAW (BURMESE).

The fact that the alleged adopted som was allowed to work the land belonging to his alleged adoptive parents and enjoyed the profits out of which he maintained the old couple is quite insufficient to show that there was relationship of parent and child between his alleged adoptive parents and him. The fact that the alleged adoptive parents on helped in the conduct of the funeral rites of the adoptive parent does not necessarily show that he is the nearest heir. (Mya Bu and Mosely, JJ.) U MAUNG GYI v. MAUNG SHWE THEE. 196 I.C. 144=14 R.R. 71=A.I.R. 1941 Rang. 183.

——(Burmese)—Adoption — Keittima adoption—Proof of—Evidence of notoriety and publicity when relevant—Nature of admissible evidence regarding conduct.

It is true that publicity must be given to the relationship in the case of keittima adoption. But where a formal ceremony of giving and taking in keittima adoption is shown to have taken place in the presence of credible witnesses who were summoned in order to secure publicity and notoriety to the factum of adoption proof of adoption is complete. It is not open for an adoptive parent who repents of his choice to disinherit a keittima adopted child, or when such a child has died, to defeat the grandchild's claim on his estate by conduct which shows a desire to defeat it. If the formal giving and taking be done privately, publicity must afterwards be given to the fact. But where the ceremony itself is public, the fact of its having been so, ensures at once and for all times the degree of notoriety requisite for the establishment of the relationship. A reputation can only be established by admissible evidence and S. 50. Evidence Act, excludes evidence of mere rumour or gossip to the effect that an adoption has taken place or that such and such a person has no adopted child. The opinion of any one who has special means of knowledge as to the existence of the relationship of one person to another is a relevant fact, if that opinion is expressed by conduct. Evidence may therefore be given as to the behaviour of the parties between whom the relationship is alleged to exist towards each other and as to the treatment accorded to them by others. Witnesses allowed to speak as to current gossip in the neighbour-hood of the existence of a relationship or of the absence of any relationship at all. The Court will consider the evidence of those who had opportunities of seeing the treatment accorded to the adopted child by the parents and others and come to a conclusion as to existence or non-existence of the relationship. Once there is evidence which is conclusive in establishing the fact of a public adoption by means of a formal ceremony, no necessity exists of further evidence on the point and no amount of negative evidence pointing to the lack of such relationship by reason of subsequent conduct can affect the conclusion unless, indeed, it is directed toward showing the breaking of the adoptive tie. (Roberts, C.J. and Dunkley, J.) MA NYUN YIN v. MA KYIN. 1941 Rang.L.R. 445=198 I.C. 42= 14 R.R. 157=A.I.R. 1941 Rang. 276.

— Burmese) — Adoption — Relationship

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between adoptive parent and alopted boy-Severance-Unilateral Act-Sufficiency-Acquiescence of the boy-Effect.

The relationship between an adoptive parent and his adoptive child cannot be terminated by the unnateral act of the parent. He cannot disinherit his adoptive child. The relationship can be severed by the act or acts of the parent in which the child, having reached the age of discretion, has by his conduct acquiesced. The conduct may be such as to raise a presumption that the boy intends to break off the relationship and in such case, he forfeits his right of inheritance. Where the boy was trained by persons other than the father and later on lived apart from the father, and did not claim a share when the tather re-married and paid the natural daughter in satisfaction of her claims and he attended the father's funeral merely as a guest and did not take part in the ceremomes, the circumstances were enough to raise a presumption or inference that the relationship was severed. (Dunkley and Blugden, JJ.) MA KYIN SEIN v. MAUNG KYIN HTAIK. 1940 Rang L R. 783-193 I.C. 507-13 R.R. 251=A.I.R. 1941 Rang. 87.

-(Burmese)—Adoption—Evidence of repute -Nature of evidence admissible.

be adopted is known in the village as the son of the above phrase are sufficiently wide to include the alleged adoptive parents is not evidence of: repute, and is clearly inadmissible as being hearsay. The evidence of repute which is allowed by the Evidence Act must satisfy the requirements of S. 32 (5) and (6) and S. 50 of the Act. Such evidence must be expressed by Hence on the death of a re married mother with the conduct of the person expressing the opinion out leaving any issue by the second marriage, her as to the relationship, who has special knowledge of the existence of the relationship. (Mya Bu and Mosely, JJ.) U Maung Gyi v. Maun Shwe Thee. 196 I.C. 144=14 R.R. 71=A.I.R. 1941 Rang. 183.

——(Burmese) — Co-owners — Parent's pro-perty—Children if hold it as co-owners—Absence of partition-Presumption of co-ownership.

The fact that the property belonged originally to their parents does not in itself prove that the children hold it as co-owners. But if after the death of the parents, there is no partition of the estate among the children and they continue to live together, they may be presumed to hold the property as co-owners. (Mackney J.) Maung Po HLAING v. Po NYI, 195 I.C. 234=14 R.R. 34= A.I.R. 1941 Rang. 111.

-(Burmese) - Ecclesiastical law-Death owner of poggalika property-Effect.

If the owner of poggalika property dies without making a valid transfer of it during his life time it becomes on his death, sanghika property. (Roberts, C. J. and Dunkley, J.) U ZAWTIPALA v. U THATPAMA. 1941 Rang. L. R. 204=194 I.C. 597 =14 B.R. 1=A.I.R, 1941 Rang. 159.

-Ecclesiastical law—Election of presiding monk of Sanghika kyaungdaik-Validity.

Where the majority of the Sangha desired that a monk should be elected presiding monk of Sanghika kyaungdaik and expressed their will at a meeting, then it must be held that he was validly | R.R. 163,

BUDDHIST LAW (BURMESE).

elected. (Roberts, C.J. and Dunkley, J.) U ZAU-TIPALA V. U THATDAMA. 1941 Rang L.R 201= 194 I.C. 597=14 3.3 1=A I.E 1941 Rang. 159.

-(Burmese) - Emdaunggyi couple-Atetpa property-11 becomes joint property-Right, if any acquired by either spouse. U San Yi v. Maung Po Yi. [see Q.D. 1930—40 Vol. I, Col. 3257] 1921 C. 425 - 13 R.R. 177.

-(Burmese)-Eindaunggyi couple—Death of both without issue within a week of each other-Rights of atet children-Doctrine of common disaster - Applicability. U SAN YI v. MAUNG POYL [See Q.D. 1930-40 Vol. 1. Col. 3257.] 192 L.C. 425-13 R.R.

-(Burmese) Inheritance-Manukye Book X. S. S Construction-Kights of children of first marriage on death of their mother.

Where the provisions of the Manukye are clear they must be applied. There is a special provision in 5.8 of Book X for the inherited lettetowa of the deceased parent, but there is no special provision for the innerited lettetpwa of the surviving parent, and consequently it is plain as a matter of construction, that the inherited lettetpwa of the surviving parent is included in the general term 'property acquired during the coverture or his mother'. Such inherited property is Evidence to the effect that a person alleged to joint property of the couple. The words used in not only hnapazon property acquired by the joint exertion of the couple but also property acquired during coverture by either of them by inheritance from their parents or relations, and the phrase is certainly not restricted to hnapazon property only, children by the first marriage are entiled to a onesixth share in the joint property whether hnapazon or inherited property, of their mother and step-father. (Roberts. C.J. and Dunkley J.) U HLA PE v. MA FILA KHIN. 1941 Rang. L.R. 440=198 I.C. 149=14 R.R. 184 = A.I.R. 1941 Rang. 229.

> -- (Burmese)-Manukye Bk. X, S, 28-Applicability of rule in-Wife's rested interest in payin property-Wording of S. 28, if restrictive in its opera-

A daughter-in-law could not be deprived by the rule in Manukye Book X, S. 28 of her vested interest in the payin property of her husband, to which vested interest the law of inheritance could have no application. All property acquired by either or both spouses before or during marriage pass into common enjoyment and both spouses have a vested interest in all such property. wording of S. 28 of Book X of the Manukye does not appear to restrict its operation to the vested interest of the deceased in the undivided family property only but appears to extend its operation to the property of the deceased generally which is in the possession of the parent. (Mya Bu and Dunkley, JJ.) MA AVE TIN v. DAW THANT. 1940. Rang. L R 831=194 I.C. 313=13 R.R. 297=A.I. R. 1941 Rang. 99.

——(Burmese)—Marriage—Denial of—Burden of proof. Maung Maung v. Ma Sein Kyi. [see Q.D. 1936'—40 Vol. I, Col. 674.] 192 I.C. 49=18

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——(Burmese)—Marriage—Divorce— Procedure and remedy open.

A husband who believes his wife to be guilty of adultery may obtain heradmission of guilt and the disolution of marriage may take place by mutual consent on the footing that the husband retains the hnapazon property. If he cannot do this and a separation ensues by reason of his own desertion, then he has three years in which to bring a suit for a decree of divorce, but if by reason of their differences his wife has deserted him, he only has one year. In the suit for a decree of divorce he may, if he can, prove the factum of adultery, but unless he loes so the dissolution of marriage becomes effective at the expiration of one or other of these periods which ever may apply. He is no longer a husband and he cannot "prove the adultery in a suit for divorce brought by him". Nor can he bring a suit for a declaration that the dissolution of the marriage tie was effected in circumstances that his former wife has been guilty of adultery. (Roberts, C.I. and Mosely, J.) USIN v. Ma Ma I.AY. 1941 Rang. I.R. 14-194 I.C. 482-13 R.R. 311-A.I.R. 1941 Rang. 118.

——(Burmese)—Marriage—Evidence of—Reputation of marriage—How to be established S. 50. Evidence Act, if affected by S. 110, Cr. P. Code. Maung Maung v Ma Sfin Kvi. [see O. D. 1936—'40 Vol. I, Col. 675.] 192 I.C. 49=13 R.R. 163.

Gurmese)-Orasa-Attainment of status of-Test.

One of the tests of attainment of orasa status is the competence to under take the responsibilities of the deceased parent. When the question is what amount of help must be given, it must be decided with reference to each case on the basis of what help was asked for or might reasonably be required. If a son is ready and willing to help in the acquisition of family property though not required to do so, or if he complies with requests to do so within the limits of his ability and in good faith, he shows the degree of competence required.

Per Mya Bu, J.—For an orasa to qualify for his special rights joint living with the surviving parent and active assistance in his or her duties is not necessary under present day conditions.

Per Ba, U.J.—Helping parents in the acquisition of properties is not one of the requisites for the status of an orasa child but what is essential is that the eldest born child should be competent to shoulder the burdens and responsibilities of the parent of the same sex on the death of the said parent. (Roberts, C.J., Mya Bu, Moselv, Ba U and Dunkley, JI.) DAW E. V MAUNG AUNG THEIN. 1941 Rang L.R. 655=198 I.C. 139=14 R.R. 175=A.I.R. 1942 Rang I. (F.B.)

— (Burmese) — Succession — Husband and wife dying within a fortnight of one another—Property inherited by husband from collateral—Shares.

### BUNDELKHAND ALIEN. OF LAND ACT(1903)

In cases where husband and wife die within a short time of one another, where property has been inherited during m rriage from collaterals by one party only it should be treated not like property inherited from parents, nor as jointly acquired property, but on the same footing as pavin property, or as inherited lettelprea in cases of divorce by mutual consent and should go to the extent of two thirds to the relatives of the party who inherited it and to the extent of one-third to the relatives of the other party (Mya Bu. and Moselv II.) MA PWA SHIN 2 MA GAIE 1940 Rang. L.R. 753=194 I.C. 201=13R.R. 284 =A.I.R. 1941 Rang 106.

---(Chinese)-Adoption-Right to inherit of.

Amongst the Chinese there is nothing which corresponds to appatitha adoption as known amongst Burmese Buddhists and therefore if a child had been adopted at all it would be either adoption with a view to inherit or no adoption at all, that is to say, proof of adoption amongst the Chinese would connote the right to inherit. (Roberts, C. J. Dunhley, J.) MA AVE MYA V. CHEW CHENG GUAT 198 I C. 777=14 R.R. 225=A I.R. 1941 Rang. 334.

BUNDELKHAND ALIENATION OF LAND ACT (II OF 1903), S. 3—Sale by a ericulturist— Real purchaser non-agriculturist—If can acquire legal title.

If the ostensible alienee is an agriculturist but he holds the property for a third party who is a nonagriculturist no resultant trust can accrue in favour of the beneficial owner in defiance of the provisions of S 3.(2) of the Bundelkhand Land Alienation Act. This is based upon principle that no party can be allowed to circumvent or defeat the provisions of the law. (Mnl/a and Yorke, J/.) DEOKINANDAN. v. RADRI PRASAD I.L.R. (1945) All 261=1945 A.L.J. 83=1945 A.L.W. 82=1945 O.W.N. (H.C.) 82=1945 A.W.R. (H.C.) 77=A.I.R. 1945 All. 141.

S. 3 of the Bundelkhand Land Alienation Act makes no exception of any kind in favour of a non-agriculturist mortgagee, who had obtained his mortgage from an agriculturist entitling him to foreclose the property prior to the passing of the Act. Such a mortgage is hit by this section. After the passing of the Act, he cannot obtain a foreclosure decree, having regard to S. 9 (3) of the Act, nor can he acquire title to the property by means of a private treaty or sale. (Mulla aud Vorke, II) Deokinandan v. Badri Prasad. I.I. R. (1945) A 261=1945 A.L.J. 83=1945 A.L.W. 82=1945 O.W.N (H.C.) 82=1945 A.W.R. (H.C.) 77=A.I.R. 1945 All. 141.

S. 14 and Court-Fees Act, Sch. II, Art, 17 (6)—Dismissal of application under S. 14 to convert sale into martgage—If a decree—Appeal—Court-fee payable.

An order of dismissal of an application under S. 14 of the Bundelkhand Land Alienation Act to convert a sale into a mortgage has the force of a decree though not in the form of a decree. In an appeal against such an order, the subject matter is not capable of being estimated at a money value and hence it falls under Art. 17 (6) of Sch.

#### BURDEN OF PROOF.

II to the Court-Fees Act. (Harper. S.M. and Sathe, J.M.) SHAMBHU NATH v. HAR PRASAD. 1941 R D. 682=1941 O.A. (Supp.) 612=1941 A. W.R. (Rev.) 672.

BURDEN OF PROOF. See ALSO EVIDENCE Act; Ss. 101-105.

-Benami-See Benami-Burden of Proof.

-Claim to damages from ex-trustee for negligence—Allegation that defendant allowed rents to become barred-Onus-What plaintiff has to prove. See TRUST-TRUSTEE. (1943) 1 M.L.J. 144.

# -Collusion.

The onus of proving a plea of collusion in regard to an entry in the patwari papers is on the person alleging it and in the absence of any evidence on the matter the Court is entitled to believe the entries. (Sathe, J M.) SHANKAR RAI v. CHANDI MISIR. 1942 A.W.R. (Rev.) 361 (1)= 1942 O.A. (Supp.) 387 (1)=1942 O.W.N. (B.R.) 494.

CONSIDERATION.

-Importance-Evidence adduced by both sides-Adoption and gift under suspicious circumstances-Plea of fraud-Onus.

Where both sides have produced evidence the question of burden of proof is not of much im-The question, whether the rule that portance. where a will executed under suspicious circumstances is challenged on the ground of fraud, before the question of fraud could arise the party propounding the will must remove the suspicion arising from the circumstances connected with the execution of will applies also to the cases of adoptions and gifts under suspicious circumstances was not necessary to be decided for the purposes of the case. (Allsop and Varma, II.) KARAN SINCH KUAR v. BIRENDRA SINGH. 1942 A.L.W. 196.

# –Limitation plea.

When limitation is pleaded in defence, the duty of proving that the suit is within limitation always lies on the plaintiff. Shirreff, S.M. and Sathe, J.M.) LACHMAN v. SIA RAM. 1941 R.D. 672=1941 O.A. (Supp.) 617=1941 A.W.R. (Rev.) 677.

Misconduct—Risk note form H. See RAILWAYS ACT, S. 72—MISCONDUCT. 1941 A.W.R. (H.C.) 5.

——Plea of payment of money under mistake of fact—Onus. See Pleadings. 22 Pat. 220.

## -Rectification of land register.

The onus is plainly upon the party seeking rectification of the Land Register to show that the neation of the Land Register to show that the entry which is prima facie right ought not to be there. (Lord Atkin.) The Heirs of Prince Mohamed Selim v. The Attorney-General of Palestine. 197 I.C. 48=1941 A.W.R. (Rev.) 747=1941 O.L.R. 846=1941 O.A. 709=A.I.R. 1941 P.C. 99 (P.C.)=8 B.R. 184=14 R.P.C. 72. 78.

#### BURDEN OF PROOF.

-Relevancy-All the evidence placed before Court-Effect.

The question of burden of proof is purely aca. demic, when both the parties have placed before the Court all the evidence they wished to adduce and the decision of the Court has been arrived at on a consideration of the entire evidence, (Davis C.J. and Loho, J.) SHIVDAS v. MAHOMED SHAH, I.LR, (1943) Kar. 263=211 I C, 99=16 R.S. 158=A.I.R. 1943 Sind 192.

Suit by Crown of the ground of escheat See Crown-Suit By. 1941 O.W.N. 33.

-Suit by Government on the ground of escheat - Onus of proof - Prima facie proof of non-existence of preferential heir to last male owner.

Where a suit is instituted by the Crown for declaration of title to and possession of property on the ground that the property had devolved on the Crown by escheat, it has first to be ascertainned whether the necessary requisites for the establishment of that title have been made out. Where the Crown's title to get the property Consideration—Absence of. See Deed—prests not in possessing any special qualification but in the assertion that no other preferential claimant was in existence at the time of the last owner's death, the onus of proving that no such person was in existence would lie on the plaintiff, and since a negative fact has to be established by the plaintiff, the prima facie proof of such nonexistence would be obviously enough. But that proof must be of such a character that firstly it may put the matter beyond any reasonable doubt thereby discharging the onus probandi, and secondly, of such a nature as may shift the burden of proof on to the defendant to rebut the evidence adduced on behalf of the plaintiff which, if not rebutted would entitle the latter to the relief asked for. (Venkataramana Rao and Abdur Rahman. II.) Krishnaswami Naidu v. Secretary of State. 55 L.W. 578=A.I.R. 1943 Mad. 15=208 I.C. 38=16 R.M. 148=(1942) 2 M.L.J. 431.

> -Suit for damages—Defendants, admittedly trespassers—Onus as to mesne profit.

> A trespasser is bound to establish if he wishes to do so, the exact amount of mesne profits which he has received from the porperty over which he has trespassed, although the initial burden would be on the plaintiff to establish facts which would give the Court some basis for estimating the amount of damages. (Allsop and Mathur, JJ.) AHMAD ALI 7 JOTI PRASAD. I L.R. (1944) All 241=1944 A.W.R. (H.C.) 229=1944 O.A. (H.C.) 229=1944 O.W.N. 71=1944 A.L.W. 264=1944 A L.J. 264=A.I R. 1944 All. 188.

> -Suit for eviction and arrears of rent—Plea that land is inam and that defendant is occupancy ryot not liable to be ejected—Further plea that Civil Court has no jurisdiction-Onus.

> Where a defendant in a suit for arrears of rent and eviction raises the plea that the land is an inam and that therefore he has occupancy rights and cannot be evicted and that the Civil Court has no jurisdiction to try the suit, the burden is upon him to prove his allegation. It is not for the plaintiff to prove that the land is not an inam

### BURMA CARR. OF GOODS BY SEA ACT (1925)

(King, J.) SINGARACHARYULU v. SESHARAO. 1941 M.W N. 803=54 L.W. 602=A,IR. 1941 Mad 865=200 I.C. 433=15 R.M. 44=(1941) 2 M.L.J. 432.

Suit to declare adoption invalid-Onus.

In a suit for a declaration that an alleged adoption is invalid and that a particular defendant is not the adopted son of another, the burden is on the plaintiff to make out a prima facie case that the adoption which is challenged is invalid in law or never in fact took place. (Fazi Ali I.) KASI PABI V. RADHIKADEI. 205 I.C. 133=8 Cut. L. T. 96=15 R.P. 245=9 B.R. 196=AIR. 1943 Pat. 68

When a determining factor and when not—Withholding of evidence relying on onus—Propriety—Duty of parties. CHAN WAN HONG TONG v. A.K.A.C. T.V. CHETTYAR FIRM. [see Q.D. 1936—40 Vol. I, Col. 3258] 194 I.C. 270=13 R.R. 294=A.I.R. 1941 Rang. 108.

BURMA CARRIAGE OF GOODS BY SEA ACT (1925) Sch Arts. 2 and 3—Act and Schedule incorporated in contract to carry goods by sea—Damage to goods by negligence—Cause of auction on contract or tort—Limitation BILASROY v. SCINDIA STEAM NAVIGATION Co., LTD. [See Q.D. 1936—'40 Vol. I, Col. 3258.] 192 I.C. 283=13 R.R. 171.

BURMA CONTRIBUTORY PROVIDENT FUND RULES, R 5 (3) and Burma General Clauses Act. S. 2 (44) Construction of R. 5 (3)—Person—Meaning of—Validity of nomination of a Charity Home to receive fund.

R. 5 (3) of the Burma Contributory Provident Fund Rule says that a subscriber may nominate a person or persons to receive the fund and in order discover, what is the meaning of 'a person' it is necessary to refer to the Burma General Clauses Act; and in Cl. (44) of S 2 of that Act it is enacted that "person shall include any company or association or body of individuals, whether incorporated or not", unless there is anything re pugnant to the subject or context. There is nothing repugnant to this meaning of 'person' in the Burma Contributory Provident Fund Rules. Hence if a subscriber has no family, he is not compelled to leave it to an individual or individuals. The nomination of a Charity Home for girls as the person entitled to receive the fund, is therefore quite a valid one. (Sharpe. J.) HANNAY v. RODRIGUEZ 1941 Rang.L.R. 712=A.I.R. 1942 Rang. 64 (2).

R. 5 (3)—"Person"—If includes association.

Having regard to the provisions of S. 2 (44), Burma General Clauses Act, the word "person" in R. 5 (3) of the Contributory Provident Fund Rules (Burma) must be taken to include any company, association or body of individuals whether incorporated or not. (Roberts, C. J. and Dunkley, I.) ELLEN FLORENCE ROPRIGUEZ v. EDITH MARY HANNAY. 1941 Rang.L.R. 720=A.I.R. 1942 Rang. 64 (2).

R. 5 (6)—Nomination cancelling previous nomination invalid—Validity of previous nomination.

BURMA DEFENCE ACT (1940).

Under Rule 5 (6), a nomination can be cancelled only by another nomination, (i.e.) another valid nomination, and if the subsequent nomination is invalid, the previous nomination remains un-cancelled and is valid. (Roberts, C.J., and Dunklev, J.) ELLEN FLORENCE RODRIGUEZ v. EDITH MARY HANNAY. 1941 Rang.L.R. 720=A.I.R. 1942 Rang. 64 (2).

BURMA COURTS (AMENDMENT) ACT (IV OF 1932) S 2 (1)—Creation of new Court—Execution in respect of decree passed by District Court—Forum.

The creation of the Assistant District Court by the Burma Courts (Amendment) Art (1932), S. 2 (1) did not extinguish the jurisdiction of the District Court to execute its own decrees under S. 38, C. P. Code, where the amount did not exceed the pecuniary limit of the jurisdiction of the Assistant District Court. (Mya Bu and Mosely, JI) Subramanian Chettyar Firm. 1940 Rang. L.R. 725—193 I. C. 318—13 R.R. 244—A.I.R. 1941 Rang. 56.

---Burma Court Manual—Scope of—Departure from directions in, if gives a right of appeal.

The Burma Courts Manual has not the force of law but is a mere collection of directions given by the High Court to its subordinates. A departure by a Court from a course it prescribes does not of itself give in unsuccessful litigant a right of appeal. (Blanden, J.) BHAWANI SANKAR JAISI V. GANGA PRASAD. 198 I.C. 516=14 R.R. 204=A.I.R. 1941 Rang. 244.

BURMA COURTS MANUAL, Para 102— Discretion of District Magistrate—Exercise of— Principles.

Para 102 of the Burma Courts Manual based on the provisions of S 17 (1), Cr. P. Code, no doubt applies to pending as well as to completed proceedings; but the discretion which has to be exercised is the discretion of the District Magisstrate, unfettered by influences and pressure which may weigh with the Deputy Commissioner and it can very rarely be a proper exercise of such discretion to remove a pending proceeding from the Court of a Magistrate and forward it to an executive officer, and even in the rare cases when such a course might be justifiable it would be essential for the District Magistrate to take adequate steps to see that the record must be returned within a reasonable time so that the trial could proceed. (Dunkley, J.) KING v. MAUNG PO THAING. 1941 Rang L. R. 82=194 I C. 370=13 R.R. 306=42 Cr.L.J. 573=A.I.R. 1941 Rang. 114.

BURMA (FRONTIER DISTRICTS) CRIMINAL JUSTICE REGULATION (I OF 1925) Sch., Cl (ii)—Transfer of cases—Powers of High Court—Cr. P. Code. S. 526. Manus Ba Ku v. The King [Sce Q D. 1936—'40 Vol. I. Col. 692]. 192 I. C. 250=13 R.R. 175=42 Cr.L.J. 261=A.I.R. 1941 Rang, 31.

BURMA DFFENCE ACT (1940), S. 18— Order fixing maximum prices at which particular BURMA DEFENCE RULES.

dealer might sell commodity—If valid under S.18.

The Controller of Prices had no authority under the or linance of 1939 to fix the maximum price at which a particular dealer might sell a commodity. Such an order is, therefore, not valid under S. 18 of the Burma Defence Act (Roberts, C.I.) S. K. Rov v. Thir King. 1941 Rang L.R. 26=192 I.C. 770=42 Cr.L.J. 335=13 R.R. 235=A.I.R. 1941 Rang. 1.

BURMA DEFENCE RULES—Control of Prices Order, (1940), Para 6—Liability of master for acts of servants.

Ordinarily a person should not be held liable for a criminal act of another. No person can be charged with the commission of an offence unless a particular intent or knowledge or mens rea-is found to be present; but in cases where a particular intent or state of mind is not of the essence of an offence, the person can be held liable for the act or omission of another. But the Defence of Burma Act is a piece of emergency legislation and is designed and intended, among others, to prevent profiteering so as to ensure the proper working of the normal economic life of the people. The act will entirely fail in its object if a master is not held liable for the act of his servant or a partner for the act of his co-partner. Because of this, para 6 of the Control of Prices Order, 1940, has been enacted. Looked at from this point of view, it will be found that: there is nothing inconsistent between this paragraph and S. 2 (1), Cl. 3 (2) the Defence of Burma Act. (Bu U. I) ISMAIL MAHOMEN HATER v. THE KING. 1941 Rang L.R. 536=14 R.R. 152=197 I.C. 845=43 Cr.L.J. 287=A.I.R. 1941 Rang. 349.

Rr. 2 (9) and 130—Public servant within the meaning of—Head Clerk of controller of prices—Competency to file complaint.

A head clerk of a Government office is a person who occupies a position to which certain duties of a public character are attached or a person who occupies a place in the administration of Government. He is accordingly a 'public servant' within the terms of the definition in S. 21, I. P. Code. Hence the head clerk of the office of the controller of prices whose duties are immediately auxiliary to those of the controller, to whom the Government has delegated part of its functions is a public servant competent to lay a complaint in respect of an offence under Defence of Burma Rules. (Ra U. J.) ISMAIL MAHOMED HAJER. THE KING. 1941 Rang. L.R. 536=14 R.R. 152=197 I.C. 845=43 Cr. L.J. 287=A I.R. 1941 Rang. 349.

BURMA GENERAL CLAUSES ACT (1898) S. 24—Enactment—Ordinance, if an.

An Ordinance is not an enactment and an Ordinance which has expired, is not an enactment which is repealed. (Roberts, C. J.) S K. ROY v. THE KING. 1941 Rang L.R 26=192 I C. 770=42 Cr. L.J. 335=13 R.R. 285=A.I.R. 1941 Rang. 1.

S. 5—Effect of repeal of Habitual Offenders Restriction Act by Purma Act I of 1936. See HABI-TUAL OFFENDERS RESTRICTION Act, S. 18 (2) AND

BURMA INCOME-TAX ACT (XI OF 1922).

BURMA ACT I OF 1935 AND BURMA GENERAL CLAUSES ACT. 1941 Rang. LR. 239.

BURMA INCOME TAX ACT (XI OF 1922), S 4 (2)—Remittance of foreign profits—What is —Money belonging to customer sent from foreign branch to branch in Ruma under instructions of customer—If taxable as remittance of foreign profits.

There is a presumption that when money is remitted from a foreign country, where the assessee carries on business, the remittance is made out of profits. In order that the presumption may be applicable the remirtance must, of cour e, be a remittance by the assessee of money belonging to the assessee. The assessee, a Hindu undivided family, was carrying on a banking and meneylending business with branches at MY and N in Burma, and at T in the Federated Motay States. One M had a current account with the T branch of the assessed which was in a credit in a considerable sum. On 15-10-1937 Minstructed the T branch to send a sum of Rs. 10,000 by banker's draft to their branch at A' in Burma, the amount to be placed to her (M's) credit in : new account to be opened at A' and the cost of the draft to be debited to her account at T. Her instructions were duly carried out. A draft for the sum of Rs. 10,000 on a Bank at Rangoon was purchased and this was paid by the Bank to the N branch to the credit

Held, that the money sent clearly was the money of M and not the money of the assessee, and the remittance was made by M and not by the assessee, and the remittance was therefore not a remittance to the assessee of foreign profits taxable under S. 4 (2) of the Burma Income-tax Act. (Roberts, C. J., Dunkley and Sharpe, JJ.) COMMISSIONER OF INCOME-TAX BURMA v. A. K. A. R. FAMILY. 1941 Rang. LR 520=196 I.C. 580=14 R.R. 90=(1941) I.T.R. 347=A.I.R. 1941 Rang. 263. (S.B.)

—— S. 10 (2) (ix)—Income-tax Rr. 25 and 36—Interpretation of—Life assurance company with head office in British India and branch in Burma—Computation of income—Proportion of Burma premia to world premia—If to be taken into account—Interim bonus paid to policy holder—If deductible.

Rr. 25 and 36 of the Income-tax Rules should not be taken as having any further effect than that they provide a somewhat arbitrary, though convenient method of a certaining the total profits or gains in res, ect of Life Assurance business. They cannot exclude the operation of unequivocal directions in the Act. It is for the Income-tax Commissioner to ascertain the proportion which one part of a business bears to whole as well as to ascertain its total income and he is not bound, in certaining such proportion to have recourse to the Rules which deal only with the computation of total income. The principles underlying the Act must be carefully borne in mind in the interpretation of the Rules. The assessee, an Insurance Company carrying on life insurance business, had its Head Office in Lahore in British India and a local agency in Rangoon in Burma. the assessment of the year 1937-1939, in respect of the Burma branch's income the Income-tax authorities calculated the income, profits and gains of the company under Rules 25 and 36 of the Burma Income-tax Rules

### BURMA INCOME TAX ACT (XI OF 1922).

on the proportion of the Burma premia to the world premia received in the previous year 1936—1937. They also included the sums paid to policy holders by way of interim bonus in the total divisible surplus. The assessee claimed that the income, profits and gains of the company should be computed on the proportion of the said premia received during the quadrennial valuation period ended 30th April, 1936, and the sums paid to the policy holders should be deducted from the divisible profits.

Held, (1) that the Income-tax authorities were right in including the sums paid to policy-holders by way of interim bonus in the total divisible surplus for the quadrennium ended 30th April, 1936, as they did not constitute expenditure incurred for earning the profits of the company within the meaning of S. 10 (2) (1x) of the Burma Income-tax Act.

(2) (per Roberts, C. J. and Dunkely, J., Sharpe, J. contra). that the Income tax authorities were right in computing the income, profits and gains of the assessee for the Burma assessment in 1937—1938 on the proportion of the Burma premia to the world premia received in the previous year 1936—1937. (Roberts, C. J., Dunkley and Sharpe, JJ.) COMMISSIONER OF INCOME-TAX, BURMA v. LAKSHMI INSURANCE CO., LTD., RANGOON. 198 I.C. 330=14 R.B. 190 (F.B.) = 1941 I T.R. 516=A.I.R. 1941 Rang. 212.

—S. 24 (1)—Loss—Setting off—Time for— Assessee compelled to take over land and house of debtor in satisfaction of loan transaction—Sale of land and houses in parts in different years loss in whole transaction claimed after sale of last part—Permissibility.

The assessee, a Hindu undivided family carrying on a banking and money-lending business, took over in 1928-1929, about 63 acres of land and a house in settlement of a debt of Rs. 9,000 due to them from a debtor. The land and the house were sold at different times in parts at the best price available at the time of the respective sales. The last sale was of the house in 1937-1938 and the account kept by the assessee of these sales showed, when all the property had been sold, a loss on the whole transaction of Rs. 5,137-8-0. In that year the assessee made a claim to deduct as trading loss the total loss of the whole transaction, namely, the sum of Rs. 5,137-8-0. The Income-tax authorities disallowed the claim holding that in each year in which a sale of a part of the property took place the assessee ought to have made an estimate of his loss on that particular sale, and ought to have claimed the loss estimated to have been incurred on that particular sale in the accounting year in which it took place.

Held, that the contention of the Income-tax department was untenable, and that the assessee was clearly entitled to deduct the amount as a trading loss, for he could not know until the transaction had been completed what his loss was where only a part of the property had been sold, whilst the rest remained in the hands of the assessee and might result in a profit or might result in a loss, and the whole transaction was not pet complete, no assessment could be made, maintenance,

BURMA LAWS ACT (XIII OF 1898).

(Roberts, C. J., Dunkley and Sharpe, IJ.) Com-MISSIONER OF INCOME-TAX, BURMA V. A.K.A.R. FAMILY. 1941 Rang. L. R. 520=196 I.C. 589=14 R.R. 90=(1941) I.T.R. 347=A.I.R. 1941 Rang. 263.

BURMA (LOWER) LAND AND REVENUE ACT (II OF 1876). Ss 46 and 47 and Burma Cooperative Societies Act (1927), S. 51—Conditions under which Ss. 46 and 47 of the Land and Revenue Act are available—Sale to realise sum due from member of Co-operative Society—Availability of Ss. 46 and 47 of the Land and Revenue Act. MAUNG MYA DIN v. K.P. A.P. CHETTYAR FIRM. [see Q.D. 1936-40 Vol. 1. Col. 698.] 191 I.C. 176.

——Ss. 55 and 56—Bar of jurisdiction of Civil Court—Question as to existence of legal authority for the Revenue Officer to act. Maung Mya Din v. K. A.P. Chettyar Firm. [see Q.D. 1936-40 Vol. 1, Col. 698.] 191 I.C. 176,

BURMA (UPPER) LAND AND REVENUE REGULATION (1889)S. 53 (2)(x·1). Ber of turisdiction of Civil Court—'Connected with or arising out of the collection of revenue'—Meaning—Resumption of land for arrears of fishery revenue—Civil suit, in respect of Maintainability.

The words 'connected with or arising out of the collecion of revenue' in S. 53 of the Upper Burma Land Revenue Regulation must be construed reasonably. Their meaning cannot be extended so as to include any consequence however indirect, or however unjustified by law, of action taken to collect revenue. The words 'collection of revenue' means collection by payment in the ordinary course, or recovery of arrears in the ways allowed by S. 41. No doubt, if the revenue authorities had proceeded to enforce any process (process is defined in S. 41) for the recovery of arrears of revenue the jurisdic. tion of the Civil Court would be barred. Where in respect of certain firshery revenue arrears, land is resumed which is not authorised by the regulation, it is an act, without jurisdiction, and a suit at the instance of the aggrieved party is maintainable in a Civil Court. (Mosely, J.) MAUNG SHWE THIN z. MAUAG THA OK. 1940 Rang. L.R. 764=193 I,C. 417=13 R.R. 250=A.I.R. 1941 Rang. 78.

BURMA LAWS ACT, (XIII OF 1898), S. 13—Chinese Buddhist—If can make a will.

Inheritance to the estate of a Chinaman who is domiciled in Burma and is a Buddhist, is governed by the Buddhist law of Burma. Though a will is not recognised under Buddhist law, a custom or usage varying this strict rule has been recognized by judicial decisions. Hence it must be taken that a Chinese Buddhist can make a will. (Roberts, C.J. and Dunkley, J.) YUP SOON E. v. SAW BOON KYAUNG. 1941 Rang. L.R. 285=196 I.C. 636=14 R.R. 96=A.I.R. 1941 Rang. 241.

S. 13 and Succession Act (1925), S. 37—I ndian or Burmese Christians—S. 13 of the Burma Laws Act, if applies—Illegitimate and adopted children, if can come in under S. 37 of Succession Act. CYRIL v. D'ATTIDES. [See Q. D. 1936—'40 Vol. I Col. 3258.] 192 I.C. 690—13 R.R. 189—A.I.R. 1941 Rang. 33.

- S. 13(1) and (3)—Applicability—Wife's claim for maintenance coupled with the child's claim for maintenance.

#### BURMA MUNICIPAL ACT (III OF 1898).

A wite's claim for maintenance is a question regarding marriage and when parties are Buddmist the Buddfist law must form the rule of decision by reason of S. 13 (1) of the Burma Laws Act. But where there is also a claim by the child against his father sub-S. (1) of S. 13 has no application; and according to sub S. (3), if there is no statutory law dealing with the matter the decision must be in accordance with justice, equity and good conscience. Hence the remedy is under S. 488, Cr. P. Code only, for even under the 6 monor law of England a child cannot bring an action against its parents for maintenance. Durkley and Flagacia, J.) The A Mya v. Ma Kin Pu. 1940 Rang, L.R. 807=193 I.C. 836=13 R.R. 266=A.I.R. 1941 Rang, S1.

According to S. 13 (1) of Burma Laws Act, inheritance to the estate of a Chainaman who is domiciled in Burma and is a Buddhist is governed by the Buddhist Law of Burma. The burden of proving any special custom of insage, like the Chinese customary law, which is opposed to the ordinary rules of the Burmese Buddhist law of inheritance is on the person asserting that variation. (Myu Bu and Mosely, 11) Yin Win I in 7. Ma Kyin Sein. 1940 Rang, L.R. 685—194 I.C. 323—13 R.R. 304—A.I.R. 1941 Rang, 66.

BURMA MUNICIPAL ACT (III OF 1898, as amended by Act V of 1933), S. 79 (5)—Competency of reference—Question of fact as to communication of notice.

The question whether the Sub-Committee's decision was duly communicated to the assessed or not is a question of fact which may affect the maintainability of the appeal but does not affect the liability to or the principle of assessment, and consequently cannot be a subject-matter of reference under S. 79 (5) of the Municipal Act. (Roberts, C.J., Dunkley and Shaw, J.) DAWSONS BANK, LID. v. MUNICIPAL COMMITTER, KYAIKLAT. 198 I.C. 180=14 R.R. 187=A.I.R. 1941 Rang. 339 (S.B.).

BURMA PREVENTION OF CRIME (YOUNG OFFENDERS), ACT (111 OF 1930), S. 14—Finding as to age—Relevant point of time—Inquiry into age—Procedure.

The age which is to be considered in passing orders under the Young Offenders Act as to detention of juveniles, is the age found by the Court under S. 14 of the Act, and not the age at the date of sentence or conviction. The inquiry as to age must, usually at all events include a medical examination and the doctor will testify to what appears to him to be the age of the accused at the time he examines him. (Mosely, J.) The King v. Tun Maung. 199 I.C. 378=43 Cr.L.J. 555=1941 Rang.L.R, 801=14 R.R. 271=A.I.R. 1942 Rang. 60.

BURMA RAILWAYS ACT (1X OF 1890) S. 112 as amended by ACT (XVIII OF 1939)—Offence under by boy of 13—Senience of whipping in default of payment of fine—Legality—Effect of Act XVIII of 1939 on S. 17 (1) of the Young Offenders Act (Burma Act III of 1930).

# BURMA YOUNG OFFENDERS ACT (1930).

Where a boy of thirteen is found guilty of an offence under S. 112 of the Railways Act, it is only a substantive sentence of whipping that could be awarded and not a sentence of whipping in default of payment of fine, Burma Act XVIII of 1939 which amends S. 112 of the Railways Act is vague and general and it must be read as enacting only that a substantive sentence of whipping may be imposed where the person convicted is unable to pay a fine. It follows that S. 17 of the Young offenders Act must be taken as having 1 cen modified by Burma Act XVIII of 1939 and can no longer affect the punishment to be awarded for offences by Javeniles under S.16 against S. 112 of the Railways Act. (Mosely, Maung Ins Shwe. 1941 Rang.L.R. 234 = 195 1.C 4=14 R.R. 19=42 Cr.L.J. 641=A.I. R. 1941 Rang. 181.

BURMA TENANCY ACT (X OF 1939), S. 25

— Application made after prescribed perod—Procedure
to be followed.

An application under S. 25 of the Burma Tenancy Act is no less an application because it is presented to the Court after the time allowed by law. In such a case the Court must receive it and dismiss it on the ground that it is barred by time. (Roberts, C.J. and Dunkley, J.) UBABANE, UYA. 1951.C. 551=14 R.R. 45=AI.R. 1944 Rang. 199.

\_\_\_\_\_S. 40 - Bar of civil suit-Dispute as to compensation between two tenants.

The matters the determination of which is expressly entrusted to Revenue Officers by the Buima Tenancy Act are set out in Ch. 111, 1V and V of the Act. None of these provisions applies to a suit by tenant evicted under the orders of the Revenue Officer against another at whose instance he was evicted for compensation for cultivation expenses incurred prior to eviction. Hence the jurisdiction of the Civil Court is not barred from entertaining such a suit. (Ba U, I) U. Shwe Yon v. Maung E. 1941 Rang L.R. 385=198 I.C. 99=14 R.R. 174=A.l.R. 1941 Rang, 268.

BURMA TENANCY ORDINANCE (1940), Ss. 6 (3) and 9-Right of appeal not availed of-Application for writ of certiorari' if lies.

A landlord who has not availed himself of his remedy by way of appeal under S. 9 of the Tenancy Ordinance from an order of the Revenue Officer under S. 6 (3) cannot petition the High Court for a writ of certiorari to quash the proceedings of the Revenue Officer. It must be taken as settled law that if a petitioner for a writ of certiorari has another certain and sufficient remedy open to him he is not entitled to the benefit of the extra-ordinary remedy by writ. (Roberts, C.J. and Dunkley, J.) UBA SAN v. UYA. 195 I.C. 551=14 R.R. 45=A.I.R. 1941 Rang. 199.

BURMA YOUNG OFFENDRRS ACT (Burma Act, III of 1930) S. 17 (1)—If affected by Burma Act XVIII of 1939. See BURMA ACT XVIII of 1939 AND RAILWAYS ACT, S. 112. 1941 Rang.L.R. 234.

Burning Ground-Dedication. See Deplication. 10 Cut.L.T. 8.

CALCUTTA ACTS.

Cotton Cloth and Yarn (Emergency) Search Order (1945).

High Court Rules. House Rent Control Order (1943). Improvement Act (XVIII of 1911).

Municipal Act (III of 1923). Tramway Act (I of 1880).

CALCUTTA COTTON CLOTH AND YARN (EMERGENCY) SEARCH ORDER (1945)—Validity—Defence of India Rules, R. 81.

The Calcutta Cotton Cloth and Yarn (Emergency) Search Order, 1945, is within the power conferred by R. 81 (2) (b) of the Defence of India Rules. (Derbyshire, C.J. and Gentle, J.) KHETSIDAS GIRDHARILAL, In the matter of. 49 C. W.N. 595.

CALCUTTA HIGH COURT RULES AND ORDERS (ORIGINAL SIDE)-Counter claim.

There is no provision in the Rules of the Calcutta High Court under which a defendant can obtain relief by way of counter-claim.

(Gentle, J.) CALCUTTA CELLULOID WORKS LTD. v. LABANYAMOHAN GHATAK. 47 C.W.N. 421.

—Chap. V, R. 3—Judge disposing of application without making report to Chief Justice—

Appellate Court, if may set aside order.
Under Chap. V, R. 3 of the Rules of the Calcutta High Court it is for the judge who deals with an application to decide whether it appears to him that there is any matter which requires a report to the Chief Justice. If he himself disposes of the application and does not make a report, the Appellate Court may assume that he was satisfied that there was no question before him requiring a report. No useful pur-pose would be served by its setting aside the order of the Judge and directing him to make a report to the Chief Justice. (Henderson, Dasand Sharpe, JJ.) HARDAS MAJUMDAR v BEJOY PROSAD SINGH. 49 C.W.N. 405=1945 F.L.J. 155.

\_\_\_\_Chap. VI, R. 12—Application for execution on Tabular Statement presented before Master— Notice issued by him returnable before Judge-

Application, if properly made.

An application for execution on a Tabular Statement presented before the Master is properly made, although the Master directs a notice to issue returnable before a Judge. (Das, J.) JAGANNATH JUGALKISHORE v. KANIRAM BANGSI-DHAR. 48 C.W.N. 280.

-Chap. IX Rr. 8, 6 and 7-Operation of-Charges for perusing affidavits of co-defendants

on originating summons—When allowed.
R. 8 of Chap. IX of the Rules of the High Court is complementary to Rr. 6 and 7 and should be read along with those preceding rules. The operation of that rule should be regarded as dimited to cases of obtaining office copy under the preceding Rr. 6 and 7. In an originating summons in which the real conflict is between the defendants inter se, charges are to be allowed for perusing affidavits of co-defendants on taxation as between party and party. It will not be right to regard and put them on the same footing as co-defendants in an ordinary suit who have a common interest as against the plaintiff. (Das, I.) RADHA BALLAV BASU v. NAGENDRA NATH MITRA. I.L.R. (1943) 2 Cal. 443=218 I.C. 248=18 R.C. 18=A.I.R. 1944 Cal. 364.

CAL. H.C. R. & O. (O.S.) Ch. XIII-A, R. 6.

-Chap. X, R 35—Exercise of powers under -Rule as to.

No rule can be laid down for the exercise of the Court's powers under R. 35 of Chap. X of the Rules of the Original Side of the Calcutta High Court except perhaps this, that before a Court under this rule deprives a litigant of his right to prosecute his claim, it should be satisfied that to do otherwise would be to permit an abuse of its process. One test as to whether there is an abuse of the process of the Court is to challenge the hesitating or laggard plaintiff to set down his case at once and proceed according to the rules. (Derbyshire, C.J. and Nasim Ali, J.) DAWOODAYAL KOTHARI v. SHIB NATH ROY. 46 C.W.N. 653.

—Chap. X, R. 35—Notice under—Suit not prosecuted for three years—No affidavit filed explaining delay-Plaintiff expressing readiness to go to trial—Dismissal of suit—Propriety.
Where a plaintiff fails to take any step in a

suit or to have it placed in the Prospective List during a period approaching three years and when it comes before the Court, upon notice under R. 35 of Chap. X, no affidavit is filed on his behalf explaining why he has taken no step to prosecute the suit but his counsel states that the plaintiff is then ready to proceed to trial, the Court has no option but to dismiss the suit.

Per Sen, J.—It is incumbent upon the plaintiff to show good cause why the suit has not been placed in the Prospective List within six months from the date of its institution. The mere statement of the plaintiff that he is ready to go to trial certainly cannot amount to good cause. The conduct of a plaintiff who does not bring his suit on the Prospective List within six months and who can show no good cause for the delay constitutes an abuse of the process of the Court which renders the suit liable to dismissal. It is not incumbent on the Court before it dismisses a suit under Chap. X, R. 35, to find that the delay in that particular case has affected the public interest in any manner. (Gentle and Sen, JJ.)
PROVASH CHANDRA DUTTA V. SANTHAL PARGANA
ELECTRIC SUPPLY CORPORATION. 48 C.W.N. 640.

-Ch. XIII A, Rr. 6, 7 and 9-Leave to defend-When may be given unconditionally.

Under Ch. XIII-A of the Rules of the High Court, the defendant is entitled to unconditional leave to defend if he satisfies the Court that he has a good defence to the claim on its merits or if he raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence. If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence yet shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim, the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security. The defendant is not entitled to leave to defend, if he has no defence or the defence set up is illusory or sham or practically moonshine. In such a case although the plaintiff is ordinarily entitled to judgment, the Court may protect him by only allowing the defence to proceed if the

CAL, H.C. R. & O. (O.S.), Ch. XVII, R.18.

amount claimed is paid into Court or otherwise secured. (Das. J.) KIRANMOYEE DASSI v. J. CHATTERJEE. 49 C.W.N. 246.

-Ch. XVII, Rr. 18 and 45-Interim order for attachment before judgment - Notice of motion containing bare endorsement as to grant of interim attachment, served on defendant by attorney's clerk—Such service, if effects attachment, See C. P. Code, S. 64. 49 C.W.N. 226.

-Ch. XXIV, R. 47 (b)-Payment of money by defendant into Court-Acceptance by plaintiff in full satisfaction-Award of costs-Considera-

tion for Court.

Where the defendant pays money into Court and the plaintiff accepts the amount paid in full satisfaction of his claim in the suit, the Court in awarding costs should consider which of the parties is most to blame for the litigation with respect of the claim. (McNair and Gentle, II.)
BAUNATH CHAUBEY & Co. v. VARAJIAL MOOLJI. 48 C.W.N. 481.

-Ch. XXVI, R. 89-Notice of motion-

Service on all parties-Necessity for.

Notice of motion under R. 89 of Ch. XXVI of the Calcutta High Court Rules and Orders for variation and discharge of the report by the Official Referee must be served on all the parties affected thereby, whether, or not they have taken any part in the reference. (McNair, J.) KANEN-DRA NATH DATTA & MANIK LAL MITRA. I.L.R. (1940) 2 Cal. 511-200 I.C. 92=14 R.C. 661 À.I.R. 1941 Cal. 118.

-Ch. XXVII, Rr. 3, 9, 12 and 21—Sales in suits, governed by Bengal Money-Lenders' Act and other suits - Difference between-Sale becoming abortive—Fresh sale—Specified price, if can be reduced—Bengal Money-Lenders' Act, S. 35.

Under the Rules of the original side of the

Calcutta High Court there is no difference between sales in a suit not governed by the liengal Money Lenders' Act and in a suit to which that Act pplies save that the property cannot be sold for less than the specified price set out in the proclamation under which the sale of the property is then being conducted. The effect of S. 35 of the Act is to prevent the sale of more than what is required to discharge the judgmentdebt and where the whole or part of the property mortgaged is to be put up for sale and included in the proclamation such property cannot be sold on that particular occasion for less than the price specified unless the decree-holder foregoes the difference. When a sale is abortive and the property is again offered to be sold, S. 35 does not require that the specified price shall be the same as in a previous proclamation and it does not prohibit the price being fixed at a different or a lower sum in any second or subsequent proclamation of sale of property to be sold in the suit. (Lodge and Gentle, JJ.) KALI DAS RAKSHIT v. SHYAM RANGINEE RAY. I.L R. (1944) 1 Cal. 245=218 I.C. 436=18 R.C. 49=AIR. 1945 Cal. 71

Ch. XXXI-Not applicable to applicafor review under Bengal Money Lenders Act. See BENGAL MONEY LENDERS ACT, Ss. 2 (22) AND 36. 45 C.W N. 859.

——(Original Side) Chap. XXXV-A, R. 44 1 Cal. 273=20 and (Appellate Side), Part I, Chap. III, R. 3—1942 Cal. 468.

CAL. H.C. R. & O. (O.S.), Ch. XXXVI R. 32

Applicability-Application for transfer under

S. 8, Para. (2) of Divorce Act.

It is doubtful whether an application for transfer made to the High Court under paragraph (2) of S. 8 of the Divorce Act is covered by R. 44, Chap. XXXV-A of the Original Side Rules or by R. 3, Chap. III of Part I of the Appellate Side Rules. (Mukherjea and Roxburgh, JJ) MALATI v. SURENDRANATH. I.L R. (1941) 2 Cal. 373 = 45 C W N. 916 = 199 I.C. 621=14 R.C. 598=A.I.R. 1942 Cal. 32.

-Ch. XXXVI, R. 4-Attorney's Bill of costs -Taxation-Bill containing items payable by plaintiff as between attorney and client (pure) without items payable by defendant-If proper

The defendant in a mortgage suit was directed to pay the costs of the suit to the plaintiff as between attorney and client. The plaintiff's attorney submitted to the defendant a complete bill of costs including (a) items of charges payable by the defendant as between attorney and client, (b) items of charges payable by the plaintiff as between attorney and client (pure) and (c) items of charges in respect of proceedings, the costs of which were not ordered against the defendant. The defendant objected to the items falling under (b) and (c) and paid only for the items falling under (a). As the plaintiff did not pay the items coming within the heads (b) and (c), the attorney lodged a bill of costs for taxation which included only the items which fell under these two heads and not the items which came under the head (a).

Held, that a bill lodged for taxation must be a complete bill of all the fees, charges and disbursements in reference to the business to which it related, and that the bill in question in so far as it included items of charges under head (b) being the pure attorney and client portion of costs without setting out the items of ordinary attorney and client's portion payable by the defendant was not a proper bill. (Das, I.) KAMALA RANJAN RAY T. BEPIN BIHARY SARKHAN, I.L.R. (1944) 1 Cal. 18==A.I.R. 1945 Cal. 34.

-Chap. XXXVI, Rr. 32 (iv) and 6-Provisions not complied with-Discretion of Court-If can be exercised.

In a suit for partition there was a preliminary enquiry before a Referee and a report was made by him. On the application for confirmation of the report by the Judge, two counsel were engaged for more than one day and refresher fees were paid to them. In the taxation for costs as between attorney and client, the client objected to the allowing of fees to two counsel with refresher fees on the ground that they were unusual fees and should not be allowed in the absence of a written consent of the client under Ch. XXXVI, R. 32 (iv) of the Rules of the High Court.

Held, that Ch. XXXVI, R. 32 (iv) and R. 6 are specific and would seem to allow no room for discretion of the Court if those provisions are not complied with. (Ameer Ali, J.) BIJON KRISHNA NAWN v Sudhir Chandra Nawn. I.L.R. (1942) 1 Cal. 273=202 I.C. 200=15 R.C. 302=A.I.R. CAL. H.C. R. & O. (O.S.), Ch. XXXVI, R. 33

——Ch. XXXVI, Rr. 33 and 34—Daily and adjournment refreshers—When allowed—Quantum.

Under R. 34 of Chap. XXXVI of the Rules of the High Court, an adjournment refresher should be allowed where the case is adjourned for over a month over and above the daily refreshers allowed under R. 33 on the basis of the length of time occupied. The amount of fee to be allowed for on adjournment refresher should be fixed by the Taxing Officer and it is not the fee allowable on an application. The brief fee or the first day's fee is not worked off on the first day of the hearing merely because there is an adjournment for more than one month, and the computation of five hours does not begin anew on the second day of hearing. (Das, J.) RADHA BALLAV BASU V. NAGENDRA NATH MITRA. I.L.R. (1943) 2 Cal. 443=218 I.C. 248=18 R.C. 18=A.I.R. 1944 Cal. 364.

——Ch XXXVI, R. 72—Review of taxation—When may be entertained.

The Court entertains a review of taxation and interferes only where a question of principle is involved. The Court is generally unwilling to interfere where it is a question whether the Taxing Officer exercised his discretion properly or if it is only a question of the amount to be allowed. (Das. J.) RADHA BALLAV BASU v. NAGENDRA NATH MITRA. I.L.R. (943) 2 Cal. 443=218 I.C. 248=18 R.C. 18=A.I.R. 1944 Cal 364.

— Chap. XXXVI, R. 77, Item 22 and Chap. XVII, Rr. 20 and 20-A—Notice of attachment issued through Sheriff on judgment—Creditors' application-Judgment-creditor thereafter realising sum of money from judgment debtor on compromise—Sheriff's right to recover poundage from judgment-creditor.

Where on the application of the judgment-creditor a notice of attachment was issued through the Sheriff in respect of a sum of money alleged to be due to the judgment-debtor, and the judgment-creditor thereafter realised a certain sum of money from the judgment-debtor as a result of a compromise in full satisfaction of his claim and costs of the suit including execution proceedings, the Sheriff is entitled to recover poundage from the judgment-creditor on the sum realised by him. (Derbyshire, C.J. and Lodge, J.) Basanti Cotton Mills, Ltd. v. T. S. Gladstone. 49 C.W.N. 161 (2).

——Chap. XXXVIII, R. 46—Application for further time made after expiry of 14 days—If competent.

An application for further time for making a motion under R. 89 of Ch. XXVI of the Rules and Orders of the Calcutta High Court for variation and discharge of the report by the Official Referee may be made even after the expiry of fourteen days from the date of the filing of the report. (McNair, I.) RANENDRA NATH DATTA v. MANIK LAL MITRA. I.L.R. (1940) 2 Cal 511=200 I.C 92=14 R.C 661=A.I.R. 1941 Cal. 118.—Ch XXXVIII, R. 48—Attorney of trustee, claiming payment of costs out of trust estate—If must first get an order against trustee—Attorney, if must also prove indebtedness of estate to

trustee-Investigation of such matters in chamber

application - Permissibility.

CAL. HOUSE RENT CONT. OR, (1943), P. 9.

An attorney of a trustee cannot apply for payment of his costs out of the trust estate unless he gets an order against the trustee under Ch. XXXVIII, R. 48. He must also show that the estate is indebted to the trustee for the amount claimed by him. Matters of this description cannot be investigated in a chamber application. (Sen, J.) ASHUTOSH SEAL v. UMESH CH. SEAL, 49 C.W.N. 263.

CALCUTTA HOUSE RENT CONTROL ORDER (1943), Para. 9—Deposit with objection to decree-holder taking money out of Court—If payment to decree-holder.

If the judgment-debtor pays the arrears of rent into Court but at the same time files an application saying that he is paying under protest and that he objects to the decree-holder taking the money out of Court, the deposit cannot be called a payment to the decree-holder. (Henderson, J.) RADHARANI DEBI V. SANATKUMAR CHATTERJEE. 49 C.W.N. 647.

Paras. 9, 9-A and 10-Ejectment suit-Tenant not paying rent in full-If protected.

The provisions of the Calcutta House Rent Control Order protecting the tenants against ejectment, apply only to tenants who have paid their rent in full as provided in sub-paragraph (4) of paragraph 9 of that order. (Ormond, J.) NARENDRA K. CHAKRAVARTY v. JUGAL KISHORE GUPTA. 48 C.W.N. 711.

NARENDRA K. CHARRAVARTY v. JUGAL KISHORE GUPTA. 48 C.W.N. 711.

— Paras. 9 and 11—Period of grace—If would help judgment-debtor seeking to alter decree.

The period of grace of three months will not help the judgment-debtor who is a defaulter on the date of the decree and who seeks to have the decree altered or rescinded under para. 11 of the Calcutta House Rent Control Order. (Henderson, J.) RADHARANI DEBI v. SANATKUMAR CHATTERJEE. 49 C.W.N. 647.

——Para. 9—Protection of tenant—Facts subsequent to suit—If relevant.

If a tenant can show that he has complied with the requirements of paragraph 9 of the Calcutta House Rent Control Order, at the time when the suit was instituted, he is entitled to its protection. The Court cannot go into facts occurring subsequent to the date of the suit. (Sen, I.) SARAT CHANDRA DUTTA v. USHANGINI DASSI. 49 C.W. N. 430.

Para. 9 (1), proviso—Applicability.

The proviso to paragraph 9 (1) of the Calcutta House Rent Control Order does not give the landlord a new cause of action and he cannot obtain a decree for ejectment by making out a case within the proviso if he fails on his original case. The proviso does not come into play until the defendant invokes sub-S. (1). If he so invokes the plaintiff will be entitled to meet it by

invokes the plaintiff will be entitled to meet it by putting forward a case under the proviso. (Henderson, I.) BABULAL CHOWKANI v. HARI PROSAD ROY. 48 C. W.N. 48=211 I.C. 445=A.I.R 1944 Cal. 72.

—Para. 9 (4)—Tenant paying up arrears of

rent due before ejectment suit but not rent due during suit—If protected.

In order that a tenant may have protection from eviction, he must not only pay rent but pay in the manner and within the time indicated in snb-para. (4) of paragraph 9 of the Calcutta

## CAL. HOUSE RENT CONT. O. (1945), P. 9 CAL. MUNICIPAL ACT (1923), S. 3.

House Rent Control Order. Further, he must not only pay up all the arrears of rent that had fallen due in terms of sub-para. (4) before the institution of the ejectment suit, but must also continue to pay in terms of that sub-paraduring the pendenc, of the suit up to the stage when the passing of the decree comes up for consideration that is, up to the date of final hearing of the suit. In view of sub-para. (4) that payment must be in accordance with contract, or where there is no contract, month by month within the 15th of the succeeding month up to the date of final hearing. (Mitter and Akram, 11.) Keshab Mitter v. Mrs. P. Ghose. 49 C.W.N. 728.

-Paras. 9 (4) and 2—Default by tenant in payment of rent in time-Landlord accepting rent subsequently-lenants, if entitled to protection Person becoming landlord subsequent to such default-If can avail himself of such default.

Para. 9 of the Calcutta House Rent Control Order affords protection to a tenant who regularly pays his rent and carries out all the obligations of his tenancy. If a tenant does not do defence on the part of the party hable to make that it is clear from para. 9 (4) that he cannot it and such party had taken no part in the proavail himself of the benefits of the order. Therefore no question of waiver can arise in such a case by the subsequent acceptance of rent by the landlord. A person who becomes the landlord sub-equent to the default committed by the tenaut, is entitled to avail himself of that default. (Gentle, J.) KANTO M. MULLICK V. JYOTISH CHANDRA MUKHERJEE. 49 C.W.N. 433.

-Para. 11—Decree for ejectment by consent -Tenant in arrears of rent on that date-Decree,

if may be varied.

In a suit by a landlord against his tenant who was in arrears of rent, a decree was passed by consent in May 1943, providing for payment of such arrears in certain instalments, for payment of the current rent and for ejectment of the tenant on 30th September, 1943. The tenant carried out the terms so far as the payment of arrears of rent and current rent were concerned but did not hand over possession on the stipulated date. Instead, she sought an order that the decree which was passed in May be varied or rescinded under para. It of the Calcutta House Rent Control Order by allowing her to remain in possession as long as that order remained in force,

Held, that para. 11 of the order could not be called in aid, as in the circumstances which existed on the date of the decree it could not be said that the Court would not have made the order which in fact was made. (Derbyshire, C.J., and Lodge, J.) JULIC SEN v. SURJENDRA MOHAN ROY. 49 C.W.N. 700.

-Para. 11—Order refusing to vary decree—

'Appeal.

No appeal lies from an order refusing to vary a decree under the provisions of paragraph 11 of the Calcutta House Rent Control O'der, 1945. (Henderson, I,) KALA CHAND SHAW V RAMANI MOHAN. 48 C.W.N. 603=219 I.C. 51=A.I.R. 1944 Cal. 321.

-Para. 11-Order refusing to vary decree-

'Appeal-Revision.

An order refusing to vary a decree under para. 11 of the Calcutta House Rent Control Order, is not an order in execution under S. 47, C.P. Code, Cal. 386.

and no appeal lies from such an order. If the appellate court entertains an appeal and varies the decree, the remedy is in revision and not by way of second appeal. It is not enough in revision to show that the appeal was incompetent. The High Court will not in revision restore the order of the trial court, if it is obviously a wrong order. (Henderson, J.) RADHARANI DEBI v. SANATKUMAR CHAPERIFR. 49 C.W.N. 647. CALCUTTA IMPROVEMENT ACT (V OF

1911), Ss. 70 and 72-Powers of Tribunal-Award modified on appeal-Inherent power to

grant restitution.

The Calcutta Improvement Tribunal has all the powers of a Civil Court of original jurisdiction mentioned in S. 18 of the Land Acquisition Act including its inherent powers. Where the award of the Tribunal is modified in appeal the Tribunal has under its inherent powers jurisdiction to grant restitution, although such award is not a decree. In any ev nt, an appellate Court will not drive a party entitled to restitution to a separate suit, when there cannot be any possible ceedings for restitution when they were pending before the Tribunal. (Mitter and Akram. II.) BHUPATI NATH DEB v. PROVINCE OF BENGAL, 48 C.W.N. 489.

S. 77 (2)—Execution of award of tribunal

by Small Cause Court-Certificate of non-satisfaction-If must be obtained-C. P. Code, O. 21,

R. 6.

Under S. 77 (2) of the Calcutta Improvement Act, the award of the tribunal is to be executed by the Small Causes Court as if it were a decree made by that Court. This clearly shows that that Court is not to be deemed to be a transferee Court and the procedure laid down in O. 21, R 6, C P. Code, will have no application to the award. The party in whose favour the award has been made need not, therefore, obtain a certificate of non-satisfaction to get it executed by the Court of Small Causes. (Mukerien and Sen, J.) ASMAROO KURBAN HOSSAIN & PROVINCE of Bengal, I L.R. (1942) 2 Cal. 528=203 I.C 429=15 R.C. 427=46 C.W.N. 927=:A.I.R. 1942 Cal. 569.

CALCUTTA MUNICIPAL ACT (III OF 1923), S. 3 (54)—'Private street'—Meaning of.

The definition of "private street" in S. 3 (54) of the Calcutta Municipal Act is not very clear, but, if it be compared with the definition of "public street" in S. 3 (57) of the Act, it would appear to have been the intention of the Legislature that it should refer to some space between neighbouring buildings, which has been left not merely for the purpose of detaching one set of premises from another but for securing access to the premises situated thereon not to the public at large, but to a limited section of the public who may have occasion to go to the premises situated on the space in question. "It includes any passage securing access to four or more premises " and by implication it may be taken that it would not include a passage which secures access to a smaller number of premises. (Edgley, J.) HIRENDAR NATH v. CORPORATION OF CALCUTTA. I.L.R. (1941) 1 Cal. 435=196 I.C. 832=14 R.C. 284=45 C.W.N. 413=A.I.R. 1941

#### CAL. MUNICIPAL ACT (1923), S. 17.

-Ss. 17 and 19-Corporation sanctioning building plan in violation of rules-Right of neighbouring owner to apply for mandamus-No objection raised by immediate neighbour. See Specific Relief Act, S 45. 45 C.W.N. 413.

S. 18—Remedy under—If bars right to

apply for mandamus.

The right given to Government to interfere under S 18 of the Calcutta Municipal Act where the Corporation fail to take action and presumably the implied right of the public or the individual to move the Government is not such an alternative remedy as will deprive the individual of the right to apply for mandamus. (Ameer Ali, J.) SM. LAKSHMIMONI DASSI, In re. I.L.R. (1941) 1 Cal. 16=196 I.C. 452=14 R.C. 242= 45 C.W.N. 401=A.I R. 1941 Cal. 391.

-S. 19—Annulment of proceedings of corporation-Power of Government to annul suo moto

-Scope.

The Government can invoke S. 19 of Calcutta Municipal Act in proper cases of their own initiative. The Government can annul proceedings, which include a resolution, which it considers not to be in conformity with law. Before the power is exercised an opportunity must be given to the corporation to make its representation. (Gentle, J.) ASHGAR ALLY v. BIRENDRA NATH DEV. 49 C. W.N. 658=A.I.R. 1945 Cal. 249.

Ss, 25 and 20 (1) (b)—Claim to be enrolled as voter, under S 20 (1) (b)—Revising Authority,

if can go behind Register of occupiers.

The Revising Authority cannot go behind the Register of occupiers in considering the claim of a person to be enrolled as a voter in the electoral roll as qualified under S. 20 (1) (b) of the Calcutta Municipal Act. If his name is not on that Register, the Revising Authority cannot include his name in the electoral roll. It is no part of the duty or function of the Revising Authority to enquire why his name is not on that Register. (Das. I.) S. K. SAWDAY v. N. SINGHA ROY. 48 C.W.N. 662.

S. 25 (2)—Rule 17—Grounds of claim not specifically stated—Reference made to application in form A for registration as voter and to S. 20 (1) (b)—If sufficient—Fejection of claim by Revising Authority on ground of form—Inter-

ference by High Court.

Where a claim preferred before the Revising Authority does not specify the grounds of such claim but makes a reference to the application in form A filed by the claimant for registration of his name as a voter and also mentions that the claimant is qualified under S. 20 (1) (b) of the Calcutta Municipal Act, the statement of grounds is sufficient and is in conformity with Rule 17. If the Revising Authority rejects such a claim in limine on the ground of form without going into the merits, he acts outside and in derogation of his jurisdiction. It is not merely an erroneous judgment but a failure to exercise jurisdiction conferred on him by the Statute, and the High Court may interfere in such a case. (Das, J.) S. K. SAWDAY v. N. SINGHA ROY. 48 C.W.N. 662.

S. 25 (3)—Jurisdiction of High Court-Writs of mandamus and certiorari-Power of High Court to issue on Revising Authority

Specific Relief Act, S. 45.

#### CAL. MUNICIPAL ACT (1923), S. 30.

S. 25 (3) of the Calcutta Municipal Act has not taken away the jurisdiction of the High Court to issue a mandatory injunction in the nature of a writ of mandamus or the high prerogative writ of certiorari upon the Revising Authority. The of certiorari upon the Revising Authority. Provincial Legislature as constituted under the Government of India Act, 1915—1919, had no power to take away by its enactment the jurisdiction of the High Court derived from Acts of Parliament and Royal charters. (Das, J.) S. K. SAWDAY v. N. SINGA ROY. 48 C.W.N. 662.

S. 27—Appointment of more than one election agent-Validity-Rejection of nomination papers. MAHOMED HOSSAIN v. MAHO-MED RAFFIQUE [See Q. D. 1936'40 Vol. I Col. 3259] 193 I.C. 833=13 R.C. 466=A.I.R. 1941 Cal. 130.

-- S. 27 (2) and R. 14 of Rules framed under S. 30-Candidate filing several nomination papers with separate declarations appointing more than one election agent-Each declaration containing name of only one election agent-All nomination papers, if liable to be rejected.

S. 27 (2) of the Calcutta Municipal Act contemplates only one declaration and the appointment of only one person as election agent by the candidate. If he files several nomination papers with separate declarations appointing more than one election agent, he commits a breach of the Act although each declaration contains the name of only one election agent, and all the nomination papers are liable to be rejected under R. 14 of the Rules framed under S. 30 of the Act. (Sen. J.) DHIRENDRA NATH BANERJI v. BHUPENDRA NATH BOSE. 48 C.W.N. 569.

-S. 29 (8)—Applicabilty—Uncontested elections—Publication purporting to be made under R. 16 (2) of Rules framed under S. 30—Effect of. S. 29 (8) of the Calcutta Municipal Act is not limited in its application to contested elections only. It directs the publication of the names of candidates elected at both contested and uncontested elections. R. 16(2) of the Rules made by the Provincial Government under powers granted to it by S. 30 of the Act, which provides for the publication of the names of persons elected at uncontested elections, must be treated as mere surplusage which leaves unaffected the force of S. 29 (8). If the publication of the name of a person elected uncontested is declared to be made under R. 16 (2) the declaration is erroneous, and the publication must be treated as one under S. 29 (8). (Sen, J.) ARUN BHUSAN ROY v. HARI SANKAR PAUL. 48 C.W.N. 563.

—S. 30, R. 9—Power of Returning Officer to

correct any inaccuracy in nomination paper. The second paragraph of R. 9 gives authority to the Returning Officer to correct any inaccuracy, in a nomination paper, although the word 'names' only has been used therein. (Mitter and Sharpe, II.) NUR MAHOMED v. S. M. SOLIMAN. 49 C.W.N. 10.

wrong electoral number—Rejection of nomination paper-If proper.

R. 14 (1) (iv) of the Rules under Calcutta Municipal Act does not contemplate a case where a seconder is by mistake given a wrong electoral number in the nomination paper. It presupposes that the electoral number given in the nomination paper to the person named as seconder and

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the number of that person in the electoral roll tallies and enacts that if the seconder is not identical with the person who bears that electoral number, then the nomination paper will be rejected; in other words, what the sule provides is that if the person bearing that electoral number comes forward and says he is not the seconder or if some one else proves that such person is not the seconder, the nomination paper will be rejected. The identity of the person and not a mere error in the giving of his electoral number is the factor which the Keturning Officer has to consider in deciding whether a paper should be rejected. (Scn. J.) S. M. Solaiman 70, Noon Mahomed. 217 I.C. 288-17 R.C. 186=48 C,W.N. 655=A.I.R. 1944 Cal. 395.

Several nomination papers handed over in a bundle—"First received"—Meaning of.

R. 14 (2) (b) applies where in a case in which there is one vacancy to be filled a candidate hands over to the Returning Officer several nomination papers in one bundle. In such a case, the paper which bears the earliest serial number must be taken to have been first received for the purposes of that rule. That being so, it is entitled to the benefit of that rule and must be deemed to be valid in spite of the fact that the proposer named therein has subscribed his name as proposer in the other nomination papers also (Sen, J.) S M. SOLAIMAN V. NOOR MAHOMED, 217 I.C. 288=17 R.C. 186-748 C.W.N. 655-7A. I.R. 1944 Cal. 395.

——S. 30—R. 14 (2) (b)—"First received"— Several nomination papers delivered in a bunch —Paper bearing earliest serial number—If pre-

sumed to be first received.

The word "deliver" used in R. 5 means the same as the act of presentation—the physical act of handing over to the Returning Officer and the word "receive" has been used to designate the act of acceptance by him. When several nomination papers are handed over in a bunch, there would be one act of delivery, but it would not necessarily follow that there would be only one act of receipt on the part of the Returning Officer. The Returning Officer would in normal course take the nomination papers from the bunch one by one and that one of the bunch which bears the lowest serial number would be presumed to have been "first received" by him for the purpose of R. 14 (2) (b), unless the presumption is rebutted. (Mitter and Sharpe, Jl.) Nur Manomed v. S. M. Solaman. 49 C.W.N. 10.

——S. 30—R, 14 (4)—!Vrong electoral number given in nomination paper—Defect, if technical.

If the electoral number of the seconder is wrongly given in a nomination paper, the effect is a technical and not a substantial one, for it could be corrected under R, 9. The case comes within R. 14 (4). The matters specifically mentioned in that sub-rule are only illustrative. The provisions of R. 14 (1) (iv) are applicable only to cases in which there is a dispute regarding the identity of the candidate, proposer or seconder, with the person described as such in the nomination paper (Mitter and Sharpe, J.). Nur Mahomed v. S. M. Solaiman. 49 C.W.N. 10.

——Ss. 46 and 47—Decision of single judge of MAHOMED. 217 I.C. 288=17. High Court—Appeal—Letters Patent (Cal) Cl. 15. N. 655=A.I.R. 1944 Cal. 395.

# CAL, MUNICIPAL ACT (1923), S. 46.

The High Court dealing with an application made under S. 46 of the Calcutta Municipal Act functions, in effect, as a special tribunal, and no appeal lies from its decision to any other tribunal. The decision given by the Judge constituting a special tribunal does not amount to a judgment within the meaning of Cl. 15 of the Letters Patent. (Derbyshire, C. J. and Costello, J.) DHIRENDRA KUMAR v. A. LATIF. 45 C.W.N. 181.

-S. 46—Decision of Single Judge of High Court-Appeal to Division Bench-If hes-Nature of jurisdiction conferred on High Court. No appeal lies to a Division Bench from the judgment of a single Judge of the High Court pronounced on an application made under S. 46 of the Calcutta Municipal Act. This section confers a special jurisdiction on the High Court and does not merely add a new subject-matter as part of its ordinary jurisdiction or merely change the procedure in respect of matters which it has jurisdiction to determine under the Letters Patent. A new right, a right in a body of persons, who would not have otherwise had the right to challenge the validity of an election in the High Court has been created by this section and that even when no part of the cause of action may have arisen within the territorial limits of the original side of the High Court. Cl. 15 of the Letters Patent cannot, therefore, be invoked. The general rule that when a matter reaches a Civil Court the procedure of Civil Courts would he attracted including the provisions regulating appeals from its judgments, decrees or orders, is applicable only when the matter comes to that Court as part of its ordinary jurisdiction and not by reason of a special jurisdiction having been conferred upon it. (Mitter and Sharpe, JJ.) Nur Mahomed & S. M. Solaiman 49 C.W.N. 10.

——S. 46—Election petition—Challenge on ground that candidate is not qualified—Publication of his name under S, 29 (8)—If prerequisite.

If an election is challenged on the ground that a person is not qualified to be elected a Councillor, that person must be one whose name has been published under S. 29 (8) of the Calcutta Municipal Act. (Sen. L.) ARIN BRUSAN ROY v. HARI SANKAR PAUL. 48 C.W.N. 563.

—S 46—Election petition—Returning Officer is not a necessary party. MAHOMED HOSSAIN 7. MHOMED RAFFIQUE. [See Q.D 1936-40 Vol. I, Col. 3259]. 193 I.C. 833—13 R.C. 466—A.I.R. 1941 Cal. 130.

\_\_\_\_S. 46-Election petition-Returning Officer,

is not a necessary party.

A Returning Officer is not a necessary party to an application made under S. 46 of the Calcutta Municipal Act, even when there is a complaint against his conduct. (Mitter and Sharpe JJ.) NUR MAHOMED v. S. M. SOLAIMAN. 49 C.W.N. 10.

S. 46-Election petition-Returning Officer,

when necessary party.

The Returning Officer is a necessary party to an election petition if allegations are made in it against him challenging the correctness of his conduct and his bona fides He may in a proper case be directed to pay the costs of the petition personally. (Sen, J.) S. M. SOLAIMAN v. NOOR MAHOMED. 217 I.C. 288=17 R.C. 186=48 C.W. N. 655=A.I.R. 1944 Cal. 395.

# CAL. MUNICIPAL ACT (1923), S. 46.

—S. 46—Petition to set aside election of person elected uncontested—His name published in gazette—Subsequent publication in gazette of names of persons elected at contested elections—Petition filed more than eight days after first publication—If time-barred.

A petition to set aside an election of a person elected at an uncontested election is time-barred, if made more than eight days after the publication of his name in the gazette. Such publication cannot be treated as made on a later date when another publication of the names of the persons elected at contested elections is made. (Sen, I) ARUN BHUSAN ROY v. HARI SANKAR PAUL. 48 C.W.N. 563.

-S. 46-Plural Councillor constituency-Petition challenging election of one councillor-Other councillors are necessary parties. GIRISH Chandra Ghosh v. Sudhir Chandra Ray. [See Q.D. 1936-'40 Vol. I, Col. 3259]. 193 I.C. 752=13 R.C 450=45 C.W.N. 188=A.I R. 1941 Cal. 133.

-Ss. 46 and 47—Recount and scruting Court has no power to order. Sharafuddin Ammed v. Shamsul Huq. [See Q D. 1936-40 Vol. I. Col. 3259] 193 I.C. 773=18 R.C. 469= A.1.R. 1941 Cal. 147.

-Ss. 46 and 47—Rejection of nomination papers—Decision of Returning Officer—Cannot be questioned Маномер Hossain v. Маномер RAFFIQUE, [See Q.D. 1936-'40 Vol. I, Col. 3259]. 193 I.C. 833=13 R.C. 456=A.I.R. 1941 Cal. 130.

-S, 47—Application to set aside election on ground of improper rejection of nomination paper -Proof that result of election has been materially

affected-If necessary.

S. 47 of the Calcutta Municipal Act does not deal with improper rejection of a nomination paper. The "irregularity of a nomination paper" mentioned in S. 47 (1) (c) relates to a nomination paper that had been received. Where, therefore, an election is sought to be set aside on the ground of improper rejection of a nomination paper, no proof to the effect that the result of the election has been materially affected would be required. (Mitter and Sharpe, J.). Nur Mamomed v. S. M. Solaiman. 49 C. W.N. 10.

—S. 47—Proof that result of election has been materially affected—Onus.

In a case where an applicant to set aside an election is required to prove that the result of the election has been materially affected, the burden of proof is on the applicant. (Mitter and Sharpe, JJ.) NUR MAHOMED v. S. M. SOLAIMAN. 49 C. W.N. 10.

-S.47—"Result" of the election has been

materially affected-Meaning of.

The phrase "the result of the election has been materially affected" means that the returned candidate would not have been returned but for the irregularity alleged and proved, and does not mean that the margin of majority would have been substantially reduced by reason of such irregularity. What evidence would be regarded as sufficient to prove this would depend upon the ground on which the election is challenged. In arriving at the relevant finding it would also be open to rely upon presumptions and inferences of fact which arise from other facts established or admitted. (Mitter and Sharpe, JJ.) NUR MAMOMED v. S. M. SOLAIMAN. 49 C.W.N. 10.

# CAL. MUNICIPAL ACT (1923), S. 51.

S. 47 (1) (c)—Onus of proof.
Under S. 47 (1) (c) of the Calcutta Municipal Act, the onus is clearly put on the person seeking to set aside the election to satisfy the Court that the result of the election has been materially affected by the non-compliance with the Act or the rules, even though such non-compliance is of a mandatory provision. (Sen, J.) S. M. Solaiman v. Noor Mahomed. 48 C.W.N. 655=217 I.C. 288=17 R.C. 186=A.I.R. 1944 Cal. 395.

-S, 47 (1) (c)—'Result of election'—Meaning of-Illegal rejection of nomination papers of a candidate—If ground for setting aside

election.

The words "result of the election" used in S. 47 (1) (c) of the Calcutta Municipal Act mean the expression of the will or decision of the electorate. If A and B stand for election and Ais elected, the result of the election is the expression of the decision of the electorate that it prefers A to B. If A, B and C stand for election and if A is elected, the electorate expresses its decision that A is more fitted to be elected not only than B but also than C. If therefore C has been wrongfully and illegally excluded from contesting the election, it follows that the result of the election has been materially affected. It is not necessary for C in such a case to show that the returned candidate would not have been returned. There can, therefore, hardly be a more just ground for setting aside an election than the ground that a person has been deprived of the right to contest the election by a wrongful and illegal rejection of his nomination papers. (Sen, J.) S. M. SOLAIMAN v. NOOR MAHOMED. 217 I C. 288=17 R.C, 186=48 C.W.N. 655=A.I.R. 1944 Cal, 395.

-S. 51 (1) and (2)—Powers of corporation to appoint officers-Nature of-Principles to be followed in appointing—Officer appointed under S.51(2)—If can perform duties of principal

Officers.

The provisions of sub-S. (1) of Section 51 of the Calcutta Municipal Act are mandatory and the Corporation is bound to appoint proper persons as Chief Executive Officer, Chief Engineer, Chief Accountant, Health Officer and Secretary. The appointees must be proper persons, inter alia, they must be quatified to hold the appointments. A person with minimum engineering experience satisfied with a nominal salary is not a proper person. The Corporation is not bound to appoint Deputy Executive Officers, but it is empowered to do so. But such appointments of deputy Executives are subject to the approval of the Provincial Government and in their absence will be ineffective. The appointment of principal Officers however do not require such approval and are complete when made by the Corporation. The Calcutta Municipal Act requires that the duties of the offices in S. 51 (1) are performed by the officers appointed under that sub-section. The permissive power, in sub. S. (2) being limited to appointing officers to offices other than those prescribed in sub-S. (1) these "other officers" cannot be invested with the duties of the offices in the other sub-section. Accordingly the Corporation cannot appoint a person as a special officer under S. 51 (2) to be in charge of a department of the Chief Engineer. The office is of a public nature and one which can be the

### CAL. MUNICIPAL ACT (1923), S. 127.

subject of proceeding by Oua warranto at the instance of a relator. (Gentle, J.) Ashgar Ally v. Birendranath Dey. 49 C.W.N. 658=A.I.R. 1945 Cal. 249.

——S. 127—'Let'—Meaning of—Flouse owned by firm occupied by one of its partners without rent—If assessable under Cl. (a) or (b).

The word "let" in S. 127 of the Calcutta Municipal Act means 'granting the use of the land for rent'. Where a house owned by a firm is occupied by one of its partners who neither pays any cash rent nor renders any service to the firm in lieu thereof, his occupation, in the absence of any evidence to the contrary, is that of one of the co-owners of the house and not that of a tenant. Such a house, when there is no suggestion that it was erected for letting purposes, is assessable under CI (b) and not under CI. (a) of S. 127 of the Act. (Nasim Ali and Blagden, JJ.) CORPORATION of CALCUTTA v. SHAW WALLACE & CO. 46 C.W.N. 978.

——S. 127 (a)—Annual value—Determination of -Provisions of Ss. 150 and 151—If can be taken into consideration.

The provisions of Ss. 150 and 151 of the Calcutta Municipal Act cannot be taken into consideration while determining the annual gross reuts under S. 127 (a) of the Act. (Nasim Ali and Blagden, JJ.) ROYAL CALCUTTA TURE CLUBY. CORPORATION OF CALCUTTA. I L.R. (1943) 1 Cal. 92 205 I.C 212=76 C.L.J 296:=15 R C 589=47 C.W.N. 119=A I R. 1943 Cal 166.

S. 127 (a)—Building "ordinarily let"— House provided by Government and occupied by its servant—Servant responsible for rent and occupier's share of taxes—Under rules Government not obliged to provide house nor servant to live in it—Baxis of assessment of such house.

Where the occupation by a Government servant of a house provided for by Government is not incidental to nor dependent upon the contract of service, and under the rules applicable to him the Government is under no obligation to provide a house nor the servant to live in it, but if a house is provided the servant is in exclusive possession and is responsible for the rent, whether he lives in it or not, and for the occupier's share of taxes, and the servant is free to sub-let it with the permission of the Government, such a house is a building which is "ordinarily let" within the meaning of S. 127 (a) of the Calcutta Municipal Act and has to be assessed as such. (Lord Porter.) CORPORATION OF CALCUTTA v. PROVINCE OF BENGAL. 71 I A. 31=I L.R. (1944) 2 Cal. 150=I.L.R. (1944) Kar. (P.C.) 206=213 I C. 257=1944 M.W.N. 459=10 B.R. 609=17 R.P.C. 13=48 C.W.N. 410=A.I.R. 1944 P.C. 42=(1944) 1 M.L.I. 528 (P.C.).

M.L.J. 528 (P.C.)
—S, 127 (a)—Valuation of property—English principle of valuing "rebus sic stantibus"—How far applicable—Valuation of vacant land—Vacant land not used by owner except for occasional golf practice—Owner asking corporation to unore such occasional user—Proper basis of valuation.

The English principle of valuing "rebus sic stantibus" (i.e.) with reference to the property in its actually existing condition taking into account neither the past conditions nor the future possibilities, can with perfect propriety be applied to cases coming under S. 127 (a) of the Calcutta

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Municipal Act where the owner has put the property to some use. The annual value in such cases must be determined on the basis of the rent expected from a hypothetical tenant who takes it from year to year. The above principle of English law can have no application to a case where land is kept vacant and the owner does not put it to any use at all. Such a case cannot possibly arise in English Law, as a owner who does not use or occupy his land is not rateable under the English Law at all. Under the Calcutta Municipal Act, an owner who keeps his land vacant is bound to pay rates. In determining the value of such land, the standard cannot be the amount of rent payable by a tenant who would keep it fallow and unoccupied. As the owner is not using it in any particular way, there is no presumption in favour of the continuance of any kind of user. The standard in such cases must be the rent which could be expected from a tenant, who would take the land as it is, and put it to such use as is possible for a yearly tenant to do. Where a piece of vacant land is not used by the owner except occasionally as an imperfect golf course, and the owner has expressly asked the Corporation to ignore such occasional user and treat it as vacant land so that he may have the vacancy remissions, it would be proper to value the land on the basis of annual letting value of lands in the vicinity let out as vacant lands to yearly tenants, (Mukherjea and Akram, JJ.) BENGAL NAGPUR RAILWAY (O. LTD. V. COR-PORATION OF CALCUITA. I.L.R. (1942) 2 Cal. 152 =46 C.W.N. 637=A.I R. 1942 Cal. 455.

S. 127 (b)—Value of land—Mode of assessment—English system of rating—If applicable

The Legislature has not laid down any definite method of estimating the present value of the land required to be estimated by S. 127 (b) of the Calcutta Municipal Act. There may be different methods of making this estimate and it will be for the expert valuers to make the estimate in each particular case and for the Court to come to a decision whether or not their valuation is correct. The word 'value' in this part of the section means the selling price of the property in question between a willing seller and a willing purchaser, subject to the advantages or disadvantages involved in its present condition. As Cl. (b) of S. 127 has been introduced, to meet the cases where determination of the 'annual rent' by any direct method is impossible, it will be absurd to suggest that in valuing the land the self-same impossible item was intended by the Legislature to supply the starting point. Therefore, the profits basis or the contractor's basis of rating prevailing in the English system, which are all methods not of determining the value of the land but of ascertaining the hypothetical annual rent, have no application in determining the value of the land under the section. (Nasim Ali and Pal II.) PROVINCE OF BENGAL V. CORPORATION OF CALCUTTA 201 I C 42=15 R.C. 121=46 C.W.N. 496=A.I. R. 1942 Cal. 418.

——S, 135—Application for separate assessment of outhouse—Duty of executive officer—Power to impose condition on applicant.

The corporation by its executive officer has a duty to perform under S. 135 of the Calcutta Municipal Act. When an application for separate

#### CAL. MUNICIPAL ACT (1923), S. 135.

assessment of an outhouse appurtenant to a building is made under that section, it is his duty to consider the application, to apply his mind to it, and to decide whether, in his discretion, the outhouse should be separately assessed and treated as a separate building. He cannot refuse to consider the application until the amount of the consolidated rate which is then in arrears in respect of the premises is paid in full. He is not entitled to impose this condition as the duty imposed upon him under the section is not subject to any such condition. (Lort Williams, J.) CORPORATION OF CALCUTTA v. SAMARENDA JIT SHAW. I.L R. (1941) 2 Cal 30=200 I.C. 89= 14 R.C. 665 = A.I.R. 1941 Cal. 719.

-Ss. 135 and 149-4pplication made for separate assessment of outhouse-Applicant, if escapes liability to pay consolidated rate there-

after.

A person who has made an application under S. 135 of the Calcutta Municipal Act for separate assessment of an outhouse appurtenant to his building cannot escape liability to pay the amount of the consolidated rate for the period subsequent to his application, although the Corporation keeps the application in absyance without disposing it of. (Lort Williams, J.) Corporation of Calcutta v. Samarendra Jit Shaw. I.L.R. (1941) 2 Cal 30=200 I.C. 89=14 R C. 665=A.I.R. 1941 Cal. 719.

 $\cdot$ S. 135 -A pplication for separate assessment of outhouses refused on the pretence that Corporation had no porwer to grant it—Effect on liability of applicant for consolidated rates.

S. 135 of the Calcutta Municipal Act contains a specific provision enabling the executive officer in his discretion to assess any outhouse pertaining to a building or any portion of a building, separately from such building or the other portions of such building, and when so separately assessed, such outhouse or portion of the building is deemed to be a separate building. Where the Corporation and its officials have refused to assess the outhouses separately (on the ground that it could be done only in the case of a sale or partition) and upon the pretence that they had no power under the Act to make separate assessments the owner of the house cannot escape liability for the consolidated rates for the property. (Lort Williams, J.) CORPORATION OF CAL-CUTTA v. NANDALAL CHOWDHURY. 198 I.C. 632= 14 R.C. 478=A I.R. 1941 Cal. 602.

-S. 138—Notice not served on owner— Validity of assessment—Owner's name not entered in assessment book.

The fact that the special notice prescribed by S. 138 of the Calcutta Municipal Act has not been served on the owner of a bustee, does not render the assessment a nullity, when the name of such owner has not been entered in the assessment book kept under S. 143 of the S. 144 (3) of the Act prohibits him from objecting that the notice was not made out in his name and he cannot, therefore, complain that he has been deprived of his right to object under S. 139 or appeal under S. 141. (Henderson, J.) COMMISSIONERS OF MUNICIPAL Howrah v. HARATOSH GHOSE. 49 C.W.N. 736.

-Ss. 149 and 135—Application made for separate assessment of outhouse-Applicant, if

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escapes liability to pay consolidated rate there-See CALCUTTA MUNICIPAL ACT, Ss. 135 after. AND 149. I.L R. (1941) 2 Cal. 30.

-Ss. 175 177 and Sch VI, Rr. 2 5 and 7-Company engaged in manufacture and sale of goods having registered office and also retail shops within municipal boundaries-Liability to take out both personal and local license.

Where a company engaged in the manufacture and sale of goods has within the municipal boundaries of Calcutta its registered office and also its retail shops through which it sells its goods to the public, it is liable not only to take out and pay for the personal license in respect of its registered office but also liable to take out and pay for proper local license in respect of each one of its retail shops. (Derby-S. 179—Conviction for not taking out

scavenging licence-When sustainable.

To sustain a conviction of an owner of a market under S. 179 of the Calcutta Municipal Act for not taking out a scavenging licence, it is incumbent on the prosecution to prove that the commissioner had determined the average amount of rubbish removed daily from the market. (Henderson, J.) Surenura Narayan Banerji v. Howrah Municipality. I.L.R. (1941) 2 Cal. 385.

-S. 189-"Person liable to pay"-Meaning

of.
The "person liable to pay" within the meaning of S. 189 of the Calcutta Municipal Act is the person who is made liable to pay under the Act and not under a contract with the owner. (Mitter and Blank, JJ.) MATHURA PROSAD 7 CORPORATION OF CALCUTTA. I.L.R. (1944) 2 Cal. 253=48 C. W.N. 336.

-Ss. 190 and 204—Notice of demand—If necessary requirement for suit.

When the consolidated rate is not paid within seven days of the presentation of the Bill, the Corporation has the option of proceeding in either of two ways. If it chooses to levy distraint it must give a notice under S. 190. If it does not desire to levy distraint, it need not give that notice. That is the significance of the word "may" in S. 190. A notice of demand under that section is not accordingly a preliminary requirement for a suit for the recovery of arrears of consolidated rates under S. 204. (Mitter and Blank, JJ.) MATHURA PROSAD v. CORPORATION OF CALCUTTA. I.L.R. (1944) 2 Cal. 253=48 C.W. N. 336.

-Ss. 204 and 189—Presentation of Bill under S. 189-If condition precedent to suit-"Defaul-

ter"-Meaning of.

The presentation of a Bill under S. 189 to the person liable to pay the consolidated rates, is not a condition precedent to the institution of a suit under S 204 of the Act. The word "defaulter" used in the latter section does not mean a person who has failed to pay the Bill within seven days of its presentation. It means a person who being liable to pay consolidated rates has failed to pay them within the time defined in S. 149. (Mitter and Blank, JJ.) MATHURA PROSAD v. CORPORA-TION OF CALCUTTA. I.L.R. (1944) 2 Cal. 253=48 C.W.N. 336.

S. 204—Right of suit apart from section,

# CAL. MUNICIPAL ACT (1923), S. 205.

The right of the Corporation to get consolilated rates is a creation of the Act. Apart from 3. 124, it will not have the right to impose such ates. So, the Corporation can pursue only such emedies for the recovery of consolidated rates is are provided for in the Act. Those remedies are distraint and a suit under S. 204. Apart from 3. 204, the Corporation has no right to sue under the general law. If the suit does not fulfil the requirements of S. 204, it is not maintainable.

Mitter and Blank, J.). MATHURA PROSAD v.

CORPORATION OF CALCUTTA, I.L.R. (1944) 2 Cal. 253=48 C.W.N. 336.

-S. 205-Charge on bustees-Right of corporation-Charge, if can be enforced on land

ibandoning structures.

Under S. 205 of the Calcutta Municipal Act, the corporation has a charge on bustees for consolidated rate due in respect thereof. A bustce would come within the description of "building" used in the Ss. 124, 127 and 205. As S. 205 of the Act creates a charge both on the land and the structures, the corporation can at its option enforce the charge on the land only, abandoning the structures. (Mitter and Blank, II) MATHURA Prosad v. Corporation of Calcutta, I.L.R. (1944) 2 Cal 253=48 C.W.N. 336.

-(as applied to Howrah), S. 300-Service of notice-Premises owned by company-Notice addressed to managing agents-If proper.

Where certain premises are owned and occupied by a company, the managing director or the managing agents of the company can hardly be said to be in occupation of the premises or the owner, and it is doubtful whether the managing agents can be said to be either the owners or the occupiers of the premises. Therefore, a notice relating to those premises under S. 300 of the Calcutta Municipal Act (as applied to Howrah) to the managing agents is not addressed to the proper persons. It should be served on the com-BOSE v. MANAGER, KEDAR NATH JUTE MANUFACTURING CO, I.TD. 196 I.C. 559=1941 Comp.C. 283=45 C.W N 925=43 Cr.L.J. 33=14 R.C. 268=A.I.R. 1941 Cal 550.

-Ss 363 Proviso (a) and 144 (3) -Order of demolition without affording opportunity to unre-

corded occupier-If ultra vires

Although under S. 144 (3) of the Calcutta Municipal Act an occupier of a building or a portion thereof whose name is not entered in the assessment book is not entitled to any notice made out in his own name, the sub-section does not deprive him of the right to be given an opportunity otherwise than by notice in his own name, for example, by a general notice to all owners and occupiers affixed on some conspicuous part of the premises. An order of demolition passed under S. 363 of the Act without affording such an opportunity to an unrecorded occupier is ultra vires. (Rau and Biswas, II) ASHUTOSH SARKAR v. Corporation of Calcutta. I.L.R. (1944) 1 Cal. 675=213 I.C. 28=16 R.C. 623=48 C.W.N. 170=A.I.R. 1944 Cal. 159.

-S 386(1)(b)—Premises let out for business—Business carried on without required licence

-Liability of owner.

An owner of premises who has let them out for the purpose of carrying on a business is not liable under S. 386 (1) (b) of the Calcutta Muni-

### CAL. MUNICIPAL ACT (1923), S. 406.

cipal Act when there is no suggestion that he intended that the letting should be for the purpose of carrying on the business without a licence if a licence was necessary and could not be obtained. The fact that when he was told by the Corporation to take steps for the removal of the business he protested that the refusal of the license was unwarranted and urged that no licence was required is irrelevant. It does not establish that he had permitted the carrying on of the business within the terms of the section (Roxburgh, J.) MOTI LAL v. COMPORATION OF CALCUTTA. I.L.R. (1942) 2 Cal. 105=204 I.C. 336=15 R C 519=44 Cr.L.J. 204=46 C.W.N. 418=A I.R 1943 Cal 39.

-Ss. 386 (1) (b) and 488-Prosecution under

-Proof required.

In a prosecution under Ss 386 (1) (b) and 488 of the Calcutta Municipal Act, the first thing the prosecution has to prove is that the Chief Executive Officer of the Corporation had formed the opinion that the purpose for which the premises in question were used was dangerous to health or likely to create a nuisance. (*Henderson*, J.) ATUL CHANDRA BHANDARI V CORPORATION OF CALCUTTA. I L R. (1941) 2 Cal. 308=199 I.C. 179=14 R.C, 534=43 Cr.L.J. 513=A.I R. 1942 Cal. 142 (2). -S. 388-()rder under-IV ho can pass.

Under S 388 of the Calcutta Municipal Act, it is only the Magistrate who imposes a fine under S. 488 for contravention of the provisions of S. 386 (1) of the Act, that is authorised to pass an order directing that the premises should no longer be used for the purpose which created the nuisance. No other Magistrate has jurisdiction to do so (I.odge and Roxburgh, II.) J. N. SARMA & SONS v. CORPORATION OF CALCUTTA. I. L. R. (1942) 1 Cal. 527=202 I.C. 592=15 R.C. 382=43 Cr.L.J.870=A.I.R. 1942 Cal. 529.

Saponification value of mustard oil exceeding limit fixed by Government notification—If

sufficient.

The mere fact that the saponification value of the mustard oil was found on analysis to be in excess of the outside limit fixed by the Government notification cannot support a conviction under S. 406 of the Calcutta Municipal Act, specially in view of the fact that it appears that the saponification value of mustard oil varies to some extent according to the kind of the mustard seed and the place where it is grown. (Bartley, and Akram, JJ.) BALLAVDAS ISWARDAS V SANIand Akram, JJ.) BALLAVDAS ISWARDAS v SANITARY INSPECTOR, HOWRAH MUNICIPALITY. 45 C.W.N. 661.

-Ss. 406 and 488—Conviction under-Proof

required.

In order to convict a person for sale of adulterated food under S. 400 of the Calcutta Municipal Act, it must be proved that on account of his action the quality or strength or value of the food was reduced or lowered or injuriously affected to the prejudice of the consumer. [See S 3 (2) of the Act.] (Bartley and Alexan, JI.)
BALLAVDAS ISWARDAS v. SANITARY INSPECTOR,
HOWRAH MUNICIPALITY. 45 C.W.N. 661.

-Ss. 406 and 407-Prosecution in respect of

luchis fried in adulterated ghee-Proof required.
The accused who was in charge of a sweetstall was frying some luchis in ghee. The Public Analyst to whom a sample of the ghee was sent

#### CAL. MUNICIPAL ACT (1923), S. 407.

stated that it did not contain any butter-fat. The accused was prosecuted with respect to the luchis.

Held, that as the luchis were not seized or analysed, there was nothing to show that any of that ghee was in the luchis and that further it had to be shown that luchis fried in that ghee would be of an inferior quality to those fried in ghee which the Public Analyst would describe as unadulterated and that in the absence of such evidence the accused could not be convicted under Ss. 406 and 407 of the Calcutta Municipal Act. (Henderson, J.) Joy Kali Ganguly v. Banerjee. 202 I.C. 679=43 Cr.L.J. 896=15 R.C. 391= A.I.R. 1943 Cal. 88.

S. 407 of the Calcutta Municipal Act has been drafted to give a general frame work as regards more important articles of food exposed for sale and lay down, as regards these articles some specific conditions which must be fulfilled in regard to their sale and so forth. While laying down definite conditions in regard to some of the articles, there are provisions leaving it to the Provincial Government to prescribe other further matters. Accordingly there is no limit on the power given to the Local Government to prescribe conditions in respect of butter although sub-Cl. (ii) of S. 407 (1) of the Calcutta Municipal Act does itself lay down certain conditions. The Notification dated 28th March, 1928, prescribing the condition that butter should not contain more than 20 per cent. of water is not in any way an unreasonable abuse of the power given by the section and is not ultra vires of the Provincial Government, (Roxburgh and Akram, JJ.) P. BANERJEE v. MURALI MOHAN DAS. 203 I.C. 89=15 R.C. 394=A.I.R. 1943 Cal. 30.

-S. 407 (3) -Liability of person temporarily in charge of shop for selling butter containing more than 20 per cent. water.

The fact that the accused was merely temporarily in charge of the shop while the actual manager was away, is no defence to a charge under S. 407 (3) of the Calcutta Municipal Act. (Roxburgh and Akram, JI) P. BANERJEE v. MURALI MOHAN DAS. 203 I.C. 89=15 R.C. 394= A.I.R. 1943 Cal. 30.

-Ss. 424 and 488-Refusal to sell rationed article for analysis to Food Inspector—If offence—Bengal Rationing Order, 1943, cls. 6, 7 and 9—Defence of India Rules, R. 4.

It is quite true that a shop-keeper is prohibited under cls. 6, 7 and 9 of the Bengal Rationing Order, 1943, from selling or supplying a rationed article except for human consumption and against a ration document, but that Rationing order being made under the provisions of R. 81 of the Defence of India Rules is subject to the provisions of R. 4 of those Rules. The effect of that is to add to cls. 6, 7 and 9 an exception in the case where a public servant acting in the course of his duty as a public servant and duly authorised by the Health Officer of the corporation directs a shop-keeper to supply him with a sample of the rationed article for analysis pursuant to . 424 of the Calcutta Municipal Act. The Food Inspector of the Calcutta Corporation is a public servant under S. 554 of the Calcutta Municipal Act and

### CAL. MUNICIPAL ACT (1923), S. 523.

the sale to him of a sample of a food stuff (which is a rationed article) under S. 424 of the Act. A shop-keeper who fails to comply with his requisition is, therefore, guilty of an offence under S. 488 of the Act. (Derbyshire, C.J. and Ellis, J.) CORPORATION OF CALCUTTA v. PRANABESH Вноwміск. 49 С.W.N. 704.

S 478 (17)—Bye-laws not framed under— Bye-laws framed under old Act—If continue in force—Bengal General Clauses Act, S. 25.

If no bye-laws have been framed under S. 478 (17) of the Calcutta Municipal Act (III of 1923), by e-laws framed under the corresponding S. 559 (18) of Act III of 1899 continue to be in force by virtue of the provisions of S. 25 of the Bengal General Clauses Act. (Henderson, J.) BHUPENDRA NATH RAY v. CORPORATION OF CALCUTTA. 218 I.C. 408=46 Cr.L.J. 480=48 C.W.N. 630=A I R. 1945 Cal. 103.

——(as applied to Howrah), Ss. 488/300— Prosecution under—Limitation. See CALCUTTA MUNICIPAL ACT (AS APPLIED TO HOWRAH), S. 534. 45 C.W.N 925.

-Ss. 492 and 179-Conviction of owner of market for not taking out license—Legality— Amount of rubbish removed not determined by

Corporation.

A conviction of the owner or occupier of a market under Ss. 492 and 179 of the Calcutta Municipal Act for not taking out a license cannot be sustained when there has not been a determination of the average quantity of the rubbish removed by the corporation and the fee payable for the license. Under S. 179 the owner of the market is to take out a license and pay the fee. Obviously a person cannot take out a licence until he pays the fee and he cannot pay the fee unless the fee is determined. It is clear from this section that the fee to be paid will depend upon the determination by the Corporation of the amount of offensive matter and rubbish removed daily by the Corporation. (Sen, J.) JITENDIRA V. CORPORATION OF CALCUTTA. I.L.R. (1941) 1 Cal. 322=196 I.C. 539=14 R.C. 261=43 Cr.L.J 28= 45 C.W.N. 306=A.I.R. 1941 Cal. 560.

S. 492—Pleader paying licence fee after 1st July of current year—Continuing offence.

On 30th March, 1937, a pleader (required to obtain an annual license under S. 175 Calcutta Municipal Act) paid his license fee for the year 1936-37. In a prosecution for practising without a license during that period the pleader was discharged and sued for damages for malicious

prosecution.

Held:-The pleader was guilty of an offence by practising on and after 1st July, 1936 and that was an offence continuing upto 30th March, 1937, when he paid the fee and up to 31st March, when the period for which the license required Mohan Banerjee v. Corporation of Calcutta.

194 I.C. 374=13 R.C. 501=A.I.R. 1941 Cal. 13.

S. 523-"Apportionment"—Dispute as to—

If includes case where one of two parties claims

entire compensation.

A dispute between two parties one of whom claims a share in the amount of compensation and the other claims the whole, is a dispute as to the apportionment of compensation within the meaning of S. 523 of the Calcutta Municipal Act. the acts in the discharge of his duty in requiring (Lodge and Akram, JJ.) COOVERJI MANICKJI v.

CAL. MUNICIPAL ACT (1923), S. 523.

SUKUMARI DASI. I.L R. (1941) 1 Cal. 182=195 IC. 677=14 R.C. 120=45 C.W.N. 79=A.I.R. 1941 Cal. 326.

-Ss. 523 and 525 - Relative scope—Dispute as to amount of compensation or its apportion-

ment-Right of suit.

S. 523 of the Calcutta Municipal Act provides a machinery for the settlement of disputes as to the amount of compensation to be paid and as to its apportionment and ousts the jurisdiction of the ordinary Courts to determine such disputes. S. 525 of the Act does not apply to cases governed by S. 523 and an aggrieved person has therefore, no right of suit under that section. Nor is there a right independent of S. 523 and similar to that recognised in S. 31 of the Land Acquisition Act. (Lodge and Akram, JJ) Coovery Manickji v. Sukumari Dasi. I.L.R. (1941) 1 Cal. 182 = 195 I.C 677 = 14 R.C. 120 = 45 C.W.N. 79=A.I R. 1941 Cal. 326.

-S. 523-Scope-If limited to disputes arising before payment.

S. 523 of the Calcutta Municipal Act is not limited to disputes arising before payment of the compensation by the Corporation. (Lodge and Akram, II.) COOVERJI MANICKJI 7. SUKUMARI DASI, ILR. (1941) 1 Cal 182=195 I.C. 677--14 R.C. 120=45 C.WN. 79=A.I.R. 1941 Cal. 326.

S. 533—Ex parte trial after accused has appeared—Legality.
Where the accused has appeared in compliance with a summons, the Magistrate cannot, under S. 533 of the Calcutta Municipal Act, hear the case ex parte on some subsequent date to which the trial is adjourned. (Honderson, I.) BHUPENDRA NATH ROY v. CORPORATION OF CALCUTTA. 218 I.C. 408=46 Cr L.J. 480=48 C.W.N. 630= A.I.R. 1945 Cal. 103.

-(as applied to Howrah), S. 534-Prose-

cution under \$. 488/300-Limitation.

Where the Municipality serves a notice on a person under S. 300 of the Calcutta Municipal Act. (as applied to Howrah), requiring him to remove a wall alleged to have been built across a public street, and then prosecutes him under S. 488(1) (c) of that Act for failing to comply with that notice, the offence charged is not the building of the wall but the failure to comply with the notice requiring him to remove the wall. Under S. 534 of the Act, the prosecution should be instituted within three months from the expiry of the time specified in the notice for compliance therewith. (Derbyshire, C. J and Bariley, J.) N. N. Bose v. Manager, Kedar Nath Jute Manufacturing Co., Ltd. 196 I C. 559=1941 Comp. C. 283=43 Cr.L.J. 33=45 C. W.N. 925=A.I.R. 1941 Cal. 550

-S. 534 (1)-Limitation-Duty of Magistrate.

Under S. 534 (1) of the Calcutta Municipal Act, a complaint in respect of an offence under S. 386 (1) (b) read with S. 488 of the Act must be made within three months of the date on which the existence of the offence is first brought to the notice of the Chief Executive Officer. It is the duty of the Magistrate to examine the ques-tion of limitation and satisfy himself that the prosecution is within time, although no question of limitation is raised at the trial. (Henderson, Sch. XVII, R. 9.) Atul Chandra Bhandari v. Corporation of Power of Corporation.

CAL. MUNI. ACT (1923), Sch. XVII, R. 94. CALCUTTA. I.L.R (1941) 2 Cal. 308=199 IC 179=14 R.C. 534=43 Cr.L.J. 513=A.I.R. 1942 Cal. 142 (2).

-S. 535-Complaint by Sanitary Inspector in his personal capacity—If competent.

Under S. 535 (2) of the Calcutta Municipal Act a Magistrate is not entitled to act upon a complaint filed by a Sanitary Inspector in his personal capacity and not on behalf of the Municipality when he is not residing or owning property in Calcutta. (Lodge and Blagden, JJ.) KESHABDFO KEDIA V. BANERJFE. 202 I.C 753=43 Cr.L.J. 900=15 R.C. 393=A.I.R. 1943 Cal. 31.

-S. 538-Suit against Corporation for damages for nuisance-Limitation-Limitation Act. S. 23 and Art. 36. S. A. BASIL V. CORPORATION OF CALCUTTA. [See Q. I). 1936-'40 Vol. I, Cot. 722] 195 I C. 306=14 R C. 67=45 C.W.N. 1008 =A I.R 1941 Cal. 207.

—— S. 538—Suit for damages for wrongful dismissal or for salary or for Provident Fund—

Notice, if necessary

Notice under S. 538 of the Calcutta Municipal Act need not be given to the Corporation before a suit is instituted by its servant in respect of a claim for damages for wrongful dismissal, or for salary or for the provident fund amount standing to his credit. (Gentle, J.) JATINDRA NATH PALT. CORPORATION OF CALCUTTA. I.L.R. (1944) 1 Cal. 463=A.I.R. 1945 Cal. 144.

-Sch. II, Paras. 1 and 3-Offence of personation—Candidate identifying person at or after delivery of ballot paper—If guilty. GIRISH CHANDRA GHOSH V. SUDHIR CHANDRA RAY. [See O.D. 1936-40, Vol. I, Col. 260]. 193 I.C. 752= 13 R C. 450=45 C.W.N. 188=A.I.R. 1941 Cal. 133.

-Sch. XVII—Building plan sanctioned in violation of regulations-Right of adjacent owner to apply for mandamus. See Specific Relief Act, S. 45

space between two buildings at the ground level but means the space between every part of the building to the boundary line of the land or building immediately opposite such part. (Edyley, J.) Hirendra Nath v. Corporation of. Calculta. I.L.R. (1941) 1 Cal. 435=196 I C. 832=45 C.W.N. 413=14 R.C. 284=A.I.R. 1941 Cal. 386.

-Sch. XVII, Rr. 91 and 94-Intention of-Buildings erected before existing rules.

The existing rules do not operate for the purpose of compelling the demolition of any masonry structure which was erected before they came into operation, and their general intention seems to be to ensure compliance with them as regards alterations of and additions to an existing building, while the original structure of such building may be left in tact. This is clearly the intention of R. 91 in respect of the space at the back of buildings, and the same intention underlies R. 94. (Edgley, J.) HIRENDRA NATH V. CORPORATION OF CALCUTTA. I L.R. (1941) 1 Cal. 435=196 I C. 832=45 C.W.N. 413=14 R C. 284 =A.I R. 1941 Cal 386.

-Sch. XVII, R. 94-Relaxation of rules-

# CAL, TRAMWAYS ACT (1880), S. 21.

Under R. 94 of Sch. XVII to the Calcutta Municipal Act the power of the Corporation to relax the operation of the rules is severely restricted. If an addition is proposed to an existing building, any relaxation can only be allowed for the purpose of preventing the demolition of any material part of the existing building, which may have been constructed on the space which is required to be left open under the rules contained in Sch. XVII, R. 94 was certainly not framed with the object of allowing additional encroachments on the minimum space which the Legislature considered necessary for the purpose of providing ventilation and sanitation. (Edgley, J.) Hirender Nath v. Corporation of Calcutta. ILR. (1941) 1 Cal. 435=195 I.C. 832=14 R.C. 284=45 C.W.N. 413=A.I.R. 1941 Cal. 386.

CALCUTTA TRAMWAYS ACT (BENGAL ACT I OF 1880), S. 21—Offer of rupee for fare with demand for change—If avoidance of payment.

A passenger who offers a rupee for his fare and demands change does not commit an offence under S. 21 of the Calcutta Tramways Act, although it is not a proper payment of the legal fare. The question whether particular acts or omissions amount to avoidance of payment of the fare within the meaning of that section is a question of fact to be determined on the circumstances of each case. (Edgley and Roxburgh, J.J.) BIRESWAR BANERJEE v. EMPEROR. 217 I C. 227=46 Cr.L.J. 253=17 R.C. 184=48 C.W.N. 550=A I.R. 1944 Cal. 417.

CANADA SEDUCTION ACT (1922), S. 5—Right of action under—Conditions. Brownlee v. Vivian Macmillan. [See Q D. 1936-40 Vol. I, Col. 3260]. 191 I.C. 433=13 R.P.C. 136=7 B.R. 319=1941 O.L.R 35.

CANTON MENTS—License in respect of sites—Ownership of trees on—Governor-General's Order No. 179 of 1836.

Sites in cantonments are normally held under the Governor-General's Order No. 179 of 1836. This order does not confer upon the licensee the ownership of the trees standing thereon, though such trees can be cut lawfully under orders from the Executive authorities of the cantonment. (Almond, I.C. and Mir Ahmad, I) SUJAN SINGH AHLUWALIA v. GOVERNOR-GENERAL-IN-COUNCIL 219 I C. 81=18 R.Pesh. 8=46 P L.R. 266=A.I. R. 1944 Pesh. 34.

CANTONMENTS ACT (II OF 1924), S. 210 (3) (a)—'Same part of the Cantonment'"—Meaning of.

Under S. 210 (3) (a) of the Cantonments Act, a person who has been carrying on a trade in the same part of the Cantonment from the commencement of the Act is not bound to apply for a licence unless the Cantonment authority has given him three months' notice of his obligation to apply for a licence. The word 'part' in this clause means something more than the same shop of the same house. It may well cover all that part of the Cantonment where the bazaar is situated and where the trader can carry on his occupation without offence or danger to other parts of the Cantonment not used for the purpose of a bazaar, but where residences of officers or the barracks for troops are situated (Davis,

CATTLE TRESPASS ACT (1871), S. 10.

R. (1942) Kar. 87 = 15 R S. 6=201 I.C. 66=43 Cr L.J. 733=A.I.R. 1942 Sind 95.

S. 273-Notice-When may not be neces-

If a plaintiff sues only for an injunction and if the purpose of the suit is liable to be defeated by delay then under sub-S. (4) to S. 273, Cantonments Act the necessity for the two months' notice may not arise. But where a suit is in the main for a declaration and an injunction is also asked for, sub-S. (4) can have no application and the two months' notice is necessary. (Davies) RAM GOPAL v. CANTONMENT BOARD. 1942 A M L. J. 60. CANTONMENTS (HOUSE ACCOMMODATION) ACT (VI OF 1923), S. 29 (2) and Limitation Act, S. 5—Appeal under Special Act

—S 5. Limitation Act, i/ applies.

S. 5 of Limitation Act is not applicable to the case of appeals under the Cantonment (House Accommodation) Act, as the latter is a special Act. (Bajpai and Dar, JJ.) CHHEDA LAL v. OFFICER COMMANDING. I.L.R. (1941) All. 356=194 I.C. 404=13 R.A. 500=1941 A.L.J. 267=1941 A.L.W. 322=1941 O.W.N. 453=1941 O.A. (Supp.) 195=1941 A.W.R. (H.C.) 122=A.I.R. 1941 A.I. 267

1941 All. 207.

CATTLE TRESPASS—Damage done by cattle of various persons— Allocation of extent of damage by each not possible—Damage to which plaintiff would be entitled.

Where a plaintiff complains of damage to his crops by the cattle of different persons and there is nothing to show the extent of damage by each set of cattle, the plaintiff can only be awarded nominal damages. (Agarwal, J.) HAR KRISHNA LAL v. QURBAN ALI. 17 Luck. 284=196 I.C. 685 = 14 R.O. 188=1941 O.L.R. 730=1941 OW.N. 1124=1941 O.A. 832=1941 A.L.W. 948=1941 A.W.R. (Rev.) 938=A.I.R. 1942 Oudh 73.

CATTLE TRESPASS ACT (I OF 1871), S 10-Applicability-Grass land.

S. 10—Applicability—Grass land.
S. 10 of the Cattle Trespass Act refers to the crop or produce of the land, and as grass is clearly the produce of land, the section is applicable to grass land. (Davis, C.J. and Weston, J.) BUDHO MAZAR v. EMPEROR. I.L.R. (1943) Kar. 112=208 I C. 258=16 R.S. 71=44 Cr.L.J. 761=A.TR. 1943 Sind. 152.

and not for protecting crop—Section, if applies.

S. 10 of the Cattle Trespass Act will not apply to a case where one claimant sends his men, not primarily to protect his crop or produce, but to take by force the cattle of rival claimant who in good faith claims a right to graze his cattle in the land in question. A decision as to actual possession is not necessary in such a case. (Davis, C.J. and Weston, J.) Budho Mazar v. Emperor. I.L.R. (1943) Kar. 112=208 I.C. 258=16 R.S. 71=44 Cr.L.J. 761=A.I.R. 1943 Sind 152.

S. 10—Seizure under—Facts to be proved which would justify—'Doing damage' if can be

implied from grazing.

situated and where the trader can carry on his occupation without offence or danger to other parts of the Cantonment not used for the purpose of a bazaar, but where residences of officers or the barracks for troops are situated (Davis, C.J. and Weston, J.) Emperor v. Nathoo. I.L.

# CATTLE TRESPASS ACT (1871), S. 24.

crops, for it is impossible for cattle to graze on crops without doing damage to them. Hence when there is evidence of such grazing and it is accepted, nothing further is necessary. (Bonnett, J.) LACHIMAN SINGHT. EMPEROR. 1944 O.W. N. 523=1944 O.A. (C.C.) 318-1944 A.W.R. (C.C.) 318-A.I.R. 1945 Oudh 116.

S. 24 and Penal Code, Ss. 147 and 149-Offence under I.P.C. connected with offence under S. 24, Cattle Trespass Act-11 can be taken into consideration only after conviction under S. 24.

It cannot be said that a conviction under S. 24 of the Cattle Trespass Act is essential before any offence under the Indian Penal Code conany offence under the indian renal Code connected with such an offence can be taken into consideration. (Bennett, I.) Lacheman Single v. Emperor 1944 O.W.N. 523-1944 O.A. (C.C.) 318=1944 A.W.R. (C.C.) 318=A.I.R. 1945 Oudh 116.

CAUSE OF ACTION. See C.P.Cone, S. 20.

Inchoate nature of Remedy—Amendment when useful. Eusoof Karwa 7. Mrs. Niemeyer [Sec Q.D. 1936-'40, Vol. 1, Col 3260] 194 I.C. 177-13 R.R. 275- A.I.R. 1941 Rang. 37.

CENSUS ACT (XXIV OF 1939), S. 9-Sanction for prosecution-Formalities-Particulars-Necessity for statement of.

Where in a case the Sub-divisional Magistrate moved the District Magistrate for sanction under S. 10 of the Census Act to prosecute a census officer without mentioning or even knowing any particulars and proceeded to summon the accused on receipt not of a sanction by the District Magistrate, but of an intimation by the District Census Officer that the District Magistrate had sanctioned the prosecution, there is no legal sanctioned the prosecution, there is no legal sanction as required by the Act, and the case should not be allowed to proceed any further. (Dhavle, J.) RAM SAKAL SINGH v. EMPEROR. 197 I.C. 359=14 R.P. 319=8 B.R. 192-43 Cr. L.J. 160=1941 P.W.N. 677=A.I.R. 1942 Pat. 1220

130. S. 9 (a) -Ingredients of offence-Conviction-Evidence requisite for-Accused producing receipt equivalent to discharge-Effect of.

S. 9 (a) of the Census Act deals with refusal or neglect to use reasonable diligence in performing any duty imposed upon a census officer for not obeying any order issued to him in accordance with the Act or any rule made under it. When there is no mention of any particular occasion on which the officer failed to discharge any particular duty imposed upon him and where there is no evidence on the record to show that he had disobeyed any orders sent to him in accordance with the Act or any rule under the Act, the conviction of the officer cannot be sustained, especially when he has produced a receipt equivalent to his discharge. (Dhavle, J.) RAM SAKAL SINGH v. EMPEROR. 197 I.C. 359=14 R.P. 319= 8 B.R. 192=43 Cr.L.J. 160=1941 P.W.N. 677= A.I.R. 1942 Pat. 130.

S. 11, Proviso—Prosecution for giving false answer to census officer under Ss. 193 and 417, I.P. Code—Sanction of Provincial Government-If necessary.

Having regard to the proviso to S. 11 of the Census Act, a prosecution cannot be instituted under Ss. 193 and 417, I. P. Code, for giving a false answer to a question put by a census officer except with the previous sanction of the Provin- truction-Additional District Judge taking on file

## C. P. COURTS ACT (1917), S. 26.

cial Government or of an authority authorised by them. (Derbyshire, C. J. and Bartley, J.)
EMPEROR v. HARIDAS UKIL. 45 C.W.N. 902=198
I.C. 196=14 R.C. 457=43 Cr.L.J. 326=74 C.L. J. 204 = A.I.R. 1941 Cal. 715.

-S 13-Record by census officer-Entries made therein by outsider-Admissibility in criminal proceedings.

Under S. 13 of the Census Act, a book, register or record made by a census officer is not admissible in evidence in a criminal proceeding relating to an offence which is not an offence under that Act, even in respect of entries made therein by an outsider. (Lodge and Roxburgh, IJ.) Em-PEROR C. HARI CHARAN CHARRAVARIY. 46 C.W. N. 258

CENTRAL PROVINCES ACTS, ETC.

Children Act (X of 1928). Courts Act (I of 1917) Court of Wards Act (XXIV of 1899). Debt Conciliation Act (II of 1933) (And Berar) Excise Act (I of 1915). Finance (Amendment) Act 1944. (And Berar) House Rent Control Order (1942).

Land Alienation Act (II of 1916). Land Revenue Act (XVIII of 1881). Land Revenue Act (II of 1917). Laws Act (XX of 1875) Local Fund Audit Act 1933. Local Self-Government Act (IV of 1920). Money Lenders Act (XIII of 1934). Motor Vehicles Taxation Act (1940). (And Berar) Motor Vehicles Rules. Municipalities Act (II of 1922). Patwari Rules.

Prohibition Act (1938).

Reduction of Interest Act (XXXII of 1936)

Relief of Indebtedness Act (XIV of 1939). Revision of Land Revenue of Estates Act (I of 1939).

Religious and Charitable Trusts Act (1937).

Temporary Postponement of Execution of Decrees Act.

Tenancy Act (I of 1920). Usurious Loans Act (1918) (Amendment Act) (1934).

Village Panchayat Act (V of 1920) Village Sanitation and Public Management Act (1920)

CENTRAL PROVINCES CHILDREN ACT (X OF 1928), S. 3-Applicability-'Youthful offender.

Only S. 3 of the C. I'. Children Act is made applicable to male persons in the whole of the Central Provinces with effect from 15th September, 1932. That section contains the definition of the expression 'youthful offender' but it cannot include the case of a boy under the age of 10 years at the time of conviction and sentence who has been convicted of any offence punishable with death (Niyogi, J.) PROVINCIAL GOVERN-MENT, CENTRAL PROVINCES AND BERAR V. MAKHOO HIRDE LODHT. I.L.R. (1942) Nag. 305=200 I.C. 368=15 R.N. 11=43 Cr.L.J. 631=1942 N.L.J. 210=A I.R. 1942 Nag. 74.

CENTRAL PROVINCES COURTS ACT (I OF 1917). S. 26 (Prior to amendment)—Cons-

# C. P. COURT OF WARDS ACT (1899).

case which he ought not to have tried-If acts without jurisdiction-If a curable irregularity.

Proir to its amendment, S. 26 of the C. P. Courts Act drew a distinction between 'jurisdiction' 'powers' and 'control.' The section makes the additional District Judge subject to the control of the District Judge but it does not take away or limit the 'jurisdiction'and 'powers' which earlier part of the section had already conferred upon them. Therefore if by some accident or mistake one of the Additional District Judges happens to take on file and try a case which, according to the distribution memorandum, he ought not to have tried, then he cannot be said to be acting without jurisdiction and in the absence of objection at the earliest stage, it will not be permitted to be raised at any later stage. The defect would be a curable irregularity. (Stone, C. J. and Bose, J.) Maniksa v. Anna. 1941 N. L.J. 625.

PROVINCES CENTRAL COURT WARDS ACT (XXIV OF 1899)—Scope—If contemplates taking over of a partnership business by the Court of Wards against the wishes of

other partners.

The C. P. Court of Wards Act limits itself throughout to the 'person or property' of the Government Ward. A partnership business and its assets are not the property of the Ward. They belong to the firm and cannot be split up among the partners until dissolution. The Act does not contemplate the taking over of a partnership business by the Court of Wards against the wishes of other partners. (Stone, C.J. and Bose, J.) SUNDRA BAI v. RAMLAL MADHAO RAO. 1942 N.L.J. 229.

—S. 13 (1)—Scope of—Substantial compliance

with-Sufficiency.

The provisions of S. 13 (1) of the C. P. Court of Wards Act are of course mandatory, but they are procedural and all that the section requires is substantial compliance with its terms rather than compliance with the letter, and provided there is no prejudice or injury, the Court of Wards can waive small and unessential irregularities. (Stone, C.J. and Bose, J.) SUNDRA BAI v. RAMLAL MADHAO RAO. 1942 N.L, J. 229.

——Ss. 15 (3), 12 and 13—'Claim' contemplated by S. 15 (3)—Receipt of claim submitted and documents produced—Effect—S. 15 (3) when

comes into operation.

S. 15 (3) of the C. P. Court of Wards Act only speaks generally of "a claim" and not of a claim submitted in accordance with the provisions of S. 12 (1). Hence when "a claim" though not strictly in accordance with S. 12 (1) is once received and the documents produced are accepted the force of Ss. 12 and 13 spends itself so far as the claim submitted and received and the documents produced are concerned. When the parties are unable to agree as to the settlement of the claim, S. 15 (3) of the Act comes into operation. (Stone, C.J. and Bose, J.) SUNDRA BAI v. RAMLAL MADHAO RAO. 1942 N.L.J. 229.

**-S.** 30—Scope.

S. 30 of the C. P. Court of Wards Act, can only relate to suits which the ward alone can bring. It clearly cannot affect the rights and interests of others who are not affected by the Act. It is doubtful whether the section prevents the ward ZILLIMAL, I.L.R. 1941 Nag. 732=1941 N.L.J.

C. P. DEBT CONCIL, ACT (1933), S. 7.

from suing. (Stone, C.J. and Bose, J.) SUNDRA BAI v. RAMLAL MADHAO RAO. 1942 N.L.J. 229. CENTRAL PROVINCES DEBT CON-CILIATION ACT (II OF 1933)—Strict co n-

The Debt Conciliation Act is a coercive measure intended to affect vested interests and rights and to bring pressure upon creditors to effect a settlement with their debtors. It operates to the detriment of creditors. The Act, as it involves very drastic and serious consequences, must be construed strictly. Any ambiguity in the section must be resolved along lines which will interfere as little as possible with existing rights. (Grille, C.J. and Sen, J.) KALYANSING v. HORLLAL. I.L.R. (1945) Nag. 250=1944 N.L.J. 220= A.I R 1944 Nag. 235.

-Ss. 2 (e) and 15-Debt-Personal debts of deceased co-parcener of joint Hindu family—Surviving co-parceners' liability—Issue of a certificate in respect of — Effect. [See Q.D. 1936-40 Vol. I, Col. 755.] BAPU SAHEB v. BHAGIRATHISAO. I.L.R. (1941) Nag. 334=194 I.C. 895 =14 R N, 27.

-S. 2 (e)—Interpretation—'Recoverable as an arrear of land revenue', meaning of-Arrears of Theka-Jama-If comes within purview of the

Board.

The words 'recoverable as an arrear of land revenue' in S. 2 (e) of the Debt Conciliation Act should be given their natural meaning, as words of description. Looked at from this point of view, the definition means that if a debt could be recovered in conceivable circumstances as an arrear of land revenue, then it is excluded from the definition. Arrears of Theka-Jama are recoverable as arrears of land revenue and so the Debt Conciliation Officer has no power to include such Theka-Jama within the purview of his proceedings. (Bose, J) HARCHARNLAL v. HIRDESINGH. 195 I.C. 522=14 R.N. 53=1941 N.L J. 150=A.I.R. 1941 Nag. 161.

-S. 4—"Prescribed"—Meaning—Increase of pecuniary limit by notification—Legality—Rule and notification—Difference.

The word 'prescribed' occurring in S. 4 of the C. P. Debt Conciliation Act can have only its defined meaning of 'prescribed by rules'. Hence where the pecuniary limit fixed in the Act is altered by means of a Government notification, and not by rule as required by the Act, there is no lawful alteration of the pecuniary limit. The difference between a notification and a rule is that a rule is not a rule until there has been prior publication which opens to the public the opportunity to object, whereas a notification can lie without any prior publication and no one has a chance to object before the notification becomes operative. (Stone, C.J. and Bose, J.) MANAGER, COURT OF WARDS v. SETH MOOLCHAND. I.L.R. (1941) Nag. 279=1941 N.L.J. 351=200 IC. 715=15 R.N. 18=A.I.R. 1941 Nag. 226.

-Ss. 7 and 8-Absence of notice-Validity

of subsequent proceedings.

Where the notice required by S. 7 (2) of the C. P. Debt Conciliation Act is not issued, there is no proper or effective admission of the petition and

C, P. DEBT CONCIL. ACT (1933), S. 7.

220=198 I C. 262=14 R.N. 210=A.I.R. 1942 Nag. 3.

-S. 7-Absence of notice-Validity of sub-

sequent proceedings.

Where notice under S. 7 of the C. P. Debt Conciliation Act is not given, the proceedings must be treated as if the application had never been admitted and the subsequent decisions of the Board on such application are not final. (Grille, C.J. and Sen, J.) KALYANSING v. HORILAL. I.L. R. (1945) Nag. 260=1944 N.L.J. 220=A.I.R. 1944 Nag. 235.

-Ss. 8 and 9-A-Absence of verification of

statement-If a curable irregularity.

It is not every irregularity in the statement that can be held to invalidate it and thus bring into operation the very harsh provisions of S, 8 (2). In each case it must be a question for decision whether the particular irregularity is so fatal as to go to the root of the matter and make the statement in point of law no statement at all. S. 9-A is no doubt mandatory in its terms as to verification of statements. But the absence of verification is only an irregularity which is curable and not fatal. Where it has been allowed to get in without objection and been acted upon, it must be regarded as a proper statement, (Bose, J.) Abbut Majib Khan v. Digambar Jairam. I.L.R. (1941) Nag. 428=199 I.C. 427=14 R.N. 276=1941 N.L J. 250=A.I.R. 1941 Nag. 249.

-S. 8-Discharge of debt-Not a matter of

declaration but a statutory effect.

The C. P. Debt Conciliation Act makes no provision for the passing of any order discharging the decree under S. 8 of the Act. The discharge comes about automatically, as a result of statutory provision, and without any order, when certain indicated facts occur. (Stone, C.J.) MAKHANLAL & BODHIRAM. 1942 N.L.J. 348.

-S. 8 and R. 47-Minor creditor-Appoint-

ment of guardian-Duty of Board.

Where a creditor is a minor, the Board is bound in view of R, 47 of the rules under the C. P. Debt Conciliation Act to follow the procedure laid down in O. 32, C. P. Code, for the appointment of a guardian for him. If the Board fails to secure the representation of the minor by the appointment of a guardian after a notice to him and to the guardian, its order discharging the debt due to the minor under S. 8 (2) of the Act will be without jurisdiction. (Grille, C.J. and Sen, J.) KALYANSING v. HORILAL. I.L. R. (1945) Nag. 260=1944 N.L.J. 220=A.I.R. 1944 Nag. 235.

-S. 8 and Rr. 16 and 17—Service of notice— Proclamation by beat of drums—When proper.
Under S. 8 of the C. P. Debt Conciliation Act,

the Board is not given an option either to serve the notice or to issue a proclamation. Under the Rules, personal service on the creditors has to be effected either by tendering or delivering a copy of the notice or sending such copy by registered post to the creditor. If service in the manner aforesaid cannot be made, then it may be affixed at his last known place of residence. Without trying to serve the creditors it is not competent for the Board to publish the notice. Such publication is not authorised. (Grille, C.J. and Sen, J.) KALYANSING v. HORILAL, ILR (1945) Nag. 260—1944 N.L.J. 220—A.I.R. 1944 Nag. 235.

### C. P. DEBT CONCIL. ACT (1933), S. 9.3

S. 8 (2) -Applicability—Non-submission

of accounts-Effect.
S. 8 (2) of the C. P. Debt Conciliation Act applies only to non-submission of statement of debt and not to a non-submission of accounts for which there is no statutory provision for discharge of the debts. (Grille, C.J. and Bose, J.) KESHRICHAND V. CHUNNILALS I.L R (1943) Nag 268=205 I.C 605=15 R.N. 235=1943 N.L. J. 156=A.I.R. 1943 Nag. 215.

-S. 8 (2)—Debts declared discharged—How

far binding on Civil Courts.

The operation of S. 8 (2) of the C. P. Debt Conciliation Act is independent of the Board and is automatic. The Civil Court has in each case to determine whether in fact the matters which bring the provisions of S. 8 (2) into operation were present or not. If they were present then the discharge is automatic; if they were not present then no order of the Board purporting to discharge the debt for the reason given in S. 8(2) is binding on a Civil Court. (Bose, I.) About.
MATID KHAN V. DIGAMBAR JAIRAM I.L.R. (1941)
Nag. 428=199 I.C. 427:=14 R.N. 276=1941 N.L. J, 250=A.I.R. 1941 Nag. 249.

-Ss 8 (2) and 16-Promissory note executed in Bombay—Declaration of discharge by C. P. Debt Conciliation Board—Suit on promissory P. Debt Contribution Boat — Surf on promissory note in Bombay—Maintainability—Jurisdiction—Contract—Suit—Law applicable. [See Q.D. 1936.'40, Vol. 1, Col. 3261.] SHANKAR VISHNU v. MANEKLAI HARIDAS. J.L.R. (1940) Bom. 799— 191 I C. 653=13 R.B. 193.

-S 8 (2)—Scope and effect.

S. 8 (2) of the C. P. Debt Conciliation Act introduces a legal fiction that even though a debt or the decretal amount has not been paid it may, under certain circumstances, be taken for all purposes and all occasions to have been duly discharged A legal fiction is limited to the purposes indicated by the context and cannot be given a larger effect. (Grille, C.J. and Sen, I) Kalyansing v. Horilal. ILR. (1945) Nag 260=1944 N.L.J. 220=A.I.R. 1944 Nag. 235.

-Ss. 8 (2), 9 (1) and 9 A-Statement signed and filed by creditor's son-Sufficient compliance

with requirements.

A statement signed and filed by a creditor's son with his father's authority is a valid statement as required by S. 9 (1) of the C. P. Debt Conciliation Act. When it is filed the debt to which statement refers cannot be declared to have been discharged under S. 8 (2). Any defect in procedure cannot affect the substance of a party's claim. (Niyogi, J.) NETRAM v. BHAGWAN. 199 I.C. 354 = 14 R.N. 272=1941 N.L.J. 151=A.I.R. 1941 Nag. 159.

-S. 9-Admission by debtor of agreement to pay sum due on bond—S.9 does not operate to bar claim.

Where there is an admission by the debtor in the pleadings of an agreement to pay the sum due on a bond it is not necessary to prove the bond. Therefore S. 9 of the C. P. Debt Conciliation Act which merely states that some documents cannot be proved is no bar to a decree being passed on the basis of the admission though the bond itself may be inadmissible in evidence by reas in of S.9 of the C. P. Debt Conciliation Act. (Stone, CJ. and Vivian Bose, J.) UDHAO NANAJI v. NARAYAN

# C.P. DEBT CONCIL. ACT (1933), S. 9.

VITHOBA. 194 I.C. 120=13 R.N. 356=1941 N. L.J. 134=A.I.R. 1941 Nag. 95.

S. 9 (3)—Failure to produce document at the initial stage—Power of Civil Court to admit.
S. 9 of the C. P. Debt Conciliation Act enacts in

a mandatory manner that along with the statement of debts the original documents on which the creditor relied together with their true copies should be filed. There is a proviso to sub-S. (1) of S 9 which gives a discretion to the Board to permit the document to be produced at a later date, if it is satisfied that it could not have been produced along with the statement. S. 9 (3) prescribes the penalty for non-production of the documents and makes them inadmissible in evidence against the debtor in any suit brought by the creditor or any one claiming under him. (3) however gives no discretion to the Civil Court to see whether the creditor could comply with the provision of S. 9 (1) or not and there is no proviso to sub-S. (3) as there is for sub-S. (1). The mere fact that proceedings were pending for a long time in spite of the creditor not producing the original document is no indication either of production of the document in time or of waiver by the Board. (Puranik, I) JAIRAM v RAJESH-WAR ILR. (1943) Nag. 259=207 I.C. 64=16 R.N. 16=1943 N.L.J. 97=A.I.R. 1943 Nag. 151. S. 10-Board having no jurisdiction to entertain application—If invalidates settlement

between parties. The mere fact that the Board has no jurisdiction to entertain the application would not necessarily invalidate an amicable settlement arrived at between a debtor and a creditor. (Pollock, J.) GHANSIAM BHOLARAM & GIRIJA SHANKAR. I.L. R.(1944) Nag. 244=A.I.R. 1944 Nag. 247.

-Ss 12 and 13 - Agreement executed and registered-Effect of-Whether can be superseded by subsequent agreement.

An agreement executed and registered in the Debt Conciliation Board under S. 12 of the C. P. Debt Conciliation Act takes effect as if it is a decree of a (ivil Court. The mere execution of a subsequent agreement regarding the same debt adding mortgage of property as security therefor, does not supersede the original agreement and cannot do so until effect is given to it, if ever, by a decree of a competent Court. If there is no such decree, the original agreement executed in the Debt Conciliation Board and registered remains in force, and the special provisions of the Act, including S. 13 for the recovery of instalments under the agreement, apply to them. (Binney, FC) WASUDEO v. NIHAL CHAND. 1944
N.L.J. 259.
S. 12—Agreement under-Validity-Non-

compilance with prescribed form-Inclusion of extraneous matter.

Where there is clearly an amicable settlement between the debtor and his creditors, and this settlement is reduced to writing in the form of an agreement as required by S. 12 of the C.P. Debt Conciliation Act, the mere fact that it contained extraneous matter and was not in the prescribed form would not invalidate it as an agreement. (Pollock, J.)GULAM ALI v. ABBUL HUSSAIN. 1942 N.L J 52

—S. 12—Effect of agreement under—Questioning its validity and cancelling it—Powers of Revenue Court and Debt Conciliation Board.

# C P. DEBT CONCILI. ACT (1933), S. 12-A.

Under S 12 of the C. P. Debt Conciliation Act an agreement once executed has the effect of a Civil Court decree. A Revenue Officer cannot dispute its validity when called upon to execute it, and a Debt Conciliation Board has no power of review and no general power to cancel an agreement once executed. For cancellation a Civil Court would have to be moved. (Greenfield, R.A.) CHAND KHAN v. SYED AMIR MOHAMMAR 1942 N.L.J. 60.

-S. 12-Scope and object of the Act-Fraudulent concoction of debts to show the necessary percentage of consenting creditors-Refusal

of relief.

The C. P. Debt Conciliation Act was designed to secure a particular class of debtors from the rapacities of creditors and was never intended to be used as an instrument of fraud. The whole basis on which conciliation proceeds is destroyed. if a debtor when coming before such a tribunal under the powers conferred by such an Act, fraudulently concocts debts so that an imaginary percentage of creditors appears to be willing to agree. Where false creditors falsely appear to agree to a false agreement, the Board necessarily brings into play powers which it would know it did not possess were it not for the fraud. The Board's conciliation falls to the ground. Agreements so made must be set aside. (Stone, C.J. and Bose, J.) BHUPSINGH v. HIRAGIR. 1942 N. L J. 194.

-Ss. 12 (1) and 13-Agreement under S. 12 (1)—Decree on mortgage to be obtained in case of default-Proper remedy open to mortgagee.

An agreement drawn up ur der S. 12 (1) of the C. P. Debt Conciliation Act which provided that if there was a default in the payments as set out the creditor had the full right to recover the amount due by obtaining a decree on the mort-gage must be enforced by having resort to S 13 of the Act (Gruer, J.) ATMARAM SAO v. SHEO-FRASAD. 1942 N.L.J. 18.

-S. 12 (2)—Agreement — Registration— Effect.

An agreement on registration takes effect from the date of registration as if it were a decree of a Civil Court under S. 12 (2) of the C. P. Debt Concilitation Act, and is executable as a decree. (Pollock. J.) KHUSHALCHAND v. HARI. I L.R. (1943) Nag. 696=215 I.C. 106=1943 N.L.J. 467 = A.I.R. 1943 Nag. 324.

-Ss. 12 (2) and 13 (4)—"Decree"—Legal fiction.

The "decree" in S. 12 (2) of the Central Provinces and Berar Debt Conciliation Act is different from the "decree" in S. 13 (4) of the Act. These are "decrees" by a fiction introduced in the Act. Where the analogy arises by a legal fiction only it must be limited to the purposes indicated by the context and cannot be given a larger effect. (Rose. J) RATANSINGH v. RAGHURAJ SINGH 1945 N.L. J. 431

S 12-A-Sale of mortgaged property to satisfy instalment of mortgage debt-Effect of-Mortgage charge, if ceases to exist.

Under S. 12-A of the C. P. Debt Conciliation

Act, the mortgage charge does not cease to exist on the sale of the mortgaged property for the satisfaction of an instalment of the mortgage debt. The charge remains until the repayment of

#### C.P. DEBT CONCIL. ACT (1933), S. 12-B.

the whole of the seded down debt. (Binney, F.C.) BALDEO & LAUTA BAL. 1943 N.L.J. 443. -S. 12-B -Applicability-Instalment falling due on 1 -4-39.

S. 12-B, C.P. Debt Conciliation Act applies to all agreements registered on or after 1-4-33 and to that extent it is retrospective. But there is nothing in the section to indicate that it is applicable to instalments which fell due prior to the Act coming into force Hence an instalment which fell due on 1-4-39 would not be post-poned by that section. (Binney, F.C.) GAJANAN v. RAMGOPAL. 1942 N.L. J. 384.

-S. 12-B-Retrospective effect.

S. 12-B of the C.P Debt Conciliation Act does not apply to an instalment which fell due before it became law. (Binney, F.C.) BAJIRAO v. GULAB MADHO. 1944 N.L.J. 263.

-S. 13—Application for recovery of instalment made before default occurred-If can be

proceeded with when default occurs.

No doubt an application for the recovery of an instalment under S. 13 of the C.P. Debt Conciliation Act can only be made after the default has occurred. But if the Revenue Officer does not reject an application made before the default has occurred but keeps it pending, there is no reason why he should not proceed with it when the default does occur. (Binney, F.C.) Bajirao v. Gulab ladho. 1944 N.L J. 263.

S 13-Application under - Suspension-Proceedings after expiry of period of-Fresh application, if necessory.

Under S. 13 of the C.P. Debt Conciliation Act, when an instalment is not paid, the amount is recoverable as an arrear of land revenue. Where in respect of an instalment which fell due on 1-4-39 an application was duly made within time but the instalment was suspended till 1-4-40, after that date proceedings to recover the instalment due can be continued without a fresh application. (Binney, F.C.) GAJANAN v. RAMGOPAL. 1942 N.L. J. 384.

-Ss. 13 and 12-Assignee of creditor-Right

to recover instalments.

In the absence of any specific provision in the C.P. Debt Conciliation Act, excluding an assignee or legal representative of the creditor from the advantages of the procedure provided in sub-S. (1) of S. 13 of the Act, there is no reason for holding that the word 'creditor' in S. 13 is to be construed in the narrow sense of the definition contained in sub-S. (2) (d), having regard to the proviso to that section or as being limited to an actual signatory to the agreement under S. 12 of the Act. Hence it is open to an assignee of a creditor to apply for the recovery of arrears of instalments. (Burton, F.C.) GOPAL v. MADHAO. instalments. (Ba 1941 N.L.J. 317.

-S. 13-Instalments due from debtor having only a life estate in inam holding-Recovery by sale of inam holding on the death of the debtor.

Where the debtor who had agreed to pay instalments under the C.P. Debt Conciliation Act has only a life estate in an inam holding fails to pay and dies, the debt cannot be recovered from the inam holding when it had once passed to his heirs. (Binney, F.C.) PRACHAKAR SHANKARRAO

v. SHAMSHFRALI ABDUL. 1942 N L. J 562.
——Ss 13 and 13-A—Order permitting deposit in proceedings under S. 13—Nature of—Jurisdic-

# C.P. DEBT CONCIL. ACT (1933), S. 13.

tion of Commissioner to interfere with such order.

An order permitting a debtor to deposit the amount due in proceedings under S. 13 of the C. P. Debt Conciliation Act is one passed under S. 13 of the Act and cannot be construed to be one passed under C. P. Land Revenue Act. Commissioner has no jurisdiction to interfere with such an order of the Deputy Commissioner. (Binney, F.C.) DAYALDAS v. RAMRAO. 1942 N. L.J. 68.

-S 13--Recovery of instalments after death

of debtor-Proper procedure.

Proceedings can be taken against the property of a deceased debtor for the recovery of instal-ments of a conclusted debt provided the heirs are brought on record. Though it is preferable to follow the procedure laid down in C. P. Code. in bringing the heirs on record, subsequent proceedings are not void when notices to pay the instalments due were served on all the heirs. (Binney, F.C.) KAMRAO v. SITARAM. 1944 N.L.J.

---S. 13-Recovery proceedings-Death of defaulter-Legal representatives not brought on record—Validity of sale—Berar Land Revenue Code, Ss. 156 and 159.

The death of the defaulter does not prevent the recovery of amounts due under S. 13 (1) of the Debt Conciliation Act and the proper course in such a case is to bring the names of the legal representatives of the deceased debtor on record and to proceed with the recovery of the amount in default. It does not however follow that omission to bring the legal representative on the record vitiates the sale. As the Berar Land Revenue Code does not require a notice to be issued to the defaulter in recovery proceedings, it is beyond doubt that the omission does not deprive the Tahsildar of jurisdiction to hold the sale. It is then no more than a material irregularity. The confirming officer will not exercise his discretion to set aside the sale under S. 159 of the Berar Land Revenue Code on an application by a creditor who was primarily responsible for the omission to bring the legal heir on record, when there is no indication that the legal representatives of the defaulter were in any way prejudiced by the omission. (Binney, F.C.) GULABCHAND V. NARAYANDAS. 1944 N.L.J. 238.

-S. 13—Sale in proceeding to recover instalment-Creditor purchasing property-Whether can set off subsequent instlament which had fallen due.

A creditor purchasing the property in a proceeding to recover an instalment payable under an agreement made before a Debt Conciliation Board, can set off against the purchase money not only that instalment but also an instalment which had subsequently fallen due, although an application for the subsequent instalment is time barred at the time when the set off is allowed. As the amount of the subsequent instalment is an amount payable under the agreement and charged on the Sale proceeds by S. 13 (2) (b) of the Act, it is justifiable to look upon it as recoverable in the proceeding if there is no prior charge under S. 13 (2) (a). (Binney, FC) ABDUL JABBAR v. SETH JAGANNATH. 1943 N.L.J. 476.

#### C.P. DEBT CONCIL. ACT (1933), S. 13.

-S. 13—Scope—If exempts debtor's property

from sale for benefit of creditors.

The first clause of S. 13 of the C.P. Debt Conciliation Act which provides that the defaulted amount should be recoverable as an arrear of land revenue does not exempt the dobtor's property from being sold for the benefit of the creditors. (Niyoyi, J.) SINGER SEWING MACHINE Co. v. Keshaorao Sonak I.L.R. (1945) Nag. 379=1945 N.L. J. 126=A.I.R. 1945 Nag. 177. -S. 13 (1)—Applicability—Execution of

agreement in Civil Court, when permissible. S. 13 (1) of the C. P. Debt Conciliation Act

applies only when the debtor has defaulted in paying any amount due in accordance with the terms of the agreement under S. 12. Where there is no term in the agreement as to the mode of payment, S. 13 would not apply and it would be open to the decree-holders to take out execution in the Civil Court, (Pollock, J.) GULAM ALI v. ABDUL HUSSAIN. 1942 N.L.J. 52.

—S. 13 (1), (as applied to Berar)—Berar Land Revenue Act, S. 164 (c)—Order of Deputy Commissioner on application under S. 13 of C.P.

Debt Conciliation Act—Appeal.

The Deputy Commissioner in taking cognizance of an application under S. 13 of the C. P. Debt Conciliation Act exercises jurisdiction under the Berar Land Revenue Code and his procedure is governed by Chap. XII. An order directing recovery to proceed under S. 13, C. P. Debt Conciliation Act is an order passed under S. 164 (c) which is a section in Chap. XII of the Berar Land Revenue Code and an appeal lies to the Commissioner against such an order. (Greenfield.) WASUDEO v. NIHAL CHAND. 1942 N.L,J. 34.

-S. 13 (1)—Recovery of dues as arrear of land revenue-Amount due disputed-Duty of

revenue officer to determine amount.

In proceedings for the recovery of private dues recoverable as arrears of land revenue, the first thing for a revenue officer to do is to determine what, if anything is due. If the amount due is disputed, the revenue officer must by summary enquiry fix the sum and then proceed to recover it in the ordinary way. (Rau, F.C.) RAMDULARI BAI v. GANESHRAM. 1945 N. L.J. 525.

-S. 13 (1)—Remedy under-Nature of.

S. 13 (1) of the C.P. Debt Conciliation Act, which gives the creditor a right to apply to the revenue authorities to recover any defaulted amount as an arrear of land revenue, merely gives a creditor an alternative remedy. (Pollock, J.) Khushalchand v. Hari. I.L.R. (1943) Nag. 696=215 I.C. 106=1943 N.L.J. 467=A.I. R. 1943 Nag 324.
S, 13 (3)—Order granting certificate under

-Appeal.

An order of the Deputy Commissioner granting under S. 13 (3) of the C. P. Debt Conciliation Act, a certificate as to non recoverability of an instalment is not appealable. (Greenfield, R.A.) ISHWARI PRASAD HARI PRASAD v. SHANKARLAL. 1942 N L.J. 420.

-S. 13 (3)—Order of Deputy Commissioner —Appeal—Revision—C. P. Land Revenue Act, S. 39.

#### C.P. DEBT CONCIL. ACT (1933), S. 15.

Ss. 13 (3) and 15 of the Relief of Indebtedness Act, is a revenue officer under the C. P. Land Revenue Act and not a persona designata. No appeal lies from his order which is, however, subject to revision under S. 39 of the Land Revenue Act. (Greenfield and Rau, F.C.) Amrit Nagoji v. Mohanlal. 1944 N L J. 537.

of instalments agreed to—Land not transferred—

Certificate, if can be issued.

Where the settlement provides for the transfer where the sethement provides for the transfer of land and payment of instalments, on the failure to transfer the land a certificate under S. 13 (3) of the C. P. Debt Conciliation Act could not be given by the Deputy Commissioner. (Greenfield, R.A.) ISHWARI PRASAD HARI PRASAD v. SHANKARLAL. 1942 N.L.J. 420.

-S 13-A-Order as to retention of deposit until determination of person entitled to it-If

appealable.

Where in permitting a deposit to be made under S. 13-A of the C. P. Debt Conciliation Act, it is ordered to be retained till the determination in civil suit of the person entitled to receive it, the order is not appealable under C. P. Land Revenue Act. (Binney, F.C.) DAYAL DAS DAYAL DAS GIRDUSA v. RAMRAO MUKUND RAO. 1942 N.L.I.

-S. 15-Grant of certificate-Power of Board.

Under S. 15 of the C. P. Debt Conciliation Act there is no limitation on the power of the Board to grant a certificate if a fair offer is refused during the hearing. Once a certificate has been properly issued during the hearing, a duty is cast on the Courts not to allow costs of the suit to enforce the claim and it is immaterial whether efforts at amicable settlement are eventually successful or not, and whether the application was or was not dismissed because settlement was not arrived at. (Digby, J.) RIPUDAMANSING v. SADURAM. 1943 N.L. J. 563=210 I.C. 405=16 R.N. 156=A.I.R. (1944) Nag. 14.

-S. 15—Issue of certificate—Jurisdiction of

Board.

Under S. 15 (1) of the C. P. Debt Conciliation Act, all that the Debt Conciliation Board is concerned with is the issue of a certificate after consideration of the conduct of the creditor. The Board cannot be expected to take into consideration whether the conditions implied by the granting of a certificate can in fact be implemented in ing of a certificate can in fact to emplemented in the Civil Court or no. If it happens that they cannot be implemented, that in no way derogates from the jurisdiction of a Debt Conciliation Board to issue such a certificate. (Grille, C.J. and Bose, J.) Keshrichand v. Chunnilalsa. I.L. R. (1943) Nag. 268=205 I.C. 606=15 R.N. 225-1043 N.I. I. 156=A I.R. 1043 Nag. 216 235=1943 N.L.J 156=A.I.R. 1943 Nag. 215.

-S. 15 (2)—Cantankerous creditor who refused to accept any terms of settlement— Allowing of maximum rate of interest-Propriety. Where a creditor had behaved in an extremely

untractable manner before the Debt Conciliation Board and not only refused what the Board considered a fair offer but also refused to make a settlement on any terms whatever, it is manifest-S. 39.

If y unfair that such a person should be awarded the maximum rate of 6 per cent. interest which of the C. P. Debt Conciliation Act, and under the law provided and 2 per cent. would be the

### C.P. DEBT CONCIL. ACT (1933), S. 15.

proper rate. (Grille and Pollock, JJ.) SINGH v CHRISTU SINGH. 1942 N.L. J. 455.

—S. 15 (2) and C. P. Code, S. 34—Scope of S. 15 (') of Debt Conciliation Act-Principle in

awarding interest.

S. 15 (2) of the C. P. Debt Conciliation Act does not prevent the Court from allowing interest and the section is so framed as to enable the Court to allow interest should it think proper. On the other hand, it does not fetter the discretion which S. 34, C. P. Code, confers except as to rate. When exercising its discretion the Court should act in such a way as not to frustrate the general intention of the Debt Conciliation Act and should not give an unreasonable creditor an advantage over the reasonable one. (Stone, C.J. and Bose, J.) SETH SHEOLAL v. DADDIGSINGH. 1941 N.L. J 591.

S. 15 (3)—Vaiver of protection by debtor

-Permissibility.

A debtor ca mot waive the protection accorded to him by S. 15 (3) of the C. P. Debt Concilition Act, as this provision protects also the rights of the creditors in respect of the property incorporated in the agreement under S 12 of that Act. (Niyogi, J.) SINGER SEWING MACHINE CO. v. KESHAORAO SONAK. I.L.R. (1945) Nag 379=1945 N L.J. 126=A I.R. 1945 Nag. 177.

-Ss. 16 and 8 (2)-Order of discharge of debt by Board-Jurisdiction of Civil Court.

If the conditions in S. 8 (1) of the C P. Debt Conciliation Act are fulfilled and a statement of debts is not submitted to the Board in compliance with sub-S. (1), the debt shall be deemed to be duly discharged for all purposes and all occasions. The order of discharge is automatic and the Civil Courts have jurisdiction to decide whether the conditions have been fulfilled which will bring into operation S. 8 (2). The mere fact that the Board rejected an application for review of its order of discharge refusing to reconsider the matter, will not be a bar for consideration of the matter by the Civil Court. (Grille, C.J. and Sen, J.) KALVANSING v. HORILAL, I.L.R. (1945) Nag. 260=1944 N.L.J. 220=A.I.R. 1944 Nag 235.

-S. 23 - Application by plaintiff for inclusion of debt due to him-Denial of debt by defendant-Dismissal of defendant's application-Plaintiff's right to exclusion of period during which his application was pending.

The defendant applied to a Debt Conciliation Board for conciliation of his debts but did not include the plaintiff's debt. The plaintiff made an application for its inclusion but the defendant denied the debt. The Board kept the plaintiff's application pending and asked the defendant to produce some proof of the fraud which he alleged. The defendant's application was even tually dismissed as there could be no conciliation of debts to the extent of 40 per cent.

Held, that the plaintiff's debt was the subject of proceedings which were within the scope of the Act and consequently the plaintiff was entitled to exclude the period during which his application for inclusion of his debt was pending before the Board in virtue of S 23 of the Act for purposes of limitation. (Digby, J.) CHAMPAT UDEBHAN & ISMAILKHAN. I.L.R. (1944) Nag 264=214 I C 335=17 RN. 33=1944 N.L.J.

108=A.I.R. 1944 Nag. 142.

C.P. & BERAR FIN. (AM.) ACT (1944).

-S. 23—Debtor not mainly agriculturist-Time spent in such application-If can be deduc-

Where a debtor was not mainly an agriculturist and was not therefore a "debtor," as defined in as defined in S. 2 (f), C. P. Debt Conciliation Act, the Board had no jurisdiction to entertain the application prior to S. 7-A, C. P. Debt Conclusion Act, coming into force. The time spent on such proceedings before the Board can be deducted under S. 23 even if the Board had no jurisdiction to entertain such application. (Pollock, GHANSIAM BHOLARAM v. GIRIJA SHANKAR. I.L. R. (1944) Nag. 244=A.I.R. 1944 Nag. 247.

CENTRAL PROVINCES AND BERAR EXCISE ACT (II OF 1915), S. 34 and Cr. P. Code, S. 162-Excise Sub-Inspector obtaining signatures of witnesses on their statements during investigation-Evidence of such witnesses-If admissible.

It is clear from the C. P. Excise Act that an Excise Sub-Inspector exercises in investigation the powers conferred on an officer in charge of a police station by Chap. XIV, Cr. P. Code, as regards offences under S. 34 of the Act. If such Sub-Inspector in the course of investigation obtains the signatures of certain persons to certain statements made by them and reduced into writing, in contravention of S. 162, Cr. P. Code, the evidence of such witnesses is inadmissible. (Hemeon, J.) BHIKARILAL v. EMPEROR. 1945 N.L.J 303.

-Ss. 34(a) and 37 and Rr. 84 (7) and 498-Rules regarding collection of a fee or the necessity of licence in respect of purchase or indent of foreign liquor-If ultra vires.

Before Government can make rules for licence or collect fees in respect of purchase or indent of foreign liquor, it must be empowered to do so under the Act. The C. P. Excise Act (as distinct from the rules) nowhere authorises the collection of a fee or requires the possession of a licence in respect of the purchase of or indent of liquor. The Act nowhere prohibits or regulates or restricts the purchase or indent of liquor, whether foreign or otherwise. Such restrictions or prohibitions cannot be imposed by the rules. Rr. 84 (7) and 498 are consequently ultra vires in so far as they attempt to regulate the purchase or indent of liquor. A violation of such rules cannot be punished as offences under the Act. (Boss, J.) J. V. C. Lobo v. EMPEROR. I.L.R. (1943) Nag 502=15 R N 142=44 Cr L.J 104=203 I.C. 532=1942 N.L.J 552=A.I.R.1942 Nag 133.

CENTRAL PROVINCES AND BERAR FINANCE (AMENDMENT) ACT (1944), S. 8—Deficit in surcharge payable under local amendment to Stamp Act—If deficit in duty levi-

able by Act itself.
S. 8 of the C. P. and Berar Finance (Amendment) Act, has the effect of making all the provisions of the Indian Stamp Act, not inconsistent with the C. P. Act, applicable to the latter. In other words, any deficit in the surcharge payable under the local amendment to the Stamp Act must be treated as deficit in the duty leviable by the Activelf. (Rau, C.R.C.A.) POMDUSA, In re. 1945 N.L.J. 110.

CENTRAL PROVINCES AND BERAR HOUSE RENT CONTROL ORDER (1942), para. 9—Appellate order of Deputy Commissioner—Revision.

An appellate order of the Deputy Commissioner under para 9 of the C. P. and Berar House Rent Control Order, is passed by him in his capacity as a Revenue officer, and as such an application for revision of that order lies to the Commissioner. (Ramsden, F. C.) PANDURANG v. MST. RAMDEVI. 1945 N.L.J. 372.

CENTRAL PROVINCES LAND ALIEN-ATION ACT (II OF 1916), Ss. 3, 9 and 10— Mortgage by conditional sale—Mortgagor declared member of aboriginal tribe by notification after its execution—Mortgagee, if entitled to foreclosure decree.

A nonfication under S. 3 of the C. P. Land Act determines what bodies of Alienation persons shall be deemed aboriginal tribes for the purposes of the Act, and if a person falls within this class then a mortgage made by him shall be deemed to have been made as a member of an aboriginal tribe irrespective of the date of execution, whether prior or subsequent to the issue of a notification. The crucial date is not the date of the execution of the mortgage but the date on which the question comes to be determined whether a mortgagor is a member of an aboriginal tribe. If a mortgage by conditional sale is executed by a member of an aboriginal tribe after the commencement of the Act on 15th April, 1917, the condition is null and void under S. 10 of the Act. If it is executed before the commencement of the Act, the Court trying the suit for the enforcement of the condition intended to operate, by way of conditional sale is bound under S. 9 (3) of the Act to refer the case to the Deputy Commissioner with a view to the exercise of the power conferred by S. 9 (2). (Grille, C. J. and Sen. J.) MADAN SINGH v. DEPUTY COMMISSIONER, BILASPUR. 1944 N.L.J. 438=A I R. 1944 Nag. 371.

——S. 9—Mortgage prior to Act—Subsequent declaration of mortgagor to be a member of an aboriginal tribe—Mortgage, if affected.

Where a mortgage was executed prior to the passing of the C.P. Land Alienation Act and subsequently it was notified under the Act that the tribe to which the mortgagor belonged was an aboriginal tribe, S. 9 of the Act could not affect the mortgage or any decree passed in respect of it because, it was not a mortgage made by a member of an aboriginal tribe after the commencement of the Act which alone are affected by the Act. The commencement of the Act in S. 9 refers to the date promulgated under S, I (3). (Clarke. I) JANKILAL v. THE D. C. BILASPUR. IL R. (1942) Nag 602=196 I.C. 360 = 14 R.N. 101=1941 N.L.J. 224=A.I.R. 1941 Nag. 163.

CENTRAL PROVINCES LAND RE-VENUE ACT (XVIII OF 1881), S.65-A— Scope and effect—Grant of lease to head of joint Hindu family—Conferment of protection under

# C.P. LAND REVENUE ACT (1917), S. 2.

S. 65-A and subsequent removal—Effect—Right of other members.

A lease was originally granted to one B, by way of short terminal leases; the defendants possessed several lands within the ambit of the original grant which was enjoyed in 1888 by three generations. It was found that the defendants constituted with B, a joint Mitakshara Hindu family. Protection was given under S. 65-A of the C. P. Land Revenue Act in 1891, but this was removed in 1914.

Held, (1) that the grant was a permanent grant, and the defendants were clearly entitled to an interest in the grant which was originally made to the ancestor of B; (2) that the only result of the application of S. 65-A, C. P. Land Revenue Act was to prevent the defendants from asserting their rights; the rights were merely dormant but not extinguished, and when the protection was removed the rights revived; that though an impartible estate could only be enjoyed by one person, it did not follow that it could not be joint family property; (3) that the removal of the protection under S. 65-A removed the bar imposed upon the other members of the family by the application of the section. (Das and Adami, JJ.) LAL RAJENDRA SINGH v. MADAN SINGH. 10 Cut L T. 62.

———(II OF 1917)—Irrigation rights—Entry in settlement khasra—Value.

The entries in a settlement khasra as to irrigation from a particular source does not necessarily imply a right to irrigation. In the absence of an indication that such a right was recognized at settlement, it would be wrong to make such an entry in the record of rights. (Binney, F.C.) QAZI ISHAQUE MOHAMMAD, Inre. 1942 N.L.J. 160.

Malguzar—Right to take water from jointly owned village tank. RAMJI v. TANYABAPU. [See Q.D. 1936-'40 Vol. I, Col. 775]. I. L.R. (1941) Nag. 299.

----Sales under-Powers of Tahsildar.

Under the C. P. Land Revenue Act, the Tahsildar has all the powers in regard to a sale including the power to accept bids, except the power to confirm it. (Rau, F.C.) MT MUKARAMPURWALI v. CHITTARSINGH. 1945 N.L.J. 198.

——Scope of the conclusive effect of revenue entries.

The conclusive effect of revenue entries should be restricted to the purposes of the C P. Land Revenue Act under which they are made. They should not lightly be allowed to destroy legal rights, and when such rights exist they should not be found against unless one is compelled so to do as the consequence of a conclusive presumption. (Stone, C. J.) CHHOTELAL v. SUDDIBAL. 1942 N. L. J. 403.

S 2 (17) and C. P. Tenancy Act (1920), S. 49—Revival of sir right—Re-acquisition of a portion of proprietary right, if enough—Ambiguity in sections to be resolved in favour of pro-

prietor of sir land.

Each co-sharer has an undivided though defined interest in the whole. Each is possessed of proprietary right in that sense, to the extent of his share. Hence, the moment that an ex-proprietary tenant acquires a portion of the proprietary right whether to the same extent owned by him prior to the transfer by which he lost it

#### C.P. LAND REVENUE ACT (1917), S. 26.

or to any lesser extent, he re-gains his proprietary rights in the sir and the land thereupon ceases to be occupancy land. S. 2 (17) of the C. P. Land Revenue Act and S. 49 of the C. P. Tenancy Act being intended for the benefit of the proprietor of sir land, any ambiguity should be resolved in their favour. (Bose, J.) KESHAO-RAO BAPUJI v. GANESHRAO SHAMRAO. 200 I.C. 806-15 R.N. 27-1941 N.L.J. 527-A.I.R.

1941 Nag 351
—S 26 -Absence of applicant—Dismissal of

case-If justified.

A revenue officer is not ordinarily justified in dismissing a case in the absence of the applicant on a date on which there is nothing for the applicant to do. He must hear and determine the case or proceeding in his absence. (P.S. Rau, F.C.) GANPAT RAO v. Mt. VENOOBAL, 1945 N.L J 580.

S. 26—Order appointing lambardar after issuing proclamation, when no one was present-

Appeal.

An order appointing a lambardar, after issuing the usual proclamation, on the day fixed for hearing when no one is present, is an order passed on the merits since the case is not dismissed in default and is appealable. (Ransden, F. C.) SHAMRAO v. VITHOBA. 1945 N.L. J 368.

-S. 33—Decision by Commissioner in appeal -Appeal to Financial Commissioner-If a third

appeal

Where in the course of an appeal the Commissioner comes to a legal decision an appeal therefrom to the Financial Commissioner cannot be considered to be a third appeal, for the Commissioner's order is the first decision in proper form. (Binney, F.C.) SARDARMAL v. RAMKHILAWAN. 1941 N L.J. 454.

-Ss. 33 and 28 (2)—Order refusing restora-

tion-Appeal.

. Obiter.-To allow an absentee against whom orders have been passed under Ss. 26 and 28 (2) of the Land Revenue Act, the full latitude of appeal provided by S. 33 against the orders refusing restoration certainly seems very liberal. (Ramsden, F.C.) SHAMRAO v. VITHORA. 1945 N.L J 368

S. 33-Right to appeal-Order acquitting patwari in proceedings commenced at the inst-

ance of tenants—Appeal by tenants—If competent.
S. 33 of the C. P. Land Revenue Act does not state who has the right of appeal. Tenants at whose instance proceedings on charges of bribery and corruption were commenced against a patwari, have no right of appeal against an order acquitting him. Such proceedings are of a quasi-criminal nature, and the rules of criminal law which do not allow a private complainant to appeal against an order if acquittal serve as a guide in such matters. (Rau, F.C.) Khushilal.

v. Ayodhya Prasad. 1945 N.L. J. 195.

33 (2) (c) (i)—Second appeal—Point not raised in trial Court—If can be raised.

Linder S 33 (2) (c) (i) of C.B. Indeed.

Under S. 33 (2) (c) (i) of C. P. Land Revenue Act a second appeal is admissible in respect of any order on the ground that it is contrary to law. There is no prescription that the ground in question must have been raised in the original case or in the first appeal and in the absence of such a prohibition, a new ground raised in second appeal cannot be excluded merely be-

### C.P. LAND REVENUE ACT (1917), S. 39.

cause it was not pleaded previously. (Burton, F.C.) GHAISSO SAKHARAM v. DAYARAM. 1941 N.L.J. 233

Ss. 39 and 148—Confirmation prior to expiry of 30 days after sale—If curable—Objection not raised-Power of Court to deal with.

Where a sale is confirmed before the expiry of 30 days from date of sale, it is an illegality which cannot be cured merely by the absence of any objection or the subsequent expiry of 30 days. It must be dealt with under the powers conferred by S. 39 of C. P. Land Revenue Act. (Burton, F.C.) DAULAT DEGMAN & RAMESHWAR DILSUKH MARWADI 1941 N.L J. 109.

——S. 39—Order under S. 15 (2) of Relief of indebtedness Act by Deputy Commissioner—If open to revision under S. 39. See C. P. RELIEF OF INDEBTERNESS ACT, S. 15 (2). 1943 N L.J. 119.

-Ss. 39 and 40-Powers of review and revision-Scope and extent-Order rejecting

review application—Revision.

Although the powers of review and of revision under C.P. Land Revenue Act are wide, they must nevertheless be exercised according to legal principles. Ordinarily Revenue Courts should apply the principles embodied in 0.47, R. I, C.P.Code, in considering review applications, though there may be special circumstances which justify going beyond these principles. Revisional power can be exercised to consider legality or propriety of an order. At the same time, these powers should not be used to provide an alternative to a remedy denied by law. Where there is no appeal or where the limitation allowed for an appeal has expired, interference in revision is rarely justifiable unless it is to set right a serious misuse of jurisdiction. Under C.P. Code, it is accepted law that there can be no revision of the rejection of a review application as it would only be an erroneous exercise of discretion. On the revenue side it would perhaps be justifiable to interfere with the rejection of a review application on the ground of impropriety. (Binney, F.C.) SOBHARAM V. ITWARI. 1943 N.L.J. 258.

-S. 39-Revision-Time limit-Considerations.

The law prescribes no limitation for revision application. An applicant for revision must show due diligence. When a remedy by way of appeal has been provided and the litig int has not availed himself of that remedy, it is clearly wrong in a case between parties to entertain a revision application after the expiry of the period prescribed for the appeal and to use revisional powers to give the litigant an alternative to the remedy which he has lost by his own laches. A revision after limitation of the appeal could only be justified if made for the same reasons as would justify an extension of time for filing the appeal under S. 5, Limitation Act. (Binney, F C.SHRIKRISHNA NILAKANTH v. KARNOO DASROO. 1943 N.L.J. 111.

-S. 39 and Central Provinces Tenancy Act (1920, S. 107 (2)—Scope of revisional powers—Order of ejectment under S. 24 (3), Tenancy Act—If revisable.

S 39 of the C. P. Land Revenue Act gives the Deputy Commissioner power to revise the order

#### C.P. LAND REVENUE ACT (1917), S. 45.

of any Subordinate Revenue Officer and this power is not restricted to proceedings under the Land Revenue Act and can be used to revise all orders passed by Revenue Officers whether under the Land Revenue Act or not. The existence of an alternative remedy does dot exclude revisional jurisdiction. An order of ejectment under S. 24 (3) of the Tenancy Act could be revised by virtue of the powers conferred by S. 39 of the C.P. Land Revenue Act read with S. 107 (1) of the C. P. Tenancy Act by the Deputy Commissioner. (Binney, F.C.) SHANKAR JAGANNATH v. SUNDRABAI KRISHNAJI. 1941 N L.J. 564.

-S. 45—Khasra and village administration paper—Contents of—Conflict between—Preference. RAMJI v. TANYABAPU. [See Q.D. 1936-'40 VOL. I, Col. 777.] I.L.R. (1941) Nag. 299.

followed.

Where a deity is recorded as the proprietor and the sarberakar dies though there is no change in the proprietary right, there is a change in the description of the proprietor and a subsidiary change of this nature must be recorded in the revenue records. It is in fact a transaction affecting proprietary rights within the meaning of S. 47, C. P. Land Revenue Act. Hence a claim to have succeeded a sarberakar must be considered by the Revenue Courts. (Binney, F.C.) GAJENDRA SINGH v. MAHANT RAM DAS. 1941 N.L.J. 548.

-S. 49-Mutation-Basis for-Registered sale deed in satisfaction of decree-Sufficiency.

A registered sale deed executed in consideration of the satisfaction of a decree debt is sufficient evidence of transfer of possession for the purposes of recording the share transferred in the vendee's name. (Binney, F.C.) BADRI NARA-YAN GOSAL PRASAD v. MOHANLAL JAGANNATH SONAR. 1942 N.L.J 474.

-S. 49-Proceedings under-Conditions for initiation—Duty of Thasildar in relation thereto —Removal of recorded proprietor with defective

title but in possession, if possible.
Proceedings under S. 149 of the C. P. Land Revenue Act can only be initiated when there has been a change of the possession recorded in the register of proprietary mutations. If there has been a transfer of possession, the Thasildar has to decide whether the person who has entered into possession is in 'lawful possession'. If he finds that no one can be said to have entered into lawful possession, he has to report to the Subdivisional Officer who decided which person is best entitled to the property and who can, if necessary, oust a person who has obtained unlawful possession. But sub-Ss. (2) and (3) cannot be used independently of sub-S. (1) to remove a recorded proprietor whose title has been found to be defective but who has not lost possession. (Binney, F.C.) ABDUI. RASHID KHAN v. MUSTKEEM KHAN. 1942 N.L.J. 536.

-S. 49-Right to mutation-Application by purchaser of village share at Court auction after twelve years.

Where a purchaser of a village share (without sir or khudkasht) at a Court auction, who was put in possession thereof by order of the Court, applied for mutation twelve years thereafter,

# C.P. LAND REVENUE ACT (1917), S. 78.

Held, that as a village share without any sir or khudkasht was an abstract quantity, no physical possession could have been given of it, and that the man whose share had been sold and who had lost possession could not set up adverse possession against the purchaser at any rate for the purposes of mutation. (Rau FC) RAMBHAV v. ABBUL RASHID KHAN. 1944 N L J. 521.

S. 49—Symbolic possession of proprietary share given by Civil Court—Change of Register—

If justified.

Where symbolic possession has been given by a Civil Court of a proprietary share recorded in the mutation register in the name of a person who was not a party to the civil litigation and who does not derive his title from the judgmentdebtor in that litigation, the Mutation Register should not be changed. (Binney, F C.) RAMESH-1943 N.L.J 260. war Prasad v. Narayandas.

-S. 56—Right of Provincial Government under-If lost by transfer of military land without recovering capitalisation of land revenue.

The Government of India held certain land on behalf of the Secretary of State who had prescribed rules which covered the disposal of that particular kind of land. These rules are shown in Revenue Book Circular 17. The note to R. 8 makes it clear that the Government of India is not entitled to dispose of land as a revenue free holding unless the capitalized value of the land revenue has been paid to the Local Government. Where in such a case there is nothing to indicate that capitalized value was recovered from the purchaser, the Provincial Government's rights under S. 56. C. P. Land Revenue Act to levy land revenue is not affected by the transfer even though the transfer mentioned that it was tree from all encumbrances. (Binney, F.C.) HANS-KUMAR KISHANCHAND, In re. 1942 N L.J. 165.

-S. 67—Purchaser of portion of plot of malik-makbuza - Right to apportionment of

revenue.

Though a person may acquire the interest of a malik-makbusa in a part of his plot, he does not thereby become a malik-makbusa. It is open to him to apply under S. 67 of the C. P. Land Revenue Act and until he is declared a malikmakbuza of the definite area over which he has acquired proprietary right, the land revenue fixed at settlement continues to be a charge on the whole of the plot and there is no separate liability regarding each field. The Land Revenue Act contains no provision for apportionment of land revenue fixed at settlement (Binney, F.C) SETH RATANLAL HARLALJI v. PANNA LAL GUJAR. 1941 N.L.J. 553.

-S. 70 -Scope. RAMJI ". TANYABAPU. [See Q. D. 1936-'40, Vol. I, Col. 779]. I.L.R. (1941)

Nag. 299. S. 75—Applicability.

S. 75 of the C. P. Land Revenue Act has reference only to those cases in which one person holds an estate or Mahal while another person is required to pay the land revenue thereof. (Burton, F.C.) KASHI PRASAD v. RAMJILAL. 1941 N.L.J. 239.

-S. 78—Custom arising out of contract between malguzar and tenant in respect of water rate -Abrogation—Power of settlement officer.

There is no provision of law whereby a settlement officer can abrogate in settlement operations

# C. P. LAND REVENVE ACT (1917), S. 78.

a custom arising out of contract between the malguzar and tenant in respect of the water rate to be paid to the malguzar. (Grille, C.J and Sen, I) CHINDU v. INDRARAJ. I.L.R. (1944) Nag. 431=216 I.C. 285 =17 R.N. 68=1944 N.L. J. 151=A.I.R. 1944 Nag. 175.

S. 78 - Settlement Instructions—Recording

of irrigation rights-Presumption-Onus as to

absence of enquiry.

In view of S. 78 of the C. P. Land Revenue Act and Settlement Instructions which make it obligatory upon a Settlement Officer to ascertain and record the custom in regard to irrigation rights in each village it has to be presumed that due enquiry was made by him before he prepared the wajib-ul-ars. The burden of proof lies upon the person who asserts that no such enquiry was made. (Pollock and Gruer, II.) HALDHAR v. NANHU. 1942 N.L.J. 102.

-S. 80 -Record of rights-Entries in-If can

be disproved.

There is nothing to prevent a person from proving if he can that the entries in the record of rights are erroneous even upon a fundamental matter. But the most cogent evidence would be require! for that purpose. (Sir George Rankin.) MADHORAO NARAYANRAO 2. RAMKUWARSHA. 207 I.C. 9=16 R. P.C. 1=I.L.R. (1943) Kar. (P.C.) 53=9 B.R. 378=A.I.R. 1943 P.C. 48 (P.C.).

-S. 84 (3)-Drawback allowed under-

Liability of lambardar to account for.

The drawback allowed under S. 84 (3) of the C. P. Land Revenue Act is part of the village profits for which the lambardar is liable to account to his co-sharers. (Grille and Gruer, JJ.) Raja Ram v. Babulai. Govindram Hissar. I.L.R. (1942) Nag. 615=202 I.C. 524=15 R.N. 87=1942 N.L. J. 211=A.I.R. 1942 Nag. 124.

-S. 88 (1), proviso (ii)—Diversion not authorised by proprietor-Revision of assessment

—Permissibility

There can be revision of assessment under S 88 (1), proviso (ii) of the C. P. Land Revenue Acr, even though the diversion is not authorised by the proprietor. This provision permits revision where there has been diversion irrespective of the person who has diverted the land. (Binney, F.C.) TIKARAM v. SPECIAL OFFICER, GONDIA. 1944 N.L. J. 437.

-S. 88 (1) proviso (ii)—Revision of assess-

ment-If can be retrospective.

As the liability to re-assessment under S. 88 (1), proviso (ii), C. P. Land Revenue Act, arises on diversion, the revision of the assessment can be retrospective. (Binney, F. C.) TIKARAM v. SPECIAL OFFICER, GONDIA. 1944 N.L. J. 437.

-S. 106—Scope and intention of. The intention of S. 106 of the C. P. Land Revenue Act is that if a claim which could have been inquired into or dealt with by the settlement officer in current Settlement after the enactment Commissioner should inquire into it or that if there were a claim in respect of which the settlement officer had not the opportunity to deal with because a settlement had not occurred since the section was enacted, the Deputy Commissioner should inquire into it. If action has been taken under S 75 it cannot be reopened during the currency of the settlement (Burton, F.C.) KASHI Kashi PRASAD v. RAMJILAL. 1941 N.L.J. 239.

#### C.P. LAND REVENUE ACT (1917), 112.

-Ss. 106 (a) and 88-Lands within settled mahal-Enhancement of assessment-Powers.

The C. P. Land Revenue Act does not permit the enhancement of the assessment of a mahal on the ground that it had escaped assessment at settlement. S. 106 (a) of the C. P. Land Revenue Act which empowers settlement officers to assess land revenue on lands which are liable to assessment but have not been assessed, cannot be invoked to impose assessment on lands in a settled mahal. The assessment on the mahal is fixed for the period of settlement. It is only under the second proviso to S. 88 (1) that assessment can be revised. (Binney, F.C.) SHAMRAO BHAGWANTRAO DESHMUKH, In re. 1942 N.L.J. 365.

—S. 109—Succession to tenure of protected thekadar—Principle governing. NARHARI v. MAHARANI. [See Q. D. 1936-'40 Vol. I, Col. 781].

I.L.R. (1941) Nag. 673.

-Ss. 109 and 117-Thekadari rights acquired out of joint family funds—Conferral of protected status on head of family—If affects rights

of other members in theka.

If the thekadari right in a village is acquired by the joint family out of joint family funds, it will be joint family property, and a member of that family would be entitled to a share in the theka and to be maintained out of its income. The conferral of the protected status on the head of the family does not affect the rights of the members in the theka. The incidents of a protected headman are the same as those of a protected thekadar. The absence of a corresponding proviso in S. 117 as it is in S. 109 (1) of the C.P. Land Revenue Act, does not in any way affect the pre-existing right which the members of the family have in the theka subject to such statutory modification as may have been introduced by the conferral of that status. (Sen, J.) NARAYANPRASAD v. LAXMANPRASAD. 1945 N.L. J. 291.

S. 109, Proviso (b) (ii)—Succession to

thekadar—Son of predeceased son and elder of surviving sons—Rule of primogeniture.

As between the son of a predeceased son and elder of the surviving sons of a deceased thekadar the latter is entitled to succeed. Proviso (b) (ii) to S. 109 of the C. P. Land Revenue Act does apply the rule of primogeniture but only among persons in the same degree of relationship to the deceased thekadir. (Binney, F.C.) SAHEBLAL V. TARACHAND. 1943 N.L.J. 358.

-S. 112-Rights of co-sharer in theka-If

enforcible in Civil Court.

The right of a co-sharer is not restricted to an application under S. 112 of the Land Revenue Act. If he has a share in the theka or a right to be maintained out of its income, he is entitled to a share in the profits of the lease and can enforce his rights in a Civil Court in case of denial and the jurisdiction of the Civil Court is not barred. (Sen J.) NARAYANPRASAD v. LAXMANPRASAD. 1945 N.L.J. 291.

-S. 112—Scope.

S. 112. C.P. Land Revenue Act, is intended to be us d where the protected thekadar has failed to pay share of the profits to the other members of the family entitled to a share in the theka. The section is not mandatory and should only be used in the case of presistent defaults by the thekadar. (Binney, F.C.) BRIJLAL v, JAILAL. 1942 N.LJ. 596,

# C. P. LAND REVENUE ACT (1917), S. 126.

-S. 126 - Accounts between lambardar and co-sharers-Tahsildar, whether can authenticate.

The Tahaildar has nothing to do with the accounts between the lambardar and the cosharers and is not in a position to authenticate them even if produced. S. 126 of the C. P. Land Revenue Act clearly refers to a statement of the Government account and the certificate of the Tahsildar is only conclusive as far as this account is concerned. (Binney, F. C.) TIJABAI. 1943 N.L.J. 387. Budhulal v.

-Ss. 138 and 128 (b) and (g)-Mortgaged share in village sold for arrears of land revenue due in respect of entire village—Proclamation issued under Form X—Purchaser, if gets property

free of encumbrances.

Malguzari shares in a village, which were mortgaged, were attached and sold to recover arrears of land revenue due not merely in respect of the shares mortgaged but also of the other shares in the village. The attachment was made in Form V-A, and the proclamation was issued under Form X. The sale certificate did not say that the sale was tree of encumbrance. In a suit to enforce the mortgage, the contention of the auction-purchaser was that the revenue Sale in his favour passed the property free of encumbrance in view of Ss. 128 (b) and 138 of the C. P. Land Revenue Act. Overruling that contention,

Held, that as the mortgaged shares were sold to recever arrears of revenue payable not by the mortgagor alone but by other co-sharers as well, it was not open to the Revenue Officer to proceed under S. 128 (b) of the Act and that the sale could not, therefore, be brought under S. 138 of the Act. The sale was under S. 128 (g) and the property had to be proclaimed for sale in Form X in which case the purchaser took the property

subject to encumbrances.

Held, further, that even if the procedure was faulty, that would not affect the rights of the parties, as the purchaser was fully aware from the recitals in the proclamation that the village shares were being sold subject to encumbrances, and he could not get, therefore, anything more than what was offered for sale and what he actually purchased (Grille, C.J. and Niyogi, J)
NARAYAN KRISHNARAO v. SAMPATLAL. I.L.R.
(1945) Nag. 621=1945 N.L.J. 226=A.I.R. 1945 Nag. 234.

S. 141 (2)—Sale held before expiry of thirty days from date of proclamation—Validity.

A sale held before the expiry of thirty days from the date of publication of the proclamation, is not ipso facto void, but is merely voidable. The holding of the sale within thirty days is a material irregularity and the person affected thereby must object and satisfy the Court that he 

before expiry of 30 days-Irregularity if affects sale.

The holding of a sale before the expiry of 30 days prescribed by S. 141 (2), C.P. Land Revenue Act, cannot make it a void one. The same principles which apply to Civil Court sales are applicable to revenue sales also (Binney, F.C.) Tansa CHIMANSA KALAR V KEDARNATH RAMNATH BHARGAO, 1942 N.L. J. 373.

#### C. P. LAND REVENUE ACT (1917), S. 145.

—S. 141 (3)—Sale proclamation issued by Tahsildar fixing date for sale—Tahsildar on tour on that date—Naib Tahsildar adjourning it to another date—Sale held by Tahsildar on the adjourned date-Legality.

In a proceeding for the recovery of arrears of a debt conciliation instalment, the sale of property was advertised to be held on a certain date, the proclimation being issued by the Tahsildar on that date. The Tahsildar was out on tour and the Naib Tahsildar adjourned the sale to another date. The Tahsildar held the sale on the adjour-

ned date.

Hetd, that the Naib Tahsildar was not an officer holding the sale for purposes of S. 141 (3) of the C. P. Land Revenue Act, that there was no proper publicity, and that the sale was illegal. (Binney, F.C.) KRISHNA v. MAKHAJI. 1943 N.L.J. 367.
——Ss. 142 and 144—Deposit—Creditor, if

There is no provision corresponding to O. 21, R. 72, C.P. Code, in the C. P Land Revenue Act, to enable the creditor to bid and claim to set off the amount due to him against the amount to be deposited by him. (Burton, FC.) DAULAT DEOMAN v. RAMESHWAR DILSUKH MARWADI. 1941 N.L.J. 109.

——S. 145—Defaulter depositing lesser amount owing to erroneous information of Tahsildar—If

entitled to have sale set aside.

A defaulter who has been misled by an erroneous information of the Tahsildar regarding the amount to be deposited, and who in consequence has deposited an amount less than that shown in the proclamation, is entitled to have the sale set aside under S. 145 of the C. P. Land Revenue Act on the principle that "the act of the Court shall prejudice no man" (Binney, F.C.) UMABAI v. Dharam Narain. 1943 N.L.J. 183.

-Ss. 145 and 25—Misdescription of property or its owner in sale proclamation-Validity of

sale.

Misdescription of the property or of its owner in the sale proclamation is a mere irregularity and will not invalidate the sale unless it has caused substantial injustice. (Rau, F.C.) IZ-UL-JABBAR V. CHAIRMAN, LOCAL BOARD, SEONI. 1945 N.L.J. 59.

S. 145-Notice to auction-purchaser-If

necessary.

It is certainly desirable that the auction-purchaser should be given an opportunity of objecting before an order is passed under S. 145, C.P. LandRevenue Act, setting aside a sale. Notice however is not essential in law as the section contains nothing corresponding to the proviso of R. 92 (2) of O. 21, C.P. Code. (Binney, F.C.) UMABAI v. DHARAM NARAIN. 1943 N.L.J. 183.

—S. 145—Sale proclamation signed by Tahsildar-Sale held by Naib Tahsıldar-Validity.

The fact that the Naib Tahsildar held the sale instead of the Tahsilder who signed the sale proclamation is at the worst a technical irregularity and can be overlooked as the Naib Tahsildar is under the law competent to hold sales. (Rau, F.C.) IZ-UL-JABBAR V. CHAIRMAN, LOCAL BOARD, SEONI. 1945 N.L. J. 59.
S. 145 — Scope - Sufficient compliance

with-Tender in Court of money to be deposited on the last day but after treasury was closed-

Payment into treasury the next day—Revenue

Book Circular 11-15-Effect.

S. 145 of the C.P. Land Revenue Act lays down that the deposits may be made within 30 days from the date of the sale. The implication is that the deposits may be made within Court hours and there is nothing in the section which could possibly justify the refusal of an amount offered in Court hours but after the closing of the treasury to public transactions. That would be a sufficient compliance with the provisions of S. 145. Revenue Book Circular 11-15 does not affect the law on this subject. (Bunney, F.C.) MOOI CHAND v. MST. RADHABAI. 1942 N.L. J. 163. -S. 145-Who can apply under-Person acquiring interest after sale.

Where the interest in the property sold has been acquired after such a sale, the person a quiring such interest is not entitled to apply under S. 145 of C. P. Land Revenue Act for setting it aside. (Binney, P.C.) DAYA SHANKAR v. RAJA DOLAN SINGH. 1942 N.L. J. 545.

S. 146—Deputy Commissioner directing completion of sale if arrears not paid on or before certain date-Sale completed at 1 p.m. on that date-Defaulter bringing money at 3 p.m.-Sale.

if liable to be set uside.

Before the end of the auction, the Deputy Commissioner stayed the proceedings by an order which read as follows:-"Sale has been held but the bid has not been accepted. I stay proceedings at that stage. The bidders should be told so and be asked to appear on the 12th September 1941, on which date the sale will be continued further bids being invited. If he pays up the entire arrears on or before the 12th, the bid should be refused, if not the sale completed." The Tahsildar completed the sale by 1 p.m on the 12th. At 3 p.m., the defaulter brought the money and applied to the Deputy Commissioner that in view of his order the sale by the Tahsildar was without jurisdiction and that he should be allowed to deposit the full amount of arrears.

Held, that the Tahsildar was acting contrary to the direction of the Deputy Commissioner in completing the sale at a time when it was still possible for the defaulter to bring the money and that the sale was liable to be set asile.

(Binney, F.C.) NILKANTH v. MANIKRAO. 1944

N.L. J. 239.

S. 146—Facts to be proved by applicant.

An applicant under S. 146, C. P. Land Revenue Act, must prove to the satisfaction of the Deputy Commissioner that he has sustained substantial injury by some mistake or irregularity in the proceedings. More is required of the applicant than under R. 90 of O. 21, C. P. Code. (Binney, F.C.) GANPATRAO DESHMUKH v. PARMANAND DUBEY. 1942 N.L.J. 613.

-S. 146-Irregularities not specified in objection—If can be considered—Irregularity in attachment—Sale, if can be set aside.

When a sale under Chap. X of the C. P. Land Revenue Act takes place, the auction-purchaser is entitled to a strict interpretation of S. 146. The mere statement that the proclamation is full of irregularities is not sufficient. The law requires that an application under S. 146 shall be to set aside the sale on the ground of some material irregularity or mistake in publishing or conducting it and the objector has to prove to the satis- | PRASAD. 1943 N.L.J. 489.

# C. P. LAND REVENUE ACT (1917), S. 145., C. P. LAND REVENUE ACT (1917), S. 148.

faction of the confirming officer that he has sustained substantial injury by such irregularity or mistake. It is not open to the confirming officer or to the appellate Court to consider irregularities which have not been specified in the objection. It is doubtful whether attachment can really be considered as part of the publishing and conducting of a sale. In any case, by no stretch of imagination, can the failure to follow the proper procedure in attaching the property ten months before the sale be said to have caused substantial injury to the objector. (Binney, F.C.) MOTILAL v. SHRIBAI. 1943 N.L.J. 412.

S. 146-Material irregularity-Vagueness as regards encumbrance mentioned in procla-

mation.

Vagueness as regards an encumbrance mentioned in the sale proclamation does not constitute a material irregularity. (Binney, F.C.) BALDEO v. LALTA BAL. 1943 N.L.J. 443.

——S. 146—Sale beyond terms of Deputy Commissioner's sanction—Legality.

Where the Tahsildar while asking for sanction for sale recommends that so much of the site should be sold as is sufficient to fetch the amount due and the Deputy Commissioner sanctions the sale as proposed by the Tahsildar, the sale of the whole plot is illegal as it goes beyond the terms of the Deputy Commissioner's sanction A sale of a valuable house standing on the plot, which is not sanctioned nor mentioned in the proclamation, is illegal and void. (Rau, F.C.) Hiralal v. Kulsambi. 1944 N.L.J. 524.

sale-Sale if can be impugned.

There is no justification for holding that a sale by public auction properly advertised is void because the officer signing the proclamation had not at the time of the issue of the proclamation authority to insert a condition that it was subject to encumbrances, which condition was subsequently approved by the proper officer prior to the actual date of sale. (Binney, F.C.) Sadashiv v. P. P. DEO. 1942 N.L.J. 70.

-Ss. 147 and 141 (3)—Postponement of sale-Absence of advertisement-Legality.

Postponement of sale from time to time under S. 141 (3) of the C. P. Land Revenue Act is permitted in order to give an opportunity for higher bids, but the power of postponement is specifically restricted by S. 147, which must be considered to be mandatory. Where on the day fixed there were no bidders and it is adjourned to another day and again adjourned to a date a month hence owing to want of bidders, it is a case of postponement and not of continuing sale and if it is held without advertisement it is without jurisdiction. (Binney, F.C.) Nyrayan Harihar v. Bulakidas. 1941 N.L.J. 479.

S. 148-If mandatory-Inherent power to

set aside sale.
S. 148 of the C. P. Land Revenue Act is mandatory and the confirming officer is bound to confirm a sale if no application under Ss. 145, 146 or 151 has succeeded. There is nothing in the Act corresponding to S. 151, C. P. Code, and the confirming officer has no inherent powers to set aside the sale. (Binney, F.C.) DANI v. MATHURA

#### C. P. LAND REVENUE ACT (1917), S. 151

\_\_\_\_\_S. 151—Co-sharer who has allowed land revenue to fall into arrears—If can claim pre-

emption.

Pre-emption can only be claimed by a co-sharer who is not responsible for the land revenue having fallen into arrears and who has paid his share before recovery proceedings started. (Binney, F.C.) UMABAI v. DHARAM NARAIN. 1943 N.L.J. 183.

-S. 151-Order of Collector during execu-

tion of Civil Court decree-Appeal.

S. 151 of the C. P. Land Revenue Act contemplates claims to pre-emption not only "under this Act", but also in connection with the execution of decrees of a Civil Court, And under S. 33 of that Act "an appeal shall lie from every original order under this Act or the rules made there-under." Reading the two together it is clear that appeals lie as provided by the Land Revenue Act in regard to claims for pre-emption made in sales conducted "under this Act," and under the rules made under S. 68, C.P. Code, in regard to claims made in "the execution of a decree of a Civil Court." (P. S. Rau, F.C.) RAGHUNANDANLAL v. GANGAPRASAD. 1945 N.L J 11.

-S. 151—Right to apply for pre-emption— Co-sharer not recorded at time of sale.

Under S. 151 of the C. P. Land Revenue Act, only a recorded co-sharer at the date of sale is qualified to apply for pre-emption. It is not sufficient that he is a co-sharer at the time of the sale and gets himself recorded as a co-sharer subsequently. The decisive date under the section is the date on which the property is knocked down, and not the date of the confirmation of sale. (P. S. Rau. F.C.) RAGHUNANDANLAL v. GANGAPRASAD. 1945 N.L.J. 11.

S. 151—Sale under Land Revenue Act of

exclusively held sir-Right to pre-emption.

The co-sharers have no right under S. 151, C. P. Land Revenue Act, of pre-emption in respect of sale under the Act of sir plots held in exclusive possession by the defaulter. (Binney, F.C.)
SHALIGRAM v. SHYAMLAL. 1941 N.L. J. 501.
—S. 151—Scope and applicability—Sale by

Collector under S. 60, Provincial Insolvency Act

-If can be pre-empted.
S. 151, C. P. Land Revenue Act, gives privileges to a certain class of persons and it must be construed strictly. It does not apply at all to sales made by Courts. A sale by the Collector in compliance with the statement forwarded to him under S. 60 of Provincial Insolvency Act is not one to which S. 151 of the C.P. Land Revenue Act would apply. Hence pre-emption could not be allowed in respect of such a sale. (Binney, F. C.) RAMLAL v. GULAB CHAND. 1941 N.L.J. 651.

-S. 157—Bid by superior proprietor at whose

instance sale is held—Right to set off.

It is only in rare cases, such as in proceedings under S. 157 of the C. P. Land Revenue Act, and in recovery of instalments under the C. P. Debt Conciliation Act and the C.P. Relief of Indebtedness Act, that recoveries are made on behalf of individuals. There is nothing objectionable in permitting such individuals, if the property is purchased by them, to set off the amount due to them in the proceedings. Hence a superior prothem in the proceedings. Hence a superior pro-prietor who has obtained an order under S. 157 can be allowed, if he bids at the sale, to set off the amount due to him. (Binney, F.C.) DAYA the provisions and has satisfied himself that the

# C.P. LAND REVENUE ACT (1917), S. 157.

SHANKAR v. RAJA DOLAN SINGH. 1942 N.L.J. 545.

S. 157—'Land revenue' if includes proportion of assessment on Sir land.

The term "land revenue" in S. 157 of the C. P. Land Revenue Act includes (or may include) a proportion of the assessment on Sir land, and it cannot, therefore, be held that under the section no part of such assessment is recoverable from a co-sharer. But an order for the recovery of the whole of the Sir assessment is improper, and can be interfered with in revision. (Ramsden, F.C.) JANARDHAN v. DURGA PRASAD. 1945 N.L.J. 385. -S. 157-Order of Deputy Commissioner-

Appeal.

Under S. 157 of the C. P. Land Revenue Act, no appeal lies from an order of the Deputy Commissioner holding that an arrear is or is not due. The person affected by the order can only file a declaratory suit in a Civil Court. But once the Deputy Commissioner proceeds to recover the dues as arrears of land revenue, the orders he passes in those proceedings such as confirmation of sales, etc., would be subject to appeals and revisions as laid down in the Act. (Rau, F.C.) Mt. Mukarampurwali v. Chittarsingh. 1945 N.L.J. 198.

-S. 157-Proceeding under-Set off-If can be allowed to lambardar auction-purchaser.

In a proceeding under S. 157 of the C. P. Land Revenue Act, the lambardar, if he is the auctionpurchaser, can be allowed to set off his claim against the purchase money. (Rau, F.C.) MT. MUKARAMPURWALI v. CHITTARSINGH. 1945 N.L. J. 198.

S, 157 (3)—Defaulter not given oppor-

tunity to show cause—Order, if void.
S. 157 of the C. P. Land Revenue Act deals with recovery on behalf or the sadar-lambardar (or whoever has paid the land revenue) "as if it were" an arrear of land revenue due from a proprietor or malik makbuza for repayment to him. The Revenue Officer cannot "satisfy himself that the amount claimed, or any part thereof is due" and certify this—as he can, under the S. 126, for land revenue due to Government—unless the alleged defaulter has been given an opportunity to show cause. The mandatory provision in sub-S. (3) is therefore essential, and the failure to comply with this provision constitutes an illegality and renders the order null and void and without jurisdiction. (Ramsden, F.C.) SARUBAI v. RAMPRASAD. 1945 N.L.J. 317.
——Ss. 157 (4) and 39—Order illegal—Revi-

sion.
S. 157 (4) of the C. P. Land Revenue Act does not specifically bar revision. When the order is illegal or clearly improper, interference in revision under S. 39 is justified. But if the order is legal and is based on correct principles but the finding is disputed in fact or a set off is claimed, then no revenue Court should interfere. (Ramsden, F.C.) JANARDHAN v. DURGA PRASAD. 1945 N.L., J. 385.

S. 157 (4)—Order passed without giving opportunity to defaulter under sub-S. (3)—

Appeal, if barred.
S. 157 (4) of the C. P. Land Revenue Act bars an appeal "from an order under this section." It means that if the Tahsildar has complied with

amount claimed or part of it, is due, that finding cannot be challenged in appeal. But it the Tahsildar's order is found to be illegal and without jurisdiction (e.g.,) as when he passes the order wit iont giving the defaulter an opportunity to show cause under sub-S. (3), it cannot be considered as "an order under this section" but only one purporting to be so. In such a case, an appeal is not barred by sub-S. (4). (Ramsden, F.C.) SARUBAI V. RAMPRASAD. 317. 1945 N.L J.

-Ss. 160 and 188 (2) (c)—Suit for account of village profits and payment-Starting point.

Where a suit is essentially one for an account of village profits and payment the remedy is founded on the statutory duty imposed by S. 188 (2) (c) of the C. P. Land Revenue Act which duty arises in the year following the year in which the profits arise. Such a suit is not for profits but for payment of sum found due on taking account. The cause of action arises in the year following the year in which the profits arise. (Stone, C. I.) GAJADHAR PRASADT. GOVIND. I.L.R. (1942) Nag. 320=200 I.C. 591= 15 R.N.2=1942 N.L.J. 111=A I.R. 1942 Nag.

-S. 166—Amendment of 1937, if applies re-

trospectively.

The amendment introduced in 1937 in S. 106 of the C. P. Land Revenue Act has no retrospective application. (Binney, F. C.) KEWALRAM v. GANESHRAM. 1943 N.L.J. 67. KEWALRAM V.

- S. 173 - Partition - Malik-makhuza plots, how to be distributed-Rights of proprietors of mahal.

The proprietors of a mahal have no right or interest in the malik-makbuza plots and hence cannot insist that these should be included in the partition. These plots should ordinarily be distributed among the pattis according to their position. (Binney, F.C.) DASHRATH GANPAT v. ASSARAM BAYL. 1941 N.L.J. 550.

-Ss. 174 and 203—Imperfect partition between two brothers-liach allowed to retain house N.L.J. 173. in the patti of the other-Retention if as licensee,

Where there is an imperfect partition of a village between two brothers and each is allowed to retain the house occupied by him in the patti of the other, their position regarding the houses is not as that of licencees. To such a case S. 203 of the C. P. Land Revenue Act cannot apply for the person in occupation was originally a pro-prietor of the mahal. The retention of the house must be held to be under the conditions contemplated by S. 174 of the Act. (Stone, C. J. and Bose, J.) Behari Lal Asaramsao v. Gyaniram Narayan. I.L.R. (1943) Nag. 67=203 I.C. 67 =13 R.N. 106=1942 N.L.J. 506=A.I.R. 1943 Nag. 23.

187-Appointment of lambardar-Wajib-ul-arz entry providing for such appointment with consent of co-sharers-Method of

election by co-sharers.

Where according to the waiib-ul-ars entry of a village the lambardar should be appointed by the Revenue Officer with the consent of the cosharers, the election by the co-sharers should be by equal votes of the individual recorded cosharers. No person recorded in the mutation register as holding an interest in the proprietary rights should be excluded, and there is no

# C. P. LAND REVENUE ACT (1917), S. 160. | C. P. LAND REVENUE ACT (1917), S. 188.

practice of allowing only one vote for a share neld jointly by several persons. (Binney, F. C.) UKANDRAO v. KASHIRAM. 1944 N.L.J. 261.

-S. 187-Lambardar-Appointment-Value to be attached to wishes of co-sharers-Hereditary claims-II hen to count.

It is intended that every co-sharer shall have a voice in the appointment of the lambardar which will carry weight according to the interest possessed by the co-sharer. Hereditary claims should obviously turn the balance where there is no great difference between the interests possessed by the candidates. (Binney, F. C.) SARDAR-MALT. RAMKHILAWAN. 1941 N.L. J. 454.

S. 187-Minor lambardar--Exercise of powers-Procedure. Brij Mohan Singh v. Tulsiram. [See Q.D. 1936-40 Vol. I. Col. 3262]. I.L.R. (1942) Nag. 53=193 I.C. 75=13 R.N.

187-Salar lambardar - Selection-Interest of the candidates-Calculation.

Where one of the candidates for the post of sadar lambardar possesses jointly with his deceased brother's widow a greater share than his competitor, he should be selected though the share in his own right may be less than that of his rival. (Greenfield.) CHANDIPRASAD v. RADHESHYAM. 1941 N.L.J. 174.

-S. 187 (3)-Interpretation-The duties of S. 107 (3)—Interpretation—The duties of the office?. Bril Mohan Singh v. Tuls-ram, [See Q.D. 1936 40 Vol. I, Cor. 3262] I.L.R. (1942) Nag. 53:=193 I.C. 75:=13 R.N. 291.

-Sadar Limbardar - Selection - Considerations -Minority, if a disqualification.

According to sub R. (2) of R. 11 of the Lambardari Rules, regard should be had to the wishes of the lambardars and to the interests represented by them, in the matter of selection of a sadar lambardar. The wishes of the cosharers as such are not relevant. Minority is not a disqualification for such appointment. (Greenfield.) BHAGWAN-INGH v. ANTAR SINGH. 1941

S. 188 and C. P. Tenancy Act (I of 1920), Ss. 2 (7) and 49-Lambardar-Right to recover ren! -Ex proprietary occupancy tenant.

The lambarday is not entitled to collect the rent of every tenant in the village irrespective of the fact whether he holds from the proprietary body as such or no. To clothe him with that power which is one of the essential appurtenances of landlordship would be to clothe him with the power to exercise the other rights of the landlord as well (e.g., to eject the tenant for nonpayment of rent and then appropriate the holding for the use of the proprietary body and he would be able to object to an unauthorised transfer, both of which functions must by their very nature belong to the landlord from whom the tenant admittedly holds. S. 188 (2) (d) C. P. Land Revenue Act, was not intended to have this effect and did not in fact have this effect. The Act makes the lambardar (in respect of sir lands exclusively held) the landlord only in respect of such land as the body of proprietors whom he represents is the landlord of. (Grille, Niyogi and Gruer II., Stone, C.I. and Rose, I. dissenting.) GOPAL v. SHAMRAO. I.L.R (1941) Nag. 54-192 I.C. 472-13 R.N. 248-1941 N.L.J. 56=A.I.R. 1941 Nag. 21 (F.B.).

-S. 188—Lambardar's liability to account— Nature and extent-Joint management with a co-

sharer-Liability, how affected.

The lambardar is under S. 188, C. P. Land Revenue Act, under a statutory liability to account. He is the person entitled and bound to recover the village profits and he is bound to account for them to his co-sharers. If he allows another person to recovr some portion of the profits, then that person must be regarded as his agent and that in no way relieves the lambardar of his responsibility. (Stone, C. J. and Bose, J.) RADHIKA PRASAD v. NANDKUMAR. I.L.R. (1944) Nag. 63=1942 N.L.J. 355=A.I.R. 1944 Nag. 7.

-S. 188-Village profits-Right to interest on-Plea of non-realisation of rent-Onus.

Interest can be allowed on village profits which are unreasonably withheld. Where parties are members of the same family and one or other is associated in the management of the property it is not right to allow interest until such time as relations became strained and one side demanded profits and interest from the other. When the lambardar pleads non-realisation of certain rents, the onus is on him to prove that they were not in fact realised. (Stone, C. J. and Bose, J.) RADHIKA PRASAD v. NANDKUMAR. I.L.R. (1944) Nag. 63=1942 N.L.J. 355=A.I.R. 1944 Nag.

sum due under S. 83 to superior proprietor—If liable to dismissal.

The sum payable by the lambardar as inferior proprietor under S. 83 (2) and (3) of the C. P. Land Revenue Act to the superior proprietor is not land revenue. Failure to pay it therefore does not bring the lambardar within the mischief of S. 188 (1) (a) of the Act. (Rau, F. Surjilal v. Narayanlal. 1945 N.L.J. 194.

-S. 188 (2)—Calculation of profits payable to co-sharers-Rent of ex-proprietary holding-

If to be taken into account.

When a person in exclusive ownership of sir land transfers it to another, he becomes the tenant of his vendee and not of the entire proprietary body and pays the rent only to the wendee. Hence the rent fixed for such a holding has to be taken into account in calculating the village profits payable to the co-sharers. (Pollock, J.) DAU PARMANAND v. DAU KANHAIYA-LAL. I.L.R. (1942) Nag. 599=1942 N.L.J. 475 =202 I.C. 427=15 R.N. 81=A.I.R. 1943 Nag.

S. 188 (2) and C. P. Tenancy Act, S. 49 -Lambardar's right to recover rent from ex-

proprietary tenant,

S. 188 (2) of the C. P. Land Revenue Act says that the Lambardar should be deemed to be the landlord of the mahal or patti to which he is appointed. If, therefore, a co-sharer transfers his share in the village without reserving cultivating rights in his Sir land and becomes an exproprietary tenant thereof, the Lambardar of the village, and not his transferee, is entitled to collect the rent of the land from him. (Rau, F. C.) NARAYAN v. REWATIRAMAN. 1945 N.L.J. 102.

-S. 188 (2)—Receiver appointed on proprietor's insolvency - Right to sue for rent of exproprietary occupancy holding.

C. P. LAND REVENUE ACT (1917), S. 188. | C. P. LAND REVENUE ACT (1917), S. 196.

Where a proprietor of a village is adjudicated insolvent and the proprietary interest in the Sir land held by him vests in the Insolvency Court, the receiver who is appointed by that Court derives his authority from that Court to perform the duties of a proprietor including that of recovering rent. As the ex-proprietary occupancy land is appurtenant to the village which is exclusively vested in the Insolvency Court, that Court or its nominee the receiver, is alone entitled to sue for the recovery of rents of the ex-proprietary occupancy land to the exclusion of the lambardar. (Niyogi, J.) KANHAIYALAL v. LILA-DHAR RAO, I.L.R. (1943) Nag. 387=208 I.C. 601=16 R.N. 96=1943 N.L.J. 374=A.I.R. 1943 Nag. 269.

S. 188 (2) (c)-Lambardar failing to render accounts-If liable to dismissal.

A lambardar who has failed to render accounts of the village profits and who was not even maintaining them, is liable to be dismissed under S. 1'8 (2) (c) of the C. P. Land Revenue Act. (Rau, F.C.) SURJILAL v. NARAYANLAL, 1945 N.L.J. 194.

S. 189—Removal from office of persons mentioned in—Grounds. Brij Mohan Singh v. Tulsiram [See Q. D. 1936-40 Vol. 1, Col. 3263]. I.L.R. (1942) Nag. 53=193 I.C. 75= 13 R.N. 291.

——S. 190 and Mukaddami Rules, R. 7— Power of Mukaddam to dismsis his gumastha.

A mukaddam has the power to dimiss at will a gumastha appointed by him. All that is necessary is that he should inform the Tahsildar of the dismissal and obtain his approval of the new agent whom he wishes to appoint. (Binney, F.C.) MOTILALJI v. VITTOBA. 1943 N.L.J. 186.

S. 192 (1)—Order fixing remuneration under-When takes effect-Retrospective operation in respect of suit for rendition of account.

An order fixing the remuneration of a lambardar under S. 192 (1), C. P. Land Revenue Act relates back to the date of the appointment as it is an order which ought to have been passed on that date. Hence though a suit for rendition of accounts is filed before the date of the order, it could be given retrospective effect and the amount due as remuneration can be set off as against the profits found due. (Niyogi, J.) VITHAL v. JAGANNATH. 1942 N.L. J. 30.

- S. 192 (2)-Mukaddam-Calculation of

remuneration of.

Under S. 192 (2) of the C. P. Land Revenue Act the mukaddam is entitled to a percentage of the land revenue payable by the lambardar. The malik makhuza revenue is included in this unless there has been a notification under the proviso to S. 123 as to payment to Government direct. Proviso (ii) to S. 192 (1) does not qualify proviso (1) to S. 192 (2). It only specifies that the lambardar cannot recover anything from a malik makhuza. (Binney F C.) OBHILAL CHUNNILAL v. JAIRAM. 1941 N.L.J. 607.

-S. 196-Remuneration of Kotwar-Land

broken from waste.

The Kotwar should get dues on land broken from waste since settlement. (Binney, F. C.)

WAMAN PRASAD T. HARIDAS PANKA. 1941

N.L.J. 557.
S 197-Application under-Limitation. The Limitation Act is not applicable to S. 197 of the C. P. Land Revenue Act and there is in law no limitation to applications under this section. It will of course be within the Deputy Commissioner's discretion to refuse to consider long delayed claims. (Binney, F.C.) Kaminabat v. Urkuba. 1944 N.L.J. 149.

S. 201 and Central Provinces Tenancy Act, S. 88-A—Cases under—Procedure—Cr. P. Code or I. P. Code—If applicable.

Cases under S. 201 of the Central Provinces

Land Revenue Act and under S. 88-A of the Central Provinces Tenancy Act are not governed by S. 5 (2) or any other provisions of the Cr. P. Code or of the I. P. Code. The definition of 'offence' contained in S. 4 (0), Cr. P. Code, does not apply to cases under these Acts. (Ramsden, F.C.) KANASHAH BAPU v. SHALI-GRAM. 1945 N.L.J. 542.

-S. 201 and C. P. Tenancy Act, S. 88-A-Case under-Revenue officer, if can start suo

Cases under S. 201 of the C. P. Land Revenue Act and S. 88-A of the Tenancy Act, can be started by the revenue officer suo motu. In S. 201 there is nothing to bar this and in S. 88-A, S. 201 there is nothing to bar this and in S. 30-X, the words "or otherwise" would authorise it. (Ramsden, F.C.) RANASHAH BAPU v. SHALL-GRAM. 1945 N L. J. 542.

——S 201 and C. P. Tenancy Act, S. 88—

Contravention of rule or custom by landlord—

Separate fine in respect of each tenant injured

thereby—If can be imposed.

Under S. 201 of the C. P. Land Revenue Act separate fines cannot be inflicted in the case of each tenant injured by a contravention of the rule or custom by the landlord. For each occasion (e.g.) each season that the landlord contrawenes each season that the faintief Contravenes each separate rule or custom, the maximum fine which can be imposed under the section is Rs. 200. This does not, however, apply to cases under S. 88 of the Tenancy Act. (Ramsden, F.C.) Ranashah Bapu v. Saligram. 1945 N.L. J. 542.

-S. 202-Rules under-Clearing of land for

cultivation-When may be prohibited.

The Deputy Commissioner can only prohibit the clearing of land for cultivation in the public interest or in the interest of persons who by virtue of any entry in the village administration paper prepared under S. 79 of the C. P. Land Revenue Actenjoy any right of user over the forest growth. The Deputy Commissioner is not authorised by the rules to consider the interests of members of the proprietary body. (Binney, F.C.) CHHAGANLAL v. JAGANNATH. 1943 N.L.J. 513.

-S. 203-Grocer-If entitled to free site.

Although the running of a grocery shop is a function of importance to the economic life of a village the grocer is not entitled to the concession of a free site for this purpose. sion of a free site for this purpose. (Binney, F. C.) RAMJULAI. RAMGULAM. 1943 N.L.J. 256.
S. 203-House site-Reasonable dimensions-Meaning-Tenant not using entire site for

residential purposes-Presumption.

The house site of reasonable dimensions, to which a tenant is entitled under S. 203, C. P.

# C. P. LAND REVENUE ACT (1917), S. 197. C. P. LAND REVENUE ACT (1917), S. 222.

Land Revenue Act, means a house site suitable for an average family. It is certainly not justifiable to require the landlord to provide a free site for a house for a large joint family which cannot possibly be supported from the land which they hold in the village. If a tenant does not use the whole of the site provided for residential purposes, there is an obvious presumption that the site is of reasonable dimensions for the purpose of S. 203. (Binney, F.C.) RAMJILAL V. RAMGULAM. 1943 N.L. J. 256.

-S. 203-Sites in abadi-Power to distribute—Co-sharer, if can purchase. Nilkanth v. Vishwanath. | See Q. D. 19 6-40 Vol. I Col. 3203]. I.L.R. (1941) Nag. 571-192 I.C. 291-13 R.N. 231.

S. 203 (3) - Usufructuary mortgagee-Suit for ejectment and possession-Limitation-If Art. 142 or 144 or 126 of the Limitation Act applies. Kuwarji 7. Bhurelal. [See Q. D. 1936-'40 Vol. I, Col. 791]. I.L.R. (1941) Nag. 33**7**.

-S. 209—Removal of Wotandar Patel-Grounds-Loss of status as adopted son.

A watandari patel in the Central Provinces can ordinarily be removed only for breach of one of the conditions in the agreement in form F which the has to execute under R. 11 (8) of the rules framed under S. 227 of C. P. Land Revenue Act with reference so S. 209. There is no provision for his removal, on his losing his status, corresponding to S. 189 (1) (a) for removal of a lambardar or rule VIII under S. 190 for removal of a Mukaddam. Where, however, a person was appointed patel on the sole ground that he was the adopted son of the previous watandar and the appointment was made conditional on the adoption not being subsequently invalidated by the Civil Court, the status quo must, in justice equity, and good conscience be restored by his removal, if the Civil Court declares his adoption invalid. (Ramsden, F.C.) KESHAO TUKARAM V. RAJESHWAR. 1945 N.L.J. 445.

S. 212 (2)—Survey numbers not included in raiyatwari village—Rights of raiyat in-Whether can be sold or foreclosed.

The prohibition in S. 212 (2) of the C. P. Land Revenue Act in respect of the sale or foreclosure of the rights of a raiyat in survey numbers in execution of a decree, does not apply to survey numbers which are not situated in a raiyatwari village. (Grille, C.J., and Puranik, J.) HIRALAL V. SARJOOPRASAN. I. L. R. (1944) Nag. 166=1943 N.L.J. 571=212 I.C. 289=16 R.N. 223= A.I R. 1944 Nag. 82.

S. 222—Scope and effect of—If bars plea in defence of possession—Rule of interpretation.

S. 222 of the C. P. Land Revenue Act debars the claim to the demarcated waste lands after the expiry of three years from date of demarcation. But the failure of a party to lodge his claim within three years specified in S. 222 cannot deprive him of his right to defend his possession. S. 222 is capable of being viewed either as laying down a rule of limitation or prescription. In the former case failure to assert a claim within the time specified would only har the remedy, while in the latter case it would destroy the right. The one important condition for the application of the rule of prescription is that the claimant must be out of

#### C. P. LAWS ACT (1875), S. 5.

The rule of prescription cannot possession. operate against a person in possession. Hence the section cannot be interpreted as laying down a rule of prescription. (Niyogi, J.) PROVINCIAL GOVERNMENT, C. P. AND BERAR v. KESHRICHAND. I.L.R. (1941) Nag. 538=197 I C. 33=14 R.N. 143=194 I N.L.J. 378=A.I.R. 1941 Nag. 300.

CENTRAL PROVINCES LAWS ACT (XX OF 1875), S 5—Personal law of Gonds—Provisions of law—If would prevail over recorded statements.

The provisions of any personal law received and acknowledged by Gonds in general if proved might have some effect to cast doubt upon the might have some effect to cast doubt upon the truth of the recorded statements and could be given effect, as a matter of justice, equity and good conscience under S. 5 of the C. P. Laws Act. (Sir George Rankin.) MADHORAO NARAYANARAO V. RAMKUWARSHA. 207 I.C. 9=16 R.P.C. 1=9 B.R. 378=I.L.R. (1943) Kar. (P.C.) 53=A.I.R. 1943 P.C. 48.

CENTRAL PROVINCES LOCAL FUND AUDIT ACT (IX OF 1933), S. 10-Byelaws of municipality fixing licence fees—Secretary neglecting to collect—Liability.

A Secretary of a municipality failing to carry out a bye-law which had come into force and collect the license fees levied by it is liable for the loss to the municipality. A subsquent resolution of the Municipal Committee accepting the secretary's explanation that in his opinion thebyelaw could be enforced from the subsquent year cannot absolve him from liability (Pollock, J.) COMMISSIONER CHITTISGAR & DIV. SION v. MURLIDHAR. I.L.R. (1943) Nag. 592=1943 N.L.J. 404=210 I.C. 42=A.I.R. 1943 Nag. 283.

S. 10—"Gross negligence—Meaning of. The expression, 'gross negligence, is intended to denote a high degree of careless conduct which has to be determined from the circumstances of the particular case. It does not necessarily include an element of fraud. | Puranik, J.) Beni Madhava v. Commissioner, Jubbulpoke Division I.L.R. (1945) Nag. 218 | 1945 N.L. J. 105=A.I.R. 1945 Nag. 111.

S.14—District Judge dealing with cases under the Act if acts as a Court—Application under S.14—Appeal—Court-fee payable.
From a reading of the various provisions of the C. P. Local Fund Audit Act it is clear that the District Judge is not intended to act as a Court but as a special tribunal. In an appeal Court but as a special tribunal. In an appeal arising out of an application under S. 14 of the Act, no court-Fee is payable, for it does not come under any other clauses of the charging section of the Court-Fees Act (ie.) S. 4. (Bose, J.) Moreshwar v. Commissioners, Chartiscark. 194 I.C. 731=14 R.N. 7=1941 N.L.J. 42=A.I.R. 1941 Nag. 129.

CENTRAL PROVINCES LOCAL SELF-GOVERNMENT ACT (IV OF 1920), S. 51 -Double taxation-Legality.

Double taxation, however repugnant it may be to the canons of taxation, is not illegal. (Grille, C. J. and Hemeon, J.) MULJI SICKA & Co. v. DISTRICT CUNCIL, BHANDARA, I.L.R. (1945)
Nag 134-1045 N.J. 662 Nag. 134=1945 N.L.J. 597=A.I.R. 1945 Nag. 171.

S. 51—Irregularity in convening meeting-Burden of proof.

C. P. LOCAL SELF-GOVT. ACT (1920), S. 73.

The burden of proof is on the party who chal-lenges the validity of a tax on the ground of an irregularity in the convening of the meeting for its imposition under S. 51 of the Local Self-Government Act, to prove the irregularity alleged by him. The presumption is that the prescribed by him. The presumption is that the prescriped procedure has been followed. (Grille, C.J.,
and Hemeon, J.) Mulji Sicka & Co. v. District
Council, Bhandara. I.L.R. (1945) Nag. 134=
1945 N.L.J. 597=A.I.R. 1945 Nag. 171.
—S. 61—Terminal tax—Power of District
Council, Bhandara, to impose tax on exports
within municipal limits of Gondia—Collection of
tax swithin those limits

tax within those limits.

The notification of the 24th March, 1927, published in the Central Provinces Gazette dated 26th March, 1927 and the notification dated the 23rd April, 1934, issued by the Local Government, authorising the District Council, Bhandara to impose, levy and collect a terminal tax and arrears thereof on bidis and bidi leaves exported outside the District, is not ultra vires, and the District Council, Bhandara, is authorised to impose such tax on exports within the limits of the Gondia Municipal Committee. The fact that the tax is collected for the sake of convenience at a place which is within the municipal limits of Gondia and therefore in virtue of the proviso to S. 3 of the C. P. Local Self-Government Act outside the jurisdiction of the District Council, is not material, as it does not in any way curtail or derogate from the rights of the Gondia Municipal Committee. Further, S. 51 of the Act which is a section for general taxation and which does not of the provisions of the C. P. Municipalities Act. (Grille, C.J. and Hemeon, J.) MULJI SICKA & Co. v. DISTRICT COUNCIL. BHANDARA. I.L.R. (1945) Nag. 134=1945 N.L.J. 597=A.I.R. 1945 Nag. 171.

-Ss. 65 and 79 (1) (vi)—Effect of rules framed in regard to election disputes—Powers of

Court under S. 65.

From the rules framed under S. 79 (1) (vi) of the C. P. Local Self-Government Act it must be inferred that it was never intended to depart from the principle that there should be no interference with decisions of petition Courts in election cases and that the powers under S. 65 should only be exercised in very exceptional circumstances. (Binney, F. C.) Kunj Biharilal v. Pandit Premshankar. 1942 N.L.J. 88.
—S. 73—Applicability—Suit for difference

between amount paid to employee and amount

payable.
When a District Council wrongfully withholds part of the pay it has assigned to its employees, then the suit may be on a contract and not for then the suit may be on a contract and not for something done or purported to be done under the statute. Where the complaint is that the District Council did not under the C. P. Local' Self-Government Act assign to the plaintiff Rs. 60 instead of Rs. 50, the suit falls within S. 73 of the Act. (Pollock, J.) DISTRICT COUNCIL, BILASPUR V. BINDRABEN. 1942 N.L. J. 332.

S. 73 (1) (2)—Applicability—Suit for rent due by the Council in vesbect of school bremises.

due by the Council in respect of school premises. S. 73 of the C. P. Local Self-Government Act

does not apply to a suit for the recovery of rent which the Council failed to pay to the owner in respect of the school premises. The period of

C.P. LOCAL SELF-GOVT. ACT (1920), C.P. MONEY LENDERS ACT (1934), S.11. S. 75.

limitation will not be that which is provided by sub-S. (2) but the period provided by the ordinary law of limitation. (Clarke, J.) DISTRICT COUNCIL, WARDHAY, VNNA DAULAT RAO, I.L. R. (1942) Nag. 294-14 R.N. 156 =197 I.C. 76 =1941 N.L. J. 371 -A.I.R. 1941 Nag. 273.

-S. 75 -Contract in breach of -Is void.

As the legislature has enacted that the breach of the provisions of S. 75 of the C. P. Local Self-Government Act shall be deemed to be an offence under I. P. Code, the provision of law is intended to protect the public and its breach is therefore impliedly prohibited and therefore illegal. A contract in breach of S 75 is void. (Clarke, J.) DISTRICT COUNCIL, WARDHAT, ANNA DAULATRAO. I.L.R. (1942) Nag. 294=14 R.N. 156=197 I.C. 76=1941 N.L.J. 371=A.I.R. 1941 Nag. 273.

-S. 75-Interpretation.

S. 75 of the C. P. Local Self-Government Act does not necessarily mean that if a member, officer or servant of a committee is interested in a contract with the District Council he shall be deemed to have committed an offence. (Clarke, J.) DISTRICT COUNCIL, WARDHA 2: ANNA DAU-LAFRAO. I.L.R. (1942) Nag. 294=14 R.N. 156 =197 I.C. 76=1941 N.L.J. 371=A.I.R. 1941 Nag. 273.

-S. 79-Election rules-Voting by ballot-Right of candidates to demand showing of ballot

Where the rules for the election of office bearers of the District Council provide that if the ballot paper is signed by a voter or marked by him in any other way that would reveal his identity the vote should be void, the implication is that the candidates can see the ballot papers as otherwise they could not raise objections of the otherwise they could not raise objections. (Binney, F.C.) KUNJ BEHARI LAL v. PANDIT PREMSHANKAR. 1942 N.L.J. 88.
CENTRAL PROVINCES MONEY-LENDERS ACT (XIII OF 1934)—Applicability—

Onus-Money-lender, who is.

The C. P. Money-Lenders Act only applies to money-lenders and therefore before it can be applied it must be shown by the person seeking to apply it and take advantage of its provisions, that the plaintiff is a money-lender. The word 'regular' in the definition of a 'money-lender' shows that the plaintiff must have been in the habit of advancing loans to persons as a matter of regular business. An isolated act of moneylending does not constitute it a regular course of business. It is an act of business but not necessarily an act done in the regular course of busi-Dess. (Bose, J) Straram Shrawan v. Bajya Pannya. I.L.R. (1942) Nag 455=195 I.C. 463 =14 R.N. 49=1941 N.L.J. 194=A.I.R. 1941 Nag. 177.

(as amended by Act XVII of 1939)— Applicability—Suits instituted between 1st April 1935 and 19th March, 1937—Amendment Act of

1939 applies.

The amendment by Act XVII of 1939 to the C. P. Money-Lenders Act (1934) applies to suits instituted between the 1st April, 1935 and the 19th March, 1937. (Pollock. Bose and Puranik, 11.) RADHAKISAN V. BABU HAZARILAL. I.L.R. (1944) Nag. 383=216 I.C. 296=17 R.N. 71=1944 N. L.J. 229=A.I.R. 1944 Nag. 163 (F.B.).

5. 3-Requirements-Form of account.

All that the C, P. Money-Lenders Act requires is that an account of the debtor's in leb edness should be muntained in sufficient form and sent to the debtor in such a form as to enable him to see clearly what his indebtedness is (Grille, C. J. and Puranik, I.) Yadarao v. Ramrao, I.L. R. (1943) Nag. 555=206 I.C. 504=15 R.N. 266 =1943 N.L. J. 220=A.I.R. 1943 Nag. 240.

-Ss. 3 (2) and 7 Expl. -. I count not showing principal and interest separately- Explanation

to S 7, if would apply.

Where in an account maintained in the mahajan system there is no attempt to show principal and interest separately, it cannot be held that such account has been kept in good faith and with the intention of complying with the provisions of S. 3 (2) of C. P. Money-Lenders Act and hence the Explanation to S. 7 caunot be relied on in such a case to cure the defects in the account (Pollock, J.) Gulabrao v, Mt. Basantibal 1942 N.L.J. 25.

-S. 7-Applicability-Loan in name of minor son of money-lender-leather money-lender, real lender-Failure to comply with statutory duties-

Where in a suit on a bond executed in favour of a minor filed in the name of the son by the father as the next friend, it is found that the father was for a long time past a money-lender, it is a fair inference that the real lender, the real carrier on of a business, is the next friend. Where such a lender has not complied with the statutory duties of maintaining account and furnishing copies of it to the borrower. S. 7 enables the Court to disallow the whole or any portion of interest found due and costs. (Stone, C.J. and Bose, J.) Sunderlat v. Sitaram Santa-RAM. 1942 N.L. J. 130.

-S. 7 (c)—Interest realised in respect of excluded period - Power of Court to order refund.

S. 7 of the C. P. Money-lenders Act does not enunciate rights of the parties but prescribes powers of the Courts. S.7 (c) authorises the Courts to disallow interest in respect of a certain period. It does not empower them to call upon the plaintiff to pay back to the defendant the amount of interest which the former received from the latter in respect of such excluded period. (Bobde, J.) Panduranc Ganpat v. Punjaji Shamji. I.L.R. (1944) Nag. 241=215 I.C. 122=17 R.N. 41=1944 N L.J. 123=A.I.R. 1944 Nag. 151.

S. 7, Expl.—Applicability, See C. P. Money-Lenders Act, Ss. 3 (2) and 7 Expl. 1942 N.L.J. 25.

-S. 11-Applicability-Final decree for sale

in mortgage suit passed.

S. 11. of the C. P. money Lenders Act has no application once a final decree for sale on a mortgage has been passed because once such a decree is passed, the decree ceases to be a decree for payment of a sum of money, or for the payment of an amount found due. (Stone, C. J. and Bose J) Pratapsingh v. Gopaldas. 1942 N. L.J. 15ó.

----S. 11-Application under-Forum.

The proper Court for exercising powers under S. 11 of the C. P. Money-Lenders Act is the decree Court and not the executing Court. (Stone, C.J. and Clarke, J.) HARI GOVIND v. INDIAN C. P. MONEY LENDERS ACT (1934), C. P. MUNICIPALITIES ACT 1922) S. 11.

COTTON CO., LTD., BOMBAY, I.L.R. (1942) Nag. 777=204 I.C. 174=15 R.N. 153.

-S. 11-Grant of instalment-Powers of

executing Court.

The word "Court" used in S. 11 of the C.P. Money-Lenders Act has a restricted meaning. It refers to the Court which passed the decree and not to the Court to which the decree is transferred for execution. The latter Court has therefore no power to direct payment of the decretal amount by instalments under that section. (Grille, C. J., Niyogi and Sen, JJ.) BILL-MORIA v. CENTRAL BANK OF INDIA, LTD., I.L.R. (1944) Nag. 1=214 I.C. 130=17 R.N. 27=1943 N.L. J. 596=A.I.R. 1943 Nag. 340 (F.B.)

S. 11-Order on application for instal-

ment-Appeal.

An order passed on an application for instalments under S. 11 of C.P. Money-Lenders Act is appealable. (Stone, C. J.) KHWAJA GULAM v. ABDUL KADIR. I.L.R. (1942) Nag. 772=202 I.C. 480=15 R.N. 90=1942 N.L. J. 398=A.I.R. 1942 Nag. 140.
S. 11—Powers under—Nature of—Inter-

ference by appellate Court.

S. 11 of the C.P. Money-Lenders Act confers upon the Court discretionary powers and where the discretion is exercised judicially it is not proper for an appellate Court to interfere with it. (Stone C.J. and Clarke, J.) HARI GOVIND v. Indian Cotton Co., Ltd., Bombay, I.L.R. (1942) Nag. 777=204I.C. 174=15 R.N. 153.

-S. 13-Appticability-Moneylender advan-

cing money for agricultural operations.

S. 13, C.P. Money-Lenders Act applies only to proprietors who make advances only to their ten-ants. Where plaintiff describing himself as a money-lender sues to recover money advanced for agricultural purposes, S. 13 does not apply, and he is not entitled to interest claimed where the has admittedly not complied with the provisions of Cl. (b) of S. 3 (1) of the C.P. Money-Lenders Act. (Pollock, J.) Balkrishna Saov. Dhanya. 1942 N.L.J. 339.

CENTRAL PROVINCES AND BERAR MOTOR VEHICLES RULES. R. 65-Rep-

lucement of vehicles-Proper procedure.

A vehicle covered by a permit can be replaced by a vehicle of a different capacity or type only on an application of the permit holder in the manner provided by R. 65 of the C. P. and Berar Motor Vehicles Rules, and not on an application of the owner of the vehicle. (Harlow, Hifasat Ali and Peers) KALOTI v. LOKSEVA MOTOR UNION. 1943 N.L.7. 190.

-R. 70-Order of refusal to vary conditions

of permit—Appeal.

There is no provision for an appeal against the refusal of the Regional Transport Authority to vary conditions of a permit as requested by a permit holder. (McDoughall, Hifasat Ali and Peers.) Lokseva Motor Service, Nagpur, In re. 1943 N.L.J. 191.

CENTRAL PROVINCES MOTOR VEHI-CLES TAXATION ACT (I OF 1942), S. 3 (1), Provis — Effect of amendment—Tax in C.P. Municipalities Act, meaning of. Amrutal v. President Town Municipal Committee, Amraoti. [See Q.D. 1936-40 Vol. I. Col. 799.] I.L.R. (1941) Nag. 294. CENTRAL PROVINCES (AND BERAR) MOTOR VEHICLES TAXATION ACT (1940). S. 3 (1)—Taxation—Liability for, if

depends on ownership or use of the motor vehicle. The ordinary principle in construing a fiscal statute is that it must be considered in favour of the subject. S. 3(1) of the C.P. and Berar Motor Vehicles Act provide that tax shall be payable on every motor vehicle used or kept for use in C.P. and Berar. There can be no presumption that a motor vehicle is necessarily kept for use. Whether it was used or not is a matter to be proved. Hence tax is not leviable where a

motor vehicle is merely kept. (Pollock, J.) BAPU RAO v. EMPEROR. 1942 N.L. J. 419.
CENTRAL PROVINCES MUNICIPALITIES ACT (II OF 1922) and Bye Laws—
Gross annual letting value'—Meaning of—If includes navments by tenants as taxes. P. V. includes payments by tenants as taxes. P. V. DIXIT v. MUNICIPAL COMMITTEE, NAGPUR. [See Q.D. 1936-'40 Vol. I. Col. 800]. I.L.R. (1941) Nag. 323=192 I.C. 762=13 R.N. 277.

Rules for assessment of conservancy and water rate—Rr. 9 (a) and 12 (a)—Scope and meaning of—Residential quarters attached to police stations—If can be assessed separately

The plain and natural meaning of Rr. 9 (a) and 12 (a) of the Rules and bye-laws framed by the Local Government for the assessment of conservancy and water rates is that when a portion of the same building or a range of buildings is occupied separately by a family having a separate source of income that portion should be deemed to be an independent and separate building notwithstanding that the portion forms an integral part of a larger structure. The residential quarters attached to a police station can be assessed separately as if they are distinct and independent buildings. (Niyogi, J.) Deputy Commissioner, Nagrur v. Municipal Committee

NAGPUR. 1942 N.L.J. 184.

Tax imposed by Municipal Committee Nandura, on trade of ginning—Nature of. On-Karsa v. Municipal Committee of Nandura. [See Q. D. 1936-'40 Vol. I. Col. 801.] 193 I.C. 473=13 R.N. 327.

— (as applied to Berar) Ss. 2 (2) and 66 (6)—Scavenging tax imposed under Berar Municipal Law, 1886-Whether validly continued after Act.

The imposition of the scavenging tax by the Ellichpur Municipal Committee, though made under the old Berar Municipal Law of 1886, was validly continued even after the application of the C. P. Municipalities Act of 1922 to Berar. The continuance of the imposition is saved under Ss. 2 (2) and 66 (6) of the Act. (Bose and Puranik, JJ.) VIDARBHA MILLS, BERAR v. MUNICIPAL (OMMITTEE, ELLICHPUR. I.L.R. (1943) Nag. 525—209 I.C. 399—16 R.N. 120—1943 N.L.J. 377=A.I.R. 1943 Nag. 277.

——Ss. 25 and 49—President of municipal committee allowing increment to Secretary without sanction of Government—Liability to committee for loss caused thereby—Sanction of budget by Government—If Succinct—CP. Financial Rules, Vol. I, R. 234.

Under S. 25 of the C. P. Municipalities Act,

it is the duty of the President of the municipal committee before using the municipal fund for payment of an increment to the Secretary to obtain the previous sanction of the Provincial

# C.P. MUNICIPALITIES ACT (1922), S. 31.

Government. The fact that the budget has been sanctioned by the Proxincial Covernment cannot be made use of by him to grant the mercunent, is quite clear from R. 237 of the C. P. Financial Rules, Vol. I. If the President orders the payment of the increment without such sauction, he is liable to the committee under S. 49 (1) of the Act for the loss caused thereby, unless he proves that he acted in good faith and with due care and attention. (Puranik, J.) BENT MAD-HAVA C. COMMISSIONER, JUBBULPORE DIVISION. I.L.R. (1945) Nag. 218 = 1945 N.L.J. 105 = A.I. 1942 N.L.J. 310. R. 1945 Nag. 111.

-Ss. 31 (2) and 23-' To convene' in S. 31 (2), meaning of -1ssue of notices signed by the Secretary - Presumption - Failure to convene by President-If curable by S. 23-Validity of mecting if affected. ONKARSA v. MUNICIPAL COMMI-TTFE OF NANDURA. [See Q.D. 1936-10 Vol. I. Col. 802.] 193 I.C. 473. 13 R.N. 327.

-S. 32 (2), Proviso-Such other day-Construction-If can mean the same day.

The words 'such other day' in the proviso to Sub-S. (2) to S. 32 of the C. P. Municipalities Act cannot mean the 'same day'. The word other is used in contrast to the same day-when the statute expressly uses the word 'other' it must, by necessary implication, exclude that day which is not other day. Hence an adjournment of a meeting to some later hour of the same day would not be in accordance with law and any business transacted by the meeting would not be at a properly constituted meeting. (Niyogi, I.) NOTIFIED AREA COMMITTEE, KOTA v. GOKUL BHAL 1942 N.L.J. 329.

S. 48 (2) -Applicability-Claim for refund of tax as illegally levied-I'ax purporting to be levied under powers conferred by Act.

If the tax purports to be levied in virtue of powers conterred by the C. P. Municipalities Act, the levy of the tax even though illegal is something purporting to be done under the Act, and S. 48 (2) of the Act applies to a claim for refund of the tax. S. 48 cannot be confined to torts. (Digby, I.) BHAGWANDAS V. MUNICIPAL COMMITTEE, YEOFMAL. 1945 N.L.J. 305=A.I. R. 1945 Nag. 197.

S. 48 (2)—Applicability—Disconnection of water supply—If continuing wrong—Suit to direct reconnection-Limitation.

Under the C. P. Municipal Act, the Municipal Committee is under no statutory duty to provide or supply water to a private house. Hence where they disconnect a private waterpipe which they in their discretion had formerly allowed the doctrine of continuing wrong giving rise to a cause of action from day to day can have no application. A pers n aggrieved by such an act must seek his remedy within the period prescribed by S. 48 (2) of the C. P. Municipalities Act. (Grille and Pollock, JJ.) DHONDBA LAXMAN KAIAR v. MUNICIPAL COMMITTE, NAGPUR. SECRETARY, I.L.R. (1943) Nag. 230=15 R.N. 132=203 I. C. 400=1942 N.L.J. 526=A.I.R. 1943 Nag. 95. -S. 66 (1)—Assessment of conservancy cess and water rate - Land held on lease from Municipality-Gross letting value-If to be taken into account. Sumatibal v. Municipal Committee, Nagpur. [See Q D. 1936-40 Vol, I, Col. 804.]

I.L.R. 1941 Nag. 330.

# C.P. MUNICIPALITIES ACT (1922), S. 83.

-S. 66 (1) (c) - Bicycle not kept though used within limits of Municipality-Liability to be taxed.

A bicycle not kept within the limits of the C. P. Municipality though used within such limits is not hable to be taxed because the tax on bicycles can only be levied under S. 66 (1) of the C. P. Municipalities Act on bicycles kept within the limits of the Municipality and no question of tax could arise in such a case. (Bose, J.) Shedicharanlate. The Secretary, M. C. Mandla.

-(as applied to Berar), S. 66 (1) (0)-Abplicability - Goods in transit through municipality

In the case of an oction tax goods subject to the tax must be those brought within the limits of the Municipality for sale consumption or use within those limits. But that is not enacted in the case of a terminal tax under S. 66 (1) (0) of the C. P. Municipalities Act, as applied to Berar, where "import" or "export" is the sole requisite for taxation. There is nothing in the phraseology of this section to suggest that it cannot apply to goods in transit through the Municipality, When goods are brought in from outside to Municipal limits simply for export from the terminus of those municipal limits they are, when so exported, exported from the limits of the municipality. The meaning of the word "export" or the word "exported" seems to be clear enough and in connection with a terminal tax they are related to traffic rather than origin. One has to look at the municipal limits from which the traffic proceeds, and not to the place where the goods were originally manufactured and from which they were first exported. (Digby. I.) BHAGWANDAS C. MUNICIPAL COMMITTEE, YEOMAL. 1945 N.L. J. 305 -A.I.R. 1945 Nag. 197.

-S. 67 (7) and (8)—Notification—Failure to mention sub-Cl. (7)-Failure to mention date from which tax was to come into effect-If affects validity of notification. ONKARSA v. MUNICIPAL COMMITTEE OF NANDURA, [See Q. D. 1936-40 Vol. 1, Col. 804.] 193 I.C. 473=13 R.N. 327.

-Ss. 71 and 76-Rr. 19, 20 and 21 of rules made under for assessment and collection of bicycle tax-If ultra vires.

The charge of 0-4-0 levied along with the recovery of cycle tax and in addition to it, is a tax and Rr. 20 and 21 framed by the Local Government in this behalf is ultra vires and inoperative. R. 19 is in direct contravention of S. 72 and it is therefore equally ultra vires and S. 72 and it is therefore equally ultra vives and of no effect (Niyogi, I) Vinayak v. Municipal Committee. Arola. I.L.R. (1941) Nag. 722=196 I.C. 578=14 R.N. 117=1941 N.L.J. 165=A.I.R. 1941 Nag. 232.

-S. 83 —Reference to High Caurt—Commissioner, if competent to make.

A Commissioner is competent to hear an appeal from a Deputy Commissioner and he must be deemed to have the same powers as are conferred on a Deputy Commissioner under S. 83 of the C. P. Municipalities Act. When a Deputy Commissioner is empowered by that section to make a reference to the High Court, a Commissioner would be equally entitled to make a reference to the High Court. (Niyogi, J.) NAGPUR ELECTRIC LIGHT AND POW R CO., LTD. v. NAGPUR MUNICIPAL COMMITTEE. I.L.R. (1941) Nag. 236=195 I.C.

C.P. MUNICIPALITIES ACT (1922), S. 83. 147=14 R.N. 39=1941 N.L.J. 137=A.I.R.

1941 Nag. 137.

—— S.83—Suit for refund of tax as illegally le 1ed—Jurisdiction of Civil Court—Question relating to construction of taxing notification.

A Civil Court has no jurisdiction to give relief on the ground that a tax is illegal, if the construction of the Act is not involved but only construction of the taxing notification. (Digby, J.) BHAGWANIAS V. MUNICIPAL COMMITTE, YEOTMAL. 1945 N.L.J. 305=A.I.R. 1945 Nag. 197.

sion, if lies against,

No appeal or application for revision lies to the Commissioner or the Provincial Government against an appellate order of the Deputy Commissioner under S. 83 (1) of the C. P. and Berar Municipal Act. (Binney, F.C.) MUNICIPAL COMMITTEE, AKOLA v. DHARSI GIGA BHAI. 1942 N.L. J. 221.

S. 84 (3)—Assessment list prepared in disregard of bye-laws—Jurisdiction of Civil

Court.

The disregard of its bye-laws by a Municipal Committee in the preparation of the assessment lists will not render ultra vires its approval of the assessment lists. If it is not shown that as a result of this irregularity of procedure any injustice is suffered, and the tax itself is a legal tax, the Civil Court will not upset the assessment lists as a whole especially in view of the adequate provisions for remedies under the C. P. Municipalities Act itself. (Digby, J.) MAHOMED NAZIR KHAN v. ELLICHPUR CITY MUNICIPAL COMMITTEE. I.L.R. (1943) Nag. 623=16 R.N. 58=208 I.C. 116=1943 N.L.J. 277=A.I.R. 1943 Nag. 224.

\_\_\_\_S. 84 (3) -Legality of assessment-Juris-

diction of Civil Court.

The C. P. Municipalities Act as applied to Berar is selfcontained with respect to the remedies available to a person regarding assessment or levy or refusal to refund any tax under the Act. Ss. 83 to 85 provide such remedies and they clearly bar the jurisdiction of a Civil Court to go into these questions. If an assessee is of the view that the scavenging tax can be assessed on him only if service is rendered and that the Municipal Committee is neglecting the rendition of service his remedy is not to go to a Civil Court but to resort to the other ways of dealing with the Municipality which are provided for in the Act. (Bose and Puranik, JJ.) VIBARBHA MILLS, BEPAR v MUNICIPAL COMMITTEE ELICH-PUR. I.L.R. (1943) Nag. 525=209 I.C. 399=16 R.N. 120=1943 N.L.J. 377=A.I.R. 1943 Nag 277.

—S. 85—Rules framed under—Applicability—Application for refund of sums recovered as tax. Pamial v. Municipal Committee. Nagrur [See Q. D. 1936.'40 Vol. I, Col. 807.] I.L.R. (1941) Nag. 471.

Ss. 97 and 98—Interpretation of byelaw by sub-committee-Subsequent meeting of Sub-Com-

mittee-If bound by.

An interpretation of a bye-law in a particular way is not absolutely binding on the subsequent meetings of the Sub-Committee. (Nivogi and Clark, JJ.) CAWASHAH BOMANJI v. PRAFULLA

C. P. MUNICIPALITIES ACT (1922), S. 179

NATH. I.L.R. (1941) Nag. 266=1941 N.L.J. 211=19 I.C. 570=14 R.N. 175=A.I.R. 1941 Nag. 364.

Nag. 364.
——Ss 97 and 98—Building bye-laws under—
Bye-law 10, proviso 1—"area"—Meaning—Resolution making the bye-law applicable to bungalow

area-Validity.

The word 'area' occurring in proviso 1 to byelaw 10 framed under Ss. 97 and 98 of the Municipal Act has reference to the plot and not to that part of the Civil Station which is popularly known as a 'Bungalow area.' The plain meaning is that if the committee decides to give permission to erect Bungalows in plots less than one acre it should do so on the conditions laid down in that proviso, but 't makes it clear that the committee has no power to permit a building on any plot less than 50' x 50'. A resolution of the Sub-Committee declaring that bye-law 10 applied to the whole of the Civil Station area, and that proviso I to that bye-law would apply to the settlements other than the bungalow area was ultra vives and of no effect since its effect was to alter the bye-law. (Niyogi and Clarke, JJ.) CAWASHAH BOMANJI V. PRAFULLA NATH. I.L. R. (1941) Nag. 266=1941 N.L.J. 211=197 I. C. 570=14 R.N. 175=A.I.R. 1941 Nag. 364.

——S. 133 (1) (e)—Licence—When necessary,—Flour mill worked by electric motor—If requi-

res license.

Under S. 133 (1) (e) of the C. P. Municipalities Act, it is obviously not intended that any manufactory should require a licence whether offensive or unwholesome smells noises or smoke arises from it or not. It cannot be said that no flour mill can be of a nature which requires a licence under this section, but this can be said that if a flour mill is to be licensable under this section it must be one from which offensive or unwholesome smells, noises or smoke arises. A flour mill worked by a small electric motor does not require licence. (Clarke, J.) MUNICIPAL COMMITTEE, BILASPUR v. WAMANRAO VINAYAKMO. I.L.R. (1942) Nag. 269=197 I.C. 300=14 R.N. 157=1941 N.L.J. 403=A.I.R. 1941 Nag. 292.

Ss. 175(i) and 176(i)—Rule-making powers—If includes power to impose pecuniary burdens. Neither S. 175 (1) nor S. 176 (1) of the C. P. Municipalities Act confers on the Local Government expressly or by some necessary implication the power to impose pecuniary burdens for any public purpose. (Niyogi, J.) VINAYAK v. MUNICIPAL COMMITTE AKOIA I.L.R. (1941) Nag. 722=196 I.C. 578=14 R.N 117=1941 N. L.J. 165=A.I.R. 1941 Nag. 232.

— S. 178 — Bye-laws— License fee payable under—Power of Municipal Committee to waive.

The bye-laws can only be varied or rescinded in the same way and subject to the same conditions as they were originally made. If a bye-law which has come into force provides that no person should sell milk without paying a license fee, it is not competent to the Municipal Committee to waive the license fee for a particular period. (Pollock, J.) COMMISSIONER CHHAT-TISGARH DIVISION V. MURLIDHAR. I.L.R. (1943) Nag. 592=210 I.C. 42=1943 N.L.J. 404=A.I.R. 1943 Nag. 283.

S. 179 (1) (b-1)—Bye law prohibiting cancellation of purchase on the ground of want of

inspection or goods not being up to sample-l'alidity.

A bye-law framed under C. P. Municipalities Act, S. 179 (1) (b-1) was as follows:—"Buyers shall satisfy themselves as to the quality of any commodities before they are put to auction. They shall not be allowed to cancel any purchase on the ground that they had not inspected the commodities or commodities were not up to sample,

Held, that the bye-law in no way went against the general law of contract or the provisions of the Sale of Goods Act, but on the contrary emphasized them. Further, such a provision did not hamper trade, but on the contrary would help trade by introducing certainty into dealings and making people careful and avoiding subsequent tutile disputes. (Grille and Gruer, II.) Реоуполад. Government, С. Р. г. Nemichand Венакила. I.L.R. (1941) Nag. 624-:195 I.C. 369--14 R.N. 51--42 Cr.L.J. 732--1941 N.L.J. 201=A.I.R. 1941 Nag. 203.

-S. 179 (1) (b) -Bye-law regulating use of markets-Power of Municipal Committee-

Extent.

Unier S. 179 (1) (h-1) of the C. P. Municipalities Act, the power of the Municipal Committee to trame bye-laws for regulating the use of markets is not confined merely to the prevention of nuisance or the maintenance of order but extends to the imposition of restrictions on the trade itself provided they do not have the effect of preventing or prohibiting it. This power is supplementary to such rights as it is entitled to exercise in the capacity of a proprietor under the law of the land. Regulations as to the opening and closing of the business in the market the registration of commercial buyers, licensing of weighment measurers and hamals, adoption of the mode of public auction in cases of sales by brokers, the supervision and control of the dealers and the modes of dealing would be illegal on t e trade or business carried on within the market as indicated in S. 27 of the Contract Act, (Grille and Niyoyi, J.) MUNICIPAL COMMITTEE, KHURAI V. KALURAM HIRALAL. I.L.R. (1943) Nag. 740=218 I.C. 161=18 R.N. 1=1943 N. L.J. 490=A.I.R. 1944 Nag. 73.

-(as applied to Berar), S. 179 (g)—Rules under-R. 1-Words "plying for hire within under—R. 1—Words plying for and limits of Amraoti Town Municipality"—Interpretation. Amrutlal v. President, Town Municipal Committee, Amraoti. [See Q. I). 1936-'40 Vol. I Col. 808]. I.L.R. (1941) Nag.

-S. 246 (2)—Money due under—Injunction restraining Municipality from recovering-If can be granted. See Specific Relief Act, Ss. 54 and 56 (i). I.L.R. (1945) Nag. 670.

CENTRAL PROVINCES PATWARI RULES, R. 2 (g) (ii)—"Concerned in money-lending business"—Meaning of.

The expression "Concerned in any money-The expression Concerned in any money-lending business" in R. 2 (g) (ii) of the l'atwari Rules means interested in any money-lending business. (Bohde, I.) INDAR SINGH V. RAMNARAYAN, I.L.R. (1944) Nag. 645=1944 N.L. J. 448=A.I.R. 1944 Nag. 325.

CENTRAL PROVINCES AND BERAR DOLLGE PEGLUATIONS P. 266.

C.P. MUNICIPALITIES ACT (1922), S. 179., C. P. REDUCTION OF INTEREST ACT (1936), S. 3.

dismissal by Inspector-General of Police with

retrospective effect-l'alidity.

The Inspector-General of Police is not authorised to pass an order of dismissal with retrospective effect against a Sub-Inspector of Police. Such an order is contrary to R. 206. Note (i) of C. P. and Berar Police Regulations, and is void and moperative. (Niyon and Digby, II), Hifzui. Qadeer v. Provincial Government CP. 

tor-Order forfeiting arrears of pay of Sub-Inspector-Legality.

The word "men" in R. 258 of the C.P. and Berar Police Regulations, does not include a Sub-Inspector of Police. Consequently the arrears of pay of a Sub-Inspector who is dismissed from Service, cannot be fortested under this rule. (Niyogi and Digby, JJ.) HIFZUL QADEER v. PROVINCIAL GOVERNMENT, C. P. AND BERAR. I.L.R. (1945) Nag. 469—1945 N.L.J. 216—A.I.R. 1945 Nag. 190.

CENTRAL PROVINCES (AND BERAR) PROHIBITION ACT (1938), S. 3 (h)-Liquor --- If includes methylated spirit.

The definition of liquor in S. 3 (h) of the C.P. and Berar Prohibition Act as including all liquid containing alcohol is clearly wide enough to include methylated spirit. (Poltock, J.) FIDA HUSSAIN T. EMPEROR. 1942 N.L.J. 81.

-S. 7 - Scope of.

S. 7 of the C. P. and Berar Prohibition Act merely provides punishment for altering or attempting to alter denatured spirit, and this offence may be committed in addition to possessing such spirit. (Pollack, J.) Fina Hussam v. Emperor. 1942 N.L.J. 81. CENTRAL PROVINCES REDUCTIONOF

INTEREST ACT (XXXII OF 1936)-Applicability-Loan, prior to the Act - Judgment in suit on the loan, after the withdrowal of the Act.

Where a loan was before the passing of the C.P. Reduction of Interest Act and the Act was withdrawn before the date of judgment in a suit on the loan, the Act cannot be applied. When the prohibition contained in the Act was withdrawn the original rights of the parties revived, and Courts cannot enforce prohibitions withdrawn and not in existence at the time of judgment. (Bose, J.) SITARAM SHRAWAN V. BAJYA PARNYA. I.L.R. (1942) Nag. 458:=14 R.N. 49 = 195 I. C., 463=1941 N.L.J. 194:=A.I.R. 1941 Nag. 177.

-Applicabitity-Preceedings pending at the time of expiry of the Act.

The effect of expiry of a statute is that it is no longer in force and in the absence of a provision to the contrary, no proceedings can be taken on it, and proceedings already commenced determine ipso facto. Hence an applicant for relief under C. P. Reduction of Interest Act though he had filed his application when the Act was in force could not be given any relief if the appli-cation is decided after the expiry of the Act (Bose, J.) JASRUP BAIJNATH v. SETH PARAMANAND DAS. I.L.R. (1942) Nag. 764=202 I.C. 465=15 R.N. 83=1942 N.L.J. 400=A.I.R. 1942 Nag. 122

S. 3-Applicability-Renewal in 1933 of POLICE REGULATIONS, R. 266-Order of bond executed in 1930. SHEOSHANKER SAHAI

(II OF 1922), S. 3. v. Surajmal. [See Q. D. 1936-'40 Vol. I Col. 809.] 193 I.C. 623=13 R.N. 341.

-S. 3-Duty of court in administering the

The Court would not be justified in adjudicating on the rights of the parties on a hypothetical case simply because that would be favourable to the class of persons for whose relief the special law was enacted. The Courts are bound to apply the law to the facts admitted or proved and not assume or invent facts to give the benefit of the law to one or the other party. Where the plaintiff claimed compound interest and the rate at which he could get compound interest under the law was also favourable to the debtor, the Court awarded the kind of interest asked for by the creditor. (Niyogi, J) NARAYANDAS v. AMRUT WAMAN. 1941 N.L.J. 672.

——S. 3—Mortgage in satisfaction of prior debts—Suit on—Reopening of old transactions,

if permissible.
Where a mortgage sued on was executed in satisfaction of certain prior debts evidenced by other deeds, the Court cannot go behind the suit mortgage and the C. P. Reduction of Interest Act could only be applied from the date of the debt in suit because that is the only liability now owing by the debtor to his creditors. (Bose, J.) PANDURANG v. RAM CHANDRA. 1941 N.L. J. 669. -S. 3 (1)—Nature of interest if intended to be affected by the Act-Agreement of parties, if

the deciding factor.

The Reduction of Interest Act only contemplates a reduction in the rate of interest and not any change in the nature of interest. when parties have agreed to compound interest, the rate allowed in the shedule for compound interest can be awarded, while in cases where parties have agreed to simple interest, the rate allowed in the schedule for simple interest can be awarded, but it is not permissible to change from one side of the schedule to the other because one works out a higher amount than the other (Stone, C. J. and Clarke, J.) Abdul Hussain v. Ratanlal. 1942 N.L. J. 42. —S. 3 (1)—Nature of interest—Determining

factor.

The nature of interest to be awarded under the C. P. Reduction of Interest Act is to be determined according to the agreement between the parties. Hence when parties have agreed to compound interest, th rate allowed in the schedule for compound interest can be awarded. (Grille, C. J and Puranik J) YADARAO v. RAM RAO. I.L.R. (1943) Nag. 555=206 I.C. 504=15 R.N. 266=1943 N.L.J. 220=A,I.R. 1943 Nag. 240.

-S. 3 (1)—Time during which the Act applies.

It is clear from the wording of S. 3 (1) of the Reduction of Interest Act that the courts have no power to reduce interest beyond the period between 1st January, 1932 and the date fixed by notification (i.e.) 31st December, 1939. (Stone, C.J. and Bose, J.) DAU BALWANT SINGH 7.

CHHATAR SINGH. 1942 N.L.J. 47.

S. 3 (1) and (3)—Limit to power of appel-

late Court to grant relief.

An appellate Court is a Court which is intended date when they were passed. Where a decree scheme framed by the Debt Relief Court for the to put right decrees which were wrong at the

C. P. REDUCTION OF INTEREST ACT | C.P. RELIEF OF INDEBTED. ACT(1939),

was right when it was passed it is sub-S. (3) of S. 3 that applies and not sub-S. (1) of S. 3 of the C. P. Reduction of Interest Act According to that sub-section the application would have to be made to the lower Court and when the Act has expired such a course is useless. The appellate Court can correct the decree and give relief only 

- Ss. 2 (b) and 6 (3)—Mortgage by conditional sale if debt-Such mortgage, if ceases to be debt after preliminary decree for foreclosure— Notice staying proceedings after such decree—If

may be issued by Debt Relief Court.

A mortgage by a conditional sale implies a debt. In such a mortgage, the absence of a personal covenant to pay does not absolve the mortgagor from the obligation to pay or prevent the mortgagee from enforcing the payment. A suit for foreclosure, is in substance one for recovery of money. This is manifestly because the debt subsists in the mortgage. A fortiori this principle must apply to those transactions of mortgage, such as lohan jahan which are not even couched in the form of a sale but are primarily those of mortgages which are covenanted to become irredeemable on default in payment on the stipulated date. A mortgage by conditional sale does rot cease to be a debt within the meaning of S. 2 (d) of the C. P. Relief of Indebtedness Act even after a preliminary decree for foreclosure is passed. A preliminary decree for foreclosure is primarily a decree for payment of money in terms of O. 34, R. 2, C. P. Code and it only seeks to give effect to the contractual obligation. The mere passing of such a decree does not interrupt the relation of debtor and creditor. So far as the judgment-debtor's liability to pay under the decree is concerned, there is no difference between a decree for sale and a decree for foreclosure. It follows therefore, that the Debt Relief Court has jurisdiction to issue a notice under S. 6 (3) of the Act to the Civil Court staying the proceedings for making the decree final, and the Civil Court cannot question the validity of that notice. 1942 N.L.J. 113 over-ruled. (Grille, C. J. Niyogi and Pollock, IJ.)
RUKHMABAI V. SHAMLAL. I.L.R. (1944) Nag. 568=1944 N.L.J. 357=A.I.R. 1944 Nag. 289 (F.B.).

-S. 2 (d)—'Debt'—If includes claim on promissory note.

As a Provincial Legislature has no power to legislate with respect to a claim due on a promissory note, and as there is a general presumption that a Legislature does not intend to exceed its jurisdiction, the word "debt," though defined in large and comprehensive terms in S. 2 (d) of the Central Provinces and Berar Relief of Indehtedness Act, should be interpreted to exclude a claim due on a promissory note. Accordingly the Debt Relief Court has no power to determine a claim due on a promissory note and the juris-diction of the Civil Court is not ousted by any

C.P. RELIEF OF INDEBT. ACT 1939), | C.P. RELIEF OF INDEBT. ACT (1939),

(Pose and Sen, IJ.) payment of such debt. 1945 N.L.J. 456. BALMUKUND T. AMBADAS

-Ss 5 (1) and 6-Suit for specific performance of contract to sell land-li can be stayed on defendant's application for relief under Relief of Indebtedness Act-Liability of defendant if a debt.

A relief for specific performance of a contract to sell is not in respect of any liability that can be said to be 'owing' and the prayer that a defendant may be compelled to execute a sale deed can in no sense of the term be described as a 'debt' within the meaning of the definition of the word in the Relief of Indebtedness Act. As a regards the alternative relief of compensation that is not yet 'owing'. It may never become due because the Court may decree specific performance itself. Hence there is no debt' in respect of that relief also. It follows that a suit for specific performance of an agreement to sell land cannot be staved under the Act because the defendant is not a 'debtor' under that Act. (Bose, J.) Debi Prasad v. Lakhmichand. 1942

N.L.J. 460.

——Ss. 6 and 23—Scope of Stry of pending proceedings in Civil Court—Necessity of notice under S. 6 (3)—Mere filing of application to Debt

Relief Court, not sufficient.

Ss. 6 and 23 of C. P. and Berar Relief of Indebtedness Act appear to overlap somewhat and [ the two sections must be read so as to be consistent with each other. Pending proceedings in a Civil Court will not be stayed merely because an application has been made to a Debt Relief Court. There must be a notice issued to the Civil Court announcing the filing of such an application.

(Pollock, J.) DAMRODIAL v. GOKULPRASAD. I.

L.R. (1942) Nag. 675=200 I.C. 14=14 R.N.

324=1942 N.L.J. 12=A.I.R. 1942 Nag. 78.

-S. 6 (1) and (3)—Notice of application under the Act served after sale-Stay of confirmation-Proceedings for confirmation if proceed-

ings for the recovery of the debt.

A notice of application made under sub-S. (1) of S. 6 of the C. P. and Berar Relief of Indebtedness Act does not operate to stay the confirmation of a sale of the judgment-debtor's property in which the bid was accepted before the notice of the application was given for this reason that proceedings for confirmation cannot be said to be proceedings for the recovery of the debt. (Burton, F. C.) RAMCHANDRA v. PANDURANG. 1942 N.L.J. 59.

S. 6 (3)—Application under the Act by some only of defendants in mortgage suit—Stay

as against them only-Legality.

Where only some of the defendants in a mortgage suit apply under S. 6 of the C. P. Relief of Indebtedness Act and a notice is sent to the Civil Court under S. 6 (3) of the Act, inasmuch as the mortgage is one and indivisible, the proceedings have to be stayed as against all the defendants and not as against the particular applicant defendants only. (Clarke I.) KULESHWAR PRASAD v. DWARKANATH I.L.R. (1942) Nag. 577=199 I.C. 453=14 R.N. 280=1941 N.L.J. 391=A.I. R. 1941 Nag. 268.

father's insolvency-Son's application under the the Collector will automatically be suspended,

S 6.

Act-Sale in spite of notice under S.6(3)-Validity.

S. 0 (3) of the C. P. Relief of Indebtedness Act is an enactment t at takes away jurisdiction from the ordinary Courts and must be construed strictly. The proceedings referred to therein must mean proceedings against a person who has applied to the Debt Relief Court as made clear in the amendment. Hence where an Insolvency Court sells the joint family property on the insolvency of the father, though the sons applied to the Debt Relief Court, and notice of it was given to the Insolvency Court, the latter Court was not obliged to stay proceedings and the sale in spite of the notice is quite valid. (Pollock, J.) VINAYAR v. DITONDO. 1942 N.L.J. 36.

----S 6 (3)-Duty of Civil Court on receipt of notice-Question as to maintainability of applica-

tion for relief if can be gone into.

When notice is received by a Civil Court under S. 6 (3) of the C. P. Relief of Indebtedness Act the Civil Court must stay proceedings and leave it to the parties to raise the question whether the application lies to the Debt Relief Court. It is not for the Civil Court to decide whether the application lies and its jurisdiction to do so is barred by S 23 of that Act (Pallock, I.) GULAM ALT v. ABBUL HUSSAIN. 1942 N.L.J. 52.

-Ss. 6 (3) and 17--Jurisdiction of Debt Relief Courts in case of mortgage claims—Proceedings for passing final decree for foreclosure.

if can be stayed under S. 6 (3).

Reading the relevant provisions of the C. P. Relief of Indebtedness Act as a whole it is clear that mortgages were intended to fall within the purview of the Act and are intended to be included in the definition of 'debt'. But though such claims are so included, a distinction is drawn between the position before decree and after decree. S. 17 of the Act which deals with mortgage decrees, restricts the jurisdiction of the Debt Relief Court after decree in a mortgage suit to cases in which a decree for payment of money on the mortgage has been passed'. Hence, where a preliminary decree for foreclosure has been passed, there is no decree as contemplated by S. 17 and it follows that proceedings in the Civil Court for making such a decree final cannot be stayed under S. 6.3) of the C. P. Relief of Indebtedness Act. (Stone. C.J. and Bose, J.)
DAN BALWANT SINGH V. MT. BINDARAL I.L.R. (1942) Nag. 357=200 I.C. 709=15 R.N. 13=
1942 N.L. J. 113=A.I.R. 1942 Nag. 88.

-S. 6 (3) -Notice received by Civil Court after transfer of decree to Collector for execution—Civil Court not intimating Collector—Sale

held by Collector-If valid.

After a Civil Court which passed a decree sends it for execution to the Collector, the only channel through which the Debt Relief Court can act to stay the proceedings before the Collector is the Civil Court which passed the decree. If the Debt Relief Court sends a notice under S. 6 (3) of the Relief of Indebtedness Act to the Civil Court, the effect of that notice is to suspend the Civil Court's power in respect of the execution of the decree and to deprive the decree of its force whether or not the Civil S. 6 (3) — Construction — Proceedings Court sends an intimation acting on the notice to -Meaning—Sale of joint family property on the Collector. The execution proceedings before

and the Collector's ignorance of the notice cannot prevent the notice from taking its legal effect. Consequently a sale held by the Collector in pursuance of the decree in ignorance of the notice issued to the Civil Court is not merely an irregularity but a nullity. The judgment-debtor is under no legal obligation to move the Civil Court to send a communication to the Collector. It is incumbent on the Civil Court to act suo motu and stop further proceedings before the Collector. In omitting to do so the Civil Court commits an error of law which cannot prejudice the right of the judgment-debtor. Further, the decree-holder being a party to the proceeding before the Debt Relief Court is bound by the settlement made by that Court and therefore, loses his right to take advantage of the sale. (Niyogi, I.) KRISHNA DEWAJI V. MITHMAL. I. L.R. (1944) Nag. 468=219 I.C. 415=1944 N. L.J. 90=A.I.R. 1944 Nag 195.
——Ss. 6 (3) and 23—Position of Collector to

whom decree is transferred for execution-Receipt of notice from Debt Relief Court-Proper procedure to be followed-Relative scope of Ss. 6

(3) and 23 of the Act.

The legal position, when a decree is transferred to a Collector for execution is that he is acting under the orders of the Civil Court and is only bound to comply with an order from that Court If he receives intimation of an application to a Debt Relief Court which is likely to lead to a stay order from the Civil Court, he should grant a suitable adjournment to enable the judgmentdebtor to obtain a stay order. But the Collector would not be acting beyond his jurtsdiction in refusing to grant such an adjournment. Ss. 6 (3) and 23 do not overlap and S. 23 only bars the assumption of jurisdiction regarding a matter which is being dealt with or has already been dealt with by a Debt Relief Court. But in any case S. 23 only applies to Civil Courts and the Collector is not a Court. (Binney, F C.) CHINTAMAN RAMJI v. BALKRISHNA. 1942 N.L. J. 167.

S. 6 (3)—Stay in pursuance of notice under—Remedy of aggrieved party. See C. P. CODE, S. 115 AND C. P. RELIEF OF INDESTEDNESS ACT, (1939) S. 6 (3)—Stay of execution—Scope—

—S. 6 (3)—Stay of execution—Scope— Decree against agriculturist principal debtors and non-agriculturist surety—Agriculturist debtors seeking debt relief—Decree against surety also, if should be stayed.

Where a money decree is passed against certain agriculturist principal debtors and against a non-agriculturist surety and all the former only apply for relief to the Debt Relief Court, when notice under S. 6(3) of the C. P Relief of Indebtedness Act is sent to the executing Court the decree against the non-applying surety also should be stayed. The scheme of the Act is not to allow a man not entitled by law to recover the full amount of his debt from his debtors to nevertheless evade the law by being able to execute a decree for the full amount against the surety. (Grille, J.) RAJFSHWAR VISVANATH v.
MADHO MORESHWAR. 1942 N.L.J. 391.
—Ss. 6 (3) and 23—Stay of proceeding in

Civil Court-Notice under S. 6 (3) necessity of.

C.P. RELIEF OF INDEBT. ACT 1939), C.P. RELIEF OF INDEBT. ACT 1939), S. 6.

Court are not to be stayed until the Civil Court has received notice under that section. Pending proceedings in a Civil Court will not be staved merely because an application has been made to a Debt Relief Court. Where though a defendant in a mortgage suit had applied under the Act during the pendency of the suit but no notice was issued under S. 6 (3) to the Civil Court and a final decree was passed it could not be set aside on the ground of the pendency of proceedings under the C.P. Relief of Indebtedness Act. (Pollock, J.) DAMOPAR v GOKUL PRASAD. I.L. R. (1942) Nag. 675=200 I.C. 14=14 R.N. 324=1942 N.L. J. 12=A.I.R. 1942 Nag. 78.

—S. 8—Defendant-debtor making payment to plaintiff-Latter appropriating it towards entire debt and balance towards rent of holding held by him—Defendant applying to Debt Relief Court-Plaintiff not appearing thinking that debt has been satisfied-Subsequent rent suit by plaintiff-Court appropriating payment made by defendant entirely towards rent in suit-Suit by plaintiff thereupon to recover debt-If maintain-

The defendant who owed a debt under a chitti to the plaintiff made a payment after holding himself out as liable to pay the debt. The plaintiff credited a part of it in full satisfaction of the debt and the balance only towards the rent due in respect of the holding held by the defen-dant. The defendant applied to the Debt Relief Court for conciliation of this debt and the plaintiff did not appear in spite of notice thinking that his debt had been discharged by the appropriation made by him, with the result that the debt was discharged. The plaintiff thereafter instituted a suit for recovery of rents and the defendant pleaded that he was entitled to have a credit for the entire amount paid by him in the rent suit. The first Court rejected this plea but the appellate Court held that under S. 75 of the Central Provinces Tenancy Act the landlord was bound to appropriate the payment towards rent only and not towards any other debt. Finding that the amount which he had appropriated towards the chitti was appropriated towards rent, the plaintiff instituted a suit for the recovery of the amount due on the chitti. It was contended by the defendant that there was an order under S. 8 of the Relief of Indebtedness Act discharging the debt which was sued for and therefore the suit was not tenable. Overruling that contention,

Held, that though the suit was based on the chitti, it was really a suit based on a new cause of action that accrued to the plaintiff because of the appropriation allowed by the appellate Court in the rent suit, and that the case was not one of revival of a debt. (Puranik. J.) CHITAR v. DATTATRAYARAO. 1945 N.L. J. 503.

-Ss. 8 (1) and 9 (2)—Debt discharged for creditor's failure to submit statement-Debtor's application subsequently dismissed on ground that he is able to pay—Discharged debt, if revives.

A debt discharged under S. 8 (1) of the Relief of Indebtedness Act for failure of the creditor to submit statement, must still be deemed to be discharged when the debtors' application is subsequently dismissed under S. 9 (2) of the Act on Indebtedness Act, proceedings before the Civil When the legislature has enacted that a debt

C. P. RELIEF OF INDEBT. ACT (1939), C.P. RELIEF OF INDEBT. ACT (1939),

shall be deemed to be discharged on every occasion it is impossible to import any limitation on these wor's, and unless and until fraud is proved, which is not proved merely by a finding that the debtor was able to pay his debts, the debt must be deemed to be discharged. (Digby, J.) Hib the Bansingh v. Kaloo Singh. I.L.R. (1944) Nag. 416 -1944 N.L.J. 277 =: A.I.R. 1944 Nag. 283.

S. 10 (2)—Whether ultra vires—Government of India Act, Ss. 107 (2) and 109 (2).

S. 10 (2) of the C. P. and Berar Relief of Indebtedness Act is intra vires of the Provincial Legislature as the matter falls within Item No. 10 in the concurrent list in Sch. 7 to Government of India Act. Although the Act was not reserved for the consideration of the Governor-General as contemplated by S. 107 (2) of the Government of India Act, it was validated by receiving the assent of the Governor-General under S. 109 (2) of that Act. (Bose, J.) BAL-MUKUND JAINARAYAN V. GADI NARAYAN, I.L.R. (1943) Nag. 546=1943 N.L.J. 408=210 I.C. 352=16 R.N. 155=A.I.R. 1943 Nag. 312. -S. 13 (3)—Instalments in arrears—Rele-

vant date. It is not clear whether S. 13 (3) of the Relief of Indebtedness Act means that instalments must be in arrears when the creditor applies to the Deputy Commissioner or when the Deputy Commissioner passes his order, but it appears that

the state of affairs on the date of the application is what we have to look to. (Pollock, J.) VITHM. RANGRAO & LAXMAN. 1945 N.L.J. 462.

-S. 13 (3)-Judgment debtor applying to Debt Relief Court after preliminary decree for foreclosure—Instalments not paid—Order of Deputy Commissioner that balance is recoverable as if final decree passed-Effect of-Right of decree-holder to be placed in possession of property.

After a preliminary decree for foreclosure was passed, the judgment-debtor applied to the Debt Relief Court which made the decretal amount repayable by instalments. The first two instalments were not paid and the Deputy Commissioner passed an order under S. 13 (3) of the Relief of Indebtedness Act that the balance remaining due should be recoverable as if a final

decree had been passed.

Held, that the order had the effect of a final decree for foreclosure and the decree-holder was entitled to be placed in possession of the mortgaged property. (Pollock, J.) VITHAL RANGRAO V. LAXMAN. 1945 N.L.J. 462.

-S. 13 (3)—Order of Deputy Commissioner

An order by a Deputy Commissioner under S. 13 (3) of the Relief of Indebtedness Act is not appealable to a higher Revenue Court. (Binney F.C.) MAROTI SATWAJI v. GOVIND WAMAN, 1943 N.L.J. 567.

S. 13 (3) and 15—Order of Deputy Commissioner—Appeal—Revision. See C. P. DEBT CONCILIATION ACT, S. 13 (3). 1944 N.L. J. 537.
—S. 15 (2) and C. P. Land Revenue Act (1917). S 39—Order of Deputy Commissioner under S. 15 (2) of Relief of Indebtedness Act—Abbeal—Revision — Computers.

Appeal—Revision—Competency.
Where an order is passed under S. 15 (2) of

S. 23.

Deputy Commissioner there is no appeal against it as the Act makes no provision for appeals and appellate powers. The Deputy Commissi ner is given powers under S. 15 as persona designata and not as a Revenue Officer under the Revenue Act. Hence his order cannot be revised under S. 39 of the Land Revenue Act because the only orders revisable under that section are those of a subordinate officer passed in his capacity as a 

sed on ground that he is able to pay debts-Ques-

tion of jurisdiction, if arises.

If the Debt Relief Court decides that the debtor is able to pay his debts and dismisses his application, it cannot be said that any question of jurisdiction has arisen, and it is impossible to hold the view that owing to some lack of jurisdiction, which has existed, any part of the proceedings has become a nullity or any stage of the proceedings was vitiated and rendered null by jurisdictional defect. (Digby, L.) HIRAJEE BANSINGH v. KALOO SINGH LL.R (1944) Nag. 416. :1944 N.L.J. 277 .: A.I.R. 1944 Nag. 283. -S. 20-District Court acting under-Power to make reference to High Court. See C.P. Code, S. 113 and O. 46, R. 1 and C. P. Relief of INDERTEDNESS ACT, S. 20. 1941 N.L.J. 485.
S. 20—Order of District Court under-

Revision by High Court-Competency.

The High Court has no power to hear revision applications from decisions of the District Courts made under S 20 of the C.P. Relief of Indebtedness Act. (Stone, C.J. and Bose, I.) HIRALAL ADKUT. PARASRAMSAO. I.L.R. (1941) Nag. 581:=1941 N.L.J. 480.=198 I.C. 155=14 R.N. 206. -A.I.R. 1942 Nag. 5.

S. 23-Applicability-Jurisdiction of civil Court to execute award under Co-operative

Societies elet-1 | barred.

The jurisdiction of the Civil Courts in the matter of executing an award (having the force of a decree under the provisions of the Co-operative Societies Act) whereby a liability is created and the sum becomes due to a society registered under the Co-operative Societies Act is not barred by S. 23 of C. P. Relief of Indebtedness Act. Owing to the operation of Ss. 4 and 4 (b) of that Act, S. 26 of the Act has no application to such a liability. Unless a matter is transferred to the Debt Relief Court under S. 26 the matter is not "pending before a Debt Relief Court."
(Stone, C.J. and Bose, J.) CO-OPERATIVE SOCIETY
No. 2, JAIPUR v. LAXMANRAO. 1942 N L.J. 38.

S. 23—Final mortgage decree passed against

two persons-One of them obtaining reduction of debt by Debt Relief Court-Decree-holder's right

to execute decree against other.

Where a final decree for sale of a mortgaged property was passed against two judgmentdebtors having an equal interest in the property and one of them obtained a reduction of the debt by the Debt Relief Court while the other was not entitled to apply to that Court,

Held, that the decree-holder was entitled to execute his decree to the extent of half the decretal amount against the other judgment-debtor in respect of the half of the mortgaged property owned by him on condition that he the C. P. Relief of Indebtedness Act by the would realise only half of the amount settled by

the Debt Relief Court from the judgment-debtor whose debt was scaled down. The decision scaling down the debt is not binding on the decree-holder as regards the liability of the other judgment-debtor, although he was a party to the proceedings in his capacity of a subsequent mortgagee of the share of the co-judgment-debtor. (Puranik and Digby, JI.) RADHAKISANDAS v. DWAFKADAS I L R (1945) Nag. 232=219 I.C. 248=1944 N.L. J. 240=A I.R. 1944 Nag. 241.

-S. 23-Jurisdiction of Civil Court-When barred.

S. 23, C. P. Relief of Indebtedness Act bars the jurisdiction of the Civil Courts only in respect of any matter lawfully pending before a Deht Relief Court. (Stone, C.J. and Bose, J.) DAU BALWANT SINGH v MT. BINDABAI. I.L.R (1942) Nag. 357 =200 I.C. 709=15 R.N. 13=1942 N.L.J. 113= A.I.R. 1942 Nag. 88,

- S. 23-Scope and applicability of. See C P. Relief of Indebtedness Act, Ss. 6 (3) and 23.

1942 N.L.J. 167.

— S. 24—Debt—Meaning of.
The word "debt" as used in S. 24 of the C. P. Relief of Indebtedness Act means the debt of the person who has made an application to the Debt Relief Court. (Puranik, J.) BALKRISHNA V ATMARAM. 1944 N.L.J. 271=A.I.R. 1944 Nag. 277.

-S. 24-Judgment-debtor applying to Debt Relief Court-Exclusion of time as against his

surety.

If a judgment-debtor applies for relief under the C. P. Relief of Indebtedness Act, the time during which the proceeding is pending before the Debt Relief Court cannot be excluded in computing the period of limitation for an execution application as against his surety who is not a party to the proceeding. There is nothing in law to prevent the decree-holder from applying for execution against the surety during the pendency of the proceeding before the Debt Relief Court. (Puranik, J.) BALKRISHNA v. ATMARAM. 1944 N.L. J. 271=A.I.R. 1944 Nag. 277. —— Ss 24, 26 and 26-A - Proceedings transfer-

red from D. C. Board to D. R. Court-Period during which they are pending before D. R. Court

-If may be excluded.

Proceedings transferred from the D, C. Board to the D. R. Court under S. 26, proviso, of C. P. Relief of Indebtedness Act, remain pending in that Court until they are terminated in accordance with S. 26-A (2) of the Act, irrespective of whether the Court has jurisdiction to deal with those proceedings or not. The jurisdiction of the Civil Courts to deal with the matter pending before that Court is barred by S. 23 of the Act, as is made clear in S. 26-A (3). Therefore, the time which intervenes between the date when the D. R Court receives the proceedings from the Board, and the date when it rightly or wrongly, terminates the proceedings, should be excluded from the computation of the period of Imitation for any suit as required by S. 24 of the Act. (Niyogi, J.) MADHORAO v. JASHODABAI I.L.R. (1945) Nag. 664=1945 N.L.J. 358=A I.R. 1945 Nag. 292.

-S. 26, proviso-"All proceedings"- If include creditor's application.

The words "all proceedings" in the proviso to S. 26 of the C. P. Relief of Indebtedness Act include creditors' as well as debtors' applications

## C. P. & B. REL. OF IND. ACT (1939), S 23. C. P. REVI. OF L. R. OF EST. ACT (1939).

to the Debt Conciliation Board, and not merely debtors' applications. The Legislature by this proviso contemplated that the creditors' applications also should be transferred to the D.R. Court. (Niyogi, J.) MADHORAO v JASHODABAI. I.L.R. (1945) Nag. 664-1945 N.L.J. 358-A.I. R. 1945 Nag. 292.

——S. 27 (4)—Notice for stay received after sale—Proceedings under S, 13 of Debt Concilia-

tion Act-If must be stayed.

The proceedings under S. 13 of the Debt Conciliation Act for the recovery of an amount, due in accordance with the terms of the agreement, must be stayed on receipt of a notice for stay issued by the Debt Relief Court under S. 27 (4) of the C. P. Relief of Indebtedness Act, although the notice is received after the property has been knocked down at the auction. (Binney, 1943 N.L.J. C.) SRINIVAS v. MITHULAL. 472.

#### CENTRAL PROVINCES RELIGIOUS AND CHARITABLE TRUSTS ACT (1937) -If ultra vires

The C. P. Religious and Charitable Trust Act 1937, is not ultra vires of the Provincial Legis-lature. This Act was passed with the previous sanction of the Governor-General as required by S. 80-A (3) of the Government of India Act and came into force on the 1st March, 1937, by virtue of a notification published in Central Provinces Gazette. (Puranik, J.) GOPALAS v. DAN PARMANAND. I.L.R. (1945) Nag. 837=1945 N. L.J. 335=A.I.R. 1945 Nag. 266.

-S. 17 (1) (b)-Exemption under-Effect

of -Act, if dead letter. Under S. 17 (1) (b) of the C. P. Religious and Charitable Trusts Act, any public trust or institution to which the provisions of the Charitable and Religious Trusts Act of 1920 apply is exempted from the operation of the former Act. As both the Acts apply to the same class of trusts the former Act is not operative by virtue of the exemption contained in S 17 (1) (b). Reading S. 1 (2) proviso of the Charitable and Religious Trusts Act of 1920 and S. 17 (2) of the C.P. Religious and Chartiable Trusts Act, it may be held that the Provincial Government wanted to classify public trusts or institutions to which the latter Act should apply and the specified trust or class of trusts to which the former Act (Central Act) should apply and to issue notifications accordingly but that the notifications were, for some reason not issued. This is the only plausible explanation that can be thought of for the existence of the provision in S. 17 (1) (b) of the latter Act. The mere fact that the Deputy Commissioner has not maintained a list of public trusts under S. 13 of the C. P. Religious and Charitable Trusts Act, is not sufficient to enable any Court to hold that that Act has not come into force. It is only by reason of the exemption given in S. 17 (1) (b) of that Act, that Act is v. Dan Parmanand. LLR, (1945) Nag. 837=1945 N L.J 335=A I.R 1945 Nag. 266

CENTRAL PROVINCES REVISION OF LAND REVENUE OF ESTATES THE

ACT (I OF 1939)—Constitutional validity.

In so far as the C. P. Revision of Land
Revenue of Estates Act (1939) fastens on contracts, it is intra vires because it has received the

## C. P. REVI. OF L.R. OF EST. ACT (1939). + C. P TENANCY ACT (1920), S. 6.

assent of the Governor-General. The Act does increase of the assessment. The attempt to bring not operate on any interest in or over immovable property. The Act which merely cuts away a Varadachariar and Mahome ! Zafrulla Khan III) portion of the concession in the matter of assessment of ramindars does not touch or confiscate any rights. Accordingly the Act is intravires. (Rose, I.) KUNWARIAL SINGIL C. PROVINCIAL GOVERNMENT, U.P. AND BERGE, ILR. (1944) Nag. 180 Al.R. 1944 Nag. 201.

Increase under of "takoli" fixed under Gordon's Settlement-Validity-Act, if ultra vires- Government of India Act, S. 299 (2).

A ramindar holding some estates in Central Provinces was assessed for 'takoh' as part and parcel of the last periodical settlement of land revenue, known as 'Gordon's Settlement' and completed in accordance with the provisions of the C. P. Lan I Revenue Act, 1917. The relevant kabuliyats and orders purported to make the assessment binding for a period of 19 years and thereafter till a fresh settlement is made. As a result of the enactment of the C. P.Revision of the Lind Revenue of Estates Act, 1939, the 'takoli' assessed on the zamindar's estates was increased. On a contention by the zamındar that the 'rights' conferred on him by the Settlement of 1921, the provisions of the Act of 1917, and the relevant kabuliyats and orders, amounted to statutory or contractual, rights of which only a new settlement carried out in accordance with the provisions of the Act of 1917 and the C. P. Settlement Act of 1929 could deprive him and that the alteration of his right to hold the estates subject only to the payment of the amount of 'takoli' fixed in 1921 on the terms of that settlement could not be made, as it was purported to be made by the Act of 1939, to his detriment without complying with the provisions of S. 299 (2) of the Constitution Act and as such the Act of 1939 was ultra vires and void.

Held, that there was nothing in any of the Acts or documents referred to which amounted to any contractual or statutory rights of the zamindar which could not at any time be varied, suspended or repealed, by enactment of the competent Legislature. The settlement was made an I took effect under and by virtue of statutory powers and provisions which could at any time be repealed, varied or replaced by other statutory provisions duly enacted. There was nothing to prevent the Legislature of the C.P. and Berar to which under S. 100 and item 39 of List II in the Seventh Schedule of the Constitution Act are given powers to legislate in regard to land revenue. acting directly in the matter and enacting in respect of all or some existing assessments that the same should be increased as from a specified date to a specified amount. It is impossible to hold that the mere increase of an assessment for land revenue involves any 'acquisition' of the land or any rights in or over immovable property. Further the word 'acquisition' implies that there must be an actual transference of, and it must be possible to indicate some person or body to whom is or are transferred, the land or rights referred to. It cannot be said that when land revenue is increased, there is any transference to the Provincial Government or any other person of any land or rights in or over immovable property, which remain in the same posses-

the case within S. 299 (2) must fail. (Spens, C.J., Bergar I.L.R. (1944) Nag. 614 -I.L. R. (1944) Kar. (F.C.) 165 - 216 I.C. 15 -17 R F C 46-1944 M.W.N. 446-1914 A.W.R. (F.C.) 24-48 C W.N. (F.C.) 24= 48 C W.N. (F.C.) 24= 1944 A.L.J. 265 - 1944) F L.J. 178 A.I.R. 1944 F C. 62 (1944) 1 M.L.J. 510 (F.C.)

CENTRAL PROVINCES TEMPORARY POSTPONEMENT OF EXECUTION OF DECREES ACT, S. 3 -Sale in contravention-L'alidity.

A safe held in direct contravention of the mandatory provision of S. 3 of the C. P. Temporary Postponement of Execution of Decrees Act is without jurisdiction. Such sale being void, should not be confirmed. (Binney, F.C.) JANKI-DAS T. LAXMAN. 1943 N.L. J. 246.

CENTRAL PROVINCES TENANCY ACT (I OF 1920), Ss. 2 (5) (d) and 25 -Prection of building on agricultural land--Improvement of land - Burden of proof.

Prima facie the erection of a building on land which is let for agricultural purposes, that is to say for the purpose of being cultivated and for no other purpose, is a diversion for non-agricultural uses, an bonce the fact of the erection of a substantial building is established it is for the tenant to show that it has been built in circumstances which make it an improvement on the land which is permitted or that it is not in fact a diversion from agricultural purposes. Any building on any agricultural land which is not of a temporary nature and is not easily removable is a diversion for non-agricultural purposes. It cannot be anything else, and ejectment can only be avoided, if the landlord objects, by the tenant showing that it is an improvement, that is to say that it adds materially to the letting value of the holding, that it is suitable thereto and consistent with the purpose for which the holding is held; and if the improvement is a building that it is required for the covenient or profitable use or occupation of the holding. (Grille, C.J. and Nivogi, I) Ganesh Prasan v. Nandanlal. I. L.R. (1945) Nag. 709:21945 N.L.J. 516.

-S. 6-elbsolute occupancy tenant-Status-Landlord's rights

Per Bobde, J.—The holding of an absolute occupancy tenant dying heir-less does not escheat to the Crown as a heritable estate. On the death of the tenant heirless the landlord is free to step into possession. (Digby, Sen and Bubble, II) TULSIRAM JIYANLAL v. HYDER LALLA. I.L.R. (1944) Nag. 473=A.I.R. 1944 Nag. 250 F.B.).

-S. 6-Application under on strength of registered transfer-Progress of proceedings-Subsequent dismissal for default of appearance-Second application on strength of delivery of possession under the original transfer-Maintainability.

Where an application for pre-emption was made on the ground of a transfer under a registered deed and after its admis ion and progress of proceedings for some time, it was dismissed for default of appearance of parties and a fresh application was put in on the strength of delivery sion or ownership as immediately before the of possession under the original transfer, held

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that the second application was not maintainable and that the delivery of possession did not constitute a different transaction and a different cause of action for purposes of S. 6 of C. P. Tenancy Act. (Burton, F.C.) GANGADHAR v. PURUSHOTTAM. 1941 N.L.J. 175.

TAM. 1941 N.L.J. II.

S. 6-Transfer of occupancy holding—Liability for rent. Shree Vithal Bhagwan Mandir v Narayan Rao. [See Q D. 1936-'40, Vol. 1, Col. 817]. I.L R. (1941) Nag. 369.

Ss. 6, 12 and 13—Occupancy tenancy—Trespasser in posvession—If can acquire tenancy wight by proceeding—Liability of trespasser to

right by prescription-Liability of trespasser to

Though the trespasser may hold a land occupied by a tenant who has been dis laced by him, it is a misnomer to say that he has a tenant's right at all unless he holds from the landlord and is a tenant vis-a vis the landlord. S. 28 of the Limitation Act cannot have the effect of vesting the tenancy in the trespasser. A trespasser who has been on the land for three years cannot, when the landlord seeks to eject him, successfully plead that the tenancy still exists or shelter any more be-hind the tenant whom he has displaced. The landlord is entitled when the tenancy, comes to an end to eject the trespasser unless the case falls within the provisions of S. 6 (4) of the C. P. Tenancy Act. (Digby, Sen and Bobde, II.)
TULSIRAM JIYANLAL v. HYDER LALLA. I.L.R.
11044) Nag 472—A I B 1044 Nag 250 (F.R.) (1944) Nag. 473=A.I.R. 1944 Nag. 250 (F.B.). -S. 6 (1) (b) and (3)—Lahan gahan mort-

gage with landlord's consent—Transfer resulting from foreclosure decree—Right of landlord to

bre-embt.

A lahan gahan mortgage is not precisely mortgage by conditional sale as defined in S. 58 (c) of the Transfer of Property Act, and accordingly it is one not permitted by S. 6 (1) (b) of the C. F. Tenancy Act. The landlord has no right of pre-emption under S. 6 (3) of the Act on transfer actions from the second seco fer resulting from a foreclosure decree passed on such a mortgage, when the then landlord has given his consent to the mortgage. (Ramsden, F.C.) GENDMAL v. NARAYAN. 1945 N.L.J. 374. -S. 6 (2)—Single notice given by tenant in 1938 of intention to transfer absolute occupancy land in two villages, A and B-Landlord applying to purchase land in A only-Tenant transferring land in M in 1941-Validity of 1938 notice in

În 1938, a tenant gave a notice under S. 6 (2) of the Tenancy Act to his landlord of his intention to transfer his absolute occupancy land in two villages, A and B. In this single notice relating to two villages, the number of the fields, their rents, the consideration money and the name of the transferee were not mentioned. The landlord sent no reply to the notice but applied under S. 6 (3) of the Act to purchase only the land in A. In 1941—(i.e.) more than  $2_2$  years after the issue of the notice under S. 6 (2)—the tenant transferred mouza B by a gift to a boy only  $1\frac{1}{2}$  years old. The landlord applied under S. 6 (3) of the (old)

Tenancy Act for its purchase.

regard to this transfer.

Held, that in the first place as the notice of 1938 covered land in two villages two notices should have been sent Secondly, the intention of the transferor could not have been the same in 1938 because the transferee was not then even

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prescribed, a period of over 2½ years cannot be considered as reasonable. These defects must be deemed to invalidate the notice at the time of transfer in 1941. As a fresh notice was not sent, the landlord's application under S. 6 (3) was good. He cannot be deemed to have waived in 1941 the right he had in respect of another transfer in 1938 and that no question of estoppel arose. (Ramsden, F. C.) 1945 N.L. J. 101. YAMUNABAI V. RAM RAO.

Starting point—Possession lost by tenant before

transfer.

Limitation for an application by the landlord for pre-emption under S. 6 (3) of the Tenancy Act starts from the date on which possession is lost by the tenant after a transfer. If possession has been lost before a transfer is complete, then Imitation runs from the date of the transfer.

(Binney, F. C.) BHAGIRATHIBAI v. NILKANTH.

1943 N.L.J. 416.

S. 6 (3)—Suit for rent against tenant pend-

ing pre-emption proceedings by landlord—Transferee also impleaded in suit—Landlord's consent

to transfer—If can be inferred.

Landlord's consent to a transfer by the tenant can not be inferred from the mere fact that he impleaded the transferee also as a defendant in a suit for arrears of rent filed by him against the original tenant during the pendency of the pre-emption proceedings. (Binney, F. C.) BHAGI-RATHIBAI v. NILKANTH. 1943 N.L.J. 416. BHAGI-

not paid within time allowed Effect Filing of

appeal—If extends time.

The right of pre-emption is a very special right and the person who claims it must comply strictly with all the conditions imposed on him. Where under S. 6 (6) of the C. P. Tenancy Act the value has been fixed and directed to be deposited within a particular time and it is not paid, the right is lost. An appellate Court in an appeal against the order has power to stay execution of the order. But the Court must be asked to do it. The filing of an appeal will not by itself operate as a stay. (Greenfield.) SHESHRAO v. MORESH-WAR. 1941 N.L.J. 50.

-S.6(6)—Price not deposited by landlord within prescribed time—Appeal filed by him with request for extension of time—No specific order passed by appellate Court-Landlord, if must be

deemed to have waved his right.

Under S 6 (6) of the Tenancy Act, 1920, the landlord must be deemed to have waived his right, if he does not pay within the prescribed time the price fixed by the Naib Tahsildar and no order for stay has been obtained from the appellate Court. The fact that he made a request for extension of time in the memorandum of appeal filed before the Deputy Commissioner and the latter passed no specific order thereon, makes no difference. When a request is made to a Court and no order is passed, the only inference that can be drawn is that it has been rejected. (Rau, F.C.) RAMDAS GOVIND v. SHIVPRASAD. 1945 N. L.J. 165.

-Ss. 6-A and 12-A-Application not accom-

panied by deposit-Validity.

The limitation for an application by the lanlord for pre-emption is thirty days from the date alive. Thirdly, although no limitation has been of receipt of the tenant's notice, and if the price

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is deposited within that period the application is valid, although it is not accompanied by the deposit (Rau, F.C.) NARAYANRAO v. RAJABAI. 1944 N L J. 529.

- - Ss. 6-A and 12-A-Fixation of price by

Revenue officer When necessary,

The intention of the Legislature is that the tenant should mention in the notice the price offered to him in the open market and that the landlerd should pay it, leaving him free to file a civil suit in the case of fraud—It is clearly not the intenti n that the landlord who finds the price mentioned in the notice too high should be able to challenge the genuineness of the price quoted and apply to the revenue officer for fixation of a fair price. On the contrary, it wants him to purchase the right for the amount stated in the notice, if he wants to purchase at all, and it has provided safeguards to protect him from unscrupulous and dishonest tenants. It is necessary for the revenue officer to fix the price in the following cases among others:—Under S. 6-A (absolute occupancy right) sub S 5 (a). If the landlord is entitled to purchase the right and if the transfer is by sale, if the consideration is either (a) not mentioned in the sale deed, or (b) cannot be determined from it whether it is sold along with other property or for other reason. Sub-S. 5 (b).-If the intended transfer is otherwise than by sale Sub-S. 8 (b) - (1) If the tenant transfers in contravention of the law and the consideration cannot be determined from the sale deed, or (2) if the transfer is otherwise than by sale. Under S. 13 A. (occupancy right) sub-S. (5).—If the landlord is entitled to purchase the right and if the consideration carnot be determined from the sale deed. Sub-S. 8 (b),—As per absolute occupancy (1). The revenue officer is also required to fix the price in the circumstances indicated in sub-sections (9) and 10 (b). (Rau, F.C.) NARAYANRAO V. RAJABAI. 1944 N L.J. 529

sell holding—Subsequent withdrawal—Permissi-

A tenant who had given notice to the landlord of his intention to sell his holding cannot withdraw it after the landlord has made an applica-tion under S 6-A (ii) (a) of the C.P. Tenancy Act accompanied by deposit, to have the sale deed executed by the tenant and to be put in possession. (Binney F.C.) DAULAT RAO T RAJA BAHABUR. 1944 N.L.J. 55.

-Ss, 6 A and 12-A-Notice covering more

than one holding-Validity.

A notice given by the tenant should not cover more than one holding or portion of a holding. But a notice covering more than one holding is not necessarily invalid, provided it specifies clearly what the price of each holding is (Rau, F.C.) NARAYANA RAO v. RAJABAT. 1944 N.L J. 529.

-Ss. 6-A and 12-A-Notice 'incorrect in material particulars"-Consideration and purchaser in sale deed different from those menti-

oned in notice.

If the consideration and the purchaser in the sale deed are different from those mentioned in the notice given to the landlord, the notice is "incorrect in material particulars". (Rau, F.C.) SITARAM v. ATMARAM. 1944 N.L.J. 522,

#### C. P. TENANCY ACT (1920), S. 11.

-Ss- 6-A and 12-A-Notice not mentioning prospective purchaser's name-Validity.

A notice given by a tenant which does not reveal the name of the prospective purchaser is improper. (Rau, F.C.) NARAYANA RAO v. RAJABAL. 1944 N.L.J. 529.

-- S 6-A-Notice not signed by tenant-Vali-

The mere omission by the tenant to sign the notice given by him to his landlord does not invalidate it if the surrounding circumstances unmistakably point to its authenticity. Where the notice which is sent by registered post is written on a post card with the name and address of the tenant printed thereon, and the postal form of acknowledgment also shows that the notice is from the tenant, and the landlord is not left in doubt as to the identity of its sender, the notice is not invalid although it is not signed either by or for the tenant. (Rau, F.C.) MANNULALT, BHAGWANSING, 1945 N.L.T. 4.

-S. 6-A-Notice omitting name of prospec-

tive purchaser-Validity.

A notice given by a transferring tenant to his landlord is invalid if it omits the name or names of the intending purchasers. The object of the Legislature in conferring the right of preemption on landlords is to enable them to prevent the entry of strangers and undesirable persons into the ranks of the village tenancy, unless the landlord knows who the prospective purchasers are, he would not be in a position to decide whether to exercise his right or not. (Ran, F. C.) MANNULAL C. BHAGAVAN SINGH. 1945 N. L.J.4

----S. 6-A (11) (a) -Deposit within one year -- If necessary-- Power of Court to extend time. Under S. 6 A (11) (a) of the Tenancy Act. though the deposit need not accompany the appli-

cation, it must, like the application itself be made within one year of the loss of possession. The Court has no pownr to extend the time for deposit (Ramsden, I) GANGADHAR v. DAULAT RAO. 1945 N.L.J. 549.

-S 9 Nature and scope of the charge created by--Rights of subsequent mortgagees paying the rent due by the tenant SITARAM P. KRISH-NA RAO [See O.D., 1936-40, Vol. I., Col. 818). I. L.R. (1941) Nag. 607.

-S 11 (amendment of 1940)-Applicability-Retrospective operation- Principle as to-

Rights of succession--Crucial date.

An act which affects vested rights and is not merely procedural, that is to say, one that affects merely the method of the enforcement of the rights, cannot be presumed to have retrospective operation. The amendment of 1910 deleted the proviso cont ined in S. 11 of the C. P. Tenancy Act and is silent as regards its retrospective operation. Hence rights of succession to a tenant who died prior to the amendment would be governed by the Act as it stood prior to its amendment (Nivogi, J.) TULARAM V. TEJIRAM I. L.R. (1942) Nag. 205—200 I.C. 54—14 R.N. 316—1942 N.L. J. 72—A. I. R. 1942 Nag. 49.

-S. 11-Occupancy holding of deceased tenant acquired under Land Acquisition Act—Compensation money payable to his heirs—If part of deceased's assets—C. P. Code, S 50.

Neither the occupancy holding which devolves on the death of a tenant on his heirs nor the

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compensation money payable to them on the compulsory acquisition of the holding under the Land Acquisition Act, forms part of the assets of the deceased in their hands. Consequently neither of them can be attached in execution of a decree passed against the assets of the deceased in their hands. (Bobbe, J.) BANSILAL v. SHRI-PAT DAMDYA. I.L.R. (1944) Nag. 881=1944

N.L.J. 304=A.I.R. 1944 Nag. 304.

—Ss. 12, 13 and 14 - Object of legislature in

enacting-Interpretation of Act in consonance

zvith-Duty of Court.

Ss. 12, 13 and 14 of the C. P. Tenancy Act are designed to protect the heirs of a tenant and to preserve to them, as far as that can be done, the very special estate of inheritance which the Tenancy Act and its predecessors have created. That is the broad aim of the legislature. It therefore behoves Courts when interpreting the Act to give effect to that object as far as they can bearing in mind of course all the usual rules of interpretation. Whenever there is doubt or room for reaching a decision either one way or the other, the endeavour should be to further. as far as that is practicable, the aims of the legislature as gathered from the Act itself. (Bose, J.) GANPAT GOVIND v. NATHA BAI. I.L. R. (1943) Nag. 379=15 R.N. 133=203 I.C. 439 =1942 N L.J. 531=A.I.R. 1942 Nag. 136.

S. 12—Proprietary share of debtor in village sold in previous proceeding—Debtor, if can object to sale of khudkasht land in subsequent

proceeding.

A debtor whose proprietary share in a village had been sold in a previous proceeding for the recovery of an instalment fixed under the Debt Conciliation Act has no right to object to the sale of the khudkasht lands in a subsequent proceeding for the recovery of a further instalment claiming that on losing proprietary rights he acquired occupancy rights in them. (Binney, F.C.) ABDUL JABBA v. SETH JAGANNATH. 1943
N.L.J. 476.
——Ss 12 and 13—Sale by tenant of holding

worth Rs. 100 by unregistered deed-Landlord's remedy for ejecting transferee-If lies in Revenue or Civil Court—Transfer of Property Act, S. 54.

A tenant who purports to transfer his holding which is of the value of Rs. 100 and upwards by an unregistered deed, does not offend against the provisions of S. 12 of the C. P. Tenancy Act as the sale is a nullity in view of the provisions of S. 54 of the Transfer of Property Act. The landlord has, therefore, no locus standi to apply to a Revenue Officer under S. 13 of the Tenancy Act. His remedy against the transferee lies in the Civil Court, and the basis of its jurisdiction is that the transferee is relegated to the position of a trespasser claiming under a void sale-deed. (Grille, C.J. and Hemeon, J.) CHINDHU PATEL DADU PATEL I.L.R. (1945) Nag 433=1945 N.L.J. 94=A.I.R. 1945 Nag. 119.

——Ss. 12, 13 and 14—Scope and effect— Transfer in violation of S. 12—Effect—Proceedings under Ss. 13 and 14—Liability of the person put in possession for arrears of transferor.

S. 12 of the C. P. Tenancy Act does not render transfers in contravention of its provisions void. They are only voidable, and that by a limited class of persons and in a very special and limited way. Hence there is no determination of tenancy that it would not be altogether ineffective as

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on such a transfer. Now by virtue of Ss. 13 and 14 the heirs of the transfering tenant steps into the shoes of the transferee and thus acquires the tenancy subject to all its liabilities, just as much as he would have done had he succeeded as an heir on death. The usual rule that the assignee of a tenant's rights is liable for arrears in the same way as the original tenant because of the privity of estate between the landlord and himself, would apply (Bose, J) GANPAT GOVIND V. NATHA BAI. I.L.R. (1943) Nag 379=15 R. N. 133=203 I.C. 439=1942 N.L.J. 531=A.I.R.

1942 Nag. 136.
——Ss. 12 and 13—Surrender of holding— Landlord leasing part and retaining rest-Surrender in respect of part retained-Whether valid. Where a tenant surrendered his holding to his landlord who leased a part of it to third persons

and retained the rest as his khudkasht.

Held, that although the surrender in so far as it resulted in a lease of a part of the holding was contrary to S. 12 of the C. P. Tenancy Act, it was valid in respect of the part retained by the land-TFJILAL v. MOTIRAM. lord (Binney, F.C.) 1943 N.L.J 373.

-Ss 12, 13 and 35-Surrender in favour of one, not a lambardar-Remedy of lambardar.

Where there has been a transfer in violation of S. 12 of the C. P. Tenancy Act, the proper course for the lambardar is to proceed before the Revenue authorities. If it is treated as if there has been no transfer, then the lambardar must determine the tenancy before seeking possession. (Stone, C.J. and Niyogi, J.) MAHOMED KHUDA BUX v RAMCHANDRA RAO. I.L.R. (1941) Nag. 743=1941 N.L.J. 497=198 I.C 449=14 R.N. 224=A I R. 1941 Nag. 328.

S. 12-Surrender of holding-Validity-Main object to settle debts and save part of

holding.

Where in making a surrender the main object of the tenant is to settle his debts with the landlord and to save a part of the holding, and there is no attempt to defeat the interests of his heirs, the transaction is not a transfer contrary to S. 12 of the C. P. Tenancy Act. (Binney, F.C.) RAKHMA-BAI v. JANKOO. 1943 N.L.J. 498.

-Ss. 12 and 13-Surrender to lambardar and

sale by latter-Validity.

Though the transaction of a surrender by the tenant to the lambardar and the sale by him to another in proprietary right take place within 3 days of each other, it cannot be held to be one transaction constituting a transfer of an occupancy right and could not be questioned. (Binney, F.C.) JANRAG BHAGWANTRAO v. PRAHLAD BAJIRAO. 1941 N.L.J. 502.

-----S. 12 (2)-Effect of sale of proprietary interest reserving khudkasht-Transferor if becomes occupancy tenant who can claim exemp-

tion from attachment and sale

When a proprietor's entire interests in a village is sold excluding khudkasht, it is doing that which is legally impossible so far as khudkasht is concerned. The khudkasht is not his to be so reserved or excluded. The sale of the share would be good and would stand. The reservation or exclusion would be bad in the sense that no right, title or interest in the land would remain in the proprietor or transferor. It may well be

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between the transferor and transferee. It may be that an estoppel would arise as between them but it would not anext the rights of third parties and it would not make the transferor a tenant of some sort so as to claim exemption from attachment and safe so for as the khudkasht is concerned. (Stode, C.J. and Bose, J.) UMARNI DESHEYNDER, DATEAURAYA 1942 N.L.J. 177. -S. 12-A -Tenant giving notice of intention

to self-Landlord applying to Tahsildar to fix value-. If plication made without deposit-If

maintainable.

An occupancy tenant gave to his landlord a written notice of his intention to sell his holding. The landlord replied that he was prepared to purchase but that the price was too much and not reasonable. The landlord then applied to the Tabsildar that the land should be sold to him at a reasonable price. The Tahsıldar ordered the landlord to deposit the original consideration money and the tenant to execute a sale deed in favour of the landlord. Overruling the contention that the landlord's application should have been rejected in the first instance as it was not

accompanied by a deposit,

Held, that as it was not indicated anywhere in S. 12-A of the C. P. Tenancy Act in what circumstances a revenue officer was required to fix the value of the right when he was dealing with an application under sub-S. (5), it was not surprising that the landlord considered that he was entitled to question the reasonableness of the consideration mentioned in the notice and that in the circumstances it was not justifiable to hold that the Tahsildar had no jurisdiction to proceed with the application owing to his failure to insist on the deposit being made at the time the application was presented to him. (Binney, F.C.) DAU BIHARUAL V. RARUTHA. 1944 N.L J. 58.

-S. 12-A (1)-Notice not mentioning name

of prospective purchaser—Validity.

A notice given by the tenant to his landlord under S. 12-A (1) of the Central Provinces Tenancy Act, which does not mention the name of the prospective purchaser, is invalid. (Rau, F.C.) Krishnaji v. Khan Mahomed. 1945 N.L.J 605.

-S. 12-A (5) (as amended in 1939)—Application by landlord-Deposit within thirty days

of notice -If necessary.

A landlord applying under S. 12-A (5) of the Tenancy Act to the revenue officer for the fixation of fair price must deposit the amount mendays. Otherwise, he would lose his right to pre-empt. (Rau, F. C.) NAMDEO v. NAGO. 1945 N.L.J. 575.

S. 12 A (5) (as amended in 1939)—Land-

lord considering price stated in tenant's notice as excessive—Whether can apply to revenue officer

to fix fair price.
Where a tenant gave notice of his intention to sell his holding for a sum named and the landlord replied that he was willing to buy the right but that the price quoted was exorbitant and applied to the revenue officer for the determination of a reasonable price,

Held, that the landlord must be deemed to have permitted the sale, that if he intended to purchase the right he must purchase it from the tenant at the price stated in the notice, and that the revenue officer was not competent in the under-If can sue for joint possession.

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circumstances of the case to fix the fair price. (Rau, F.C.) NAMBEO E. NACO. 1945 N L. J. 575 - S 12 A (9)-Tenant's notice of intention to sell not specifying fields and not naming transferce- Landlord giving notice of intention to purchase but taking no action-Sale of holding-Application by the landlord under sub-S. (9)-II lies.

Respondent served a notice on her landlord expressing her intention to transfer her share in an occupancy holding for Rs. 500. The notice did not specify the fields which would be transferred and did not name the transferee. The landlord gave notice of his intention to purchase but took no action until almost a year after the respondent had sold her holding. On an application by the landlord under S. 12-A (9) of the C.

P. Tenancy Act.

Held, that the application did not lie, that the sale deed did not differ materially from the notice, that the purchase money was as stated in the notice and the property transferred was the respondent's share, that there had been no contravention of any of the provisions contained in sub-Ss. (1) to (7) and that there was no reason to consider the argument that the tenant's notice was a valid notice under sub-S. (1) as the landlord accepted it and acted on it. (Binney, F.C.) LALITABALT. BASANTIBAL. 1944 N.L.J 146.

-S. 12 A (15)-Suit under -Consideration not proved to be fraudulently stated - Dismissal

of suit—If proper. Under S. 12-A (15) of the C. P. Tenancy Act, the right to institute a civil suit is based on the ground that the consideration is fraudulently stated in the sale deed, and if it be found that the consideration was not fraudulently stated, then the basis of the civil suit disappears, and the suit must fail. The lambardar is not entitled to ask the Civil Court to fix a fair consideration and pass a decree. (Pollock, J) Shridhar Shrikrishna 7, Rushi, I.L.R. (1945) Nag. 865= 1945 N.L.J. 404=A.I.R. 1945 Nag. 248.

-Ss 13 and 12-deceptance of surrender by co-sharer working as joint lumbardar-Surrender if in contravention of S. 12-Right of acquiescing

lambardar to challenge.

Where a surrender of an occupancy holding is accepted by a co-sharer who was for long working as joint lambardar and taken to be such by all including the lambardar appointed it is not open to the latter to seek to set aside the surrender as being in contravention of 5, 12 of the C. P. Tenancy Act inasmuch as he himself had acquiesced in treating the other as joint lambardar, though not really appointed as such. The latter must be taken to have acted as a co-sharer on behalf of the proprietary body and with the implied consent of the lambardar (Binney, F. C.) SAMIULLAH KHAN v. KEDARNATH. 1942 N. L.J. 69.

-S. 13-Heir born subsequent to transfer-Whether can apply.

Applications under S. 13 of the C. P. Tenancy Act are not restricted to the heirs in existence at the time of the transfer. Even heirs born subsequent to the date of the transfer can apply under the section (Binney, F.C.) SOBHARAM v. ITWARI 1943 N.L. J 258.

S 13—Lambardar failing to take action

#### C. P. TENANCY ACT (1920), S. 13.

A lambardar who omitted to apply under S. 13, C. P. Tenancy Act, for possession of an occupancy holding surrendered by the tenant to his co-sharer can sue his co-sharer in the Civil Court for joint possession of the holding because when a lambardar sues his co-sharer in the Civil Court for joint possession of the holding he is so suing as co-sharer, which he may do in spite of the fact that he could as lambardar sue to set aside the transfer under S. 13 of the Act and claim to be put into exclusive possession of the whole holding on behalf of the proprietary body. (Grille and Gruer, JJ.) GANPATI v SAKHARAM ILR. and Gruer, JJ.) GANPATI V SAKHARAM ILR. (1941) Nag. 454=195 I.C. 869=14 RN. 70=1941 N L.J. 307=A.I.R 1941 Nag 221.

S. 13-Sale of holding by unregistered deed --Application by heirs-If maintainable.

A sale of an occupancy holding by the tenant to a stranger cannot be said to be a legal transfer, if the deed witnessing the sale is not registered and the possession which the transferee obtains being in pursuance of an incomplete transfer is only the possession of a licensee there is no real transfer, no cause of action accrues to the heirs of the tenant to apply under S. 13 of the C. P. Tenancy Act to have the transfer set aside (Rau. F. C.) Mt. Sonnat v. Dhansal. 1945 N L. J. 58.

——Ss. 13 and 105 (c)—Sale of occupancy holding—Remedy—Jurisdiction of Civil Court.

Where a transfer of an occupancy holding is valid as between parties thereto but voidable at the instance of the landlord on account of the provisions of S. 12, C. P. Tenancy Act, which prohibited such transfers, it could only be avoided by the lambardar applying under S. 13 of the Act to the Revenue Officer. No suit to avoid it could be maintained in the Civil Court. (Niyogi, J.) Jamna Prasad v. Singhai Bansidhar. 1941 N.L.J 643.

-S. 13—Scope of—Surrender obtained by co-sharer—Lambardar resorting to remedy under S. 13—Equivable relief to co-sharer. Lachhman Singh v. Moti Singh. [See Q.D. 1936-'40, Vol., I., Col. 821] I.L.R. (1941) Nag. 348=192 I C. 6=13 R.N. 217.

-Ss. 14 (2)—Application putting forth claim

-If can be made after date fixed.

S. 14 (2) of the C. P. Tenancy Act prescribes for a notice to all known heirs and a proclamation inviting all persons claiming to be heirs to appear on a particular date fixed. The section does not bar the consideration of a claim made even after the date so fixed. (Binney, F C.) CHANDRABAI KALAR v. RAFANLAL BALGOVIND. 1942 N L J. 598.

——Ss. 24, 30 and 32-Exercise of powers under S. 24-Caution to be observed-Failure to

comply with Ss. 30 and 32-Effect.

The powers of summary ejectment given to the Revenue Officer by S. 24 are drastic and have to be exercised strictly in accordance with the provisions of that section and the other provisions regulating ejectment. The ejectment is subject to the provisions in S. 30 as to payment of compensation. Ss. 30 and 32 are mandatory and if they are not complied with the ejectment is without jurisdiction and not according to law. (Burton, F.C.) GHAISSO SAKHARAM v. DAYA-RAM. 1941 N.L.J. 233.

## C.P TENANCY ACT (1920), S. 35.

S. 24—(Prior to amendment)—Notice of ejectment not mentioning amount of arrears-If can affect ejectment.

If a notice under S. 24, C. P. Tenancy Act in fact is served on the tenant and he is not so misled by it that he suffers substantial injury, then no plea based upon an omission to state the amount of arrears in the notice or such other error or omissions is of any avail. Ejectment could not be set aside on account of the omission in the notice. (Binney, F. C.) GANPATRAO v. SANTOSH RAO. 1942 N.L J. 513.

-Ss. 24 and 100-Possession given to landlord under S. 24--If can be questioned in proceed-

ings under S. 100.

S. 100 of the C. P. Tenancy Act cannot be used to call in question possession given to a landlord in proceedings under S. 24 of that Act. (Binney, F.C.) SHANKARRAO v. MIRGU. 1943 N.L J. 520.

S. 24—Transfer of order of ejectment—

Powers of Revenue Officer in dealing with— Question of discharge of decree, if can be ad-

judicated upon.

Although the Revenue Officer to whom the 'order for the ejectment' has to be transferred under S. 24 of the C. P. Tenancy Act is not empowered to adjudicate on any such matter as the discharge of the decree, yet if such a point is raised, should return the matter to the Court for determination. The Court which passed the decree on the executing side or any Court to which it transferred the decree could in execution entertain this question as to the 'discharge' of the decree. (Stone, C J.) MAKHANLAL v. BODHIRAM. 1942 N L.J. 348.

Ss. 30 and 32—Failure to comply with— Effect. See C. P. Tenancy Act. Ss. 24, 30, 32. 1941 N. L. J. 233.

- S. 32-Construction-Arrears and costs which have been ascertamed in the proceedings'—

If includes decretal amount.

The words "arrears and costs which have been ascertained in the proceedings' in S. 32 of the C. P. Tenancy Act do not include the decretal amount. It cannot therefore be set off against RAMLAL v. PADAMLAL. 1941 N.L.J. 237

—S. 33—Question of law—If can be raised

at any stage.

A question of law can be raised at any stage, although not raised in the original case or in first appeal. (Rau, FC.) RAMDAS GOVIND v. SHIV-PRASAD. 1945 N.L.J 165.
———S. 35—Abandonment—Meaning—Right of

reversioners, when abandonment is by life holder

of occupancy tenancy,
The word 'abandonment' in S. 55 of the C. P. Tenancy Act is used in the usual legal significance and not in any special sense. When a life holder of an occupancy tenancy abandons the holding, the next reversioner can on the death of the holder sue for a declaration that the tenancy was not extinguished by abandonment. (Stone, C.I. and Bose, I.) MURLIDHAR V. HAZARILAL. IL R. (1942) Nag. 703-1941 N.L. J. 612-202 I.C. 25=15 R.N. 61=A.IR 1942 Nag. 108.

-S. 35-Abandonment of holding-Proof-Tenant purporting to transfer holding under void sale-deed—Suit by landlord for ejectment of transferee-Tenant pleading that he claimed no

interest in holding.

## C. P. TENANCY ACT (1920), S. 36-A.

A tenant purported to transfer his holding by a void sale-deed, and when the landlord sued to eject the transfered he pleaded that he claimed no interest in the holding and desired to withdraw from the suit.

Held, that abandonment has been established by the tenant's own pleading in the suit. what he believed to be a sale he abandoned all claim to the holding and at no time had any desire or any legal hen for recovery of possession. Further, it must be presumed as between the landlord and a trespasser (which is what the transferce is since he has no title at all) that the tenant has abandoned the holding. (Grille, C. J. and Hemcon J.) CHINDHU PATEL v. DAU PATEL, I.L.R. (1945) Nag. 433=1945 N.L.J 94 =A.I.R. 1945 Nag. 119.

-S. 36-A -- Declaration of tenant to be malik makbuza-Discretion of Revenue Officer-Division of land to non-agricultural purpose contem-

plated.

Under S. 36-A of the C. P. Tenancy Act, the the Revenue Officer's discretion to declare an occupancy tenant to be a malik makbuza remains unhampered provided that he follows the rules of procedure laid down and arrives at a considered finding. There is nothing in the section itself or even in the Rules to indicate that in all cases in which division to non-agricultural purposes is which division to non-agricultural purposes is contemplated, declaration should be refused. (Ramsden, F. C.) Annapuranaeat v. Naina. 1945 N. L. J. 314.

S. 38-Equitable principles—If can be applied to enforcement of tenancy by contract.

S. 38 of the C. P. Tenancy Act does not preclude the application of equitable principles even where the incidents of the tenancy are governed by contract. (Puranik and Digby, II) SHRI-KISHANLAL v. RAMNATH JANKIPRASAD. I.L.R. (1944) Nag. 877-219 I.C 163:=1944 N.L.J. 321=A.I.R. 1944 Nag 229.

-S. 46-Applicability-Lands ceasing to be agricultural and treated as non-agricultural. PAR-MESHWAR PRASAD 7. WALH CHHATRI. [See Q.D., 1936-40 Vol. 1 Col. 813.] 196 I.C. 724-8 B.R. 89=AIR. 1941 Pat. 352.

-S. 46 -Scope-Three usufructuary mortgage deeds instead of one to evade provisions of law as to registration—Validity. See REGISTRATION ACT, S. 17. 11 Cut. L.T. 42.

Ss. 46, 47 and 48— Fransfer in contraven-

tion of S 46 (3) -Effect-Landlord's remedy-Failure to avail remedy—Hiffeet. JABBARSHAH v. KANCHEDILAL. [See Q. D., 1936-40, Vol., 1, Col. 828]. I.L.R. (1941) Nag. 203.

-S. 46 (5)—Applicability and scope—Occupancy holding-Mortgage-Registration of mortgage deed -Effect - Suit for foreclosure by mortgagee - Maintninability - Diversion of part of

Jands to non-agricultural purposes—Effect.
S. 46 (5) of the C. P. Tenancy Act contains a clear prohibition that no document shall be right to occupy the sir land as proprietor and beadmitted to registration, and therefore the mere fact that a registering officer admits a document to registration, cannot clothe the claimant under the document with any rights which can be en-forced in courts of law. The registration, if effected, is in violation of the clear prohibition and is therefore null and void. A registering officer has no jurisdiction to register a document Act XI of 1940 do not alter this legal position. which purports to transfer the right of an occu- (Pollock and Sen, JJ.)

## C. P. TENANCY ACT (1920), S. 49.

pancy tenant. Where a person advances money to an occupancy tenant on the foot of a mortgage bond on the security of his occupancy lands, and gets it registered, he gets no rights under the document and he cannot therefore claim a right to sue for and obtain a decree for foreclosure on the basis of the morigage bond, even though the tenant mortgagor may have diverted part of the lands to non-agricultural purposes, e.g., by building a house on part of the holding, the document would not be effective as a mortgage document. S. 46 of the Act applies in such a case. (Monohar Lall and Brough, Jl.) WALTGHATM v, GANPAT SINGH. 22 Pat. 532 209 I.C. 438= 16 R.P. 91=9 Cut. L.T. 67 24 P.L.T. 418= 10 B.R. 156 = A.I.R. 1943 Pat. 386.

-Ss. 47 and 48 - Scope - Unauthorised transfer-() mission to avoid under S. 47-Effect-Dispossession of transferee-Right to sue in ejectment-. Ibsence of registered sale deed-Epect.

Under S. 46 (3) of the C.P. Tenancy Act, an unauthorised transfer by an occupancy tenant is voidable and not void. Such a transfer is voidable only in the manner prescribed by Ss. 47 and 48 of the Act. If the procedure prescribed by S. 47 is not followed and no application is made. the transfer remains good and cannot be avoided. But the transferee who has no title deed in his favour, the sale deed not having been registered, cannot maintain a suit in ejectment, if he is dispossessed. He is exactly in the same position as a transferee who is allowed to take advantage as a defendant to resist a possessory suit under S. 53-A, of the T. P. Act, as amended in 1929, (Fazi Ali, C.J., and Manohar Lall, J.) RADHA-RRISHINA PAIR 7. SANA ROLL. 23 Pat 645= 218 I.C. 185=18 R.P. 9:10 Cut. L.T. 71= 1945 P.W.N. 230=11 B.R. 265=A.I.R. 1945 Pat. 124.

-Ss. 49 and 37-Acquisition of both proprietary and cultivating rights—Right to transfer.

Where the cultivating rights also have been given up along with the proprietary rights, a person acquiring both the rights in respect of a field can transfer the cultivating rights to any one he pleases or confirm the transfer of them if they had already been transferred. (Stone, C. J. and Niyogi, J.) BABULAI, NANDRAM 77. MANI-KLAL BEHARULAI, I.L.R. (1941) Nag. 124=192 I.C. 826.-13 R.N. 280-1941 N.L.J. 142= A.I.R. 1941 Nag. 79.

-Ss. 49 and 12 (2) and Provincial Insolvency Act, S. 28-Adjudication of proprietor as insolvent-Effect-Cultivating rights in six-If vest in Receiver-Law after Amending Act XI of 1940.

On the adjudication of a proprietor of a village as an insolvent his proprietary right in sir land vests in the Receiver. The proprietor loses his comes an occupany tenant of such sir land under S. 49 (1) of the C. P. Tenancy Act. The cultivating rights in sir remain with him and do not vest in the Receiver on account of S. 12 (2) of the Act. The Receiver cannot, therefore, lease out the occupancy holding er sell the standing crops. The amendments introduced in S. 49 by MANOHAR v. K. S.

#### C.P. TENANCY ACT (1920), S. 49.

MISHRA. I.L. R. (1945) Nag. 363=1944 N.L. J. 293 = A I.R. 1944 Nag. 350.

-S. 49-Execution sale of proprietary share of gaontia in Sambalpur territory—Purchaser, if

gets bhogra land.

The transfer of proprietary share of a gaontia in a village situate in Sambalpur territory includes by necessary implication the bhogra land. Gaontiahi right comprises the right to collect rent and pay a fixed sum to the Government, the right to hold bhogra land in ownership and the right to hold non-bhogra land as an occupancy tenant or a lessee. If, therefore, the proprietary share of a gaontia in a village is sold in execution of a decree, the purchaser acquires a proportionate share in the bhogra land. (Niyogi, J.) BHOGILAL v MEHTAR BANSHI, IL.R. (1945) Nag. 548=1944 N.L.J. 427=A.I.R. 1944 Nag. .369.

S 49 (1) (b)—Final mortgage decree for sale against khudkasht fields-Some of them subsequently recorded as sir-Cultivating rights in

sir fields-Whether can be sold.

Where after a final mortgage decree for sale is passed against certain khudkasht fields, some of the fields become recorded as sir, the cultivating rights in these sir fields cannot be legally sold (Grille, CJ. and Puranik, J.) DASHRATHSA SHANKARSA v. MANGILAI, ILR. (1943) Nag. 634-209 I.C. 549=1943 N.L.J. 448-A.I.R. 1944 Nag. 29.

S. 50—Sanction to transfer sir—Discretion

if can be directed to be exercised-Proper order

to be passed by Civil Court.

No Civil Court can dictate to a Revenue Officer as to the granting or withholding of sanction to transfer sir. It can only dictate to the party concerned what he is to do. The proper order would be that the party should take all necessary steps to obtain sanction, the other party being given liberty to apply to Court for further directions should it appear that steps are not being taken to carry out Court's orders. It is for the Revenue Court to decide whether sanction should or should not be given. (Stone, CJ) HIRALAL v. MUNSHI RAHMANLAL. 1942 N.L. J. 340.

-S. 58-A and Central Provinces Tenancy (Amendment) Act (XI of 1940), S. 55-Landlord obtaining rent decree before and executing it after amendment—If a charge holder.

A landlord who obtains a decree for arrears of rent before the amendment of the Central Provinces Tenancy Act by Act XI of 1940, holds a charge on the holding, if the decree is pending in execution or an application for its execution is made after the commencement of the Amendment Act. (Puranik, J.) REWAPRASAD v. BABU Punamchanda. 1945 N.L.J. 507.

-S. 63 (3)—Wajih-ul-arz entry declaring tenant as holding land rent free for ever for maintenance-Whether effective after tenant's

death.

A wajib-ul-arz entry made under S. 63 (3) of the C. P. Tenancy Act of 1898 declaring the tenant as holding land rent free for ever for maintenance will, under the proviso to S. 63 (3), be effective during the currency of the settlement. A successor of the tenant can, settlement. therefore, claim the benefit of that entry during the currency of the settlement. (Puranik, I) BEHARILAL LACHHIRAM v. MUKUTABAI. I.L.R.

## C.P. TENANCY ACT (1920), S 95.

(1943) Nag. 516=208 I.C. 634=16 R.N. 98= 1943 N.L.J. 343=A.I.R. 1943 Nag. 250.
S. 74-Wrongful acts of servant-Liabi-

lity of zamindar.

The zamindar is not liable to a penalty under S. 74 of the C. P. Tenancy Act for the wrongful acts of his servant, if he neither expressly authorised nor personally co-operated in them, (Rau, F. C.) DHARAMRAO v. TUKYA. 1945 N. L.J. 197.

-S. 81-Suit by lambardar for arrears of rent-Amount wrongly paid by tenant to previous lambardar as rent for year previous to years in

suit—If can be set-off.

In a suit for arrears of rent by a lambardar, the tenant cannot claim to set-off an amount wrongly paid by him to the previous lambardar as rent for the year previous to the years in suit without knowing that the rent for that year had been suspended by Government. Such a set-off is not permissible under S. 81 of the C. P. Tenancy Act. (Puranik, J.) NARAYAN v. BADRIDAS. I.L.R. (1945) Nag. 691=1945 N.L.J. DAS. I.L.R. (1945) Nag. 341=A.I.R. 1945 Nag. 271.

-S. 88-A-Cases under-Procedure-Cr. P. Code or I. P. Code-If applicable See CENTRAL PROVINCES LAND REVENUE ACT, S. 201. 1945
N.L. J. 542.
S. 88-A-Cases under-Revenue Officer, if

can start suo motu. See Central Provinces LAND REVENUE ACT, S. 201. 1945 N.L.J. 542.

 S. 88-A—Payment by landlord – If must be made at market rate-Payment in kind-Permis-

sibility.

Unless payment is made in full (i.e.) at reasonable or market rates and according to the work performed the landlord is liable to be penalised as provided in S. 88-A of the Tenancy Act, in respect of each day's work or each task which has not been fully paid for. Payment in kind, if accepted as such by the labourer is legally permissible-provided, of course, that the value thereof is equivalent to the amount of wages due at reasonable or market rates. (Ramsden, F.C. RANASHAH BAPU V. SHALIGRAM. 1945 N.L.J.

S. 89—Surrender—Registration if necessary for its validity. Kashi Prasad v. Bed Prasad. [See Q.D. 1936-'40, Vol. I, Col. 832.] I.L.R. (1941) Nag. 386.

-S. 93 and Partition Act (1893), S. 2-Partition not possible in view of S. 93—Power of Court to apply S. 2, Partition Act.

Where in view of S. 93 of the C. P. Tenancy Act read with R. 2 of the rules framed by the Financial Commissioner in exercise of p wers conferred on him by S. 109, partition of an occupancy holding is not possible the Court can order sale under S. 2, Partition Act and distribution of the proceeds. (Niyogi, I.) CAPUR CHAND v. SHANKARRAO. 1942 N.L.J. 134.

S. 95—Creation of occupancy tenancy—Reservation by landlord of his right to fruit trees

-Legality.

After the passing of the C. P. Tenancy Act of 1920, it is not permissible for the landlord to create a tenancy and reserve the right to the fruit on the fruit trees in the holding for himself. when no such light existed on the date when the Act came into force. (Sen, J.) KESABAI v. PANDIT RAJABHAU. I.L.R. (1944) Nag. 141=

C.P. TENANCY ACT (1920). S. 95.

217 I.C. 75=17 R.N. 83=1944 N.L.J. 32= A.I.R. 1944 Nag. 94.

-S. 95-Scrub-jungle-Tenant's right to

appropriate sale proceeds.
Under S. 95 of the C. P. Tenancy Act, a tenant is entitled only to clear his land of scrub-jungle. He is not entitled to appropriate it in the sense of making it a marketable commodity and selling it as fuel and appropriating its sale proceeds for himself. Scrub-jungle is of spontaneous growth and is not the result of human labour and is not thus a part of agriculture. That spontaneous growth which is on the land is a part and parcel of the land and belongs along with the land to the landlord. But as it interferes with the proper cultivation of the land the legislature considered it proper to grant the privilege to the tenant to whom the land is let of clearing his land of that wild and spontaneous growth. The tenant may clear it up in any manner he chooses-either by uprooting and throwing it out or by burning it on the spot or by cutting it and absorbing it for purposes subscrient to agriculture. The law has not undergone any change by reason of the amendment of 1940. (Grille, C.J., Niyogi and Puranik, JJ.) GOPALDAS V. MST. MALLA. I.L.R. (1943) Nag. 298=207 I.C. 539=116 R.N. 42= 1943 N.L. J. 214=A.I.R. 1943 Nag. 200 (F.B.). -S. 100—Nature of provision—Landlord creating occupancy tenant right in favour of third

persons-Remedy of tenant excluded from posses-

sion.

S. 100 of the C. P. Tenancy Act is only an enabling provision for a tenant who does not wish a final decision on the point of title but wants speedy recovery of possession in a cheap manner on the prima facie record of his tenancy. A civil suit is not barred by S. 105 of the Act Where the landlord has created occupancy tenant right in favour of third persons, the proper remedy of a tenant who has been excluded from possession is a civil suit against them in time under Sch. II, Art 1 of the Act and not an application under S. 100 of the Act against the landlord who had already parted with possession Any order that may be passed under that section will not bind the occupancy tenants simply because their landlord was a party thereto. (Grille, C.J. and Puranik. J.) JIWANDHAR v. BAKARAM, I.L.R. (1944) Nag. 135=213 I.C 32=16 R.N. 255=1944 N.L. J. 62=A.I.R. 1944 Nag. 92.

S. 100-Possession given to land ord under S. 24—If can be questioned in proceedings under S. 100. See C. P. TENANCY ACT, Ss. 24 AND 100, 1943 N.L.J. 520.

-S. 105 (b)—Water rate levied from tenant at flat rate per head irrespective of acreage—If rent—Order of settlement officer abolishing it—Power of Civil Court to question.

If the charge levied by the Malguzar for water from his tank is a charge proportionate to the acreage of each tenant, that charge would be in the nature of rent and it would be within the competence of the settlement officer to abolish that charge and to make the rental assessment of the tenant commensurate to the benefit received. But if the water rate levied by the Malguzar from the tenants is a flat rate per head irrespective of the size of the holdings, it cannot be taken as constituting rent. An order of the settlement officer abolishing that rate can, therefore, be retrospective.

C.P. USU. LOANS (AM.) ACT (1934).

questioned by the Civil Court. (Grille, C.J. and Sen, J.) CHINDU v. INDRARAJ. I.L.R. (1944) Nag. 431=216 I.C. 285=17 R.N. 68=1944 N.L.J. 151=A.I.R. 1944 Nag. 175.

-S. 106-Arrears of rent-Decree obtained by lambardar-Court and person competent to

execute it.

When a Court presided over by a Revenue Officer passes a decree for arrears of rentit creates a debt of record and it can be executed as an ordinary decree by any Court. It is not necessary that the officer presiding over the executing. Court should be a Revenue Officer. When the decree is obtained by a lambardar who is no longer the lambardar when it is executed, he can nevertheless execute it and it is no concern of the judgment-debtor that a new lambardar has been appointed. The money collected will be held in trust by the decree-holder lambardar. C.J.) CHINTAMAN V. SHRIKISAN I.L.R. (1943) Nag. 319-206 I.C. 93-15 R.N. 237-1942 N.L. J. 344-A.I.R. 1943 Nag. 138.

S. 106 and C. P. Code (1908), S. 9— Court trying rent suit—Nature of. Under S. 106, C. P. Tenancy Act, the Court before which a rent suit is brought is a Civil Court having, of necessity, as its presiding officer a Judge who is also a Revenue Officer. Such a Court is not a Revenue Court but it is a Civil Court having as its presiding officer a Judge with certain qualifications. He must be both a Judge and a Revenue Officer. (Stone, C.J.) MAKHAN LAL v. BODHIRAM. 1942 N.L.J. 348.

-Sch. II, Art. 1-Abandonment by life tenant-Reversioner's right to sue for declaration

-Starting point of limitation.

Art. 1 of Sch. II to the C.P. Tenancy Act corresponds in principle to Art. 142, Limitation Act and as such there can be no adverse possession against a person not entitled to immediate possession until his right to possession accrues. A reversioner's right to possession would accrue on the death of the widow and hence when there is an abandonment by a life tenant under S. 35 of the C.P. Tenancy Act, the starting point for limitation for a suit by him would be the death of the life holder. (Stone, C. J. and Bose, J.)
MURLIDHAR v. HAZARILAL. I.L.R. (1942) Nag,
703=15 R.N. 61=1941 N.L.J 612=202 I.C. 25 =A.I.R. 1942 Nag. 108.

-Sch. II, Art. 1-Encroachment on part of occupancy holding by projection of caves-Suit for removal-Limitation-Limitation Act, S.23 and Art. 142.

A suit for the removal of an encroachment made by the defendant by projecting his eaves on a part of the plaintiff's occupancy holding is governed by Art. 1, Sch. II of the C. P. Tenancy Act and not by Art. 142 or S. 23 of the Limitation Act. The projection of the eaves amounts to an, act of trespass and it is complete when the projection is completed and the continuance of the projection does not amount to a continuing wrong within the meaning of S. 23 of the Limitation Act. (Grille, C.J. and Sen, J.) Ambadas v. Dattatraya. I.L.R. (1944) Nag. 753=1944 N. L.J. 467=A.I.R. 1945 Nag. 78.

CENTRAL PROVINCES USURIOUS LOANS (AMENDMENT) ACT (1934)-It

## C.P. VIL. PAN. ACT (1920), S. 12.

The C. P. Usurious Loans (Amendment) Act which amended the Usurious Loans Act of 1918 has no retrospective operation. The result is that in transactions prior to 15-6-1934 the date on which the Amending Act came into force recourse cannot be had to that Act. (Grille and Pollock, JJ.) KALUSINGH v. CHHITTU SINGH. 1942 N.L.J. 455.

CENTRAL PROVINCES VILLAGE PAN-CHAYAT ACT (V OF 1920), Ss. 12 and 15-Power of panchayats to control holding of mar-

kets and to lery fees.

S. 12 of the C.P. Village Panchayat Act confers a discretionary power on panchayats to undertake the control and administration of certain matters specified in it. I'hough markets are not mentioned expressly, holding of markets being a measure of public utility would fall under head (1) of S. 12 (1) and a Village Pancha-necessary.

There is no provision in the C.P. Village Panchayat Act that a notice under S. 80, C. P. Code, should be given before a suit is instituted against any member of the Village Panchayat. It is only for the purposes of the Penal Code that the panch or every member of the Village Court or Village Panchayat is regarded as a public servant under that Act. (Puranik, I.) MUKUNDRAO v. DURGA PRASAD. I.L.R. (1944) Nag. 687=216 I.C. 30=17 R.N. 49=1944 N.L.

J. 79=A.I.R. 1944 Nag. 130.

-S. 66 (2)—Resolution of Village Panchayat

Committee-If protected.

Where a resolution of a Village Panchayat Committee is not passed as that of a Village Court or Village Bench, the members of the Village Panchayat Committee are not in any way protected in respect thereof by S. 66 (2) of the C. P. Village Panchayat Act. (Puranik, I.)
MUKUNDRAO v. DURGA PRASAD. I.L.R. (1944)
Nag. 687=216 I.C. 30=17 R.N. 49=1944 N.L.
J. 79=A.I.R. 1944 Nag. 130.

PROVINCES VILLAGE CENTRAL SANITATION AND PUBLIC MANAGE-MENT ACT (II OF 1920)—Village Sanitation Panchayat constituted under powers given by-If

a juristic person.

A Panchayat brought into existence under the powers conferred by the C. P. Village Sanitation and Public Management Act is not a juristic person and therefore cannot sue. (Stone, C.J. and Bose, J.) CHAIRMAN, VILLAGE SANITATION PANCHAYAT v. ABDUL KADAR. I L.R. (1942) Nag 717=202 I C 621=15 R.N. 94=1942 N. L.J. 438=A I R 1942 Nag 114.
S 5 (1) (d) and R. 23-Right to collect

dues-If can be sold.

The sale of the right to collect the dues which a Village Sanitation Panchayat is authorised to collect by the C. P. Village Sanitation and Public Management Act is wholly illegal and outside the powers created by the Act or the rules made —Ceylon (States Council Elections) Greet in thereunder. (Stone, C. J. and Bose, J.) CHAIR-Council, 1931—Order of Judge of Sapreme Court

#### CERTIORARI.

MAN, VILLAGE SANITATION PANCHAYAT v. ABDUL KADAR. I.L.R. 1942 Nag. 717=202 I.C. 621= 15 R.N. 94=1942 N.L.J. 438=A.I.R. 1942 Nag. 114.

CERTIORARI—Writ of—Another remedy open—If can be issued. See BURMA TENANCY ORDINANCE, Ss. 6 (3) AND 9. A.I.R. 1941 Rang.

——If may be issued only to correct judicial or quasi-judicial acts—Test of such acts—Order under R. 51-F (6) of Defence of India Rules—If

can be corrected by writ.

A writ of certiorari does not lie to correct purely executive or administrative acts but only acts of a judicial nature. In this connection the term 'judicial' does not necessarily mean 'acts of Courts' in the strictest sense but may be acts of body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially. The duty of 'acting' judicially implies something more than mere application of the mind by the authority on the materials before him. If the doing of the act is left entirely to the discretion of the authority as a purely subjective matter or if the official act is "discretionary and in some respects facultative", it is purely an administrative or executive act. In such a case the authority alone has to form his own opinion, in good faith of course, on the materials before him. A judicial or quasi-judicial act, on the other hand, implies more than mere application of the mind or the formation of the opinion. It has reference to the mode or manner in which that opinion is formed. It implies "a proposal and an opposition" and a decision on the issue. It vaguely connotes "hearing evidence and opposition." R 51-F (6) of the Defence of India Rules does not involve the doing of any judicial or quasijudicial act as distinguished from an administrative or executive act and therefore cannot be corrected by a writ of certiorari. (Ameer Ali, A. C.J. and Das, J.) BANWARILAL ROY, In re. 48 C. W.N. 766.

-If may issue against Province of Bengal-Order passed under Defence of India Rules-Government of India Act, Ss. 176 and 306.

A writ of certiorari to correct an order made under the Defence of India Rules cannot issue against the Province of Bengal. "Province of Bengal" or "Provincial Government" or "Government of Bengal", whichever name one may use, is not a legal entity, a body corporate which can sue or be sued in that name. S. 176 of the Government of India Act authorises the use of the name of the province only in respect of certain suits and proceedings specified therein. Further, assuming the "Government of Bengal" can be proceeded against in that name, surely that name will mean or at any rate include the The issue of a writ against the 'Gov-Governor. The issue of a writ against the 'Government of Bengal' will therefore mean issuing process against the Governor which is prohibited by S. 306 of the Government of India Act. (Ameer Ali, A. C. J. and Das, J.) BANWARILAL Roy, In re. 48 C.W.N. 766.

Jurisdiction of Court—Writ, if can be issued by Court to bring up an order made by Judge of that Court or of another Superior Court -Ceylon (States Council Elections) Order in

#### CERTIORARI.

on election petition-Power of Supreme Court to

direct writ against such order.

A Court having jurisdiction to issue a writ of certiorari will not and cannot issue it to bring up an order made by a Judge of that Court. Nor will a Superior Court issue the writ directed to another Superior Court. While the ordinance constituting the Supreme Court of Ceylon does not confer upon it original, but only appellate jurisduction in civil cases, the cognizance of elec-tion petitions under the Ceylon (States Council Elections) Order in Council, is a special jurisdiction conferred upon the Supreme Court by the latter order in Council. An election petition is a proceeding in the Supreme Court. Cognizance of these petitions is an extension of or addition to, the ordinary jurisdiction of the Supreme Court and consequently certiorari cannot be granted to bring up any order made in the exercise of that jurisdiction. Even if the election Judge is to be regarded as a special or independent tribunal, his Court would be a Superior Court. (Lord Goddard.) GOONESINHA v. HONOURABLE O. L. DE KRETSER (1945) F.L.J. 96=58 L.W. 371=1945 M.W.N. 536=A.I.R. 1945 P.C. 83 = (1945) 2 M.L.J. 314 (P.C.)

-Jurisdiction of High Court to issue-Assessment order under Income-tax Act-Writ to challenge validity—Jurisdiction to issue. See GOVERNMENT OF INDIA ACT, S. 226. 45 Bom.L. R. 31.

-Jurisdiction of High Court to issue-Board of Revenue-Order enhancing rent in revision in proceedings under Ch. XI, Madras Estates Land Act—Power of High Court to call up and quash.

The Supreme Court at Madras by its charter of 1860 had no general power or control over the Courts of the East India Company in the mofussil or over their officers acting judicially even though they were British subjects. It had no jurisdiction to issue the prerogative writ of certiorari to any Court or officer in the mofussil, dealing with disputes between Indians independently of its jurisdiction over the Presidency Town and over British subjects or their servants. The High Court which has inherited the powers of the Supreme Court has not been given such a power by any later enactments. The respondent zamindar applied under Ch. XI of the Madras Estates Land Act for the settlement of fair and equitable rent in respect of land in the villages in his estate in the District of Ganjam. The Special Revenue Officer made an order doubling the previous rents. On appeal to the Revenue Board by the appellant-ryots, a member of the Board sitting alone reversed the decision of the Revenue Officer and allowed an increase of only revenue Omer and anowed an increase of only 12½ per cent. considering himself bound by proviso (b) to Cl. (1) of S. 30 of the Estates Land Act. The respondent zamindar moved the collective Board by way of revision, and the collective Board by a majority held that the proviso did not apply to the case but held that an enhancement by 37½ per cent. would be an appropriate increase. The ryots petitioned to the High Court of Madras for a writ of certiorari to quash the order of the collective Board on the ground that the enhancement was beyond that permitted by the proviso to S. 30 (1) (b). The High Court held that if the proviso applied so as to make an increase beyond 12½ per cent. illegal, then the ment of India Act (1935), S. 306.

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ryots would be entitled to the issue of the writ prayed but that in the circumstances of the case the Board of Revenue had the power to enhance the rent by 37½ per cent. and dismissed the petition. The ryots appealed to the Privy Council.

Held, (1) that even if it was assumed that the collective Board exceeded its powers in exhancing the rent by  $37\frac{1}{2}$  per cent the High Court had no jurisdiction, either independently of the local civil jurisdiction which it exercised over the Presidency Town, or solely by reason thereof as an incident of the location of the Board of Revenue within the City of Madras, to issue a writ of certiorori to the collective Board of Revenue to bring up, in order to be quashed, its order enhancing the rent; (2) that the collective Board of Revenue did not exceed the powers entrusted to it under S. 172 of the Estates Land Act by enhancing the rest by 371 per cent. inasmuch as proviso (b) to cl. (1) of S. 30 did not apply to the case; (3) that the duty imposed by S. 168 (2) of the Act to "have regard to the provisions of the Act for determining the rates of rent payable by a ryot" had no more definite or technical meaning than of ordinary usage, and only required that those provisions must be taken into consideration and that it was impossible to say that the duty to have regard, inter alia, to the prohibition contained in proviso (b) to S. 30 (1) was a duty to keep rigidly within the limit there imposed for cases to which the section of its own case applied. When giving directions under S. 172 of the Estates Land Act, the Board of Revenue is to be considered not as a Court or the highest Court in a hierarchy of Revenue Courts, but as the official body specially entrusted with particular duties which included duties of a judicial character (Lord Chancellor.) Ryots of Garacharacter (Lord Chancellor.) Ryots BANDILO v. ZAMINDAR OF PARLAKIMEDI. BANDIIO 7. ZAMINDAR OF PARLARIMEDI. 70 I.A. 129=I.L.R. (1944) Mad. 457=I.L.R. (1944) Kar. (P.C.) 119=16 R.P.C. 137=10 B.R. 278=47 Bom.L.R. 525=210 I.C. 239=48 C.W.N. 18=1943 M.W.N. 525=56 L.W. 460=A.I.R. 1943 P.C. 164-1043-2 W.I. 1943 P.C. 164=(1943) 2 M.L.J. 254 (P.C.).

-Jurisdiction of High Court to issue-If confined to orders of tribunals within area of original jurisdiction.

The High Court of Bombay would have no jurisdiction to issue writs of certiorari with regard to the decisions of tribunals outside the area of its original jurisdiction, namely, the Town and Island of Bombay. (Wadia and Weston, JJ.) Weston, JJ.) RAGHUNATH KESHAV v. POINA MUNICIPALITY. I.L.R (1944) Bom. 683=46

Bom. L.R. 675=A I.R. 1945 Bom. 7.

-Jurisdiction of High Court to issue-Madras Hindu Religious Endowments Act-Notification of temple under—Order of Religious Endowments Board made arbitrarily and in abuse of powers High Court's power to quash, See Government of India Act (1935), S. 306. (1941) 2 M L.J. 175.

-Jurisdiction of High Court to issue-Order without jurisdiction-Debt Conciliation Board-Order declaring debt discharged made without jurisdiction and in abuse of powers—Quashing of See Madras Debt Conciliation Act, Ss 10 and 23. (1941) 1 M.L J 108.

— Jurisdiction of High Court to issue—Writ

against Government—Issue of—Bar of—Govern-

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The power of the High Court to issue a writ of certiorari is statutorily limited and cannot be issued to as to affect the Government. The High Court has no jurisdiction to issue a writ against a Provincial Government including the Governor or against the Central Government including the Governor-General, in view of S. 306 of the Government of India Act, 1935 (Coyajee, J.) DINBAI PETIT v. M. S. NORONHA. 1945 F.L.J. 170=47 Bom.L.R. 500=A.I.R. 1945 Bom. 419. — Jurisdiction of Nagpur High Court to issue. See Government of India Act, S. 224 (2). I.L.R. (1941) Nag. 397.

- Jurisdiction of Patna High Court to issue

-Proceedings under-Ordinance 2 of 1942. The Patna High Court has no power at all to issue a writ of certiorari. Even if it has the power, S. 26 of Ordinance (2 of 1942) has taken it away, except possibly in cases where the High Court could more suitably act under S. 491, Cr.P. Code, upon the ground of lack of jurisdiction. (Fazl Ali, C.J., Manohar Lall and Meredith, IJ.) GOPAL MARWARI v. EMPEROR. 22 Pat. 433=209 I C. 482=16 R.P. 114=10 B.R. 193=1944 P.W.N. 420=45 Cr.L.J. 177=A.I.R. 1943 Pat. 245 (S.B.).

-Locus standi to apply-Person not aggrieved.

A writ of certiorari can be issued even on the application of a man who has not suffered any injury. In such a case, the Court has a discretion to grant or refuse the application according to the circumstances of the case, whereas in the case of a man who is personally aggrieved, he can ask for the writ almost ex debito justifiae. (Das, I.) S. K. SAWDAY v. N. SINGHA ROY. 48 C.W.N. 662.

Order without jurisdiction—Liability to be set aside-Order substantially correct-If ground for non-issue of writ. See Madras Hindu Reli-GIOUS ENDOWMEMTS ACT, S. 44-B (2) (d) (i). (1942) 2 M.L.J. 470.

Certiorari—Power to issue. See Government of India Act, S. 224 and S. 226.

-When can be issued—Election declared

under Calcutta Municipal Act.

Writs of certiorari and prohibition can be issued only in respect of judicial or quasi-judicial acts, and they have no application to executive acts. No application for the issue of these writs will, therefore, lie against the Calcutta Corporation in respect of elections declared under the Calcutta Municipal Act. (Sen, J.) Arun Bhusan Roy v. Hari Sankar Paul. 48 C.W.N. 563.

When to be issued—Jurisdiction of High Court. See MADRAS CITY MUNICIPAL ACT, S. 54

(1). (1942) 1 M.L.J. 70.

CESS—Gao-sumari and ginti—If recoverable in village Tilana—Nature of cess.

The gao-sumari or ginti cess is not now reco-

verable in law in the Tilana village. Gao-sumari and ginti both have the same signification. This cess was originally levied not as a grazing cess but as a tax on the number of heads of cattle possessed by individuals. (M.R. Davies.) BHOLA v. KAJJA. 1941 A.M.L.J. 120. CHAMPERTY. See CONTRACT ACT (IX OF

1872). S. 23—CHAMPERTY. CHARGE. See T. P. ACT, S. 100.

CHARGE TO THE JURY. See CR. P. CODE,

CHAR. & REL. TRUSTS ACT (1920) CHARITABLE AND RELIG CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920)—Applicability
—"Public trust"—Dedication of properties to— Thakur or idol-Provision for worship and ceremonies-Incidental provision for feeding of

sadhus and travellers—Effect.

In order that the Charitable and Religious Trusts Act of 1920 may apply, the trust must be substantially for public purpose. It is not sufficiently the substantially for public purpose. cient if one of the purposes of a trust is public. A mere provision for the service of sadhus, occasional guests and way-farers in a dedication to an idol does not render the dedication substantially for public purposes. A deed of dedication to a Thakur or arpanama after providing that the Government demands, and the zamindar's rent were to be the first and important expenses out of the income, provided, "whatever may be the residue after meeting the expenses of pujapath, ragbhog, occasional utsavas, sevas of sadhus, atithis and abbyagatas it shall be spent in making improvement in the property of the said Thakurji.

Held, that the main purpose of the trust was making provision for the due worship of the idol and the performance of the necessary ceremonies; that the seva of sadhus, guests and travellers was not the main object of the trust but was merely incidental or ancillary to the worship of the idol; that by the terms of the arpanama nothing was dedicated to the public and the trust created was therefore a private trustand not a public trust falling under the Charitable and Religious Trusts Act of 1920. (Harries, C.J. and Manohar Lall, J.) RAMSARAN DAS v. JAIRAM DAS. 21 Pat. 815=206 I.C. 214=9 B.R. 273=15 R.P. 320=A.I.R. 1943 Pat.

——Applicability—Trust for public purpose— Property granted to Mahant as "Gurudakshina" to be held generation after generation—Grant described as 'Bishunprit'—Effect—Public trust—

If created.

To constitute a trust "created for a public purpose of a charitable or religious nature" within the meaning of Act XIV of 1920, the author or authors of the trust must be ascertained and the intention to crate a trust must be indicated by words or acts with reasonable certainty. Moreover, the purpose of the trust, the trust property and the beneficiaries must be indicated so as to enable the Court to administer the trust if required. The fact that the property is recorded in the Lakheraj register as Bishunprit land is not conclusive to show that it is property gifted to the idol for public purpose. Nor would the description of the grant as gunudakshina be conclusive of the grant being for public purposes. Gurudakshina means a gift by a disciple to his Guru, and when the property is granted to the Mahant to be held by the grantee generation after generation, the gift must be taken to be a gift to the Mahant personally. Such words are not reconcilable with the view that grantor was in fact making a dedication. Even if the grant is taken to be a grant to the idol and not to the mahant, that in no way shows that the property is trust property held for public purposes. the evidence at the utmost only suggests that the properties were possibly debottar and no more, the fact that the property belongs to an idol would in no way establish that the trust was

## CHAR. & REL. TR USTS ACT (1920), S 3.

public. (Harries, C.J. and Manohar Lal. J. RAM SARAN DAS v. JAI RAM DAS. 21 Pat. 815-206 I.C. 214=9 B.R. 273=15 R.P. 320=A.I.R. 1943 Pat. 135.

-S. 3-Applicability-Requirements-Dedi-

cation to idol-Nature of trust.
S. 3 of the Charitable and Religious Trusts Act sets out what must be established in order to bring the matter within the purview of the Act. Put shortly there must be a trust. It must be either express or constructive. It must have been either created or it must be existing for a public purpose. And that public purpose must be of a charitable or a religious nature. Though the trust which arises in the case of a dedication to an idol is not the exact kin l of trust which the English law contemplates, nevertheless, they are trusts, though of a special and particular kind and they are the sort which the Charitable and Religious Trusts Act is intended to cover. S. 5 (6) would seem to prohibit it except in the (Stone, C.J. and Bose, J.) Byankat Paikajt v. circumstances mentioned in the section itself. RAM CHANBRA I.L.R. (1942) Nag. 468=197 (Sinha, I) Myhomed Ibrahim v. Karam Ilahi. I.C. 602=14 R.N. 179=1941 N.L.T. 396=A.I. 1944 A.L.W. 488. R. 1941 Nag. 317.

-S. 5-Jurisdiction of District Judge to decide if a trust was a trust to which the Act

applied.

S. 5 of the Charitable and Religious Trusts Act confers powers on the Court to arrive at a decision on the question whether the trust was a trust to which the Act applied, upon a summary enquiry and it is clearly necessary where objection is taken to the applicability of the Act, that the Court shall decide this question. But this is subject to the provision in S. 5 (3) which provides for stay of proceeding to enable the con-testing party to file a suit for a declaration. Where a party fails to file a suit within the time allowed the District Judge is perfectly justified in making a summary enquiry and coming to a finding that the Act was applicable. (Bennet, I.) NAGESHWAR DASS v. HARNAM DASS. 200 I.C. 611=15 R.O. 29=1942 O.W.N. 337=1942 A. W.R. (C.C.) 225=1942 O.A. 246=A.I.R. 1942 Oudh 387.

-S. 5-Question of title-Power of Court to decide.

Under S. 5 (4) of the Charitable and Religious Trusts Act, the Court has power to decide a question of title raised if no undertaking is given to file a declaratory suit under sub-S. (3), although the order of the Court does not operate as res judicata and does not preclude the persons aggrieved from filing a suit. (Sen, J.) Kubrabi v. Shuberati. I.L.R. (1944) Nag. 775=220 I.C. 57=1944 N.L.J. 170=A.I.R. 1944 Nag.

Suit to declare that trust is not public trust— Onus.

In a suit by a trustee under S. 5 (3) of the Charitable and Religious Trusts Act for a declaration that the trust in dispute is not a public trust and that the Act does not apply thereto, it being common ground that the property originally stood in the names of the various mahants and now stand recorded in the name of idol with the reigning mahant as shebait, and in possession of the shebaits on behalf of the idol, the onus is on the defendant alleging that the property is trust property held for public purposes to prove affir-

## CHILD MAR. RES. ACT (1929), S. 5.

matively that a trust of a public character was imposed upon the property. By mere acquisition by a mahant a property does not lose its secular character and assume a religious character, and the descent of property from guru to chela does not warrant the presumption that it is religious property. The plaintiff can be defeated only if the defendant establishes affirmatively that a trust of a public character was imposed upon the Property. (Harries, C.J. and Manohar Lall, J.)
RAMSARAN DAS 7. JAI RAM DAS. 21 Pat. 815—
206 I.C. 214—9 B.R. 273—15 R.P. 320—A.I.R. 1943 Pat. 135.

-S 5 (6) -Elaborate inquiry into questions of title if can be made in proceedings under the

Act.

The District Judge is not to make an elaborate inquiry into questions of title in proceedings under the Charitable and Religious Trusts Act.

CHARITABLE SOCIETIES ACT (1860), S. 20 -Applicability-Some objects of a Sabah though religious, dominant intention charitable-Overriding powers given to head of Sabah if invalidates registration.

S. 20 of the Charitable Societies Act does not clearly mention whether a purely religious purpose may be a charitable purpose within the meaning of the Act. But where though some of the objects of a Sabah are religious the dominant intention is charitable it can be validly registered under the Act. The mere fact that the head of the Sabah for the time being is given powers to override the Sabah could not invalidate its registration. (Bajpai and Dar, JJ.) THE SECRETARY OF STATE FOR INDIA IN COUNCIL V. THE RADHA SWAMI SAT SANG. 1943 A.L.W. 569.

CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929)-Marriage of minor (subject of Native State) to be performed in Native State-Application for liberty to spend monies for-If can be granted in an administration suit pending in British India.

It will be wrong in principle for a British Indian Court to facilitate conduct which the Legislature has made penal as being socially injurious, on the ground that the promotion of the contemplated marriage is not punishable by the law of the place where it is proposed to celebrate it. Though the parties to an intended marriage are subjects of an Indian State an application in an administration suit pending in British India on behalf of one of them a minor for permission to withdraw and spend money for the marriage to be performed in the Indian State cannot be allowed. (McNair, J.) HANSRAJ BHUTERIA v. ASKARAN BHUTERIA 194 I.C. 730 = 14 R.C. 9=A.I.R. 1941 Cal. 244.

Effect on Hindu Law—Marriage in contravention of the Act—If "necessity" justifying alienation. See HINDU LAW—JOINT FAMILY—ALIENATION. 1941 N.L.J. 282.

——S. 5—Construction and scope—"Perform.

conduct or direct"-Meaning of-Parents of grown up bride taking part in kanyadan ceremony—If liable, EMPEROR v. FULABHAI BHULABHAI. [See Q.D. 1936-40, Vol. 1, Col. 3264.] 42 Cr.L.J. 62.

## CHILD MAR. RES. ACT (1929), S. 6.

-S. 6-Applicability-Persons liable under. It cannot be said from the words "where a minor contracts a child marriage" occurring in S. 6 of the Child Marriage Restraint Act, that the section applies only to cases where the child himself or herself entered into an agreement for the marriage. The liability rests on any parent or guardian who in any way is responsible for the marriage of his minor child, by whomsoever the agreement and arrangements for the marriage may be mide. Further the responsibility is laid by S. 6 on the person who has charge of the minor. Hence where a father is alive and the daughter is living with him, he alone can be made liable under the section and the grandfather would not be liable though he might have in fact made all the arrangements. (Bennet, J.)
BHAGWAT SARUP v. EMPEROR. I.L.R. (1945)
All. 272=221 I.C. 47=1945 A.W.R. (H.C.) 67
=1945 A.L. J. 232=A I.R. 1945 All. 306.

\_\_\_\_S. 10 (as amended by Act VII of 1938), and Cr. P. Code, S. 537—Preliminary enquiry not held—Trial and conviction, if vitiated—S. 537, if cures defect. EMPEROR v. MEHTAR. [See Q.D. 1936-'40, Vol. I, Col. 848.] 42 Cr. L.J. 37.

S. 10—Scope—If mandatory—Non-compliance—If vitiates proceedings. EMPEROR v. MAHOMED HASHIM. [See Q.D. 1936-40, Vol. I, Col. 3265.] 191 I.C. 123—13 R.S. 127—42 Cr. L.J. 83.

#### CHILDREN.

See (1) BOMBAY BORSTAL SCHOOLS ACT (1929). (2) Bombay Children Act (1924).

CHIN HILLS REGULATION (1869), Ss. 4 (1) (4) and 34-A-Offence of illicit manufacture and possession of spirit in Chin Hills-Accused

not a 'chin'-Law applicable.

Where a person who is not a 'chin' as defined in the Chin Hills Regulation is accused of the offence of illicit manufacture and possession of spirit, by virtue of Ss. 4 (1) (4) and 34-A, he is to be tried under the Excise Act and not under the Regulation. If it is found that the liquor was the product of the manufacture complained against, the accused need not be charged with and convicted of two offences, for the offence of manufacture necessarily includes possession of the article manufactured. It would be otherwise where the accused was not found manufacturing but only in possession of apparatus for manufacturing plus the article manufactured. (Moseley, J.) THE KING v. Yoo NGOON. 1941 Rang L.R. 555=197 I.C. 734=14 R.R. 145=43 Cr.L.J. 258=A.I.R. 1941 Rang. 332.

-Ss. 10 and 41-High Court-Powers of

revision-Proper Court to revise.

The High Court has no power to revise proceedings under the Chin Hills Regulation, whatever the nationality of the accused or the law under which he has been or should be tried. According to S. 10 of the Chin Hills Regulation, for the purposes of Cr. P. Code the Governor shall exercise the powers of the High Court and S. 41 provides for the delegation by the Governor of his powers. The Governor has by notification No. 633, dated 21st December, 1939, delegated his powers as a High Court to the Com-

CH NAG. EN. ES. ACT (1876), S. 21-B.

L.R. 555=197 I.C. 734=14 R.R. 145=43 Cr. L J. 258=A.I.R. 1941 Rang. 332. CHOTA NAGPUR ENCUMBERED ES-TATES ACT (VI OF 1876). S. 3-Construction and scope—Alienation—If includes devise by will—Execution of will by holder—If prohibited.

The alienation referred to in S. 3 of the Chota

Nagpur Encumbered Estates Act is an alienation inter vivos, and the prohibition against alienations in the section is directed against alienations inter vivos, and not against a devise by the bolder by will. The holder is not therefore incompetent to make a will by reason of the prohibition in S. 3 of the Act.

Manohar Lal, J.—The combined effect of Ss. 3 and 9 of the Act shows that the object of the Act is that the manager shall have unfettered power of management and control over the property so that he may apply the rents and profits of the land to speedily relieve the holder's estate from the burdens created on it by the holder. The Act does not make the manager, the holder of the estate, but merely prohibits the holder in his own interest from exercising the acts of ownership so that he may not interfere with the wide powers given to the manager to manage the estate. A will speaks from the death of the testator only and the mere execution of a will by the holder is not an alienation of property and in no way affects the possession of the estate by the manager. (Harries, C.J. and Manohar Lall J.) Mon Mohan Singh v. Raghu Nandan Singh. 20 Pat 280=194 I.C. 23=13 R.P. 666 =7 B.R. 703=A.I.R. 1941 Pat. 465.

S. 12—'Heir"—Meaning of. The word "heir" in S. 12 of the Chota Nagpur Encumbered Estates Act is loosely used and may be taken to include a person who has a right to succeed in law to the holder. (Harries, C. I. and Manohar Lall, I) Mon Mohan Singh v. Raghu Nandan Singh. 20 Pat. 280=194 I.C. 23=13 R.P. 666=7 B.R. 703=A.I.R. 1941 Pat.

S. 12-A—Scope—Objection to sale in execution of property inalienable--Dismissal-Suit after sale to declare same void and for possession—Competency. See C. P. Code, S. 47. 23 Pat.L.T. 56.

S. 12-A-Scope-Sanction-If condition precedent-Subsequent sanction-Sufficiency to validate transaction effected without sanction.

Under S. 12-A of the Chota Nagpur Encumbered Estates Act, the sanction of the Deputy Commissioner must precede the alienation or charge. If an alienation or charge is made without such previous sanction, by a person not competent to make it, the alienation or charge is void in view of S. 12-A (3). It is not cured by sanction given subsequently. Subsequent sanction cannot transform what was a nullity into a valid transaction. (Harries, C. J. and Chatterji, J.)
SHYAM BEHARI SINGH v. RAMFSHWAR PRASAD
SAHU. 20 Pat. 904=198 I.C. 208=8 B.R. 337 =14 R.P. 393=A.I.R. 1942 Pat. 213.

-S. 21-B-Construction and scope-Party to litigation represented by manager-Death of-Failure to implead heirs—Abatement—Presence of manager on record—If prevents abatement. missioner of Magwe Division and he alone can revise proceedings under the Regulation. (Moseley, J.) The King v. Yoo Ngoon. 1941 Rang. Q.D. 1936-40, Vol. I, Col. 854.] 22 Pat.L.T. 457

CHOTA NAGPUR TENANCY ACT (VI CHOTA NAGPUR TEN. ACT (1908). S. 33.

OF 1908)—Rent suit—Parties—Absence of proper parnes-Effect on Revenue Court's jurisdiction-Revenue Officer-When can pass decree and order sale. Lai Ballabi Nath Sah Deov. Habibur Rahman. [See Q.D. 1936-'40 Vol. I, Cot. 3265.] 191 I.C. 693=13 R.P. 345=7 B.R. 244.

-Revision-Powers of Commissioner-Rent reduction case-Application by landlord for revision--- Further reduction of rent by Commissioner

—Legality.

Under the law the Commissioner has wide powers of supervision, including the power of correcting mistakes even when such correction is against the interests of the party applying in revision. In an application by the landlord against an order reducing the rent, the commissioner has therefore the power to further reduce the rent though no appeal or revision petition has been filed by the tenant. (Swanzy.) CHOTA NAGPUR BANKING ASSOCIATION LTD. v. ASHUTOSH PATHAK. 8 B.R. 830.

-Ss. 3 and 32—Record of rights—Entry— Construction-"Non-resumable" tenure- Mean-

ing of.

Where a tenure is entered in the Record of Rights as "non-resumable." the term "non-resumable" must be interpreted in the light of the definition of resumable tenures contained in clause (xxiv) of S. 3 of the Chota Nagpur Tenancy Act; and it must be taken to mean that the tenure does not lapse to the e-tate of the grantor either on the failure of male heirs or on the happening of any other definite contingency. (Fazl Ali, C.J. and Reuben J.) KAMAKSHYA NARAIN SINGH T. HIRO MAHTON. 23 Pat. 233=219 I.C. 20=18 R.P. 62=11 B.R. 333=1944 P.W.N. 566=A.I.R. 1944 Pat. 348.

Ss. 4 and 7—Scope—Khunt-Katti tenureholders-If recognised under and consistent with Act—Enumeration of tenants—If exhaustive.
The existence of Khunt-Katti tenure-holders is

not consistent with the Chota Nagpur Tenancy Act; they are merely a sub-class of the first class of tenants enumerated in S. 4, namely tenure-holders. Besides, S. 7 (2) of the Act clearly recognises the possibility of there being Khunt-Katti tenant other than raiyats having Khunt-Katti rights.

Quaere: Whether the list of classes of tenants in S. 4 of the Act is exhaustive. (Facl Ali, C.I.) and Reuben, J.) Kamakshya Narain Singh v. Hiro Mahton. 23 Pat. 233=219 I.C. 20=18 R.P. 62=11 B.R. 333=1944 P.W.N. 566=A.I.

R. 1944 Pat. 348.

S. 7 (1)—Khunt-Katti tenancy—Nature of rights—If confined to lands actually reclaimed. A Khunt Katti tenancy is a tenancy for the reclamation of jungle areas; but there is no reason why the interest of a Khunt-Katti tenant should be confined to the lands actually reclaimed. Khunt-Katti rights extend not only to reclaimed Lands but also to unreclaimed lands. (Fazl Ali, C.J. and Reuben, J.) KAMAKSHYA NARAIN SINGH V. HIRO MAHTON 23 Pat. 233=219 I.C. 20=18 R.P. 62=11 B.R. 333=1944 P.W.N. 566=A.I. R. 1944 Pat. 348.

S. 17—Settled raiyat—Continuous holding of same land for 12 years-If necessary.

Under S. 17 of the Chota Nagpur Tenancy Act. a settled raiyat is a raiyat who has continuously held as a raiyat land in the village; it is not necessary that a raiyat to become a settled raiyat should hold the same land continuously for 12 years. (Swanzy.) KAMAKHYA NARAIN SINGH 21. DHUPLAL RAM. 8 B.R. 828.

-S. 22—Scope—Occupancy raiyat sub-letting land for building purposes—Suit by landlord to evect tenant and sub-tenant from portion of holding on ground of misuse—Maintainability.

A suit by a landlord to eject an occupancy raivat and his sub-tenent from a part of his holding on the ground that he had misused it in a manner contrary to the provisions of S. 21 of the Chota Nagpur Tenancy Act, i.e., by sub-letting it for building purposes, is not maintainable under S. 22 of the Act or under the general law of landlord and tenant. There cannot be a suit for ejectment from a portion of the holding. (Manohar Lall and Meredith, JJ.) JAGDISH CHANDRA DEO DHABAL DEE 2. GAYA PRASAD SINGH. 22. Pat. 648:=212 I.C. 362=-16 R.P. 272=10 B.R. 502=A.I.R. 1944 Pat. 26.

-Ss. 26 and 33-A-Rent, when first became payable—Rent payable and rent paid—Distinction -Proceedings under Chapters XII and XIII-Finding that rent was Rs. 14-4-0 from 1954 to 1961, Sambat and thence Rs. 15 up to 1913, A.D.-Restoration to Rs. 14-4-0—Material date—1954 Sambat or 1913 A.D.

S. 26 of the Chota Nagpur Tenancy Act was designed to legalise in certain circumstances enhancements which under the old law had been illegal. There is further a distinction between the rent payable and the rent paid. Where in a proceeding under Chapters XII and XIII of the Chota Nagpur Tenancy Act, the finding was that from 1954-1961 Sambat, the prevailing rent was Rs. 14-4-0 that from 1961 to the time of inquiry in 1913 A.I), the prevailing rent was Rs. 15, and Assistant Settlement Officer in those proceedings re-established Rs. 14-4-0.

Held, that the Rent Reduction Officer was clearly justified in acting on this finding and in taking 1954 Sambat as the year in which the rent first became payable, and it was wrong to take 1913 A.1). as the year when the rent first became payable for purposes of reduction. (Swanzy.) CHOTA NAGPUR BANKING ASSOCIATION, LTD. v.

ASHUTOSH PATHAK. 8 B.R. 830.

-S. 33 (2) (v)—Construction and scope of-Rent-Date when it originates-Burden of proof. The time given in S. 33 (2) (v) of the Chota Nagpur Tenancy Act is an artificial time which is to be treated as the time when the rent is to be regarded as having originated in default of satisfactory evidence of when it actually originated. It might be the case that it was known that the rent did not originate then. If receipts are available for the same rent for the five preceding years, unless it can be proved that the tenancy was created at the existing rent in the first of those five years, then the year when the record of rights was first prepared must still be taken. It would thus be correct to take the year when the terii was prepared if the terii rent and the finally published rent are the same. But it is not enough for the landlord to prove that the rent entered in the record of rights was paid in a particular earlier year unless he can prove also

#### CHOTA NAGPUR TEN. ACT (1908) S. 35. | CHOTA NAG. TEN ACT (1908), S. 48-A.

that the rent originated then. If the landlord can prove that the existing rent dates back from a period of low prices which do not admit of any reduction, then no reduction is admissible, even if the landlord cannot prove the exact year when the rent originated; for this, however, the landlord must strictly prove that the same rent for the same holding has been coming on continuously since the period of cheap prices (Middleton) Kamakshya Narain Singh v. Habib Mian 9 B.R. 229.

-S. 35, Proviso (v)-"Current prices"-Ascertainment of -Yearly averages.

The words "current prices" are not defined in the Chota Nagpur Tenancy Act; the officers administering the Act are bound to take the average over a considerable period. It would have to be decided whether the price at the date of the institution or at the date of disposal was to be considered. It must have been the intention of the Legislature that as far as possible there should not be a great deal of difference in the relief admissible in cases otherwise similar. The best course is to take yearly averages (Middleton.) KAMAKHYA NARAIN SINGH v. ANUP MODI. 1941 P.W.N. 456=7 B.R. 798

-Ss. 46 and 47—Scope and effect—Mortgage of raiyati land in contravention of law-Validity -Subsequent change of land from raiyati to Chhaparbandi-If validates transaction. MAK-SUDAN LAL SAHU v. NIRANJAN NATH DAS. [See Q.D. 1936-40, Vol. I, Col. 856]. 1940 P.W.N. 986.

-Ss. 46 and 47—Scope—Under-raiyat — Right to claim benefit of Ss. 46 and 47.

Ss. 46 and 47 of the Chota Nagpur Tenancy Act are intended to protect the rights of a raiyat only and not of an under-raiyat. A person who does not claim to hold land under a proprietor, tenure-holder, or a Mundari Khunt-kattidar cannot be held to be a raisat, and cannot claim the benefit of Ss. 46 and 47 of the Act, though he is RAMPRATAP MARWARI v LACHMAN MISTRY.
194 I.C. 441=13 R.P. 719=7 B R.772=1941
P.W.N. 625=A.I.R. 1941 Pat. 485

-S. 46 (4) (a), (as amended in 1938)-Scope — Retrospective operation — Transfer invalid under old law-If validated.

S. 46 (4) (a) of the Chota Nagpur Tenancy Act has no retrospective operation. There is nothing in the language of the clause to justify such a view. Neither expressly nor by necessary implication does it lead to the conclusion that it was the intention of the legislature to validate trans fers which under the former law were invalid when they were made. (Agarwala, I.) DHANNA MUNDA v KOSILA BANIAN. 193 I.C. 851=13 R. P. 635=7 B.R. 624=A.I.R. 1941 Pat. 510.

S, 46 (6)—Scope—Transfer in contraven-tion of — Sanction of Deputy Commissioner obtained on false representation—Transferor challenging validity later-Estoppel.

Where a raiyat makes a transfer in contravention of S. 46 (6) of the Chota Nagpur Tenancy Act, as it stood before its amendment in 1938 it should have been raised by himself. The inafter taking the consent of the Deputy Commistention of the legislature is to make the pro-

sioner on false representations, he is not estopped. from afterwards challenging the validity of the transfer by showing that the transferee was not a person to whom a transfer of a part of it could be validly made, more especially when the transferee was aware that he was not of that category of persons to whom a transfer could be sanctioned by the Deputy Commissioner. (Agarwala, I.)
DHANNA MUNDA v KOSILA BANIAN 193 I.C. DHANNA MUNDA V KOSILA BANIAN 193 I.C. 851=13 R.P. 635=7 B.R. 624=A.I.R. 1941 Pat. 510.

--- S. 47-Scope-Occupancy raiyat-Money decree against-Appointment of receiver in execution-Jurisdiction of Court.

S. 47 of the Chota Nagpur Tenancy Act only prohibits the sale of a holding of an occupancy raiyat in execution of a decree against him; it does not, however, prevent execution of a decree, against an agriculturist in any other way open to the decree-holder, such as, by the appointment of a receiver, which is one of the modes permitted by S. 51, C.P. Code. The Court has, therefore, jurisdiction to appoint a receiver in execution of a money decree against an occupancy raiyat, although a sale of his holding in execution is prohibited by S. 47 of the Chota Nagpur Tenancy Act. (Agarwala, J) BANWARILAL SAHU v. BALDEO SAH. 200 I.C. 649=14 R P 670=8 B. R. 710=23 Pat. L.T. 91=A.I.R. 1942 Pat. 240.

S 48-Scope—Bhuinhari Pahrai lands
-Alienation before 1908-If void-Suit to avoid —Limitation.

Before the 1st January, 1908, Bhuinhari Pahrai lands were not inalienable by law, and it was only by the provisions of S. 48 of the Chota Nagpur Tenancy Act of 1908 that such lands were made inalienable. Hence an alienation or transfer made before that date cannot be questioned in a suit instituted in 1941. The lands originally belonging to the village community and then made over to the family of the pahan as reward for services in the past and as a remuneration for services to be rendered in future as village priest, vests in the family of the pahan. Since the pahan is neither elected nor nominated by the village community, apart from the alienor, any member of the family or of the village community canchallenge the alienation. But there is no fresh cause of action, accruing to each successor to the office of pahan. Hence a suit instituted more than 12 years after the alienation would be out of time. (Fazl Ali, C.J., and Sinha, J.) SAJIBMIAN v. LANGOURAON. 24 Pat 251.

– S. 48-A (2), (as amended in 1938)—Scope -Rent decree—Attachment and sale of crops on land of judgment-debtor-Objection on ground that crops were raised by under-tenants-Sustainability.

S. 48-A (1) imposes a bar against execution of a rent decree by sale of the tenure itself, but sub-S. (2) of S. 48-A gives the landlord his remedy by the attachment and sale of produce of the land comprised in the tenure. S. 48-A does not anywhere say that in order to be attached and sold the produce must be still in the possession. of the judgment-debtor (tenure-holder) or that it should have been raised by himself. The in-

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duce of the land liable to be proceeded against in the hands either of the judgment-debtor or of any transferee from him or his under-tenant. Where therefore a decree for rent in respect of a bhumihara tenure is sought to be executed under S. 48-A (2) by attachment and sale of the produce of the land comprised in the tenure, the fact that the crops standing on the land had been grown not by the bhumihar judgment-debtor but by some under-tenants is no bar to execution, and an objection raised to execution on that score ought to be disallowed. (Rowland, I.) RAMDAS SAHUV. KAPIL SAHU. 196 I.C. 86=14 R.P. 179=7 B.R. 986=22 Pat. L.T. 717=A.I.R. 1942 Pat. 37.

S. 49-Scope-Bhuinbari tenure-If in-

cludes pahnai lands.

Bhumbari lands, which are referred to in S. 48 of the Chota Nagpur Tenancy Act include Palmai lands; hence the provision in S. 49 for the transfer of Bhumbari tenures includes transfer of Palmai lands. (Middleton.) Zahlook Ali v. Nandu Pahan. 1941 P.W.N. 744=8 B. R. 223.

S. 49 (2) and (a)—"Reasonable and sufficient purpose"—Meaning of—Transfer of part of encumbered tenure—If can be sanctioned.

It cannot be said that the examples of "reasonable and sufficient purpose" given in S. 49 (2) of the Chota Nagpur Tenancy Act are solely for the benefit of the tenure itself, and not for the benefit of the tenure-holder as well. It is difficult to make an abstraction of what benefits the tenure but does not benefit the tenure-holder. It is not unreasonable to say that as only a part of the tenure is being transferred, the transaction is to the benefit of the remainder which will be the unencumbered property of the proprietors, whereas otherwise the whole tenure would be rencumbered. (Middleton.) Zanoor All v. Nandu Pahan. 1941 P.W.N. 744=8 B.R. 223.

——8. 60, Proviso — Scope and effect— Purchase of tenure by landlord in execution of money decree—Effect on arrears of rent due.

Where a tenure is sold in execution of a money decree against the tenant purchaser who acquires only the right title and interest of the judgment debtor takes the tenure subject to the charge for the arrears of rent remaining due at the date of the sale. Where the landlord himself purchases the tenure in execution of a money decree passed in his suit for arrears of rent after another decree for money in a second suit for arrears of rent for a subsequent period has been passed the landlord takes the tenure subject to the liability for arrears of rent due under the second though such liability may not have been notified in the sale proclamation. The second money decree must be deemed to have been satisfied when the landlord purchased the tenure in execution of the first money decree. (Faal Ali, C.J., Chatterji and Shearer, JJ.) KALYANI PRASAD SINGH v. SURENDRA NATH. 24 Pat. 9=26 P.L. T 66=1945 P.W.N. 123=A.I.R. 1945 Pat. 33

S. 60—Scope and effect—Sale of holding— Purchaser—Liability for rent for period prior to sale.

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It is clear that by virtue of S. 60 of the Chota Nagpur Tenancy Act, liability for rent for a period prior to the date of sale cannot be imposed on the purchaser of the tenancy whatever may be the contents of the sale proclamation. (Rowland, J.) MIDNAPORE ZAMINDARY CO., LTD. v. CHINTAMONI MONDAL. 196 I.C. 33=14 R.P. 169=7 B.R. 989=A.I R. 1941 Pat. 600.

S. 61—Applicability—Under-raiset—Right to apply for commutation.

S. 61 of the Chota Nagpur Tenancy Act is restricted to tenure holders or occupancy raiyats and it mentions specifically the rent of a tenure or a holding. The land cultivated by an under raiyat is neither a tenure nor a holding. An under raiyat with occupancy rights has not got all the rights of occupancy raiyats: and unless the under-raiyat can prove that a custom of commutation exists, he has no right to apply for commutation of his rent under S. 61 of the Act. (Middleton) RANKI URAIN v. STRAJUDDIN. 7 B. R. 929=1941 P.W.N. 430.

S. 62 of the amended Chota Nagpur Tenancy Act is a bar to reduction of rent of a holding which was commuted in 1926, as S. 33-A (e) is not included in S. 62 (2) (i). (Swanzy.) KAMARHYA NARAYAN SINGH v. DHUPLAL RAM. 8 B. R. 828.

—— (as amended in 1938), S. 63—Applicability—Offence when committed. Angelov. Kandan Manjhi. [See O. D., 1936-'40, Vol. I, Col. 857.] 21 Pat.L.T. 1085.

——S. 63—Scope—Suit for ejectment of tenant and possession—Compromise—Agreement by tenant to pay amount over and above rent—Enforceability—Suit to recover such amount. Jurisdiction of civil court—Such amount, if rent.

Where in a suit for ejectment of a tenant and for recovery of possession, a compromise is entered into by which the defendant tenant agrees to pay to the plaintiff a certain sum of money over and above the rent which he has been paying in consideration of the plaintiff agreeing not to further proceed with the suit, such agreement to pay is perfectly valid and enforceable and does not come within the mischief of S. 63 of the Chota Nagpur Tenancy Act. Such additional payment is not rent or a payment by a tenant to a landlord as such, but an amount which is payable under a personal covenant and a suit for recovery of the same is therefore cognizable by the civil court. (Manolar Lall and Beevor, II) Anantalal v. Birhutt Bhusan. 23 Pat. 334=217 I.C. 14=17 R.P. 162=A.I.R. 1944 Pat. 293.

—S. 63 (1) (a)—Scope—Offence under—Trial—Procedure—Criminal Procedure Code—Applicability—Cr. P Code, S. 197. ANGELO V, KANDAN MANJHI. [See Q. D., 1936-'40, Vol. I. Col. 857]. 21 Pat.L.T. 1085.

——Ss. 64 (3) and 67—Applicability and scope — Mundari khuntkattidari tenancy — Landlord consenting to conversion of land into Korker by

S. 74.

person not Mundari khuntkattidar - Effect-

Acquisition of right of occupancy.

S. 64 (3) of the Chota Nagpur Tenancy Act does not strictly speaking, apply to lands in a Mundari khuntkattidari Tenancy. If a landlord merely gives his consent to the creation of korkar in a particular village or area to a particular person, such consent does not create any tenancy and does not, therefore, amount to any transfer or alienation of any portion of his interest by the landlord. There is, therefore, nothing in S. 240 which will prevent the landlord from giving consent to a person who is not a Mundari khuntka-tidar for converting the land into korkar in the Mundari khuntkattidari Tenancy. When such person actually creates korkar in the land, S. 64 (3) would apply; if no application to eject him is filed before the Deputy Commissioner within two years of the commencement of the conversion, he cannot be ejected as he acquires a title under the provisions of the Act by the application of S. 67. (Beevor, J.) THAKUR MRITUNJAY SINGH v. JUGAURAON. 1945 P.W.N. 370.

-S. 74-A—Applicability—Purchase of tenure at sale in execution-Right of raiyat to apply for Pradhan service.

There is no warrant for holding that when a tenure is extinguished the rights which existed under it, including the right of the raiyat to apply for a Pradhan service, still survive. S. 74-A of the Chota Nagpur Tenancy Act is concerned with a case in which a Pradhan has been evicted by a landlord; a case of purchase of a tenure at an execution sale does not come within the terms of S, 74-A. (Middleton.) DALU GAUR v. RADHA GOBIND SINGH. 8 B.R. 530.

-S. 77 - Pradhani - If service tenure. JAGDISH CHANDRA DEO v. DEBNATH MAHTO. [See O.D., 1936-'40, Vol. I, Col. 3265, 67 I.A. 290=73 C.L.J. 261.

-Ss. 84 and 132—Applicability—Settlement record—Presumption of correctness.

Supposing S. 132 of the Chota Nagpur Tenancy Act to be inapplicable to the settlement record, the statutory presumption of its correctness would still attach to the record under S. 84 of the Act, and the onus would be on the person alleging the record to be incorrect. (Fazl Ali, C.J. and Reuben, J.) KAMAKSHYA NARAIN SINGH v. HIRO MAHTON. 23 Pat. 233=219 I.C. 20=18 R.P. 62=1944 P.W.N. 566=11 B.R. 333=A.I. R. 1944 Pat. 348.

**-S**.84—Record of rights—Presumption of correctness.

The record of rights relating to a particular plot though it may not be a record under S 132 Chota Nagpur Tenancy Act, is a record entitled to the presumption of correctness under S. 84 of the Act and should not be overlooked. (D)

J.) GOBARDHAN DAS v. SURESH CHANDRA. (Dhavle,J.) GOBARDHAN DAS v. SURESH CHANDRA. 203 I.C. 521=9 B.R. 91=15 R.P. 180=44 Cr.L.J. 95 =A.I.R. 1942 Pat. 489.

-S. 84 (3)—Survey record of rights—Entry in-Value of-Entry based on known patta-Effect.

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> An entry in the survery record-of-rights in Chota Nagpur has a presumptive value under S. 84 (3) of the Chota Nagpur Tenancy Act and is entitled to great weight. But when the basis of the entry in the survey record is known to the Court, namely, that it is based on a jagir patta, the rights of the parties will be presumed to be governed by the terms of that document. (Harries, C.I. and Manohar Lall, I.) HARAKHNATH OHDAR v. GANPAT RAI. 198 I C 680 = 8 B.R. 449=14 R.P. 488=22 Pat.L.T. 829=A.I.R. 1941 Pat. 625,

> ——S. 132—Applicability—Settlement record— Presumption of correctness, See Chota Nagpur Tenancy Act, Ss. 84 and 132. 23 Pat. 323.

-S. 133-Principle of-Nature of tenancy-Determination—Matter to be ascertained.

In order to determine the nature of a tenancy it is necessary to ascertain the terms under which the tenancy is held, and Courts should not be guided merely by descriptions of the tenancy contained in documents executed subsequent to its inception. S. 133 of the Chota Nagpur Tenancy Act recognises the principle and does not lay down any new principle. (Fazl Alt, C.J. and Reuben, Jr.) Kamakshya Narain Singh v Hiro Mahton. 23 Pat. 233—219 I.C. 20—18 R.P. 62—11 B.R. 333—1944 P.W.N. 566—A.I.R. 1944—Pat. 348 Pat. 348.

S. 139-Applicability-Suit for rent of homestead land held by raiyat-Jurisdiction of civil Court.

A suit for rent of homestead land held by a raiyat is cognizable by the Civil Court. S, 139 of the Chota Nagpur Tenancy Act does not apply to such a case and does not oust the Civil Court's jurisdiction to entertain and try such a suit. (Fazl Ali, C. I. and Chatterji, J.) RUPRANI v, DURGA. 23 Pat. 654=217 I.C. 7=17 R.P 161=1944 P.W.N. 570=11 B.R. 168=26 P.L.T. 93= A.I.R. 1944 Pat. 391.

-S. 177, proviso-Suit for mere declaration without consequential relief-Maintainability.

S. 177 of the Chota Nagpur Tenancy Act does not suggest that the suit which may be brought under the proviso should not be merely a declaratory suit, but, there should also be a prayer in, such a suit for some kind of consequential relief (Fazl Ali, J.) SHYAM PRATAP RAM MISSIR v. BENI NATH DUBEY. 198 I C. 711=8 B.R. 459=14 R.P. 498=A.I.R. 1942 Pat. 449.

\_\_\_\_S. 184, proviso (a)—Applicability—Arrest of debtor—When barred.

Proviso (a) to S. 184 of the Chota Nagpur Tenancy Act prohibits the arrest of a judgmentdebtor in satisfaction of a decree for arrearst of rent only when such rent is due in respect of a holding or a Bhunihari tenure. If the interes of a certificate debtor is not a tenure, S. 210 (2) will not apply; and if the interest of a certificate debtor is not a holding or Bhunihari tenure S. 184, proviso (a) is not a bar to the arrest of the certificate debtor. (Middleton.) BRAJDEO NARAIN 8 B.R. 305, SINGH v. BHANNATH SINGH.

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arrest of debtor.

Proviso (b) to S. 184 of the Chota Nagpur Tenancy Act has nothing to do with the arrest of certificate debtor, it merely restricts the attachment or sale of movable property. (Middleton.) Braideo Narain Singh v. Bhannath Singh. 8 B.R. 305.

-S 186 (e)-Pradhani-Sale of-If barred. JAGDISH CHANDRA DEO v. DEBNATH MAHTO [See Q.1)., 1936-'40, Vol. I, Col. 3265.] 67 I.A 290=73 C.L.J. 261.

Ss. 198 and 210, (2) (as amended)— Relative scope and application of Decree for money-Execution against property other than tenure-Right of decree-holder-". Iny immovable property"-Meaning of.

Prima facic, the words "any other property." in S. 210 (2) of the Chota Nagpur Tenancy Act (as amended) must mean any property other than the tenure itself. One of the requisites of the application of the clause is that the decree must be a decree for arrears of rent due in respect of a tenure, that is to say, it must be a rent decree under the Act. Where the sum for which the decree has been passed is not recoverable as an arrear of rent, the decree has to be regarded as a decree for payment of money, which would be covered by S. 198 of the Act. That section contemplates that where a decree sought to be executed is a decree for money, application may be made for execution against any immovable pro-perty belonging to the debtor. The words "any immovable property" in this section are obviously wider than the words "any other immovable property" in S. 210 (2). But under S. 198, sanction of the Commissioner is necessary, and in the absence of such sanction the property cannot be sold. (Fazl Ali and Shearer, II.) LAL INDERTIT NATH v. PRATAP UDAI NATH. 1941 P.W.N. 553 = 199 I.C. 83=8 B.R. 488=14 R.P. 532=A.I.R. 1942 Pat. 84.

-S. 208-Applicability-Suit for rent-Non-joinder of some tenure holders-Decree-Nature of-Sale in execution-If affects shares of parties not impleaded in suit. Mahomed Murtaza v. Cyril Indernath. [See Q.D., 1936-40, Vol. I, Col. 864.] 22 Pat. L.T. 457.

-Ss. 208 and 74-A, (as amended in 1920) -Pradhan-Sale of tenure in execution of rent decree—Exemption. JACADISH CHANDRA DEO v. DEBNATH MAHTO. [See Q. D 1936-'40, Vol. I. Col. 3266.] 67 I.A. 290=73 C.L.J. 261. decree-Exemption.

-S. 208-Sale for arrears of rent-Effect of-Under-raiyat with occupancy right-If liable to be evicted by purchaser. See BENGAL RENT Recovery (Under-tenures) Act, S. 16. 20 Pat.

-S. 208-Scope-Decree against some of several tenants-Sale of holding in execution-Validity.

S. 208 of the Chota Nagpur Tenancy Act does not authorise the sale of a holding in execution of a decree for rent obtained only against some 743 (1).

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of the tenants of the holding; an order directing S. 184, proviso (b)—Scope of—If bars the sale of the holding in execution of such a decree is void. Where a sale under S. 208 is oviso (b) to S. 184 of the Chota Nagpur without jurisdiction, it does not affect the interest of any of the judgment-debtors, even though the sale of their interest under S. 210 (b) might be valid. (Agarwala, J.) Nehal Khan v. Felu Dome. 194 I.C. 435=13 R.P. 721=7 B. R. 770=A.I.R 1941 Pat. 490.

> S. 210 (2)—Applicability — Conditions—
> "Any other property"—Meaning of—Decree for money—Execution—Right to proceed against any property other than tenure. See CHOTA NAGPUR TENANCY ACT, Ss. 198 AND 210 (2), 1941 P.W.N. 553.

-S. 211-Scope-Transferce of holding-Failure to get recorded in landlord's sherista-Effect on suit under S 211 (2)-If gives right to landlord to treat transferor tenant as representative of transferee, Mahomfd Murtaza v. Cyrll Indernath. [See O. D., 1936-40, Vol. I, Col. 866] 22 Pat. L.T. 457.

-Ss. 213 and 258-Applicability-Void sale -Suit to declare nullity-If barred under S. 258.

S. 213 of the Chota Nagpur Tenancy Act relates to an application to set aside an execution sale on the ground of material irregularity or fraud in publishing and conducting a sale. It does not apply where the sale is challenged on the ground that it is void for want of jurisdic-tion in the executing Court. No application at all is needed to set aside such a sale; and a suit to declare the sale void is not barred under S. 258 of the Act. (Agarwala J.) Nehal Khan v. Felu Dome. 194 I.C 435=13 R.P. 721=7 B.R. 770=A.I.R. 1941 Pat. 490.

Ss. 217 and 270—Scope—Order of Commissioner under S. 208 (2)—Revision—Interference by Board of Revenue.

S. 208 (1) of the Chota Nagpur Tenancy Act gives the Commissioner ample discretion to exempt or refuse to exempt a portion of the tenure from sale; and an order of the Commissioner on an application for exemption under S. 208 (1) is ordinarily subject to revision by the Board of Revenue. The Board will not interfere unless. extremely strong grounds are made out (Middleton.) Gokul Sahu v. Pratap Udai Nath Shah Deo. 8 B.R. 294.

-Ss. 217 and 218-Scape-Suit for arrears of rent-Decree by Deputy Commissioner-Revision-Competency.

Where in a suit under the Chota Nagpur Tenancy Act, for arrears of rent of agricultural land not exceeding Rs. 100, the Deputy Commissioner passes a decree holding that the rents are due, no appeal or revision is competent. The judgment of the Deputy Commissioner is final in a case to which S. 218 (2) does not apply. Even a revision which is otherwise provided by S. 217 of the Act is execluded by S. 218 (1) read with S. 139 (2). (Middleton.) MADHIM GHAST 7. NARKU SAHU. 8 B.R. 48=1941 P.W.N.

#### CHOTA NAGPUR TEN ACT (1908), S. 258. CIVIC GUARDS ORD. (1940), S. 8.

\_\_\_\_\_S. 258—Suit challenging correctness of entry in record of rights—Maintainability in Civil Courts.

A suit challenging the correctness of an entry in the record-of-rights on the ground that the proceedings under Ch. XV of the Chota Nagpur Tenancy Act, were without jurisdiction is one which the Civil Courts have jurisdiction to entertain. S. 258 of the Chota Nagpur Tenancy Act, is no bar to the Civil Courts' jurisdiction to entertain such a suit. But where the proceedings of the revenue authorities under (h. XV are not without jurisdiction the record-of-rights prepared by them is conclusive under S. 132 of the Act, and it is not open to the Civil Court to go behind the entry in it and to question its correctness, though it can interpret the entry. (Fazl Ali, C.J., And Reuben, J.) KAMAKSHYA NARAIN SINGH V. HIRO MAHTON. 23 Pat. 233=219 I C. 20=18 R.P. 62=11 B.R 333=1944 P.W.N. 566=A.I. R. 1944 Pat. 348.

CHOTA NAGPUR TENURE HOLDERS RENTACCOUNTACT (I OF 1929), S. 11 (a) and (b)—Registration fee and maintenance fee-Calculation-Basis of-Whole rent or rent of Calculation—Basis of—Whole rent or rent of separated portion only. Ishwar Nath Roy v. Pertap Udai Nath Saha Deo. [See Q. D., 1936-'40, Vol. I, Col. 3266] 192 I C 56=13 R.P. 395=7 B.R. 315=22 Pat. L.T. 573.

—S. 11 (b)—"Rent"—If includes cess, Ishwar Nath Roy v. Pertap Udai Nath Saha Deo [See Q.D., 1°36.'40, Vol. I (ol. 3266.] 192 I.C. 56=13 R.P. 395=7 B.R. 315=22 Pat. L.T. 573.

573.

S. 11 (b) - Rent of the tenure "-Meaning, ISHWAR NATH ROY U PERTAP UDAI NATH SAHA DEO [See Q D. 1936-40 \ OL. 1, OL. 3 67.) 192 I.C. 56=13 R.P. 395=7 B.R 315=22 Pat L.T. 573.

CHRISTIAN MARRIAGE ACT (XV OF 1872), Ss. 19 and 42 (c)—Construction - Guardian for giving consent to marriage of minor—appointment of—Permissibility—Power of Court.

The words of Ss. 19 and 42 (c) of the Christian

Marriage Act cannot be construed as meaning that if the parents are dead and there is no person resident in India authorised to give consent to the marriage of the minor, a guardian of the minor for the purpose of giving such consent should be appointed which guardian would exercise his mind in the matter of the desirability or otherwise of the marriage of the minor and would be in a position to enter a protest with the Registrar within the meaning of S. 44 of the Act. Such a construction involves the importing into the sections of provisions which are not there and which would create a class of guardians who presumably would know nothing about the status and position of the minor concerned and the desirability or otherwise of the marriage of the minor. The proper and correct construction of the sections is to read them as meaning that where the father of the minor is dead or where the guardian of the person of such minor, either testamentary or otherwise appointed by the father or by any competent authority, is not in guard has been called out for duty until the existence, or where in the absence of any such order calling them out for duty has been notified guardian the mother of the minor is also dead, it in the Calcutta Police Gazette and until such cannot be stated that there is any person authorised to give the consent to such marriage of the any of the special powers of a Police-officer.

any of the three categories above mentioned is in existence and happens to be "not resident" in India that the latter part of S. 19 comes into operation and the consent of such guardian is dispensed with. There is no provision for the appointment of a guardian for the purpose of giving consent to the marriage of the minor in case any of the persons answering any of the above three categories is not in existence. (Biagwati, J.) Badruddin Abdulla v. Registrar of Marriages. 47 Bom.L.R. 938.

-S. 88-Scope-"Personal law"-Marriage of Roman Catholic with Protestant wife in Protestant Church without dispensation solemnised by Protestant Pastor-If void-Release by wife in favour of husband according to custom—If dis-solves marriage—Subsequent marriage with Protestant wife—"Bigamy"—Offence.

A marriage between a Roman Catholic husband a d Protestant wife solemnised in Protestant Church by a Protestant Pastor and without a dispensation under the canon law of the Church of Rome, is not invalid or void under S. 88 of the Christian Marriage Act. Such a marriage is a valid marriage. A marriage to attract the provisions of S. 88, must be a nullity according to the personal law of a party; the "personal law" contemplated by S. 88 is only that part of the personal law which relates to absolute impediments to any marriage at all between the parties, even marriage according to the rites of their own churches, impediments such as prohibited degrees of consanguinity or affinity. 'Personal law' in S. 88, means the personal law of either party which relates to absolute impediments to any marriage between the parties. Such a marriage being legal and valid, if the husband marries another woman a Projestant, during the subsistence of that marriage, he is guilty of the offence of bigamy under S. 494, I. P. Code. A release executed by the protestant wife in favour of the husband, before his subsequent marriage with a protestant wife, cannot operate as a dissolution of the first marriage with the Protestant wife under S. 10 of the Indian Divorce Act, though the custom of the community might allow it. The custom is not a part of the personal law of the parties which invalidates the marriage ab initio and there is nothing in the Divorce Act which permits the dissolution of a legal marriage between Christians by reason of any custom applicable to either or both of the parties to the marriage. The release deed would not therefore validate the second marriage or afford a valid defence to a charge of bigamy. (Happell, I) GNANASOUNDARI. NALLATHAMBI 58 L.W. 449 = 1945 M.W.N. 421=A.I.R. 1945 Mad. 516= (1945) 2 M.L.J. 80.

CIVIC GUARDS ORDINANCE (VIII OF 1940) S. 8-R. 7-Resistance to arrest by civic guard-When offence-Penal Code, Ss. 21 and

Having regard to the mandatory provisions of R. 7 of the Rules framed under S. 8 of Ordinance VIII of 1940 it cannot be said that the civic publication its members cannot legally exercise minor. It is only when any person answering Nor can it be said that members of the civic

#### CIVIL COURTS.

guard were in actual possession of the situation as Police-officers within the meaning of Explanation (2) of S 21, 1. P. Code, until they had been legally called out for duty under the terms of the Ordinance. Resistance to an arrest by the members of the civic guard who had not been legally called out for duty is, therefore, no offence under S. 353, 1. P. Code. (Edgley and Das, JJ.) JITENDRA MOHAN DE v. EMPEROR. I.L.R (1944) 1 Cal. 456—211 I.C. 392—45 Cr L.J. 384—16 R.C. 562 =48 C.W.N. 138=A I.R. 1944 Cal 79.

COURTS-Jurisdiction. See C. P. PROCEDURE CODE (V OF 1908)—Repeal of S. 257-A of the Code, (XIV of 1882)—Effect. See Derkham Agriculturists Relief Act (XVII of 1879) S. 13 (c). 44 Bom I P. 151 Cone (1908), S. 9.

-Ss. 2 (2) and 47—Appeal Execution sale -Excess delivery-Application for re-delivery of part delivered in excess-Order on-If decree

-Applicability.

Where in execution of a decree a property is sold, and the judgment-debtor, after delivery of possession, applies, for re-delivery of a part of the propperty delivered on the ground that more than the extent of property sold has been delivered to the purchaser, the question is one falling under S. 47, C. P. Code, and the order on such an application is therefore a decree within the meaning of S. 2 (2), C. P. Code and is appealable. (King and Happell, II.) SREE KANFA GOUNDAN V. JAVANI. 1942 M.W.N. 190 =55 L.W. 159 A.I.R. 1942 Mad. 406 (1) =205 I.C. 91=15 R.M. 320-(1942) 1 M. L.J. 386.

——Ss. 2 (2) and 47—Applicability—Proceeding under O. 20, R. 12—Direction as to mesne profits in preliminary decree for partition— Final decree not passed—Appeal—Competency—

Proceeding if one in execution.

In a case where the special provisions of O. 20, R. 12, C. P. Code, can be properly applied, S. 2 (2), C. P. Code, cannot be invoked. Nor would S. 47, apply for a proceeding under O. 20, R. 12, C. P. Code, i.e., an inquiry into mesne profits, is not a proceeding in execution but one in the suit itself. An order for an enquiry as to mesne profits must necessarily be embodied in a preliminary decree which must ordinarily be followed by a final decree. Where a preliminary decree awards mesne profits from a specified date and gives a direction under R. 12 of O. 20, there has to be a final decree drawn up in accordance with R. 12 (3). Until that final decree is drawn up there is no right of appeal against the order for mesne profits (Davis, C.J. and Weston, J.) SAHIJRAM RUPCHAND v. ALU TUNDU. I.L.R. (1941) Kar. 563=200 I.C. 74=14 R.S. 205=A.I.R. 1942 Sind 60.

S. 2 (2)—Decree—Alternative claims-Adjudication on a preliminary issue in respect of one. Shriber Ram Janki v. Nathuram. See [Q.D., 1936—'40, Vol. I, Col. 3267.] I.L.R. (1941) Nag. 90=195 I.C. 91=14 R.N. 35=A.I.R. 1941 Nag. 84.

S. 2 (2)—"Decree"—Application for personal decree in mortgage suit—Order granting —If decree. See Court-Fees Act. Sch. I.

-If decree. See Court-FEES ACT, SCH. I, ART. 1. (1945) 2 M.L.J. 87.

C. P. CODE (1908), S. 2.

Ss. 2 (2) and 96—Decree—Decision on preliminary issue holding pre-emption suit maintainable-If a decree and appealable-Test of

appealability.

Although a finding by the trial Court that the pre-emption of the entire pre-emptible property, namely, the zamindari rights as distinguished from the mortgagee rights, though it is part of the property conveyed under the sale deed, is permissible, is conclusive as regards that Court on the question whether the plaintiff could maintain the suit for partial pre-emption, it cannot that adjudication. Hence it does not amount to a decree under S. 2 (2), C.P. Code, and is not appealable under S. 96. Where a preliminary point raised in defence in a suit may possibly he decided against the plaintiff and may terminate in dismissal of the suit on that point alone, the adjudication would no doubt amount to a formal expression conclusiely determining the rights of the parties, but where such an adjudication does not put an end to the suit, no right of appeal against such an adjudication will come into existence as the adjudication does not amount to a decree as defined in S. 2 (2) of C.P. Code. (*Thomas, C.J. and Ghulam Hasan, J.*) MATHURA PRASAD v. KANHAIYA LAL. 195 I.C. 615—14 R.O. 104—1941 R.D. 700—1941 O.L.R. 598—1941 O.W.N. 957— 1941 A.W.R. (Rev.) 629=1941 O.A. 658

-A.I.R. 1941 Oudh 590. S. 2 (2) and C. P. Land Revenue Act. (1917), S. 75 (3) -Decrée-Decision to make a reference under S. 75 (3) of C. P. Land Revenue Act, if a decree-Appealability.

The decision of a Civil Court to make a reference under S. 75 (3), C. P. Land Revenue Act, to the Settlement Officer is not a decree and hence not appealable as such. (Digby, J.) RAGHUNATH BHUJRAM 7. SETH PAHLADDAS. 1942 N.L.J. 574=204 I.C. 272=15 R. 154 

Failure to furnish particulars-Order discharg-

ing defendants, if appealable.

Where on the failure of the plaintiff to furnish certain necessary particulars, the defendants are discharged as they had no case to meet, the order is appealable either on the view that it or the suit. (Bose, I.) NAZIR ABBAS v. AZAM
SHAH. 1941 N.L.J. 260=I.L.R. (1942).
Nag. 428=197 I.C. 520=14 R.N. 173=A.
I.R. 1941 Nag. 223.
——Ss. 2 (2) and 96—Decree—Interlocutory

order-Where appealable.

A finding on any point in contraversy in a case would ordinarily be final so far as the Court is concerned but unless that finding is such as is sufficient for the disposal of the suit there can he no judgment and no decree and unless there is a decree there can be no appeal. No finding or interlocutory order which is not sufficient to dispose of the suit as a whole can in itself give rise to a right of appeal except where an appeal is expressly provided. (Niyogi, Bose and Digby; JJ.) Bali Ram v. Manohar. I.L.R. (1943) Nag. 241=207 I.C. 625=16 R.N. 51=1943 N.L.J. 228=A.I.R. 1943 Nag. 204 (F.B.).

-Ss. 2 (2) and 47—'Decree'—Interlocutory

order in execution proceedings.

Within S. 2 (2) from which an appeal (Per Tek Chand and Bhide, II.) (Becket, I., dissenting.) An interlocutory order in execution proceedings as much as in suits overruling pleas of jurisdiction and limitation is not a decree within the meaning of S. 2 (2) of the C. P. Code from which an appeal will lie. (Tek Chand, Bhide and Becket, JJ.) BARKAT RAM v. BHAGWAN SINGH. 208 I.C. 89=16 R.L. 29=A.I.R. 1943 Lah. 140 (F.B.

rights of parties under scheme framed under S. 92—Appeal. *See C. P. Code*, S. 47—Appeal. **73 C.L.J.** 530.

—S. 2 (2)—Decree—Order dismissing for non-payment of additional Court-fees-Appeal.

An order dismissing an appeal for non-payment of the additional Court-fee demanded of the appellant following upon an adjudication on a question of the classification of the suit comes within the definition of a decree under sub-S. 2, C. P. Code, and is hence appealable. The order cannot be regarded as an "order of dismissal for default" within the meaning of Cl. (b) of the said sub-section. It is wholly immaterial that the appeal is directed, not against the adjudication itself, but against the consequent order of dismissal. (Biswas, I.) Abdul. Majid v. Amina Khatun. I.L.R. (1942) 2 Cal. 253=201 I.C. 683=15 R.C. 269=75 C. L.J. 393=46 C.W.N. 697=A.I.R. 1942 Cal. 539.

\_\_\_\_\_\_S. 2 (2)—Decree—Order dismissing appeal for non-payment of Court-fee—Appeal— Revision.

An order of the appellate Court dismissing a memorandum of appeal for non-payment of deficit Court-fee is a decree and is appealable as such. A petition for revision from that order is, therefore, not competent. (Tek Chand, J.) BARKAT BIBI v. NAZIR alias NADIR. 199 I.C. 298=14 R.L. 383=43 P.L.R. 710=A.I.R. 1942 Lah. 64.

-S. 2 (2) and O. 34, R. 3-'Decree'-Order dismissing application for final decree as

premature—Appeal—Revision.

An order dismissing an application for making a preliminary decree final on the ground that it is premature, does not amount to a decree and is not appealable. Therefore, an application for revision of that order is tenable. (*Puranik, J.*) Govindarao v. Narayan Ganpat. I.L.R. (1945) Nag. 885=1945 N.L.J. 394=A.I.R. 1945 Nag. 277. -S. 2 (2)—Decree—Order dismissing suit as against some defendants for want of sanction

of Provincial Government—Nature of—Appeal. See C. P. Code, S. 115. 1941 P.W.N. 25.

2 (2)—Decree—Order modifying

scheme framed under S. 92, C. P. Code.
An order of a District Judge modifying a scheme framed in a suit under S. 92, C. P. Code, on an application made in that suit is a decree. So also is an order altering the scheme in a new suit under S. 92, C. P. Code. (Mitter and Khundhar, JJ.) SRIJIB NYAYATIRTHA v. DANDY SWAMI JAGANNATH ASRAM. 199 I.C. 841=14

C. P. CODE (1908), S. 2.

R.C. 648=73 C.L.J. 532=A.I.R. 1941 Cal.

-S. 2 (2)—'Decree'—Order rejecting application for final decree in mortgage suit-Appeal.

An order rejecting an application for a final decree in a mortgage suit on the ground that a scheme has been framed by the Debt Relief Court and that the Civil Court therefore has no jurisdiction to entertain the application, is a decree and an appeal lies against it. (Pollock and Sen, JJ.) VISHWANATH RAO v. BHAGIRATHI SAO. 219 I. C. 367=18 R.N. 35=1944 N.L. J. 526=A.I.R. 1945 Nag. 68.

-S. 2 (2)—Decree—Preliminary or final— Executability.

Where in a suit for the recovery of money, the amount found due to the decree-holder is declared and it is also laid down in the decree in what manner that amount should be paid and there is nothing more left to be done in the suit, such a decree is not a preliminary decree but a final decree capable of execution. (Thomas, C.J. and Agarwal, J.) LAL BHAGWAT SINGH v. HARI KISHEN DAS. 17 Luck. 249=1941 O.A. 865=1941 A.W.R. (Rev.) 949=1941 O.W. N. 1138=1941 O.L.R. 848=197 I.C. 167=14 R.O. 268=A.I.R. 1942 Oudh 1.

-S. 2 (2) and O. 7, R. 11-Decree-Rejection of appeal as time barred-If a decree-Appealability. GAJADHAR BHAGAT v. MOTI CHAND. [See Q.D., 1936-'40, Vol. I, Col. 3267.] 22 Pat.L.T. 549=A.I.R. 1941 Pat. 108.

Ss. 2 (2) and 96—"Decree"—Several issues framed in suit—Decision on some of the issues—Court writing judgment and issuing decree incorporating findings—Appeal from such decision—Maintainability. See APPEAL—Competency. (1943) 2 M.L.J. 343.

-S. 2 (2) and O. 1, R. 10-Discharge of some of the defendants-Suit decreed against others-Gricvance against order of discharge-

Agitation-Proper remedy.

Where some of the defendants are discharged on the ground of a want of cause of action against them and the suit is decreed as against the rest the correctness of the order of discharge could be questioned only in an appeal against that order in as much as it amounts to a decree. It could not be agitated in an appeal against the decree in the suit. (Pwanik, J.) Lalasa Motisa v. Bhagwant. 194 I.C. 37=13 R. N. 353=1941 N.L.J. 235=A.I.R. 1941 Nag. 166.

-Ss. 2 (2) and 96-Partition suit-Orders between preliminary and final decree—

If decrees and appealable.

In a suit for partition there can be only twodecrees. The first is a preliminary decree and the second is a final decree. In between thesetwo stages, there can be no other decree passed by a Court which may be designated a 'decree' liable to appeal under S. 96, C.P. Code, (Thomas, C.J. and Ghulam Hasan, J.) KEDAR NATH v. PUTHU LAL. 1945 O.W.N. 363=1945 A.W. R. (C.C.) 214=1945 O.A. (C.C.) 214=1945 O.A.L.W. (C.C.) 328=A.I.R. 1945 Oudh. 312

-S. 2 (3) and O. 21, R. 16-"Decreeholder"-Transfer of decree for execution-Death of decree-holder -. Application by son to transferce Court to continue execution-If by decree-holder to save limitation.

A decree had been transferred by the Subordinate Judge of a place to the District Munsiff of the same place for execution. The son of the deceased decree-holder subsequently applied under O. 21, R. 16, C.P. Code, to the transferce Court to be brought on record and for permission to execute the decree.

Held, that the application was liable to be dismissed as it was not presented to the proper Court, namely, to the Court which passed the

decree.

Held further, that the application was not made by the "decree-holder" within the meaning of S. 2, Cl. (3) of the Code, and that consequently it was not a step-in-aid of execution within the meaning of Act 122 (5) of the Unit within the meaning of Art. 182 (5) of the Limitation Act. (Byers, J.) KOTHANDARAMA AYYAR 7. SWAMINATHA SASTRIAL 57 L.W. 129=A.
I.R. 1944 Mad. 363=(1944) 1 M.L.J. 156.
——S. 2 (5)—Foreign Court--Courts in
Berar are not foreign but domestic Courts— Courts in Berar which have been established or continued by the authority of the Governor-General-in-Council are not foreign Courts within the meaning of S. 2 (5), C.P. Code, but domestic Courts. (Stone, C.J., Grille, Niyogi, Gruer and Bose, JJ.) Jagni Ram v. Ganpati I.L.R. (1941) Nag. 1:-198 I.C. 873:14 R.N. 251-1941 N.L.J. 1-A.I.R. 1941 Nag. 36 (F.B.).

-S. 2 (11)—Hindu joint family-Coparcener getting property by survivorship-If his

legal representative.

A coparcener of a Hindu joint family who gets property by survivorship comes within the purview of the term "legal representative". (Teja Singh, J.) Sabiru Singh 2. Kahan Singh, 218 I.C. 167=18 R.L. 4=46 P.L.R. 292=A.I. R. 1944 Lah. 473.

-S. 2 (11)—Hindu joint family—Son If

legal representative of his father.

Where a deceased Hindu coparcener was the father of the joint family who represented the family, his son is a person who, in law, represents the estate of the deceased person within the meaning of the definition of the term "legal representative" in S. 2 (11), C.P. Code. (Lokur and Rajadhyaksha, JJ.) DHONDO KHANDO V. WAMAN BALWANT. 46 Bom. L.R. 737=A.I. R. 1945 Bom. 126.

sentative of father in respect of separate debt of father-Suit against son for father's separate of father—Suit against son for rather's separate debt—Decree against son as legal representative—If can be passed—S. 53—Effect of, JAMBURAO SATAPPA v. ANNAPPA RAM CHANDRAPPA. [Scc Q.D., 1936-'40, Vol. I, Col. 3267.] I.L.R. (1941) Bom. 177=192 I.C. 198=1941 A.L. W. 34=1941 A.W.R. (Supp.) 4=1941 O.A. (Supp.) 61=13 R.B. 240=A.I.R. 1941 Bom. 23 (F.B.).

——S. 2 (11)—Legal representative—Decree against holder of impartible estate for compensions.

against holder of impartible estate for compensation in lieu of specific performance-Death

## C. P. CODE (1908), S. 2.

of the holder and devolution of estate on his sion-Decree, if executable against him as legal representative. RAO BHIMSINGH v. GANGARAM, [See Q.D., 1936.'40, Vol. I, Col. 879.] 13 R.N. 334=I.L.R. (1941) Nag. 632=193 I.C. 598. -S. 2 (11)-Suit by Hindu widow to recover mortgage debt due to husband-Reversioners, if legal representatives. See C. P. Code, O. 32, Rr. 3 and 9. 45 C.W.N. 105.

S. 2 (12)—Mesne profits—Ascertainment

On the terms of the definition of mesne profits what the plaintiffs have to show is that with reasonable diligence more might have been realised than was actually realised by the revenue authorities in the way of profits which term includes both rents and premiums, if any. true test is clearly not what the plaintiff has lost by his exclusion but what the defendant has or might reasonably have made by his wrongful possession. What the plaintiff in such a case might or would have made can only be relevant as evidence of what the defendant might with reasonable diligence have received. (Derby-Bengal C. Jund Nasim Ali, J.) Province of Bengal C. Purna Sasin Chaudhhurant. 206 I.C. 181-15 R.C. 682-75 C.L.J. 479=A. I.R. 1943 Cal. 125.

----S. 2 (12) -- Mesne profits -- Basis of calculation-Suit for partition of putni taluk and khas lands held thereunder and for profits-Lands made khas with defendant's own money-Plaintiff's right to profits of such lands on basis of

produce raised.

Plaintiff sued the defendant for partition of certain joint properties and for his share of profits of those properties till the disposal of the suit. There were among the properties a putni taluk and certain plots of land held in khas by the putnidars. The plaintiff's case was that these lands were comprised in the holdings of tenants holding under the putnidars, but those holdings had been purchased with the income of the putni and so belonged to them in equal shares. The Court found that some of these lands were acquired by the defendant with his own money and not with joint money. The plaintiff claimed to have the profits of even these lands assessed on the basis of khas cultivation.

Held, that the plaintiff was entitled to profits calculated only on the basis of the cash rent and that would be payable by the subordinate tenants holding under the putni and not on the basis of the actual crops raised on those plots. (Mitter and Akram, JJ.) BENOY KRISHNA CHOUDHURY v. BHOLANATH CHOWDHURY. 45 C.

W.N. 298.

Signing by Court—Sufficiency.

An order written by a clerk and signed by the Court is a proper order, for there is nothing in the Code which requires that the order should be in the Court's own handwriting. (Sathe, S.M.) ULFAT v. JALEBI. 1943 R.D. 73=1943 O.W.N. (B.R.) 73=1943 O.A. (Rev.) 33 (1)=1943 A.W.R. (Rev.) 33 (1).

S. 2 (17) (d)—Liquidator appointed by Registrar of Co-operative Societies—Is not an

-S. 9 and Agra Tenancy Act. Ss. 85 and 120 Maintainability of suit in Civil Court Fixed rate tenant building on agricultural land Suit for mandatory and prohibitory injunction.

Where a suit is brought against a fixed rate tenant for a mandatory and prohibitory injunction in respect of an unlawful construction of a building on the land, as the Revenue Court is not competent to entertain such a suit either under S. 85 or 120 of the Agra Tenancy Act, a suit would lie in a Civil Court under S. 9, C. P. Code, on the allegation of the invasion of the rights of the plaintiff landholder. (Collister, Tights of the planting and district District District Asharet Single, I.L.R. (1941) All. 250
192 I.C. 496—13 R.A. 327-1941 O.A. (Supp.) 34-1941 A.L.W. 18-1941 A.W.R. (H.C.) 34 -1941 O.W.N. 12=1941 A.W.R. (Rev.) 45 -1940 A.L.J. 906=A.I.R. 1941 ÀII. 61 (F.B.).

S. 9 - Right to celebrate annual worship of deity in a temple -Is a civil right in respect of which a suit for injunction is maintainable

in a Civil Court.

Certain villagers claiming that the worship of a deity should have been celebrated by themselves sucd for a permanent injunction restraining the defendants (the zamindar and a villager of an adjoining village) from celebrating the annual worship of the deity (Magah Annuan) of the village during that year or at any future time. The defendant's case was that it was the zamindar who had the right to perform the ceremonies in the temple and that the plaintiffs had not the right which they claimed.

form the annual worship of the Goddess which is enforceable by a civil suit. (Happell, J.) previously filed in the Court of the District GOPANNA MANNADIAR V. RAMASWAMI GOUNDAR. 57 L.W. 340=1944 M.W.N. 383-A.I.R. 1944 Mad. 416=(1944) 1 M.L.J. 421.

received by an unauthorised priest Maintain ability.

A suit by one priest against another to recover the fees received by the latter in connection with a ceremony at which he officiated in an area which was alleged to be exclusively allotted to which was alleged to be excusively and the plaintiff is maintainable in a Civil Court and different though question of law same.

Though the questions of law involved in the 443.

-S. 9-Civil Court-Jurisdiction-Question as to validity of decree passed by Village Council—Entertainability by Civil Court.

The N.-W.F.P. Village Council Act nowhere says that the Civil Courts are debarred from questioning the validity of a decree passed by a Village Council. S. 9 of the C. P. Code, clearly provides that the Courts shall have jurisdiction to try all suits of a Civil nature excepting suits of which their cognizance is either expressly or

## C. P. CODE (1908), S. 10.

jurisdiction to entertain and decide the claim decreed by it and that the decree passed by the Council had been obtained by fraud and was not binding on the plaintiff. (Allmond, C.J. and Mahomed Ibrahim, J.) ALI ASGHAR V. WALAYAT SHAH. 201 I.C. 564=15 R. Pesh. 24=A.I. R. 1942 Pesh. 55.

-S. 9-Suit of a civil nature-Declaration of right to inherit Birt Jijmani right-Entertain-

ability by Civil Courts.

An action by a legal heir of a gangaputra or a panda at Benares for a declaration of his right to inherit Burt Jiimani right (which is heritable property and in some cases transferable) and for an injunction restraining the defendants from interfering with the plaintiff's rights and for recovery of possession of the pilgrims' Bahis, is a suit of a civil nature as the right claimed is a right in property and is cognisable by Civil Courts. (Iqbal Almad, C.J. and Dar, J.) SARMA KUNWAR T. GAJAMAND. I.L.R. (1942) All. 821-202 I.C. 653-15 R.A. 181=1942 A.L.J. 346-1942 A.L.W. 444-1942 A.W. R. (H.C.) 185 A.I.R. 1942 All. 320.

10-1pplicability -- Application letters of administration filed in High Court while similar application pending in District Court-Property outside limits of latter Court exceeding Rs. 10,000 in value—Application in High Court II can be stayed - Succession Act. S. 273.

S. 10, C. P. Code, is not limited to suits. It applies to an application for letters of administration by reason of the provisions of S. 141, Held, that in the present case there was a C. P. Code. An application for letters of adstraightforward claim to have the right to per-ministration filed in the High Court while a similar application in respect of the same estate Judge is pending, cannot be stayed under S. 10, C. P. Code, when the property situate outside the province of the District Judge exceeds Rs. 10,000 in value. The Court of the District -S. 9 Suit by one priest to recover fees | Judge not having jurisdiction to grant the relief claimed in the application before the High Court, the section can have no application. (Sen, J.) Lillian Singh, In the goods of I.L.R. (1942) 2 Cal. 194 204 I.C. 457=15 R.C. 521 -A.I.R. 1943 Cal. 19.

new suit are the same as those involved in certain pending appeals but the cause of action is an entirely new one, S. 10 of the C. P. Code, has no direct reference to the matter and the new suit cannot be stayed. (Braund and Yorke, II.) KAILASH CHANDRA JAIN 2'. JHAMOLA KUNWAR 1942 A.L.W. 391.

-S. 10--Applicability—Decision in subsequent suit not likely to affect decision in earlier

suit—Stay of carlier suit—If can be ordered.

As suit by a Hindu widow for division of occuof which their cognizance is either expressly or impliedly barred. Accordingly Civil Courts are fully competent to entertain and decide a suit for a declaration that a Village Council had no a declaration that a Village Council had no a member of joint Hindu family because the

decision of the Civil Court in her favour cannot affect her rights in the occupancy holding. (Shirreff, S.M. and Sathe, J.M.) Asharfa Kuer v. Bindhya Chal Chaube. 1941 O.A. (Supp.) 605 (1)=1941 R.D. 688=1941 A. W.R. (Rev.) 751.

-S. 10—Applicability and scope—Directly and substantially in issue—Test to decide—Delay in applying for stay—If ground for refusing stay—Mandatory nature of section.

The words of S. 10, C. P. Code, are manda-

tory and enjoin the Court not to proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit. The fact that an application for stay is delayed is no ground for refusing stay. But before a stay can be ordered it must be made out that the matter in issue in both the suits is the same, although the reliefs asked for in the one is not of the same character as in the other. The real test whether the two suits are parallel is that if the first was determined, the matters raised in the second suit would be res judicata by reason of the decision of the first suit. (Blackwell, I.) TRIKAMDAS JETHABAI v. JIVRAJ KALIANJI. 203 I.C. 359=15 R.B. 234=44 Bom.L.R. 699=A.I.R. 1942 Bom. 314.

S. 10—Applicability—Suit by a debtor under S. 33 of the U.P. Agriculturists' Relief Act—Subsequent suit by mortgagee on mortgage-Latter suit cannot be stayed. Behari LAL v. DURGA. [See Q.D. 1936—'40 Vol. 1, Col. 3268.] 16 Luck. 188.

-S. 10-Jurisdiction-Application for stay -Forum-Suit pending on Original Side of High Court-Application for stay pending disposal of suit in moffussal Court—If lies on appellate side.

An application under S. 10, C. P. Code, asking the Court not to proceed with the trial of a suit should normally be made to the Court which is actually seized of the case. An application for stay of a suit pending on the Original Side of the High Court until the decision of a previously instituted suit in a moffussal Court has to be made on the Original Side to the Judge trying the suit and not on the Appellate Side of the High Court. (Broomfield and Macklin, JJ.)
NAGAPPA CHANNAPPA V. RAMSING JESSASING.
I.L.R. (1941) Bom. 325=194 I.C. 510=13
R.B. 373=43 Bom.L.R. 236=A.I.R. 1941
Bom. 160.

-S. 10-Jurisdiction-Injunction to restrain defendant from proceeding with suit by him in another Court in different province—Judge on original side of High Court—Powers of to issue.

There is nothing in law to prevent a judge on the original side of a chartered High Court from granting an injunction to restrain a defendant from proceeding with a suit in another Court in a different province, provided it is shown on the face of the plaint that the High Court has jurisdiction to try the suit before it. It is no objection to the Court granting an injunction because the defendant does not reside within the jurisdiction or carry on business within the invisdiction of the Court. (Kania. J.)

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DHANRAJ YUGULKISHORE & CO. v. BABULAL RAMCHANDRA, I.L.R. (1943) Bom. 286= 209 I.C. 12=16 R.B. 97=45 Bom.L.R. 326 =A.I.R. 1943 Bom. 206.

----S. 10-Jurisdiction of High Court-Injunction restraining defendant from litigating in another Court on ground of convenience-Power to issue.

The power of the High Court on its original side to issue an injunction restraining the defendant in a suit before it from proceeding with a suit in another Court, is not restricted by the provisions of C. P. Code. It has jurisdiction to restrain a defendant from litigating in another Court on the ground of convenience. (Lord Williams, J.) NASKARPARHA JUTE MILLS Co. Ltd. v. Nirmal Kumar Jain. I.L.R. (1941) 1 Cal. 373=196 I.C. 415=14 R.C. 231=A.I. R. 1941 Cal. 434.

-Ss. 10 and 151—Jurisdiction of High Court-Injunction restraining defendant from litigating in another Court-Power to grant. The High Court in its original jurisdiction has inherent power to grant an injunction restraining the defendant in a suit before it from proceeding with a previously instituted suit in another Court on grounds of convenience alone and in spite of the provisions of S. 10, C. P. Code. (Lort Williams, J.) BHAGAT SINGH BUGGA v. DEWAN JAGBIR SAWHNEY. I.L.R. (1941) 1 Cal. 490 =199 I.C. 32=14 R.C. 514=A.I.R. 1941 Cal. 670.

-S. 10-Priority of suits-Test-One of the suits filed in forma pauperis. RAISUDDIN v. 

A Court will not grant to a plaintiff an injunction restraining the defendant from prosecuting his suit in another Court, if the plaintiff can apply under S. 10, C. P. Code, to the other Court for a stay of the defendant's suit. Where the Legislature, in S. 10, has provided a procedure to obtain relief, that procedure must be followed. (Gentle, J.) RAMNICKIAL v. VIVEKANAND MILLS Co., LTD. 49 C.W.N. 58.

S. 10—Stay of claim for theka money under U.P. Stay of Proceedings Act—Rejection

of application to reopen—Fresh suit, if barred—

Proper remedy.

Where a claim for theka money is stayed under U.P. Stay of Proceedings Act and an application for its reopening after the passing of Amending Act IX of 1937 is rejected and a fresh suit is brought for the same relief, it is barred by S. 10, C. P. Code, for as long as the order staying the previous suit remains in force another suit in respect of the same cause of action and between the same parties cannot be against the refusal to reopen the suit. (Shirreff, S. M. and Sathe, J.M.) Mohd. Safar v. Mst. Hajira Bibi. 1942 O.A. (Supp.) 368=1942 A.W.R. (Rev.) 342=1942 O.W.N. (B.R.) 552.

-S. 10-Stay of suit-Test. One of the tests for stay of a suit is whether the previous decision in a previously instituted

suit would operate as res judicata in a subsequent suit. (Sen, J.) Liladhar v. Firm Radhakishan Ramsha. I.L.R. (1945) Nag. 634=1945 N.L.J. 526. ——S. 11—RES JUDICATA.

Adverse finding.

Appeal and Cross-objection.

Applicability.

Cause of action.

Co-defendants. Competent Court.

Conflicting decisions.

Connected cases.

Constructive res judicata.

See also S. 11—Execution Proceedings.

Directly and substantially in issue. Distinction petween res and judicata

Estoppel.

Erroneous decision.

Execution proceedings. Ex parte decree.

Findings.

General principles of.

Heard and finally decided.

Issue of law.

Litigating under same title. Might and ought. See Expl. IV.

Miscellaneous proceedings.

Parties and their representatives. Sec. Expl. VI.

Plea if can be raised in appeal.

Plea of res judicata. Pro forma defendant.

Question of tenancy rights.

Rent suit.

Representative suit.

Revenue proceedings.

Scope.

Subject-matter different.

Expl. IV. Expl. VI.

Adverse Finding.

S. 11—Adverse finding—Defendant challenging such finding in appeal—Appeal allowed on another ground—Pinding, if res judicata.

Where an adverse finding is expressly challenged in appeal by the defendant, but the appellate Court allows the appeal on another ground and dismisses the suit in consequence, that finding will not stand as the dismissal of the suit involves a reversal of the judgment in which it is contained. But if it could be shown that in disposing of the appeal, the Court, while dismissing the suit on another ground still in-tended to maintain the finding of the lower Court against the defendant, the finding may operate as res judicata, notwithstanding the dismissal of the suit, as being embodied in a judg-ment which is subsisting and in force. (Biswas, SARASHIBALA SEAL v. ATASI KANTA. 45 C. W.N. 220.

**S.** 11—Adverse finding—Finding against successful plaintiff-Res judicata.

If the plaintiff's suit is decreed in its entirety, an issue decided against him cannot operate as res judicata, against him in a subsequent suit. For the plaintiff cannot appeal from a finding on

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favour. The fact that he unsuccessfully contested the finding in revision is not relevant. (Bobde, J.) Scott v. Mahomed Din. I.L.R. (1944) Nag. 465=216 I.C. 88=1944 N.L.J. 156=A.I.R. 1944 Nag. 154.

----S. 11--Appeal and cross-objections-Restoration of appeal dismissed for default-Decision in cross-objections not set aside—Rule of res judicata. See C. P. Code, O. 41, Rr. 19 and 22 (4). 46 P.L.R. 80.

Applicability.

-S. 11-Applicability-Cause of action-Suit for specific performance of contract of sale -Subsequent suit for possession-Bar. See C. P. Code, Ss. 10, 99 and O. 2, Rr. 2, 3 and 4. 43 Bom.L.R. 293.

11-1pplicability-Dismissal of suit under S. 41, Agra Tenancy Act as premature-If operates as res judicata as regards fresh suit, S. 11, C. P. Code, has no application unless

an issue has been heard and finally disposed of on merits. Where a suit under S. 44, Agra Tenancy Act, is dismissed as being premature it does not operate as res judicata to bar the institution of a fresh suit. (Sathe, A.M.) BASHIR AHMAD KHAN 7. KUNDAN LAL. 1941 O.A. (Supp.) 933-1941 A.W.R. (Rev.) 1164-1942 O.W.N. (B.R.) 17-1942 R.D. 33.

-S. 11--Applicability-Execution proceedings--Execution against surety "struck off"

after enquiry into merits-Effect.

Though S. 11, C. P. Code, does not in terms apply to execution proceedings, the principle of res judicata applies. Where an execution application against a surety is enquired into and on its being found that he did not stand surety to the judgment-debtor, the application is dismissed and the proceedings 'struck off', there is an adjudication on the merits in respect of the surety's liability and hence it would operate as res judicata in subsequent execution proceedings against the surety. An order 'striking off' an execution application cannot be always regarded as legally ineffective. (Bennett, J.) RAM GOPAL v. BANSIDHAR. 17 Luck. 366=197 I.C. 305=1941 O.W.N. 1227=1941 A.W.R. (Rev.) 1053=1941 O.A. 931=14 R.O. 295= A.I.R. 1942 Oudh 183.

-S. 11—Applicability—Mortgage suit for redemption ending in decree before T. P. Act, providing for instalment payment and for extinguishment of right to redeem on default-Failure to pay instalments-Effect-Subsequent suit for redemption-Competency. See T. P. Acr, S. 60. 47 Bom.L.R. 90.

-S. 11—Applicability—Suit under O. 21, R. 63-Order of executing Court upholding attachment ceasing to have effect as a result of attachment coming to end—Suit still proceeded with and decided—Decision—If res judicata in subsequent suit between parties. See C. P. Code, O. 21, R. 63. 45 Bom.L.R. 980.

Cause of Action. any such issue, the decree being wholly in his -S. 11-Cause of action-Decision in suit

for arrears of rent for one year-If res judicata in later suit for arrears of rent for several years filed in a Court of higher grade-Competency to

try later suit-Test.

Though in view of the Explanation appended to R. 2 of O. 2, C. P. Code, successive claims in respect of rent for several years arising out of the same obligation are deemed to constitute one cause of action, it cannot be said that a composite cause of action relating to arrears of more than one year is a different one from that relating to one year. If it is possible to treat the entire cause of action upon which the later suit is founded as divisible and if in the earlier suit one of the component parts of the cause of action was relied on then the previous decision will stand as a bar to the extent of the matter involved in the previous suit. If an earlier decision bars a suit to recover arrears of rent for one year, it must logically bar a suit in respect of any other year. Hence, a decision in a suit for arrears of rent for one year would operate as res judicata in a later suit between the same parties for the recovery of arrears of rent for a number of years filed in a Court of a grade higher than that in which the earlier suit was filed. The competency of the Court to try the subsequent suit refers to its competency at the time when the first suit was brought. (Niyogi, J.) TEKCHAND KAPURCHAND v. BIRZABAI, I.L. R. (1942) Nag. 721=202 I.C. 317=15 R.N. 77=1942 N.L.J. 423=A.I.R. 1942 Nag. 119.

#### Co-defendants.

11—Co-defendants—Conditions

cessary.

Per Nasim Ali, J.—The limits within which the doctrine of res judicata should be applied as between co-defendants are these:—(a) that the co-defendants were necessary or proper parties in the former suit; (b) that there was a conflict of interest between them; (c) that there was a necessity to decide that conflict in order to give the plaintiff appropriate relief; and (d) that there was a decision of the question between the co-defendants. (Syed Nasim Ali and Pal, JJ.) RADHARANI DASSI v. BINDDAMOYEE DASSI. I.L.R. (1942) 1 Cal. 169=200 I.C. 216=14 R.C. 685=46 C.W.N. 245=74 C.L.J. 180= A.I.R. 1942 Cal. 92.

S. 11—Co-defendants—Res judicata bet-

Where there is a conflict of interest between the defendants and it has to be decided to give relief to the plaintiff and the question is decided, the defendant adversely affected by the decision has a right to appeal against it even if he was only a pro forma defendant, and the decision would operate as res judicata. (Ross, J. M.) DEVI PRASAD v. SITABALLABH JI MAHARAJ. 1944 R.D. 42=1944 A.W.R. (Rev.) 9.

-S. 11-Co-defendants-Points for consideration.

In order to see whether the doctrine of res judicata may be invoked in a subsequent suit by persons whose predecessors had been impleaded as co-defendants in a previous suit or who were themselves co-defendants in such previous suit, it is necessary to consider the following

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points: (1) What was the relief claimed by the plaintiff in the previous suit? (2) Were the codefendants proper parties to the suit? (3) Was there a conflict of interest between them? (4) Was it necessary to decide that conflict in order to give the plaintiff the relief that he claimed? (5) Was the question in issue between the codefendants actually decided. (Edgley and Biswas, II.) FATEH NASIB v. SWARUP CHAND HUKUM CHAND. 73 C.L.J. 475.

-S. 11-Co-defendants-Res judicata between—Conditions.

In order that a decision may operate as res judicata between the co-defendants, three conditions must be fulfilled, namely, there must be (1) a conflict of interest between the co-defendants, (2) the necessity to decide that conflict in order to give the plaintiff appropriate relief, and (3) a decision of the question between the codefendants. The first condition will be satisfied if the pleadings on record raise the conflict of interest as between the defendants no matter whether the co-defendants pleaded anything inter se or not. (Nasim Ali and Pal, JJ.) CHANDU-LAL AGARWALA v. KHALILAR RAHAMAN. I.L. R. (1942) 2 Cal. 299=205 I.C. 344=15 R.C. 599=75 C.L.J. 301=46 C.W.N. 729=A.I.R. 1943 Cal. 76.

-S. 11-Co-defendants-Res judicata bettween—Conditions.

In order that a finding may operate as res judicata as between co-defendants three conditions are necessary: (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) be give the plantin the relief lie Claims, and (9) the question between the defendants must have been finally decided. (Verma and Yorke, JJ.)
POORAN CHAND v. RADHA RAMAN. 207 I.C. 99=15 R.A. 534=1943 O.W.N. (H.C.) 125=1943 O.A. (H.C.) 40=1943 A.L.J. 82=1943 A.L.W. 220=1943 A.W.R. (H.C.) 40=A.I.R. 1943 All. 197.

-S. 11—Co-defendants—Res judicata between—Conditions.

In order that a decision should operate as res. judicata between co-defendants three conditions must exist: (1) There must be a conflict of interest between those co-defendants; (2) it must be necessary to decide the conflict in order to give the plaintiff the relief he claims; and (3) the question between the co-defendants Where a plaintiff have been finally decided. claimed to be entitled to a charge on an estate left by a testator and the defendant pleaded that certain other villages in another's hands were also charged and that the other person should be impleaded and he was so impleaded and the question as to the existence of the charge on that person's property was finally decided by the appellate Court, held that the question of the existence of the charge on the other villages was: directly raised and had to be decided before the Court could determine what relief claimed by the plaintiff could be given to him and hence such a decision would operate as res judicata in any

subsequent dispute between the defendants. (Lord Russell of Killowen.) Mahomen Saadat Ali Khan 7. Wighter Ali Bed. 208 I.C. 553 =1943 A.W R. (P.C.) 23 1943 O.A. (P.C.) 23=16 R.P.C. 75 48 C.W.N. 66=209 I.C. 74=1943 O.W.N. 238 1943 A.L.J. 307=1943 A.L.W. 421=A.I.R. 1943 P.C. 115 (P.C.) I.L.R. (1943) Kar. (P.C.)

-S. 11—Co-defendants--Res judicata between --Conditions, See Limitation Act, 123. (1943) 1 M.L.J. 36.

11—Co-defendants –Res judicata Conditions-Partition suit - Rule in-Defendant claiming share giving rise to conflict of interest -Court giving express decision as to though decision not necessary for giving relief to plaintiff-Res judicata, HARIHAR PRASAD SINGH v. NARSINGH PRASAD SINGH, [See Q.D. 1936-40 Vol. 1, Col. 3268. 13 R.P. 471-192 I. C. 441-7 B.R. 402-22 Pat.L.T. 553-A.I. R. 1941 Pat. 83.

11—Co defendants Res judicata Plea neither raised nor decided as between defendants-If res judicata in subsequent suit between them.

· Where the question as to which of the defendants in an earlier suit was surety and who was the principal was not agitated by the defendants among themselves and was not decided the decree in such suit will not operate as res judicata in a subsequent suit between such defendants on that question. (Fuzil Ali, J.), LARSHMANA SAHU 7, SIMACHALA PATRA. 194 I.C. 739-14 R.P. 58 = 7 B.R. 817=A.I.R. 1941 Pat. 211.

**–S**. 11–Competency to try the subsequent  $\epsilon$ suit-Différence in valuation.

Per F. B. (Madeley, J., Diss.).-A declaratory decree passed by a Munsif that a plaintiff was entitled to a maintenance allowance as a charge upon a property would operate as res judicata in a subsequent suit by the plaintiff for arrears of maintenance even though it was not within the competency of the Munsif to try the later suit. (Thomas, C. I., Bennett, Ghulam Hasan, Agarwal and Madeley, JI.) Magsoon Ali v. H. Hunter. 18 Luck. 683=210 I.C. 163=16 R.O. 144=(1943) O.W.N. 280=1943 O.A. (C.C.) 158=A.I.R. 1943 Oudh 338 (F.B.).

-S. 11-Competency to try the subsequent suit—Difference in valuation.

The decision in a former case cannot operate as res judicata in a subsequent suit between the as res juactata in a subsequent suit between the same parties on the same cause of action if the valuation in the later suit is beyond the jurisdiction of the former Court. (Ghulam Ilasan and Agarwal, II.) MUNICIPAL BOARD OF LUCKNOW V. GOVERNMENT OF THE UNITED PROVINCES. 18 Luck. 220=204 I.C. 186=15 R.O. 276=1942 O.A. 398=1942 O.W.N. 567=1942 A.W.R. (C.C.) 318 (1)=A.I.R. 1943 Oudh 58.

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#### Competent Court.

-S. 11—Competent Court. Where the earlier suit is decided by a Munsif and later on by the Additional Civil Judge, the later decision is not barred by res judicata because the former Court was not competent to try the subsequent suit. (Yorke and Ghulum Hasam, II.). MUNIA V. MANOHAR LAL. 194 I. C. 161=13 R.O. 558=1941 O.L.R. 428=1941 R.D. 359=1941 A.W.R. (Rev.) 395=1941 O.A. 422=1941 A.L.W. 492=1941 O.W.N. 648=A.I.R. 1941 Oudh 429.

-S. 11—Competent Court-...1djudication by Court not having jurisdiction -- Res judicata.

No adjudication on a point with reference to which a Court has no jurisdiction can operate as res judicata. (Edgley and Biswas, II.) FATEH NASIB V. SWARUP CHAND HUKUM CHAND. 73 C.L.J. 475.

-S. 11-Competent Court- Decision by District Judge on reference under S. 30, Land Acquisition Act, as to title to land acquired—

Res judicata.

A decision by a District Judge on a reference to him under S. 30 of the Land Acquisition Act on the question of title to the acquired land is a decision of a competent Court and operates as res judicata in a subsequent civil suit. N's holding was sold under S. 112 of the Madras Estates Land Act and purchased by the predecessor-intitle of P. Subsequently the Government acquired a part of the holding under the Land Acquisition Act. N and P both claimed the compensation money. On a reference to the District Judge, the latter decided that P was the owner of the holding and entitled to the compensation money. N was not present at the hearing of the enquiry. N afterwards filed a suit for a declaration that the sale for arrears of rent was null and void for want of notice to N as required by S. 112 of the Estates Land Act. P raised the plea of res judicata.

Held, that the decision of the District Judge on the reference under S. 30 of the Land Acquisition Act was a decision by a Court of competent jurisdiction and therefore operated as residudicata. (Leach, C.J. and Krishnaswami Aiyangar J.) Nanjappa Chetty v. Perumai. Chet-TIAR. 1941 M.W.N. 268 (2)=53 L.W. 364 == (1941) 1 M.L.J. 408.

-S. 11—Comfetent Court-Decision Insolvency Court that properties of Hindu in-solvent are self-acquired—Direction that sons claiming them as joint family properties may file separate suit—Subsequent suit claiming properties as joint family properties- Res judicata.

If there is a final and conclusive adjudication by a competent Court of any issue between the parties, a mere direction by that Court that another proceeding (such as a regular suit on title) might be taken for having the point more adequately considered and decided, is of no availwhen a plea of res judicata has to be considered. A decision by the Insolvency Court under S. 4 of the Provincial Insolvency Act is final and

conclusive between the parties. Where, there-fore, on an application by a purchaser at a sale by the Official Receiver of the properties by a Hindu father who has been adjudicated insolvent, to remove the obstruction by the ansoivent's sons in taking possession, the Insolvency Court makes an order holding the properties to be the self-acquired properties of the insolvent, such an order, being within the jurisdiction of the Court under S. 4 of the Provincial Insolvency Act, operates as res judicata on the question of title to remove the obstruction by the insolvent's sons in a subsequent suit by the sons for partition, and the sons cannot agitate the question of the pro-perties being joint family properties, in spite of a direction by the Insolvency Court that a separate suit might be filed. (Chandrasekhara Aiyar, J.) SINNA SUBBA GOUNDAN v. RANGAI GOUNDAN, 58 L.W. 562=1945 M.W.N. 673= (1945) 2 M.L.J. 384.

question of title by Revenue Court in rent suit— If bars suit for declaration of title in Civil Court.
The decision of a Revenue Court in a suit for

rent that the defendant is a tenant and liable to pay rent does not bar the defendant from maintaining a suit in a Civil Court for a declaration that he is the owner. (Agarwal, J.) JA-WAHR v. NIAZ AHMED KHAN. 199 I.C. 682= 14 R.O. 509=1942 R.D. 162=1942 A.W.R. (C.C.) 55=1942 O.A. 34=1942 O.W.N. 66 =A.I.R. 1942 Oudh 301.

S. 11—Competent Court—Former suit in Court of lower grade with cause of action split up—Subsequent suit in superior Court with same cause of action not split up-Res judicata.

Where the earlier suit was instituted in a Court of a lower grade by splitting up the cause of action, the decision in that suit would operate as res judicata in a subsequent suit between the same parties, if the cause of action is the same, though the later suit is brought in a Court of a higher grade with the cause of action not split up as in the earlier suit. (Macklin and Sen. JJ.) Feshwant Bala v. Babat. I. L. R. (1945) Bom. 38=218 I.C. 510=18 R.B. 56=46 Bom. L.R. 728=A.I.R. 1945 Bom. 67.

-S. 11—Competent Court—Meaning—Competency of Court—Relevant point of time. Sa-HIB NASIB KHAN v. QUTBUNNISSA. [See Q.D. 1936-'40 Vol. I, Col. 3269.] I.L.R. (1940) All. 691=192 I.C. 589=13 R.A. 340=A.I.R. 1941 All. 18.

-S. 11-Competent Court-Meaning of-Subsequent suit in Court of higher grade com-prised of additional causes of action against same defendants—Decision in prior suit on common to both suits—Res judicata. claims

S. 11 requires that the Court which decided the suit pleaded as res judicata must have been a Court competent to try the subsequent suit, and ordinarily the decision of an issue in a Court ordinarily the decision of an issue in a Court of lower pecuniary jurisdiction will not operate as res judicata in a subsequent suit filed in a Court of superior jurisdiction and triable only by such Court. But it is not open to the plaintiff to evade the bar of res judicata by joining several causes of action against the same defend-

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ants in a subsequent suit instituted in a Court of higher pecuniary jurisdiction. Where a decision has been given by a competent Court in a previous suit, regarding part of the claim in the subsequent suit, and between the same parties, then so much of the claim, which is common to the two suits should be excluded from the subsequent suit as barred by the principle of res judicata. (Divatia and Weston, JJ.) SHAMAJI NARAYAN v. GOVIND RANGACHARYA. 218 I. C. 154–46 Bom. L.R. 658–A.I.R. 1945 Bom.

-S. 11-Competent Court-Pecuniary jurisdiction-General principles of res judicata-Applicability.

Even if S. 11, C. P. Code, itself cannot be applied, according to its terms to a case of difference in the pecuniary value of the two suits at any rate the principle can be applied. The principle underlying the section could be applied where the first suit was for dissolution of a applied partnership on a tentative value of Rs. 5,500 and the second was for a claim valued at two lakhs itself to start with. (Stone, C.J. and Clarke, J.) MITHOOLAL v. BABU JAINARAYAN, 199 I. C. 537=14 R.N. 283=1941 N.L.J. 508=A.I. R. 1941 Nag. 346.

-S. 11—Competent Court—Sadr Munsarim -Question of claim to under-proprietary rights. A Sadr Munsarim with judicial powers is competent according to Gonda Settlement Report to decide claims as to under-proprietary rights.
(Ghulam Hasan, J.). BATUL BANDI v. SRI DHAR.
192 I.C. 259=13 R.O. 338=1941 O.L.R. 93
=1941 A.W.R. (Rev.) 19=1941 R.D. 6=
1940 O.A. 1293=1940 O.W.N. 1344=A.I.R. 1941 Oudh 189.

-S. 11—Competent Court—Small Cause Court—Decision in rent suit that tenancy is governed by T. P. Act—If bars claim in subsequent title suit that tenancy is governed by B. T. Act. Anantamoni Dasi v. Bhola Nath. [See Q.D. 1936-'40, Vol. I, Col. 3270.] 195 I.C. 870=14 R. C. 146=A.I.R. 1941 Cal. 104.

-S. 11—Competent Court—Test.

In order that a decison in a former suit may operate as res judicata in a subsequent suit, it is necessary that the Court which tried the former suit must have been a Court competent to try the subsequent suit. The decree in a previous suit cannot be pleaded as res judicata in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself in which the issue is subsequently raised. (Divatia and Lokur, JJ.) RADHABAI GOPAL v. GOPAL DHONDO. 212 I.C. 291 =16 R.B. 345=45 Bom.L.R. 980=A.I.R. 1944 Bom. 50.

In a suit for rent in the Court of the Sub-Collector under the Madras Estates Land Act, the plaintiff applied for leave to amend the schedule of land attached to the plaint on the ground of a clerical error in the description. Leave was refused and a revision application to the District Collector under S. 205 of the Estates Land Act was also dismissed. The suit was tried and eventually dismissed by the Sub-Collector the main ground that no decree could be granted on a defective plaint. On appeal, the District Judge, holding that there was a clerical error, allowed the amendment and remanded the suit to the Sub-Collector for disposal according to law, overruling the objection to his jurisdiction to allow the amendment. In appeal to the High Court from the order of remand it was contended that the District Judge had no jurisdiction to allow the amendment, as the matter had already been decided by the District Collector in the revision application and his decision operated as res judicata in the present proceedings.

Held, that there was a clear distinction between the decisions of Courts which had an inherent jurisdiction to come to those decisions and cases in which Courts had no jurisdiction at all and while the decisions in the former were merely voidable, in the latter they were void and could not be relied upon as constituting res judicata; (2) that in the present case there was no question of inherent jurisdiction lying in the Court of the District Collector, as his jurisdiction was severely limited, not only by the fact that it was conferred upon him by a particular Act (the Estates Land Act) and therefore dealt with a very restricted subject-matter, but also by reason of the very terms of S. 205 of the Act; (3) that since S. 205 related only to a proceeding in a suit from which no appeal lay and since an appeal clearly lay from the decision in the present suit, the District Collector had no jurisdiction to pass the order in revision which he passed in so far as it decided on the merits that no amendment should be allowed; (4) that it therefore could not and did not operate as res judicata in the appeal to the District Judge from the dismissal of the suit, so that the decision of the District Judge could not be attacked on the ground of res judicula. (King, I.) Pullayya v. Zamindar of Ratnavaram. 219 I.C. 46= 18 R.M. 52=57 L.W. 152=1944 M.W.N. 147=A.I.R. 1944 Mad. 257=(1944) 1 M.L.

S. 11—Competent Court—Plaintiff putting higher value on subsequent suit—If can get over bar of res judicata.

It is open to a plaintiff to fix any value for jurisdiction, provided he does not exceed the maximum laid down in S. 4 of the Suits Valuation Act. But the plaintiff cannot deliberately increase the value (though still below the maximum) in a subsequent suit on the same cause of action in order to avoid the bar of res judicata. (Almond, J.C. and Mir Ahmad, J.) AMIR KHISRO V. FEROZ SHAH. 207 I.C. 282=16 R. Pesh. 7=A.I.R. 1943 Pesh. 37.

Conflicting decisions.

S. 11—Conflicting decisions—Later decision to prevail over former—Application of prin-

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ciple—Limits to—Earlier order on claim under O. 21, R. 63—Suit not filed within one year to set aside order—Later contrary decision—If prevails over former order.

Where there are conflicting decisions or judgments inter partes the later adjudication should be taken as superseding the earlier for purposes of res judicata. But this principle cannot be applied in a case where the earlier decision is an order on a claim petition which under O. 21, R. 63, C. P. Code, has become conclusive, O. 21, R. 63, is a statutory provision and the Court must apply it. The provision being mandatory there is no room for the application of the principle of res judicata as regards conflicting decisions in such a case. (Leach, C. J. and Byers, J.) AKRAMMAL v. KOMARASAMI CHETTIAR. I.L.R. (1943) Mad. 40=208 I.C. 32=16 R. M. 145=55 L.W. 511=1942 M.W.N. 567=A.I.R. 1943 Mad. 36=(1942) 2 M.L.J. 315.

#### Connected Cases.

8. 11—Connected cases—Appeal against decree in one only—Res judicata—Application of rule,

Where several suits are tried together and disposed of by one judgment, different decrees being passed in each, but only one decree is appealed against and the decrees in the other suits have become final, if the object of the appeal is in substance, if not in form, to get rid of the very adjudication which is put forward as constituting res judicata that adjudication should not be held to bar the appeal. It would lead to startling results if it were held that an appellate tribunal is precluded from dealing with a question which comes before it on appeal because an inferior Court upon the same facts but in a case other than the one under appeal had given a decision which had not been appealed against at the same time as the decision in the case under appeal. Three suits in which the same question arose for decision, viz., whether the plaintiff, the admitted half-sister of the last male-holder was entitled to his estate under Act II of 1929 in preference to the admitted agnates' were tried together and disposed of by a common judgment. Only this issue was decided in all the cases and all the suits were dismissed without deciding the other issues and separate decrees were passed in each. An appeal was filed in the High Court against the decree in one of the suits and two appeals were filed in the District Court against the decrees in the other two suits. The appeals in the District Court were withdrawn later to the High Court, in view of the pendency of the appeal in the High Court; but as it was found that the appellant had not paid sufficient Courtfee on the two appeals withdrawn from the District Court and had failed to make up the deficiency, those two appeals were ultimately rejected. It was pleaded that in as much as the decrees in the other two suits had become final as a result of the appeals therefrom having been rejected, the other appeal was not maintainable, because the decision in the other two suits operated as res judicata.

Held, that the doctrine of res judicata had no

application when the object of the appeal was in substance if not in form, to get rid of the decision which was pleaded in bar, and the appeal in the High Court was therefore competent and not barred. (Krishnaswamy Ayyangar and Kunhiraman, JJ., in order of reference to the Tight and the first and the fi B.).

11-Connected cases-Appeal in one

only-Effect of.

Where a common judgment disposes of a suit by a creditor on a pronote and a suit by the debtor under S. 33 of the U. P. Agriculturists' Relief Act and the debtor is made liable for the same sum of money in both the suits, the debtor in the absence of an appeal in his own suit, cannot maintain an appeal against the judgment in not maintain an appeal against the judgment in the creditor's suit in which he was the defendant. (Bajpai and Dar, J.I.) MAHOMED MOHTASHIM v. JOTI PRASAD. I.L.R. (1941) All. 360 =194 I.C. 801=14 R.A. 7=1941 A. W. R. (Rev.) 306=1941 O.A. (Supp.) 237=1941 A.L.J. 246=1941 R.D. 460=1941 A.L. W. 359 (2)=1941 O.W.N. 502=1941 A.W.R. (H.C.) 128=A.I.R. 1941 All. 277.

——S. 11—Connected cases—Common judg-ment—Appeal in one case—Res judicata.

Where in respect of a number of connected cases a single common order is passed in one case only and there is not even any reference to the connected cases and an appeal is preferred against the order in that particular case, the proceedings are not quite regular. But there is nothing in them that can operate as res judicala. (Shirreff, J.M.) BIND BASNI PRASAD V. RAMPATI DEI. 1941 A. W.R. (Rev.) 562=1941 O.A. (Supp.) 493=1941 R.D. 530.

-S. 11—Connected cases—Common judg-

ment—Appeal in one—Interference.
Per Harper, S.M.—Where four cases under S. 44 of the Agra Tenancy Act were heard together and disposed of by a single judgment and an appeal was preferred in one only, held, that though the reasons given by the lower Court were not very strong, as the matter had been given judicial discretion there was no sufficient reason to differentiate one case which came upon appeal from the rest. (Harper, S.M. and Shirreff, J.M.) Durga Charan Singh v. Jagai. 1941 R.D. 586=1941 A.W.R. (Rev.) 579=1941 O.A. (Supp.) 537.

-S. 11—Connected cases—Common judgment in appeal and cross objections-Single second

appeal though two decrees—Res judicata.
Where only a cross objection is filed but it is wrongly numbered separately as a cross appeal and is disposed of in a common and single judgment but two decrees are prepared and the unsuccessful party challenges the entire decree dismissing the suit and pays full Court-fee, the appeal is in form and substance against the entire decree and is not barred by the principle of res judicata on the ground that a separate appeal has not been filed against the dismissal of the

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and Ghulam Hasan, cross objection. (Bennet J.) Behari Lal v. Ramchandra Sharma. 17 Luck. 702=200 I.C. 172=14 R.O. 570=1942 A.W.R. (C.C.) 141=1942 O.A. 120=1942 O.W.N. 184=A.I.R. 1942 O. 335.

-S. 11—Connected cases—Single judgment but separate decrees-Appeal against one decree -Other decrees if operate as res judicata.

In view of Explanation 2 to S. 11, C. P. Code the section does not in terms apply to appeals and on general principles of res judicata where in a consolidation of suits one judgment is pass-ed and separate decrees are drawn up in an appeal against one of the decrees the existence of the other decrees which had become final will operate as a bar to the appeal. The other decree will operate as an estoppel by record if they liave deprived the appellant of any rights. (Almond, J.C. and Mir Ahmed, J.) Mt. Zohra v. Razakhan. A.I.R. 1945 Pesh. 35.

\_\_\_\_\_S. 11—Connected cases—Single judgment but two decrees—Appeal against one—Matter decided by the other, if res judicata in the appeal filed.

Where two suits between the same parties involving common issues are disposed of by one judgment but two decrees are issued and an appeal is preferred against the decree in one but it is either not preferred against the decree in the other or is rejected as incompetent, the matter decided by the latter decree does not become res judicata so as to bar its reopening in the appeal against the former. This rule is, however, liable to exceptions which depend on the circumhable to exceptions which depend on the circumstances of each case. (Glulam Hasan, Misra and Madeley, II.) Shankar Sahai v. Bhacamat Sahai. 20 Luck. 339=1945 O. A. (C. C.) 164=1945 O.W.N. 247=1945 A. W. R. (C.C.) 164=1945 A.L.W. 232 (F.B.).

S. 11—Connected cases—Suit for redemption of kanom—Application by tenant for renewal—Both disposed of by common judgment— Appeal by tenant in application only without appeal in suit-Res judicata.

Where a suit for redemption of a kanom and an application for renewal of that kanom are disposed of by a common judgment, and an appeal is preferred against the decision in the latter and no appeal is preferred from the decree in the redemption suit, it cannot be said that the appeal is barred by res judicata. The very object of the appeal, in substance, if not in form, is to get rid of the adjudication which is said to constitute res judicata and the appeal, if successful, would have the effect of superseding the adjudication in the suit. (Horwill, J.) Neella-Kandhan Nambudripad v. Krishna Aixar. 213 I.C. 225=17 R.M. 62=A.I.R. 1943 Mad. 544=(1943) 1 M.L.J. 325.

11-Consent decree-How far res

A consent decree is no doubt, as much binding upon the parties and their privies to the suit as a decree in invitum. But what has to be seen is the nature of the issues and the decision of the case. A compromise decree cannot be taken to

decide every point that ought to have been pleaded as a decree on the merits must. (Niyogi, J.) BAKARAM v. KASHIRAO. 1945 N.L. J. 383=A. I.R. 1945 Nag. 288.

\_\_\_\_S. 11—Constructive res judicata—Appli-

cability of doctrine-Conditions.

The rule of constructive res judicuta can only apply to matters actually decided and to all matters which are necessarily deemed to have been decided by the judgment. But where the relief prayed for is not dependant on the adjudication of a particular matter in issue, by no conceivable reason can it be said that the matter must be deemed to have been also decided by the judgment. (Venkataramana Rao, I.) Chandrayya v. Chinnappa Reddi. 200 I.C. 492=15 R.M. 59=1941 M.W.N. 489=A.I.R. 1941 Mad. 753.

#### Directly and substantially in issue.

Where in the prior case the question for consideration was whether the plaintiff had obtained title by virtue of the dhardura custom and his claim to have done so was negatived and the claim in the later suit though with reference to a portion of the property included in the earlier suit was on a different basis altogether held that the earlier decision did not operate as res judicata in the later case for the basis of the possessory title involved in both were different and the nature of title raised in the later suit did not arise for decision in the earlier suit. (Bennett and Madeley, JJ.) Hari Saran Das v. Bhagwar Prasad Tewari. 200 I.C. 126=14 R.O. 549=1942 O.A. 18=1942 O.W.N. 34=A. I. R. 1942 O. 286.

—S. 11—Directly and substantially in issue—Charge decree for arrears of rent and royalty—If bars subsequent money suit on personal liability.

A charge decree for arrears of rent and royalty passed in a prior suit, where no question of personal liability of the defendant was ever gone into therein is not res judicata in a subsequent suit to enforce the personal liability. (Manohar Lall and Reuben, JJ.) MADHABILATA DEBI V. BUTTO KRISTO ROY. 214 I.C. 84=17 R.P. 45=10 B.R. 652=A.I.R. 1944 Pat. 129.

S. 11—Directly and substantially in issue—Decision on interpretation of law—Res judicata. When the cause of action is different; an earlier decision on the interpretation of the law will not operate as res judicata. (Broomfield and Sen, JI.) Mahadevappa Somappa v. Dharmappa Sanna Ningappa. I.L.R. (1942) Bom. 798=15 R. B. 273=203 I.C. 655=44 Bom.L. R. 710=A.I.R. 1942 Bom. 322.

——S. 11—Directly and substantially in issue —Decision on issue not necessary for decision of previous suit—If operates as res judicata in a subsequent suit.

When a matter directly and substantially in issue in a subsequent suit has been directly and substantially in issue in a previous suit and has been finally heard and decided between the same

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parties the issue cannot be re-opened in a subsequent suit notwithstanding the fact that the previous suit could have been decided independently of the decision upon that issue. (Agarwal, J.) HUSAINI V. SHANKAR. 199 I.C. 509=14 R.O. 494=1942 R.D. 71=1942 O.A. 13 (2)=1942 A.W.R. (C.C.) 25 (2)=1942 O.W.N. 25 = A.I.R. 1942 O. 309.

The principle of res judicata would apply though the subject-matter of the two proceedings may be different provided the issue is the same. (Divatia, J.) RAMA MARUTI v. MALLAPPA KRISHNA. I.L.R. (1942) Bom. 822=15 R.B. 226=203 I.C. 339=44 Bom.L.R. 678=A.I. R. 1942 Bom. 309.

——S. 11—Directly and substantially in issue—Issue in later suit also in issue in prior suit—Finding in prior suit—Res judicata.

Where the question involved in an issue in a suit was also directly in issue in a previous suit between the same parties and adjudicated upon and the finding on such issue was upheld in appeal, the matter is res judicata between the parties in the later suit. (Lobo, J.) Haji Abdulla Haroon v. Municipal Corporation of Karachi, I.L.R. (1942) Kar. 306=207 I.C. 83=16 R. S. 8=A.I.R. 1943 Sind 17.

——S. 11—Diretly and substantially in issue—Prior partitition suit—Opposition by defendants on ground property was debuttar of which they were shebaits—Finding by Court in favour of defendants not disturbed in appeal—Subsequent suit for declaration of title to same property—Same defendants impleaded both in their personal capacity and as shebaits along with their tenant—Res judicata.

The plaintiff sued for partition of certain plots of land against three defendants who opposed the suit on the ground that the properties were the debuttar properties of a deity of whom they were the shebaits. The Court found that all the plots except one were absolute debuttar property and dismissed the suit in respect of them inasmuch as the deity was not made a party. On appeal, the High Court did not disturb this finding but dealt with the other plot in suit. The plaintiff subsequently brought a suit for a declaration of his title to the same plots of land which were found to be debuttar in the earlier suit impleading the same defendants both in their personal capacity as well as in their capacity as shebaits of the deity along with their tenant.

Held, that the suit was barred by rcs judicata on the following grounds:—(i) The question whether the land sought to be partitioned in the earlier suit was debuttar, or not was not one which was merely incidental. It was a vital question and it must be taken to be a question directly and substantially in issue inasmuch as if the property was debuttar, the suit for partition would necessarily fail. (ii) The suit for partition was not dismissed for defect of parties. The reason for the dismissal was the finding that the

property was debuttar and the other finding that the suit was bad for defect of parties was merely a consequential one. (iii) The defendants, although they were impleaded only in their personal capacity in the partition suit, contested that suit as shabaits on behalf of the deity. They were, therefore, litigating under the same title in both the suits. The addition of the tenant of the defendants as a party made no difference as he was not asserting any independent title himself. (iv) The decision of the Court in the earlier suit as regards the land which it held to be debuttar had not merged in the decision of the High Court. (Sen, J.) NABENDRA KISHORE Roy v. Purnasashi Chaudhuri. 45 C.W.N. 854.

 $-\mathbf{S}$ . 11—Directly and substantially in issue -Subject-matter in prior proceeding not identi-cal with subject-matter in later proceeding-Claim in respect of attached crops on land—Dismissal—Subsequent attachment of land itself—Claim to

land-If barred by res judicata.

An order on a claim petition in relation to attached crops standing on a plot of land cannot operate as res judicata in a subsequent claim petition in respect of the land itself when the land is attached by another decree-holder in execution of a decree against the same judgment-debtor, the subject-matter of the claim order in the prior claim which related to the crops is not identical with the subject-matter of the subsequent claim which relates to the land itself. (King, J.)
PETHURAJU KONE v. MUTHUSWAMI AIYAR. 1941
M.W.N. 982=201 I.C. 199=15 R.M. 273=
A.I.R. 1942 Mad. 128=(1941) 2 M. L. J. 784.

-S. 11—Directly and substantially in issue —Subject-matter of prior and later suit—If to be identical—Decision as to one property—If resjudicata in respect of another property claimed

under same title.

Where the decree in a suit depends on an issue as to title, the finding on that issue is binding as res judicata in a subsequent suit although subsequent suit is with regard to a property different from that involved in the prior suit, when the claim is made under the same title. (Agarwala, I.) ABUL HASAN v. NANHE SHAH. 1942 P.W.N. 94.

——S. 11—Directly and substantially in issue—Suit under S. 9, Specific Relief Act—Dismissal-If bar to subsequent suit on title by long possession. See Specific (1945) 1 M.L.J. 206. RELIEF ACT, S. 9.

-S. 11-Directly and substantially in issue S. 11—Directly and substantially it issue—Usufructuary mortgage or conditional sale—Suit for rent—Ex parte decree—Subsequent suit for redemption on ground that deed was mortgage by conditional sale—Res judicata.

The decision in a prior suit for rent under a deed of transfer which was decreed exparted without resigning the the greation as to whother the

without going into the question as to whether the deed in question was a sale or a mortgage cannot operate as res judicata in a subsequent suit involving the question as to whether the deed was a mortgage or sale, especially when the result of the prior suit would have been the same whe-

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ther the deed were construed as a sale or as a mortgage. (Horwill, J.) JAMPUR BAI v. SIDDAPPA. 219 I.C. 56=18 R.M. 54=57 L.W. 42=1944 N.W.N. 38=A.I.R. 1944 Mad. 237 =(1944) 1 M.L.J. 30.

Erroneous decision.

-S. 11—Erroncous decision—Question of jurisdiction.

An erroneous decision by a Court that it has no jurisdiction, is not a nullity which can ignored or even impeached in a collateral decision. The rule of res judicata applies to such a decision. (Tek Chand and Beckett, JJ.) Annu Mal Har Narain v. Brij Lal. 196 I.C. 611 = 14 R.L. 164=43 P.L.R. 479=A.I.R. 1941 Lah. 327.

-S. 11—Erroneous decision—Res judicata. A decision which is clearly wrong and contrary to law would still operate as res judicata between the parties if the circumstances existing in the later case were the same as those existing in the earlier case. (Harries, C.J. and Manohar Lall, J.) Shiva Prasad Singh v. Sris Chandra Nandi. 22 Pat. 220=210 I.C. 426=16 R.P. 147=10 B.R. 259=A.I.R. 1943 Pat. 327.

-S. 11-Erroncous decision-Question of

A decision on a question of law, though erroneous, would operate as res judicata between the parties to it Correctness or otherwise of a judical decision has no bearing upon the question whether the contract of the contrac wise of a judicial decision has no bearing upon the question whether or not it operates as rcs judicata. (Mukherjca and Pal, JJ.) Abhov Kanto Gohain v. Gopinath Deb Goswami. 209 I.C. 71=16 R.C. 280=76 C.L.J. 183=A.I.R. 1943 Cal. 460.

S. 11—Execution application filed out of time—Judgment-debtor ex parte—Order allowing execution—Objection at a later stage that application is out of time—Bayred by res judicate.

application is out of time—Barred by res judicata.

If an order prejudicial to the judgment-debtor

is passed then he is barred from raising any point at a later stage of the proceedings decided expressly or impliedly by that order. An execution petition was filed out of time. Notice went to respondents and other judgment debtors but they remained cx parte and an order was passed 'Proclaim and sell.' At a later stage of the execution proceedings an objection of limitation was taken.

Held, that when the adverse order was passed against the respondent, he had a right of appeal under S. 47, C. P. Code, but as he did not exercise that right he was barred from dispupting the correctness of the order at a subsequent stage. (Horwill, J.) Puttappaji v. Dodda Mallappa. 57 L.W. 356=1944 M.W.N. 413=A.I.R. 1944 Mad. 420=(1944) 1 M.L.J. 494.

#### Execution proceedings.

S. 11—Execution proceedings—Construction of decree—Executability of decree—Decree executed without execution—Plea in subsequent proceedings that decree is incapable of execution—The second of the se tion being only declaratory-If open-Res Judicata. See Decree-Executability. 46 Bom. L. R. 718.

-S. 11-Execution proceedings-Constructive res judicata-Applicability-Execution ap-

plication dismissed as premature without hear-

ing parties.

The bar of constructive res judicata is not applicable where the previous application for execution was dismissed as premature on the Court's own motion on an erroneous view of the law without hearing the parties and without going into the merits. (Sale, J.) KARNAIL SINGH v. VIRU MAL. 210 I.C. 40=46 P.L.R. 171=16 R.L. 147=A.I.R. 1943 Lah. 189. **-S.** 11—Execution proceedings—Construc-

tive res judicata-Application for execution by assignee—Judgment-debtor failing after notice to raise objection to execution on ground of invalidity or non-production or non-registration of assignment deed-Objection in subsequent execution-Bar of constructive Res judicata. See C. P. CODE, O. 21, R. 16. 44 Bom. L.R. 164.

-S. 11—Execution proceedings—Constructive res judicata—Failure of judgment-debtor to object to saleability of property before sale-

Effect of.
Per Bhide, J.—Where the judgment-debtor had notice of the attachment and sale but had failed to raise the objection that the property was not liable to be sold under S. 60, C. P. Code, before the sale, he is precluded from raising it after the sale on the principle of constructive

res judicata.

Per Tek Chand, J.-Where the order for sale is passed under O. 21, R. 64, C. P. Code, after notice had been given to the judgment-debtor and he has not objected that the property is not liable to sale, and in furtherance of that order the property has been sold, the judgment-debtor is precluded from questioning the propriety of that order and impugning the sale on the ground which he might and ought to have taken before sale. (Tek Chand, Bhide and Beckett, JJ.) GAURI v. UDE. I.L.R. (1942) Lah. 559=203 I.C. 166=44 P.L.R. 302=A.I.R. 1942 Lah. 153 (F.B.).

-S. 11-Execution proceedings-Constructive res judicata-Failurc of judgment-debtor to raise objection as to absence of personal decree under O. 34, R. 6—Estoppel.

It is well established that the principle of constructive res judicata applies to execution proceedings. The failure of the judgment-debtor to object at the proper time to the proceedings for attachment and sale of his properties other than those mortgaged on the ground of the absence of a personal decree under O. 34, R. 6, C. P. Code, estops him from taking the objection at a later stage. (Bhide, I.) JOGINDRA SINGH v. SHIB NARAIN SINGH. 195 I.C. 288 = 14 R.L. 54=43 P.L.R. 60=A.I.R. 1941 Lah. 171.

-S. 11-Execution proceedings-Constructive res judicata—Failure to object to maintain-ability of application or jurisdiction of executing Court—Disposal on footing that it is a proper application—Effect—Plea that later application is harred by limitation as former one was not according to law-Maintainability.

If an execution application is not a proper application which can be entertained by the executing Court, an objection on that score must be raised then and there and in the proceedings

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on that appplication. When the parties proceed on the footing that the application was a good one and one which the executing Court had jurisdiction to entertain, and is disposed of by the Court, it must be held that the question of jurisdiction and maintainability of the application is by implication deemed to have been decided against the judgment-debtor. It is not open to him to raise this objection on a later occasion and to plead that a subsequent application for and to plead that a subsequent application for execution is barred by limitation as the former application was not in accordance with law. (Fast Ali and Shearer, JJ.) HARBANS NARAYAN SINGH v. UMA SHANKAR PRASAD, 196 I.C. 621=14 R.P. 215=8 B.R. 63=22 Pat.L.T. 809=A.I.R. 1942 Pat. 68.

—S. 11—Execution proceedings—Constructive res judicata—Failure to plead bar of limitation—Entertainability of such a plea on a later occasion.

The failure of the judgment-debtor to raise the question of limitation when notice is served upon him will not debar the Court from considering that question on a subsequent application Stdering that question on a subsequent appreciation for execution. (Bennett, J.) BHAGWAT PARTAB SINGH v. JANAKRAJ KUER. 211 I.C. 371=16 R.O. 229=1943 A.W.R. (C.C.) 70=1943 O.A. (C.C.) 174=A.I.R. 1943 Oudh 385.

S. 11—Execution proceedings—Constructive res judicata—Failure to plead satisfaction of decree—Res judicata. See C. P. Code, O. 21, R. 16, Proviso. 48 C.W.N. 419.

-S. 11-Execution proceedings-Constructive res judicata—Notice to judgment-debtor under O. 21, R. 66—Judgment-debtor declining on frivolous ground—Non-apperance and failure to object to execution—Order "proclaim and sell"
—Operates as res judicata in subsequent pro-

Where a judgment-debtor fails to appear and raise objections to the executability of the decree (e.g. on the ground of limitation) and the Court passes an order on the execution petition, "proclaim and sell" in his absence such order is final and conclusive against the judgment-debtor who has failed to raise a defence to the executability of the decree, despite the fact that the execution petition on which such order has been passed is subsequently dismised. Such an order would operate as constructive res judicata in a subsequent execution petition against the judgmentdebtor on the question of executability of the decree. The fact that the execution petition is dismissed shortly after the date fixed for the appearance of the judgment-debtor would not mean that the earlier order is not an order binding on him with its implication of executability. The mere fact that the executing Court before passing the order, had failed to declare that service on the judgment-debtor was suffi-cient and to declare him ex parte does not lead to the inference that he was not properly served and therefore the principle of constructive res judicata cannot be applied. It is no doubt the duty of the Court to declare the service sufficient if the service is not a personal one, but the omission to expressly declare a service sufficient does not mean that there has been no due service. The Court has to consider the facts of

each case and decide on those facts whether the failure to declare a judgment-debtor ex parte was a mere omission and the subsequent procedure made it clear that the Court did consider the service sufficient, or whether the facts of the case left in some doubt the question whether there was a sufficient service or not. Where on the facts it is found that the judgment-debtor had refused to accept service on a frivolous and evasive ground, and that the executing Court, after noting it, immediately ordered "proclaim and sell," it must clearly be held that the Court did consider service sufficient before it passed the order. The judgment-debtor must consequently be held bound, on the principle of constructive res judicata, by all orders passed which impliedly decided any question that he might have raised with regard to the executability of the decree. (Horwill, J.) Adhilakshmi Ammal v. Srinivasa Goundan. 219 I.C. 344=57 L. W. 40=1944 M.W.N. 94=18 R.M. 75=A. I.R. 1944 Mad. 193=(1944) 1 M.L.J. 36. tive res judicata-Notice under O. 21, R. 66 for settling proclamation-Judgment-debtor failing to appear and raise plea of non-saleability of property-Effect-Plea at later stage-Res judicata.

Where a notice given to the judgment-debtor under O. 21, R. 66, C. P. Code, does not contain the list of properties which are sought to be sold, but merely that the date had been fixed. for settling the terms of the sale proclamation it cannot be said that he has definite information as to what the properties are that are brought to sale. If he does not appear in Court and raise objections to attach and sell the properties, the order settling the proclamation in his absence would not operate as res judicata so as to estop him from disputing the liability of the properties to be attached and sold, at a later stage of the execution, merely by reason of the fact that he has failed to be present on the date of hearing fixed for settling the proclamation. (Kuppu-swami Aiyar, J.) Soorianarayana Chettiar v. Shenbagathammal. 1944 M.W.N. 588= A.I.R. 1945 Mad. 77=(1944) 2 M.L.J. 114.

-S. 11—Execution proceedings—Constructive res judicata-Objection as to limitation-If can be raised at later stage.

Although the execution of a decree may have been actually barred by time at the date of the application made for its execution yet, if an order for such execution had been regularly made by a competent Court having jurisdiction to try, whether it was barred by time or not, such order although erroneous, must, if unreversed, be treated as valid and will operate as res judicata. (Tekchand and Beckett, JJ.) BHAGWAN SINGH v. BARKAT RAM. 207 I.C. 561=16 R.L. 11=A.I.R. 1943 Lah. 129.

- -S. 11—Execution proceedings—Constructive res judicata-Plea of limitation. BARKAT

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raised by application under S. 47 but not pressed -Dismissal of application-Effect of.

Where the question as to whether a decree was a nullity by reason of the provisions of S. 33 of the Bengal Agricultural Debtors' Act was raised by an application under S. 47, C. P. Code, but not pressed and the application was dismissed, that question is concluded on the principle of constructive res judicata and cannot be reagitated. (Henderson, J.) ABBUS SAMAD v. BAIDYANATH NANDI. 48 C.W.N. 606 (2).

-S. 11—Execution proceedings—Constructive res judicata—Sale at price less than that mentioned in proclamation-Order accepting bid and recording part satisfaction-No appeal filed -Subsequent application by judgment-debtor to set aside sale as being bad under S. 14 of Behar Money Lenders Act—If barred. See Bihar Money Lenders (Regulation of Transactions) Act, S. 14. A.I.R. 1944 Pat. 392.

-Ss. 11 and 145-Execution proceedings-Decision against surety-Reagitation by separate

suit—Bar of res judicata.

It is open to a decree-holder either to proceed against a surety in execution of his decree or to bring a separate suit against the surety on the surety bond and it is open to the surety if he has not been made a party to the execution proceedings, to bring a separate suit to decide his liability under the surety bond. Where the surety has been made a party to the execution proceedings and has raised a defence that has been decided, then it is not open to him to raise again the same defence in a separate suit. The principle of respirate would apply to such a case. (Pollock, J.) JAGNA FAGOO POWAR v. DHEKAL BHIKOO PATIL. I.L.R. (1942) Nag. 779=201 I.C. 692=15 R.N. 56=1942 N.L.J. 413=A.I.R. 1942 Nag. 107.

-S. 11—Execution proceedings—Decision in—How far res judicata.

A decision in execution proceedings operates as res judicata in subsequent stages of the same proceedings only and not in subsequent proceedings. (Sale, J.) KARNAIL SINGH v. VIRU MAL. 210 I.C. 40=A.I.R. 1943 Lah. 189.

-S. 11—Execution proceedings—Default of appearance after notice of execution application— Formal order of substitution—Judgment-debtor not barred by principle of res judicata from raising question of limitation in a later execution

Where on the failure of the judgment-debtor to appear after notice of an execution application a formal order of substitution is alone made without any decision as to the question of limitation, it is open to the judgment-debtor to raise the question of limitation in a subsequent execution application. No inference of implied adjudication on the question of limitation can be drawn from the formal order of substitution RAM v. BHAGWAN SINGH. [See Q.D. 1936—'40, Vol. I, Col. 927.] 191 I.C. 612=13 R.L. 307.

S. 11—Execution proceedings—Constructive res judicata—Question if decree is nullity

| A.W.R. (C.C.) 231=1944 O.A. (C.C.) 231

S. 11—Execution proceedings—Dismissal for default—Obiter on merits—If res judicata. Where an application for execution is dismissed for default, the obiter of the Judge dismissing the application to the effect that that the land sought to be proceeded against could not be sold cannot operate as res judicata in a subsequent execution application. (Almond, J.C. and Mir Almad, J.) RAMJI DASS v. ASQHAR KHAN. 209 I.C. 424=16 R. Pesh. 37=A.I.R. 1943 Pesh. 52.

S. 11—Execution proceedings—Dismsisal for default of objection to execution application

-Bar of fresh objection.

The dismissal for default of the objections to an execution application would not bar fresh objections unless the execution application has become fructuous (i.e.) the result of the application has been to grant the relief of partial satisfaction of the decree to the decree-holder. (Mathur, J.) Mahomed Ikramul Raq v. Nizamuddin. 1944 A.L.W. 226.

S. 11—Execution proceedings—Dismissal of judgment-debtor's objections for default—New objection of limitation, if can be raised by fresh

objections.

Where the objections of a judgment-debtor to the execution of a decree have been dismissed for default, but the execution proceedings have not fructified, it would yet be open to the judgment-debtor to file fresh objections to execution based on the ground of limitation not raised before. The principle of res judicata cannot be extended to execution proceedings so as to bar the consideration of the question of limitation—particularly when prima facie the petition in question appears to be time barred. (Sathe, S. M. and Ross, A.M.) Shfo Shankar v. Zahid All. 1944 R.D. 6=1944 A.W.R. (Rev.) 42.

S. 11—Execution proceedings—Dispute between heir of decree-holder and judgment-debtor—Decision that former was validly adopted son of decree-holder—If operates as res judicata

in subsequent suit.

A decision arrived at in execution proceedings on contest between a person claiming to be the heir of the decree-holder and the judgment-debtor, that the former was the validly adopted son of the decree-holder who was the owner of the disputed property operates as res judicata in a subsequent suit between the same parties with reference to a part of the same estate, although the subject-matter of the later suit may not be the identical property involved in the prior proceeding. (Divatia, J.) RAMA MARUII v. MALLAPPA KRISHNA. I.L.R. (1942) Bom. 822=15 R.B. 226=203 I.C. 339=44 Bom. L. R. 678=A.I.R. 1942 Bom. 309.

S. 11—Execution proceedings—Executability of decree—Judgment-debtor's right to raise in later application for execution—Omission to raise in previous applications—Effect—Res judicata.

There is some limit in time and opportunity as to when objections to the effect that a decree is not executable can be taken in the execution

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of the decree. It cannot be held that the judgment-debtor can at any time, however remote. raise for the first time objections which go to the root of the decree. He must do this at the first suitable opportunity, and if he does not. then the point must be deemed to have been raised and decided against him, by reason of the principle of res judicata which applies to execution proceedings as much as to other legal proceedings. Where, however, previous execu-tion applications are found to have never been made the subject of a proper contest and decision, but to have been settled by reference to private arbitrations, it cannot be said that the question of the executability of the decree was ever heard and decided or that it was, by necessary implication, heard and decided. In such a case, therefore, the question as to whether the decree can and to what extent, be executed. can be raised in a subsequent execution application. (Davis, C.J. and Tyabji, J.) Godhumal.
v. Mt. Bhambho. I.L.R. (1942) Kar. 326=
205 I.C. 256=15 R.S. 118=A. I. R. 1943 Sind 11.

S. 11—Execution proceedings—Failure of judgment-debtor to appear on notice under O. 21, R. 22—Effect—Res judicata.

The rule of constructive res judicata must be applied with great caution against a party to the execution who had no direct notice of a point and therefore no opportunity to raise it. The failure of a judgment-debtor to dispute the amount of the claim made in the application for execution after he had received a notice under O. 21, R. 22, C. P. Code, does not operate as a bar to his raising the dispute at another stage of the same execution proceedings on the principle of res judicata. The failure of the judgment-debtor to appear in answer to a notice under O. 21, R. 22, C. P. Code, would not preclude him from contending afterwards that there had been a partial satisfaction of the claim under the decree sought to be executed. (Broomfield and Wassoodew, JJ.) MITTASAHEB HIRAMA v. GURUNATH HANMANT. 208 I.C. 418=16 R.B. 85=45 Bom.L.R. 519=A.I.R. 1943 Bom. 252.

——S. 11—Execution proceedings—Failure to raise plea as to executability of decree or jurisdiction—Effect—Res judicata.

Where an execution application is filed for sale under a mortgage decree which is only a preliminary decree and not a final decree, and the judgment-debtor who is served with notice under O. 21, R. 22, C. P. Code, does not appear and object to execution but remains ex parte and the Court passes an order directing execution to proceed, it must be held to involve a decision that the decree is capable of execution by the Court in which the execution petition is filed. Notwithstanding the absence of an express decision, the order operates as res judicata, and the judgment-debtor is precluded from raising in a subsequent execution petition an objection that the decree is not executable or that the Court has no jurisdiction to execute the decree. (Krishnaswamy Ayyangar and Kunki Raman, JJ.)

BALAKRISHNAYYA v. LINGA RAO. I.L.R. (1943) Mad. 804=212 I.C. 633=A.I.R. 1943 BALAKRISHNAYYA Mad. 449=(1943) 1 M.L.J. 198.

-S. 11-Execution proceedings-Matters iecided in same proceeding-Res judicata.

Per Bhide, J.—The principle of res judicata will apply even to matters decided in the same execution proceedings. (Tck Chand, Bhide and Beckett, JJ.) GAURI v. Upe. I.L.R. (1942) Lah. 559=203 I.C. 166=44 P.L.R. 302=A. I.R. 1942 Lah. 153 (F.B.).

-S. 11-Execution proceedings-Matter not decided on merits-If can be re-opened.

If a matter has once been finally decided between the parties to execution proceedings, the effect is the same as that of an interlocutory judgment in an ordinary suit and whether it has been decided on the merits or not is binding upon the parties for the rest of the proceedings, if it has been allowed to become final. (Bcckett, J.) Partap Singh v. Bhagat Ram. 199 I.C. 160=14 R.L. 381=43 P.L.R. 727=A.I.R. 1942 Lah. 71.

under O. 21, R. 22 served on judgment-debtor— No objection as to limitation taken by him-Execution case dismissed on part satisfaction with costs-Subsequent application by decree-holder for execution-Judgment-debtor, if precluded

from raising plea of limitation.

On an execution application filed more than three years after the date of the decree, a notice under O. 21, R. 22, C. P. Code, was served upon the judgment-debtor and the execution case was put down for hearing on a certain date. In the meantime the decree-holder filed a petition, obviously at a time when the judgmentdebtor was not present, stating that he had received a certain sum from the judgment-debtor in part satisfaction of the decree. On the day of hearing no objection as to limitation was taken by the judgment-debtor, and the execution case was dismissed on part satisfaction with costs. Some time later, the decree-holder filed another execution application.

Held, that the judgment-debtor was precluded at that stage from raising the objection that the previous application was barred by time. (Khun-dkar and Biswas, JJ.) PROMATHA NATH v. HALU MIA. 49 C.W.N. 260=A.I.R. 1945 Cal. 335.

-S. 11-Execution proceedings-Objections to execution not filed as petition was dismissed—Raising of objections on later execution applications if barred.

Where on an execution application being dismissed the objector does not file his objections he is not thereby precluded from filing the objections when a later execution application is filed. (M. R. Davies.) NORAT MAL v. HAR SWAROOP. 1941 A. M. L. J. 130.

-S. 11-Execution proceedings-Objections to execution of Revenue Court's decree held to be not entertainable-Not res judicata in subsequent suit to set aside that decree.

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The throwing out of the objection to the execution of a Revenue Court's decree as not being entertainable in execution proceeding would not operate as res judicata in a subsequent suit to set aside that decree. (Mathur, J.) Bhano Devi v. Harnandan Lal. 1944 A.L.W. 481.

rejecting application for nedecree-holder—If res judicata. 11—Execution proceedings—Order non-appearance of

An order merely dismissing an application for execution for some such ground as non-appearance of the decree-holder then there is no decision on the merits and when there is no decision on the merits there is of course no resjudicata. If however there is a dismissal on the ground that the application was not in accordance with law, it will operate as res judicata in a subsequent application on the question whether it was made within limitation. (Bose, J.)
Nathmal v. Balkrishna. 194 I.C. 641=14 R.
N. 4=1941 N.L.J. 319=A.I.R. 1941 Nag. 152.

——S. 11—Execution proceedings—Order made after notice to judgment-debtor under O. 21, Rr. 22 and 66—Res judicata.

Obiter.-Where on an application for execution notice was served on the judgment-debtor under O. 21, Rr. 22 and 66, C. P. Code, who took no objection to the execution, he would be debarred from raising the question of limitation at a later stage, if the application became fructuous in whole or in part. Such fructification necessarily involved the assumption that the application had been made within limitation. (Khundkar and Biswas, JJ.) SATYANARAYANAN BANNERJEE v. KALYANI PRASAD SINGH. 49 C. W.N. 558=A.I.R. 1945 Cal. 387.

S. 11—Execution proceedings—Order refusing relief to defendant on basis of pre-decree agreement—Failure to appeal—Effect—Right to claim relief in appeal from decree.

Where no appeal is filed against an appealable order passed in execution of a decree, refusing relief to the judgment-debtor on the basis of an agreement between the parties, before decree in the suit, such order becomes final and conclusive, and no relief on that basis can be claimed or awarded to the defendant judgment-debtor in an appeal from the decree itself. (Davis, C.J. and Weston, J.) RAMA BROS. v. FORBES, FORBES CAMPBELL & Co., LTD. I.L.R. (1941) Kar. 227=195 I.C. 626=14 R.S. 40=A.I.R. 1941 Sind 103.

——S. 11—Execution proceedings—Plea of limitation raised and abandoned—If can be raised

at later stage—Res judicata.
It is a well established principle that a party is not entitled to raise at a later stage of a procoeding a plea in bar which was open to him at an earlier stage and which he had an opportunity of raising, or which, having been raised, has been overruled. When a plea in bar of execution is not taken or is overruled, the judgmentdebtor is not a later stage entitled to challenge the validity of the proceedings on that ground. Where a point of limitation is raised and apparently abandoned or is not pressed, it cannot be

raised again at a later stage, by reason of the principal of res judicata. (Harries, C.J. and Agarwala, J.) SITLA SAHAI v. GOURI NATH. 202 I.C. 264=8 B.R. 866=15 R.P. 106=23 Pat.L.T. 361=A.I.R. 1942 Pat. 477.

—S. 11—Execution proceedings—Res judicata—Attachment of properties—Objection by debtor—Order cancelling attachment—Observation that decree-holder had right to attach such right as debtor had in properties under will—If decision barring plea in bar of attachment of

such rights.

Where on a petition by the judgment-debtor objecting to an attachment of his properties the Court cancels the attachment on the ground that the will under which the judgment-debtor derived title to the properties attached does not disclose any such right as was specified in the application for attachment, but the Court observes that the decree-holder would be entitled to attach and proceed against such interest as the judgment-debtor has in the properties under the terms of the will, such observation does not amount to a definite finding or decision that such rights as he had are attachable, so as to operate as res judicata and preclude the judgment-debtor from pleading that his right in the properties under the will is not liable to be attached and sold in execution in a subsequent execution ap-plication filed by the judgment-creditor to attach such right, title and interest as he had in the will. (Kuppuswami properties under the Ayyar, J.) SOOMANARAYANA CHETTIAR v. SHEN-BAGATHAMMAL. 1944 M.W.N. 588=A.I.R. 1945 Mad. 77=(1944) 2 M.L.J. 114.

Where the judgment-debtor in answer to a notice of sale proclamation objects to the proposed sale of a particular item of property on the ground that the property is not included in the decree under execution, but fails to substantiate his objection, he cannot afterwards raise the same plea in another stage of the execution, although no sale was held under the prior proclamation and a fresh proclamation is taken out for a sale. The matter in issue, being resjudicata, cannot be re-agitated. (King, J.) MAHARAJA OF COCHIN v. THUPRAN. 200 I.C. 324=15 R.M. 76=1941 M.W.N. 805=A.I. R. 1941 Mad. 861=(1941) 2 M.L.J. 792.

S. 11—Execution proceedings—Res judicata—Order for execution after notice—Effect of
Sons proceeded against under pious obligation theory of Hindu Law—If barred by res judicata

from pleading limitation.

An order for execution made after notice to the judgment-debtor who does not appear and offer any objection precludes him from raising the plea of limitation in subsequent proceedings even though the application on which the order is made does not fructify and is eventually struck off or dismissed. But the sons of the judgment-debtor who are proceeded against in execution under the doctrine of pious obligation of a Hindu son to pay his father's debts, are

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not precluded from pleading limitation as a bar to execution. (Wadsworth and Patanjali Sastri, JJ.) Venkataranga Reddi V. Stithamma. 200 I.C. 27=14 R.M. 645=53 L.W. 181=1941 M.W.N. 329=A.I.R. 1941 Mad. 440=(1941) 1 M.L.J. 270.

#### Ex-parte decree.

\_\_\_\_\_S. 11-Ex parte decree-If operates res judicata.

An ex parie decree for rent cannot operate as res judicata. (Sathe, J.M.) ABDUL HAMID v. LAKHPAT RAI. 1941 R.D. 321=1941 A.W. R. (Rev.) 447 (1)=1941 O.A. (Supp.) 379 (1).

\_\_\_\_\_S. 11—Ex parte decree—Rate of rent\_

Where the queston of rate of rent is raised but the defendant is subsequently absent and an ex parte decree is given for a particular amount, it is not conclusive owing to the failure of defendant to prosceute his case. (Harper, S.M.) HORILAL v. CHUNNA. 1940 R.D. 602=1941 A. W.R. (Rev.) 90=1941 O.A. (Supp.) 78.

as res judicata.

A matter will be res judicata if it is actually heard and finally decided in a suit even though the decree is passed ex parte. (Sen, J.) PRIOMBALA DEBI V. JOHURI LAI RAY. 198 I.C. 462=14 R.C. 462=A.I.R. 1941 Cal. 574.

An ex parte decree creates res judicata in a subsequent suit in respect of matters involved in such decision, and what precisely these matters are have to be determined with reference to Expl. IV to S. 11, C. P. Code. (Dible, J.M.) ATAL BEHARI v. SUKHDEVI. 1944 R.D. 243=1944 A.W.R. (Rev.) 120 (2).

#### Findings.

\_\_\_\_\_S. 11\_Finding\_Implied finding in compromise decree\_If may operate as res judicata.

Where in a mortgage suit a distinct issue was raised on the plea of the defendant-mortgagor, as to whether he was a member of an agricultural tribe and whether the mortgage of the suit land contravened the provisions of the Punjab Alienation of Land Act, and subsequently a compromise decree was passed against the defendant, a finding on that issue in the plaintiff's favour must be regarded as implicit in the decree eventually passed. The mere circumstance that this implied finding was based not on an adjudication by the Court but on an agreement or admission by the defendant cannot make any difference in so far as the operation of the principle of res judicata is concerned. (Achimu Ram, J.) Nand Singh v. Rahmat Din. 47 P.L.R. 385=A.I.R. 1946 Lah. 73.

ing as to jurisdiction, if implied finding—Findpassed in suit—Such implied finding, if res judicata.

A Court is competent to decide an issue of jurisdiction, if raised. If, therefore, it entertains a suit and passes a decree without any objection being raised to its jurisdiction, it must be taken that it came to an implied finding that the facts giving it jurisdiction were in existence. Such an implied finding as to jurisdiction, be it right or wrong, is one given in the exercise of the court's jurisdiction, and would operate as wes judicata in a subsequent suit. (Sen, J.) HARIRAM SARAOGI v. RAMESWAR LAL. 49 C.W. N. 354.

———S. 11—Findings—Several issues framed—Décision on each—If res judicata.

Where several issues have been framed, the decision on each issue which supports the ultimate decision in the case must be regarded as res judicata between the parties to the suit. But if a decision on an issue does not support the ultimate decree, such decision cannot operate as res judicata. (Edgley and Biswas, JJ.). FATEH NASIB v. SWARUP CHAND HUKUM CHAND. 73 C.L.J. 475.

Heard and finally decided.

S. 11—Heard and finally decided—Application to set aside ex parte decree under 0. 9, R. 13, C. P. Code—Dismissal—Subsequent suit to set aside on same ground—Res judicata.

Where an application is filed under O. 9, R. 13, C. P. Code, to set aside an ex parte decree on the allegations that the summons had been fraudulently suppressed, that the plaintiff, though a minor at the date of the suit, was impleaded as a major, and that the claim in the suit was entirely false and supported by false evidence, but these were found against and the application was dismissed by the Court which was competent to decide the matter, the decision operates as res judicata, and no separate suit to set aside the decree on these grounds can be maintained. (Harries, C.J. and Fasl Ali, J.) LAGANMANI KUER v. RAM GOVIND SINGH. 199 I.C. 736=14 R.P. 626=8 B.R. 623=1942 P. W.N. 88=23 Pat.L.T. 225=A.I.R. 1942 Pat. 357.

S. 11—Heard and finally decided—Award of interest in prior suit on particular facts—If res judicata in subsequent suit on question of interest.

Where in a previous suit between the parties the Court for some reason or another, on the particular facts of the case, awards interest to a party, it cannot be said that the question of interest is decided for all time. It is impossible to hold upon such materials that the Court in a subsequent suit is bound by the principle of resignation of the later suit. (Harries, C.J. and Manohar Lall, J.) Shiva Prasad Sinch v. Sris Chandra Nandi. 22 Pat. 220=210 I.C. 426=16 R.P. 147=10 B.R. 259=A.I.R. 1943 Pat. 327.

——S. 11—Heard and finally decided—Award under Bombay Co-operative Societies Act—Execution—Award not invalid or without jurisdiction on face of it—Execution ordered—Subsequent suit to declare award ultra vires—Question of validity of award—If res judicata.

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When there is nothing on the face of an award under the Bombay Co-operative Societies Act, to indicate that it was without jurisdiction, the executing Court is not competent to go into the validity of the award and refuse to execute it. The question as to the validity of the award cannot therefore be deemed to have been decided so as to operate as res judicata in a subsequent suit between the parties to have the award declared null and void. (Broomfield and Lokur, JJ.) KARASHIDDAYYA SHIDDAYYA V. GAJANAN URBAN CO-OPERATIVE BANK., LTD. I.L.R. (1943) Bom. 400=212 I.C. 205=16 R.B. 332=45 Bom.L.R. 553=A.I.R. 1943 Bom. 288.

S. 11—Heard and finally decided—Claim not adjudicated upon in prior suit—Plaintiff not proceeding with claim—Choice to wait for a different action.

Where a claim made in a prior suit is not judicially considered or adjudicated upon between the parties and all that happened is that the party elected not to proceed with the action for that purpose but to seek a judicial decision thereon in other proceedings, there is no bar of resjudicata to that claim being adjudicated in a different suit. (Lord Russel.) Okusanya v. Akanwo. 197 I.C. 27=54 L.W. 618=1941 A.W.R. (Rev.) 781=1941 O.A. 735 (P. C.)=8 B.R. 174=14 R.P.C. 75=1941 O.L. R. 835.

——S. 11—Heard and finally decided—Claim to marshalling—Issue raised and decided in mort-gage suit—If can be re-agitated in execution. See Transfer of Property Act, S. 81. (1943) 2 M.L.J. 301.

———S. 11—Heard and finally decided—Connected cases—Appeal in one only—Effect—Suit on mortgage after insolvency of mortgagor—Application by Official Receiver to set aside mortgage—Decree in suit and dismissal of application—Appeal by Official Receiver against dismissal of application alone—If res judicata—Provincial Insolvency Act, Ss. 4 and 53—Scope. Sevadappa Gounder v. Narayanaswami Ayyar. [See Q.D. 1936-40, Vol. I, Col. 940.] 192 I.C. 810=13 R.M. 591. Reversed on L.P.A. [See (1941) 2 M.L.J. 932.]

A decision may be wrong and a decision may be on a pure point of law, but if the matter has been put into issue, then the decision will bind the parties and their privies in a representative suit. Where a suit as framed under Mahomedan law is held to be barred by O. 22, R. 9 (1), a subsequent suit, based on customary law will not be barred by res judicata by reason of the previous decision, if the question of customary law was neither heard nor decided in the prior suit. (Tek Chand and Dalip Singh, JJ.) JAN MOHAMMAD v. MOHAMMAD KHAN. 196 I. C. 130=14 R.L. 132=A.I.R. 1941 Lah. 169.

-S. 11—"Heard and finally decided"—Decree subject to final decision of Privy Council in another case.

A decree in a suit which is expressed to be "subject to the final decision of the Privy Counschill in another case is not a final decree within the meaning of S. 11, C. P. Code. (Lord Thankerton.) KUMAR CHANDRA SINGH v. MIDNAPORE ZEMINDARY CO. 69 I.A. 51=I.L.R. (1942) 2 Cal. 1=8 B.R. 627=14 R.P.C. 128=46 C. W.N. 802=I.L.R. (1942) Kar. (P.C.) 23 =199 I.C. 545=A.I.R. 1942 P.C. 8 (P.C.).

-S. 11—Heard and finally decided—Execution application impleading surety-Plea of adjustment of decree between creditor and debtor discharging surety-Court not going into question as adjustment was uncertified—Suit by surety for declaration of discharge—Res judicata.

Where in execution proceedings a surety for the judgment-debtor is impleaded as a party and sought to be proceeded against, and a plea that the surety is discharged from liability on account of an adjustment between the creditor and debtor is rejected on the ground that the adjustment, not being certified, could not be recognised by the executing Court, and the executing Court makes no finding on the question as to whether the surety had been relieved from his liability on account of the adjustment, it would be open to the surety to agitate that question in a regular suit by him to have it declared that he is discharged from liability. Such a suit is not barred by res judicata. (Divatia, J.) BONDRU AVASU v. DAGADU EKOBA. I.L.R. (1943) Bom. 382=209 I.C. 435=45 Bom.L.R. 438= A.I.R. 1943 Bom. 246.

S. 11—Heard and finally decided—Finding of trial Court—Res judicata when appeal

preferred against decree.

No finding of a court of first instance can be said to have been "finally decided" any matter in issue, when a competent appeal has been preferred from its decree and hence such finding cannot operate as res judicata. (Wadsworth and Patanjali Sastri, II.) JANIKAMMA v. VENKATA RAJAGOPALA CHINNARAO. I.L.R. (1945) Mad. 62=(1944) M. W. N. 702 (2)=A.I.R. 1945 Mad. 62=(1944) 2 M.L.J. 384.

-S. 11-Heard and finally decided-Find-

ing without issue.

The appellant executed a sale deed and a lease as well as a mortgage in favour of the plaintiff's whose case was that the consideration was the balance of remittances made by the plaintiff. In a suit to recover possession by the plaintiff if the property covered by the sale-deed and lease the defence in the suit was that the two transactions were benami and that no interest passed to the plaintiffs. The plea of benami was accepted and the suit dismissed and plaintiff's story that the remittances were loans was rejected. In a subsequent suit to enforce the mortgage on the issue whether the remittances were loans by the public, Held, the finding in the previous suit did not operate as res judicata. (Henderson, J.) Nur Hossein v. Tamijuddin. 197 I.C. 495= 14 R.C. 366=A.I.R. 1941 Cal. 449.

#### C. P. CODE (1908), S. 11.

-S. 11-Heard and finally decided-Issue raised in suit and expressly decided against plaintiff-Effect of-Right to seek relief in execution contrary to decision in suit-Res judicata. Sed C. P. CODE, S. 47. 8 B. R. 401.

-S. 11-Heard and finally decided-Partition suit-Plea that suit is bad as being for partial partition—Dismissal—l'f operates as res judicata against defendant-Right to appeal on ground of being dissatisfied with statement in judgment. See APPEAL—COMPETENCY. (1944) 2 M.L.J. 181.

-S. 11-"Heard and finally decided"-Partition suit-Revenue paying land-Preliminary decree declaring plaintiff to be entitled to partition-No partition effected and no execution taken out—Fresh suit for partition—Res judicata. See C. P. Cope, S. 47. 43 Bom.L.R. 971.

-S. 11—Heard and finally decided—Question of estoppel decided by trial Court but left open by appellate Court—If can be raised in later suit.

Where a question of estoppel is raised and it is decided by the trial Court but the appellate Court leaves the question open, there is no bar to the same question being raised in a later suit between the same parties. (Sathe, S.M.) MARWA v. JAGESHWAR. 1943 A.W.R. (Rev.) 240=1943 R.D. 393.

S. 11—Heard and finally decided—Rent suit—Tenant's plea that third person was landlord overruled—Subsequent suit for declaration that the third person was landlord—Res judicata.

Where in a suit for rent the tenant's plea that a third person was the landlord was investigated and overruled it will operate as res judicata in a subsequent suit by the tenant for a declaration that the third person was his landlord. (Pal, J.)
PANCHANAN GHOSH v. SARAT KUMAR ROY. 197
I.C. 316=14 R.C. 328=A.I.R. 1941 Cal. 512.

suit for redemption—Usufructuary mortgage— Prior suit for redemption-Preliminary decree-Final decree dismissing suit for non-payment of commission fee-Second suit-If barred. Apr-NARAYANA CHETTY v. SRIRANGACHARIAR [See O.D. 1936-'40, Vol. I, Col. 946.] A.I.R. 1941 Mad.

-S. 11-Heard and finally decided-Unnecessary findings-Notice of suit under S. 80 not served on public officer-Parties not raising objection—Findings on merits—If res judicata. See C. P. Cope, S. 80. 48 C.W.N. 421.

Issue of Law.

-S. 11—Issue of law—Decision on—Change in law-Effect.

There is no res judicata when the law has changed since the decision in question was given. If the law has been altered since the decision on a particular question of law, that decision on that issue in the earlier suit would not operate as res judicata with regard to the same question in a subsequent suit. Hence a decision in regard to land which was grove-land under Agra Tenancy

Act of 1901 would not operate as res judicala in a subsequent suit with respect to the same land after the law has been altered by the Agra Tenancy Act, 1926, in regard to the status of such a tenant. (Dible, J.M. and Ross, A.M.) ASHT-EHUJI DEVI v. GOPAL KHATIK. 1943 A.W.R. (Rev.) 296=1943 R.D. 470.

-S. 11-Issue of law-Decision-Change in

law-Effect.

A previous decision between the same parties does not operate as res judicata when there has been a change in law made by the Legislature subsequent to that decision. (Roxburgh, J.) JHARURAM DASS MANDOL v. HAZAR MAHOMED SHEIK FAKIR. 211 I.C. 33=16 R.C. 489=77 C.L.J. 137=A.I.R. 1944 Cal. 13.

-S. 11—Issue of law—Decision on question

good law-If res judicata.

A decision on a point of law which has ceased To decision on a point of raw winth has ceased to be good law, will not operate as res judicata in a subsequent suit. (Sathe, J.M.) BASUDEO v. DATWA. 1941 A.W.R. (Rev.) 480 (2)=1941 O.A. (Supp.) 439 (2)=1941 O.W.N. 691=1941 R.D. 373.

-S. 11-Issue of law-Decision on question of jurisdiction-Rights of parties not decided-

Decision, if ree judicata.

A decision of Court that it has no jurisdiction to deal with the case without deciding anything regarding the rights of the parties, is not res judicala. (Henderson, J.) MEGHRAJ GOLAB CHAND C. CHANDRA KAMAL BHUIYAN. 196 I.C. 534=14 R.C. 257=73 C.L.J. 410=A.I.R. 1941 Cal. 493.

-S. 11-Issue of law-Decision on-Operation as res judicata—Decision as to non-executability of a maintenance decree—Subsequent exe-

cution application—Res judicata, bar of.
It is only in regard to cases where there is a decision on a pure question of law quite irrespective of the facts of the two cases involved that it may be said that such a decision does not operate as rcs judicata in a subsequent suit on a different cause of action. Where a decree for future maintenance is once held to be not executable, that decision would operate as res judicata when a subsequent application is made for execution of the same decree though in respect of later arrears. (Allsop, J.). DULARI V. SAHDEL. 1942 A.L.W.

-S. 11—Land registration proceedings— Decision as to possession-If res judicata in subsequent proceedings.

It is not proper that a decision as regards possession in land registration proceedings should be treated as an absolute bar to a subsequent adjudication on the point. The fact that a person was not in possession in 1913 cannot by itself be any proof that he or his representative in inte-rest is not in possession in 1942. The claims of the parties should be investigated and it is undesirable to have the name of a person recorded who is certainly not in possession if it can be avoided. (Middleton.) Jagannath Swamiji v. Chhabiraj Kuer. 9 B.R. 195.

#### C. P. CODE (1908), S. 11.

"Litigating under the same title".

S. 11—"Litigating under the same title—Adoption by widow in 1927—Decision in Suit in 1928 that widow had no right to adopt—Change in law-Subsequent adoption by widow in 1935 of same person-Suit by adopted son-If barred

by res judicata.

A later suit for a declaration of the validity of the plaintiff's adoption in 1935 cannot be held to be barred by res judicata by reason of his adoptive mother's right having been negatived in an earlier suit of 1928 in respect of an adop-tion made in 1927, the adopter and adoptee being the same, when in the meanwhile there has been a change in the law. (Broomfield and Bom. 798=15 R.B. 273=203 I.C. 655=44
Bom.L.R. 710=A.I.R. 1942 Bom. 322.

-S. 11-Litigating under the same title-Decision in declaration suit as to ownership of a property—Reagitation in subsequent suit of same question by creditor of defeated defendant

in former suit-If barred.

Where the plaintiff in a suit to have the estate of D administered by Court had already filed a suit against the beirs of D for a declaration that a certain property belonged to him solely and the Official Receiver in the administration suit was impleaded as a party to the declaration suit and the suit decreed against the heirs of D and the Official Receiver the decision would operate as res judicata in the administration case. The Official Liquidator of D & Co. having a claim against the estate of D in respect of the property in question would be barred from property in question would be barred from reagitating the same question in the administration suit. He is only in the position of a creditor attempting to assert the title of his debtor and hence must be held to be claiming under him. (Bennett and Agarwal, JJ.) The Official Liquidator, Dinshaw & Co. v. Anand Behari Lal. 18 Luck. 92=201 I.C. 69=15 R.O. 48=1942 O.W.N. 269=1942 A.W.R. (C.C.) 198=1942 O.A. 205=A.I.R. 1942 Oudh 327. Oudh 327.

-S. 11—Litigating under same title—Different rights claimed in respect of same property. Where in the prior suit the plaintiff claimed that the house in dispute was liable to sale in execution of a decree in favour of the defendant only after reserving a charge for her betrothal and marriage a subsequent suit by her claiming a one-sixth share in the property of her father on the ground of inheritance will not be barred by res judicata. (Abdul Rashid, Ram Lal and Mahajan, J.J.) Mr. SARDARAN v. SHIV LAL. 215 I.C. 125=17 R.L. 89=A.I. R. 1944 Lah. 282 (F.B.).

——S. 11—Litigating under the same title— Lessor and lessee becoming Sadar lambardar and lambardar after decision in rent suit—Later suit between same parties in respect of rent for subsequent years—Bar of res judicata.

The mere fact that the lessor and lessee had

subsequent to a decision in a suit for rent be-

tween them acquired the additional capacity of sadar lambardar and lambardar would not alter their capacities in a later suit between them, for rent capacities in a later suit between them, for rent in respect of later years. Nor would it bar the application of the rule of res judicata. (Niyogi, J.) Tekchand Kapurchand v. Birzabai. I.L.R. (1942) Nag. 721=202 I.C. 317=15 R.N. 77=1942 N.L.J. 423=A.I.R. 1942 Nag. 119.

-S. 11—"Litigating under same title"—

Meaning of.

The expression 'title' in S. 11, C. P. Code does not refer to the cause action on which the suit is brought but to the interest or capacity of the party suing or being sued. If the plaintiff in both suits is suing in his individual capacity and in his own interest then he is litigating under the same title. Where in a rent suit the plaintiff sued as landlord for rent and subsequently sued as owner of the land for ejectment against alleged trespassers it must be held that in both the suits he is suing in the same capacity. (Sen, J.) PRIOMBALA DEBI v. JOHURI LAL RAY. 198 I.C. 462=14 R.C. 462=A.I.R. 1941 Cal. 574.

-S. 11—Litigating under same title—Prior partition suit—Opposition by defendants ground property was debuttar of which they were shebaits—Finding by Court in favour of defendants not disturbed in appeal—Subsequent suit for declaration of title to same property
—Same defendants impleaded both in their personal capacity and as shebaits along with their tenant-Res judicata. See C. P. Code, S. 11-DIRECTLY AND SUBSTANTIALLY IN ISSUE. 45 C. W.N. 854.

-S. 11-Litigating under the same title-Suit on mortgage by assignee under unregistered deed—Dismissal—Fresh suit after obtaining registered deed of assignment—If barred. Jethanan Issardas v. Udhomal. [See Q.D., 1936-'40, Vol. I, Col. 3270.] I.L.R. (1941) Kar. 99=192 I.C. 676=13 R.S. 198.

-S. 11-Might and ought-See C. P. Code, S. 11, EXPL. IV.

# Miscellaneous proceedings.

sion as to title in suits under S. 44, Agra Tenancy Act-Same question of title raised in suit under S. 180-A, U. P. Tenancy Act-If barred by res judicata.

The decision in a suit under S. 44, Agra Tenancy Act, negativing the plea of the defendants as to title by inheritance would operate as res Judicata in subsequent suit under S. 180 of the U. P. Tenancy Act, when the same title is set up in defence. (Sathe, S.M. and Ross, A.M.) RAM RAKHAN SINGH v. SYED ABDUL SHAFUR. 1944 A.W.R. (Rev.) 28=1944 R.D. 82.

-S. 11—Miscellaneous proceedings—Decision in profits suit as to whether land was Khudkasht or tenancy land-If operates as res judicata in later declaration suit.

Where the question whether land was khud-

#### C. P. CODE (1908), S. 11.

a suit for profits, the decision would operate as res judicata in subsequent suit for declaration when the same question is raised. (Shirreff, when the same question is raised. (Shirreff, S.M.) JAIRAJ SINGH v. ASHARFI DEVI. 1942 R.D. 433 (1)=1942 O.W.N. (B.R.) 344 (1)=1942 A.W.R. (Rev.) 266=1942 O.A. (Supp.) 292 (1).

S. 11—Miscellaneous proceedings—Decining in the control of the contro

sion in suit under S. 108 (2), Oudh Rent Act, that payment claimed is not rent-If operates as res judicata in later suit for its recovery under

the U. P. Tenancy Act.

The decision in the earlier suit under S. 108 (2), Oudh Rent Act, that the claim did not fall within the term 'rent' cannot operate as res judicata in the later suit in respect of a similar claim after the U. P. Tenancy Act, inasmuch as the definition of 'rent' under the later Act is different 'irom that in the earlier one. (Sathe, S.M. and Dible, J.M.) MOHAMED EJAZ RASOU. KHAN v. MST. SURJA. 1944 A.W.R. (Rev.) 238=1944 R. D. 457.

S. 11—Miscellaneous proceedings—Decision in suit decided under S. 183, U. P. Tenancy Act, of suit filed under S. 108 (10), Oudh Rent Act—Second suit under S. 183, on point which could not have been taken in earlier suit, but could have been added on amendment of the plaint –Res judicata.

Where a suit filed under S. 108 (10) of the Oudh Rent Act is decided under S. 183 of the New Tenancy Act and a second suit is brought under S. 183 of the New Act on a point which could not have been raised in the earlier suit and which arose because of the New Act, the decision in the earlier suit would operate as res judicata under Expl. IV to S. 11 where it was open to the plaintiff to have obtained an amendment of the plaint in the former suit so as to include the point arising by virtue of the new Act and he failed to do so. (Dible, J. M.) Dookhi Barai v. Маномер Менрі. 1944 R.D. 346=1944 A.W.R. (Rev.) 171.

S. 11—Miscellaneous proceedings—Dis-missal of declaratory suit under local Tenancy Act without deciding on merits as to existence of tenancy rights-If operates as res judicata in later correction case.

It is not the suit as a whole which operates as res judicata but the findings on individual issues which do so. Hence the question to be considered when a plea of res judicata is raised is not to look into the question whether the previous suit was dismissed in default or decreed ex parte but to consider whether the particular issue the finding on which is alleged to operate as res judicata was finally decided after a hearing. So the dismissal of declaratory suit under the Agra Tenancy Act cannot operate as res judicata in subsequent correction case, where there had been no decision in that suit as to whether the plaintiff Ross, A.M.) Tursi v. Mst. Lachma. 1944 R. D. 125=1944 A.L.J. (Supp.) 13=1944 A.W. R. (Rev.) 69.

kasht or tenancy land is raised and decided in sion of Revenue Court as to defendants being

muafidars-Later civil suit to declare that they are not muafidars-Bar of res judicata.

Where a Revenue Court has decided in a suit for profits that the defendants are muafidars, the decision cannot operate as res judicata in a later civil suit to declare that they are not muafidars. (Bynnett, J.) AZIZ AHMAD KHAN V. INAYAT KHAN. 17 Luck. 215=1941 O.W.N. 1101= A.I.R. 1942 Oudh 25=1941 A.W.R. (Rev.) 879=14 R.O. 203=1941 O. L. R. 738=196 I.C. 673=1941 R.D. 851=1941 O.A. 805.

—S. 11—Miscellancous proceedings—Dismissal of suit for declaration of tenancy rights based on succession-Suit for ejectment of the plaintiff in the former suit-Plca of tenancy right

by survivorship if available.

Where the claim of a plaintiff in a suit 'for declaration of tenancy rights based on succession is negatived and the suit is dismissed, in a subsequent suit against that plaintiff under S. 180 of the U. P. Tenancy Act for his ejectment, it is not open to the defendant to plead that he is a tenant by survivorship. The previous decision would operate as res judicata. (Sathe, S.M. and Acton, A.M.) Mubarak Husainkhan v. Lal SINGH. 1945 R.D. 15=1945 A.W.R. (Rev.) 15.

-S. 11—Miscellaneous proceedings—Finding as to amount charged under security bond in execution proceedings under S. 386, Cr. P. Code-Subsequent suit to enforce security bond-Bar of res judicata as to extent of charge created.

Where in execution proceedings under S. 386, Cr. P. Code, on objections raised under S. 386, Cr. P. Code, read with O. 21, R. 90, C. P. Code as to the extent of the charge created by the security bond the Court determines the amount charged under the security bond, the finding of the Court as regards the amount would operate as res judicata between the parties in a subsequent suit to enforce the security bond. (Collister and Baipai, JJ.) JAGAT SINGH v. BEHARI LAL. 199 I.C. 212=14 R.A. 351=1942 A.L. J. 37=1941 A.W.R. (H.C.) 389=A.I.R. 1942 All. 104.

-S. 11-Miscellaneous proceedings-Finding as to validity of will in proceedings under S. 44 of the Mad. H. R. E. Act—If operates as res judicata in subsequent suit involving the declara-

tion of invalidity of will.

A will was found to be valid in proceedings under S. 44 of the Mad. H. R. E. Act-A suit was filed subsequently for a relief involving the declaration of the invalidity of the will-On a question whether the order in the previous proceedings operated as res judicata. Held, that the order in the proceedings under S. 44 of the Mad. H. R. E. Act was not final and therefore did not operate as res judicata in the later suit (Leach, C.J., and Lakshmana Rao, J.) AMIRT-THALINGA PADAYACHI v. CHANDRASEKHARA PADAYACHI. 1945 M.W.N. 236=58 L.W. 188 = A.I.R. 1945 Mad. 242=(1945) 1 M. L. J. 357.

S. 11—Miscellaneous proceedings—Findings in summary cases under U.P. Land Revenue Act—Res judicata.

Any finding in a summary case under the U. P. Land Revenue Act cannot operate as res

#### C. P. CODE (1908), S. 11.

judicata. (Shirreff, S.M. and Sathe, J.M.) BAL-KISHUN PASI v. KHATRANI. 1941 A. W. R. (Rev.) 685=1941 O.A. 625=1941 R.D. 723.

-S. 11 and U. P. Tenancy Act, S. 242-Miscellaneous proceedings—Judgment in civil suit to eject defendant as trespasser-If operates as res judicata in subsequent ejectment suit in Revenue Court not triable by Civil Court.

The judgment of the Civil Court in a suit to eject the defendants as trespassers cannot operate as res judicata in a subsequent suit to eject the defendants in the Revenue Court when such suit is not triable by Civil Court and is exclusively within the jurisdiction of the Revenue Court under S. 242 of U. P. Tenancy Act or S. 230 of the Agra Tenancy Act. (Sathe, J.M.) MAULADAD KHAN v. SRI THAKUR RADHA KANT. 1942 O.A. (Supp.) 207 (1)=1942 O.W.N. (B.R.) 335=1942 R.D. 424=1942 A.W.R. (Rev.) 187 (1).

S. 11—Miscellaneous proceedings—Proceeding under O. 22, R. 5—Order in—Res judicata. See C. P. Code. O. 22, R. 5. 43 P.L.R.

-S. 11-Miscellaneous proceedings-Rent decrees-Relationship of landlord and tenant-How far res judicata.

Rent decrees obtained in certain years do operate as res judicata between the parties and it is not open to the defendant to allege that in those years he was not the tenant of the plaintiff. But these decrees do not prevent the defendant from relying upon facts which show that whatever the position was in those years he was not tenant of the plaintiff in subsequent years. (Harries, C.J. and Facil Ali, J.) JAGDISH CHANDRA' DEO v. BISESWAR LAL. 199 I.C. 341=8 B.R.; 547=14 R.P. 582=23 P.L.T. 673=A.I.R.; 1942 Pat. 323.

C. P. Code, S. 11. Expl. VI.

Plea of Res Judicata. -S. 11—Plea of res judicata—Availability -Reasons for declining jurisdiction-If decisions. Upendra Nath Bose v. Lall. [See Q.D., 1936-'40, Vol. I, Col. 3271.] I.L.R. (1940) Kar. (P.C.) 460=191 I.C. 7=13 R.P.C., 110=7 B.R. 198=45 C.W.N. 204=73 C.L.J.

145=43 Bom.L.R. 381.

-S. 11-Plea of Res judicata-Competency. of appellate court to consider when either party had not raised it.

The appellate court could consider a plea of res judicata even though either party had not raised it in the trial Court or before it. If the plea could not be sustained on the facts before ti, it should not be allowed to be raised at that stage. (Malik, J.) Shib Singh v. Mst. Gaura. I.L.R. (1944) A. 601=1945 A.L.J. 7=1944 O.A. (H.C.) 224=1944 O.W.N. (H.C.) 136=1944 A.W.R. (H.C.) 224=A.I.R. 1945 A. 76.

-S. 11-Plea of res judicata-When not oben.

In a suit for arrears of rent under the Bengal Tenancy Act the defendant alleged that the tenancy was a niskar one. But the Munsif found the holding was already assessed to rent under S. 105-A Bengal Tenancy Act and as that assessment had the effect of a decree it was not competent to the defendant to agitate the matter in the suit. The suit was decreed. On appeal by the defendant the District Judge finding that the S. 105 proceedings were decided ex parte and did not bar the tenant from claiming niskar title in the subsequent rent suit set aside the decree and remanded the suit for rehearing with liberty to parties to adduce fresh evidence when the case heard after the remand, the plaintiff contended that on the issue whether the jama was a miskar one the defendant cannot agitate the matter as he raised the same objections in an application by the plaintiff under S. 26-J, Bengal Tenancy Act but did not contest it at the hearing and allowed an ex parte order to be passed. This contention was accepted and the defendants' plea was rejected as barried by res judicata. On appeal the subordinate judge held that after the decision of the Court of appeal remanding the suit the question of res judicata was no longer open for decision by the Munsif. On further appeal, held: As only a particular decision was incidentally considered as a bar by the trial court and no bar by the appellate Court, the plea of res judicata is not wholly excluded in the trial on remand specially when the whole suit is directed to be tried on fresh evidence. (Pal, J.) Srish Chandra Nandy v. Kala Chand Roy. I.L.R. (1942) 1 Cal. 510=202 I.C. 570=16 R.C. 367=75 C.L.J. 20=46 C. W.N. 169=A.I.R. 1942 Cal. 445.

S. 11—Principle of res judicata—Applicability—Decision in later suit on the same issue becoming final during the pendency of appeal against earlier decision—Bar of res judicata.

Where during the pendency of an appeal against the finding in a suit, the same issue had been raised and decided differently in another suit in the same Court later by a different Judge and such later decision had been allowed to become final it will operate as res judicata in the appeal against the earlier decision. (Leach, C.J. and Kuppuswami Ayyar, J.) CHOCKALINGA THEVAR v. SANKARAPPA NAICKER. I.L.R. (1942) Mad. 677=201 I.C. 733=15 R.M. 385=1942 M.W.N. 178=55 L.W. 128 (2)=A.I.R. 1942 Mad. 421=(1942) 1 M.L. J. 281.

S. 11—Prior decision—Two suits filed one after another—Decision in later suit given earlier—Res judicata.

If the same question is in controversy between the same parties in two different suits filed one after the other, but simultaneously pending, the final decision in the later suit, if given earlier, operates as res judicata in the earlier suit whose final stage is reached later. Edgley and Ahram, II.). Ganga Prasanna v. Kumar Brahma Niranjan. 46 C.W.N. 702.

S. 11—Prior suit on title—Decision that land belonged to Government—Subsequent suit based on acquisition of casement over the same

### C. P. CODE (1908), S. 11.

land—Finding as to ownership of Government, if operates as res judicata.

Where in a suit based on acquisition of title by adverse possession the defendant pleaded that the land was transferred to him by Government it was found that the land belonged to Government that finding would operate as res judicate in a subsequent suit brought by the same plaintiff based on the acquisition of an easement over the same property. (Collister and Allsop, JI.) LALIT KISHORE v. RAM PRASAD. I.L.R. (1943) All. 792=209 I.C. 578=1943 A.L.W. 552=1943 O.W.N. (H.C.) 328=1943 A.W.R. (H.C.) 233=A.I.R. 1943 All. 362.

\_\_\_\_\_S. 11—Pro forma defendant—If bound by decision—Collusion with plaintiff—Onus.

A decision in a former suit, which affects the interests of a firo forma defendant against whom no relief had been claimed, can operate as res judicata in a subsequent suit between the same parties. It is immaterial that no express issue was framed in that suit with regard to his rights, when it is clear from the pleadings that his interest was identical with that of the plaintiff. The onus would lie on the party who asserts to show that he was colluding with the plaintiff. (Edgley and Biswas, JJ.) Fateh Nasib v. Swarup Chand Hukum Chand. 73 C.L.J.

S. 11 and U. P. Tenancy Act (1939), S. 41—Question of tenant's right to benefit of S. 41, raised in two appeals by tenant—Summary dismissal of one, if operates as res judicata in the other.

Where the question of a tenant's right to benefit of S. 41 of the U. P. Tenancy Act is raised in two appeals filed by him, if one of the appeals is summarily dismissed, it would operate as res judicata in the other appeal. (Sathe, S.M.) GOPAL v. MST. SAFIA BEGUM. 1944 R.D. 138=1944 A.W.R. (Rev.) 74.

#### Rent Suit.

Where in a case no plea is raised as regards the rate of rent and no specific issue is framed and the Court decrees the suit at a certain rate of rent, the decision would no doubt not constitute as res judicata in a subsequent suit, but where the question has been pointedly raised and embodied in the form of a specific issue as to the proper rate of rent, then the decision arrived at by the Court upon such issue will be res judicata in subsequent suits for rent. (Ghulam Hasan, J.) MAHABIR SINGH v. TIRBHAWAN BAHABUR SINGH. 192 I.C. 75=13 R.O. 308=1941 O.L.R. 57=1941 R.D. 332=1941 O.A. 30=1941 A.W.R. (Rev.) 75=1941 O.W.N. 30=A.I.R. 1941 Oudh 259.

——S. 11—Rent suit—Decree in—Issue as to relationship of landlord and tenant—Res judicata—Tenure sold in execution.

A decree for arrears of rent obtained against a defendant tenant will not bar the issue as to relationship of landlord and tenant between him

and the plaintiff by the principle of res judicata, if in execution of that decree the tenure is sold. After the execution sale the old tenancy right of the defendant ceases to exist. If he succeeds in remaining in possession as against the auction-purchaser or in regaining possession, the old relationship between him and the plaintiff does not thereby revive. It will be a new legal relation between the parties constituted by a new set of facts. The decision in respect of the old relationship will not debar the issue in respect of this new legal relation. (Akram and Pal, JJ.) Woomesh Chandra Dutta v. Jabed Ali. 211 I.C. 388=16 R.C. 529=77 C.L.J. 155=A.I.R. 1944 Cal. 42.

Revenue court not competent to decide question of title—Subsequent suit involving question of title—Bar of res judicata.

An ex parte decision in a rent suit by a Revenue Court not competent to decide questions of title could not operate as res judicata in a subsequent suit involving decision of questions of title. (Malik, J.) Shir Singht v. Msr. Gaura. I.L.R. (1944) A. 601=1945 A.L. J. 7=1944 O.W.N. (H.C.) 136=1944 O.A. (H.C.) 224=1944 A.W.R. (H.C.) 224=A. I.R. 1945 A. 76.

Rate of rent—If res judicata—Such decree and executed—Evidentiary value.

A previous cx parte decree in a rent suit will not operate as res judicata on the question of the rate of rent in a subsequent suit between the same parties unless a declaration was asked for in the plaint as part of the substantive relief claimed that the rate was at a specific figure. But such a decree, whether or not it was executed, is admissible in evidence to establish the rate of rent although the fact that it has not been executed will be one of the circumstances to be taken into consideration along with other facts of the case in determining the value to be given to it. (Roxburgh, J.) Madaripur General Bank, Ltd. v. Mohiuddin Ahmed. I.L.R. (1943) 1 Cal. 430=212 I.C. 123=16 R.C. 579=47 C.W.N. 362=A.I.R., 1944 Cal. 118.

S. 11—Rent suits—Plea in defence in rent suit denying plaintiff's right to sue by themselves—Decree in previous suit between same parties for proprietory share of past rent, if operates as res judicata.

Where in a suit for arrears of rent the defendants plead in bar of suit that there were other co-sharers who had not joined in the suit, such a defence is not barred by res judicata by reason of an ex parte decree in the case of one defendant and a consent decree in the case of another in an earlier suit by the plaintiffs against two of the defendants for their share of part rent for certain years. (Bennet and Madeley, JJ.) BAJRANG BAHADUR SINGH v. HUBRAJ KUER. 215 I.C. 40=17 R.O. 48=1944 O.A. (C.C.) 166=1944 A.W.R. (C.C.) 166=1944 O.W.N. 245=A.I.R. 1944 Oudh 281.

### C. P. CODE (1908), S. 11.

Res judicata.

S. 11—Res judicata and estoppel—Distunction between.

Per Pal, J.—The doctrine of res judicata no doubt resembles the doctrine of estoppel in some respects; but the two are materially different. The doctrine of res judicata differs from 'estoppel' chiefly in not resulting from an act of party himself but from a decision of the Court. The plea of res judicata amounts to an assertion that the very legal rights of the parties are such as they have been determined to be by the judgment of a competent Court and no other Court should proceed to determine this again. That which has been delivered in judgment must be taken for established truth. In all probability it is true in fact; even if not, it is expedient that it should be held as true none the less. The operation of the doctrine is thus the transformation of a question of fact into a question of law. (Syed Nasim Ali and Pal, II.) Srimathi Radharani Dassi v. Srimati Binodamoyee Dassi. I.L.R. (1942) 1 Cal. 169= 200 I.C. 216=14 R.C. 685=46 C.W.N. 245=74 C.L.J. 180=A.I.R. 1942 Cal. 92.

Where parties to a litigation join issue upon a certain matter and adduce evidence and invite a decision by the Court, that decision, even when it happens to be one on title, will operate as res judicata, and will not in any way be affected by the circumstance that the earlier suit was valued as a suit between landlord and tenant and not as a suit upon title. (Collister and Allsop, JJ.) LALJI SAHIB v. MUNSHI LAL BABU. I. L.R. (1943) All. 834=210 I.C. 420=16 R. A. 180=1943 A.L.J. 437=1943 A.L.W. 501=1943 O.W.N. (H.C.) 298=1943 A.W.R. (H.C.) 230=1943 O.A. (H.C.) 230=A.I. R. 1943 All. 340.

S. 11 and O. 17, R 3—Res judicata—Decision under O. 17, R. 3, if would operate as. The decision of a suit under O. 17, R. 3, C. P. Code, is one on the merits and as such would operate as res judicata in subsequent litigation. (Shirreff, S.M. and Sathe, J.M.) VIRENDRA SINGH v. SATISH CHANDRA. 1943 R.D. 507.

S 11—Res judicata—Each finding on which judgment is based—Is res judicata.

Though the suit could be disposed of in its entirety on the ground of prescriptive title where the judgment bases itself both on the binding character of an award as well as on adverse possession each of the two findings will give rise to the bar of res judicata in a subsequent suit. (Bennett and Misra, JJ.) GUR PRASAD v. GUR PRASAD. 20 Luck. 64=1944 O.A. (C.C.) 214=1944 A.W.R. (C.C.) 214=A.I.R. 1944 Oudh 321.

S. 11—Res Judicata—Final decision in suit and the decree not set aside—Different decision in later suit on point forming basis of decision in the earlier suit—Rights under decree which had become final if affected.

When a plaintiff has filed a suit in a court of competent jurisdiction and that suit has been finally decided and no appeal against the decree has been preferred and that decree, has not been set aside, the mere fact that in some other litigation the point which is the basis of the decision in the previous suit was differently decided will not affect the rights of the parties under the decree that had become final. (Malik and Mathur, JJ.) Muhammad Obedullah Khan v. Muhammad Abdul Jalil Khan. I.L.R. (1945) A. 75=1945 A.L.J. 11=A.I.R. 1945 À. 121.

**-S.** 11—Res judicata—Lunatic's claim for declaration and possession of his half share decreed against brother's creditors—Decision operates as res judicata with respect to whole estate.

In various suits filed on behalf of a lunatic claiming a declaration of his proprietary rights and for possession of his half share there was decree as against the creditor. In the suits, the brother also was impleaded as a defendant. In a subsequent suit by the brother claiming the whole estate as owner the decree in the earlier suits will operate as res judicata not only quoad the properties which were in dispute in the earlier suits but also in respect of the whole estate. Such claim to the whole estate might and ought to have been made a ground of defence in the earlier suits. (Collister and Allsop, II.) BHAGWATI SARAN SINGH V. PARMESHWARI NANDAN SINGH. I.L.R. (1942) All. 518=202 I.C. 227=15 R.A. 104=1942 A.L.J. 197=1942 A.L.W. 245=A.I.R. 1042 All 267 (2) 1942 All. 267 (2).

-S. 11—Res judicata—Tenancy cases. Decision in another case can only estop parties when a point in issue has been clearly defined, argued and decided in the earlier suit. In tenancy cases special care has to be exercised. (Garbett, F.C.) BABU v. SHERA. 21 Lah.L.T. 4.

Revenue Proceedings. -S. 11-Revenue Proceedings-Order in correction of patwari papers case-If operates

as res judicata in subsequent declaration suit.

See Revenue Proceedings—Res Judicata. PROCEEDINGS—RES JUDICATA. 1942 R.D. 202.

S. 11—Revenue proceedings—Orders in— If res judicata. U. P. LAND REVENUE ACT, S. 57 AND C. P. CODE, S. 11. 1941 O.W.N. 461.

-S. 11-Scope-Bar of trial of issue and of suit.

S. 11, C. P. Code not only bars trial of a issue but also the trial of a suit in which the matter directly and substantially in issue has already been agitated upon in a previous suit. (Malik and Mathur, JJ.) MUHAMAD OBEDULLAH KHAN V. MUHAMMAD ABDUL JALIL KHAN. I.L.R. (1945) A. 75=1945 A.L.J. 11=A.I.R. 1945

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-S. 11-Scope-General principles of res judicata-Application of-Limits. Anantamoni DASI v. DHOLANATH. [See Q.D., 1936-'40, Vol. I, Col. 3271.] 195 I.C. 870=14 R.C. 146=A.I.R. 1941 Cal. 104.

-S. 11-Scope-General principles of res judicata—Applicability—Limits.

The general principle of the law of res judicata can be applied only where the section itself is silent but where the section provides specific conditions those conditions must be fulfilled before the general principles can apply. As a Tahsildar is not competent to try a suit for determination of rent under S. 94, U. P. Tenancy Act, any finding by him in a prior arrears of rent suit cannot operate as rcs judicata in a subsequent suit for determination of rent. (Sathe, S. M. and Ross, A.M.) Yusuf Ali Khan v. Llaicht. 1944 A.W.R. (Rev.) 147 =1944 R.D. 287.

Specific Relief Act. Scc Specific Relief Act. S. 43. 1943 O.W.N. 280 (F.B.).

S. 11—Scope—Issue in proceeding decided by final order—Power of succeeding Judge to reopen issue in same proceeding at later stage. Subramani Rao v. Rami Reddi. [See Q.D., 1936-40 Vol. I, Col. 3272.] 193 I. C. 44=13 R.M. 608.

11—Scope—Mortgagor adjudged insolvent-Suit by mortgagee to enforce his mortgage making special receiver a party-Application by receiver in insolvency for setting aside mortgage as one without consideration—Both suit and application heard together—Suit decreed and application dismissed—Appeal only against order dismissing receiver's application-Decree in the suit if operates as res judicata.

A mortgagee instituted a suit to enforce his mortgage on the 23rd June, 1931 and impleaded as a party the special receiver in the insolvency of the mortgagor who had been adjudicated an insolvent on the 25th October, 1930, in the same Court. On the 20th August, 1931, the Special Receiver applied in the insolvency proceedings for an order setting aside the mortgage under the provisions of Ss. 4 and 53 of the Provincial Insolvency Act. The suit and the application were heard together and the mortgage was held to be valid. The consequence was that the Court granted the mortgagee a preliminary decree and dismissed the receiver's application. The receiver filed an appeal against the order dismissing his application but filed no appeal against the preliminary decree.

Held, that the unappealed decree did not operate as res judicata in the appeal against the order. 16 M.L.J. 63=I.L.R. 29 Mad. 333 (F. B.), Foll.; (1940) 1 M.L.J. 647, reversed (Leach, C.J. and Happell, J.) NARAYANASWAMI AYYAR v. SEVADAPPA GOUNDAR. 54 L.W. 654 = 201 I.C. 187=15 R.M. 262=A.I.R. 1942 Mad. 226=(1041) 2 M.I.I. 032

Mad. 226=(1941) 2 M.L.J. 932.

Subject-matter —S. 11—Subject-matter different—Finding as to jointness or otherwise of Hindu family-Crucial point of time different in the two suits.

An earlier decision that a particular Hindu family was not joint at a particular point of time, could not operate as res judicata in a later suit where the question is as to the jointness or otherwise of the same family, but at a ness or otherwise of the same family, but at a point of time earlier than that to which the prior decision referred. (Yorke and Agarwal, I.) MOHANLAL v. RAM DAYAL. 16 Luck. 708 = 194 I.C. 61=13 R.O. 525=1941 O.L. 370=1941 A.L.W. 525=1941 O.A. 370=1941 A.W.R. (C.C.) 139=1941 O.W.N. 577=A.I.R. 1941 Oudh 331.

-S. 11-Subject-matter different-Same issue raised in subsequent suit between same

parties and others-Bar.

S. 11, C. P. Code, does not say that the entire subject-matter of both the suits should be identical. It deals with suits as well as with parti-cular issues in the suits. If the particular issue raised in both the suits concerns the same parties, then the bar provided in S. 11 would apply to that particular issue even though there may be other issues raised in the subsequent suit and other parties involved in those issues. Accordingly, an issue raised and decided in a previous suit between the plaintiff and some of the defendants would operate as res judicata in the subsequent suit so far as those defendants are concerned, although that issue is raised with respect to the other defendants as well. (Sen, I.) BHOLANATH CHATTERJI v. MONMOTHA NATH DUTTA. 45 C.W.N. 420.

-S. 11, Expl. III-Decrée on admitted

facts-How far res judicata.

Where in a prior suit there was no issue or decision on a certain point because both parties admitted it and a decree is passed on the footing of the facts admitted by all the parties, in such a case res judicata by reason of the prior decision extends not merely to the actual decision or finding in the case but also to the common basis of facts accepted by both parties which are incorporacts accepted by both parties which are incorporated in and made the foundation of the judgment and decree in the case. (Bennett and Ghulam Hasan, JJ.) MST. SUKH RANI v. GAJRAJ SINGH AND OTHERS. 200 I.C. 241=14 R.O. 584=1942 O.W.N. 222=1942 O.A. 132=1942 A.W.R. (C.C.) 153=A.I.R. 1942 Oudh 354.

The principle of constructive res judicata embodied in Expl. IV to S. 11, C. P. Code, cannot come into operation unless it is shown that the party sought to be estopped had knowledge of facts which could have enabled him to raise an issue, and therefore the question of knowledge of the parties becomes material. (Niyogi, J.) BA-KARAM v. KASHIRAO, 1945 N.L.J. 383=A.I. R. 1945 Nag. 288.

-S. 11, Expl. IV—Applicability—Party

successful in previous proceeding.
S. 11, Expl. IV, C. P. Code, applies only to a case in which the party against whom it is sought to apply was unsuccessful in the previous pro-

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ceeding. It cannot be applied against a person who in the previous proceeding had been success-Ful. (Thomas, C.J. and Ghulam Hasan, J.)
Debi Dayal v. Annu Singh. 206 I.C. 179=
15 R.O. 476=1943 A.W.R. (C.C.) 15=1943
O.W.N. 46=1943 O.A. (C.C.) 39=A.I.R. 1943 Oudh 231.

suit for declaration of title and possession as owner under sale-deed-Dismissal on ground that plaintiff was only benamidar and that transaction was only a mortgage and not sale-Subsequent suit by benamidar and real owner to enforce mortgage—Res judicata—Same parties. Guru-sangappa v. Baslingappa Basappa. [See Q.D. 1936-'40, Vol. I, Col. 970.] 192 I.C. 305=13 R. B. 244=A.I.R. 1940 Bom. 311.

\_\_\_\_S. 11, Expl. IV—Applicability—Suit against Hindu coparcener to enforce mortgage against property as his absolute property-Finding that property was joint family property— Decree against share of mortgagor alone—Subsequent suit to enforce mortgage against other members of family on footing that mortgagor was de facto manager and incurred debt as manager and for family necessity—Res judicata. See C. P. Code, O. 2, R. 2. (1943) 2 M.L.J. 548.

-S. 11, Expl. IV—Applicability—Suit on mortgage-Sub-mortgaged impleaded at instance of defendant mortgagor-Sub-mortgage not proved and amount due to him not ascertained— Sub-mortgagee awarded no relief—Second suit

by sub-mortgagee-Res judicata.

Where in a suit to enforce a mortgage, the sub-mortgagee who was impleaded as a party defendant at the instance of the other defendants did not prove his sub-mortgage or the amount due under it with the result that no relief was given to him in the suit and the preliminary and final decrees were passed and the sub-mortgagee then brought a suit to enforce the sub-mortgage in his favour by sale of the mortgage right.

Held, that the second suit was not barred by res judicata under S. 11, Expl. IV, C. P. Code. Even if the sub-mortgagee had proved his submortgage and the amount due to him had been ascertained, he would still not be paid if the mortgagee failed to execute the decree. Hence, he would have a right of suit. (Нарреі, І.).
Venkamma v. Shivaraya Shanbhaga. 216 І.
C. 140=1943 М.W.N. 788=A.І.R. 1944
Mad. 137=(1943) 2 М.L.J. 632.

-S. 11, Expl. IV-Applicability-Title of transferee from Hindu widow admitted by lambardar in suit for profits—Subsequent suit by lambardar as reversioner of estate against transferee, for possession, if barred. BALARAM v. KEWALRAM. [See Q.D. 1936-'40, Vol. I, Col. 3272.] 191 I.C. 881=13 R.N. 221.

-S. 11, Expl. IV-Constructive res judicata—Decision in prior litigation based on admission.

Where in a prior litigation between the parties regarding some of the villages held by the de-

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fendants under a codicil the plaintiff sued for various sums including certain contributions to be made to certain institutions and the defendants had admitted that claim and the matter had then been decided, such admission would come within the scope of Expl. IV to S. 11, C. P. Code and would operate as res judicata in a subsequent suit between the same parties where the question of the liability to make those contributions is once again raised in respect of similar villages held under the same codicil, and the defendants cannot contest their liability. they wished to do so they should clearly have done so when the claim was first made and their liability must, therefore, under Expl. IV, be deemed to have been a matter directly and substantially in issue in the previous suit where the claim was made and not disputed. There is no reason why the principle should apply only where there has at one time been an objection which is subsequently waived. If effect is to be given to the Explanation, that is to say, to the principle of constructive res judicata, where the defence that ought to have been raised is not raised, it must be held that there has similarly been constructively a decision upon the point. Otherwise little or no purpose would be served by the Explanation. Actual decision on a plea not taken cannot be possible and unless the principle be as formulated the rule of constructive res judicata as formulated in S. 11 would be rendered almost nugatory. (Thomas, C.J. and Bennett, J.) Durga Bakhsh Singh v. Umanath BAKHSH SINGH. 19 Luck. 428-214 I.C. 277-217 R.O. 33=1943 O.W.N. 509=1943 A. W.R. (C.C.) 195=1943 O.A. (C.C.) 327-A.I.R. 1944 Oudh 94.

S. 11—Expl. IV and V—Duty of party raising plea of res judicata—Absence of material showing waiver of claim when judgment silent as to that relief—Only available plea of claim being premature not known whether raised—Sustainability of plea of res judicata.

It is incumbent upon the party raising the plea

It is incumbent upon the party raising the plea of res judicata to place before the court all materials required to enable the court to allow the

plea.

Where a relief in respect of which a plea of res judicata was raised in the later suit was one of the reliefs claimed in an earlier suit, but was not decreed and there was nothing to show that it was waived or that the only available plea of the relief being premature was raised in defence, held that the claim must be deemed to have been refused in the earlier suit but that if it was refused as being premature, the refusal could not operate as res judicata. On the materials before the court it was not possible to hold that the matter was directly and substantially in issue in the former suit and that the issue was heard and finally decided. (Bennett and Madeley, JJ.) Hardeo Bakhish Singh v. Vidya Dhar. 1944 O.W.N. 509=1945 O.A. (C. C.) 32=1945 A.W.R. (C.C.) 32=A.I.R. 1945 Oudh 70.

S. 11, Expl. IV—Matter constituting ground of defence.

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A matter constitutes a ground of defence only when it can be used for the purpose of resisting a claim. There must, therefore, be a claim and a matter must be such as would defeat the claim either wholly or in part. A bare assertion in a plaint is not a claim. It becomes a claim when the plaintiff prays expressly or impliedly for the Court's decision upon it, or if the defendant treats it as such by denying it and inviting the Court's decision thereon. (Sen, J.) PRIOMBALA DEBI T. JOHURI LAL RAY. 198 I.C. 462=14 R. C. 462=A.I.R. 1941 Cal. 574.

————S. 11, Expl. IV—"Might and ough" —Alternative claim—Previous suit on basis of valid sale—Subsequent suit for return of consideration alleging that sale had fallen through— Res judicata.

Where the previous suit was based on the ground that there was a valid and existing sale as a result of which the plaintiff had become the owner of the property in suit, a second suit based on an allegation that the sale, if it ever took place, had fallen through so that the plaintiff is entitled to the return of his money under S. 65 of the Contract Act, is not barred by the rule of resjudicata. Though the claim made in the second suit might have been added as an alternative claim in the previous suit, it cannot be held that it ought to have been so added, as there is a distinct incongruity between the two claims. (Beckett and Teja Singh, JJ.) LABH SINGH v. COURT OF WARDS. 47 P.L.R. 174=A. I. R. 1945 Lah. 210.

Applicability of rule where the subject-matter is not identical.

In questions of res judicata identity of the issues and not identity of the subject-matter is relevant. Hence it cannot be held that there would be no constructive res judicata unless the subject-matter in the two suits are identical. Where, in a suit by one brother against another for a declaration of his sole right to a property of which he was in possession, no question of any family arrangement under which the defendant was also entitled to remain in possession was raised, in a subsequent suit for possession of some other property as belonging to the plaintiff in the former suit, held that it was not open to the same defendant to raise the plea of a family arrangement as it was a plea which ought to have been raised in the former suit and that not having been raised was barred by the principle Naving been raised was barred by the finithment of res judicata. (Ismail and Mulla, JJ.) Har Sarup v. Anand Sarup I.L.R. (1942) A. 624=15 R.A. 261=203 I.C. 371=1942 A.L. J. 506=(1943) A.W.R. (H.C.) 272=1943 O. A. (H.C.) 272=A.I.R. 1942 All. 410.

S. 11 Expl. IV and O. 2, R. 2—Might and ought—Claim for title in first suit—Claim of right of easement in second suit—If being.

As a claim for title cannot be joined with a claim on a right of easement, an earlier suit in respect of title could not bar a later suit claiming only an easement. The later relief could not be claimed in the earlier suit and hence the

case would not come under Expl. IV to S. 11, C. P. Code. Nor would it be barred by reason of O. 2, R. 2, because the cause of actions in the two suits could not be said to be the same. (Mathur, J.) HIRA LAL v. ISMAIL KHAN. 1943 A.L.W. 515.

——S. 11, Expl. IV—Might and ought— Interpretation.

S. 11, Expl. IV, C. P. Code, relates to any matter which might and ought to have been made a ground of attack in a former suit. The words are not "might or ought" but "might and ought". The mere fact that the plaintiff might have included his claim in the previous suit is no ground for saying that he ought to have done so. (*Tek Chand and Sale, JJ.*) Shujauden v. Sirajuddin. 195 I.C. 81=14 R.L. 30=43 P.L.R. 44=A.I.R. 1941 Lah. 139.

S. 11, Expl. IX—Might and ought—

Meaning.

The 'matters that ought to be taken' referred to in the Expl. IV, to S. 11, C. P. Code, must be matters connected with the cause of action and the questions in issue between the parties at the time. (Darling, S.M. and Bonnford, J.M.) Mackinnon v. Sampat Kumar Sinha. 1941 R.D. 678.

S. 11, Expl. IV—Might and ought—Mortgage—Suit for redemption—Mortgagee failed to pjead that as owner of part of equity of redemption he is entitled to redeem—If operates as res judicata in subsequent suit asserting his claim.

A mortgagee who, in a suit for redemption of the mortgage, omits to plead that he, as owner of a part of the equity of redemption, is also entitled to redeem, does not lose his right to redeem, and a subsequent suit by him to assert his right of redemption is not barred by res judicata. He is however, bound to pay the proportionate costs of redemption in respect of his share in the equity of redemption. (Sen, J.) PARVATIBAT GOPA. v. MARUTI LUXMAN. 46 Bom.L.R. 704=A.I.R. 1945 Bom. 69.

——S. 11, Expl. IV—Might and ought— Mortgage suit—Question of paramount title— Relevancy—Decision in suit—If res judicata.

It is well-settled that as a general rule paramount title cannot be ordinarily drawn into controversy in a mortgage suit without the consent of the parties. But if there is any allegation in the plaint derogatory to the title of a prior mortgagee, and if the prior mortgagee, being a party to the suit, consents to have that title decided, then he will be bound by that decision in the suit, and the decision will operate as res judicata in a later suit. If however, the question of paramount title is in conflict with the title of the mortgager as well as of the mortgagee, that is a matter which should not ordinarily be decided in a mortgage suit. If the issue is not also raised and decided, the rule of constructive res judicata should not be applied.

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Manohar Lall, J.—The question of priority of mortgages is a necessary issue in mortgage actions, as for instance where a subsequent encumbrancer claims priority on the doctrine of subrogation, and in such a case he must raise that issue. On the other hand where the person impleaded sets up a title adverse to the mortgagor, that question is obviously beyond the scope of the mortgage action, and unless that question is distinctly raised and decided, the decision in the suit cannot operate as rcs judicata. (Varma and Manohar Lall, JJ.) RAMESHWAR RAI v. HARAKH LAI SAHU. 199 I.C. 713 =8 B.R. 616=14 R.P. 611=20 Pat. 841=A. I.R. 1942 Pat. 226.

——S. 11, Expl. IV—Might and ought— Mortgage suit—Subsequent mortgagee impleaded as defendant—Failure to put forward claim to priority—If operates as res judicata.

A subsequent mortgagee who is impleaded as a defendant in a suit on a mortgage and who has priority by reason of a right to subrogation is bound to put forward such right; if he fails to do so, he is debarred from asserting that right subsequently by the principle of res judicata. If, in addition to having a subsequent mortgage he has a prior independent mortgage, he is not bound to say anything about that prior mortgage unless his right is impugned. In such a case, failure to put forward his prior mortgage would not operate as ree judicata. (Lakshmana Rao and Horwill, JJ.) SESHAMA RAJU v. SUBRAMANIA SASTRI. 58 L.W. 16=1945 M.W.N. 306=A.I.R. 1945 Mad. 151=(1945) 1 M.L.J. 167.

Appellant sued for rent of the years 1931-1932 and 1932-1933, and for enforcement of a charge in respect thereof. The tenants, respondents 1 and 2 had attorned to respondents 3 and 4, who set up title in themselves as landlords. The suit of the appellant was dismissed by the trial court and by the appellate court. A second appeal was preferred to the High Court by the appellant and that was pending when Madras Act IV of 1938 came into force. The tenants, respondents 1 and 2, applied under S. 15 of that Act for wiping off the arrears of rent by making a deposit of rent for faslis 1346 and 1347, impleading both the appellant and the respondents 3 and 4, though they alleged that they held under respondents 3 and 4. They obtained a declaration that the arrears were wiped off under S. 15 of the Act but they did not bring this to the notice of the High Court at the time of the hearing of the second appeal, as they did not contest the second appeal, as they did not contest the second appeal. The High Court in second appeal, in ignorance of the order under S. 15 of Madras Act IV of 1938, passed a preliminary decree for the full amount claimed by

the appellant, upholding his title as against respondents 3 and 4. When the appellant applied for a final decree, respondents 1 and 2 objected and contended that the appellant was debarred from claiming a final decree in respect of the arrears by reason of the order passed in the proceedings under S. 15 of Madras Act IV of 1938.

Held, that the respondents 1 and 2, having failed to plead in the second appeal a judicial discharge which they had obtained in respect of the arrears of rent, were barred by res judicata from contending that the appellant was barred by res judicata. Having failed to set up and establish a defence which they had, at the proper time, they could not be heard after the preliminary decree had been passed in the case for a particular amount, to contend that that decree was wrong. (Wadsworth, J.) Kunhi Pakki v. Cheeru. A. I. R. 1945 Mad. 185 = (1945) 1 M.L.J. 157.

\_\_\_\_\_S. 11, Expl. IV—Might and ought—Plea not raised in prior suit—If can be raised in later suit.

The respondent filed a suit claiming half share in the income from certain offerings made by pilgrims to an idol at the time of certain annual fairs; the appellant (defendant) contended that the plaintiff (respondent) was entitled to a half share in the income of one portion only of the offerings, vis., the shamlat kut or joint account. In a prior litigation between the same parties, it was assumed that the appellant was entitled to one half of the whole income subject to the question of certain deductions to be made before division, and the appellant's title to one half of the whole income, after the proper reductions, was judicially upheld; the appellant did not raise the present defence in that suit.

Held, that the present defence of the defendant was a matter which might and ought to have been raised in the prior litigation and must therefore be deemed to have been a matter directly and substantially in issue in such suit within the meaning of Expl. IV to S. 11, C. P. Code, and therefore the present defence of the appellant was excluded by res judicata. (Lord Thankerton.) SOBHAG SINGH v. RAIJIT SINGH. 49 C.W.N. 743=1945 M.W.N. 523=58 L. W. 485=1945 N.L.J. 480=1945 P.W.N. 389=A.I.R. 1945 P.C. 132=(1945) 2 M.L. J. 223 (P.C.).

S. 11, Expl. IV—Might and ought—Prior suit as legatee under will of maternal grand-mother to property alleged to be absolute property of latter—Dismissal on finding that testator had only a life-estate of widow—Second suit as heir of grand-father—Res judicata—C. P. Code, O. 2, R. 1.

S and his wife L had a daughter D. D had a daughter, the plaintiff. She brought a suit claiming the suit property as owner on the ground that it was the absolute property of her grand-mother L who devised it to D, who again devised it to the plaintiff. She claimed as the legatee of her mother D. She did not claim it

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as heir of her grand-father S. The Court found that L had only a life-interest in the property and not an absolute right as owner, that her will in favour of D was not binding on the defendants and therefore dismissed the plaintiff's suit. She then brought the present suit as heir of S.

Held, that (1) the plaintiff could and should have claimed, in the previous suit, for possession not only as legatee through L, but also in the alternative as heir of S; and not having done that, the present suit was barred by resjudicata under Expl. IV, to S. 11, C. P. Code; (2) that the claim of the plaintiff as heir to S in the second suit was not so inconsistent with her previous claim as legatee under the will of D, who was herself a legatee of L, that it could not have been put forward as an additional or alternative claim in the first suit, under O. 2, R. 1, C. P. Code. (Davis, C.J. and Weston, J.) CHATANMAL DHOLUMAL v. PINIOMAL. I.L.R. (1943) Kar. 386=210 I.C. 310=16 R.S. 138 =A.I.R. 1943 Sind 251.

——S. 11, Expl. IV—Might and ought— Previous suit by wife for divorce—No alternative plea for declaration that she is not wife —Subsequent suit for such declaration—If

barred by res judicata.

A person petitioning the Court for a divorce as a husband or wife need not add an alternative plea asking for a declaration that he or she is not a husband or wife at all, on the ground that the marriage had long ago ceased to exist. The causes of action, which a married woman brings for divorce, and which a woman no longer married brings for a declaration that the marrige has long ago ceased are inconsistent and ought not to be brought together. The failure of a wife to raise such an alternative plea will not bar a subsequent suit for such declaration. (Roberts, C.J. and Mosely, J.) USIN v. MA MA LAY. 1941 Rang. L.R. 14-194 I.C. 482-13 B.R. 311-A.I.R. 1941 Rang. 118.

\_\_\_\_\_S. 11, Expl. IV—Might and ought—Pro forma defendant.

When no relief is sought against a pro forma defendant, nd-necessary for him to raise any defence in the suit. A decree passed against him without amending the plaint or without giving him any opportunity to be heard cannot operate res judicata by reason of S. 11, Expl. IV, C. P. Code. (Harries, C.J. and Chatterji, J.) Bhuddeb Chandra Roy v. Bhik Shankar Pattanik. 196 I.C. 837=8 B.R. 121=14 R. P. 248=A.I.R. 1942 Pat. 120.

Rent suit—Extent of tenancy.

Where a decree for rent has been passed in a suit in which the plaintiff in describing the tenancy in his plaint states that two plots appertain to the tenancy, in the absence of any invitation to decide it or any such decision that the two plots appertained to the tenancy, it cannot be said that the question has been decided by implication so as to operate as res judicata. (Sen, J.) PRIOMBALA DEBI v. JOHURI LAL RAY.

198 I.C. 462=14 R.C. 462=A.I.R. 1941 Cal. 574.

Suit by co-sharer under S. 148-A, Bihar Tenancy Act-Other co sharers made parties defendants not claiming their share of rent-Subsequent suit by latter for their share-Res judicata.

In a suit framed under S. 148-A of the Bihar Tenancy Act, the issue is not merely the amount of rent due to the plaintiff but the entire rent due from the tenant. If in such a suit by one co-sharer, the other co-sharers impleaded as defendants do not allege that rent is due to them also, it must be taken that the only rent due from the tenant or tenants is the amount claimed by the plaintiff. A co-sharer impleaded as a defendant in a suit under S. 148-A who does not allege or claim that any rent is due to him, cannot therefore be subsequently heard to assert that his share of the rent has not been paid by the tenant and is due. A subsequent suit by him for his share of the rent for the same period is therefore barred by res judicata, his claim for his share of the rent being a matter which he might and ought to have asserted in the first suit. (Agarwala, J.) Azizuddin Ahmad v. Keshwar Mahto. 209 I.C. 174= 16 R.P. 82=10 B.R. 101=24 P.L.T. 209= A.I.R. 1943 Pat. 454.

Suit for arrears of rent—Title of landholder not denied-If can be denied in subsequent suit

for declaration of status.

Where a tenant fails to raise any plea denying the title of the landlord in a suit for arrears of rent he cannot be permitted to raise such a plea in a subsequent suit for declaration of status for the decree in the rent suit operates as res judicata. (Shirreff, S.M. and Sathe, J.M.) RAMPAL SINGH v. JOTISH CHANDER. 1942 A.W.R. (Rev.) 187 (2)=1942 O.W.N. (B. R.) 298=1942 O.A. (Supp.) 207 (2)=1942 R.D. 387.

-S. 11, Expl. IV-Might and ought-Suit for damages or mesne profits against person in possession without title-Omission to claim set-off in respect of Government revenue paid-Subsequent suit for amount of revenue paid-If res judicata. See Contract Act, S. 69. (1941)

2 M.L.J. 866.
S. 11, Expl. VI—Applicability—Claim for oneself of a right common to others also— Principle of representation when applies.

Expl. VI to S. 11, C. P. Code, will not apply where a plaintiff claims a right for though the right may be common to others also. The general principle is that one person will not represent others in litigation unless it is expressly stated that he is litigating in a representative capacity and that provisions of R. 8 of O. 1, C. P. Code, are observed. (Bennet and Madeley, JJ.) JITENDRA SINGH v. ALLIANCE BANK OF SIMLA. 198 I.C. 775=1941 O.W.N. 1381=1942 A. W. R. (C.C.) 39=14 R.O. 438=1941 O.A. 1074=1942 R.D. 27=A.I.R. 1942

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go behind decree to challenge existence of debt on which decree is based. See Hindu Law—Joint Family—Father. I.L.R. (1945) Lah. 67 (F.B.).

-S. 11, Expl. VI-Parties and representatives—Attaching decree-holder-If claims

under judgment-debtor.

Attachment does not create any specific charge on the property attached. It does not by itself give the attaching decree-holder in strictness a title to the attached properties but it is the basis of the decree-holder's right to assert his judgment-debtor's interest in the property attached. There is no reason why this right created in favour of the decree-holder by attachment cannot be considered as a claim under the judgment-debtor within the meaning of S. 11, C. P. Code. (Syed Nasim Ali and Pal, JJ.) RADHARANI DASSI v. BINODAMOYEE DASSI. I.L.R. (1942) 1 Cal. 169=200 I.C. 216=14 R.C. 685=46 C.W.N. 245=74 C.L.J. 180=A.I.R. 1942 Cal. 92.

-S. 11, Expl. VI-Parties and representatives-Attaching creditor-Rule of res judicata against judgment-debtor-If affects his attach-

ing creditor also.

Under the General law, when a judgment creditor seeks to execute his decree by attachment of property he can attach only the right, title and interest of his judgment-debtor in that property. If by virtue of a decree the judgment-debtor has lost his right in that property and he is precluded by the rule of res judicata from averring that that decree is erroneous, his attaching creditor would also be affected by the same disability. (Sen, J.) HARTRAM SARAGGI v. RAMESWAR LAL. 49 C.W.N. 354.

-S. 11, Expl. VI-Partics and Representatives—Claim by aliened of attached property—Order allowing—Suit by creditor to set aside-Dismissal-Subsequent attachment by another creditor and removal of attachment on claim-Suit by second creditor-Res judicata-

If applies.

R gifted a house to his wife who sold it to the appellant who leased it back to R. A suit by a creditor of R under O. 21, R. 63, C.P.C. to set aside a claim order holding the gift to R's wife and the sale by the latter to be true. was dismissed. An appeal by the creditor was also dismissed. Subsequently another creditor of R sought to attach the house, whereupon a claim was preferred and upheld, the Court holding that the gift and sale were true. The creditor then filed a suit to set aside the claim order alleging that the gift and sale were nominal. It was pleaded that the decision in the suit of the prior creditor operated as res judicata under Expl. VI, to S. 11, C. P. C.

Held, that the prior creditor in the first suit was not litigating on behalf of the general body of creditors but was merely concerned with having it declared that the gift and sale were nominal in order that he might proceed against the property. He was not concerned with the Oudh 199.

S. 11, Expl. VI—Joint Hindu family—Decree against father—Execution—Son suing to avoid liability of property in his hands—If can not barred by res judicata under S. 11, Expl. VI,

C.P.C. (Horvill, J.) MARUDAMUTHU PILLAI 7. RADHAKRISHNA CHETTY. 57 L.W. 600=1944 M.W.N. 734=A.I.R. 1945 Mad. 118= PILLAI M.W.N. 734=A.I.R. (1944) 2 M.L.J. 362.

-S. 11, Expl. VI-Parties and their representatives—Decision as to legal representatives—If res judicata. Suleman v. Abbul Shakoor. [See Q.D. 1936—'40, Vol. I, Col. 962.] I.L.R. (1941) Nag. 735.

-S. 11, Expl. VI-Parties and representatives—Hindu widow—Gift deed by—Suit by ostensible reversioners to declare invalid— Decree-Subsequent adoption by widow-Suit by adopted son for possession of gifted property

from donce—Res Judicata.

The ostensible reversioners to the estate of the last male holder in a Hindu family questioned the validity of a deed of gift executed by his widow and in 1913 sued for a declaration that the gift was not binding beyond the lives of the widow and her daughter. The suit succeeded and a decree was passed. In 1926 the widow adopted the appellant who in 1938, brought a suit to recover from the donee under the deed of gift. The plea was raised that the suit was barred by res judicata by reason of the decree in the prior suit.

Held, that Expl. VI to S. 11. C. P. Code, did

not apply in the case as the ostensible reversioners who sued in 1913 could not be regarded as representing the interest of the adopted son. (Leach, C.J. and Lakshmana Rao, J.) Sri-I.L.R. (1944) Mad. 775=218 I.C. 223= 18 R.M. 17=57 L.W. 118=1944 M.W.N. 136=A.I.R. 1944 Mad. 326=(1944) 1 M.L. J. 151.

-S. 11, Expl. VI-Parties and representatives-Land allotted to co-sharer at private partition leased by him to plaintiff-Subsequent suit for partition impleading that co-sharer but not plainfiff-Decision in that suit if binding on plaintiff.

A certain land which was alleged to have been allotted at a private partition to one of the co-sharers,  $\mathcal A$  was leased by him to plaintiff. Subsequently there was a partition suit between the co-sharers in which A was impleaded but not the plaintiff. In the final decree in that suit the same land was allotted to the defendant. In

a suit by the plaintiff to recover possession of that land,

Held, that the decision in the partition suit could not operate as res judicata as against the plaintiff. (Rau and Mukkerjea, JJ.) NISHI-KANTA SAHA v. UMESH CHANDRA MANDAL. 48 C.W.N. 268.

-S. 11, Expl. VI-Parties and representatives—Necessary party not impleaded in the prior suit but impleaded in the later suit—Effect -Representative suit-Omission to comply with O. 1, R. 8-Effect.

An essential condition to the application of S. 11, C. P. Code, is that the suit is between the same parties or between parties under whom they or any of them claim; an addition of one or more parties may make all the difference. Expl. VI to S. 11 will not apply when the second

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suit and when in the prior suit the provisions of O. 1, R. 8, C. P. Code, were not complied with. D, the outgoing President of a Municipal Preside pality brought a suit against K for a declaration that the election of K as President of the Municipality was illegal. The suit was dismissed on the grounds, inter alia, that it should be brought against the Municipality, that no notice was given to the Municipality, and that the Municipality which was a necessary party was not joined as a party. It was not a representative suit under O. I, R. 8, C. P. Code. Subsequently a second suit was brought by one Ga ratepayer, against K and the Municipality, praying for a declaration that K was not the lawfully elected President of the Municipality and for a consequent injunction. It was pleaded that as the prior suit was brought in a representative capacity on behalf of the ratepayers of the Municipality, the second suit was barred

by res judicata.

Held: (1) that Expl. VI to S. 11, C. P. Code, did not apply because the prior suit was not brought as a representative suit but in the individual capacity of the plaintiff therein to vinditate a right said to be vested in him alone and the provisions of O. 1, R. 8, C. P. Code, were not complied with; (2) that the provisions of O. 1, R. 8, C. P. Code, must be strictly complied with as a condition precedent to the binding effect of a decree upon persons not parties to the suit in the strict sense of the word; (3) that S. 11 could not apply as the suit was not between the same parties; the absence of the Municipality in the first suit and its presence in the second suit made all the difference and precluded the application of S. 11, C. P. Code: and (4) the second suit was not barred by res judicata by reason of the decision in the first. (Davis, C.J. and Lobo, J.) KALUMAL v. GHANOOMAL. I.L.R. (1944) Kar. 62=A.I.

R. 1944 Sind 165.

S. 11, Expl. VI—Parties and representatives—Suit against a person as sarbarkar of another—Decision—Binding nature.

Where a person is mentioned by name as defendant but he is really sued as sarbakar of a pardanashin lady and is also her uncle and guardian managing her property, the decision in such a suit would bind the lady in question and would operate as res judicata in subsequent suits in which she or her representatives are parties. (Ghulam Hasan, I.) BATUL BANDI v. SRI DHAR. 192 I.C. 259=13 R.O. 338=1941 O.L.R. 93=1941 A.W.R. (Rev.) 19=1941 R.D. 6=1940 O.W.N. 1344=1940 O.A. 1293=A.I.R. 1941 Odh 189.

S. 11, Expl. VI—Religious Endow-ment—Mortgage decree passed against Mahanth -If binds his successor.

A mortgage decree passed against a 'former Mahanth does not operate as res judicata against a succeeding Mahanth, when there is nothing to show that the former Mahanth was impleaded in the suit as representing the deity, and no issue on the question of legal necessity was raised or decided in that suit. (Chatterji and Meredith, Expl. VI to S. 11 will not apply when the second JJ.) Jankijee v. Mathura Prasad Missir. 192 suit is not between the same parties as the prior I.C. 789=13 R.P. 535=7 B.R. 569=1941 P.

W.N. 75=22 Pat.L.T. 239=A. I. R. 1941 Pat. 354.

\_\_\_\_\_S. 11, Expl. VI—Representative suit or proceeding—Claim to attached property—Objection to same by decrec-holder-If one on behalf of all creditors.

A suit by a creditor to set aside an adverse claim order may in certain circumstances be in essence a suit under S. 53 of the T. P. Act; but where one creditor merely resists the claim made by a claimant, his resistance in the summary proceedings cannot be deemed to be on behalf of all the creditors. (King, J.) PETHU-RAJU KONE V. MUTHUSWAMI AIYAR. 201 I.C. 199=15 R.M. 273=1941 M.W.N. 982=A.I. R. 1942 Mad. 128=(1941) 2 M.L.J. 784. ——S. 11, Expl. VI—Representative suit— Representor abandoning suit-Representee not 

There is no doubt that under S. 13, C. Code, the word "judgment" is not used in the sense of a statement of the judge's reasons; a "foreign judgment" undoubtedly means an adjudication by a foreign Court upon the matter before it. The Court has to ascertain what the actual decision of the foreign Court is, and for that purpose, the first thing to be looked at is the actual decree or order of the foreign Court. In order to understand and interpret the decree or order, the Court may have to look at the pleadings of the parties and the reasons of the judge; but those reasons would not be binding on any 

The decree of the foreign Court remains, in spite of decree passed in the British Court, executable in the foreign country where it was passed. The judgment and decree of the foreign Court cannot be said to have merged in the decree passed by the British Indian Court on it. (Monroe and Abdur Rahman, JJ.) DAR-BAR PATIALA T. NARAIN DAS GULAB SINGH. A.

I.R. 1944 Lah. 302.
S. 13—Foreign judgment—Conclusive character of—Award in Native State—Arbitrator going beyond terms of reference and hearing third parties-Foreign Court filing award passing decree on-If conclusive in British India.

Under the law in British India, an arbitrator, acting on a written submission, must confine himself to the terms of the submission, and none the less so, because he may think that possibly the submission ought to have gone further than it does go, and that it may have been a mistake on the part of the parties to limit it in the manner ment of loan executed in Khyrim State—Conditional Conditions of the parties to limit it in the manner ment of loan executed in Khyrim State—Conditional Conditions of the parties to limit it in the manner ment of loan executed in Khyrim State—Conditional Conditions of the parties of

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in which it has been limited. In such a case the most an arbitrator can do is to defer making his award until the submission has been extended either by agreement between the parties, or by an order of a competent Court, and he certainly would not be at liberty to proceed to arbitrate on something not included in the sub-mission. It would also amount to "misconduct" on the part of the arbitrator if he allows other people, not parties to the submission, to come and see him about the matter in dispute. Where a foreign Court files an award made by an arbitrator who has gone beyond the reference contained in the written submission and who allowed third parties to come and speak to him about the matter referred, and passes a decree in terms of the award, the judgment of the foreign Court is conclusive under S. 13, C. P. Code. The judgment of the foreign Court amounts to an adjudication that the award is a valid award and for that reason ought to be filed, and it is not open to the British Indian Court, before which the foreign judgment comes up, to decide the question on the merits, though it would set aside the award on the ground of legal misconduct of the arbitrator, if it were open to it to do so. Misconduct on the part of the arbitrator which does not go to jurisdiction is not a matter which can be gone into in the British Indian Court. Such a point can only be taken in the foreign Court which files the award and passes a decree in terms thereof. (Beaumont, C.J. and Weston, J.) BRIJLAL RAMJIDAS v. GOVINDRAM SEKSARIA. I.L.R. (1943) Bom. 366=209 I. C. 50=16 R.B. 99=45 Bom.L.R. 358=A.I. R. 1943 Bom. 201.

—S. 13—Foreign judgment—Conclusiveness

-"Directly adjudicated upon"—Test.

It cannot be said that for any matter to be "directly adjudicated upon" within the meaning of S. 13, C. P. Code, there must be a positive discussion of evidence relating to that matter. If any claim is made by any party and subsequently abandoned at the trial of a suit, and if the decree in that suit necessarily implies that that claim has not met with acceptance at the hands of the Court, then the Court must be deemed to have directly adjudicated upon it, and under S. 13, C. P. Code. Such adjudication will be conclusive on the point. (King and Shahabuddin, JJ.) PALANIAPPA CHETTIAR v. NARA-YANAN CHETTIAR. 1944 M.W.N. 242=57 L. W. 252=A.I.R. 1944 Mad. 427=(1944) 1 M.L.J. 331.

13-Foreign Judgment Incidents-Judgment obtained in Foreign Court against some of joint promisors-Suit against the rest in British Indian Court-If barred. NILRATAN MUKHO-PADHYA v. COOCH BEHAR LOAN OFFICE, LTD. [See Q.D. 1936-'40, Vol. II, Col. 4166.] I.L.R. (1941) 1 Cal. 171=194 I.C. 746=14 R. C.

11=A.I.R. 1941 Cal. 64.

S. 13—Scope—Suit on foreign judgment
—Nature of relief. Wazır Zahu v. Munshr
Das. [See Q.D. 1936-40, Vol. I, Col. 3273.] 20
Pat. 144=A.I.R. 1941 Pat. 109.

tion that on non-payment, property in British India will pass to lender-Judgment passed by Chief

of State.

By an agreement executed in Khyrim State, A borrowed money from B on condition that upon failure to repay the loan within the stipulated period he would give up to B an orchard situated in British India. Both the parties were permanent residents of that State. A did not pay the money and thereupon B instituted a suit before the Khyrim State Darbar to enforce the above agreement. The Darbar passed judgment in the suit directing A to pay the amount due and declaring that if he failed to pay, B should obtain absolute possession of the orchard as provided for in the agreement under the terms provided for in the agreement under the terms of the sanad granted to the Siem or Chief of the Khyrim State by the British Government, the Siem is empowered and required to adjudicate and decide all civil cases which may arise within the limits of the State. In a suit instituted by B in a British Indian Court for a declaration of his rights under the judgment of the Siem of the Khyrim Darbar,

Held, that effect could be given to that judgment to the extent to which, on the strictest view of the powers of the Siem of the Darbar, that Darbar would be competent to deal with the matter. Regarded as a declaration of the plaintiff's rights to implement the agreement in so far as it entitled him to possession of the orchard, the judgment would be quite within the competence of the Khyrim Darbar and S. 13, C. P. Code, would apply to the judgment as so read. Accordingly the plaintiff was entitled to a decree in terms of the agreement as declared by that judgment. (Biswas and Akram, JJ.) U. Khur Singh v. U. Achar Khasia. 49 C.W.N. 754.

-S. 13 (a)—Applicability—Suit in foreign Court—Defendant filing written statement attack-ing jurisdiction of Court—If submission to jurisdiction-Decree-Executability in British India.

The action of a defendant in filing a written statement in a suit against him in a foreign Court and attacking the jurisdiction of that Court amounts to submission to its jurisdiction, as by such a course he is aking the Court to decide a point in contraversy between himself and the plaintiff; even a mere submission of the issue of jurisdiction to the decision of the Court amounts to acceptance of that Court's jurisdiction. S. 13 (a), C. P. Code, does not apply to such tion. S. 13 (a), C. F. Code, does not apply to such a case, and the decree passed cannot be said to be one not pronounced by a Court of competent jurisdiction. (King, J.) Sundaram Pillai v. Kandaswami Pillai. 200 I.C. 83=14 R.M. 702=53 L.W. 89=1941 M.W.N. 182=A.I. P. 1041 Mad. 387=(1041) 1 M.I. I. 140 R. 1941 Mad. 387=(1941) 1 M.L. J. 140.
S. 13 (a)—Court of competent jurisdiction—Defendant resident in British India—Agent in Baroda state holding power-of-attorney to file suits in Baroda Courts on behalf of defendant—Power revoked before suit in Baroda Court—Ex parte decree—If binds defendant—Executa-hilitain Resitioh India

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the mere possession by the defendant at the commencement of the action of property locally situate in that country, or from the presence of the defendant in such country at the time when the obligation in respect of which the action is brought was incurred in that country or from the fact that the defendant was carrying on business in such country through a manager or agent at the time when the obligation in respect of which the action is brought was incurred. The defendant against whom an ex parte decree was obtained in a Court in Baroda State in 1939, was a British Indian subject and had at no time material to the litigation resided within the state of Baroda. One R held a power-of-attorney from the defendant and lived in Baroda when the suit transaction took place, but the power-of-attorney was revoked before the suit and R had left Baroda and gone to British India and lived there for many months before the date of suit. At the date of the suit there was no agent of the defendant within the jurisdiction of the Baroda Court. The business of the defendant had ceased as early as October 1936. The suit summons was served on the defendant in Bombay in January, 1939. The power-of-attorney held by R entitled him to appear and to file suits in the Baroda Courts and to engage pleaders to sign vakalatnamas in the defendant's name and to exercise in his name "all lawful rights".

Held, that the Baroda Court was not a Court of competent jurisdiction within the meaning of S. 13 (a), C. P. Code, and hence the decree did not bind the defendant and could not be executed against him in British India. The defendant had not submitted to the jurisdiction of the Baroda Court by reason of the power-of-attorney given by him to A, which existed at the time of the transaction but which was revoked before the suit. (Kania, J.) VITHALBHAI SHI-VABHA V. LALBHAI BHIMBHAI, I.L.R. (1942) Bom. 688=202 I.C. 286=15 R.B. 149=44 Bom.L.R. 380=A.I.R. 1942 Bom. 199.

——S. 13 (a)—"Court of competent jurisdiction"—Person born of Cochin parents resident in British India—Decree by Cochin Court against such person—If decree of Court of competent jurisdiction—Executability in British India.

A person born of Cochin parents in British India, where they ordinarily resided, does not lose his Cochin nationality by acquiring by birth British nationality. The fact that he can claim British nationality under S. 2 (1) (a) of the British Nationality and Status of Aliens Act, 1914, would not preclude him from having a dual status, dual nationality being well-recognised. Accordingly Courts in Cochin have jurisdiction to pass a decree against such a subject, capable of execution in British Indian Courts. in Baroda state holding power-of-attorney to file suits in Baroda Courts on behalf of defendant— Executability in British India.

In an action in personam the Courts of foreign country do not acquire jurisdiction from Any renunciation of his Cochin nationality and the passing of the decree will not affect the passing of the decree will not affect the jurisdiction of the Cochin Court to pass such a decree. (Leach, C.J. and Somayya, J.) RAMA-LINGA ATYAR V. SWAMINATHA AIYAR I.L.R. (1941) Mad. 891=54 L.W. 73=200 I.C. 254=15 R.M. 16=1941 M.W.N. 701=A.I.R. 1941 Mad. 688=(1941) 2 M.L.J. 68. Any renunciation of his Cochin nationality after

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—S. 13(a)—Foreign Court deciding that it has jurisdiction—Question of jurisdiction—If open in British India.

The question as to which domestic Court in the foreign state is competent to decide the suit is really a question for the foreign tribunal; and if that tribunal decides that the particular Court which made the decree has jurisdiction, it is not open to the Court in British India to disagree. (Beaumont, C. J. and Weston, J.) BRIJLAL RAMIIDAS v. GOVINDRAM SEKSARIA. IL. R. (1943) Bom. 366=209 IC. 50=16 R.B. 99=45 Bom.L.R. 358=A.I.R. 1943 Bom. 201.

—S. 13 (a),(b) and(d)—Foreign judgment—Conclusive character of—Sut in French Court against British Indian subject—Ex parts decree—Subsequent "opposition" application by defendant praying inquiry into merits—Rejection of application and confirmation of prior judgment—Effect of—If with jurisdiction and on merits—Failure to follow rules of British Indian procedure—Effect of. WAZIR SAHU v. MUNSHI DAS [See Q.D. 1936—'40 Vol. I, Col. 3273.] 20 Pat. 144 = A.I.B. 1941 Pat. 109.

-S. 13 (b)—Applicability—Defendant set ex parte—Defendant getting ex parte order set aside and filing written statement raising various issues and then withdrawing—Decree after examination of plaintiff—If not one on merits.

Where a defendant, after getting an order setting him ex parte set aside, files his written statement raising various issues in the foreign Court and then withdraws, and a decree is given against him by that Court after the plaintiff has actually been examined in the witness-box, it cannot be held that the decision is an exparte decision and not given on the merits of the case within the meaning of S. 13 (b). C.P. Code. (King, J.) SUNDARAM PILLAI. 200 I. C. 83=14 R. M. 702=53 L.W. 89=1941 M.W. N. 182=A.I.R. 1941 Mad. 387=(1941) 1 M.L.J. 140.

— S. 13 (b)—Exparte decree—If not on merits. WAZIR ZAHU v. MUNSHI DAS. [See Q.D. 1936—'40 Vol. I, Col. 3274.] 20 Pat. 144—A.I.R. 1941 Pat. 109.

—S. 13(b)—"On the merits"—Judgment by trial Court on merits—Appeal—Judges of appellate Court differing on question of competency of appeal—Effect on finality of first Court's decree

A decision of a foreign Court which was a judgment on the merits, does not cease to be one on the merits merely because an appeal was filed against it which became infructuous. That would not destroy the finality of the trial Court's judgment. Where the judges of the appellate Court differ as to the competency of the appeal, and the lower Court's judgment prevails, the finality of the latter judgment is not disturbed or destroyed though the appellate judgment is not on the merits. (Beaumont, C.J. and Weston, J.) BRIJLAL RAMIDAS v. GOVINDRAM SEKSARIA. I.L.R. (1913) BOM. 366 = 209 I.C. 50 = 16 R.B. 99 = 45 BOM.L.R. 358 = A.I.R. 1943 BOM. 201.

S. 13 (d)—Applicability—Decision by foreign Court after hearing parties—Fact that British Court may disagree—Decision if can be held opposed to natural Instice.

Where in the case of a foreign judgment, the parties were heard by that Court and it reached its conclusion, the mere fact that the Court in British India may-disagree with the conclusion is clearly not enough to justify the British Indian Court in holding that the decision is opposed to natural justice. (Beaumont, C.J. and

#### C.P. CODE (1908), S. 14.

Weston, J.) BRIJLAL RAMIJIDAS v. GOVINDRAM SEKSARIA. I.L.R. (1943) Bom. 366 = 209 I.C. 50= 16 R.S. 99=45 Bom L.R. 358=A.I.R. 1943 Bom. 201.

S. 13 (d)—Natural justice—Meaning of. WAZIR ZAHU v. MUNSHI DAS. [See Q.D. 1936—'40 Vol. I, Col. 3274.] 20 Pat. 144—A.I.R. 1941 Pat. 109.

S. 13 (e)—Applicability—"Fraud"—Meaning— Decree obtained on evidence which is not true but which is becieved by Court—If vitiated.

It cannot be said that merely because a plaintiff obtains a decree upon evidence which is believed by the Court, but which in fact is not true, the decree has been obtained by fraud so as to attract the operation of S. 13 (c), C.P.Code. In order to attract S. 13 (c) there must be fraud connected with the procedure in the suit itself. (King, J.) SUNDARAM PILLAI v. KANDASWAMI PILLAI. 200 I.C, 83=14 R.M. 702=53 L.W 89=1941 M.W.N. 182=A.I.R. 1941 Mad. 387= (1941) 1 M.L.J. 140.

S. 13 (f)—Applicability—Claim in foreign Court to recover money spent on marriage of minor members of joint family—Defendants over 18 years but minors under British Indian Law being wards under guardian—Decree—If unenforceable in British India under S. 13 (t).

Plaintiff sued defendants 1 and 2 in a foreign Court. The 1st defendant was married to the plaintiff's daughter, and the plaintiff alleged that he had furnished the money to pay for the expenses of the marriage, and that both the defendants had promised to repay the money to him. The plaintiff also claimed re-payment of the money independently of the agreement as money due from the joint family of the defendants to reimburse him for what he had spent upon a marriage which was a duty devolving upon that family. Both the defendants were at that time above 18 years of age, but were minors according to the law of British India, being under 21, as they had guardians appointed for them under the Guardians and Wards Act A decree was passed and sought to be executed in British India. The defendants pleaded S 13 (f), C.P.Code, in bar of execution.

Held, that the claim was founded partly perhaps upon a breach of the Contract but also partly upon a claim under S. 68 of the Contract Act which in no way involved its breach; and whether the claim was good or bad, the decree given sustained a claim which was not wholly founded upon a breach of the Contract. The plaintiff could not therefore be prevented from executing his decree in British India by S. 13 (1), C.P.Code. (King, 1). SUNDARAM PILLAI v. KANDASWAMI PILLAI. 200 I.C. 83=14 R.M. 702=53 L.W. 89=1941 M.W.N. 182=A.I.B. 1941 Mad. 387=(1941) 1 M.I.J. 140.

S. 14—Scope—Duty of Court under—Presumption—Rebuttal.

On production of a certified copy of a foreign judgment, it is obligatory on a Court in British India to presume that the Court which passed that decree was a Court of competent jurisdiction. It is open to the other party, however, to show by following the record itself that there was want of jurisdiction, or the presumption may be displaced by evidence led on the point. (Kania, J.) VITHALBHAI SHIVABHA v. LALBHAI BHIMBAI. ILB. (1942) Bom. 688 = 202 I.C. 286 = 15 R.B. 149 = 44 Bom.L.B. 380 = A.I.B. 1342 Bom. 199.

S. 15 and 0.7 B. 10—Institution of suit in Court of higher grade—Order returning plaint after suit reaching certain stage involving considerable expenses—Kevision.

S. 15, C.P.CoJe, lays down a rule of procedure and not of jurisdiction; if a suit is over-valued and instituted in a Court of ingner grade, it is in the discretion of that Court either to retain it in its file or to return the plaint for presentation to the Court of the lowest grade. If in the exercise of its discretion it returns the plaint after the suit reaches a certain stage involving considerable expenses and the Court of appeal confirms that order, the High Court will not interfere with it in revision. (Muther jea and Pat. 11) MOHINI MOHAN DAS v. KUNJU BEHARI DAS. 209 I.C. 225 = 16 R.C. 3.3. 47 C.W.N. 720=77 C.L.J. 309=A.I.B. 1943 Cal.

Ss. 15 37 and 92—Scope—Jurisdiction of District Court in respect of suits under S. 92 if affected by jurisdiction being conferred on subordinate Court—Jurisdiction of court under Ss. 92 and 37—If limited or curtailed by S. 15.

S. 15, C.P.Code, relates to procedure alone and cannot affect the jurisdiction of Court to entertain and try suits as laid down in S. 92 or as contemplated by S. 37, C.P.Code. The provisions of S. 15 cannot limit or nullify the jurisdiction of a Court resulting from the application of S. 37, \$\phi\$) in the case of a decree made in a suit filed under S. 92, C.P.Code. Though the first class Subordinate Judge's Court has been empowered under the amendment of S. 92 to entertain and try suits under S. 92, that cannot have the effect of giving it exclusive jurisdiction to the exclusion of the District Court. The jurisdiction originally existing in the District Court cannot be said to be affected by its having been further conferred (by the amendment) on the first class Subordinate Judge's Court. (Sen, J.) DAKOR TEMPLE COMMITTEE \$\nu\$. SHANKERLAL. 218 I.C. 504 \$\leftarrow 46 \text{Borm. 1, B. 653} = A. I.R. 1944 \text{Borm. 300}.

-8.15-Scope-Jurisduction of Courts of higher grade-If affected.

The rule in S. 15 C.P. Code, that every suit should be instituted in the Court of the lowest grade competent to try it, is intended for the protection of Courts of higher grade and does not affect their jurisdiction. (Allsop and Hamilton, J.). RATAN SEN v. SURAJ BHAN. I.L.R. (1944) All. 20=211 I.C. 157=16 R.A. 211=1943 A.L.W. 579=1943 A.L.J. 535=1943 A.W.R. (H.C.) 269=1943 O.A. (H.C.) 269 -A.I.R. 1944 All. 1.

—Ss. 16, 99 and 0. 2 Br. 2, 3 and 4—Applicability and scope—Suit for specific performance of contract of sale of immovable property and possession—Vendor and subsequent purchaser made defendants—Jurisdiction—Joinder of claims—Leave of Court-Necessity—Separate suits—If barred by Res judicata.

Where an agreement is entered into for sale of immovable property in favour of one person and subsequently the vendor sells the property to another under a conveyance, the prior vendee is entitled to bring a suit against both the vendor and the subsequent vendee for specific performance of the contract as well as for possession. It is settled law that the cause of action for specific performance is distinct from that for possession and a subsequent suit for possession after a suit for specific performance would not be barred by res judicata for O. 2, R. 2 C. P. Code. But though a separate suit for possession is not barred, the two causes of action may be joined in the same suit for the sake of convenience

A.I.R. 1942 All, 387.

C. P. CODE (1908), S. 17.

or to avoid multiplicity of suits. The combination of the two suits is not repugnant to any provision of law. O. 1. R. 3, C.P. Code, and S. 27, Specific Relief Act would permit the joinder of all these defendants i.e., the vender and the subsequent vendees. The Court where the property is situate is the Court which has jurisdiction to try the suit under S. 16 C.P. Code, so far as the suit for possession is concerned. When the subsequent purchaser also lives where the property it situate, the Court of that place and that Court alone has jurisdic. tion to try the suit against that defendant. Though the vendor resides and the contract is concluded at a place outside the jurisdiction of that Court, it would still have jurisdiction to try the suit against him also by reason of S. 16 (d), C.P Code. The proviso to S. 16 C.P. Code, would not apply to the suit, as it cannot be said that the suit is one in personam. The joinder of the two causes of action, ziz., specific performance and possession, is not dependant upon the leave of the Court under O. 2, R. 4. C.P. Code, because O. 2 R. 4, may not apply to a case where the recovery of property is sought as a relief consequential on the relief of specific performance of a contract, and in practice leave of the Court is not asked for. Assuming that leave of the Court is necessary for such joinder, the absence of leave of the Court is not fatal and is no ground for reversal or variation of the decree, because the case would be covered by S. 99 C.P. Code. (Broomfield and Divatia, JJ.) NEW MOFUSSIL CO., LTD. v. SHANKARLAL NARAYANDAS. I.L.R. (1941) Bom. 361=196 I.C. 146=14 R.B. 100=43 Bom. L R. 293=A.I.R. 1941 Bom. 247.

—S. 16 — Jurisdiction — Immovable property attached before judyment in money suit—Objector's claim allowed—Suit for declaration that property belongs to debtor—Jurisdiction.

A suit by a creditor for a declaration that immovable property attached by him before judgment in a money suit belongs to his debtor and not the claimant should be instituted in the Court within the local limits of whose jurisdiction the property attached is situate (Henderson, J.) PRABHASINI DUTTA v. NRIPENDRA NATH SINHA. 199 I.C. 681=14 R.C. 619=A.I.R 1941 Cal. 363.

S. 17—Applicability—Application under para 20 (2), Sch. II—Jurisdiction—Property situate within the jurisdiction of sereral Courts—Jurisdiction to entertain and deal with application. Venkatachellam v. Suryanarayanamurthy. [See Q.D. 1936-'40 Vol. I, Col. 3275.] A.I.R. 1941 Mad. 129.

\_\_\_\_S. 17—Applicability—Conditions.

Before provisions of the S. 17 C. P. Code, can come into play there must be one property which is situated in different jurisdictions. The property must capable of being described as a single entity. If there is a dispute, for instance, about a single estate which both parties are claiming as a whole that estate is for the purposes of that suit a single entity. If, on the other hand, the owner of an estate has a claim against unconnected trespassers who have trespassed upon different parts of the estate or different properties situated within it, those parts or those properties would not for the purposes of the dispute between him and the trespassers be one entity but several entities and the provisions of S. 17 would not apply. (Allsop and Verma, J.) KARAM SING v. KUNWAR SEN. I.L.R. (1942) All. 862=206 I.C 222=15 R.A. 498=1942 A.L.W. 399=1942 A.W.R. (H.C.) 270=

A British Indian Court cannot pass a decree in respect of property situate outside British India. But it can pass a decree in respect of property situate outside the local limits of its jurisdiction when the suit is to obtain relief in respect of that property as well as property situate within its local limits. (Tek Chand and Beckett, Jf.) RAM KRISHAN v. OM PARKASH. 197 I.C. 481 = 14 R L. 241 = 43 P.L.R. 489 = A.I.R. 1941 Lah. 347.

S. 20—"Cause of action"—What constitutes—contract for sale of goods completed by correspondence—Jurisdiction in respect of breach of such contract.

A Court has jurisdiction if any part if the cause of action arose within its territorial jurisdiction. "Cause of action" consists of that bundle of rights which taken together give a right of suit (e.g.) to recover damages for beach of contract. Where a contract for sale of goods was completed by offer and acceptance communicated through the post, the offer cannot be said to be complete when the letter containing the offer is posted but only when it is received by the addressee. Accordingly the court at the place of posting the letter containing an offer will not have jurisdiction to entertain a suit for damages for breach of the contract. The offer in the case was only an invitation to accept the offer by post and when the letter of acceptance was posted by the acceptor the contract was complete and bound the offerer immediately. The receipt of the letter at the offerers place will not confer jurisdiction. (Harries C. J. and Abdur Rahman J.) POKHAR MAL RAM NATH v. KHANEWAL OIL MILLS, 47 P.L.R. 277 = A.I.R. 1945 Lah. 260,

S. 20—"Carry on business"—Meaning Insurance company having head office at L and branch office at C—If carries on business at C.

Where an insurance company had its head office at Lahore and the business of the company was transacted in Calcutta by its agents who were not office or conduit pipe through which communications were sent to the company and they did a considerable amount of business on behalf of the company in which they were allowed a certain amount of discretion.

Held, that the insurance company did carry on business in Calcutta. (Mc Natr, J.) BRINDARANI DEBI v. CO-OPERATIVE ASSURANCE CO., LTD. I.L R. (1944) 1 Cal. 101=211 I.C. 450=16 R.C. 535=A.I.R. 1944 Cal. 1.

S. 20—'Carrying on business'—Meaning—Insurance company with a head office and different sub-agency offices at different places—Receipt of premium and other business transacted by the branch offices—Company if carries on business in the place where the sub-agency or branch office is.

"Carrying on business' in S. 20, C. P. Code, means having an interest in the business transaction at the particular place and a voice in what is done and a share in the gain or loss. Where an insurance company having a head office at Calcutta has a sub-agency office in Nagpur, and all business in connection with the policy holders are transacted by sub-agency office and a Bank account is also maintained in that place, the company must be said to be carrying on business at Nagpur within the meaning of S. 20, C. P. Code. (Clarke, J.) HINDUSTAN INSURANCE CO. v. NATHU. 1941 N.L.J. 37.

C. P. CODE (1908), S. 20.

---- S. 20—Carrying on business—Nature of work carried on by branch office—If relevant.

The language of Expl. II of S. 20 C. P. Code, is perfectly clear and once it is established that a corporation has got a branch office at any place it shall be deemed in the eye of law to carry on its business at that place irrespective of the nature of the work that is actually carried on there. (Mukherica and Blank, J.) PEOPLE'S INSURANCE CO., LTD. v. BENOY BHUSAN BHOWMIK, I.R. (1943) 1 Cal. 564 = 207 I C. 68=16 R.C. 23=77 C.L.J. 112=47 C.W.N. 292=A.I.B. 1943 Cal. 199.

\_\_\_\_\_S. 20-Cause of action-Contract of insur-

Where the proposal for insurance is made in Calcutta and forwarded from Calcutta to Lahore a part of the cause of action arises in Calcutta. (McNair. J.) BRINDARANI DEBI v. CO-OPERATIVE ASSURANCE CO. LTD. I.I.R. (1944) 1 Cal. 101=211 I.C. 450=16 R.C. 535=A.I.R. 1944 Cal. 1.

\_\_\_\_S. 20—Contract regarding purchase of goods—Place of suit.

To decide the question of jurisdiction of a Court to entertain a suit based upon a contract regarding purchase of certain goods, three points arise, one is the place of the contract; second is the question of delivery of the goods; and the third is the question of payment for the goods. (Dalip Singh and Sale, J.) SHAW HARI DIAL v. SOHNA MAL BELI RAM. 202 I.C. 449 = 15 R.L. 132 = 44 P.L.R. 428 = A.I.R. 1942 Lah. 252.

S. 20—Jurisdiction—Suit by wife against husband and father-in-law for maintenance and return of stridhan property entrusted at time of marriage—Place of suing—Suit at place of wife's residence—Maintainability—Rule of debtor seeking out creditor—Applicability.

The plaintiff, a Hindu wife, whose marriage took place at Negapatam and who was residing with her husband at Vellore had to leave her husband owing to ill-treatment by him and returned to her father's place at Palghat. Her father in-law was residing at Mayavaram. She filed a suit in Palghat against her husband and father-in-law claiming maintenance and return of stridhanam properties alleged to have been entrusted to him at the time of marriage. It was contended that the husband and father-in-law were her debtors and that, in the absence of a contract to the contrary, the English common law rule that the debtor should seek out the creditor applied and therefore the Court at Palghat had jurisdiction to entertain the suit.

Held, that the Palghat Court had no jurisdiction because no part of the cause of action, whether for recovery of maintenance or for return of the entrusted properties (return of which must have been contemplated either at the family residence at Mayavaram or at the place where the husband resided) arose at Palghat and neither of the defendants resided or worked for gain at Palghat. The rule that the debtor must seek out the creditor could not apply to the case. (Leach, C. J. and Somayya, J.) RAMALINGA IYER v JAYALAKSHM. 200 I.C. 58=14 R.M. 685=53 L.W. 686=1941 M.W.N. 629=AI.R. 1941 Mad. 695=(1941) 1 M.L.J. 784.

S. 20—Place of suing—Purchase of Post Office cash-certificate at A—Conversion at Number of declaration of ownership of certificates and refund of cashed amounts.

Where the plaintiff bought certain postal cash certificates at A with his own money but in the name of the defendant and later on sued for a declaration that they were his in the Court at A and pending the suit some certificates were cashed at N by the detendant and an additional relief for the recovery of the amount so cashed was added by amendment, on the question of the jurisdiction of the Court at A to try the suit.

Held, that the purchase of the certificates at A was a contract and hence part of the cause of action arose at A and the case was one of those border line cases where the balance of convenience was to have the whole suit tried in the same Court at A. (Daries, f.C.) RADHEY LAL v. SHRIMATI RUPVATI. 1943 A.M.L.J. 60.

S. 20—Principal and agent—Suit for accounts by principal against agent—Cause of action—Place of business of agent or of principal. AUDINARAYANA RAO D. LAKSHMI NARAYANA KAO. [see Q.D. 1936-40 Vol. I, Col. 1003] 193 I C. 81—13 R.M. 616.

—S. 20 (c)—Cause of action—Contract in C.I.F. form—Shipment of goods at Karachi—Contract that delivery and payment to be made at Madras—Documents not handed over to buyer or agent at Karachi—Breach by refusal to take delivery—Suit for damages—Jurisdiction of Court at Karachi.

It is an essential feature of a C. I. F. contract that delivery of the goods passes with the delivery of the documents at the port of departure, and in a C. I. F. contract the time and place of the delivery would be the time and place where the vendor delivers the goods on board ship, the delivery being symbolized by the deli-very of the documents. The port of departure, under the circumstances, is the place where delivery is given and the place where a breach of contract is committed when the breach arises from failure to deliver the goods or when the goods are not of the stipulated quality. Jurisdiction in a suit for breach of a C. I. F. contract therefore lies in the Court with jurisdiction over the place where the property in the goods passes and where the breach is committed. But this rule does not apply when the essential features of the contract are departed from. A contract for sale of flour was made at Madras and the goods were to be delivered at Madras and payment also was to be made at Madras. The goods were to be shipped from Karachi. The contract was a C. I. F. contract, but the seller who was at Karachi did not deliver the documents to the buyer, but he endorsed the documents to himself and retained them. The plaintiff filed a suit in Karachi for breach on the part of the buyer on the ground that he wrongly refused to accept delivery.

Held, on the question of jurisdiction, that the ordinary rule relating to C. I. F. contracts did not apply in this case, as the documents were not handed over to the buyer or his agent at Karachi and property in the goods did not pass to the buyer at Karachi. Karachi as a place of shipment was not part of the contract at all and it cannot therefore be said that the Karachi Court had jurisdiction merely because of shipment of goods at Karachi. The Karachi Court, therefore, had no jurisdiction. (Davis, C. J. and Weston, J.) GOPALDAS MULII v. BISHAMBERDAS MUNILAL. I.I.R. (1943) Kar. 384-211 I.O. 277-16 R.S. 179-A.I.R. 1944 Sind 70.

S. 20 (c)—Cause of action—Contract—
Offer and acceptance—Acceptance of offer by post—
Gause of action—Where arises—Place of posting letter of acceptance or place of its receipt.

#### C. P. CODE (1908), 20 (c).

A contract is made at the place where the offer is accepted. An offer when accepted by post is accepted at the place where the letter of acceptance is posted, and therefore the cause of action for a suit on the contract arises there. The receipt of the letter of acceptance is not part of the cause of action and hence the Court at the place where the letter of acceptance is received has no jurisdiction to entertain the suit. (Leah, C. J. and Shahab-ud-din, J.) MANILAL v. VENKATACHALA-PATHI IVER. I.L.B. (1944) Mad. 95 = 210 I.C. 580 = 16 R.M 457 = 56 L.W. 242 = 1943 M.W.N. 325 = A I.R. 1943 Mad. 471 = (1943) 1 M L.J. 353,

——S. 20 (c)—Cause of action—Contract of hiring —Dramatic work converted into film and hired to sine ma company for exhibition—Film exhibited in pursuance of contract—Suit by author of dramatic work for infringement of copyright—furisdiction—Suit at place of exhibition of film—Maintainability.

In the absence of any specific terms in the actual contract between the parties to the contrary, a transaction of hiring cannot be completed until the article hired, is in the hands of the person to whom it is hired; an article cannot be said to be hired until it reaches the hands of the person to whom it is to be hired. The plaintiff brought a suit for damages for infringment of copyright in respect of a dramatic work, claiming that he had written that work which according to him had been converted by the defendants into a cinematograph film. He complained that the defendants, who were a movietone company of Madras, entered into a contract with the proprietor of a cinema at Rajahmundry to exhibit the film and that the film was duly exhibited at Rajahmundry in pursuance of the contract. He brought his suit in Rajahmundry. The detendants contended that no part of the cause of action arose at Rajahmundry and that the suit therefore lay only in Madras and not in Rajahmundry.

Held, that the question whether the contract was completed in Madras or Rajahmundry was entirely irrelevant as the mere completion of the contract was no part of the cause of action, that the action of hiring out this film was not complete until the film reached Rajahmundry and was delivered to the proprietor of the cinema. Part of the cause of action therefore arose in Rajahmundry and the suit would therefore lie in Rajahmundry. (King, J.) KAMESWARA RAO v. NATIONAL MOVIETONE CO., LTD. 204 I.C. 25=15 R.M. 692=1942 M.W.N. 448=A.I.R. 1942 Mad. 659=(1942) 2 M.L.J. 110.

The cause of action in a suit for damages for a breach of contract arises either at the place where the contract was made or at the place where the contract was agreed to be performed or the place where the money was agreed to be paid or where the breach of contract actually took place. Where the contract actually takes place at F, where the defendant resides and the defendant agrees to perform it within the B district, the breach of contract takes place in district B, when the defendant fails to perform it. Though there is a clause in the contract that the entire accounting would take place at F, it refers to the final adjustment, between the parties in, the event of the contract being performed. Hence where it is not performed, that clause could have no operation. (Ghulam Haism and Madeley, J.) MAHOMAD IDRIS v. RATI RAM. 17 Luck. 733=199 I.O. 446=14 B.O. 489=1942 A.I.W. 40=1942

C. P. CODE (1908), S. 20 (c).

A.W.R (C.C.) 53 = 1942 O.A. 30 = 1942 O.W.N. 56 =A.I.R. 1942 Cudh. 250.

-S. 20 (c)—Cause of action—Jurisdiction to file award-Contract made at one place-Agreement to refer disputes to arbitrator at another place-Award at the latter place.

Where the original contract was not made at Cawnnore and the cause of action with regard to the original contract did not arise at Campore, then the mere fact that the parties to the contract later on agreed to submit their disputes to an arbitrator at Cownpore and the arbitration proceedings were carried on at Campore and the award given at Cawnpare would not give the Campore Court a jurisdiction to file the award. The cause of action in this matter is to be determined with reference to the original transaction which took place between the parties and not with reference to the agreement to refer to arbitration or with reference to the arbitration proceedings. (Barpar and Dar, JJ.) MADAN GOPAL RADHEYLAL v. SANWAL DAS. 1943 A.L.W. 457.

-S. 20 (c)—Cause of action—Promissory note-Suit on-Jurisdiction-Note made at specified place—No reference to place of payment— If payable at place of payee—Duty of debtor to seek out creditor.

The cause of action for a suit on a promissory note is the promissory note itself and not the consideration which gave rise to the note and in a suit founded on a promissory rote it is not permissible to go into the consideration for the note and to read into the note something founded on the circumstances giving rise to it. A promissory note made at a particular place and containing no stipulation as to the place of payment, cannot be regarded as being payable at any place other then the place where it is made. The common law rule that the debtor must seek out his creditor has no application to a negotiable instrument, and hence a suit on such a promissory note has to be instituted only at the place where the note is made. (Beaumont. C.J. and Somjee, I.) JIVATLAL PURTAPSHI v. LALBHAI FULCHAND. I.L.R(1942) Bom 620=203 I.C 27=15 R.B. 184=44 Bom.L.R. 495=A.I.R. 1942 Bom 251.

-S. 20 (c)—Cause of action—Suit on contract-Place of receipt of letter or telegram of acceptance of offer.

In suits arising out of contracts, a part of the cause of action arises where the letter or telegram of acceptance of the offer is received and delivered. (Patanjali Sastri, 1) SEPULCHRE BROS v. KHUSHAL DAS JAGJIWAN DAS. I L R 1942 Mad. 243=201 I.C. 176=15 R.M 260=54 L.W. 345=1941 M.W.N. 838=A.I.R. 1942 Mad. 13= (1941) 2 M.L.J. 481.

-S. 20 (c)—Contract of sale of goods— Breach-Place of suing.

The plaintiff firm carrying on business at Amritsar agreed to purchase from the defendant certain goods. The contract was entered into by correspondence and the offer to buy the goods was accepted by the defendant at Bangalore. There was no condition to the effect that the payment was to be made at Amritsar. As regards Court to transfer case pending in a Court sub-

C. P. CODE (1908), Ss. 22 and 23.

delivery, the plaintiff asked for goods to be despatched to him from Bangalore by rail at his ex-pense. Plaintiff sued the defendant at Amritsar for damages for breach of contract.

Held, that no part of the cause of action arose at Amritsar, as the contract was completed at Bangalore and payment as well as delivery were to be made there, and that the Amritsar Court had, therefore, no jurisdiction to entertain the suit. (Tek Chand and Beckett. JJ.) AMAR NATH-SHAD LAI v. DHONDUSA DHARTAPPA, 195 I.C. 300=14 R.L. 56=43 P.L.R. 158=A.I.R. 1941 Lah. 223.

-S. 20 (c)—Life insurance policy—Death of assured-If part of cause of action

In the case of a life-insurance pilicy the claimant must prove the death of the assured before he can enforce his claim against an insurance company The death of the assured is thus a material part of the cause of action upon which a suit for money due on a life insurance policy can be based. Therefore, the Court within whose jurisdiction the assured dies is competent to entertain the suit under S. 20 (c), C. P. Code. (Mukherjea and Blank, JJ.) PEOPLE'S INSURANCE (O., I TD. v. BENOY BHUSAN BHOWMIK. J.L.R (1943) 1 Cal 564=207 J.C. 68=16 R.C. 23=77 C.L J. 112=47 C.W.N. 292=A.I.R 1943 Cal. 199.

——S. 20 (c)—Place of suirg—Contract for sale or goods—Place of payment—Creditor's place of residence-Power of Court to find out implied intention of parties. See Contract Act S. 49. 22 P.L.T. 282.

-S. 20 (c)-Suit on contract-Jurisdiction of Court within whose limits offer is made.

In a suit for damages for breach of contract, the making of the offer which upon acceptance eventually becomes the contract, should be regarded as forming part of the cause of action. Therefore, under S. 20 (C), C.P.Code, such a suit may be instituted in a Court within the local limits of whose jurisdiction the offer is made. (Biswas and Latifur Rahman, J.). DHAN-MAL MARWARI v. JANKIDAS BAIJNATH. 49 C.W. N. 123.

-S. 21-Applicability-Suit under U. P. Debt Red. Act. See U. P. DEBT RED. ACT: SS. 4 AND 6 1945 A.W.R. (H.C.) 46.

-S. 21—Score of rule embodied in.

The rule embodied in S. 21, C.P. Code is not limited to appeals and revisions in the same suit (Stone, C.J., Grille, Niyogi, Gruer and Bose, JJ.)
JAGNI RAM v. GANPATI. I.L.R. (1941) Nag 1=
1941 N.L.J 1=A.I.R. 1941 Nag 36 (F.B.)=198 I.C. 873=14 R.N 251.

-S. 22—Applicability—Conditions.

The provisions of S. 22, C.P. Code, could apply only if the suit in its entirety, is cognizable by either of the Court in which the suit is filed or by the Court to which the suit is sought to be transv. Kunwar Sen. I.L.R. (1942) All. 862=206 I.C. 222=15 R.A. 498=1942 A.W.R. (H.C.) 270 =1942 A.L.W. 399=AI.R. 1942 All. 387.

-Ss. 22 and 23-Scope of-Power of High

C.P. CODE (1908), S. 23.

ordinate to it, to a subordinate Court of another High Court. Kanhaiyalal Daga v. Zumber Lal. [see Q.D 1936-'40 Vol. I, Col. 1007.] I.L.R. (1941) Nag. 311.

S. 23—Applicability—Plea of want of jurisdiction taken in one Court—Transfer, if can be ordered. BABU LAL GIRDHARI LALV. KOTUMAL. [see Q.D. 1936-'40 Vol. I, Col. 3275.] I.L R. (1940) All. 737=192 I.C. 543=13 R.A. 332=A.I.R. 1941 All. 27.

——S. 24—Applicability—Court subordinate to Court—Assistant Judge holding inquiry into validity of election under S. 19, Bombay Local Boards Act—If Judge or persona designata—Proceedings before Judge—Jurisdiction to transfer.

Before the High Court can grant an application for transfer under S. 24, C.P.Code, the Court has to decide two questions, viz., (1) whether the proceedings to be transferred are pending in a Court, and (2) whether that Court is "Subordinate" to the High Court.

An Assistant Judge hearing an election petition under S. 19 of the Bombay Local Boards Act acts as a persona designata and not as a Court subordinate to the High Court within the meaning of S. 24, C.P. Code. Hence S. 24, C.P. Code, does not apply to the case, and the proceedings in such an inquiry cannot therefore be transferred by the High Court under S. 24, C.P. Code. (Lobo, C.J.) JAN MAHOMED v. MAHOMED AKIB. I.L.R (1944) Kar. 388 = 218 I. C. 193 = 18 R.S. 3 = A.I.R. 1945 Sind 9.

S. 24-Applicability-Execution proceed-

ings.
S. 24, C.P. Code, applies to execution proceedings also. (Horwill, J.) SEETHARAMAYYA v. SIVARAMA KRISHNA RAO. 216 I.C. 316=56 L.W. 605=1943 M.W.N. 650=A.I.R. 1944 Mad. 145=(1943) 2 M.L.J. 536.

S. 24—Applicability—Proceedings for enforcement of injunction under O. 39, R. 1. See C. P. Code, O. 39, Rr. 1 and 2 and Ss. 24 and 36. 1941 A.L.J. 46.

S. 24—Application under, to transfer election, petition referred to District Judge under S. 35 C, U. P. District Board Act—Maintainability.

When an election petition is referred to a District Judge under S. 35-C, U. P. District Boards Act, he is deciding it in his capacity of persona designata selected by Government and is not acting in his capacity as a District Judge. The power to withdraw proceedings on such a petition does not exist either in the High Court or Chief Court and an application for its transfer under S. 24, C. P. Code, would not be maintainable. (Thomas, C.J.) MAHESHWARI PRASAD SINGH v. RUDRA PRATAP SINGH. 20 Luck. 382=1945 O.A. (C.C.) 67=1945 A.L.W. (C.C.) 89=1945 A.W.R. (C.C.) 67=1945 O.W.N. 95=A.I.R. 1945 O.W.N. 258

——S. 24—Dismissal of transfer application without giving notice or hearing parties—Power-of Court.

S. 24 C.P. Code does not provide that the court cannot dismis an application for transfer without giving notice or hearing the parties. Where the Court does not intent to transfer a case it is not incumbent on it to issue notice and hear the parties before dismissing application. (Almond, C. J.) GOPAL DAS BHADAR SAIN v. KAPAL DRY. 208 I.C. 600=16 R. Pesh. 29=A.I.R. 1943 Pesh. 71.

C. P. CODE (1908), S. 24.

S. 24—Ground for transfer—Finding on identical question of fact given by Judge in previous case.

Under S. 24, C. P. Code, a transfer should not be ordered for reasons of sentimentality, but only if good grounds are made out for it. A case should not be transferred from the file of a Judge on the mere ground that he has given a finding on an identical question of fact in a previous case. There is no reason for supposing that the Judge will not decide the case on the material before him. If that material is different from that in the previous case, there is nothing either in theory or in practice to bar a different finding. If the material is identical then there will not only be an identical finding, but there ought to be, and if it is wrong it can be corrected by an appeal to a superior Court. That is legitimate and envisaged by the law. What is not envisaged by the law is the use of S. 24, C.P. Code, to give an indirect sort of anticipatory appeal, not to a superior Court, but to a Court of equal jurisdiction. (Blacker, J.) MAHOMED ASHRAF v. BUTA MAL. 46 P.L.R. 180=A.I.R. 1944 Lah. 400

——S. 24—Ground for transfer—Same question of interpretation of a will involved—Parties different,

Where two appeals between different parties is pending one before the High Court and the other before the District Court, the fact that the main question in the two appeals is the same, namely, the interpretation of a will is no ground for transferring the appeal from the District Court to the High Court. It cannot be said that such transfer is desirable to avoid a conflict of decisions. If the District Judge should come to a wrong decision the remedy by way of second appeal was available. (Blacker, J.) JAMIL UR RAHMAN v. SHAMSHER ALI. 219 I.C. 157=AI. R. 1944 Lah. 440.

S. 24 and Provincial Small Cause Courts Act (1887), S. 16—Pending small cause suit—Transfer to a regular Court though there was a Small Cause Court in that place—Validity—Scope of S. 16, Prov. S. C. Courts Act—If takes away jurisdiction of regular Court to try small cause cases.

The District Judge can under S. 24, C. P. Code, transfer a case pending in a Court of Small Causes to any other Court having jurisdiction even though a Small Cause Court having jurisdiction to try the suit is in existence in that particular place. S. 16 of the Provincial Small Cause Courts Act has not the effect of making Courts other than those governed by that Act incompetent to try Small Cause suits. It only says that suits triable by a Small Cause Court shall not be tried by any other Court and it does not take away the jurisdiction of other Courts. (Madeley and Agarwal, JJ.) Khwaja Afsal Husain. v. Mahomed Husain. 208 I.C. 144=16 R.O. 63=1943 A.W.R (C.C.) 48=1943 O.A. (C.C.) 119=1943 O.W.N. 205=A.I.R. 1943 Oudh 449.

S. 24—Powers of High Court—Suit in subordinate court—Transfer to High Court during vacation of former court—Quashing of interim order of subordinate court and subsequent re-transfer to that court—Hgh Court's power—Procedure—Notice to parties—Necessity. See Letters Patent (Mad.), Cl. 13. (1945)1 M.L.J. 14 (F.B.).

-S. 24-Powers of transfer-Suit filed in Court lacking pecuniary jurisdiction. KANHAIYA LAL v. HAMID ALI [see Q.D. 1936-40, Vol. I, Col. 1009.] 15 Luck. 619.

-S 24—Powers of District Court—Suit remand ed by High Court expressly to District Court-Transfer by latter to Sub-Court for trial-Legality.

Where in appeal the High Court remands a suit for disposal to the District Court, there being no Sub-Court functioning at the time, and the District Court transfers the suit for trial to a Sub-Court which is subsequently established, it cannot be said that the transfer by the District Court is illegal or without jurisdiction. Under S. 24, C. P. Code, the District Court is given very wide powers to transfer any suit, appeal or proceeding at any stage to a subordinate Court. (Somayya, J.) KIYA THANGAL 2. RAVI VARMA 218 I.C. 427=18 R.M 41=1944 M.W N 490= A.I.R. 1944 Mad. 569=(1944) 2 M.L.J. 91.

- S. 24 and O. 7 R. 10-Suit instituted in proper Court-Transfer for disposal to another Judge of same Court-Amendment of plaint taking suit beyond jurisdiction of Judge-Procedure to be followed-Power of High Court to transfer-Return of plaint under O.7. R. 10-Necessity. BABU BHAI VAMALCHAND v. HIRALAL VAMAICHAND, [see Q D 1936-40 Vol I. Col. 3275] ILR. (1941) Bom 131=193 I.C. 242= 13 R.B. 305=A I.R. 1941 Bom 69.

——Ss. 24 and 37—Transfer—Effect on interim Orders. See C. P. Code, O. 39 Rr. 1 and 2 and Ss. 24 and 36. 1941 A.L.J. 46.

-S. 24-Transfer-Grounds.

Where a plaint was wrongly permitted to be returned and a fresh plaint put in the same Court, it is no ground for asking for a transfer of the case from out of that Court. (Davies.) NAND LAL v. AMAR SINGH. 1942 A.M.L.J. 33.

-S. 24—Transfer—Sufficient reason—Similar question of law in prior proceedings by same Judge.

The circumstance that a Judge has already in prior proceedings between the same parties come to a conclusion of law on a similar question is no sufficient reason for transferr ng a suit from his Court to another Court. (Braund and Yorke. JJ.) KAILASH CHANDRA JAIN v. JHAMOLA KUN-WAR. 1942 A.L.W 291.

 S. 34—"Decree for payment of money"-Meaning of—Interest on damages—Award of—Discretion of Court. Phagwant Genuji v Gangabisan Ramgopal. [see Q D. 1936-40 Vol. I. Col. 1012.] I.L.R. (1941) Bom. 71=13 R.B. 202=191 I.C. 806=A.I.R. 1940 Bom. 369.

-S. 34-Deposit of decree amount in Court-Security ordered before withdrawal-Liability to interest only till date of notice of deposit and not till date of withdrawal.

Interest would continue to run on the decree amount from the date of deposit until the date when notice of the deposit is given to the decree

C. P. CODE (1908), S. 34.

unable to furnish the security is no ground for making the judgment-debtor liable for interest for that period. (King and Kunhi Raman. 11.) THE SOUTH INDIAN RAILWAY CO. v. MAYILVAHA NAN 208 I C 176=16 R M 189=56 L W 17= 1943 M W N 8=A I.R. 1943 Mad 334=(1942) 2 M.L J. 803.

-S. 34-Discretion of Court, if affected by Interest Act-Wrongful retention of money by mortgagee in possession-Power of Court to charge him with liability for interest - Rate of interest. See INTEREST ACT. S. 1, PROVISO. (1945) 1 M.L.J. 478.

-S. 34-Interest-Discretion-Province of appellate Court.

If a lower Court in the exercise of its discretion either refuses or allows interest, an appellate Court will not ordinarily interfere. But where owing to an erroreous view of the law that interest is not allowable by him under the provisions of the Debt Concil ation Act, a Judge dees not allow interest, there is no exercise of discretion at all. In such a case the appellate Court will exercise the discretion which ought to have been exercised by the lower Court. (Stone, C.J. and Bose. 1.) SETH SHEOLAL V. DADDIG-SINGH. 1941N.L.J 591.

-S. 34-Interest-Fair rate-9 per cent. per annum.

The fair rate at which interest pendente lite should be awarded to the plaintiffs would be 9 per cent, per annum simple from the date of the suit till the expire of the period of grace fixed for payment and thereafter at the rate of 6 per cent. rer annum till realisation. (Harries, C.J. and Manohar Lall, J.) TIKA SAO v. HARI LAL. 195 I.C. 428=14 R.P. 122=7 BR. 924= A.I.R. 1941 Pat. 276.

-S. 34-Interest perdente lite-Award of-Discretien of Court-Such interest n t asked for in plaint.

The fact that interest pendente lite is not asked for in the plaint, is not a bar to such interest being awarded. The question is one for the discretion of the Court and is not a matter of substantive law which must be pleaded. (Grille, C.J. and Puranik, J.) YADAORAO v. RAMRAO. ILR (1943) Neg 555=15 RN 266=206 I.C. 504=1943 N.L.J. 220=A.I R. 1943 Nag 240.

-S. 34—Interest prior to suit—Claim for-Sustainability-Absence of demand before suit-Effect.

Interest prior to suit cannot be claimed or allowed when there has been no demand made for it prior to the suit. (Dhowle, J.) Commissioners of the Patna City Municipality v. Kapur Chand Lall 201 I C 8=8 B R 764=15 R.P. 25=23 Pat.L.T. 407=A.I.R. 1942. Pat. 417.

#### -S. 31-Interest-Right to-Facts entitling.

Courts have no power to award interest merely because money due is withheld-Facts must be alleged and proved which would make the Court hold that it is payable under a provion of law holder. The decree holder is not entitled to interest after that date till he withdraws the amount on furnishing security. The fact that the next friend of the minor decree-holder is 1941 N.L.J. 371=A.I.R. 1941 N.E. 273.

-S. 34-Pendente lite interest-Discretion of Court.

The rate of interest to be allowed from the institution of the suit till realisation is entirely within the discretion of the Court. (Lord Romer) Hakim Rai v. Ganga Ram. ILR. (1942) Kar. (PC) 157=55 L.W. 121=1943 M.W.N. 187=45 Bom L.R. 270=45 P.L.R. M.W.N. 187=45 Bom L.R. 270=45 P.L.R. 124=24 P.L.T. 26=202 I.C. 754=15 R.P.C. 48= 9 B.R. 61=1942 A.L.J. 710=47 C.W.N. 113= 1942 O.W.N. 814=1943 A.L.W. 20=A.I.R. 1942 P.C. 61=(1943) 1 M.L.J. 16 (P.C.).

#### -S. 34—Right to by way of damages.

In the absence of usage or contract expressed or implied or of any provisions of law justifying the award of interest on the decretal amount for the period before the institution of the suit, interest for that period could not be allowed by way of damages caused by the wrongful detention of the money. (Agarwal and Madeley, IJ.) PIAREY LAL v. MAHADEO PRASAD 199 I.C. 698= 14 R.O. 514=1942 R.D. 320=1942 A.W.R. (C.C.) 109=1942 O.W.N. 157=1942 O.A. 88= A.I.R. 1942 Oudh 311.

-S. 34 - Scope - Effect of 1929 amendment -Interest after date of suit—If comes within S. 34 C. P. Code—Grant of interest at contract rate—Up to date fixed for payment-If obligatory.

Quaere:-Whether after the amendment of 1929 even interest after the date of suit comes within S. 34 C. P. Code and whether the grant of interest at the contract rate up to the date fixed for payment is obligatory. (Venkataramana Rao and Somayya, JJ.) RANGASWAMI Goundar v. Official Receiver, Colmbatore, I.L.R. (1942) Mad. 618=202 I.C. 170=15 R M. 453=1942 M.W.N. 399=55 L.W. 120=A.I.R. 1942 Mad. 535=(1942) 1 M L.J. 296.

-S. 35-Appeal necessitated by mistake of Court-Respondent responsible for mistake but not contesting appeal-Appellant-It can be deprived of costs.

Where the respondent to an appeal has been responsible for a mistake on the part of the Court which has led to the appeal, it would be ineqitable to make the appellant liable for the whole costs of the appeal though the respondent does not contest the appeal. The appellant must be awarded costs against the respondent. (Harries, C.J. and Manohar Lal, J.) JOYRAM NARAYAN v. SHIVA PRASAD SINGH. 193 I.C. 32=13 R.P. 534=7 B.R. 503=A.I.R. 1941 Pat. 416.

-S. 35—Assignee of decree under appeal impleaded in appeal-Assignee supporting decree-Costs of successful appellant-Liability of assignee for costs of Suit and of appeal.

An assignee of a decree who is made a party respondent to an appeal by the defendant against the decree and who actively asserts the correctness of the decree and does everything he can to obtain the dismissal of the appeal by the defendant, may properly be ordered to pay the successful defendant the costs not only of the appeal but also the costs of the trial Court. (Gentle, J.) THIMMAPPA CHETTIAR v. THANGAVELU CHETTY, 54 L.W. 100=1941 M.W.N. 854=A.I.R. 1941 Mad. 762 (1)=(1941) 2 M.L.J. 119.

-S. 35-Peneficiary propourding will and

C. P. CODE (1908), S. 35.

plaintiff to proof-Costs of beneficiary proving the will-Right to.

Where a benificiary applied for probate of a will and on the application being contested he was put to proof of the will.

Held, that the usual practice in cases where a plaintiff seeks to establish a will under which he has been given a legacy and he is merely put to proof of it, is to award costs to both parties from and out of the estate. In cases where no executor has been appointed under the will it is the duty of the Probate Court on the will being established to direct the issue of letters of administration with will annexed to such persons as are under the Succession Act competent to administer the estate thus avoiding further expense and litigation. (Venkataramana Rao and Horwill, JJ.) KANAKASABAPATHI CHETTY V. UNNAMALAI AMMAL. 198 I.C. 560=14 R M. 457=53 L.W. 243=1941 M W.N. 301=A.I.R. 1941 Mad. 502 =(1941) 1 M.L.J. 299.

-S. 35-Contention which succeeded not meritorious—Refusal of costs proper.

Where the contention which succeeded in the High Court was not a meritorious one, the successful party can be refused the costs throughout. (Bobde, J.) GULAB SINGH v. NATHU. I.L. R (1944) Nag. 419=217 I.C. 295=17 R.N. 111 =1944 N.L.J. 200=A.I.R. 1944 Nag. 145.

-S. 35-Costs-Next friend-Order against -Liability of estate.

If a next friend is ordered to pay costs, the costs should be paid personally by him, and the estate will not be liable unless the Court so orders. (Ameer Ali, J.) SRIDHAR JEU V. MANINDRA KUMAR. I.L.R. (1940) 2 Cal. 285=195 I.C. 473=14 R.C. 101=A.I.R. 1941 Cal. 272.

-S. 35-Costs in partition suits-Rule-Parties if to bear own costs up to preliminary decree.

It is by no means correct to hold that in partition suits parties should bear there own costs up to the preliminary decree. The question would depend upon the nature of the dispute raised in the suit. (Harries, C.J. and Chatterji, J.) JUGE-SHWAR MISRA v. KIRET SINGH. 198 I.C 743= 8 B R. 463=14 R.P. 500=1941 P.W.N. 557=A. I.R. 1942 Pat. 76.

-S. 35—Costs—Liability of legal practitioner for-Circumstances justifying order against pleader.

There is no justification, for the assumption that S. 35, C. P. Code, is not intended to cover any case where the act of a legal practitioner comes within the term 'mis-conduct' within the meaning of the Legal Practitioners and the Bar Councils Acts. A pleader may therefore be liable for costs of the proceedings taken by him in cases where the costs occasioned to his client are the direct result of the initiation and prosecution of the proceedings by him. Where an application for review purports to be made by a pleader personally on his own behalf and not on behalf of his client the minor or his gauardian, on grounds wholly untenable, there is no justification for his offlying for frobete- Contest by widow-Putting action and he can be asked to pay the costs per

sonally. (Ghulam Hasan and Madeley, II.) SRIPAL SINGH v. MAHARAJ SINGH. 199 I.C. 385 = 14 R.O. 486=1942 A.W.R. (CC) 65=1942 O.A. 43=1942 A.L.W. 73=1942 O.W.N. 68=A. I.R. 1942 Oudh 279.

-S. 35—Costs—Non-payment of dues to plaintiff owing to incorrect thasil report—If a ground for withholding costs from successful plaintiff.

Even though a defendant might have been misled by a thasil report which had resulted in the non-payment to plaintiff, his dues, that is no reason why a successful plaintiff should be debarred from having his costs of the litigation. (Sathe, S.M. and Ross, A.M.) Mohd. Raza v. Special Manager, Court of Wards. Allahabad. 1943 A.W.R. (Rev.) 92 (2)=1943 R.D. 182.

-8.35—Costs not following the result— sence of notice prior to suit, if a sufficient reason.

The mere fact that a successful plaintiff did not issue notice to the defendant prior to suit is no ground for not following the rule that costs should follow the result when the suit has been contested and it is not suggested that no costs would have been incurred if notice had been issued. (Allsop and Verma, JJ) ALLAH DIYA v. Sona Devi. I.L.R (1942) All. 745=204 I.C. 133=15 R.A. 310=1942 A.L.J. 443=1942 A.W. R. (H.C.) 218=1942 A.L.W. 329=A.I.R. 1942 All. 331.

-S. 35-Costs-Particular item-Discretion of court to allow or not.

The discretion of the Court under S. 35 of the C. P. Code extends not only to the question which party should bear the costs of a suit or proceeding or in what proportion but also in many instances to the question whether a particular item should be allowed as costs of a party and, if so for what sum. The fact that a subsis-tence allowance claimed was a paltry item is no ground for disallowing it. (Manchar Lall and Beevor, JJ.) KAMESHWAR SINGH v. NEBITAL MISTRI. 219 I.C. 510=11 B.R. 439=A.I R. 1945 Pat. 184.

-S. 35—Costs—Pleader's fees—Return of plaint on ground of improper valuation—Basis for computing pleader's fee.

Where the plaint in a suit valued at Rs. 1280 is ordered to be returned on the ground that the valuation of the suit was not properly made and that the correct valuation ought to have been Rs. 2396, the defendants are not entitled to claim pleader's fee on the correct amount of valuation. They are entitled to costs only on Rs. 1280. (Agarwal, I.) KALLU MAL v. MUNICIPAL BOARD. NAVABGANJ. 200 I C. 608=15 R.O 25=1942 O. W.N. 335=1942 A W.R. (C.C.) 220=1942 O.A. 241=A I R. 1942 Oudh 392.

-S. 35-Costs-Power of Court to award costs against stranger to litigation-Relief against real plaintiff in suit by benamidar.

The Court may, in exceptional cases, award costs even against a stranger to the litigation. If a party to damages-Decree for smaller amount than claimed-

C. P. CODE (1908), S. 35.

a litigation desires costs to be awarded against a stranger to that litigation, he must, at an appropriate stage of the litigation, raise the point before the Court, so that the Court may, if it thinks proper to do so, implead the stranger as a party to the litigation and give him an opportunity of being heard. Instances of suits by a benamidar or by a mere puppet in the hands of a speculator are not wanting. It is open to a defendant in such a suit to say that the real plaintiff is a person other than the person in whose name the suit has been filed, and to ask the Court to implead the real plaintiff and award him costs as against the real plaintiff but, if the defendant in such a suit does not adopt such a course, he cannot, after the termination of litigation, raise the question of costs by a separate suit.

Per Dar, J:-If it is intended to make any person other than the nominal party responsible for costs this should be done before or at the time of the passing of the decree for costs and not in the execution of decree. (Iqbal Ahmad, C.J. Ganga Nath and Dar. JJ.) CHANDRA SHEKHAR v. MANOHAR LAL, IL.R. (1942) All. 832 = 201 I C. 695 = 15 R.A. 79 = 1942 A. L.W. 478 = 1942 A.W.R. (H.C) 241 = 1942 A.L.J. 367 = A.I.R. 1942 All. 233 (F.B.).

-S. 35 and Stamp Act, S. 29 (c)—Costs—Stamp duty and penalty paid by plaintiff on rent note executed by defendant-Whether can be awarded as costs against latter.

Under S. 29 (c) of the Stamp Act, in the absence of an agreement to the contrary the lessee is responsible for providing the expense of the proper stamp. Where, therefore, in a suit for rent based upon an unstamped rent note executed by the defendant, the plaintiff is ordered to pay the Stamp duty and penalty the amount thus realised may be awarded as costs against the defendant. (Puranik, J.) LOKMAT MOTOR SERVICE 2. NEW LORMAT LODGING. 1945 N.L.J. 180 = A.I. R. 1945 Nag. 178.

-S. 35—Costs—Suit for accounts—Order for costs ogainst the defendant-When can be made even in the priliminary decree.

Where the defendants denied the very right of plaintiff to sue as an assignee asserted that the suit was barred by limitation and denied liability to account at all, they can be properly held liable for the costs of the litigation even at a preliminary stage. If they had taken the plea that they had no objection if an account was taken, then the matter would have been different and the determination of the question of costs reserved for the final decree stage. (Harries, C.J. and Manchar Lall, J.) DEVI v. ANPURNA DAI. 22 Pat. 114 = 206 I.C. 126 =15 R.P. 309=9 B.R. 260=A.I.R. 1943 Pat. 218.

-S. 35—Costs—Unnecessary litigation due to not raising plea in proper form-Ground for depriving successful party of his costs.

Where owing to the defendant not raising his plea in a proper form unnecessary litigation had to be carried up to the High Court, he was disallowed his costs in the first and second appellate Courts though he succeeded in the second appeal. (Niyogi, J.) JAMNA PRASAD v. SINGHAI BANSIDHAR. 1941 N.L J. 643.

—— S. 35—Discretionary matter. MAHRANA v. MAHRAJ NARAIN. [See Q.D. 1936—'40 Vol. I, Col. 3323] 1941 A.W.R. (Rev.) 62 (2)=1941 O.A. (Supp.) 49 (2).

-S. 35-Discretion - Defamation - Suit for

Q, D, I-51

Full costs—Power of Court to award. VENKAYYA PANTULU v. SURYA PRAK-SAMMA. [See Q.D. 1936—'40 Vol. I, Col. 2340.] I.L B. (1941) Mad. 255=191 I.C. 600=13 R M. 199=A I R. 1940 Mad. 879.

A plea of limitation is in no sense an unjust plea, and because a defendant succeeds on a plea of limitation, that is no ground why he should not get his costs. (King and Kunhi Raman, Jf.) RAJABAPAYVA v. BASAVAYVA. 205 I.C 326=15 R.M 848=55 L.W. 644 (2)=1942 M.W.N. 820 (2)=A.I.R. 1942 Mad. 713=(1942) 2 M.L.J. 515.

——S. 35—Discretion—Exercise of — Principles— Disallowance of subsistence allowance—Valid grounds— Smallness of amount. See PATNA HIGH COURT GENERAL RULES AND ORDERS (1916), Vol. I, CH. I, RULE 31. 23 Pat. 927.

Where a discretion under S. 35 C. P. Code has properly been exercised by the trial Court the appellate Court and the High Court in revision will not interfere with that discretion. The discretion given is however, a judicial discretion to be exercised in accordance with definite principles. Where however a question of principle is involved the High Court will interfere and review the decision of the taxing officer. (Manchar Lall and Beever, 11) KAMESHWAR SINGH v NERILAL MISTRI. 219 I.C. 510=11 B.R. 439=A.I.R. 1945 Pat 184.

—S. 35—Discretion—Mortgage suit—Purchaser of mortgaged property undertaking with mortgagor to pay purchase-money to mortgagee but failing to do so and occasioning suit—Order directing him to pay costs of suit—If justified—Reversal by appellate Court—Propriety. RAGHAVACHARIAR v. PONNUSWAMI MUDALI. [See Q.D. 1936—'40 Vol. I, Col. 2342.] 191 I.C. 805—13 R.M. 510.

S. 35—Discretion of Court—Order for costs of defendant against plaint: If in suit by minor by next friend—Liability of next friend—If can be implied—Absence of express direction for recovery from next friend—Construction of decree—Executing Court—Powers of—O. 32, R. 8.

Where a suit brought by a minor represented by his next friend is dismissed, the next friend of the minor plaintiff is ordinarily liable to pay the costs of the successful defendant; but there must be an express direction, and in the absence of clear expression in the decree of the Court's intention to enforce such liability, the matter cannot be left to the interpretation of the executing Court, which must deal with the decree as it finds it, i.e., in its ordinary meaning, without importing anything which is not to be found in the language. Where the decree merely mentions that the successful defendant's costs are to be recovered from the plaintiff the costs would not be recoverable from the next friend unless it is expressly stated that he would be liable and only the minor and his estate can be proceeded against in execution under S. 35, C. P. Code. The Court has the discretion to determine and order by whom and to what extent the costs of a party should be paid. The dircretion must be a judicial discretion, and an order as to costs he can never be automatic; i.e., it can never be said of such an order that no other kind of order could possibly have been made. The executing Court must

C. P. CODE (1908), S. 35.

deal with the decree as it finds it, and cannot assume, in the absence of any indication, that the Court must have so clearly intended to impose the liability for costs on the next friend of a minor plaintiff that it has no option but to give effect to such intention. (W..dia and Scn., J/) VINAYAKRAO PANDURANGRAO v. SHARANAPA RAMANNA. I.L.R. (1944) Bom. 12=212 I.C. 601=45 Bom. L. B. 1029=A.I.R. 1944 Bom. 100.

S 35—Discretion of lower Courts—Interference by Judicial Commissioner's Court—Practice. Where the Courts below have rightly exercised their

discretion in the matter of awarding costs the Judicial Commissioner's Court will not normally interfere. (Mir. Ahmad J.C. and Sovft, J.) KHADI KHAN v. MURAD KHAN. 200 I.C. 732=15 R.Pesh. 11=A.I.R. 1942 Pesh. 39.

S. 35—Mistake of Court—Correction—Order for costs—If justified. BADRI PRASAD v. AMBIKA PRASAD. [See Q.D. 1936—'40 Vol. I. Col. 3323.] 16 Luck. 294 = 13 R.O 349 = 192 I.C. 332=1941 0. L.B. 115—A.I.B. 1941 Oudh 91.

——S. 35 and O. 7 R. 10—Plaint presented in wrong Court—Order returning plaint—Condition that plaintiff should pay costs of defendant before presenting to proper Court—Jurisdiction to imfose.

The Court, when passing an order under O. 7, R 10, C. P. Code, returning a plaint for presentation to the proper Court, has no jurisdiction to impose a condition that the plaintiff whose plaint is returned shall, before presenting it to that Court, pay the costs of the defendant as a condition precedent. Though under S. 35, C P. Code, the fact that a Court has no jurisdiction to try a suit is no bar the exercise of the power to award costs, there is no power to make payment of cost a condition precedent to the filing of the suit in the proper Court. (Somayya, J.) Kesavalu Naidu v. Venkatarama Chettiar 201 I.C. 119=15 R M. 221=1941 M.W N. 817=54 L.W. 315=A.I.R. 1942 Mad. 35=(1941) 2 M.L.J. 450.

S. 35—Plaint presented wrongly in Small Cause Court—Order returning for presentation to proper Court—Direction that court trying suit will make order as to costs—Propriety.

Where a plaint is wrongly presented in the Presidency Small Cause Court, Madras, the Judge of that Court in ordering the plaint to be returned for presentation to the proper Court, has no power to direct the latter Court to pass orders as regards the costs of the suit incurred in the Small Cause Court. The proper order to make would be to order the plaintiff to pay the costs of the defendant, and the Judge of the Small Cause Court should himself make that order. (Mockett J.) GOPALAKRISHNAVYA v. SUBBA NAIDU. 1945 M. W.N. 303 = 58 L.W. 307 = A.I.R. 1945 Mad. 168 = (1945) 1 M.L.J. 161.

Ss. 35 and 35-A—Power of Court to award costs by way of penalty—Limits—Order to pay costs to other side before admission of certain documents—Legality.

Costs awarded by Court as between parties are meant to compensate the party receiving them for the expenses incurred or to be incurred by it except in the case of special costs awarded under S. 35-A of the C. P. Code. Apart from action under this section no costs can be

C. P. CODE (1908), S. 36.

awarded by way of penalty or fine. Hence an order directing the payment of a certain amount to the opposite party before the admission of certain documents ready with the party seeking to put them in, is irregular. (Sathe, S.M. and Ross, A.M.) RAM SANCHI v PARAG NARAIN. 1944 A.W.B. (Rev.) 294=1944 R.D. 548.

\_\_\_\_\_S.35—Rent suit—Misstatement of area of holding by landlord.

In cases where a landlord deliberately misstates the area of the holding in respect of which he claims rent, it is only fair that he should bear the costs of the litigation. But where the landlord has purchased the interest of a cosharer after partition and in his plaint he describes the area of the holding as it is described in the partition paper, the accuracy of which he has no reason to doubt, it cannot be said that it is a case in which the landlord deliberately misstates the area of the holding, and he should not therefore be made to bear the costs of the suit. (Agarwala, J.) MAHAFEO DAS v. TRIBENI PRASON SINGH. 192 I.C. 48=13 R.P. 394=7 B.R. 308=A.I.R. 1941 Pat. 404.

——S. 35—Suit instituted by some of defendants in name of another as hlaintiff—Suit unsuccessful—Proper order as to costs.

Where some of the defendants in substance and in fact are the plaintiffs and have used the name of the wife of one of them as plaintiff for the institution of the suit against themselves and the other defendants, they and not the nominal plaintiff should be made liable for costs in the event of the suit being unsuccessful. (Gentle, J.) SREE SREE SREEDHAR JEW v. KANTA MOHAN. 50 C.W.N. 14.

S. 35(2)—Compliance with—Duty of Court.

A mere reference to the circumstance of the case with no further detail mentioned is not a sufficient compliance with the provisions of S 35(2). (King and Kunhi Raman, II.) RAJABAPAYAA v. BASAVAYYA. 205 I.C. 326=15 R M 348=55 L W 644 (2)=1942 M.W.N. 820 (2)=A.I.R. 1942 Mad. 713=(1942) 2 M.L.J. 515.

——S. 35-A — Applicability — Next friend of minor plaintiff — Liability for compensatory costs.

S. 35-A C. P. Code, must be held to apply to a next friend of a minor plaintiff as well as to a plaintiff or a defendant. S. 35-A is clearly not intended to be read alone. It is as it were, an an appendix to S. 35 and is intended to deal with some exceptional cases for which the exercise of the ordinary discretion of the Court under S. 35 would not afford a sufficient compensation. The legislature must be held to have intended, in enacting S. 35 A to make the next friend of a minor plaintiff liable for compensatory costs under S. 35 A, as well as for ordinary costs under S. 35. (Horwill, J.) MEENAKHH V. AYVAMPERUMAL UDAYAN. 56 L.W 615=1943 M.W.N 644=211 I.C. 424=16 R.M. 525=A,I.R. 1944 Mad. 81=(1943) 2 M.L.J. 430.

S. 35-A—Applicability—"Party by whom such claim or defence has been put forward"—Defendant instigating suit and supporting plaintiff, in suit—Dismissal of suit as false and vexatious—Award of exemplary costs—Liability of defendant behind suit.

S. 35-A, C.P. Code is sufficiently wide to bring within it not only a party who actually puts forward a false claim or defence, but also a person who instigates and supports the party who puts forward such claim or defence. A defendant who is behind the suit filed by the plaintiff and who supports the plaintiff comes under the section, and when the suit is dismissed as false and vexatious the Court has power to award exemplary costs not only against the plaintiff but also against the defendant who was behind the suit and instigated it and was in fact the real actor. Leach, C.J. and Shahabaddin, J.) Subbayya 7. Ramachandrappa. I.L.R. (1945) Mad. 407=57 L.W. 594=1944 M.W.N. 698=A.I.R. 1945 Mad. 84=(1944) 2 M.L.J. 369.

----S. 35-A—Compensatory costs—Award of—Conditions—Powers and duty of Court.

In the absence of an objection raised by the plaintiff that the defence was false or vexatious to the knowledge of the defendant, the Court has no power to award compensatory cost under S. 35-A C. P. Code. An order under S. 35-A has to be passed after recording reasons for holding the defence to be false or vexatious. Where the Court merely says, "having regard to the contentions raised, I think that this is a case in which the plaintiff is entitled to some compensation," that is not a sufficient recording of the of the reasons for holding the defence to be false or vexatious to the knowledge of the defendant. (Wadsworth, I) SWARNAM IVFR v. VEERAGU AMMAL. 210 I C. 53=56 LW. 208.=1943 M.W N 66=16 R.M. 355=A.I.R. 1943 Mad. 286 = (1943)1 M.L. J. 41.

——S. 35-A—Specific issue as to compensatory costs—If necessary—Absence — Interference in revision, if justified.

The framing of a specific issue as to compensatory costs is not an essential condition under S. 35-A. C. P. Code. The non-framing of such an issue is not therefore a material irregularity meriting interference in revision. (Harper, S. M. and Sathe. f M) MAHOMED ZEA v. JANGI. 1941 R.D. 383 (2)=1941 A.W.R. (Rev.) 474=1941 O.A. (Supp.) 433.

—S. 36—Applicability—Scheme for charitable trust—Clause empowering District Judge to remove trustee on his own motion or on application—District Judge acting under—If Court or persona designata—Order for costs by—Executability.

Where a clause in a scheme for regulating and managing a charitable institution empowers a District Judge, of his own motion or upon the application or representation of any person interested in the institution, to remove from the management any trustee who may be found to be unfit or incompetent or negligent, it must be held that such power is given to him as persona designata and not in a judicial capacity. He can act,

under the scheme only as a persona designata and not as a Court, and it is therefore not competent to him to make an order for costs capable of execution under the C.P. Code. (Beaument C.J. and Sen. J.) LAXMAN RAGHUNATH v. MAHADEO 199 I.C. 647=14 R B. 374=44 Bom. L.R. 11=A.I.R. 1942 Bom. 97.

——Ss. 37 and 38—"Court which has ceased to exist or to have jurisdiction to execute it"—Meoning of—Transfer of jurisdiction after decree—Execution—Jurisdiction of new Court to entertain application to execute decree.

S. 37, C. P. Code, does not take away from the Court which passed the decree the power to execute it which is conferred by S. 38 The power of execution is given to a Court which could have passed the decree at the time when the execution application is made if the Court which passed the decree has ceased to exist or has ceased to have jurisdiction to execute it. Where a Court which actually passed the decree has ceased to exercise territorial jurisdiction over lands once within its jurisdiction but transferred to the jurisdiction of another Court, the former Court must be regarded as a Court "which has ceased to exist or to have jurisdiction to execute it" within the meaning of S. 37 (b), C. P. Code, and the latter Court has jurisdiction to execute the decree in respect of those lands and can entertain the execution application itself. It is not necessary that the application for execution should be presented to the former Court and transferred by it to the latter. Where there is a transfer of territorial jurisdiction, jurisdiction is not limited only to future proceedings in the nature of suits but also include future proceedings in the nature of execution proceedings. S. 37 (b) specifically relates to execution proceedings. (Davis, C. J. and O'Sullivan, J)
NARAINDAS v. SAINDAD. I.L.R (1944) Kar. 33
=220 I.C. 126=A.I.R. 1944 Sind 173.

S. 37—"Include" — Interpretation—Original Court, if excluded.

The word "includes" as used in S. 37, C. P. Code, though it extends the meaning of the expression "Court which passed the decree" in one sense, does in another sense restrict it. The effect of the words is to exclude, under the circumstances specified in Cls (a) and (b) of the section, the original Court and substitute for it another Court which for purposes of the section is to be regarded as the only Court which passed the decree. Thus when a decree is passed in exercise of appellate jurisdiction as contemplated by Cl. (a) of S. 37, it cannot be said that the word "include" would not exclude the appellate Court which passed the decree, and that both the original and the appellate Courts are proper Courts for execution to either of which an application for execution of the decree could be made. Similarly, to bring a case within the purview of Cl. (b) of that section it is essential that the Court which originally passed the decree has ceased to exist or to have jurisdiction to execute it, and then only can the other Court, which would be entitled to try the suit if it was then instituted, be regarded as the Court which passed the decree. The other Court is substitut-

C. P. CODE (1908), S. 37 (b).

ed for and not added to the original Court. If the original Court has ceased to exist or has ceased to have jurisdiction to execute the decree, an application for execution cannot be made to that Court. (Mukheriez and Bismar, J/) MASRAB KHAN v. DEBNATH MALL. I.L.R. (1942) 1 Cal. 289=201 I.C. 234=15 R.C. 144=46 C.W.N. 141=75 C.L.J. 255=A I.R. 1942 Cal. 321.

— Ss. 37, 38 & 150-Mortgage decree—Subsequent order under S. 13(2) of Bengal, Agra & Assam Civil Courts Act assigning area in which mortgaged property was situate to another Court -Application for execution—Proper forum.

A Court which passes a mortgage decree does not cease to have jurisdiction to execute that decree merely by reason of a subsequent order of a District Judge under S. 13 (2) of the Bengal, Agra and Assam Civil Courts Act assigning the particular area in which the mortgaged property, is situate to another Court in the same locality. Such an order is only an arrangement for distribution of civil business and cannot in any way curtail the jurisdiction of the Court which passed the decree over the entire area as determined by the Local Govt. under S 13 (1) of the Civil Courts Act. The Court to which the particular area is assigned has no jurisdiction to entertain an application for execution of the decree as its competency is affected by S. 38, C.P. Code, which lays down that a decree could be executed only by the Court which passed it or the Court to which it was sent for execution. The decree holder cannot invoke the provisions of S. 150, C. P. Code, in his favour, as an assignment of business under S. 13 (2) of the Civil Courts Act is not a transfer of business within the meaning of S. 150, C. P. Code. (Mukheriea and Risseas. 11) MASRAB KHAN v. DEBNATH MALI. I.L.R. (1942) 1 Cal. 289=201 I C 234=15 R.C. 144=46 C.W N. 141=75 C.L.J. 255=A.I.R. 1942 Cal. 321.

——Ss. 37 and 39—Order for costs passed in refusing leave to appeal to Privy Council—When may be executed by trial Court—Such order sent to trial Court by High Court for execution—Trial Court cannot transfer it to another Court for execution.

An order for costs passed by the High Court in refusing leave to appeal to the Privy Council, is not passed by that Court in appeal but in a special jurisdiction. The trial Court has, therefore, no jurisdiction to execute that order unless it is transferred to it by the High Court for execution. When it is so transferred, the trial Court may execute it, but cannot transfer it again to another Court for execution. (Henderson, J.) Durga Charan Chatterer v. Binodini Debi. 48 C.W.N. 535=A.I.R. 1945 Cal. 301 (1).

S. 37 (b)—Applicability—Decree prior to Government of India Act of 1935 by Madras Court—Execution closed before 1935—Subsequent transfer of district to Orissa Province—Area relating to suit remaining in Madras—Court passing decree ceasing to exist as Madras Court—Jurisdiction to execute decree.

On 5th December, 1933, respondents obtained a decree against the appellant in the Court of the District Munsif of Berhampore in Ganjam Dis-

C. P. CODE (1908), S. 37 (b).

trict within the Presidency of Madras. Execution was taken out but the proceedings were closed on 23rd July, 1934. Consequent on the coming into force of S 289 of the Government of India Act of 1935 on 1st April, 1936, Ganjam District was transferred from Madras to Orissa Province but the area to which the suit related remained in Madras within the jurisdiction of the Court of the District Munsif of Somepet. In 1939 the respondent commenced execution proceedings in the Court of Berhampore, there having been intermediate proceedings in the same Court in 1937 as well. The judgment-debtor (appellant) pleaded that the Berhampore Court had no jurisdiction.

Held, (1) that on the transfer of Ganjam District from Madras to Orissa, the Berhampore Court ceased to exist as a Court constituted under the Madras Civil Courts Act, but would be deemed as constituted under the Bengal Civil Courts Act; (2) that the Berhampore Court had lost its jurisdiction to execute the decree which was passed by it when it was a Court within Madras as there was no execution application pending on 1st April, 1936; (3) that the considerations applicable to cases of transfers of an area from one district to another in the same province would not apply to a transfer of a district from one province to another under the Government of India Act; (4) that S. 37 (b) of the C. P. Code would apply to the case, and the decree-holder should proceed as provided by that section. (Manohar Lall and Brough, J.) RAMAMURTHY V. GAVARAMMA. 211 I.C. 91=16 R. P. 193=10 B.R. 329=9 Cut. L.T. 77=A.I.R. 1943 Pat. 423.

-S. 37 (b)-' Jurisdiction to execute it'-If includes competency to effectively execute decree.

The expression "jurisdiction to execute it" as used in S. 37 (b) C. P. Code, does mean and include the competency of the Court to entertain an application for execution of the decree. Even if in the circumstances of a particular case a Court cannot effectively execute the decree, that would not mean that it has ceased to have jurisdiction to execute it. It still remains a competent Court for purposes of execution, though the decree-holder might have to apply for transmission of the decree to another Court for the purpose of obtaining the relief which he wants. (Mukherlea, and Bis vas, J.). MASRAB KHAN v. DEBNATH MALI. I.L.R. (1942) 1 Cal. 289=201 I.C. 234=15 R.C. 144=46 C.W.N. 141=75 C.L.J. 255=A.I.R. 1942 Cal. 321.

\_\_\_\_\_S. 37 (b)—Scope—If limited or curtailed by S. 15, See C. P. Code. Ss. 15, 37 and 92. 46 Bom. L.R. 653.

——S. 38—Court passing decree incompetent to execute—If competent to entertain execution application.

Under S. 38, C. P. Code, a Court which passes the decree is competent to entertain an execution application even though it may be incompetent to execute the same owing to the fact that the property to be attached or the judgment-debtor to be arrested is outside the Court's jurisdiction. (Shirreff, J. M. and Sathe, A. M.) MATHURA PRASAD v. JIA LAL. 141 O.A. (Supp.) 789= (1943) 2 M.L.J. 452

O P. CODE (1908), S. 39 (1) (a).

1941 A.W.R. (Rev.) 91=1941 R.D, 946=1941 A.L.J. (Supp.) 136.

An executing Court has jurisdiction to order the sale of mortgaged property in execution of a mortgage decree even though the property is situated beyond the limits of its jurisdiction, but it will be for that court to decide after hearing the parties, whether on the score of convenience, he should or should not exercise this jurisdiction. (Sale, J.) GOKAL CHAND v. KISHORI LAL. 200 I.G. 425=14 R.L. 481=44 P.L.R. 125=A.I.R. 1942 Lah. 123.

If two Subordinate Judges have the same local juris\* diction assigned to them, it is certainly competent for the District Judge to distribute the business among the two officers, but that would not empower the District Judge to make any order in contravention of S. 38, C. P. Code, and direct that the decree passed by one of the officers could be executed by the other. (Mukherjea and Biswas, J.).) ATAMBA SINGH v. GOPAL CHANDRA. 73 C.L.J. 351.

Transfer proceedings are of a ministerial character and it is not necessary to issue a notice to the jndgment debtor in those proceedings and accordingly the omission to give such notice does not vitiate the proceedings. (Almond, J.C. and Mir Ahmad, J.) MT. VASHNO DITTI v. MT. RAMESHRO. 209 I.C. 611=A.I.R. 1945 Pesh. 87=16 R.P. 42.

——Ss. 39 and 42—Small Cause Court decree— Transfer to regular side for execution against immovable property—Legality.

Where the same Judge holds the office both of the Judge, Small Causes, and judge on the regular side, he can, on an application of the decree-holder or otherwise, transfer a Small Cause Court decree to the regular side for the purpose of obtaining attachment and sale of the immovable property. (Young, C. J. and Blacker, J.) JALLA MALL JAWAHAR MAL z. MOTIA. I.L.R. (1941) Lah. 670=198 I.C. 446=14 R.L. 329=43 P.L.R. 1=A.I.R. 1941 Lah. 109.

——S. 39 (1) (a)—Discretion of Court—Refusal te transfer decree on ground that judgment debtor not liable to arrest—Propriety.

The fact that the judgment-debtor is not liable to arrest in execution of the decree is not in itself a good reason for refusing to make an order for transmission of the decree to another Court, when it is found that the judgment-debtor resides within the jurisdiction of the latter Court. The Court has a discretion given to it and it must exercise it after taking into account the relevant circumstances. (Krishnaswami Ayyangar and Kunhi Raman, J.) RAMANATHAN CHETTIAR V. KASI CHETTIAR. 211 I.C. 518=16 B.M. 546=56 L. W. 635=(1943) M.W.N. 642=A.I.R. 1944 Mad. 73—(1943) 2 M.I.J. 452

# C. P. CODE (1908), S. 39 (2).

-S. 39 (2) -Scope-Transfer of decree for execution by one subordinate Court to another--Propriety.

S. 39 (2) C. P. Code contemplates a transfer by a District Court of a decree of a court subordinate itself. One Subordinate Court is not subordinate to another so as to empower one to transfer a decree for execution to another of its own motion. (Davis, C.J. and O'Sullivan, J.) NARAINDAS U. SAINDAD. I.L.R. (1944) Kar. 33=220 I.C. 126=A.I.E. 1944 Sind. 173.

-S. 42-Mortgage decree-Transfer for execution to another Court-Power of latter to execute against property beyond its territorial jurisdiction.

A Court to which a mortgage decree is transferred for execution has the power to execute it against all the property which is the subject of the decree, even though none of it might lie within its territorial jurisdiction. It has under S. 42, C. P. Code, the same powers as the Court which passed the decree. (Horwill, J.) SEETHA-RAMAYYA v. SIVARAMAKRISHNA RAO. 216 I C. 316 =17 R.M. 221=56 L.W. 605=1943 M.W.N. 650= A.I.R. 1944 Mad. 145=(1943) 2 M.L J. 536.

-S. 42-Mortgage decree-Transfer for execution to another Court - Power of latter to sell property outside its jurisdiction.

There is nothing in S. 42 or in any part of the C.P. Code which restricts the mode of execution or the power of the Court to which a decree has been transferred for execution. Where therefore a mortgage decree has been transferred to a Court for execution, it can sell the properties lying outside the boundaries of its jurisdiction as well as those lying within them, (Leach. C. J. and Shahabuddin, J.) SIVARAMAKRISHNA RAO v. SEETHARAMAYVA. I.L.B. (1945) Mad. 257=57 L. W. 344 = 1944 N.W.N. 380 = A.I.R. 1944 Mad. 446 =(1944) 2 M.L.J. 2.

-S. 42-Power of executing Court-Grant of instalments.

Under S. 42, C. P. Code the Court executing the decree sent to it has the same powers in executing such decree as if it had been passed by it self. But this does not clothe the executing Court with the power to vary or alter the decree by directing payment of the decretal amount by instalments. (Grille, C. J. Niyogi and Sen, J.) BILIMORIA v. CENTRAL BANK OF INDIA, LTD. I.L.B. (1944) Nag. 1=214 I.C. 130=17 R.N. 27= 1943 N.L.J. 596 = A.I.R. 1945 Nag. 340 (F.B.).

-S. 42—Scope and effect—Small Cause Court decree-Transfer for execution to regular side of another Court-Orders in execution-Appealability-Revision-Competency.

Where a decree of a Small Cause Court is transferred for execution to the regular side of another court and executed the orders passed in the execution of the decree by such Court are appealable and no revision under S. 20 of the Provincial Small Cause Courts Act is competent. (Chatterii, J.) ANANTA SAHU v. BARAJU SAHU. 197. I.C. 824=14 R. F. 370=8B.R. 306=7 Cut.L.T. 33=22 P.L.T. 819 = A.I.R. 1941 Pat. 624.

-S. 42 and Provincial Small Cause Courts Act, S. 34—Scope and object of S. 34, Small Cause Courts Act—Decree of Small Cause Court -Execution against immovable property.

S. 34 of Provincial Small Cause Courts Act contemplates as legal, the transfer of an execution application by a Small Cause Court's Judge acting in that capacity to a Court of ordinary civil jurisdiction also presided

C. P. CODE (1908), S. 45.

of a subordinate judge. Small Cause Courts are no doubt to execute decrees against movable property, but once a decree has been passed by the Small Cause Court judge, it is of the same relative value as any other money decree passed by any other Court of competent jurisdiction. (Davies.) NANUNDA v. MAHI PAL. 1940 A.M.L.J. 133.

-S. 42-Scope-Decree of one Court sent to another Court for execution-Limitation-If depends on character of executing Court.

S. 42, C. P. Code, deals simply with the manner of execution and leaves the matter of limitation to be governed by Limitation Act. Where a decree passed by one Court is sent for execution to another Court, the period of limitation applicable to the execution of that decree concerned depends upon the character of the Court which passed the decree and not upon the character of the Court executing it. (Dravle and Chatterji, //) KANGANADHAN v. PONNACHARAMMA. 197 I. C. 627=14 R.P. 322=7 Cut.L.T. 45=8 B.R. 256= 23 Pat.L.T. 87=A.I.R. 1942 Pat. 128.

Court-Jurisdiction--S. 42—Transferee How conferred-Extent of.

The same territorial jurisdiction which the transferring Court had is transferred to the trensferee Court by the very order of transfer. (Thomas, C.J. and Agarwal, J.) LAL BHAGWAT SINGH v. HARI KISHEN DAS. 14 R.O. 268=17 Luck. 249=197 I.C. 167= 1941 O.A. 865=1941 A.W.R. (Rev.) 949=1941 O, W.N 1138=A.I.R. 1942 Oudh. 1.

-S. 44-A (3)—Decree not given on merits— Burden of proof.

It is quite clear from the provisions of S. 44-A (3) C. P. Code that the burden is upon the judgment-debtor to establish that the decree falls within exception (b) of S. 13, namely, that it has not been given on the merits of the case. If the judgment debtor alleges that the matter was adjudicated upon without evidence being given by the plaintiff it is for him to prove it. There is a presumption under S. 114 of the Evidence Act that judicial acts have been regularly performed and it is for the judgment debtor to rebut that presumption. (Derbyshire, C. J. and Gentle, J.) SHEIKH ABDUL RAHIM v. MAHOMEDDIN. 205 I.C. 85 = 15 R.C. 579 =75 C.L.J. 271=A.I.R. 1943 Cal. 42.

-S.45-Court of Political Agent of Quetta-If one established or continued by Governor-General-in-Council.

Application to Judicial Commissioner's Court, Sind for the transfer of a decree for execution to the Court of the Political Agent, Quetta which is one established by the Governor General in Council is a valid applica-tion and can constitute a "step in aid" of execution for the purposes of limitation. (Almond J. C, and Mir Ahmad. J.) FORBES FORBES CAMPBELL & CO. LTD. v. FAZAL KARIM. 201 I.C. 610=15 R. Pesh. 26=5 F.L.J. (H.C.) 159=A.I.R. 1942 Pesh. 49. -- S. 45-Khan of Qalat-If "foreign Prince"-Quetta, if part of his state-Transfer of decree to Court in the state.

The territories of the Khan of qalat are situated within the borders of Baluchistan and there can be no doubt whataver that he is a foreign or Indian prince within the meaning of S. 311 Government of India Act Quetta is part of his state and a British Indian Court for instance in Sind can transfer a decree for execution over by himself, He could also transfer it to a Court | CO., LTD, v. FAZL KARIM. 201 I.C. 610=15 R.

Pesh. 26=5 F.L.J. (H.C.) 159=A.I.R. 1942 Pesh. 49.

S. 46—Applicability—Attachment before judgment of property outside jurisdiction. See C.P. CODE, (1908), SS. 136 AND 40. 1941 O.W.N. 550.

S.47—Adjustment of decree by subsquent agreement—Power of parties—Limits to powers of the executing Court with reference to such agreement.

The C. P. Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree. Where it appears to a Court acting under S. 47 C. P. Code that the true effect of an agreement between parties to a decree is to discharge the decree forthwith in consideration of certain promises by the debtor then there would be no occasion for the Court to enforce it in execution proceedings and the creditor would have to bring a separate suit upon the contract. But where it is clear that the agreement in a adjustment of the original decree is an agreement intenced to govern the liability of the debiors under the decree and to have merely an effect upon the manner of its enforcement and is not an agreement whose effect is to discharge the decree forthwith such an agreement is a matter to the dealt with under S. 47 C. P. Code. (Roberts C. J. and Dunkley, J.) KORBAN BIBI v. V. M R.P. CHETTYAR FIRM. 1941 Rang. L. R. 767=A.I.R. 1942 Rang. 57.

S.47—Appeal — Amounts realised in execution sale and lying in Court—Application in respect of and raising questions as to decree holder's right to obtain more money by way of interest—Order on Appealability.

Where the subject matter of an application in respect of amounts realised by sale in execution of a decree and lying in Court is a question regarding the right of the decree-holder to obtain further sums by way of interest upon his decree amount, the question falls clearly under S. 47 C.P. Code and an order passed on such application is open to appeal. (King and Byers, J.J.) PALAMALAI CHETTIAR v. RAMANATHAN CHETTIAR. 202 I. C. 475=15 R.M. 505=1942 M.W.N. 283=55 L.W. 212=A.I.R. 1942 Mad. 442=(1942) 1 M.L.J. 439.

S. 47—Appeal—Application by auctionpurchaser for delivery—Obstruction by judgmentdebtor—Order dismissing application—Appealability.

No appeal lies from an order dismissing an application for delivery of property by an auction-purchaser of the property at an execution sale due to objection by the judgment-debtor; the dispute between the auction-purchaser and the judgment-debtor, being one between the judgment-debtor and a person claiming through him, does not fall within the scope of S. 47, C.P. Code. (Horwill, J.) Kotayya v. Narayana. 214 I.C. 304=1943 M.W.N. 828=A.I.R. 1944 Mad. 60=(1943) 2 M.L.J. 450.

S. 47—Appeal—Application by judgmentdebtor for dismissal of execution case on full satisfaction in view of Bengal Money-Lenders Act.

An application made by a judgment-debtor to the effect that in view of the provisions of the Bengal Money-Lenders Act it should be held that the decretal amount has been paid off, and an application case be accordingly dismissed on full satisfaction, falls within S. 47, C. P. Code, and an appeal is, therefore, competent from an order rejecting that application. (Henderson, J.)

C.P. CODE (1908), S. 47.

ABDUR RAHIM v. ABDUR ROUF. 200 I.C. 734=15 R.C. 68=46 C.W.N. 179=A.I.R. 1942 Cal. 342 (1).

——S. 47—Appeal—Application by purchaser at mortgage sale for retention of portion of sale proceeds for payment of unpaid taxes—Order thereon.

An order on an application made by a purchaser at a mortgage sale to the effect that a certain sum might be retained by the Court for payment to the Calcutta Corporation which has a demand on the property sold for arrears of taxes, does not come within S. 47, C. P. Code, and as such cannot be challenged by way of appeal. (Ghose and Mukherjea, J.). Satish Chandra Das v. Kamala Bala Devi. 75 C.L.J. 363.

——Ss. 47 and 151—Appeal—Application by supraider for recovery of costs incurred in respect of attached property from decree-holder—Order on—If appealable.

Where on an application by supratdar to recover from the decree-holder the costs incurred by him in bringing the attached property to Court and taking it back from Court, the Court passed an order that they should be recovered from the judgment-debtor and not from the decree-holder.

Held, that whether the order was regarded as falling under S. 145 or S. 144 or S. 47, C. P. Code, all of them would have to be read with S. 151; and that as orders passed under any of these sections were appealable the mere fact that any of the sections were not strictly applicable to the facts of the case did not negative the right of appeal of the supratdar. (Puranik, J.) Sheonandanial v. Gopal Babaji. I.L.R. (1943) Nag. 699=207 I.C. 41=16 R.N. 12=1943 N.L.J. 172=A.I.R. 1943 Nag. 172.

S. 47—Appeal—Consent deeree—Clause providing for payment of sum in lump on default—Application for relief against clause on ground of its being penal—Dismissal—Appeal—Competency—C. P. Code, S. 151—Scope.

Apart from S. 47, C. P. Code, an appeal does not ordinarily lie against an order under S. 151, C. P. Code. S. 151 confers no powers upon the Court; it does not confer a right of appeal. But when an order though ostensibly made under S. 151, is one in execution falling under S. 47, C. Code, there is a right of appeal. The deciding factor is not whether the order was made under S. 151, C. P. Code, but whether it is an order which properly falls under S. 47, C. P. Code and is a decree within the meaning of S. 2 (2), C. P. Code. S. 47 is wide in its terms and covers all questions arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree. A question whether a particular term or clause in a consent decree which is sought to be executed is penal and whether it shall or shall not be enforced in execution, is one which clearly falls under S. 47, C. P. Code, and an appeal therefore lies from an order dismissing appeal therefore lies from an order an application praying for relief against the so

falls under S. 47, C. P. Code, and hence is appealable. (Davis, C.J., and Lobo, J.) Monteiro v. Astridge. I.L.R. (1943) Kar. 245=210 I.C. 397=16 R.S. 141=A.I.R. 1943 Sind 247.

——S. 47—Appeal—Decree against person in personal property—Objection to attachment and sale of property on the ground that he holds it as mutawalli—If falls under S. 47 or O. 21, R. 58—

Appeal-Competency.

Where a judgment-debtor objects to the sale of the attached property on the ground that he holds such property as a mutawalli or trustee and therefore it is not liable to be sold in execution of a decree obtained against him in his personal or individual capacity, S. 47, C. P. Code, applies to the case and the order is appealable. O. 21, R. 58, C. P. Code, does not apply to the case and hence an appeal, and not a separate suit lies. (Davis, C.J. and Weston, J.) Shahban Mohib v. Hemraj Rachavji. I.L.R. (1941) Kar. 474=197 I.C. 884=14 R.S. 125=A.I.R. 1942 Sind 14.

S. 47—Appeal—Dispute between decree-holder and court-auctioneer as to commission—Order—If appealable. (*Tek Chand, I.*) HARDWARI MAL v. GANGA RAM. I.L.R. (1942) Lah. 483=197 I.C. 862=14 R.L. 291=A.I.R. 1941 Lah. 450.

S. 47—Appeal—Execution of charge decree— Order refusing prayer of transferee of portion of charged properties that properties in his possession should

not be sold first.

An appeal lies from an order of the executing Court accepting the contention of the holder of a charge decree that a transferee of a portion of the charged properties subsequent to the decree has no right to say that the properties in his possession should not be sold till the other properties are sold. To the extent of the properties the transferee holds he is a representative of the judgment-debtor, and the question that has been raised and determined by the Court is one which relates to the execution, discharge or satisfaction of the decree within the meaning of S. 47, C. P. Code. (Grille, S.J. and Puramk, J.) NIL-KANTHRAO v. MT. SATYABHAMBAI, I L.R. (1944) Nag. 230=210 I.C. 548=16 R.N. 162=1943 N.L. J. 532=A.I.R. 1944 Nag. 25.

S. 47—Appeal—Execution—Order allowing or disallowing claim or plea but not terminating execution

petition-Appealability.

(Krishnaswamy Ayyangar and Kunhi Raman, JJ. in order of reference).—If a claim or plea is definitely allowed or disallowed, the order is appealable notwithstanding that the execution petition in which it is made is not terminated by it. (Leach, C.J., King and Lakshmana Rao, JJ.) BALASUBRAMANIAM CHETTY v. KOTHANDARAMASWAMI NAYANIM VARU. I.L.R. (1943) Mad. 164—204 I.C. 96—15 R.M. 697—55 L.W. 623—1942 M.W.N. 657—A.I.R. 1942 Mad. 688—(1942) 2 M.L.J. 463 (F.B.).

B. 47—Appeal—Execution petition filed a few days before decree became barred—Dismissal for default —Appeal.

In execution of a decree dated 20-4-1928, and an execution petition was filed on 25-3-1940, praying for attachment of immovable properties,

C. P. CODE (1908), S. 47.

The Court fixed 18-7-1940 for filing sale papers and encumbrance certificate. On the adjourned date the Court made an order in the following terms:—"The judgment debtor, exparte. Sale papers and encumbrance certificate are not filed. Dismissed. No costs. Attachment to cease." An appeal by the decree-holder was dismissed on the ground that no appeal lay.

Held, that the order of dismissal fell under S. 47, C. P. Code and was therefore appealable. (Kunhi Raman, J.) LAKSHMANA KORO V. VISWE SWARA PATHRUDU. 209 I.C. 613=56 L.W. 104=1943 M.W.N. 137=A.I.R. 1943 Mad. 346=(1943) 1 M.L.J. 174.

—S. 47—Appeal—Execution sale and delivery—Application by judgment-debtor for redelivery of part alleged to have been delivered in excess of what was sold—Order on—Appealability. See C. P. Code, Ss. 2 (2) AND 47. (1942) 1 M.L.J. 386.

—S. 47—Appeal—Legal representative of judgment debtor—Objection to attachment—Plea that preperty attached is not assets of deceased but his own property held in individual capacity—Order—Appealability—Separate suit—If necessary.

Where a legal representative of a judgment-debtor objects to the attachment and sale of property on the ground that the property sought to be sold in execution is his own property, held by him in his individual capacity, and is not property coming to him as legal representative of the judgment-debtor and is not assets of the judgment-debtor in his hands, the question falls to be decided under S. 47, C. P. Code and not under O. 21, R. 58, C. P Code. An appeal lies against the order dismissing the objections and no separate suit is necessary. (Davis, C.J. and Tyabji, J.) HARBHAGWANDAS v. RUGHNATH. I.R. (1941) Kar. 211=196 I.C. 447=14 R.S. 63=A.I.R. 1941 Sind 142.

——S. 47—Appeal — Mortgage decree — Execution sale—Purchase by decree-holder—Application for possession—Order on—Appeal.

Where the property of a judgment-debtor is sold in execution of a mortgage decree and purchased by the decree-holder, the question whether the property purchased and sought to be taken possession of by the decree-holder purchaser, is included in the sale certificate is not a question relating to the execution, discharge or satisfaction of the decree falling under S. 47, C. P. Code, and hence no appeal lies from an order on such application by the decree-holder for possession. (Macklin and Lokur, JJ.) SAVLARAM GANGARAM v. VISHWANATH. 47 BOM.L.B. 320=A.I.R. 1945 Bom. 386.

S. 47—Appeal—Objection by judgment-debtor to sale—Plea that property is ghatwall tenure and hence not saleable—Order on—Appealability—O. 21, R. 58—Applicability—Objection raised at late stage on day of sale—Duty of Court to consider—Summary rejection—Propriety of.

An objection to the sale of a property in execution of a decree to the effect that the property is a ghatwali tenure and therefore not saleable, is one which goes to the root of the jurisdiction of the Court to hold the sale, and must be determined before the sale takes place. The mere fact

that the objection is raised by the judgment-debtor at a late stage, i.e., on the date fixed for the sale, is no ground for rejecting it summarily. Such an objection raised by the judgment-debtor does not fall under O. 21, R. 58, C. P. Code. The objection can be raised under S. 47, C. P. Code, and the order passed thereon is appealable. (Chatterji and Meredith, JJ.) KUSUM KUMARI V. HARNATH RAI BIRIJRAJ. 191 I.C. 138=13 R. P. 318=7 B.R. 148=A.I.R. 1941 Pat. 240.

——S. 47—Appeal—Order fixing valuation of property under S. 14, Orissa Money Lenders Act—Appealability. See Bihar Money Lenders Act, S. 14. 7 Cut. L.T. 41.

——Ss. 47 and 2 (2)—Appeal—Order interpreting scheme framed in suit under S. 92—Order finally adjudicating rights of parties under scheme —If decree.

An order interpreting a scheme framed in a suit instituted under S. 92, C. P. Code, or giving directions for carrying out the provisions of the scheme cannot be regarded as an order passed in execution under S. 47 C. P. Code. But an order of a District Judge finally adjudicating the rights of the Mohant and the committee under the scheme framed in the suit which is kept pending and to which they may be regarded as parties, amounts to a decree and is appealable as such. (Mitter and Khandkar. J.) SRIJIB NYAYATIRTHA v. SREEMAT DANDY SWAMI JAGANNATH ASRAM. 199 I.C. 841=14 R.O. 648=73 C.L.J. 532=A.I.B. 1941 Cal. 618.

——Ss. 47 and 151—Appeal—Order of executing court questioning appropriation made by Revenue Court under S. 162, Berar Land Revenue Code, inspite of its prohibitory order—Appeal by Government — Second appeal—Maintainability.

Property belonging to a judgment debtor was sold by the Revenue Court for Rs. 900 for arrears of land revenue amounting to Rs. 18. At the instance of the decree-holder, the executing Court issued a prohibitory order under O. 21, R. 52, C. P. Code, to the Revenue Court for attachment of Rs. 882 out of the sale proceeds. Some time later, when the executing Court asked the Revenue Court to send the amount attached, it was informed that the surplus available to the decree-holder was only Rs. 104 after deducting under S. 162 of the Berar Land Revenue Code other arrears payable to the Crown by the judgment-debtor. The executing Court ordered that the Revenue Court should not appropriate the amount in the manner in which it had done after an attachment had been effected by it. On an appeal by the Provincial Government, the District Judge reversed that order. On second appeal,

Held, that the matter fell under S. 47, read with S. 151, C. P. Code, that the Provincial Government was a representative of the judgment debtor to the extent of the amount appropriated under S. 162 of the Berar Land Revenue Code, and that, therefore, both the appeal before the lower appellate Court and the second appeal in the High Court were maintainable. (Puranik, J.) JAGANNATH v. PROVINCIAL GOVT. C. P. & BERAR. I.L.R. (1945) Nag. 496=1945 N.L.J. 111=A.I.R. 1945 Nag. 150.

An application for attachment of Property under O. 21, R. 42, C. P. Code, is a proceeding in execution

# C. P. CODE (1908), S. 47.

and an order passed thereon must, therefore, be treated as one relating to execution and coming within the purview of S. 47 C, P. Code. The fact that before passing the order the Court entered into an investigation of claims and objections to the proposed attachment cannot affect the character of the order, particularly when the objections were filed not only by stranger objectors but also by the judgment-debtors As such, the order will be open to appeal under S. 47, C. P. Code. (Biswas and Roxburgh, J.) JAGAT TARINI DASSI v. SAROJ RANJAN. I.L.R. (1941) 1 Cal. 363=196 I.C. 247=14 R.C. 195=74 C.L.J 169=45 C.W.N. 323=A.I.R. 1941 Cal. 357.

——S. 47 and O 21, R. 95—Appeal—order on Application under O. 21, R. 95. by decree holder auction-purchaser—If appealable—Separate suit, if barred.

An order passed on an application under O. 21, R. 95, C. P. Code, made by an auction-purchaser, who was a decree-holder, is outside the ambit of S. 47, C. P. Code and is not appealable as such and a separate suit to recover possession of the property sold to him is not barred by the provisions of that section. (Abdul Rashid Ram Lall, and Mahajan, J.) RAM SINGH GOPAL SINGH v. ABDULLAH HABIBULLAH. 217. I G. 147 = 17 R.L. 209 = 46 P.L.Z. 357 = A.I.R. 1944 Lah. 402 (F.B).

It is not every order made in execution of a decree that comes within S. 47 C.P. Code. A refusal to entertain a new plea cannot be regarded as a determination of the rights of parties and such order will not be appealable. (Tek Chand, Bhide and Beckett, J.) BARKAT RAM v. BHAGWAN SINGH. 208 I.C. 89=16 R.L. 29=A.I.R. 1943 Lah. 140 (F.B.).

S. 47—Appeal—order refusing amendment of execution application.

An order rejecting an application to amend an execution application does not amount to a conclusive determination of the interests of the parties and interlocutory orders of such a nature are not subject to appeal. (Davies.) BHAG CHAND v. SHANKAR LAL. 1941 A. M.L.J 78.

S. 47 and O. 21, R. 18.—Appeal—order refusing to allow set-off.

The question the whether decree holder is entitled to a set-off or not of a cross-decree under O. 21, R. 18, C. P. Code is a question relating to execution or satisfaction of a decree within the meaning of S. 47, C. P. Code. An appeal is therefore, maintainable from an order refusing to allow set off. (Harris C. J. and Manohar Lall, J.) SIDHESHWAK PRASAD SING v. SONU LAL. 197 I. C. 440 = 14 R. P. 300 = 22 Pat. I. T. 1031 = 8 B. R. 207 = A.I. R. 1942 Pat. 197.

——S. 47—Appeal—Order refusing to stay execution—Conversion of revision petition into memorandum of appeal—Permissibility — Bengal Agriculturists' Debtors Act, S. 34.

An order refusing to stay execution proceeding on receipt of a notice under S. 34 of the Bengal Agriculturists' Debtors Act, comes within S. 47, C. P. Code, and is appealable. Where the value of the decree is above Rs. 5,000, the High Court has jurisdiction to convert a revision petition into a memorandum of appeal from the original order. (Mukher ica and Edits, J.). MAHOMED ABDUL WASHE v. BROJENDRA MOHAN MAITRA. 49 C.W.N. 532.

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8.47—Appeal—Order refusing to stay proceeding under S. 174, B. T. Act.

An order of an executing Court refusing to stay a proceeding under S. 174 of the Bengal Tenancy Act in spite of a notice under S. 34 of Bengal Agriculturist's Debtors Act is an order relating to execution, and although the auction-purchaser is a party to the proceeding, it is still an order which comes within S. 47, C. P. code the question at issue being one in which the judgment-debtor on the one hand and the decree-holder on the other are really interested. This being so the order is open to appeal and an application under S. 115, C.P. code, is not accordingly competent. (Biswas and Roxburgh, J.) MUKIMANNESSA CHAUDHURANI v. RAMESWAR SHUKUL. 194 I.C. 805—14 R.C. 17—45 C.W.N. 379—A.I.R. 1941 Cal. 264.

S. 47—Appeal—Order setting aside execution sale.

An order setting aside an execution sale on an application by the judgment debtor under S. 47, C. P. Code is appealable as a decree. (Henderson, J.) UDAY CHAND MAHTAB v. PHANINDRA LAL GHOSH. I.LR. (1941) 1 Cal. 28 = 218 I.C. 198 = 18 R.C. 17 = A.I.R. 1944 Cal. 384.

——S.47—Appeal—order under 0.21, R. 66, amending sale proclamation—1/ judicial or administrative—Appealability.

An order of the executing Court amending a sale proclamation, giving certain particulars about encumbrances or liens on the property proclaimed for sale, under O. 21. R. 66, C. P. Code, is not appealable. It is only an administrative order and not a judicial one. Even if the Court proceeds under the rule after a summary inquiry and purports to decide disputed rights between the parties the decision would be an interlocutory decision only and not final. (Davis C. J. and Tyabii, J.) GHANSHAMDAS v. KHUDABADI AMIL CO-OPERATIVE CREDIT BANK LTD. I.I.R. (1941) Kar. 199 = 195 I.C. 367 = 14 R. S. 30 = A.I.R. 1941 Sind. 101.

——S. 47—Appeal—Parties—Objection filed only by one of the heirs of judgment-debtor—Appeal by decree-holder—Other heirs, if necessary parties.

Where an objection under S. 47 C. P. Code, was filed by only one of the heirs of the deceased judgment-debtor it is not necessary for the decree holder filing an appeal to make the other heirs parties in it. (Hinderson J.) RADHABALLAV BASAK v. MAHENDRA KUMAR SEN. 45 C.W.N. 342.

S. 47—Appeal—"Party to suit"—Meaning— Purchaser of mortgaged property impleaded as party in suit on mortgage—Execution of personal decree—Objection by purchaser—Order on—Appeal—Competency.

In order that a person may be regarded as a party to the suit within the meaning of S. 47, C. P. Code it is not necessary that he should be a party to the decree sought to be executed, but he should be a party to the suit in which the decree is passed. Where in a mortgage suit the purchaser of a portion of the mortgaged property is impleaded as a party, and a mortgage decree is passed, and subsequently a personal decree is passed in the suit such purchaser must be regarded as a party to the suit, in proceedings for execution of the personal decree although the personal decree is not against him and no personal decree could be passed against him. Where he raises objections to execution in respect of such personal decree, his objections fall under S. 47 and an order on such objection is subject to appeal and

C. P. CODE (1908), S. 47.

second appeal. (Varma and Chatterli, JJ.) SAMHU-TRAI v. SAMBARAN R. VI. 22 Pat 678=211 I.C. 604 =10 R.R. 423=16 R.P. 246=25 P.L.T. 44=A.I. R. 1944 Pat. 105.

——S. 47—Appeal—Person wrongly held to be representative of party to suit—Right of appeal—Oblection to appeal by respondent—Sustranability.

It is true that a person who is neither a party to a suit nor a representative of a party within the meaning of S. 47, C. P. Code, has no right of appeal from an order. But an appeal does lie if the Court purports to make an order under a provision of law wrongly assumed by it to be applicable, though it was not really applicable, provided of course that an appeal is ordinarily permitted against orders rightly made under that provision. Where the lower Court has held in effect that a person was the representatives of a party to the suit, though he is a stranger to the suit, it is open to that person to appeal from that order. A respondent who has invited the Court to pass the order under appeal on the footing that the appellant was the representative of a party to the suit or of one who was sufficiently represented in the suit, cannot be permitted to urge the contrary in bar of the maintainability of the appeal. (Krishnaswami Avyangar and Kunhi Raman, J.) ANJAYYAv. GUN. DARAYUDU. I.L.R. (1943) Mad. 702-313 I.C. 406 = 17 R.M. 103 = 56 L.W 756=1943 M.W.N. 89=A.I.R. 1943 Mad. 381=(1943) 2 M.L.J. 539.

S. 47—Appeal—Rateable distribution—Decision as between rival decree-holders—If appealable. Set C. P. CODE (1908), SS. 73 AND 47—APPEAL. 1940 Rang. L.R. 718.

Ss. 47 and 73—Appeal—Rateable distribution— Order as to—Contest between rival decree-holders only, No appeal lies from an order under S. 73, C. P. Code,

No appeal lies from an order under S. 73, C. P. Code, when the contest is between the rival decree-holders only and is one in which the judgment debtor is not interested. (Bose, J.) BALMUKUND JAINARAYAN v. HIRASAO. 1943 N.L. J. 450=I.L. R. (1943) Nag. 562=209 I.C. 281=16 R.N. 118=A.I.R. 1943 Nag. 320.

—S. 47—Appeal—Receiver—Order directing payment of sum of money to third party—Appealability. See C.P. CODE, O. 43, R. 1 (S). I.L.R. (1942) Kar. 343.

S. 47—Appeal—Representative—Decree against insolvents—Attachment and sale of property—Notice not served on Official Receiver—Application by latter to set aside sale on ground of non-service of notice—Rejection—Appeal—Maintainability—Official Receiver—If representative of judgment-debtor.

Official Receiver in insolvency cannot be regarded merely as the representative of the creditors. He represents the insolvent and the debtor's interest in the properties of his estate devolves on him. Where in execution of a decree against certain insolvent debtors properties belonging to them are sold without impleading the Official Receiver or serving a notice on him under O. 21, R. 22, C. P. Code, an application by the Official Receiver to have the sale set aside on the ground of non-observance of O. 21, R. 22, C. P. Code, falls under S. 47. The dispute being one between the decree holder and the representative of the judgment debtors S. 47, C.P. Code, has full application and an appeal therefore lies against an order rejecting the appliction of the Official Receiver. (Leach C.J. and

Krishnaswami Aiyangar J.) OFFICIAL RECFIVER, NELLORE v. VENKIAH. 198 I.C. 417=14 R.M. 435=53 L.W. 498=1941 M.W.N. 577=A.I.R. 1941 Mad. 606=(1941) 1 M.L.J. 569.

A dispute between two representatives of the judgment-debtor, in which the decree-holder has no concern, does not fall under S. 47, C. P. Code, and an order as to such dispute is not appealable. Where an application under O. 21, R. 97, C. P. Code, by a stranger auction purchaser at a sale in execution of a decree creating a charge on immovable properties, to remove obstruction by a private purchaser from the judgment-debtor, is dismissed, the remedy of the applicant is by way of suit under O. 21, R. 103 and not by way of appeal; S. 47 does not apply, as the contest is not between the opposing parties in the suit or their representatives. (King and Shahabuddin, Jf.) MALLARI RAO v. SIVAGNANA VANDAYAR. 213 I.C. 70=17 R.M. 18=1943 M.W.N. 602=56 L.W. 560=A.I.R. 1944 Mad. 11=(1943) 2 M.L.J. 391.

-S. 47—Appeal—Transferee of transferee from judgment debtor—Objections by to atta.hment—Order on—Appealability—Representative—O. 21, R. 58.

A transferee from a transferee from a judgment-debtor is not a representative of a judgment-debtor, and the objections filed by such transferee to the attachment of the property in his hands falls not under S. 47, C.P. Code, but under O. 21, R. 58, C.P. Code. No appeal therefore lies against an order disallowing his claim or objections. (Harries, C.J. and Manohar Lall, J.) RAM BEHARI SAHAI v. BINDA PRASAD. 194 I.C. 45=13 R.P. 651=7 B.R. 630=A.I.R. 1941 Pat 394.

Where after a decision that a wall is party wall, and before an appeal is preferred therefrom a party makes alterations thereto without the knowledge or consent of the other side it is an obstruction raised during the pendency of the suit and it should be ordered to be removed on application made, by the executing Court under S. 47, C. P. Code. (Davies.) ACHAL DAS v. SUNDARAM. 1940 A.M.L.J. 120.

—S. 47—Applicability—Application by judgment-debtor to set aside execution sale on ground of want of jurisdiction—Application made after confirmation of sale—If maintainable.

An application by the judgment-debtor to set aside an execution sale on the ground that the executing Court had no jurisdiction to proceed with the execution and put up the property to sale after receipt of a notice under S. 34 of the Bengal Agricultural Debtors' Act, raises a question relating to the execution of the decree between the judgment-debtor on the one hand and the decree-holder on the other, and the fact that the stranger purchaser who though not a party to the suit is interested in the result does not operate as a bar to the application of S. 47, C. P. Code. The fact that the sale has been confirmed is no bar to the application under S. 47; but if the judgment-debtor was actually a party to the order for sale or was aware of the proceeding and did not appeal against it, he is precluded from

C. P. CODE (1908), S. 47.

questioning the propriety of the order and the sale held in pursuance of the order. (Mukheriea and Ellis, J.) SARAT CHANDRA GAYAN v. PORT CANNING AND LAND IMPROVEMENT CO., LTD. 80 C.L.J. 35.

5. 47—Applicability—"Between the parties to the surt"—Interpretation—Conflict in the suit—Necessity—Detendants sailing together and supporting each other—Conflict in execution—Appeal—Maintainability.

It is necessary that there should have been a conflict in the suit between the parties in order that the decision of the question arising in execution between them could come under S. 47, C. P. Code. Where in a suit two defendants sailed together and supported each other but in execution there is a conflict of interest and orders are passed in favour of one against the other, the case does not fall under S. 47, C. P. Code and hence an appeal against the order in execution will not lie, (Wadsworth Offs. C. J. and Patanjali Sastri, J.) BAGYALAKSHMI AMMAL v BAPPU AIYAR. 1945 M. W.N. 761 = 58 L. W. 631 = (1945) 2 M.L.J. 567.

—S. 47 — Applicability — Bihar Money-Lenders Act, S. 13—Order under-If decree— Second appeal—Maintainability.

Obiter;—An order under S. 13 of the Bihar Money Lenders Act amounts to a decree and comes within S. 47, C. P. Code, and a second appeal is therefore competent. (Meredith, J.) LAL BAHADUR SINGH v. BISHWANATH PRASAD SINGH, 198 I.C. 204 = 14 R.P. 412 = 1942 P.W.N. 28=8 B.R. 335=23 P.L.T. 14=A.I.R. 1942 Pat. 237.

——S. 47—Applicability — Co-decree-holders— Dispute between—Order on—Appeal.

For S. 47, C.P. Code, to apply, the contest must be between the opposing parties in the suit or their representatives in interest. Where the dispute is one merely between co-decree-holders in which the judgment-debtor has no concern, S. 47 does not apply and an order in that matter cannot be the subject of an appeal. (Leach, C. J. and Lakshmana Rao, J.) BAPANNA GARU V. JAGGIAH. 209 I.C. 589=1943 M.W.N. 228=56 L.W. 169=A.I.R. 1943 Mad. 407=(1943) 1 M.L.J. 271.

S. 47—Applicability — Court of Deputy.
Collector under Bengal Rent Act.

S 47, C. P. Code, does not apply to the Court of a Deputy Collector under the Bengal Rent Act. A party aggrieved by an order passed by that Court in execution proceedings has, therefore the remedy of a suit. (Henderson, J.) SAKKAL SARDAR v. ISWAR DAS THIRANI. I.L.R. (1941) 2 Cal. 366=199 I.C. 740=14 R.C. 629=A.I.R. 1941 Cal. 230.

—S. 47—Applicability—Decision under O.21, R. 63 H (Patna) — Appeal — Court-fee. See Court-fees Act, Sch. I Art. 1 and Sch. II, Art. 11, 22 Pat. 278.

——S. 47 — Applicability — Dispute between party and his representative or between persons representing same party.

S. 47, C. P. Code does not apply where the dispute arises between a party and his own representative or between two persons who both represent the same party. (Leach, C. J., Pandrang Row, Abdur Rahman, Krishnaswami Ayyan-

gar and Patanjali Sastri, JJ.) Annamalai Mudali v. Ramaswami Mudali. I.L.R. (1941) Mad. 438=196 I C. 204=14 R.M. 255=1941 M.W.N. 149=53 L.W. 27=A.I.R. 1941 Mad. 161=(1941) I M.L.J. 45 (F.B.).

——S. 47—Applicability—Equities in favour of judgment-debtor — Agitation. See EXECUTION—MORTGAGE DECREE. (1945) 2 M.L.J. 544.

S. 47—Applicability—Execution sale—Application to set aside on ground of non-compliance with S. 13, Bihar Money-Lenders Aci—If falls under S. 47 or O. 21, R. 90—Limitation. See LIMITATION ACT, ART. 166. 23 Pat. L.T. 139.

—S. 47 and O. 21, R. 90—Applicability— Execution sale—Application to set aside on ground of want of jurisdiction—Order on— Second appeal.

An application to set aside a sale on the ground of want of jurisdiction in the Court executing the decree and holding the sale falls under S. 47, C. P. Code, and does not fall under O. 21, R. 90, C. P. Code; hence an order passed on that application is open to appeal and second appeal. (Harries, C.J. and Dha.le, J.) Mohan Lal Mahto v. Shibdhary Chaube. 197 I.C. 651=14 R P. 327=8 B R. 273=22 Pat. L.T. 1018=A.I.R. 1942 Pat. 146.

S. 47—Applicability-Execution sale—Application to set aside on ground of want of notice prior to fresh proclamation of sale—Order on—Second appeal—Competency—Limitation.

Where notice has not been issued to the judgment-debtor before a fresh proclamation of sale is settled, and failure to issue notice is alleged to constitute a defect which entitles him to come under S. 47, C. P. Code a second appeal will lie against an order passed on an application made by him for setting aside a sale. Where the application is not filed within thirty days from the date of sale it is barred under Art. 166, Limitation Act, even though it is made under S. 47, C. P. Code, and not under O. 21, R. 90, (Kuppuswami Ayyar, J.) PERIYANNAN KALADI v. RAMASWAMI PALLAVARAYAN, 58 L.W. 235=1945 M,W.N. 474=(1945) 1 M.L.J. 267.

S. 47—Applicability—Execution sale—Setting aside—Power of Court under S. 47. See C. P. Cope, O. 21, R. 90. A.I.R. 1941 Pat. 566.

Ss. 47 and 151—Applicability—Order made under S. 151—If appealable under S. 47—Test.

Where a defendant order to give security on failing to do so is ordered under S. 151 C.P. Code to deposit the amount in court, the order is appealable though the order was made in the

exercise of the inherent jurisdiction of the court. (Davies, C. J.) GIRIAJMAL v. JETHANAND. I.L.R. 1945 Kar. 116=A.I.R. 1945 Sind 146.

S. 47—Applicability—Partition decree directing payments inter so and for payment of creditors—Payment to creditors by one—Kight to set off against payments due by him to the other.

payments due by him to the other.

Where a partition decree provided for the payment of certain amounts by the plaintiff to the defendant and also declared the family liable for the payment of the debts, and the plaintiff pays certain debts, in an application for execution by

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the defendant for the recovery of the amounts payable to him by the plaintiff a set off was pleaded, the plaintiff's application claiming set off for the amounts paid by him could be treated as a suit for contribution under the powers conferred by S. 47, C. P. Code. and the relative rights of parties gone into. (Stone, C. J. and Bose J.) YESHWANTRAO v. BHASKERRAO. 1941 N.L.J. 653.

-S. 47 and O. 21, R. 53 - Applicability-Power of Court to examine substance of application.

Although objections are headed under R. 58 of O. 21, C. P. Code it is open to the Court having regard to the nature of the objections and the character which the objectors occupied in relation to the proceedings to treat them as having been made under S. 47, C. P. Code. (Benneti, and Ghutam Hasan, Jl.) Bankey Behari Lalv, Brij Rani. 20 Luck. 226—1944 O.W. N. 410—1944 A.W.R. (C.C.) 246—1944 O.A. (C.C.) 246—A.I.R. 1944 Oudh 314.

S. 47—Applicability—Proceeding under 0. 20, R. 12—If one in execution—Award of mesne profits in preliminary decree for partition and direction as to mesne profits—Appeal—If lies, See C. P. Code, S. 2 (2) AND 47. I.L.R. (1941) Kar. 563.

—S. 47 and O. 21, R. 58—Applicability—Representative — Insolvent judgment-debtor—Attachment—Objection by Official Receiver that all properties vested in him from date of insolvency petition—Order disallowing objection—Appeal—Competency—Remedy—Suit. Official Receiver, Guntur v. Seshayya. [see Q. D. 1936—40 Vol. I, Col. 3277.] A.I.R. 1941 Mad. 262.

—S. 47—Applicability—Transferee of judgment debtor's property paying decretal amount under protest to raise attachment and applying for refund—Power of Court to order. JAISINGHANI, In re. [see Q.D. 1936-40 Vol. I, Col. 3276.] 191 I.C. 635=13 R.S. 160.

S. 47—Application to set aside sale—Plea that property was not saleable under S. 60 (1) (c)—Limitation—Limitation Act, Art. 166. See LIMITATION ACT, ART. 166. 21 Pat. 774.

A question as to what should be the substituted security in the case of a mortgage decree or as to whether the sale certificate should be amended falls within the ambit of S. 47, C.P. Code. An order refusing an application for amending the plaint in a mortgage suit the decree and the sale certificate, by correcting the description of the properties given therein consequent on the alteration of the mortgagor's interest from pucca to kham share as the result of a collectorate partition of which the decree holder came to know only subsequent to the sale under the mortgage decree, is appealable under S. 47, C. P. Code as the question relates to the execution, discharge and satisfaction of the decree under S. 47. A separate suit by the decree-holder is not maintainable. The plainting

such a suit can however be treated as a proceeding under S. 47, C. P. Code, subject to limitation. (Harries, C. J. and Manohar Lall. J.) SITARAM SINGH v. JANARDHAN SINGH. 1943 P.W N. 45.

—S. 47—Bar of suit—Decree for money against ward of Court of wards—Leave of Court not obtained—Execution disallowed on ground of non-compliance with S. 60-A. Bengal Court of Wards Act—Suit on decree—Maintainability—Principles. Lachmi Narayan v. Mahomen Mehdi. [see Q.D. 1936-40 Vol. I. Col 3277.] 20 Pat. 223—192 I.C. 387—13 R.P. 455—7 B R. 385—A.I.R. 1941 Pat. 70

——S. 47—Bar of suit—Decree for possession—Possession obtained without execution—Suit on subsequent dispossession—Maintainability.

Where persons who have obtained a decree for possession get possession without execution and are subsequently dispossessed, they are entitled to sue for possession. The fact that they did not execute their decree does not debar them from suing for possession, as under S. 47, C. P. Code, it is not necessary for them to seek possession through execution, when they are already in possession. (Ghulam Hasan and Madeley JJ.) LALTU SINGH v. MANGAU SINGH. 17 Luck. 109=196 I.C. 99=14 R.O. 132=1941 R.D. 777=1941 O.L.R. 645=1941 O.A. 739=1941 A.W.R. (Rev.) 771=1941 O.W N. 1014=A.I.R. 1941 Oudh. 615.

—S. 47—Bar sixuit—Execution sale of property in contravention of S. 12-A. Chota Nagpur Encumbered Estates Act—Objection—Dismissal—Suit to declare sale void and for possession from auction purchaser—Maintainability.

The question whether a certain property can be sold in execution in contravention of S. 12-A of the Chota Nagpur Encumbered Estates Act is essentially one falling under S. 47, C. P. Code and must be decided in execution. The judgment-debtor cannot raise this question in a separate suit although such suit may be brought not against the decree-holder but against the auction-purchaser at the sale and though it may be assumed that the auction-purchaser is not a representative either of the judgment-debtor or of the decree-holder. Further if the judgmentdebtor in execution objects to the sale on the ground that it is prohibited by S. 12-A of the Chota Nagpur Encumbered Estates Act and his objection is dismissed and the property is sold the order which becomes final as against the decree-holder becomes final against the auctionpurchaser as well. (Fazl Ali and Meredith, JJ.) BHAGWAT NARAIN SINGH v. MAHADEO PRASAD BHAGAT. 21 Pat. 233=198 I.C. 411=8 B.R. 417 =14 R.P. 457=23 Pat. L.T. 56=A.I.R. 1942 Pat. 244.

S. 47—Bar of suit—Hindu reversioners impleaded as legal representatives of widow in execution of mortgage decree against her—Defences open—Separate suit to challenge the mortgage in question—Maintainability.

When a person is brought on record in execution proceedings as the legal representative of a deceased party, it is no doubt open to him to contend that he does not occupy that capacity and if such a question is raised, the Court must chaser, as the decree holder purchaser under his mortgage decree acquired the rights both of the decree-holder and of the judgment-behor, and to some extent represented both the decree-holder and the judgment-debtor, in opposing the

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decide it. But once he is brought on the record as the legal representative of a deceased judgment-debtor it would not be open to him to raise questions which would amount to challenging the decree or going behind the decree. Hence, a reversioner impleaded in execution as the legal representative of the judgment-debtor a Hindu widow, against whom a decree for sale on the basis of a mortgage of her husband's property has been passed, can raise the question as to the validity and binding nature of the mortgage in a separate suit, though he may not have raised the question in the execution proceedings (Ghulam Hasan and Kaul, JJ.) Ganga Singh v. Badri Singh. 1945 O.A. (C.C.) 207=1945 O.W.N. 290=1945 A.W.R. (C.C.) 255.

S. 47—Bar of suit—Malabar Compensation for Tenants' Improvements Act, Ss. 5 and 6—Decree for eviction subject to payment of compensation for improvements—Non-execution—Suit by landlord for rent for period subsequent to suit—Competency. See MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT, Ss. 5 and 6. (1945) 1 M.L.J 326.

—S. 47—Bar of snit—Mortgage decree in respect of entire rights in house—Sale—Purchase by decree helier and delivery of possession—Subsequent decree on nortgage of shire in same house—Sale—Purchase by decree holder—Application for delivery—Dismissal on obstruction by prior purchaser—Remedy—Appeal—Separate suit—Competency.

The appellant's vendor was the mortgagee of a two-thirds share in a house, under a mortgage executed by two members of a joint Hindu family who purported to mortgage their share. After their death, a suit was brought on the mortgage against his nephew S, as their legal representative; a decree was passed and in execution, the appellant's vendor purchased the property. S himself had mortgaged the entire house purporting to act as manager of the joint family of himself and his two uncles, to the respondent who brought a suit and in execution of the decree obtained by him, purchased the house. He got delivery of possession. When the appellant tried to obtain delivery of possession, he was obstructed by the respondent and when he applied for removal of obstruction, his application was dismissed on the ground that his proper remedy was to file a partition suit. The appellant then filed a suit against the respondent without preferring an appeal against the order dismissing his application.

Held, (1) that in the circumstances of the case the contest was one between the representative of the judgment-debtor and the decree-holder in execution, and fell under S. 47, C. P. Code, (2) that the appellant as the decree-holder in the second execution, was still the decree-holder, he having purchased nothing, because the rights of the judgment-debtor had already been purchased by the respondent in execution of his mortgage decree; (3) that, through the respondent as purchaser, as the decree holder purchaser under his mortgage decree acquired the rights both of the decree-holder and of the judgment-bebtor, and to some extent represented both the decree-holder and the judgment-debtor, in opposing the

claims of the appellant (the decree-holder in the second execution), he was certainly putting forward rights derived by him from the judgment-debtor which would disentitle the appellant to proceed against the property in which the judgment-debtor had no longer any interest, the whole rights having been acquired by the purchaser in the earlier proceedings; (4) that therefore the proper remedy of the appellant was to appeal from the order dismissing his application for removal of obstruction and delivery and not to file a separate suit. (Horwill 1.) BALALINGAYYA v. SUNKU NALLAYYA. 215 I.C. 130=1943 M.W.N. 830=A.I.R. 1944 Mad. 62=(1943) 2 M.L.J. 508.

——S. 47—Bar of suit—Mortgage suit—Party elaiming property by title paramount and held to be not necessary party to suit—Procedure—Dismissal of suit as against such party—Propriety—Such party—If "party to suit"—Explanation to S. 47—Question between such party and decree-holder—Separate suit—If barred.

Where in a mortgage suit some defendants plead that they are entitled to the property in suit and claim the mortgaged property or an interest in it by title paramount, and the Court holds that they are not necessary parties to the suit, the Court should order their names to be struck out of the plaint. It is not correct for the Court to dismiss the suit as against them. Where, instead of so directing that such parties should be struck out as having been improperly impleaded, erroneously makes an order dismissing the suit as against them, such persons cannot properly be said to have been parties to the suit within the meaning of the Explanation to S. 47, C. P. Code. A question which arises between them and the decree-holder in the execution of the decree cannot also properly be said to be one relating to the execution of the decree. A separate suit is therefore not barred by S. 47. (Agarwala and Shearer, JJ.) KUSMI v. SADASIVA MAHTO. 21 Pat. 601=201 I.C. 196-8 B.R. 770=15 R.P. 34=23 Pat. L.T. 354=A.I.R. 1942 Pat. 432.

S. 47—Bar of suit—Partition suit—Decree— Provision that sharers other than plaintiff will be put in possession of shares on paying necessary Court-fec— Separate suit by defendant-sharer for recovery of share —Maintainability.

Where a decree in a partition suit provides that the remaining sharers other than the plaintiff shall be put in possession of their respective shares on paying the necessary Court-fee, the proper method of reading such a decree is that it declares the right of the sharers to the properties allotted to them and gives an option to the defendant-sharers to pay the Court-fee in respect of the properties allotted to them and seek possession if they like in execution of that decree. But it does not oblige them to do so, and hence a separate suit for possession by a sharer defendant is not barred by S. 47, C. P. Code. But a decree may be passed in favour of a defendant without any condition particularly as regards his payment of Court-fee. Such a decree may be one executable under S. 47. C. P. Code, and may bar a separate suit, But before a separate suit can be barred, there must be an unconditional decree giving a defendant a right to

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execute the decree to get the properties allotted to him. (Somayya, J.) NAHA HAJI v. VEERAN 204 I.C. 209=15 R.M. 718=55 L.W. 61=1942 M.W.N 363=A.I.R. 1942 Mad. 364=(1942) 1 M.L.J. 219.

Although in the case of a decree determining a right to partition which could be executed, it would fall under S. 47, C. P. Code a preliminary decree directing that the plainiff in the suit was entitled to partition is a merely declaratory decree, which, if not subsequently enforced, would not debar the plaintiff from filing a fresh suit; S. 47, C. P. Code, does not apply to such a case. In the case of property paying revenue to Govern. ment, the Court only directs that the plaintiff is entitled to partition, which alone it is competent to do. The matter then rests with the Collector to effect partition. Whether it is regarded as a declaratory decree or as the final decree of the Court, there is nothing for the parties to do in execution, and S. 47 will not apply. A fresh suit for partition is not also barred by res judicata. Looked at as final decree, the prior decree would not prevent the Collector from performing his duty of effecting a partition in pursuance of the decree in the fresh suit. if the only difficulty be that he had not performed his duty; and if it is a declaratory decree, it is not a decree finally decided within the meaning of S. 11, C. P. Code so as to bar the filing of a fresh suit for partition. (Beaumont, C. J. and Sen, J.) VISHNU JANARDAN v. MAHADEV KESHAV. I.L.R. (1942) Bom. 14=198 I.C. 550=14 R.B. 318=43 Bom.L.R. 971=A.I. R. 1942 Bom. 44.

8. 47—Bar of suit—Person impleaded in execution as legal representative of deceased party after having been dismissed from suit—Claim to property covered by decree—If to be set up in excution—Separate suit—If barrea.

When a person comes to Court in execution proceedings as the legal representative of a deceased party, he cannot question the decree which has been passed. If the decree concerns property in which he claims an interest, the decree will not be binding upon him unless he was a party to the suit. If he was not a party to the suit or if he had been dismissed from the suit his rights would be entirely unaffected and he would be in a position to enforce them in a suit instituted by him for that purpose. He is not compelled to have his own claims to the property decided in execution proceedings. (Leach, C.J., Krishnaswami Aiyangar and Chandrasekhara Aiyar, JJ.) Hamidani Ammal v.Amma Sahib Ammal I.L.R. (1942) Mad. 271=198 I.C. 158=14 R.M. 389=1941 M.W.N. 906=54 L.W. 448=AI.R. 1941 Mad. 898=(1941) 2 M.L.J. 622 (F.B.).

KHIALMAL v. POHUMAL. [see Q.D. 1936—'40 Vol. I, Col. 3277.] 193 I.C. 247=13 R S. 214.

Where in execution of a decree ancestral property is sold to a stranger auction-purchaser as the separate property of the judgment-debtor which was beyond the jurisdiction of the Civil Court to sell, a separate suit, the object of which is to set aside the sale, does not lie at the instance of the judgment-debtor. The question as to the nature of the property is one relating to execution and the dispute is as between the parties to the suit and as such falls within S. 47, C. P. Code. (Thomas, C. J. and Ghulam Hasam, J.) Sharbett Bandi v. Mahomed Hashim. 1943 O W N 418 = 1943 A.W.R. (C.C.) 141=1943 O A (CC) 273=212 I.C. 281=16 R.O. 275=A.I.R. 1944 Oudh 43.

—S. 47 and O. 21. R. 95—Bar of suit—Suit for possession by landlord decree-holder—Auction-purchaser—Inclusion of claim for mesne profits—Effect—Limitation Act, Art. 139.

Where a decree-holder auction-purchaser seeks to recover possession of any immovable property purchased by him, he must proceed by way of an application, and not by a separate suit: in other words, if he wants khas possess on, he is limited to the remedy provided by O 21, R. 95, C. P Code and a separate suit by him is barred by S. 47, C P Code. The fact that he is also the landlord does not give him an independent right to sue for the same relief. It is the auction-purchase which consuitutes his cause of action and a suit by hom to recover possession cannot be referred to his character as landlord. Art. 139 of the Limitation Act does not create a right of suit, but merely recognises it. The landlord decree-holder auction-purchaser cannot escape the bar of S. 47, C. P. Code, by including a claim for mesne profits in a suit for possession. A claim to mesne profits can arise only when he has established his title to recover possession. So far as possession is concerned, his only remedy is by way of an application under O. 21, R 95 and if he seeks mesne profits, he must bring a separate suit for purpose. (Ray and Biswas, JJ.) Debi Prasad Bhakat v. Satish Chandra Ghosh. 218 I C 144=18 R.C. 6=77 C.L.J. 395=A.I.R. 1944 Cal. 328 (1).

——S. 47—Bar of suit—Suit for possession by mort-gagee decree-holder auction purchaser. ABDUL GHANI v. LAL CHAND. [See Q. D. 1936—'40 Vol. I, Col. 1063.] I.L.R. (1941) Lah. 91—43 P.L.R. 313.

——S. 47—Bar of suit—Suit on sale but decree as on mortgage—Defendant failing to pay amount decreed and plaintiff put in possession as per decree—Subsequent suit by defendant for possession alleging satisfaction of mortgage out of income—Maintainability. PANDHARI v. DIGAMBARDAS. [See Q.D. 1936—'40 Vol. I, Col. 1063.] I.L.B. (1942) Nag. 131.

—S. 47—Bar of suit—Suit to declare that assignment of decree is bogus and not valid—Maintainability. The question whether an assignment of a decree by the holder thereof is valid or bogus is one which falls

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under S. 47, C.P. Code, and must therefore be determined by the executing Court and not by a separate suit. Hence a suit for a declaration that an assignment of a decree was bogus and not valid is not maintainable, (Lotur, f.) Kundanmal Jaskaj v Surajki Varbai Tarachand. 210 I C. 605=16 R.B. 240=45 Bom. L.R. 859=A I.R. 1943 Bom. 455.

Where a decree, for the satisfaction of which, a person has stood surety, has been materially altered by reason of an adjustment between the judgment-creditor and the judgment-debtor without the consent of the surety, the latter is discharged from his liability, on the principle of S 135. Contract Act, even though the adjustment has not been certified to the executing Court. It is open to the surety to file a suit for a declaration that he has been discharged on account of the adjustment between the creditor and the debtor. Such a suit is not barred by S. 47, C.P. Code, the surety not being a party to the original suit. (Divatia, 1) BONDRU AVASU v. DACADU EKOBA, I L.R. (1943) Bom. 382=209 I C. 435=45 Bom. L.R. 438=A.I.R. 1943 Bom. 246.

Where a decree-holder has assigned the decree and the assignee who files an execution application does not apreal against the order thereon the decree-holder though a "party" cannot appeal. The dispute is one between the decree holder and his assignee and the remedy is by way of suit only. (Kupoustvami Aiyar, J) SANKAPALINGAM PULLAL & KIMASWAMI NAICKER 57 LW 552=1944 M.W N 645=A.I.R. 1945 Mad 25=(1944) 2 M.L J. 323.

S. 47—Executibility of decree—Decree fixing monthly maintenance—Agreement by decree-holder giving up portion of maintenance—If amounts to novation.

Where the holder of a decree for maintenance gives up a portion of her maintenance that cannot amount to a novation as the mode of payment under the decree is not changed and no extraneous matter has been brought into the decree. The executing court therefore can execute the decree as it stands. (Mr Ahmad, J.C.) SANTO DEVI v. IAL CHAND. 198 I.C. 734—14 R. Pesh. 75—A.I.R. 1942 Pesh. 13.

S. 47 — Executability of decree — Decree for future maintenance creating charge on property — Arrears of future maintenance—Recoverability by execution—Fresh suit—Necessity. BASUMATI KUAR v. HARBANSI KUAR. [See Q.D 1976—'40 Vol. I, Col. 3278] 20 Pat. 86=192 I.C. 866=13 R.P. 528=7 B.R. 545=A.I.R. 1941 Pat. 95.

S. 47 - Executability of decree—Grant of time and instalments to judgment-debtor—If novation of contract.

The granting of time and instalments does not amount to a novation of contract and has not the effect of extinguishing the decree. (Almond J.C. and Mir Ahmand J.) Behari Lal v Tuisi Dass 207 I.C. 342=16 R. Pesh. 5=A.I.R. 1943 Pesh. 29.

8. 47—Executability of decree—Suit on handnote against members of joint Hindu family—Minor

defendants not represented by guardian—Decree passed only against their fathers—If can be executed against them.

Where in a suit brought on the basis of a hand-note against the members of a joint Hindu fainly the minor defendants are not represented by any guardian, the effect is that they are not in the eye of law parties to the suit at all. If, therefore, no decree is passed against them on this ground, it cannot be said that the suit is dismissed against them. That being so, the decree which is obtained against their fathers can be executed against the joint family property including the interest of the minor sons. (Chatteriee and Shearer, J.). TRIBENI PRASAD v. THAKUR PRASAD SINGH. 199 I C. 157—8 B.R. 513—14 R.P. 540—A.I.R. 1942 Pat. 279.

—S. 47—Executing Court—Powers of Compromise decree—Objection that term went beyond scope of suit and therefore compromise decree is invalid—If can be considered by executing Court. See C.P. CODE, O. 23, R. 3. 45 Born. L. R. 1045.

It is correct to say that an executing Court cannot go behind a decree but that presumes that there is a valid decree in existence. When a decree is passed against several persons one of whom was dead before the decree and it is sought to be executed against his legal representatives and their contention is that the decree is a nullity either in whole or in part, then to the extent of the nullity there is no decree. Consequently the executing Court is not going behind the decree in such a case but is considering whether there is a decree or not. The executing Court is the proper Court to decide this. (Bose, J.) BHAKRU v. RAMAJI. 1942 N.L.J. 338.

——S. 47—Executing Court—Powers of— Decree against minor.

It cannot be said that an executing Judge has jurisdiction to question a decree which has been passed against a minor in proceedings under S. 47, C. P. Code. (Almond, J.C. and Mir Ahmad, J.) MIR MAHOMED SHAH V. MAHOMED SADIQ. 219 I.C. 188=A.I.R. 1945 Pesh. 21.

——S.47—Executing Court—Power of—Decree challenged as nullity on ground of want of jurisdiction—Objection to under-valuation of suit not raised in suit or appeal—If can be entertained in execution. See Suits Valuation Acr, S. 11. 22 Pat. L.T. 855.

Ss. 47 and 54—Executing Court—Powers of—Partition decree omitting direction that it should be effected by Collector.

A decree directing partition is prima facie capable of execution under O. 21, C. P. Code, by the executing Court and that Court on an application for execution of such a decree is entitled and indeed is bound to give effect to S. 54, C.P.Code, and order that the partition should be effected by the Collector, although the decree omits such a

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direction. (Niyogi and Digby, JJ.) Gendmal v. Laxman. I.L R. (1944) Nag. 852=A.I.R. 1945 Nag. 86.

The Court sending a partition decree for execution to the Collector under S. 54, C. P. Code, can still function judicially to decide under S. 47, who are the legal representatives. The executing Court alone can decide that point. An application to get such a point decided is not governed by Art. 182 of the Limitation Act, but can be made at any time before the right to obtain partition by the Collector has lapsed. It is an interlocutory matter to be decided before such proceedings start, or while they are pending, but it falls to be decided by the executing Court under S. 47, C. P. Code, and not by the Collector. (Nivogi and Digby, JJ.) GENDMAL v. LAXMAN. I.L.R. (1944) Nag. 852—A.I.R. 1945 Nag. 86.

——S. 47—Executing Court—Powers—Postdecree agreement restraining execution—Enforceability—Bar of separate suit.

The question whether a post-decree agreement will or will not be excluded from the purview of the executing Court under S. 47, C. P. Code, will depend upon the nature of the agreement. If a post decree agreement seeks to affect the character of the decree, it may no doubt be said that this is a question which could be raised only by an independent suit, and not by an application under S. 47. If, however, the agreement leaves the decree untouched and merely seeks to restrain its execution, it is a matter which legitimately comes within the province of the executing Court to consider and determine and a separate suit is not maintainable. (Biswas, J.) GIRISH CHANDRA SANTRA v. PURNACHANDRA BHATTACHARYYA. 211 I. C. 515=16 R.C. 555=77 C. L. J. 224=A. I. R. 1944 Cal. 53.

—S. 47—Executing Court--Power of--Power to award relief expressly denied in suit—Issue raised in suit and decided against plaintiff—Right to ask some relief in execution—Interpretation of decree—Reference to judment.

A Court executing a decree is bound by the decision in the suit in which the decree was passed. When there was a distinct issue raised in the suit on a point and decided against the plaintiff, a particular relief being thereby refused, it is open to the executing Court to give the plaintiff what was expressly denied to him by the decision in the suit. Where the plaintiff specifically prays in his suit for recovery of the amount due to him by sale of certain ornaments pledged with him and that prayer is refused, the Court executing the decree has no jurisdiction to sell those ornaments in execution. If the decree is in any way ambiguous the executing Court can always interpret the decree with reference to the judgment. (Chetterji and Dhavle, JJ.) RADHAMONI DEVI V. GOBIND CHANDRA DAS. 198 I.C. 250=14 R.P. 414=7 Cut.L.T. 55=8 B.R. 401=

the Collector, although the decree omits such a behind decree-Mortgage suit-Decree directing

specific property to be sold last—Executing Court directing same property to be sold first—If ultra vires.

Where the Court has ordered marshalling in a mortgaged suit and ordered that a particular property should be sold last, the executing Court has no right to go behind the decree and to order that property to be sold first even with the consent of the parties. Such an order by the executing Court is ultra vires, and a sale in pursuance of such order is illegal and ultra vires. (Kuppuswami Ayyar, I.) Murugappa Chettiar v. Chengalvaraya Chettiar. 57 L.W. 370=A.I.R. 1944 Mad. 465=(1944) 2 M.L.J. 8.

S. 47—Executing Court-Power to grant relief against penal clause in consent decree—Separate suit unnecessary.

An executing Court can grant relief against a penal provision in a compromise decree; and there is no reason why, in order to obtain relief, a party should be forced to a civil suit. A party claiming relief against a penal provision is not challenging the validity of the decree which contains such penal clause or seeking to go behind it; it is more a matter of the interpretation of the decree. (Davis, C.J. and Lobo, J.) MONTEIRO v. ASTRIBGE. I.L.R. (1943) Kar 245—210 I.C. 397—16 R.S. 141—A.I.R. 1943 Sind 247.

——S. 47—Executing Court—Powers of—Question whether and to what extent decree is executable—If can be raised and decided.

The question as to how far a decree is capable of execution as an executory as opposed to a declaractory decree is one which can be taken in execution. Such a plea does not go behind the decree. The question falls under S. 47 and has to be decided by the executing Court, as it is entirely distinct from the question whether the decree to be executed was or was not a valid decree. (Davis, C.J. and Tyabji, J.) Godhumal v. Mt. Bhambho. I.L.R. (1942) Kar. 326=205 I.C. 256=15 R.S. 118=A.I.R. 1943 Sind 11.

——S. 47—Executing Court — Powers of— Validity of decree or jurisdiction of Court which passed decree—Power to go into.

An executing Court cannot go behind a decree and question its validity when, on the face of it, it is not a nullity. It is not open to the executing Court to go into the question of jurisdiction, territorial, pecuniary or personal, of the Court which passed the decree, which, by necessary implication, must be taken to have been decided by the trial Court when it passed the decree. But an executing Court can inquire into and decide that a decree is a nullity not on the ground of jurisdiction, but because the decree passed is not a decree at all, such as in the case of a decree against a dead man. In such a case the decree is a nullity and cannot be executed, not because the particular Court had no jurisdiction, but because no Court at all had jurisdiction. (Davis, C.J. and Lobo, J.) Shingomal Pohumal v. Khushalds Lekhraj. I.L.R. (1941) Kar. 79=190 I.C. 881=13 R.S. 106=A.I.R. 1940 Sind. 150.

-----S. 47—Execution proceedings—Order for instalments—Effect—Default—Right to execution.

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Once an order for instalments came into force the right of the decree holders to execute would arise on the occurrence of each default, and on such default it would be necessary for the decree holders to apply to the Court for execution for the amount outstanding at the time so as to give the Court jurisdiction to proceed in the matter. The Court cannot sell the property in pursuance of execution proceedings commenced before the instalment order and kept on hammer. RAMPAL SINGH v. UDIT NARAIN PANDE. A.I.R. 1945 Pat. 76.

S. 47—Execution by assignee of decree—Judgment debtor not pleading satisfaction by payment to original decree-holder—No bar to raising objection under S. 47, C.P. Code. See C. P. Code, O. 21, R. 16, Proviso. 48 C.W.N. 419.

S. 47—Execution proceeding—Parties—Receiver in possession of property—If necessary party.

A Receiver appointed in a suit under O. 40, R. 1, C.P.Code, is not a necessary party to an execution proceeding against the property of which he is in possession and the omission to make him a party does not, therefore, render the proceeding null and void. (Khundkar and Biswas, J.) SATYANARAYAN BANNERJEE v. KALYANI PRASAD SINGH. 49 C W.N. 558=A.I.R. 1945 Cal. 387.

——S. 47—Execution proceeding—Person made party to—If continues to be party to subsequent execution proceedings.

There is neither principle nor authority for holding that if a person is made a party to an execution proceeding, and particularly, if that proceeding is finally disposed of by an order of dismissal, he must be taken to be a party to every subsequent execution that may be levied, whether he is in fact joined as a party or not. Each execution case is a distinct proceeding, and there is no presumption of continued representation of parties in successive execution. (Khundkar and Biswas, JJ.) Sayyanarayan Bannerjee v. Kalyani Prasad Singh. 49 C.W.N. 558=A.I.R. 1945 Cal. 387.

——S. 47—Exonerated defendant—Sale of property of party dismissed from suit—Suit against auction-purchaser for possession—Not barred.

Where property of a party against whom the suit has been dismissed is wrongly sold, in execution if he does not go into the executing Court for summary remedy there is no bar to a separate suit by him for recovering possession of the property from the auction purchaser. (Abdul Rashid Ram Lal and Mahajam, JJ.) SURINDAR NATH v. RAM SARUP. I.L.R. (1944) Lah. 479=215 I.C. 276=17 R.L. 128=A.I.R. 1944 Lah. 294 (F.B.).

S. 47—Jurisdiction of executing Court— Decision on points in issue where decree-holder applies for withdrawal of the execution application.

The executing Court is not debarred from deciding a point which has arisen between the judgment-debtor and decree-holder, namely a question of jurisdiction especially when the parties have gone to a full trial on the point and have either produced or been given an opportunity.

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of producing their evidence, by the mere fact that the decree-holder had applied to withdraw his application. There is nothing in the Code which forbids a Court from deciding the question at that stage and there is no reason why it should be postponed for decision in a subsequent application. ((Ahmed, IC.) KARIM BAKSH V. AGHA MOHAMED 208 I.C. 488=16 R.Pesh. 27=A.I.R. 1943 Pesh. 67.

S. 47—Miscellaneous Proceedings—Ejectment under S. 61 of Oudh Rent Act—If can be set aside on objection under S. 47.

As the law provides a remedy by regular suit in the case of an ejectment under S. 61 of the Oudh Rent Act, the ejectment which has taken place under that section cannot be set aside by an objection under S. 47, C. P. Code (Shirreff, IM.) Sheo Narain v. Sundar Lal. 1941 A.W.R. (Rev) 565 (2)=1941 O W.N. 848 (1)=1941 A L J. (Supp.) 103=1941 O.A. (Supp.) 496 (2)=1941 R.D. 590.

——S. 47 and O. 21, R. 66—Mortgagee objecting to the order in which sale of items of properly should take place—Discretionary order—Administrative convenience—Appealability of—Interference in revision.

Upon notice to settle the terms of a proclamation in execution of a mortgage decree against two items of property, the third defendant in the case appeared and asked the Court to order his property to be sold after the other property. The mortgagee objected but the Court decided that it was in the interests of justice, and equity to sell the third defendant's property after the other property had been sold and drew up the proclamation accordingly. On appeal against the order the question of appealability of such an order was raised.

Held, that even though the decree was a mortgage decree, the Court had a discretion in fixing the order of sale and order doing so is an administrative order not liable to appeal. (Horwill, J.) NARASIMHAM v. LATCHAYYA. 57 L.W. 336=A.I.R. 1944 Mad. 429=(1944) 1 M.L.J. 459.

——Ss. 47 and 144 and Court Fees Act, Sch II, Art. 11—Nature of order under S. 144 for purposes of Court-fee.

An order under S. 144, C.P.Code, is essentially different from an order under S. 47. Such an order could not be obtained by proceedings under S. 47. A clear distinction is drawn between the two cases by S. 2. An order under S. 144 is not for Court-fee purposes the same as an order under S. 47. (Stone, C.J. and Niyogi, J.) ABDUL MAJID SHAH v. ABDUL SATTAR. I.L.R. (1941) Nag. 662=197 I.C. 778=14 R.N. 194=1941 N.L.J. 459=A.I.R. 1941 Nag. 313.

——S. 47—Objection as to saleability of property—When could be raised Marott v. Kisan-Lal. [see O.D. 1936—'40 Vol. I, Col. 1070.] I.L.R. (1941) Nag. 381.

S. 47—Parties and representatives—Moneydecree—Receiver appointed to realise money by disposing of fudgment-debtor's property—Receiver selling property by private treaty with Court's permission—Purchaser, if representative of fudgment-debtor.

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A purchaser of the debtor's property is a representative of the judgment-debtor and it did not make any difference whether the property had been obtained in a public auction or private treaty. Accordingly purchaser from a receiver appointed to realise a money decree has a right of appeal under S. 47, C. P. Code against any order of Court affecting him. (Almond, J.C. and Mir Ahmad, J.) DIWAN SINGH v. MAHOMED AKBAR. A.I.R. 1945 Pesh. 43.

A receiver appointed in a suit under O. 40, R.I, C. P. Code, is not a representative of any of the parties to the suit for the perposes of S. 47, C.P. Code. The appointment of such a receiver, though it may operate to change possession, does not affect the title to the property which remains in those in whom it is vested when the appointment is made. (Khundkar and Biswas, II.) SATYANARAYAN BANNERJEE v. KALYNI PRASAD SINGH. 49 C.W N. 558=A.I.R. 1945 Cal. 387.

A defendant against whom a suit is withdrawn or abandoned at the last date, is a person against whom the suit stands dismissed and therefore he remains a party to the suit within the meaning of S. 47, C. P. Code. and the explanation thereto. (Harries, C. J. and Mehrchand Mahajan. J.) BABU RAM v. SHAFIUL ZAMAN. 217 I.C. 376=46 P.L. R. 222=A.I.R. 1944 Lah. 273.

A person who was unnece-sarily joined as one of the defendants and who was discharged from the suit on the plaintiff giving up his case against him, ceases to be a party to the suit, and the discharge cannot be regarded as a dismissal of the suit against him. If such person's property is attached in execution of the decree passed in the suit he is entitled to file an objection under O, 21, R. 58, C. P. Code. If the objection is allowed, the plaintiff decree-holder is entitled to institute a suit under O 21, R. 63 and is not barred by the provisions of S. 47, C.P. Code. (Puranik. J.) RAMSEWAK BHURELAL v. HIRALAL. I.L.R. (1943) Nag. 462—208 I.C. 549—16 R.N. 93—1943 N.L.J. 333—A.I.R. 1943 Nag. 273.

——S. 47—Party to the suit — Minor member of joint Hindu family—Decision aganis! major members —Bar of fresh suit against minor.

Though a decision against a major member of a joint Hindu family may operate as res judicata against a minor member, not a party to the suit, in view of Expln. VI to S. 11, C.P. Code, it would not follow that he would be considered as a party to that suit for the purposes of S. 47, C.P. Code, so as to bar a fresh suit against him. (Allsop, J.) RAGHUBAR DAYAL v. KUISUM-UN-NISSA-BIBI. 1945 A.L.W 256=1945 O.W.N. (H.C.) 235=1945 A.W.R. (H.C.) 269=A.I.R. 1945 A. 392.

- S. 47—Party to suit—Person made party to to execution proceeding.

A person who is made a party to the execution proceeding cannot claim to be regarded as a "party to the suit" for the purpose of raising objection under S. 47.

C. P. Code. (Khundkar and Biswas, J.J.) SATYANARA-YAN BANNERJEE v. KALYANI PRASAD SINGH, 49 C.W.N. 558=A.I.R. 1945 Cal. 387.

Where a final decree in a mortgage suit says that the hypotheca or a sufficient portion thereof shall be sold, a person who propounds an agreement that certain items of the hypotheca should not be sold is clearly attacking that decree. Where a judgment-debtor under a mortgage decree for sale comes up in execution with the allegation that before even the preliminary decree was passed he had made an arrangement with the plaintiff (decreeholder) that certain items of the hypotheca should not be brought to sale, he on his part undertaking not to press his defence and to remain ex prate, he is clearly pleading an agreement which attacks the decree itself. Such an agreement is not a mere agreement relating to the execution or executability of the decree and cannot be pleaded in bar of execution. (Burn and Mockett, JJ.) KANGAYA GOUNDER v. MUTHUSWAMI GOUNDER. 54 L.W. 157=1941 M.W.N. 1044=1941 (2) M.L.J. 344.

S. 47 — Question between decree-holder and Official Receiver representing insolvent fudgment-debetor—Order under O. 43, R. 1 (1)—Appeal and second appeal—Competency.

A question between the decree-holder and the Official Receiver representing an insolvent judgment-debtor falls under S. 47, C.P. Code and the order on such a question is open to appeal and second appeal, even when the order falls under O. 43, R. 1 (j). (Leach C. J. and Kuppuswami Ayyar, J.) GURAVAIAH v. OFFICIAL RECEIVER, NELLORE. I.L.R. (1942) Mad. 614=201 I.C 769=15 R.M. 408=1942 M W.N. 198=55 L.W. 119=A.I.R. 1942 Mad. 415 (1)=(1942) 1 M.L. J. 283.

——S. 47—Question of trust—Question whether a wakf is vaild or not under Shia School of Mahimedan Law—If can be decided in execution proceedings.

There is no invariable rule that in no circumstances can a matter relating to a trust be decided in execution proceedings. Where such questions are difficult and complicated, execution proceedings are not the appropriate proceedings for deciding them. It is not so much a question of kind, but of decree. Where the question is only whether a certain wakf is or is not a valid wakf under the Shia School of Mahomedan Law it can be decided under S. 47, C.P. Code. (Divis, C.J. and Weston, J.) SHAHBAN MOHIB v. HEMRAJ RAGHAVJI. LL.R. (1941) Kar. 474—197 I.C. 884—14 R.S. 125—A.I.R. 1942 Sind 14.

Sa. 47 and 68—Question relating to execution—Sale by Collector—Application to set aside—Forum. ZIBAL v. MUKA. [See Q. D.: 1936—'40 Vol. I, Col. 1078.] 193 I.C. 274—13 R.N. 302.

—S. 47—Question relating to execution—Symbolical pissession obtained against judgment-debtor—Subsequent recovery of actual possession—Proper remedy—Suit or application.

When once a decree-holder auction-purchaser obtains symbolical possession in execution proceedings against the judgment-debtor, any futher question regarding actual possession or dispossession is not a question relating to

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execution, discharge or satisfaction of the decree within the meaning of S. 47, C.P. Code. A second application by him for delivery of possession will not, therefore, lie and his only remedy in respect of actual possession is by way of a suit. (Khundkar, J.) SURENDRA PRASAD LAHIRI v. GOBINDA DAS. 48 C.W.N. 15.

——S. 47—Applicability—Application for setting aside dismissal of execution application for default—Appeal—If lies.

S. 47, C. P. Code, is not applicable to an application for setting aside an order dismissing an application for execution for default. An order refusing such application is not appealable. (Malik, J) BHAGWATI PRASAD v. THE COLLECTOR OF ETAH. I.L.R. (1944) All. 381=218 I C. 269=18 R.A. 6=1944 A L.J. 298=1944 O.A. (H C.) 133=1944 A.W.R. (H C.) 133=A.I.R. 1944 All. 218.

S. 47—Representative—Decrees for rent in favour of landlord for earlier and later periods—Execution of earlier decree—Sale of holding—Purchase by stranger—Liability of latter for arrears for period prior to purchase—Purchaser—If representative of judgment-debtor.

A stranger auction-purchaser who purchases a holding in execution of a decree for rent with notice that it is saddled with liability for arrears of rent for a period anterior to the date of sale, though subsequent to the decree under execution, is liable for the rent of that period. Such an auction-purchaser purchasing the holding subject to a rent charge is a representative of the judgment debtor, and his liability may be enforced in execution of a decree for rent in respect of the period subsequent to the former decree and antecedent to the sale at which he has purchased. The rights and liabilities of the parties have to be worked out by execution proceedings and not by a separate suit; such a suit by the landlord for the arrears of rent for the period prior to the purchase under the earlier decree would be barred under S. 47, C. P. Code, his only remedy being by way of execution. (Agarwala, I.) DARSON MAHTO v. SHEO KUMAR. 197 I.C. 688=8 B.R. 263=14 R.P. 341=22 Pat, L.T. 734=A.I.R. 1941 Pat. 612.

S. 47—"Representative"—Decree-holder attaching property of judgment-debtor—If representative of the latter.

A decree-holder attaching the property of his judgment-debtor cannot be regarded as a representative of the latter, the attachment by the decree-holder is not effected by him as the privy or representative of the judgment-debtor, but by virtue of a right inherent in him to attach what is really the property of the judgment-debtor at the date of the attachment. (King, J.) PETHURAJU KONE v. MUTHUSWAMI AIYAR. 201 I.C. 199 = 15 R.M. 273=1941 M.W.N. 982=A.I.R. 1942 Mad. 128=(1941) 2 M.L.J. 784.

# ——S. 47—Representative—Meaning of.

The word 'representative' in S. 47, C. P. Code, has a much wider meaning than the words 'legal representative' used in S. 50 in asmuch as it includes not only a legal representative but any representative-in-interest i. e. any transferee of the interest of a party. (Bennett and Ghulam Hasan, II.) BANKEY BEHARI LAL v. BRIJ RANI,

20 Luck. 226=1944 O.W.N. 410=1944 A.W.R. (C.C.) 246=1944 O.A. (C.C.) 246=A.I.R. 1944 Oudh. 314.

Assignee of decree—Assignment challenged by creditor of decree-holder—Plea that transfer is fraudulent and fictitious—Duty of executing Court.

The term "representative" in S. 47, C. P. Code, is not confined to legal representatives but would also include the representatives in interest who may have obtained or who may allege to have obtained a decree-holder's interest by transfer or assignment. If that assignment is challenged by a creditor of the decree-holder and it is pleaded that the assignee is not the representative of the decree-holder, that the decree cannot be taken to have been assigned so far as the decree-holder is concerned and that the interest in the decree still continues to vest in the decree-holder, the question has to be gone into by the executing Court. (Abdur Rahman, J.) ADEMMA v. SUBBAMMA. 55 L.W. 682=1942 M.W.N. 826=206 I.C. 381= 15 R.M. 960=A.I.R. 1942 Mad. 714=(1942) 2 M.L.J. 491.

- ——S. 47—"Representative"—Meaning—Auction-purchaser of judgment-debtor's property in execution. Basumati Kuar v. Harbans! Kuer. [see Q.D. 1936—'40 Vol. I Col. 3279]. 20 Pat. 86=192 I.C. 866=13 R.P. 528=7 B.R. 545=A.I.R. 1941 Pat. 95.
- S. 47—Representative—Mortgage decree—Execution—Purchaser at sale—If representative of either party—Dispute between purchaser and decree holder—If falls under S. 47.

An auction-purchaser purchasing mortgaged property under a mortgage decree acquires the interest of the mortgagee decree holder as well as that of the mortgagor judgment-debtor in the mortgaged property and such purchaser is therefore, necessarily a representative in interest of the decree-holder as well as of the judgment debtor. A question arising between the auction purchaser and the decree-holder is one that falls under S. 47, C. P. Code. (Tyabii, J.) PIRUJI HAZA-RIJI V. AMRATI. I.L.R. (1944) Kar. 284=218 I.C. 486=A.I.R. 1944 Sind 233.

A purchaser who is bound by the doctrine of lispendens is a representative in interest and is therefore a representative within the meaning of S. 47, C. P. Code. (Nivogi and Digby, Jl.) GENDMAL V. LAXMAN. I.L.R. (1944) Nag. 852—A.I.R. 1945 Nag. 86.

A purchaser from a decree holder who has purchased the property in execution of his own decree against the judgment debtor is not a representative of the judgment-debtor. (Bose, J.) RUKHMANI V. RAMSAROOP. I L.R. (1944) Nag. 739=1944 N.L.J 385=A.I.R. 1944 Nag. 3 24.

S.47—"Representative"—Purchaserin execution of money decree-Right of appeal against order in execu-

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tion of another decree against judgment-debtor when he is not a party to the latter decree.

A purchaser in execution of a money decree is not a representative of the judgment-debtor within the meaning of S. 47 C. P. Code for purposes of execution of another decree against the same judgment-debtor, so as to entitle him to appeal against a decision or order in the course of execution of the latter decree to which he is not a party. A representative in interest within the meaning of S. 47 includes only a purchaser of the judgment-debtors interest, who so far as that interest is concerned is bound by the decree, (Agarwala, J.) LAKHPAT LAL v. MAKHAN RAM, 201 I. C. 786-8 BR. 838=15 R.P. 77=23 Pat. L.T. 342=A.I.R. 1942 Pat. 369.

——S. 47—'Reperentative'—Stranger purchaser in execution of monsy decree—If representative of decree-hilder—Suit for possession from judgment-debtor's representative in interst—Maintainability.

In execution of a money decree certain immovable property was attached on 18th September 1921. On 26th September 1921, the widow of the judgment-debtor (he having died) sold the property to the 1st defendant. On 7th January, 1922, the property was sold by the Court in execution proceedings, and the plaintiff, a stanger, became the auction purchaser. The plaintiff, who obtained a sale certificate only on 30th November, 1931, filed a suit on 1st Match 1932, for possession from the 1st defendant and his tenant the 2nd defendant. S. 47 was pleaded in bar of the suit,

Held, (1) that the stanger purchaser was not entitled to apply for possession as against the judgment debtor or his representative in interest under S. 47, C. P. Code, (2) that the suit was not therefore barred under S. 47; (3) that the stranger purchaser was not a representative of the decree holder.

Per Patanjali Sastri J, dissenting.)—(1) that the stranger auction-purchaser must be regarded as the representative of the decree-holder (2) that the question of delivery of possession to a stranger auction-purchaser, however, did not relate to execution discharge or satisfaction of the decree within the meaning of S. 47. (Leach, C. J., Pandrang Row, Abdur Rahman. Krishnaswami Ayyangar and Patanjali Sastri. JJ.) Annamala Mudali v. Rahmaswami Mudali. I.L.R. (1941) Mad. 438=196 I.C. 204=14 R.M. 255=1941 M.W.N 149=53 L.W. 27=A.I.R. 1941 Mad. 161=(1941) 1 M.L.J. 45 (F.B.)

S. 47—Representative—Transferee of share of decree with notice of attachment.

The word 'representative' in S. 47, C. P. Code, should be interpreted liberally. A transferee of a share of a decree with notice of its attachment is a 'representative' within the meaning of section. (Davies.) Chhagan Lal v. Man Mal. 1942 A. M.L.J. 37.

Ss. 47 and 60—Saleability of property—objection as to—Judgment-debtor, if can raise after sale. See C. P. Code, O. 21, Rr. 90 and 92. 44 P.L.R. 302 (F.B.).

S. 47—Scope—Application to have order striking off execution on full satisfaction set aside on ground of mistake.

An application to have an order striking off execution on full, satisfaction set aside on the ground that a mistake had been made in stating that the decree was satisfied, falls within S. 47, C. P. Code. (Grille, C.J. and Puranik, J.) Manorath Kanhal v. Atmaram. I.L. R. (1944) Nag. 370=214 I.C. 12=17 R.N. 19=1943 N.L.J. 521 =A.I.R. 1943 Nag. 335.

—S. 47—Scope—"Execution"—Decree and sale set aside as result of decree in another suit—Application by purchaser for return of purchasemoney from decree-holder—Competency—If relates to execution.

Where a decree and an execution sale held under it are in effect set aside as the result of the decree passed in another suit, and the auction-purchaser at the sale applies for re-payment of the purchase money from the decree-holder, such an application is competent and falls under S. 47, C.P. Code. No separate suit is necessary. The question whether the applicant should be put into possession of the property purchased by him or restitution of the price paid should be ordered is obviously a question relating to the execution of the decree within the meaning of S. 47, C.P. Code. (Tyabji, J.) PIRUJI HAZARIJI V. AMRATI. I.L.R. (1944) Kar. 284=218 I.C. 486=A.I.R. 1944 Sind 233.

—S. 47—Scope—Mortgage decree—Sale—Delivery of possession—Objection that property mentioned in sale proclamation was not really mortgaged and did not pass under sale—Maintainability—Jurisdiction of executing Court to go into.

A question whether property of which possession is sought by the purchaser in execution of a mortgage decree and which is in the possession of the judgment-debtor was or was not actually mortgaged and sold is one relating to the execution of the decree and the execution of the decree and the executing Court has jurisdiction to decide it. In proceedings upon a suit for delivery of possession of porperties puuchased by a mortgagee-decree-holder, the judgment-debtor raised an objection that certain buildings which had been mentioned in the sale proclamation along with other buildings admittedly mortgaged were not really mortgaged and that therefore title to those buildings did not pass to the mortgagee under the sale and he was not therefore entitled to be put in possession of the same under the suit for delivery taken out by him.

Held, that the objection was maintainable as it was one relating to execution of the decree under S. 47, C.P. Code, and the executing Court had jurisdiction to entertain and decide it. (Shearer, J.) GOKHEI SWAIN v. CHAITAN ROUT. 217 I.C. 386=11 B.R. 235 =10 Cut.L.T. 32=A.I.R. 1944 Pat. 347.

S. 47—Scope—Mortgage Suit—Preliminary decree—Application for final decree—Application for execution before final decree—Proceedings started—Defendants not raising objection—Final decree actually passed before sale—Sale held in proceedings started before final decree—If void—Objection to validity—Competence.

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A preliminary decree on a mortgage was passed on 26-2-1937. The plaintiff in due course applied for a final decree and notices were served on the datendant. On 19-9-1937, without waiting for the final decree to be made, he applied for execution. Notices were served on defendants and the sale was held on 7-1-1939. In the meanwhile the final decree was passed on 14-1-1938. The defendants raised no objection to the proceedings in execution or to the sale. On 7-5-1940, one of the defendants applied under S. 47, C. P. Code, challenging the validity of the sale and the execution proceedings on the ground, mainly, that the Court has proceeded to sell the property in execution of the preliminary decree.

Held, that since the final decree was passed and a sale proclamation was actually issued thereafter before the sale, even assuming that there was any irregularity in the procedure the sale could not be held to be void, especially because there was no objection raised by the defendants and no prejudice was shown to have resulted. (Manohar Lall, J.) BASHISTA NARAIN SINGH v. RAM PUKAR SINGH. 199 I.C. 470=14 R.P. 579=8 B.R. 582=1942 P.W.N. 64=A.I.R. 1942 Pat. 343

——S. 47—Scope—Order fixing valuation of property under Bihar Money-lenders Act. (VII of 1939)—Second appeal. See Bihar Money-Lenders (Regulation of Transactions) Act, S. 13 and 14. (1944) P.W.N. 177.

——S. 47—Scope—pre-decree agreement—Suit for money on account of sale of goods—Consent order on application for attachment before judgment—Defendants handing over goods to plaintiff for sale by latter and for appropriation of proceeds towards decree—If can be given effect to in execution.

An application for attachment before judgment in a suit for money on account of goods sold and delivered, was amicably settled by consent of parties. The parties agreed as follows: "Without prejudice to the contentions of the parties in this suit or in other proceedings between the parties the defendants have handed over to the plaintiffs the... goods as shown in two sheets attached. These will be sold by the plaintiffs pending the disposal of the suit and pending final orders with regard to the same, which will be appropriated towards the decree, if any, passed in their favour."

Held, that on a proper interpretation of the consent order the sum received by the plaintiffs was to be appropriated in satisfaction of the decree and this presumed a decree. It presumed a credit in execution and not a credit in the suit itself.

Held, further, that it was implicit in the terms of the agreement that the defendants were to get a fair price for the goods and to get credit for this price in the proceedings, if not in the suit itself, then in the execution of the decree and an inquiry as to the price that should have been received for the goods handed over could be and should have been ordered in execution, no sepa-

rate suit being necessary for the purpose. (Davis, C.J. and Weston, J.) RAMA BROS. v. Forbes, Forbes Campbell. & Co., Ltd. I.L.R (1944) Kar. 227=195 I.C. 626=14 R.S. 40=A. I.R. 1941 Sind 103.

——S. 47—Scope—Sale void as wholly without jurisdiction—Application by judgment-debtor to have it declared void—If hes.

Where a sale is wholly without jurisdiction and consequently void as opposed to voidable, an application by the judgment-debtor to have it declared void will lie under S. 47. In such a case no actual setting aside of the sale is really necessary. (Dhavle and Meredith, JJ.) LHAN KUMAR CHAND v. LACHMIKANTA RAI. 8 B.K. 507=199 I.C. 169=14 R.P. 557=A.I.R. 1941 Pat. 566.

——Ss. 47 and 52—Scope—Suit by creditor against heir of debtor—Decree against assets—Separate suit for administration of debtors, estate—Maintainability.

A Court is not bound to pass a decree or an order for the administration of the estate of a deceased person at the instance of a creditor when the question between the parties can be properly determined without such a decree or order. Where a creditor obtains a decree for recovery of his debt against the assets of the deceased in the hands of his legal representative, but instead of proceeding to execute his decree under S. 52, C. F. Code, against the assets in the hands of the legal representative, files a separate suit to have the estate of the debtor administered, the Court will not pass a decree for administration of the estate. It is doubtful whether a creditor who has obtained a decree is entitled to file another action which in substance is really for recovery, of his debt, though in form an administration action. S. 47, C. F. Code, may operate as a bar to such a suit. (Somayya, J.) Venugopala Naiduv. Valambal Ammal. 205 L.C. 297=15 R.M. 843=55 L.W. 308=1942 M. W.N. 356=A.I.R. 1942 Mad. 588=(1942) M.L.J. 580.

S. 47—Scope—Usufructuary mortgage— Suit on—Final decree for sale—Execution— Application by judgment-debtor claiming comrensation for waste by decree-holder after lecree—Competency—Separate suit—Necessity.

The Court executing a decree is entitled to go nto such matters as waste committed, whichever side has happened to be in possession, since the date of the decree sought to be executed. A final decree in a suit on a usufructuary mortgage provided that as the money due under the preliminary decree had not been paid, the mortgaged property or a sufficient portion thereof should be sold to satisfy the decree and the balance, if any, should be paid over to the judgment-debtor. In execution proceedings for sale, the judgment-debtor claimed that the property should be sold only after allowance had been made for compensation due to him for acts of waste committed by the decree-holder after the decree. The Court, however, directed the judgment-debtor to file a separate suit.

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Held, that the question of waste by the decree-holder and the compensation due in respect of it should be considered as one arising in execution within the meaning of S. 47, C. P. Code, and should be determined in execution. (Horwill and Bell, JJ.) RAMANATHA IYER v. ABDUL SALAM SAHIB. (1945) 1 M.L.J. 67—A.I.R. 1945 Mad. 179.

SHEIKH TAMIZALI v. NASARALI BHUIYA. [see Q.D. 1936-40 Vol. I, Col. 3279.] 193 I.C. 451=13 R.C. 439=A.I.R. 1941 Cal. 58.

S. 47, O. 21. Rr. 95 and 96—Suit by decree holder auction-purchaser for actual possession after obtaining formal possession—Maintainability—Limitation.

A suit by a decree holder auction-purchaser for actual possession after he obtained formal possession would be maintainable and the date of the granting of the formal possession would afford a fresh starting point of limitation against the judgment-debtor in respect of such a suit. (Yorke, J.) THE COLLECTOR OF BENARES v., JAISRI GIR. 1944 A.L.W. 62.

——S. 47, Expl.—"Party" Party against whom suit is erroneously dismissed instead of his being struck out of the plaint—If "party."

Where in a suit the Court, instead of directing that a certain party should be struck out as having been improperly impleaded, erroneously makes an order dismissing suit as against him, such a person cannot properly be said to have been a party to that suit within the meaning of the Explanation to S. 47, C. P. Code. (Agarwala and Shearer, JJ.) KUSMI v. SADASIVA MAHTO, 21 Pat. 601=201 I. C. 196=15 R.P. 34=8 B.R. 770=23 Pat.L.T. 354=A.I.R. 1942 Pat. 432.

—S. 47 (1) and (3)—Scope of—Disputes between attaching creditor and purchaser of decree—If can be gone into in execution.

Where an attaching creditor of a decree challenges the right of the purchaser of that decree to execute it, the matter cannot be gone into under S. 47, C. P. Code. The dispute is as between representatives of the decree-holder and not one between parties to the suit and hence would not come under S. 47, C. P. Code. (Agarwal, J.) DWARKA v. ABDUL SHAKUR. 198 I.C. 514=14 R.O. 412=1942 O.A. 16=1942 A.W.R. (C.C.) 28=1942 A.L.W. 7=1942 O.W. N. 1=A.I.R. 1942 Oudh 281.

——S. 47 (2)—Suit against landlord and rival tenant—Conversion into proceedings in execution of prior decree against landlord alone.

A subsequent suit against a landlord and a rival tenant who is not a representative of the landlord cannot be converted into proceedings in execution of a prior decree for possession obtained by the plaintiff against the landlord alone. (Shirreff, J.M.) Behari v. Angude Singel. 1942 O.A. (Supp.) 10=1942 A.W.R. (Rev.) 10.

S. 47 (3), C. P. Code, does not apply where the dispute is between persons who have rival claims to be accepted as legal representatives on one side only. In such cases, no appeal lies and the decision is merely a summary decision for the purpose or enabling the proceedings to be carried on, without affecting any right which any person may have, to the proceeds of the decree. (Beckett, J.) Sunder v. Sita Ram. 196 I.C. 895=43 P.L.R. 435=14 R.L. 190=A.I.R. 1941 Lah. 342.

S. 47 (3)—Applicability—Dispute between one party and representative of another—Decision on—Res judicata—O. 22, R. 5—Application of.

S. 47 (3) does not apply when the dispute is between rival representatives of one party, the other party having disclaimed any interest in the question. It applies where there is a dispute between one party and a representative of another party about the latter's right to represent the deceased party's estate, and a decision on the question by the executing Court will operate as res judicala in a subsequent suit between the same parties. O. 22, R. 5, C. P. Code, does not govern such a case. (Divatia, J.) RAMA MARUII v. MALLAPPA KRISHNA. I.L.R. (1942) Bom. 822=15 R.B. 226=203 I.C. 339=44 Bom. L.R. 678=A.I.R. 1942 Bom. 309.

persons each claiming to be decree-holder.

S. 47 (3), C. P. Code, is wide enough to include a dispute between two persons each of whom claims to be the decree-holder. (Sinha and Beevor, JJ.) LALMANI KUER v. RAGHUBANSI DEVI. 23 Pat. 410=219 I.C. 100=11 B.R. 349=A.I.R 1944 Pat. 307.

S. 48—Amendment of execution application—Limitation—Application filed within 12 years—Amendment for remedying defects after 12 years—Permissibility.

There is no option or discretion in the Court with regard to ascertaining whether the requirements of Kr. II to 14 of O. 21, C. P. Code, have been complied with. Where an execution petition, after referring to movables, also contains a prayer for sale of immovable property, but gives no particulars of the property to be sold, it is the duty of the Court to return the petition for amendment for the purpose of having the defects remedied. The amendment can be made even after the expiry of 12 years period prescribed by S. 48, C. P. Code. (Mockett and Clark, JJ.) DIVAKARAN NAMBUDRIPAD v. BRAHMADATHAN NAMBUDRIPAD, 58 L.W. 211=1945 M.W.N. 347=A.I.R. 1945 Mad, 241=(1945) 1 M.L.J. 447.

S. 48—Applicability—Applications to revive pending execution application.

S. 48, C. P. Code, only bars a fresh application for execution and can have no application where the application is to revive a pending execution application. (Ghulam Hasan and Madeley, JJ.) DEPUTY COMMISSIONER BARABANKI V. ANAND BEHARI LAL. 220 I.C. 137=1944 O.W.N. 169=1944 A.L.W. 239=1944 O.A. (C.C.) 120=1944 A.W.R. (C.C.) 120=A.I.R. 1945 Oudh 110.

—S. 48-Applicability-Consigning of appli-

cation to records—Revival.

C. P. CODE (1908), S. 48.

Where an execution was directed to be consigned to the records as partially unsatisfied, it cannot be regarded as a final order disposing comp etely of the execution application. This application can be subsequently revived and the time limit provided by S. 48, C. P. Code, is no bar to such an application. (Agarwal and Madeley, JJ.) MISRI LAL v. ISHRI PRASAD. 17 Luck. 618—199 I.C. 124—14 R.O. 467—1942 A.L.W. 146—1942 O.W.N. 123—1942 O.A. 69—1942 A.W.R. (C.C.) 91—A.I.R. 1942 Oudh. 331.

Small Cause (ourt—Transfer for execution to Civil Court of original jurisdiction—Execution beyond 12 years of decree but within three years of last execution—If barred—Limitation Act, Arts. 182 and 183.

It is obvious that by reason of S. 8, C. P. Code, S. 48 of the Code does not apply to a decree passed by a Presidency Smill Cause Court, whether it is being executed by that Court itself or by some other Court of original jurisdiction. Where a decree of a Presidency Small Cause Court is transferred for execution to a Court of original jurisdiction an application for execution filed in the latter Court beyond 12 years of the decree will not be barred by limitation under S. 48, C.P. Code, but will be in time if filed within 3 years of the iast execution as provided by Art. 182 of the Limitation Act. Art. 182 and not Art. 183 of the Limitation Act applies to such a case. (Dhavle and Chatterji, J.) RANGANADHAN v. PONNACHARAMMA. 7 Cut.L.T. 45=197 I.C. 627=14 R. P. 322=8 B.R. 256=23 Pat.L.T. 87=A.I.R 1942 Pat. 128.

—S. 48—Applicability—"Fresh application"
—Execution application presented within 12 years
—Application beyond 12 years for amendment to
include property or person not named or specified
in original application—Maintainability—If
"fresh" application or only in continuation of
original application. RAM RAN BIJAIYA PRASAD
SINGH v. KESHO PRASAD SINGH. [See Q.D. 1936
—'40 Vol. I, Col. 1087.] 191 I.C. 492—13 R.P.
326—7 B.R. 206—A.I.R. 1941 Pat. 635.

—S. 48—Applicability—Sentence of fine—Warrant under S. 386 (1) (b) Cr.P.Code—Execution under C.P.Code—Limitation—Penal Code, S. 70. See Penal Code, S. 70. 43 Bom.L.R. 122.

S. 48—Computation of limitation—Exclusion of period under S. 15 of Limitation Act.

S. 48, C.P.Code, prescribes a period of limitation for execution of a decree. S. 15 of the Limitation Act is perfectly general and is not restricted to the limitation prescribed by the First Schedule to the Limitation Act, and the provisions contained therein can, therefore, be invoked in computing the period of limitation prescribed by S. 48, C.P.Code. (Grille, C.J. and Sen, J.) SITARAM NANASA V. CHUNNILAISA. I.L.R. (1944) Nag. 250=217 I.C. 298=17 R.N. 107=1944 N.L.J. 127=A.I.R. 1944 Nag. 155.

—S. 48—Decree-holder ordered to refund money realised in execution—Application for execution within three years of order but more than 12 years after original decree—If barred—Application, if can be treated as continuation of

original application. See Limitation Act, Art. 182 (6). 46 C.W.N. 149.

S. 48—"Decree sought to be executed"—Decree confirmed in appeal—Starting point of limitation—Date of original decree or date of appellate decree.

The "decree sought to be executed" in S. 48, C. P. Code, in cases where there has been an appeal which confirmed the original decree, is the decree of the appellate Court, and the period of 12 years has to be computed from the date of the appellate decree. (Kuppuswani Aiyar, J.) NACHARAMMAL v. VEERAPPA CHEITIAR. 1945 M.W.N. 513=(1945) 2 M.L.J 197.

——S. 48—Execution application—Application to amend by substitution of a different property—If a continuation of a prior application.

Where an application purporting to be an application for amendment of a prior application for execution prays that, instead of execution against the superior proprietary rights execution should be allowed against the under-proprietary rights, it cannot be regarded as a continuation of the prior application. It is a fresh application even though framed as an application for amendment because it substitutes a different property for that given in the original application. (Ghulam Hasan and Madeley JJ.) NOOR MOHAMMAD KHAN W. RAMESWAR PRASAD SINGH. 1944 O.W.N. 301=1944 A.W.R. (C.C.) 208=1944 O.A. (C.C.) 208=A.I.R. 1945 Outh 84.

——S. 48— Execution application— Dismissed for statistical purposes—New application—When continuation of old one,

Where the circumstances indicate that the intention in making an order dismissing an execution application was not to dismiss the application for negligence but the intention was to remove an old execution application from the list and deal with it afresh under the guise of a new application, the new application must be treated as a continuation of the earlier application and will not be time barred under S. 48 C.P. Cope. (Tek Chand and Dalip Singh, JJ.) MUNICIPAL COMMITTEE, HARIZABAD v. GOPAL DAS. 193 I.C. 334=13 R.L. 449=A.I.R. 1941 Lah. 62.

There is no option or discretion in the Court with regard to ascertaining whether the requirements of Rr. 11 to 14 of O. 21, C.P. Code, haven been complied with. Where an execution petition after referring to movables also contained a prayer for the sale of immovable property but no particulars of the properties were given it is the duty of the Court to return the petition for amendment for the purpose of having the defects remedied. The amendment can be made even after the expiry of the twelve years period of limitation prescribed by S. 48, C.P. Code. (Mockett and Clark, J.) DIVAKARAN NAMBUDRIPAD v. BRAHMADATHAN NAMBUDRIPAD. 58 L.W. 211=1945 M.W.N. 347=A.I.B. 1945 Mad. 241=(1945) 1 M.L.J. 447.

C. P. CODE (1908), S. 48.

-S. 48—'Fresh application'—Application to continue execution proceeding against legal representatives of deceased judgment debtor.

An application made by the decree-holder on the death of the judgment-debtor pending an execution proceeding for the continuation of the proceeding against his legal representatives, is merely ancillary to the substantive petition against the original judgment debtor, and cannot rank as a fresh application within the meaning of S. 48, C. P. Code. (Mukerjea and Ellis, J.). HARL SHIKESH SAHA v. RADHARANI KAR. 49 C.W.N. 522.

——S. 48—Limitation—Application for execution within 12 years—Application after 12 years to substitute new property for property in original application—Competency—If can be regarded as continuation of original application—Americanent.

Where a decree-holder wishes by means of a subsequent application merely to correct any description of the property mentioned in his application for execution, such subsequent application may be regarded as a continua. tion of the original application for execution, but where he tries to substitue a new property which is quite different from the property against which he wished to proceed in the first intsance, his application therefor must be regarded as a fresh application for execution, and cannot be allowed when it is made beyond the period of 12 years after the date of the decree under execution, prescribed by S. 48, C.P. Code. A decree-holder cannot be allowed to proceed against a new property after the decree has become barred by limitation and he cannot be allowed to evade the bar of limitation by his assertion that he is merely asking for an amendment of his original application for execution. (Fazl Ali and Chatterji, JJ.) GAJANAND SHA z. DAYANAND THAKUR. 21 Pat. 838=205 I.C. 561=15 R.P. 296 =9 B.R. 243=A.I.R. 1943 Pat. 127.

——S 48.—Limitation for execution—Extension— —Minority of decree-holder—Limitation Act. S. 6 and Art. 182.

S. 48, C. P. Code, contains an absolute prohibition against taking action on execution petitions put in more than 12 years after the passing of the decree, subject to certain stated exceptions. This prohibition is not modified in favour of a minor decree holder by virtue of S. 6 of the Limitation Act, as this section is expressly confined to cases falling under the same Act. Further the minor cannot derive benefit from Art. 182, read with S. 6 of the Limitation Act, for Art. 182 only applies in cases not coverd by S. 48, C.P. Code. (Beckut and Teja Singh, J.). NATHU MAL v. JAI KARAN DASS. 212 I.O. 228=16 R.L. 264=46 P.L.R. 24=A.I.R. 1944 Lah. 68.

——S. 48—Limitation under — Starting point— Decree amended under U.P. Agriculturists' Relief Act.

The fact that a decree was amended under S. 5 U. P. Agriculturists Relief Act is no ground for holding that it should not be treated as a subsequent order directing the payment of money at a certain date or at recurring periods, as mentioned in S. 48 (1) (b) C.P. Code. Hence the period of twelve years provided in the section should be computed only from the date of the amended and not the original decree. (Ghulam Hasan, J.) MANGNOO SINGH v. BINDESHRI. 19 Luck. 291=209 I.C. 631=1943 O.W.N. 313=1943 C.A. (C.C.) 194=1943 A.W.R. (C.C.) 87=A.I.R. 1943 Oudh. 412.

S. 48—Scope—Amendment of decree unier S. 19
Madras Agriculturists Relief Act—If gives fresh start
—Execution petition in transferee Court before order
of transfer for execution—Order of transfer after 12
years—If dates back to date of petition in transferee
Court—Stay under S. 20 Madras Agriculturists' Relief
Act,—If deductible—Limitation Act, S. 15—"fraud
or force" in S. 48 (2)—Meaning of.

There can be no execution of a decree governed by S. 48, C. P. Code, when twelve years have passed from the date of the decree, whether amended or not. An amendment of the decree under S. 19 of Madras Act, IV of 1938 does not give a fresh starting point of limitation for the purpose of the 12 years rule under S. 48. The appellant obtained a decree for money on 18-3-1930. On 17-4-1941, the judgment-debtor obtained a stay under S. 20 of Madras Act IV of 1938, and in subsequent procedings under S. 19 of that Act, the amount of the decree was scaled down and reduced. On 16-3-1942, i.e., two days before the expiry of the 12 years fixed by S. 48, C. P. Code, the appellant applied to the Court which passed the decree for transfer of the decree for execution to another Court, but this was ordered only on 20-3-1942, i.e., after the expiry of the 12 years. Meanwhile, the appellant in anticipation of the decree being transferred, filed an execution petition in the transerring Court on 18-3-1942, but the papers were received by the latter Court only on 28-3-1942, and the execution petition was held to be barred by limitation under S. 48, C. P. Code.

Held (1) that jurisdiction to execute the decree passed to the transferee Court by the transfer, order, and it could not be held that this order dated back to the date of the execution application; as the transferee Court had no jurisdiction to entertain the application on that date the petition could not be held to be a validly presented one; (2) that the amendment of the decree under S. 19 of Madras Act IV of 1938 did not give a fresh starting point of limitation; (3) that the words "fraud or force" in S. 48 (2) (a), C. P. Code, contemplated some Act of violence or deceit at the instance of an interested party where by the decree-holder is prevented from executing his decree and did not contemplate a mere judicial order, like one under S. 20, Madras Act IV of 1938, restraining execution; (4) that the execution petition in the transferee Court could not be regarded as a continuation of the petition in the Court which passed the decree for transfer of the decree, which was merely an ancillary proceeding in the transferring Court; (5) that the period for which the stay under S. 20 of Madras Act IV of 1938 continued could not be excluded under S. 15, Limitation Act, in calculating the 12 years prescribed by 48, C. P. Code. (Wadsworth, J.) MANICKAM CHETTIAR v. RAMASWAMI CHETTIAR. 57 L.W. 602=1944 M.W.N. 707=A.I.R. 1945 Mad. 70=(1944) 2 M.L. I. 403.

within 12 years—Application after 12 years to substitute new property for property mentioned in original application—Permissibility—If con-

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tinuation of original application or fresh application. See— Execution—Limitation. 21 Pat. 838.

Summary dismissal on merits—Starting point of limitation of 12 years—Limitation Act, Art. 182—Distinction.

The period of 12 years under S. 48, C. P. Code, has to be determined with reference to that section only and not with reference to any other enactment. S. 48, C. P. Code, differs from Art. 182, Limitation Act, in that a decree holder can reckon his three years under Art. 182 (2) instead of under Art, 182 (1) when there has been an appeal with whatever result; but for the purpose of counting the period of 12 years under S. 48, C. P. Code, from a date later than that of the decision of the trial Court, it is not sufficient that an appeal has been presented. It must be shown that a decree has been passed by the appellate or superior Court in supersession of the first Court's decree. There is no such decree when the appellate or superior Court dismisses the appeal or revision for default without any adjudication. Where an appeal is dismissed under O. 41, R. 11, C. P. Code, or an application in revision is summarily rejected not for default but substantially on the ground of the correctness of the trial Court's decree, such dismissal must be deemed to be the decree which is sought to be executed, for purposes of S. 48, C. P. Code; therefore the 12 years' period under S. 48, commences to run from the date of that decree and not from the date of the decree of the first Court. (Rowland. J.) JAGANNATH BAL v. SADHU CHARAN BAL. 211 I.C. 303=10 B.R. 364=16 R.P. 223=9 Cut. L.T. 21=A.I.R. 1943 Pat. 371.

S. 48—Scope—Decree amended by scaling down under Madras Agriculturist's Relief Act—If new decree—Period of 12 years—Starting point—Revival of execution petition pending before amendment.

A decree as amended by scaling down under Madras Act IV of 1938 cannot be regarded as an entirely new decree. It is only the old decree amended and for purposes of limitation for execution, the starting point of 12 years under S. 48, C. P. Code, is the date of the original decree and not the date of the amendment by scaling down. An execution petition filed and pending at the time of the application for scaling down can, after amendment, be revived and proceeded with, although at the time of amendment this period of 12 years from the date of the original decree has elapsed. (Horwill, I.) JAGANNADHAN V. VENKATAPPANNA. 210 I.C. 624—16 R.M. 469—1943 M.W.N. 591—56 L.W. 564—A.I.R. 1943 Mad. 765—(1943) 2 M.L.J. 358.

—S. 48—Scope—If controls Ss. 6 and 7 of the Limitation Act. See Limitation Act, Ss. 6 and 7. 20 Pat. 1.

\_\_\_\_S. 48-Scope-If controlled by S. 14 of Limitation Act.

S. 48, C. P. Code, is not controlled by S. 14 of the Limitation Act. The period referred to in the former cannot be described as a period of limitation prescribed for any proceeding. (Henderson, J.) MAKHAN LAL SAHA v. FIRM MADAN MOHAN, 50 C.W.N. 12.

-S. 48—Scope — If controlled by S. 15, Limitation Act—Stay of execution—If extends limitation beyond 12 years fixed by S. 48.

S. 48, C. P. Code, is controlled by S. 15 of the Limitation Act and there is no reason why S. 15, Limitation Act should not apply so as to extend the period of limitation prescribed by S. 48, C. P. Code. If execution is therefore stayed by the Court, it is the act of the Court which prevents execution and it would be unreasonable to make the party suffer. It is not correct to hold that S. 48. C. P. Code, does not provide a "period of limitation" within the meaning of S 15, Limitation Act, and the words 'period of limitation' in S. 15, cannot be confined to periods given in the Schedule to the Limitation Act. (Broomfield and Macklin, JJ.) RAMGOPAL BHUTADA v. SID-RAM AUNAYYA. 208 I.C. 254=16 R.B. 61=45 Bom. L.R. 234=A.I.R. 1943 Bom. 164.

-S. 48—Starting point—Decree of Small Cause Court-New trial application and subsequent revision application in High Court-Effect of on limitation for execution-Period-If extended.

A decree in a suit in the Presidency Small Cause Court was passed on 2-2-1926. The decree-holder unsuccessfully prosecuted a new trial application and thereafter a Civil Revision Petition in the High Court, which was dismissed on 7-3-1928. He filed one execution application in October, 1938.

Held, that the application was barred by S. 48 C. P. Code, and the fact that the revision application was filed and dismissed was not immaterial for deciding the question of limitation. (Burn and Mockett, II.) NAGALINGA CHETTY v. SRINI-VASA AIYANGAR. 199 I.C. 812—14 R.M. 631—53 L.W. 284—1941 M.W.N.292—A.I.R. 1941 Mad 477=(1941) 1 M.L.J. 365.

-S. 48 (1) (b)—Compromise of execution ease—Stipulation that if I.D. committed default in instalments, original decree to be executed— Execution application filed on J. D.'s default-Limitation.

A compromise was entered into between a decree-holder and a judgment-debtor in execution proceedings by which the decretal dues were adjusted at a certain sum. It was also agreed that the decree would be regarded as fully satisfied if the judgment debtor paid a specified smaller amount in a certain number of instalments, but if he defaulted in the payment of any one instalment, the decree-holder would be entitled to execute the decree in respect of the entire decretal amount. The judgment-debtor committed default in the payment of one of the instalments. The decree-holder filed an application for execution of the original decree more than 12 years from the date of the decree but within 12 years from the date of the default.

Held, that the case fell under S. 48(1)(b), C. P. C. and the application was not barred by limitation under that section. (Khundkar and Biswas, JJ.) NARENDRA NATH v. HERAMBA CHANDRA. 220 I.C. 160=79 C.L.J. 100=49 C.W.N. 254=A.I.R. 1945 Cal. 154.

C. P. CODE (1908), S. 49.

execution proceedings-Starting point. CHHAT-RAPATI PRATAP BAHADUR v. HARI RAM. [see Q.D. 1930-40 Vol. 1. Col. 1092.] 191 I.C. 616=13 R.A. 241.

-S. 48 (1) (b)—Order passed on compromise not directing payment of money-Limitation-Fresh start.

If an order of an executing Court passed on a compromise arrived at between the parties does not direct any payment of inoney at a certain date or at recurring periods although it takes notice of and refers to the compromise, it cannot be held to tall within the purview of S. 48 (1) (b), C. P. Code, and cannot give rise to a fresh starting point of limitation. In the absence of any direction by the Court to the parties to receive and pay the money in accordance with the fresh contract arrived at between them, the order cannot be construed so as to contain a direction in regard to the payment of money at any date different from what was provided by the decree, (Harries, C./. and Abdur Rahman. J.) ZAHUR-UD-DIN v. AMTUR RASHEED. 217 I.C. 119=17 R.L. 204=46 P.L.R. 26=A.I.R. 1944 Lah. 106,

Under S. 48 (1) (b) of the C. P. Code, where a decree directs any payment of money at a certain date or at recurring periods the date of default in making the payment in respect of which the applicant seeks to execute the decree will be treated as the starting point of limitation to calculate the twelve years period provided by S. 48 (!). (Harries, C. J. and Manohar, Lall, J.) LAKSHMI NARAIN KHATRI v. GOPAL LAL. 202 I.C. 680=15 R.P. 139=9 B.R. 45=1942 P.W.N 184 = A.I.R. 1943 Pat. 33.

-S. 48 (2) (a)—Plea of fraud of judgment debtor-If can be raised for the first time at the appellate stage of execution proceedings.

Though as a general rule a plea of fraud has to be raised at the earliest stage of a proceeding, and all that has to be said should be said fully and at once, yet slightly different considerations arise when applying the provisions of sub-Sec. (2) of S. 48 of the C. P. Code. A plea of fraud on the part of the judgment-debtor could be raised for the first time in the appellate stage of the execution proceedings where the decreeholder had in spite of his diligence been unable to execute his decree by reason of the fraudulent transfer by the judgment-debtor of his property to his own relation. (Bell. J.) VENKANNA V. KOTTAYYA. 1946 M.W.N. 38=(1945) 2 M.L.J. 564.

-S. 49-Scope - Transferee of decree-Rights of — Liabilities and equities existing against transferor—Enforceability against transferee.

S. 49, C. P. Code, states in the plainest language that the transferee of a decree shall take it subject to the equities which the judgmentdebtor might have enforced against the assignor. There is no difference in principle between S. 49, 2. 48 (1) (b)—Limitation—Decree amount feree of a decree therefore takes the decree and subject to all liabilities and equities to which the

transferor was subject. whether or not the transferee had any knowledge of them. (Leach, C. J. and Lakshmana Rao, J.) SURYANARAYANA v. NAGENWARA RAO. 1945 M.W.N. 238=58 L.W. 186=A.I.R. 1945 Mad. 381=(1945) 1 M.L. J. 438.

——Ss. 50 and 52—Decree against assets of deceased—Execution by sale of undivided interest in joint family in the hands of widow—Availability.

In execution of a decree passed against the assets of a deceased debtor, the life interest of his widow in the undivided interest in the joint family cannot be sold. (Davies.) GAURI SHANKAR V. KAJORI. 1941 A.M.L.J. 94.

S. 50 and O. 21, R. 22—Decree for rent—No notice issued to legal repersentatives of deceased judgment-debtor—Execution sale—If void or voidable.

If the holder of an unsatisfied decree wishes to continue the execution proceedings or wishes to execute the decree against the legal representatives of a deceased judgment-debtor, he must make an application to that effect under S. 50, C. P. Code, and a notice has to be served on such legal representatives in accordance with O. 21, R. 22 (1), C. P. Code. The mere fact that in connection with a rent decree obtained under the B. T. Act, execution proceedings are taken against the holding of the deceased person makes no difference. The holding represents a portion of the estate of the deceased judgment-debtor and the latter's heirs are, therefore, entitled to be brought on the record of the case and to receive the notice which the law requires in order that they may be given an opportunity either to satisfy the outstanding decree or to show cause why execution should not proceed. A sale held in execution of a rent decree is void and not merely voidable in a case in which there has been no application under O. 21, R. 22 (1). C. P. Code. (Edgley and Akram, IJ.) FAIZADDI TALUQUAR v. REZIA BEGUM. I.L.R. (1942) 2 Cal. 262=202 I.C. 109=15 R. C. 290=75 C.L.J. 368=46 C.W.N. 631=A.I.R. 1942 Cal. 436.

S. 50—Jurisdiction—Death of judgment debtor—Substitution of heirs—Power of Court to which decree is transferred for execution—Order by transferee Court for substitution—Legality—Interference in appeal—S. 99. Debendra Nath Haldar v. G. A. Aratoon. [see Q.D. 1936—'40, Vol. I, Col. 3279.]. 193 I.C. 245—13 R.P. 559=7 B.R. 515—22 Pat.L.T. 439—A.I.R. 1941 Pat. 139.

S. 50—Rent decree against tenant—Subsequent death of tenant leaving will—Execution against sons as legal representatives—Executor not made party—Execution sale, if pasees tenure.

Where a rent decree obtained against a tenant during his lifetime is put into execution after his death under S. 50, C. P. Code, against his two sons as his legal representatives, when the tenant has left a will appointing one of his sons and another as joint executors without any objection being taken on that ground, the execution sale passes the tenure to the purchaser when it is not alleged that the two sons were not in possession

C. P. CODE (1908), S. 51.

of the estate of the deceased. (Akram and Pal, JJ.) Woomesh Chandra Dutta v. Jabed All. 211 I.C. 388=16 R.C. 529=77 C.L.J. 155=A.I. R. 1944 Cal. 42.

——S. 50 and O. 21, R. 95—Satisfaction of decree—Addition of legal representative—Necessity—Proceedings under O. 21, R. 95.

When once a decree has been fully satisfied, there is no need to bring the legal representative on record under S. 50, C. P. Code. Where proceedings under R. 95 of O. 21 are taken they are between the auction-purchaser and the claimants, in which the legal representative of a judgment-debtor do not require to be added. (Pollock, J.) GANPAT SINCH v. RAMGOPAL. I.L.R. (1942) Nag. 633=198 I.C. 284=14 R.N. 209=1941 N. L.J. 494=A.I.R. 1941 Nag. 322.

Where a Hindu father made himself responsible to produce certain crops entrusted to him or on failure to make good a particular sum and died and the crops disappeared.

Held:—(Per Harper, S.M.).—The father was in the position of a judgment-debtor and he having died the decree or order could be executed againt his legal representative who would be liable to the extent of the assets of the deceased in his hands and under S. 53 even ancestral property could be proceeded against, if it is liable under Hindu Law and the debt not being repugnant to good morals, the property in the hands of the sons were liable.

Per Sathe, J.M.—The question of the applicability of Hindu Law arose only in respect of ancestral property and as regards self-acquired property, there was no doubt it was liable under S. 50 (2), C. P. Code. (Harper, S. M. and Sathe, J.M.) ATTAR SINGH v. MOHAN. 1941 R.D. 120=1941 O.A. (Supp.) 156=1941 A.W.R. (Rev.) 229.

----S. 51-Appointment of Receiver in execution of - When justified.

There is ample justification for the appointment of a receiver in execution where the circumstances are such that the decree-holder can only exercise the ordinary legal remedies at considerable risk and with doubtful results. (McNair, J.) Pursattamdas v. Baijnath. 195 I.C. 69=14 R.C. 41=A.I.R. 1941 Cal. 240.

\_\_\_\_S.51-Appointment of receiver-When may be made.

Execution by appointment of a receiver is one of the methods of execution provided by S, 51, C. P. Code and so long as in the circumstances of the case it is the best means of securing the rights of the judgment-creditor without causing undue hardship to the judgment-debtor, there is no valid reason for avoiding this method of execution. (McNair, J.) Suresh Chandra Roy v. Prakash Krishna. 45 C.W.N. 1104.

S. 51—Arrest of debtor—Power of Court.
A Court should not order the arrest and detention of a debtor if it is satisfied by evidence that the debtor has not the means to satisfy the debt or a substantial portion thereof but be can pay a

small amount towards the debt monthly if appropriate steps are taken. (Harries, C.J., and Fasl Ali, J.) JOGESH CHANDRA SINGH v. TINKORI DATIA. 197 I.C. 470=14 R.P. 315=8 B.R. 222 (1)=A.I.R. 1942 Pat. 242.

——S. 51 and O. 40, R. 1—Receiver—Appointment in execution without prior attachment—Validity.

Appointment of a receiver in execution is itself a form of attachment. The C. P. Code does not contemplate an attachment as a necessary preliminary to the appointment of a receiver in execution. Therefore, the appointment of a receiver in execution without prior attachment of the property is not invalid. (Wadsworth, J.) Narappa Naidu v. Thummalur Chinna Astithu Reddi. 203 I.C. 529=15 R.M. 657=55 L.W. 89 (2)=1942 M.W.N. 116=A.I.R. 1942 Mad. 396 =(1942) 1 M.L.J. 217 (2).

S. 51—Execution by arrest—Circumstances—Onus finding of lower Court—Interference.

JASSAWALA v. AMULYA CHANDRA DUTTA. [see
Q.D. 1936—'40 Vol. I, Col. 3280.] 191 I.C. 799=
13 R.A. 280.

S. 51, Proviso—Applicability—Decree for alimony under Divorce Act—If decree for money. J. G. KHAMBATTA v. M. C. KHAM BATTA. [see Q. D. 1936—'40 Vol. 1, Col. 3280.] 13 R.B. 264=192 I.C. 605=A.I.R. 1941 Bom. 17.

Ss. 51, 60 (1) and O. 40, R. 1—Right to future maintenance—Attachability—Receiver if can be appointed in respect of.

A right to future maintenance in order to be non-attachable and non-transferable should be personal as distinguished from being heritable. Hence where such a right is heritable it is not exempt from attachment. The language of S. 51 shows that a receiver can be appointed even in cases in which attachment cannot be made and it follows that in the case of a right to future maintenance a receiver can be appointed over it in execution of a decree against the person entitled to the right even though the right is exempt from attachment. (Bennett and Agarwal, JJ.) ASHFAQ MOHAMMAD KHAN v. NAZIR BANU. 18 Luck, 147=201 I.C. 100=15 R.O. 54=1942 A.W.R. (C.C.) 241=1942 O.A. 262=1942 O. W.N. 359=A.I.R. 1942 Oudh 410.

side local limits—Power of Court to issue writ of errest—Execution of such writ.

A Court has in execution of its own decree power to issue a writ of arrest to be executed within its local limits, even though at the date of the order the judgment-debtors reside or carry on business outside those local limits. Such a writ can be executed as and when the judgment-debtors come within the jurisdiction of the Court. (Das, J.) Arratoon and Co. v. MIMRAJ PURANMULL. 48 C.W.N. 706.

S. 51 (d)—Scope—If subject to O. 40, R. 1

—Appointment of Receiver in execution—If matter
of right in decree-holder—Grounds—Bihar
Money-Lenders Act, Ss. 13 and 14—Valuation
under—If justifies appointment of Receiver,

C. P. CODE (1908), S. 51.

S. 51 (d), C. P. Code, is subject to O. 40, R. 1. C. P. Code, and relief by way of appointment of a Receiver under S. 51 (d) is not a matter of course or of right, but can only be given where it appears to the Court to be just and convenient. in other words a proper case must be made out for the exercise of the Court's discretion to appoint a receiver by way of execution, e.g., by showing an impediment preventing the decreeholder from obtaining satisfaction of his decree by an ordinary execution sale. The valuation fixed by the Court under S. 13 of the Bilar Money-Lenders Act, is not such an impediment to an ordinary execution as would entitle the decreeholder to the appointment of a receiver for the purpose of selling the property of the judgment-debtor by private sale. The valuation under Ss. 13 and 14 of the Money-Lenders Act is a judicial decision binding on both the decreeholder and the judgment-debtor, and it would be a clear evasion of law to treat this valuation as an impediment to an ordinary execution sale by the Court and let the decree-holder have a receiver for sale of the property by private treaty on the ground that no bidders can be found for the value fixed by the Court. (Harries, C.J., and Dhavle, J.) BANK OF BIHAR, L.TD. v. HARI KISHUN PRASAD. 201 I.C. 350=15 R.P. 50=8 B.K. 791=23 Pat.L.T. 191=A.I.R. 1942 Pat. 455.

S. 51. proviso—Discretion of Court to order or refuse arrest—O. 21, Rr. 37 and 40—Judgment-debtor not appearing—No discretion to refuse arrest.

Although a decree-holder may not be debarred from executing his decree by arrest of the judgment-debtor under the proviso to S. 51, C. P. Code, it would not prevent the Executing Court from exercising its discretion whether or not it would order arrest. Reading O. 21, Rr. 37 and 40 together, it is clear that the Court has no discretion to refuse arrest where the judgment-debtor does not appear, but that it has a discretion where the judgment-debtor does appear. (Horwill, J.) MUTTALIF v. MEENAKSHI SUNDARM PILLAI. 219 I.C. 31=18 R.M. 45=1944 M.W.N. 85=57 L.W. 150 (2)=A.I.R. 1944 Mad. 191=(1944) 1 M.L.J. 53.

—S. 51, proviso, Cl. (b) and Explanation— Judgment-debtor in receipt of pension—It a person having no means of paying—Pension paid over to judgment-debtor—It to be left out of account.

After the amount of pension payable to a judgment-debtor is paid over to him, the amount ceases to be exempt from attachment and it cannot therefore be left out of account for purposes of Cl. (b) and Explanation to S. 51, C. P. Code, in considering whether the judgment-debtor has got the means to pay the amount of the decree or a substantial portion of it. Such a judgment-debtor is not a person who has no means of paying the decree amount or a sufficient portion thereof. (Somayya, J.) GNANASIROMANI NADAR V. NEDUNGADI BANK, LTD., MADRAS. 219 I.C. 340 = 57 L.W. 17=1944 M.W.N. 180=A.I.R. 1944 Mad. 263=(1944) 1 M.L.J. 45.

\_\_\_\_\_S. 51, Explanation — Income of land exempt from sale—If can be left out of account,

Under the Explanation to S. 51, C. P. Code, the income of the judgment debtor from his land which is exempt from sale should not be left out of account, as such income is attachable in execution of the decre, against him. Moreover, the land itself may be exempt from sale, but it is not exempt from attachment. (Abdul Rahman, J.) MAHOMED HUSSAIN SHAH v. CO-OPFRATIVE SOCIETY FOR LOANS OF SHAHPUR CITY. 209 I.C. 609=16 R.L. 143=45 P.L.R. 173=A.I.R. 1943 Lah. 166.

S. 52-Nature of decree granted under— Judgment-debtor not the real legal representative of deceased—Proper remedy against real legal representative.

Where by virtue of S. 52, C. P. Code, a decree is obtained against the legal representative of a deceased debtor in respect of the latter's asset in the hand of such legal representative it is to be regarded merely as a money decree and not as one which creates a charge on such assets. If it subsequently turns out that the judgment debtor in that decree was not the real heir but someone else, the decree cannot be executed against the latter by merely substituting him for the original legal representative in the execution proceedings. A fresh suit on the judgment and execution of the decree obtained therein would be the proper remedy. (Misra, J.) Sural Mohan Dayal v. Bhagwan Din. 1945 O.W.N. 163=1945 A.L.W. (C.C.) 156=1945 O.A. (C.) 117=1945 A.W.R. (C.C.) 117.

S. 52—Scope—Decree against assets of deceased in the hands of his legal representative—Remedy of creditor—Separate suit for administration of estate—Bar of. See C P. Code, Ss. 54 AND 72. (1942) 1 M.L.J. 580.

S. 53 — Applicability—IVatan property— Liability in the hands of son for fathers's debts —Bombay Watan Act, S. 5.

Watan property cannot be regarded as property inherited by a son from his father so as to expose it to liability in execution under S. 53, C. P. Code. A son does not inherit watan property from his father at any rate to the extent of making that property liable for the father's debts. To hold that watan property is liable for the father, would be to go behind the prohibition in S. 5 of the Bom. Watan Act. (Beaumont, C.J., and Sen, J.) RAMABAI SHRINIVAS v. GOVERNMENT OF BOMBAY. 194 I.C. 431=13 R.B. 371=43 Bom.L.R. 232=A.I.R. 1941 Bom. 144.

S. 53—Decree against Hindu father—Joint family property—Liability of son's interests—Extent.

S. 53, C. P. Code, was not intended to diminish the ordinary liability of a Hindu son under the Hindu Law as it existed before the enactment of that section. Under the Hindu Law, a son is bound to pay his father's debts not incurred for immoral purposes to the extent of his interest in the joint family property at the time of execution and not at the time of his fathers death. (Pollock, J.) Shrawan v. Jangalya. I.L.R. (1945) Nag. 409=1944 N.L.J. 424=A.I.R. 1944 Nag. 360,

#### C. P. CODE (1908), S. 54.

S. 53—Scope and applicability of—Decree for compensation in lieu of specific performance. RAO BHIMSINGH V. GANGARAM. [see Q.D. 1936—'40 Vol. I, Col. 1106.] I.L.R. (1941) Nag. 632=193 I.C. 598=13 R.N. 334.

——S. 53—Scope—Suit in respectof a trespass against a Hindu father alone—Partition between father and sons before decree—Death of father—Execution—Son's share—If liable.

Apart from S. 53. C. P. Code, there can be little doubt that if a decree is obtained against a Hindu tather personally, it cannot be executed against somebody who is a stranger to the suit. If he is to be made liable, a separate suit must be filed. Where the suit is in respect of a trespass committed, and the father alone is impleaded as a party to the suit it cannot be said that the sons can be proceeded against in respect of the decree passed. But where it is shown that the father and his sons effected a division of the family properties during the pendency of the suit, the property in the hands of the father which fell to his share on partition would be liable under the Hindu law for the payment of the father's debt in respect of which a decree has been passed. And if the father dies after the passing of the decree, the property in the hands of the son after the partition can be proceeded against in execution under S. 50 or S. 52 C. P. Code. (Horwill, J.) RETHNASAMI NAIDU V. KANNAN. 210 I.C. 616=16 R.N. 461=56 L.W. 176=1943 M.W.N. 180 =A.I.R. 1943 Mad. 415=(1943) 1 M.L.J. 268.

S. 54-Appeal-Execution by Collector— Order in-Appeal to Court-If lies.

No appeal lies as a matter of course from the order of the Collector acting under S. 54 to the Court whose decree is being executed by the Collector. (Davies, C.J., and Weston. J.) CHANDUMAL JASSUMAL V. HAFIZ DIN MAHOMED. I.L.R. (1942) Kar. 162=204 I.C. 324=15 R.S. 93=A.I.R. 1943 Sind 7.

——S. 54—Jurisdiction—Decree for partition sent to Collector—Jurisdiction of Court to entertain objecting to partition effected—Right to modify partition—Remedy of aggrieved party.

A Court which has passed a decree for partition to which S. 54. C. P. Code applies, and has sent it to the Collector for the purpose of effecting the partition has no power to hear objections to the partition made by the Collector or his subordinate or to modify the partition. A Collector acting under S. 54. C. P. Code, is performing a statutory duty and in doing so he is not under the control of the Court. Once the Court has sent the decree to the Collector for action under S. 54, the matter passes entirely out of its hands. A party aggrieved by the partition is not, however, without a remedy. He has the right of asking the Board of Revenue to revise the Collector's order. (Leach, C.J., Lakshmana Rao and Kuppuswami Ayyar JJ.) Venkatraghava Rao v. Hanumantha Rao. 58 L.W. 330=1945 M. W.N. 406=A.I.R. 1945 Mad. 336=(1945) 2 M.L.J. 62 (F.B.).

S. 54 and O. 20, R. 18—Partition by Civil Court—Separate alloiment of revenue not asked for.

The Civil Court can make a partition of land of a revenue-paying estate when no separate allotment of Government revenue is asked for. (Raw and Biswas. /J.) PRIYANATH ROY v. SREE-DHAR CHANDRA. 218 I.C. 67=17 R.C. 196=48 C.W.N. 223=A.I.R. 1945 Cal. 28.

\_\_\_\_\_S. 54 and O. 20 R. 18—Partition decree— Contents of—Powers of Court and of Collector— Discretion of Collector—Power of Court to interferc or to fetter.

A Court passing a partition decree under O. 20, R. 18, C. P. Code, in respect of an undivided estate assessed to the payment of revenue to Government, has no power so to fetter the discretion of the Collector as to over-rule the powers that are conferred upon him under S. 54 and O. 21, R. 18. The decree should declare the rights of the several parties interested in the property, and direct such partition to be made by the collector or his gazetted subordinate in accordance with such declaration. The Collector is to divide the estate in accordance with the rights declared in the decree, in the manner he thinks best, bearing in mind the convenience of the land as a revenue paying estate. The Col-lector is to execute the decree, but not to alter it and the Court will not interfere with the exercise of discretion by the Collector unless he has contravened or ignored the terms of the decree. (Davis, C. J. and Weston, J.) CHANDUMAL JAS-SUMAL v. HAFIZDIN MAHOMED. I.L.R. (1942) Kar. 162=204 I.C. 324=15 R.S. 93=A.I.R. 1943 Sind 7.

——S. 55 (4)—Construction—Rights of decree-holder—Surety for judgment-debtor—Liability of—Judgment-debtor sent to jail—Subsequent proceedings against surety—Permissibility.

Where a person has stood surety for a judgment-debtor under S. 55 (4), C. P. Code, the Court cannot at the instance of the decree-holder proceed both against the surety and against the judgment-debtor concurrently. If the judgment-debtor is committed to the civil prison the state of affairs is just the same as if the surety had never come forward so that the Court cannot concurrently proceed against the surety or his property. S. 55 (4) is explicit; the decree-holder having given up his rights against the surety by proceeding against the judgment-debtor and sending him to jail cannot be allowed to re-open the matter by asking that the surety should be proceeded against. (Harries, C. J. and Manohar Lall, J.) RAGHUBIR SINGH v. MAZHARUL HAQUE 21 Pat. 644=202 I.C. 589=15 R.P. 129=9 B.R. 26=24 Pat, L.T. 69=A.I.R. 1942 Pat. 506.

A security bond executed under S. 55 (4), C. P. Code, can be enforced against the surety although there has been a failure on the part of the judgment-debtor of only one of the two conditions set out therein, (i. e.) either in applying for adjudication as an insolvent or in appearance. It is not necessary that there should have been a failure on his part in both respects. (Lobo and Tyabji, JJ.) ASSANDAS v. HARDASMAL I.L.R. (1942) Kar. 79=201 I.C. 750=15 R.S. 18=A.I.R. 1942 Sind. 134.

O. P. CODE (1908), S. 55 (4).

——Ss. 55 (4) and 145—Forfeiture of security.
—Power to refuse—Grounds.

Assuming that there is a discretion in the Court as to whether or not it will order the security to be realized where it is found that the judgment-debtor has substantially if not technically, complied with with the order of the court and that the purpose for which the security was given was substantially fulfilled, the court will not order that the security should be forfeited expecially when the application therefor is made after over three and a half years. (McNair. J.) JITTNDRA MULLICK V. HAPIZ ALLA BUX. 194 I.C. 103=13 R.C. 483=A.I.R. 1941 Cal. 122.

——S. 55 (4)—Obligation of Judgment-Debtor to apply to be declared insolvent—If ceases with presentation of petition.

The mere presentation of a petition to be declared an insolvent is not a sufficient compliance with the undertaking given by a judgment-debtor under S. 55 (4), C. P. Code, that he would apply to be declared an insolvent. The obligation includes not only the presentation of a petition but the presentation of a petition but the presentation of a petition in the manner provided by law and the proper prosecution thereof. (Lobo and Tyabji. JJ.) ASSANDAS v. HARDASMAL. I.L.R. (1942) Kar. 79=201 I.C. 750=15 R. S. 18=A.I.R. 1942 Sind. 134.

——S. 55 (4)—Surety—Bond—Judgment-debtor—Required to apply in insolvency and to conduct all proceedings thereon regularly and properly—Failure to apply for discharge—If breach of bond—Surety's liability.

S. 55 (4). C. P. Code, requires the due prosecution of a petition for adjudication as an insolvent of a judgment-debtor and his presence in Court when required. When a surety bond executed under S. 55 (4) metely requires the indgment-debtor to present the petition for insolvency and regularly and properly conduct the proceedings thereon, there is no further liability on the part of the surety when there happens to be a failure on the part of the insolvent to apply for discharge. (Leach. C. J. and Lakshmana Rao, J.) RATNA-SWAMI GOUNDAN V. ARUNACHALAM CHETTIAR. I.L.R. (1943) Mad. 691=210 I.C. 256=16 R.M. 407=1943 M.W.N. 172=56 L.W. 112=A.I.R. 1943 Mad. 363=(1943) 1 M.L.J. 162.

S. 55 (4)—Surety under—Liability of— Right to apply for discharge before fulfilment of conditions in security bond—Contract Act, Ss. 129 and 130.

A person who becomes a surety under S. 55 (4) of the C. P. Code cannot claim to be released from his obligation at his pleasure. There is no analogy between a security bond executed under S. 55 (4), C. P. Code, and a continuing guarantee under S. 129, Contract Act and S. 130 of the Contract Act (and its principle) cannot apply to a surety under S. 55 (4), C. P. Code. The surety under S. 55 (4) cannot be discharged from his obligation at any stage before he has fully carried out his undertaking to the Court. (Patanjah Sasiri, J.) Sankaranarayana Ayyar v. Paramasivam Pillai. 200 I.C. 774=15 R.M. 141=1941 M.W.N. 793=A.I.R. 1942 Mad. 101=(1941) 2 M.L.J. 650.

\_\_\_\_S. 60-Applicability-Mortgage decree.

It has been accepted for a long period of time that S. 6", C. P. Code, does not apply to mortgage decrees and it is now too late to urge and to hold that it does. (Harries, C.J. Abdur Rahman Mehr Chand, Mahajan Teia Sanah and Bhandari, J.). ALLAH BAKHSHY. CHER RAM. 47 P.L.R. 107=A.I.R. 1945 Lah. 123 (F.B.)

\_\_\_\_S 60-Applicability to sales under U. P

Encumbered Estates Act.

R. 6 of the Rules framed under the U. P. Encumbered Estates Act makes the provisions of the C. P. Code applicable to soles under the U. P. Encumbered Estates Act so far as they are not inconsistent with the provisions of the Act and the rules. Hence S. 60 of C. P. Code would apply to such sales. (Shirreff, S. M. and Sathe, J. M.) CHHATAR v. THASUR S NGH. 1942 A.W.R. (Rev.) 253 (1)=1942 O. A. (Supp.) 279 (1)=1942 R.D. 351 (2)=1942 O.W.N. (B.R.) 262 (2).

—Ss. 60 and 73 (as amended by Act IX of 1937)—Altischment of salary, now exempted by 1937 Amending Act—Availability for alcobe distribution with other creditor was so exempted

tribution with other creditor not so exempted.

An attachment under S. 60 C. P. Code of salary now exempted by the amending Act of 1937 but made by a judgment creditor saved by the proviso to the amending Act is available by way of rateable distribution to another judgment creditor who is not covered by this proviso. (Weston, J.) Marutreerao Krishnaji v Thakurdas. 194 I.C. 582=14 R S. 2=A.I.R. 1941 Sind. 96.

S. 60—Attachment of salary of govern-

S. 60—Attachment of salary of government employee—Right of Government to object—Decision between decree-holder and judgment-debtor that such salary is attachable—Effect of.

A decision between the decree-holder and the judgment-debtor who is a Government employee that the latter's salary is attachable, is not binding upon the Government when it is not a party to it. If in pursuance of that decision, the decree-holder proceeds to attach the salary of the judgment-debtor in the hands of the Government the Government is entitled to object and to bring the illegality to the notice of the Court. (Harries, C. J. and Abdur Rahman, J.) RAJINDRA KUMAR V. CENTRAL GOVERNMENT. 46 P.L.R. 124=215 I.C. 110=17 R.L. 88=A.I.R. 1944 Lah. 168.

S. 60—"Debt"—Untaid mortaage money. The unpaid balance of the consideration for a mortgage is not a "debt" due by the mortgages to the mortgagor, and, therefore, it is not liable to attachment in execution of a decree against the mortgagor. It makes no difference whether the mortgage is simple or possessory or by way of conditional sale. (Tek Chand and Beckett, II.) SOHAN LALT. LABL SINGH. I.L. R. (1943) Lah 746=202 I.C. 347=15 R.L. 113=44 P.L.R. 342=A.I.R. 1942 Lah. 234.

——S. 60 and O. 21, R. 46—'Debt'—Unpaid Purchase money left with vendee for payment to vendor's creditors— If attachable immediately after sale-deed—Locus standi of such creditors to object to attachment.

object to attachment.

The unpaid purchase price of a property left with the vendee for payment to the creditors of the vendor but which the vendee has not actually paid to them is a 'debt' due by the vendee to the

C.P CODE (1908), S. 60.

vendor. It is the vendor's money in the hands of the vendee, which he is under an obligation to pay to the vendor and in the absence of a contract to the contrary, this obligation arises at the moment the sale transaction is completed. The fact that the money is, by agreen ent, made payable at a future date or that the vendor has asked the verdee to pay it to a third party makes no difference. It is none-the-less an existing and completed obligation and, as regards it, the relationship between the vendor and the vendee is that of a creditor and debror.

If, therefore, at the instance of a person who holds a decree against the vendor, a prohibitory order under O. 21, R. 46 C. P. Code, is served on the vendee, before he has paid out the amount to the nominees of the vendor in accordance with the directions set out in the deed, the attachment is good and neither the vandee nor the vendor can object. The vendor's nominees of course have no locus standi to object, for there is no privity of contract between them and the vendor and the mere direction of the vendor to the vendee to pay the amount to them creates no jural relationship between them. The direction is, ordinarily, revocable at any time before payment has actually been made. Further, the decreeholder of the vendor can attach it even immediately after the execution of the sale-deed and need not wait until the lapse of reasonable time from the sale, within which the vendee could have paid, but has neglected to pay, the vendor's nominees. (Tek Chand, Bhide and Sale, JJ) MELA RAM v. RAM DAS JOSHI. I L.R. (1943) Lah. 17=15 R L 215=203 I.C 462=44 P.L.R. 415=A.I.R. 1942 Lah. 275 (F.B.)

\_\_\_\_\_B. 60—Decree against Hindu father— Attachment of sons' interests in family property in execution—Permissibility.

If the father in a joint Hindu family has a disposing power, which he may exercise for his own benefit over the property of his sons, then such property can be attached in execution of a decree against the father under S. 60, C. P. Code. So long as there has been no partition between the father and his sons that power clearly exists and therefore under S. 60 C. P. Code execution can proceed against the sons and their interests in the family property can be attached. (King, J.) KISTAMA NAYUDU V. SANKARAYVA NAYUDU. A.I.R. 1945 Mad 278=(1945) 1 M.L.J 218.

S. 60-Exemption as agriculturist-Status of legal representatives of judgment-debtor-If relevant.

In order to claim exemption as an "agriculturist" under S. 60 C. P. Code the status of the judgment-debtor has to be seen and not that of his legal representatives. (Tek Chand, Dalip Sinoh and Bhide JJ.) DHANI RAM v. DISTRICT OFFICIAL RECEIVER AMRITSAR I.L. R. (1943) Lah. 242=204 I.C. 344=15 R.L. 259=45 P.L.R. 57=A I.R. 1943 Lah. 19 (F.B.).

S. 60 (as amended by S. 35 of Punjab Relief of Indebtedness Act.)—Exemption under —Onus of proof.

The onus of proving facts necessary for the exemption under S. 60, C. P. Code. as amerded by S, 35 of the Punjab Relief of Indebtedness

Act, lies on the judgment-debtor for two reasons:
(1) the burden of proving an exception is generally on the person seeking to prove the exception, (2) the judgment-debtor has special know-ledge of the circumstances. (Skemp, J.) RAMA MAL V. BHOLA SINGH. I.L R. (1941) Lah. 441.

S. 60—Inamdar—Remuneration payable by Government for services useful to Government—Liability to attachment in the hands of Government—"Debt."

Remuneration or money payable to an inamdar by the Government of Bombay for services useful to Government, the grantee being an alienee of the revenue and not of the soil, cannot be attached in the hands of the Government in execution of a decree against the inamdar. Moneys payable as reward for services to be rendered to the public are not attachable before receipt.

Quaere: Whether such money is a debt attachable in execution under S. 60, C. P. Code; (Beaumont, C. J.) RAMRAKH BASHIRAM v. MADHAVRAO GANPATRAO. 209 I.C. 588=16 R.B. 152=45 Bom.L.R. 494=A.I.R. 1943 Bom. 258.

The practice of taking away by force from a Railway employee his monthly pay under colour of an order of attachment under a money decree is absolutely illegal. (Davies.) RAM CHANDER v. MOOLCHAND. 1944 A.M.L.J. 40.

## -S. 60-"Property"-Meaning of.

Per Pal, J.—The word "property" in S. 60, C. P. Code, is used in a very wide sense. All the interest in the properties which are available to the judgment-debtor for his benefit can be seized in execution. Even if the property does not belong to the judgment-debtor, if he has acquired any right or power in respect of the same which can be sold by him for his benefit, such right or power will be seizable property within the meaning of the section. Syed Nasim Ali and Pal, JJ.) RADHARANI DASSI v. BINODAMOYEE DASSI. I.L. R. (1942) 1 Cal. 169=200 I.C. 216=14 R.C. 685=46 C.W.N. 245=74 C.L.J. 180=A.I.R. 1942 Cal. 92.

\_\_\_\_\_S. 60 and O. 21 R. 46—Provident Fund— Amount standing to credit of member—If attachable as a "debi".

A Provident Fundamount standing to the credit of a member is not a "debt" which can be attached in execution of a decree against the member. (Mya Bu and Mosely, JJ.) SECRETARY BURMA OIL SUBSIDIARY PROVIDENT FUND, LTD. v. DADIBHAR SINGH. A.I.R. 1941 Rang. 256.

\_\_\_\_\_S. 60-Provident Fund money-If attachable as "debt".

Where under the rules of a Provident Fund the money contributed by an employee is vested in trusts and is payable to him only upon certain contingencies which may or may not happen, the money standing to his credit in the Provident Fund books is not a "debt" within the meaning of S. 60, C.P.Code and is, therefore, not attachable in execution of a decree against him. (Bose, I.) ANANDARAO v. VISHWANATH. I.L.R. (1944)

C. P. CODE (1908), S. 60.

Nag. 711=218 I.C. 63=1944 N.L.J. 96=A.I.R. 1944 Nag. 144.

——S. 60—Provident Fund of Company for benefit of employees—Money payable to member after retirement in full or to nominee—Member not permitted by rules to dispose of moneys during service—Effect—Attachability and saleability in execution of decree against member—If trust money—Trusts Act, S. 5.

"Debt" within the meaning of S. 60 (1), CP. Code, does not mean a debt only presently pay. able, but it means also a debt due but payable at some future time. A debt is a sum of money which is now payable or will become payable in future by reason of a persent obligation. The defendant-company had a provident fund for its employees called the Labour Provident Fund one A.R.B., an employee of the company was a subscriber to this Fund. The plaintiff having obtained a decree against A.R.B., attached on 11—10—1934, a sum of Rs. 81-14-3 out of the moneys lying to the credit of A.R.B. in this fund in execution of the decree. On 21-10-1934, A.R.B. retired from the service of the company and the defendant company thereupon paid to A. R.B. the entire sum due to him under the Provident Fund Rules. In 1936 the plaintiff applied for sale and at the sale held on 27-4-1934, he purchased the debt. In a suit by the for plaintiff for Rs. 81-14-3, the defendant pleaded that A.R. B. created a trust by subscribing to the Fund and that in any case the amount was not a debt under S. 60 (1), C.P.Code. One of the Rules of the Fund provided that no member shall have any claim upon the moneys standing to his credit except in accordance with the Rule and that the Trustees shall take no cognizance of any disposition or assignment of any sums standing to the credit of a member. Another Rule provided for a separate account to be kept for each member in the books of the Fund, and that the amounts contributed by the member and the company together with interest accrued thereon should be entered therein. The rules further provided that the management and control of its funds shall be vested in the defendant company (hereinafter referred to as the "Trustees"). The money due to a member on the date of his ceasing to be a member was to be paid to him in full or to such person as he desired, within 3 months after his ceasing to be so.

Held, on a construction of the Rules, (1) that the rules were not statutory provisions but only amounted to a private contract between the parties, and that the parties could not by private agreement alter the provisions of the statute law including the provisions of S. 60 (1) C. P. Code; (2) that the sum standing to the credit of A.R.B. on 11—10—1934 was a debt over which he had a disposing power within the meaning of S. 60, C. P. Code, and it could therefore be the subject of a prohibitory order or attachment although it could not be sold until it was at the disposal of the judgment-debtor. A sale held after the retirement of the employee when he ceased to be a member, would therefore be valid; (3) that taking the Rules and Regulations of the Fund, it could not be said that the moneys were trust moneys or vested in trustees. as neither the trus

fund nor the beneficiary was clearly indicated, the member being at perfect liberty to withdraw the whole amount if he retired or to nominate a new nominee; the essentials of a trust under S. 5 of the Trusts Act were absent; and (4) that therefore there was valid attachment and a valid sale, and in consequence the defendants were liable to the plaintiff for the sum of Rs. 81-14-3. (Davis, C.J., and Weston, J.) ISMAIL JAKRIA & Co. v. BURMAH SHELL PROVIDENT TRUST, LTD. LLR. (1941) Kar. 401=199 I.C. 525=14 R.S. 187=A.I.R. 1942 Sind. 47.

S. 60 and O. 38, Rr. 9, and 11—Scope—Attachment before judgment—Dismissal of suit—Subsequent review allowed—Decree for plaintiff after review—Effect—Decree-holder—If can avail of prior attachment—Alienee after decree subsequent to review—Rights of.

An attachment before judgment effected in a suit can be availed of by the plaintiff decree holder, whose suit, though originally dismissed by the trial Court, is subsequently decreed by the Court allowing a review petition filed by the plaintiff. Though the decree dismissing the suit automatically puts an end to the attachment before judgment, the moment the review is allowed, the decree already passed is vacated, and the suit must be considered to be restored to file; and with the restoration of the suit all the ancillary orders also get restored. The decree passed thereafter is the decree of the trial court itself and the attachment which is restored enures for the benefit of the decree-holder who obtains a decree subsequently after the review is allowed, as against a purchaser of the attached property who purchases subsequent to the decree after review. (Kuphuswami Ayyar, J.) NAYUDAMMA v. SIVARAJU DHARAMCHAND. 210 J.C. 453=16 R. M. 441=1943 M.W.N. 284=56 L.W. 313=A,I. R. 1943 Mad. 515=(1943) 1 M.L.J. 394.

S. 60—Scope—If over-rides O. 23, R. 1 (3), C. P. Code—Suit for redemption of mortgage—Dismissal as withdrawn or abandoned—Second suit—Competency. See C. P. Code, O. 23, R. 1 (3). (1945) 1 M.L.J. 212.

S. 60 (1)—Scope—Amending Act IX of 1937 and V of 1943—Scope and effect of—Private employee Salary and Dearness Allowance—Attachibility in execution of decree passed in suit instituted before 1-6-1937.

Act IX of 1937, which amended S. 60 (1), C. P. Code, preserved for the holder of a decree passed in a suit filed before 1-6-1937 the right to attach the salary of a judgment-debtor in accordance with S. 60, as it stood before the amendment and in spite of the amendment he could attach the whole of the salary of a private employee. That right was not taken away by the repeal of Act IX of 1937. Further Act V of 1943 was not intended to take away pre-existing rights that were preserved by Act IX of 1937. In proceedings arising out of any suit filed hefore 1-6-1945 the liability of a judgment-debtor's salary to attachment is governed by S. 60, C. P. Code as it stood before it was amended by Act IX of 1937 and the whole salary of a private employee including dearness allowance is liable to attachment. (Iokur and Weston. J.).
MANILAL BHAI CHAND V. MOHAN LAI. 47 Bom. L.R. 836=A.I.R. 1946 Bom. 102.

C. P. CODE (1908), S. 60 (1) (b).

-S. 60 (1) Proviso-"Attachment or Sale"-Interpretation.

The word "or" in the expression "attachment or sale" in the proviso to S. 60 (1), C. P. Code, is used in a conjunctive and not in a disjunctive sense. Therefore, the property mentioned in that proviso will neither be liable to attachment nor sale. (Moorce and Abdur Rahman, J.) MT. REWATE v. CHIRANJI LAL. I.L. R. 1943 Lah. 666=212 I.C. 144=16 R.L. 256=46 P.L.R. 115=A I.R. 1944 Lah. 29.

——S. 60 (1) (b)—Applicability—"Tools of an artisan"—Cooking vessels of hotel-keeper—Exemption from attachment.

Cooking vessels with which a hotel-keeper prepares sweetmeats are not tools of an artisan exempt from attachment within the meaning of 60 (1) (b), C. P. Code. The word "artisan" has a "well-recognised meaning and is roughly synonymous with "handicraftsman" or "mechanic." Cooking vessels are certainly not tools and a hotel-keeper cannot claim exemption from attachment of the vessels used by his employees in the preparation of food which he sells to the nublic. (Horwill, J.) RAMACHANDRA AYYAR v. Sesha Ayyangar. 209 I C. 22=16 R.M. 263=56 L.W. 301=1943 M.W.N. 437=A.I.R. 1943 Mad. 523=(1943) 1 M.L.J. 414.

——S. 60 (1) (b) -Applicability—"Tools of an artisan"—Musical instruments of musician—If exempt from attachment.

A musician is not an artisan and his musical instruments are not "the tools of an artisan" exempt from attachment under S. 60 (1) (b), C. P. Code. (Haphell. 1.) MANIKYAM v. MANIKYAMMA. 200 I.C. 868=15 R.M. 164=1941 M W.N. 783=A.I.R. 1942 Mad. 4=(1941) 2 M.L.J. 671.

S. 60 (1) (b)—Exemption from attachment— Existence of ground for—Relevant point of time— Change of circumstances after date of execution—If affects question.

Where a tailor who was using a number of sewing machines sells a couple of them after their attachment and works thereafter in another's shop, that cannot affect the question of the exemption of all the machines from attachment. The criterion in such matters is the position of affairs at the time of execution. If on that date he was working in his own shop with all 'the machines, then all are exempt from attachment, and his subsequent conduct and position does not affect the question of exemption. (Collision, I.) Ahmad Sayed v. Kanizak Zohra. I.L.R. (1941) All. 278=193 I.C. 826=13 R.A. 456=1941 A.W.R. (H.C.)' 55=1941 O.A. (Supp.) 64=1941 A.L.J. 117=1941 A.L. W. 57=1941 O.W.N. 52=A.I.R. 1941 All. 157.

S. 60 (1) (b)-Tailor, if an artisan-Number of sewing machines used-All of them, if exempted from attachment.

A tailor who uses a sewing machine is an artisan, and the sewing machine is an artisan's tool. S. 60 (1) (1), C. P. Cc de does not say that only such tools shall not be liable to attachment as are necessary for the maintenance of the

C. P. CODE (1908), S. 60 (1) (c).

artisan. Hence if a tailor has a number of sewing machines all of them are exempt from attachment though as a matter of fact a single machine might be sufficient for his livelihood. (Collister. J.) AHMAD SAYFD v. KANIZAK ZOHRA. I.L.R. (1941) All. 278=193 I.C 826=13 RA. 456=1941 A.W.R. (H.C.) 55=1941 O.A. (Supp.) 64=1941 A.L.J. 117=1941 A.L. W. 57=1941 O.W.N. 52=A.I.R. 1941 All. 157.

——S. 60 (1) (c)—'Agriculturist'—Occupancy raiyat—Land cultivated under bhag system—Small income derived by him from Zemindary properties.

An occupancy raivat who has got about 20 or 25 bighas of land which he gots cultivated under the bhag system and whose other income derived from Zemindary properties is only Rs. 25. is an agriculturist within the meaning of S. 60 (1) (c). C. P. Code. (Mukherjca and Blank, JJ.) NAGENDRA NATH SARKAR v. KRISHNA PADA SIRKAR. 201 I.C. 632=15 R.C. 264=75 C.L. J. 501=46 CW. N. 612=A.I.R. 1942 Cal. 425.

## ----S. 60 (1) (c)—"Agriculturist"--Test.

An "agriculturist" within the meaning of S. 60 (1) (c) C. P. Code must be a person who tills the soil and thereby earns his livelihood and is expected to have implements of husbandry, cattle and seed grain. An old or otherwise disabled man, or a woman may not till the land with his or her own hands but may do it through others such as relatives or hired lahourers. Still such person may be an agriculturist, to all intents and purposes. Again a person may he a real tiller of land without having his own implements of husbandry. At the time of cultivation he may borrow or hire such implements. Ir any case however cultivation must be his main source of living though this will not be the sole test. (Chatterji and Meredith, JJ.) ANANTALA CHAKRAVARTY v. BIBHUTI BHUSAN DAS. 23 Pat. 348=1944 P.W.N. 306=11 B.R. 166=A.I.R. 1944 Pat. 272.

## ——S. 60 (1) (c)—'Agriculturist'—Test.

The proper test to be applied in deciding whether a particular person is an 'agriculturist' is to see whether his main source of income is derived from cultivation or not. The term 'agriculturist' is used with reference to one who is so by profession. (Sathe, S.M. and Dible, I.M.) SHIV LAL v. MST. RUNNA. 1944 R.D. 226=1944 A.W.R. (Rev.) 119.

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It cannot be said that a person who cultivates lands mainly through his tenants is not an "agriculturist." It is for the Courts to decide whether a particular individual situated as he is with reference to his occupation or other circumstances is an agriculturist or not. A person who derived his whole income from his lands and had no other profession or occupation must be held to be an agriculturist within the meaning of S. 60 (1) (c). (Almond J.C. and Mir Ahmad, J) ASADULLAH KHAN v. CHETAN DAS. 202 I.C. 770 =15 R. Pesh. 52=A.I.R. 1942 Pesh. 65 (2).

C. P. CODE (1908), S. 60 (1) (c).

exemption in respect of house in which he ordinarily resides.

It cannot be held that because an agriculturist has a shed in or near his field he cannot get exemption under S. 60 (1) (c), C. P. C., for the house in which he ordinarily resides, unless he proves he has tethered some cattle in the house or keeps agricultural implements there. An agriculturist like every person, must have a house in which to live; and the fact that he has a shed in or near his field in which he may keep some implements and perhaps spend an hour or two in the middle of the day, while engaged in agricultural operations, would not disable him from retaining possession of the house in which he ordinarily resides, provided that that house is not on a scale inappropriate to an agriculturist (Horwill, J.) Venkayya v. Tatayya. 58 L.W. 100 (1)=A.I.R. 1945 Mad. 276=(1945) 1 M.L. J. 211.

----S. 60 (1) (c)—Applicability—Right to exemption—Conditions of.

To claim exemption from attachment under S. 60 (1) (c), C. P. Code, it must be proved that the objector is an agriculturist and is occupying the house concerned (i.e,) it is being occupied bona fide for the purpose of agriculture. (Agarwal, I.) Sheo Shankar Lal v. Bittan Kuar. 199 I C. 456-14 R.O. 491-1942 R. D. 69-1942 A.W R. (C C.) 27-1942 O.A. 15-1942 O.W.N. 23-1942 A.W.R. (Rev.) 50-A.I.R. 1942 Oudh 308.

exemption under—Conditions of.

The property of an agriculturist to be exempt under cl. (c) of S. 60 (1), C. P. Code, must be shown to have been occupied by him as such for purposes of agriculture, i.e., in order to enable the owner or occupier to cultivate the land. (Abdur Rahman, J.) Official Receiver, Kistna v. Lakshmayya. 55 L.W. 634.

—S. (60) (1) (c)—Decree against non-agriculturist legal representative—Original debtor agriculturist—Property if liable to attachment. SHER SINCH v. BALDEV SINGH. [see Q.D. 1936—'40, Vol. I, Col. 1122,] I.L.R. (1941) Lah. 588.

S. 60 Cl. (1) (c)—Exemption from attachment.

Where the evidence showed that a debtor had no other vocation except agriculture and that he kept his plough, bullocks and carts in his house, the house is really used for the purpose of carrying on his calling effectively as an agriculturist and is exempt from attachment under S. 60 (1) (c) of the Code of Civil Procedure. (1937) 2 M. L. J. 11: I.L.R. (1937) Mad. 777 (F.B.), applied. (Yenkairamana Rao. J.) Subbarayudu v. Venkata Subbamma 201 I C. 781=15 R.M. 407=55 L.W. 176 (1)=1942 M.W. N. 128 (2)=A.I. R. 1942 Mad. 375 (1)=(1942) 1 M.L.J. 87.

S. 60 (1) (c)—Exemption under—Availability to agriculturist who had knowingly mortgaged his house—Estoppel.

S. 60 (1) (c)—Applicability—Agriculturist tial house and thereby causes the mortgages to shed in or near fela-Right to claim believe that it could be sold, be is esterned from

C. P. CODE (1908), S. 60(1) (c).

raising the question that the house is not liable to attachment under S. 60, C.P. Code as the voluntary nature of the mortgage must imply an agreement that the house may be sold under certain conditions. (Shirreff, S. M.) TARA CHAND V. SHIB PRASAD, 1942 A.W.R. (Rev.) 307=1942 O.A. (Supp.) 333=1942 O.W.N. (B.R.) 476=1942 R.D. 593.

——S. 60 (1) (c) (as amended by S. 35 of Punjab Relief of Indebtedness Act)—"For a period of a year or more"—If qualify "left vacant" only.

The words "for a period of a year or more" in S. 60 (1) (c). C. P. Code, as amended by S. 35 of the Punjab Relief of Indebtedness Act, qualify "left vacant" only and not "let out on rent or lent to others." (Skemp. J.) RAMA MAL v. BHOLA SINGH. I.L.R. (1941) Lah. 441.

-S. 60(1) (c)-"House and other buildings" -Exemption from attachment.

To enjoy the benefit of S. 60 (1) (c) C. P. Code an agriculturist occupying his residential quarter need not also put it to some other agricultural use. (Mir Ahmad, J) MOHAMMAD JAN v. S. KIRPAL SINGH. 196 I.C. 856=14 R. Pesh. 28 = A.I.R. 1941 Pesh. 68.

S. 60 (1) (c)—House occupied by agriculturist—Exemption from attachment not claimed prior to sale in execution—Bar of constructive res judicata applies—Scope and nature of the protection under S. 60 (1) (c).

If a person during the course of execution proceedings dose not raise an objection to the sale of property which, if raised would prevent the property from being brought to sale, he is debarred by the principle of constructive res judicata from raising the same objection either in subsequent proceedings or at a subsequent stage in the same execution proceedings. The question whether a particular house is a house in the occupation of an agriculturist is a question of fact and where there is nothing before the Court to show that the house sought to be sold is a house in the occupation of an agriculturist, it cannot be said that the Court acted without jurisdiction in selling that house. S. 60 (1) (c) was no doubt enacted to protect agriculturists, but the protection can be waived by them. If they can waive it, it follows that there cannot be any absolute prohibition against the sale of an agriculturist's house and there is therefore no bar to the application of the principle of constructive res judicata; moreover the fact that S. 60 prohibits only the attachment of an agriculturist's house and does not prevent him from selling it, if he so wishes, indicates that there is no public policy against the alienation of an agriculturists house. (King and Horwill, 11.) BASAYYA v. HANUMANTHA REDDI. I L.R. (1945) Mad. 211 = 220 I.C. 15=57 L.W. 434=1944 M. W N. 473=A.I.R. 1944 Mad. 548=(1944) 2 M.L.J. 46.

——S 60 (1) (c)—Mortgage decree—House of agriculturists—If can be sold.

The house of an agriculturist cannot be sold in execution even of a mortgage decree passed against that property. (Almond, J.C. and Mir Ahmad, J.) MAHOMED JAN v. GUTTA SINCH-RECEIVER, AMPITSAR, I.L.R. (1943) Lah. 242=

C. P. CODE (1908), S. 60 (1) (ccc).

194 I.C. 716=14 R. Pesh. 3=A.I.R. 1941 Pesh. 53.

5.60 (1) (c)—Objection based on—When to be raised.

An objection that the debtor was an agriculturist and therefore his house is not liable to attachment and sale ought to be raised before the sale and if not raised at that time it cannot be subsequently raised. (Agarwala, J.) Sheo Shankar Lalc: Bittan Kuar. 199 I.C. 456=14 R. O. 401=1942 R.D. 69=1942 A.W.R. (C.C.) 27=1942 O.A. 15=1942 O.W.N. 23=1942 A.W.R. (Rev.) 50=A.I.R. 1942 Outh 308.

Whether can be raised after sale.

An objection that a house is not liable to attachment or sale by reason of S. 60 (1) (c). C P. Code, as being a house occupied by an agriculturist, must be made prior to the sale. It is undesirable that a judgment-debtor should stand by and allow the sale to take place and then come forward and file an objection that he could and should have filed before the sale. 30 N.L.R. 135, foll. (Pollock, I.) BALKKISHNA PHAWANSA V. CHANGDEO, I.L.R. (1944) Nag. 159=210 I.C. 85=16 R.N. 143=1943 N.L.J. 475=A.I.R. 1943 Nag. 330.

Where an owner of property has failed to raise a plea under S. 60 (1) (c). C. P. Code, at the time of the execution sale, it is not open to a stranger in possession to raise the plea in a suit by the auction purchaser for possession of the property purchased by him in auction. (Ghulam Hasan, J.) SHEGRAY V. GANGA PRASAD. 193 I.C. 675=13 R.O. 502=1941 O.L.R. 361=1941 A.L.W. 519=1941 A.W.R (Rev.) 372=1941 O.A. 399=1941 R.D. 328=1941 A.L.W. 462=1940 O.W. N. 618=A.I.R. 1941 Oudh 395.

----S.60(1)(cc)-Milch animals not belonging to agriculturist-If exempt from attachment.

S. 60 (1) (cc), C. P. Code, makes all milch animals exempt from attachment or sale, whether they belong to an agriculturist or not. (Sale, J.) JHANDA v. NIKKA. 200 I.C. 159==14 R.L. 460=44 P.L.R. 66=A.I.R. 1942 Lah, 88.

——S. 60 (1) (ccc) proviso—Applicability— Mortgage of residential house executed by insolvent annulled by Insolvency Court before proviso came into force.

The proviso to S. 60 (1) (ccc) C. P. Code, added by Punjab Act XII of 1940, does not exempt property which had been mortgaged and redeemed in remote antiquity and had no subsisting charge on it, when it was sought to be attached and sold in execution. Where a mortgage has been annulled by the insolvency court and was no longer in existence when the property is sought to be sold in execution the proviso to S. 60 (1) (ccc) does not apply whether the annulment was at the instance of the insolvent or the receiver. (Tek Chand Dalip Singh, and Bhide, JJ.) DHANI RAM v. DISTRICT OFFICIAL

P, CODE (1908), S. 60 (1)(ccc).

4 I.C. 344=15 R.L. 259=45 P.L.R. 57=A.I. 1943 Lah. 19 (F.B.).

-S 60 (1) (ccc)—Sale effected but not conmed before Amending Act-Exemption.

A judgment-debtor other than an agriculturist mot claim exemption under S. 60 (1) (ccc), P. Code when the sale had been effected before date on which the Punjab Amending Act XII 1940 came into force, though the sale had not n confirmed on that date. The word 'sale' in clause is used, as in other parts of the Code meaning sale as at the conclusion of the tion, and not as confirmed by the Court. Chand, Monroe and Din Mohammad, JJ.). AM SINGH v. VIR BHAN. I.L.R. (1942) Lah. =200 I.C. 302=14 R.L. 462=44 P.L.R. 126 I.R. 1942 Lah. 102 (F.B.).

—S. 60 (1) (f)—Moneys due from company its managing agents—If constitutes right of sonal service.

loneys due to the firm of managing agents of mpany from the company does not constitute ight of personal service" within the meaning 5, 60 (1) Cl. (f). (McNair. J.) PURSATTAMPAS SAIJNATH. 195 I.C. 69=14 R.C. 41=A.I.R. 1 Cal. 240.

-S. 60 (1) (g)—Applicability—Money receiby retired Government servant in commutaof pension-Liability to attachment.

cannot be said that commutation of a pen-comes under the heading of stipends or uities under S. 60 (1) (g), C. P. Code, the iso was never intended to apply to money rit has passed into the pocket of the pener. Where a retired Government servant received a certain sum of money in commun of his pension, such amount is not exempt 1 attachment under S. (1) (g). (Davis, C.J., Weston, J.) HASOOMAL SANGUMAL v. DIA-I.L.R. (1941) Kar. 479=198 LLALOOMAL. I.L.R. (1941) Kar. 479= 630=14 R.S. 150=A.I.R. 1942 Sind 19.

-S. 60 (1) (g)-Applicability - Railway pany-Gratuity sanctioned to deceased emee and credited to Provident Fund account of rsed—Liability to attachment in execution of see against deceased—T. P. Act, S. 123.

an employee in the service of the G. I. P. way, died on 20-4-1940, leaving behind him ridow. After his death the Agent of the way Company sanctioned the grant of an ant by way of gratuity to C and the amount credited to the Provident Fund account of 10-5-1940, under the rules governing the t of gratuities, the grant was in the discreof the Agent and could not be claimed as of t. The Agent had a discretion to make a t to the employee or to his widow and Iren dependant on him. On 19-5-1940, the ioner who held a money decree against the ased employee, C sought to attach the unt of the gratuity credited to the Provident d of C, in execution of his decree, as money ie hands of the Railway company due to the

eld, (1) that the payment of a gratuity was in nature of a gift to complete which either

O. P. CODE (1908), S. 60 (1) (h).

as provided in S. 123, T. P. Act; (2) that there could be no delivery of movable property to one who was dead and the amount in question was not credited to any living person, and the mere fact that it was credited to the account of the Provident Fund of the deceased did not mean that thereby the amount became a part of the Provident Fund or that the title to it passed either to the widow or to any other dependant of the deceased; and the amount was not payable to the estate of the deceased; (3) that the amount still remained in the hands of the Company and the mere crediting of it to the account of the deceased employee did not amount to a delivery as contemplated by S. 123, T. P. Act; (4) and that therefore there was no attachable debt in the hands of the Railway Company, as the amount in the hands of the Company was not liable to attachment, by reason of S. 60 (1) (g), C. P. Code. (Lokur, J.) USMAN ABUBAKAR V. CHIEF ACCOUNTS OFFICER, G. I. P. RAILWAY. 210 I.C. 553=16 R.B. 236=45 Bom.L.R. 816= A.I.R. 1943 Bom. 423.

S, 60 (1) (h)—Applicability—"Wages of labourer"—Textile mill—Head jobber doing work of spinning occasionally as a term of his employment-Remuneration earned by-If exempt from attachment.

A person would be regarded as a labourer within the meaning of S. 60 (1) (h), C. P. Code, if he does or is expected to do that class of work which requires manual labour, such as the work of spinning in a textile mill. If the doing of manual labour is a term of his employment, he is a labourer and the remuneration earned by him constitutes "wages of a labourer" within the meaning of S. 60 (1) (h). The head jobber, i.e., the head of a gang of workmen employed in a textile mill industry, is a labourer if he participates in the work of his gang occasionally, though not necessarily continuously, as a term of his employment. The remuneration earned by him must therefore be held to be "wages of a labourer" exempt from attachment under S. 60 (1) (h), C. P. Code. (Wassoodew. I) Kul-KARNI v. GANPAT HIRAJI TELI. I.L.R. (1942) Bom. 287=202 I.C. 157=15 R.B. 133=44 Bom. L.R. 264=A.I.R. 1942 Bom. 191.

-(As Amended in 1937), S. 60 (1) (h)-Construction—Salary of persons in private service –If protected.

An interpretation of Cl. (h) of S. 60 (1) fourded upon the language of that clause alone without reference to the entire section would be unsafe and unwarranted. What the Legislature intended to protect from attachment in execution of a decee in the latter part of Cl. (h) was the salary of all persons in receipt of salary other than public officers and servants of a Railway Company or local authority. (Lobo, J.) Hormusji Jamshedji, In re. I.L.R. (1942) Kar. 237=182 I.C. 185=A.I.R. 1939 Sind 134.

-S. 60 (1) (h)—Construction—"Wages of labourers"—If wholly exempt—"Salary"— If includes "wages".

The first clause of S. 60 (1), (h), C. P. Code, is not controlled by the second clause, and "salary" very or a registered instrument was required in the second clause does not include "wages of

#### G. P. GODE (1908), S. 60 (1) (h).

labourers" in the first clause. The second clause is designed to protect to a limited extent, salaries of servants who are outside the class of labourers and domestic servants. But the wages of labourers and domestic servants are wholly exempt from attachment and are not liable to attachment at all. (Wassoodew, J.) KULKARNI v. GANPAT HIRAJI TELI. I.L.R. (1942) Bom. 287=202 I.C. 157=15 R.B. 133=44 Bom.L.R. 264=A.I.R. 1942 Bom. 191.

# \_\_\_\_\_S. 60 (1) (h)\_"Salary"—Meaning of.

"Salary" in S. 60 (1) (h), C.P. Code, is not confined to the emoluments of labourers and domestic servants. The clause clearly makes a distinction between salary and the wages of labourers and domestic servants. "Salary" is something other than, and contrasted with the wages of labourers and domestic servants (Harries, C. J. and Meredith, J.) RAGHUNANDAN SAHAIV. JAIGOBIND SAHAY. 20 Pat. 866—199 I.C. 635—14 R.P. 601—1942 P.W.N. 38—8 B.R. 554—23 P.L.T. 400—A.I.R. 1942 Pat. 194.

S. 60 (1) (h)—"Wages"—Bonus paid by employee under agreement in view of exceptional circumstances—Amount of bonus dependant on kind of work done and on the number of days for which employee worked—Attachability.

Bonus paid by an employer to an employee in view of the exceptional circumstances existing, under an agreement between the two, the amount of bonus depending on the kind of work on which the employee is employed and on the number of days for which he has worked must be regarded as part of the "wages" of the employee within the meaning of S. 60 (1) (h), C. P. Code, and such bonus is exempt from attachment under S. 60. Such bonus is clearly in respect of past work done and the fact that the bonus is given or distributed once a year would make no difference. (Sem. J.) JIVAN LAL KANDAS v. RAMTUJI BHAIJE. I.L.R. (1945) Bom. 46=46 Bom.L.R. 795=A.I.R. 1945 Bom. 119.

—S. 60 (1) (i)—Protection conferred—Whether a personal benefit which can be waived by agreement—Public policy.

The provisions of S. 60, C. P. Code which are imperative are intended to give protection to debtors on grounds of public policy and not merely to confer a personal benefit upon them which can be waived by agreement. Accordingly an arrangement made by an employee of a Municipality who was drawing a salary of Rs. 100 a month that his creditor who had obtained a decree against him may take Rs. 15 per month out of his salary in satisfaction of the decree is not enforceable in law and the Rs. 15 cannot be attached in execution of the decree. As an assignment of salary such an agreement is also opposed to the provisions of S. 6 (f) of the T. P. Act. (Kunhi Raman, J.) Subramaniam v. Satyanadham. I.L.R. (1942) Mad. 640—203 I.C. 200—55 L.W. 130—1942 M.W.N. 179—15 R.M. 601—A.I.R. 1942 Mad. 391—(1942) 1 M.L.I. 292.

S. 60 (1), (i)—Protection under—If can be weived.

## C. P. CODE (1908), S. 60 (1) (i).

It is not open to a public officer or servant of a railway company or local authority to barter away or waive the protection given by S. 60 (1), Proviso (i). Any agreement which has that effect is not enforceable by law and therefore void. (Harries, C. J., Din Mahomed and Abdur Rahman, JJ.) PREM PARKASH V. MOHAN LAL. 211 I.C. 291=16 R.L. 200=45 P.L.R. 432=A.I. R. 1943 Lah. 268 (F.B.)

—S. 50 (1) (i)—Protection under—If can be waived—Public servant contracting himself out of statutory exemption—Legality See C. P. CODE, O. 21, R. 48. 43 Bom.L.R. 758.

S. 60 (1) (i) and (k), (as amended in 1937)—Scope and effect of—Decree obtained against public officer in suit instituted after 1st June, 1937—Extent of salary attachable—Contribution to Provident Fund—Deduction of—Salary—If means net salary or gross salary—Incometax—If deductible.

The C. P. Code Amending Act (IX of 1937), enlarges the exemption from attachment of a judgment-debtor's salary provided the proceeddings relate to suits instituted on or after 1st June, 1937. The new Cl. (i) of S. 60 (1) exempts from attachment in execution of a decree the salary of a public officer to the extent of the first hundred rupees and one half the remainder of such salary. Further, Cl. (k) of S. 60 (1) exempts all compulsory deposits to a Provident Fund when the judgment-debtor belongs to a recognised Provident Fund. The exemption of deposits in Provident Fund is separate from the exemption in respect of salaries given by Cl. (i) and the result therefore is that the recurring contributions of the judgment-debtor to the Provident Fund must in working out the amount attachable, fall on that moiety of the excess of the salary over the first hundred rupees which is not already reserved for the judgment-debtor by Cl. (i). In other words, a decree-holder who is hit of the amendment of 1937, is only entitled to look to the balance after deducting the Provident Fund contribution from the amount that is left over after giving effect to the exemption granted by Cl. (i).

Quaere:—Whether income-tax deductions made from the munthly salary of a public officer have to be deducted for the purpose of Cl. (i) and whether salary means net salary only after such deduction. (Dhavle, J.) BHAGWAN DASS RAMPRASAD v. SECRETARY OF STATE. 193 I.C. 360=13 R.P. 584=21 P.L.T. 776=7 B.R. 598=A.I.R. 1941 Pat. 157.

S. 60 (1) and Divorce Act (1869), S. 37—protection under S. 60 (i), C. P. Code—If available to husband against whom an order for payment of alimony has been made.

A person against whom an order of attachment of salary in execution of an order for alimony is made is entitled to the protection afforded by item (1) of the proviso to S. 60. C. P. Code. (Grille. C. J. and Puranik, J.) Dr. NATH "V. SHAKUNTALABAI. =I.L.R. (1943) Nag. 1. =203 I.C. 84=15. R.N. 109=1942 N.L. J. 450 =A.I.R. 1943 Nag. 1.

S. 60 (1) (i)—Right to attack—Jebkharch

O.P. CODE (1908), S. 30 (1) (1).

Amount reserved for disbursing Jebkharch or 'pocket money', can be attached because maintenance is not included in 'pocket money'. (Davies.) GOPAL KRISHNA v. PANI. 1945 A.M. L.J. 12.

\_\_\_\_\_S 60 (1), (i)—Salary--Meaning of.

The word 'salary' as used in proviso (i) to S. 60, C. P. Code, must be construed as meaning the total monthly emoluments to which a public servant is entitled, including any sum which may be required for the payment of taxes or payments or re-payments to a Provident Fund, even though these may be recovered by deduction from his salary. (Dalip Sing and Beckett, II.) UMAR KHAN v. ABDUL WAHID. 206 I.C. 77=15 R.L. 296=45 P.L.R. 46=A.I.R. 1943 Lah. 60.

— (as amended in 1937), S. 60 (1) (i)— Scope—If controls S. 73. See C. P. Code, S. 73. 46 Bom,L.R. 757.

—S. 60 (1) (i)—Scope of—If controls S. 73, C. P. Code. See C. P. Code, Ss. 73 and 60, Proviso 1 (i). 1941 N.L.J. 331.

——S. 60 (1) (i)—Scope—If controls S. 60, Presidency Towns Insolvency Act—Order of allocation under latter—If liable to revocation by reason of S. 60, C. P. Code. See Presidency Towns Insolvency Act, S. 60. (1941) 2 M.L.J. 845.

—S. 60 (1) (k) and (i)—Amount required for Provident Fund contribution—If exempt from attachment.

S. 60 (1) (k), C. P. Code, does not mean that such portion of the salary of an employee as is required for the purpose of paying his provident fund contribution is rendered unattachable. Cl. (k) comes into operation only when the amount which is deducted from the salary on account of the provident fund is paid into the fund. It is then that it becomes a compulsory deposit in the fund. The amount necessary for deposit in the provident fund is, therefore, not immune from attachable portion" of the salary, that is, that amount of the salary which will be left over after attachment of the protion liable to attachment under Cl. (i). (Mukherjea and Biswas, II.) SUPERINTENDENT, R. M. S. (C) DIVISION, CALCUTTA V. R.M.S. (C) DIVISION, CO OPERATIVE CREDIT SOCIETY, LTD., HOWRAH. I.L.R. (1944) 2 Cal. 187=214 I.C. 108=17 R.C. 24=A.I.R. 1944 Cal. 135.

S. 60 (1) (k)—Applicability—Railway guard—Allowance of over and above salary—Attachability—Advance from Provident Fund—Repayment in monthly instalments—Instalments—If deductible from attachable salary. Kondayya Naidu v. Marianan. [see Q.D. 1936-40 Vol.1. Col. 1129.]. 191 I.C. 462=13 RM. 498.

S. 60 (1) (k)—Deposit by optional subscri-

S. 60 (1) (k)—Deposit by optional subscriber—If compulsory deposit.

Obiter:—As an optional subscriber to a provident fund cannot demand repayment of his deposit at his option, such deposit may be regarded as a compulsory deposit within the meaning of S. 60 (1) (k), C. P. Code. (Mukherjea and Biswas, II.) Superintendent, R. M. S. (C) DIVISION CALCUTTA v. R.M.S. (C) DIVISION, CO

C.P. CODE (1908), S. 60 (m).

OPERATIVE CREDIT SOCIETY, LTB., HOWRAH, I.L. R. (1944) 2 Cal. 187=214 I.C. 108=17 R.C. 24 = A.I.R. 1944 Cal. 135.

—S. 60 (1) (1)—Provident Fund—Agreement between member and trustee of Provident Fund—Third parties, if affected—Rule as to fortesture of amount on attachment—Effect.

The member and the trustees of a Provident Fund cannot agree between themselves that when a third party obtains an order of the Court to attach the interest of the member in the fund held by the trustees that interest should cease to exist. When the attachment is received it is in existence and no understanding between the member and the trustees can ensure that it shall be deemed to have disappeared. When the money becomes payable to the subscriber it must not be paid otherwise than under the orders of the Court. (Mackney, I.) R. C. Dass v. Secretary of Burma Oil Subsidiary Provident Fund Trust (India), Ltd. 198 I.C. 737=14 R.R. 220=A.I. R. 1941 Rang. 239.

——S. 60 (1) (k)—Provident Fund money of railway servant—Liability to attachment—Payment to subscriber—Test.

The money due to a railway servant on his account in the Provident Fund is not liable to attachment by his creditor until it is paid over to him. In order to decide whether the money has been paid to him, the test to apply is whether the railway has obtained a valid discharge. After his retirement a railway servant filled in the necessary form asking for payment of the money due to him on his account in the Provident Fund. The railway authorities requested the Reserve Bank to send a cheque to Messers. Thomas Cook and Sons. A creditor of the railway servant obtained an order from Court attaching the money. Messrs. Thomas Cook and Sons in the meantime had returned the cheque to the railway authorities alleging that the railway servant had no account with them.

Held, that the railway authorities would be discharged if, in asking the Reserve Bank to send the cheque to Thomas Cook and Sons, they were acting in accordance with the instructions given by the railway servant. (Henderson, J.) NAZAR MAHOMED KHAN KABULI v. BROWNE. 201 I.C. 17=15 R.C. 108=74 C.L.J. 524=A.I.R. 1942 Cal. 292.

—S. 60, (1) (1)—Applicability—Dearness allowance of private employee—Exemption from attachment—Government of India Notification No. 1489/D/43, dated 29—4—1943.

Clause(1) of the proviso to S. 60 (1), C. P. Code only applies to an allowance of a public officer or a servant of a railway company or a local authority, and it does not apply to any allowance received by private employees. Hence dearness allowance received by a private employee from his employer is not exempt from attachment by reason of the Government of India Notification No. 1489 D/43, Home Department, dated 29—4—1943. (Lokur and Weston, II.) MANILAL BHAICHAND v. MOHANLAL 47 Bom.L.R. 836—A.I.R. 1946 Bom. 102.

S.60 (m)—Applicability—Sale of Hindu coparcener's interest in joint family property—If

illegal-Want of specification of the interest of co-purcener-If vitiates sale.

Where in execution of a decree against a Hindu co-parcener, the share of that co-parcener in a part of the joint family property is put up for sale, the want of specification of the extent of the co-parcener's interest in the joint family property cannot invalidate the proclamation or the Sale. S. 60 (m) has no application to the case. The interest of a co-parcener in the joint family property is not a matter of contingency or dependant upon any future happening. So far as it is an interest, it must ex hypothesi be a vested interest. (Burn and Mockett, II.) Seam-MUGHAM CHETTIAR v. NAGASWAMI AYYAR & CO. 54 L.W. 365=201 I.C. 155=15 R.M. 247=1941 M.W.N. 985=A.I.R. 1942 Mad. 97=(1941) 2 M. L.J. 550.

S. 64—Applicability—Attachment—Sa: sequent mortgage by judgment-debtor—Execution sale—Private sale debtor before confirmation of execution sale with permission of Court—Deposit of sale proceeds by private purchaser—Decree satisfied and attachment withdrawn—Position and rights of purchaser—Mortgage—If void as against purchaser—Lis pendens—Applicability—T.P. Act, S. 52. LANKARAM v. SUNDARAGOPALA AYYAR. [See Q.D. 1936—'40 Vol. I, Col. 3281.] 195 I.C. 212=14 R.M. 152=1941 M.W.N. 66=A.I.R. 1941 Mad. 208.

—8.64—Applicability — Claim enforceable under attachment—Applicant for rateable distribution—Right to challenge alienation by judgment debtor after setting aside of execution sule and satisfaction of decree under which sale was held.

Where, the attachment in pursuance of which the property is brought to sale is set aside by reason of the decree-holder having been paid in full the attaching decree-holder has no claim against the judgment-debtor and therefore there is no claim enforceable under the attachment under S. 64, C.P. Code. The moment the attachment under S. 64, C.P. Code. The moment the attachment ends as a result of the sale being set aside all claims which were enforceable under it cease to be enforceable and a creditor who would have had a right to rateable distribution if the sale had stood, cannot therefore challenge an alienation by the judgment debtor under S. 64, as his claim has ceased to be enforceable on the sale being set aside. (Leach, C.J. and Lakshmana Rao, J.) RAMAYYA. NANAYYA. I.L.R. (1943) Mad. 175=207 I.C. 223=16 R.M. 62=1942 M. W.N. 682=55 L.W. 733=A.I.R. 1943 Mad. 165=(1942) 2 M.L.J. 607.

S. 64—Applicability—Contract to sell land
—Subsequent attachment in execution of decree
against owner—Sale deed in pursuance of contract
after attachment—Subsequent Court sale in pursuance of attachment—If prevails over sale in
pursuance of contract—T. P. Act, S. 54.

It is quite clear that though a contract to sell land does not create any interest in, or charge on, the property in question, it does give rise to an obligation which limits the right of the owner; and the attachment of the right, title and interest of the owner in the property in execution of a decree against him is subject to such limitation by which the judgment-debtor (owner) was

C. P. CODE (1908), S. 64.

bound. There is no legal basis for the theory that an attachment will prevail against a preexisting contract binding the owner of the land if the attaching decree-nolder has no notice of the contract. It the attachment is followed by a Court-sale and the purchaser at the Court-sale has no notice of this obligation he will no doubt get a good tille and the promisee under the private contract would be left to seek his remedy against his promisor. Where, however, a registered sale-deed is executed after the attachment and before the Court-sale, in pursuance of the prior contract to sell made before the attachment, the position is different. The sale can only be attacked under S. 64, C. P. Code, which section will apply only if it is shown that the sale is a private transfer cont. ary to the attachment. But when the attachment is subject to the obligation under the pievious contract, the sale in pursuance of the contract cannot be a transfer contrary to the attachment. (Wadsworth, J.) ATHINARAYANA KOMAR v. SUBRAMANIA AIYAR. 201 I.C. 307=15 R.M. 301=A.I.R. 1942 Mad. 67 =54 L.W. 474=1941 M.W.N. 896=(1941) 2 M. L.J. 722.

-- S. 54-Applicability-Execution sale.

S. 04, C.P.Code, is confined to private transfers of property and does not apply to sales in execution of a decree. Accordingly a sale made in pursuance of a later attachment will prevail even though there is an earlier attachment in existence at the date of the sale. ((Boss, J.) RUKMANI D. RAMSAROOP. I.L.R. (1944) Nag. 739=1944 N.L.J. 385=A.I.R. 1944 Nag. 324.

The very object with which S. 64, C. P. Code, has been enacted is to save rights which do not conflict with the claims enforceable under the attachment. The expressions "contrary to such attachment," and "as against all claims enforceable under the attachment," limit the operation of S. 64 only to certain transfers or acquisitions of interest or payments to the judgment-debtor. It does not render void any transaction or part of a transaction which in no way prejudices the claims of the decree-holder against the property which he has got attached. (Wadia and Sen, JI.) VISHNU BALKRISHNA v. SHANKARPPA GURLINGAPPA. 202 I.C. 392=15 R.B. 156=44 Bom. L.R. 415=A.I.R. 1942 Bom. 227.

——S. 64—Applicability—"Private transfer"—Contract of sale—Subsequent attachment of property—Suit for specific performance of contract—Decree enforcing conveyance—Conveyance if void by reason of attachment effected after agreement and before sale, See C. P. Code, O, 38, R. 10. 45 Bom.L.R. 208.

——S. 64—Applicability—"Private transfer"— Decree on award creating charge on land—If voidable as private transfer.

S. 64, C. P. Code, affords protection to an attaching creditor only against a "private transfer" but not against an enforced transfer obedience to a decree of a Court. A charge created by a decree passed on an award is not a private

transfer which is voidable under S. 64. But if there were no disputes between the parties and the reference to arbitration was collusive and sham, then the award following on the reference would only be a camouflage to disguise the private character of the transaction; and in that case though the award might be filed and a decree passed on it, it would be treated as a private transfer for the purpose of S. 64, C. P. Code. But the burden of proving that an award is not genuine but was made collusively only as a device to invest a private arrangement with the appearance of a public adjudication lies heavily on the attaching decree-holder who pleads so. If there be a genuine dispute between the parties and that dispute is settled by arbitration and the award is made a decree of Court, it cannot be regarded as a private transfer. (Divatia and Lokur, JJ.) Saburdas Mahasukhram v. Gopalji Nandas. 211 I.C. 230=16 R.B. 283=45 Bom.L.R. 526= A.I.R. 1943 Bom. 283.

S. 64—Applicability and scope—O. 38, R. 10
—If qualifies 5. 64—Attachment before judgment
—If affects rights subsisting on date of attachment.

S, 64 and O. 38, R 10, C.P. Code, have to be read together, and S. 64 applies to an effective attachment. An attachment ordered under O. 38, R. 10 C.P. Code, before judgment is not effective as against rights subsisting at the date of the attachment. (Wassoodew, J.) SHIVSHANKAREPPA MAHADEVAPPA V. SHIVAPPA PARAPA. 204 I.C. 340=15 R.B. 312=44 Bom. L.R. 874=A.I.R. 1943 Bom. 27.

S. 64 and O. 38, R. 10—Attachment before judgment of land—Prior agreement by defendant to sell land to third party—Right of decree-holder to bring property to sale in execution—Remedy.

The holder of a money decree, who has attached immovable property of his judgment-debtor before judgment, cannot bring that property to sale in satisfation of his decree, when the judgment-debtor has, before the attachment, agreed to sell the property to a third party, and the sale has been completed by a conveyance after the attachment. The attachment before judgment of property subject to a contract of sale merely gives the attaching creditor a right to the balance of the purchase-money, if any. He would also have the benefit of the vendor's lien under S. 55 (4) (b) T. P. Act. (Broomfield and Divatia, JI.) RANGO RAMCHANDRA V. GURLINGAPPA. I.L.R. (1941) Bom. 290=195 I.C. 547=14 R.B. 45=43 Bom. L.R. 206=A.I.R. 1941 Bom. 198.

S. 64 Effect of attachment—Scope and applicability of S. 64.

Attachment creates no new title. The attaching creditor only obtains certain negative rights which are limited in scope. S. 64 of the C.P. Code, sets out these limits. The section is restricted to private transfers of, and private dealings with the property attached and does not extend to involuntry transfers or other consequences which ensue ad invitum the parties because of a statutory enactment. (Stone, C.J. and Bose J.) BHURA V. SADDULAL, I.L.R. (1942) Nag. 691=198 I.C. 665=14 R.N. 238=1941 N.L.J. 593=1.R., 1942 Nag. 36,

C. P. CODE (1908), S. 64.

——Ss.64 and 73—Execution petition and application for rateable distribution filed—No separate order on application for rateable distribution that attachment was to subsist—Effect—Order on execution petition—If sufficient.

Where an execution petition and connected application for retable distribution are ordered to be filed infructuous but an order that the attachment was to subsist made on the execution petition only can be availed of the creditor to enable him to claim rateable distribution though there was no separate order on the application for rateable distribution that the attachment should subsist. Applications for rateable distribution go hand in hand with the application for execution. (Almond, J.C. and Mir Ahmad, J.) SOHAN LAI GULAB RAI v. MOHAMMAD DIN MOHAMMAD YUNIS. 193 I.C. 712=13 R. Pesh. 65=A.I.R. 1941 Pesh. 18.

—S. 64 and O. 21, R. 54 and O. 38, R. 7—Interim order for attachment before judgment passed by High Court—Notice of motion containing bare endorsement as to grant of interim attachment, served on defendant by Attorney's Clerk—Such service, if effects attachment—Attenation of property after such service—Validity—Calcutta High Court Original Side Rules, Chap, XVII, Rr. 18 and 45.

An attachment, whether it is in execution of a decree or before Judgment, must be made in the manner prescribed by law, if it is to render a subsequent alienation invalid. Attachment is a real thing, distinct and separate from an order for attachment. Where on an interim order for attachment before Judgment passed by the High Court on its original side, a notice of motion containing only a bare endorsement by an Assistant Registrar that an interim attachment has been granted is served on the defendant by an attorney's clerk, such service does not have the effect of an attachment of the immovable property in question, as it falls utterly short of the requirements of the law. The contents of the notice of motion were not proclaimed on or near the property to be attached, nor was a copy of the notice affixed either on the property or on the Court house. Further the notice of motion was not delivered to the Sheriff for Service as required by the Rules of the High Court, and it contained no words of formal prohibition such as are contemplated by O. 21, R. 54 (1), C. P. Code. Consequently an alienation of the property made after such service of the notice of motion is not hit by S. 64, C. P. Code. (Mitter and Khundkar, JJ.) MONOHARLAL BANERJEE v. BENGAL IM MUNITY CO., LTD. 49 C.W.N. 226=A.I.R. 1945 Cal. 308.

# ----S. 64-Private transfer-Meaning.

A 'private transfer' in S. 64, C.P. Code, means transfer carried out without the intervention of the attaching Court or of some Court superior to it or again of some Court to which the proceedings have been lawfully transferred. A transfer during the pendency of an attachment is illegal. (Davies.) Noor Mohammed v. Umra Mal. 1941 A.M.L. J. 51.

S. 64 and U.P. Encumbered Estates Act (1934). S. 7 (1) (a)—Sale of property by judgment-debtor during subsistence of attachment in execution of money decree—Judgment-debtor subsequently applying under Encumbered Estates Act and passing of order under S. 6—Effect-Rights of decree-holder.

Where a judgment-debtor during the subsistence of an attachment of his property in execution of a money decree, sells it to third person and therafter makes an application under 5.4, Encumpered Estates Act, which is, in due course forwarded to the special judge, the attachment no doubt becomes null and void in view of the provisions of S. 7 (1) (a) of the Encumbered Estates Act. But the rights acquired by the decree-nolder prior to that date, namely, the right to realise the decree from the properties remain in tact and the private sale by the judg-ment-debtor is subject to such rights. (Iqbal Ahmad, C.J. and Plowden J.) SURAJ BUX SINGH v. I.L.R. (1944) All. 230=218 LOKENDRA SINGH. I.C. 498=18 R.A. 25=1944 A.W.R. (H.C.) 112= 1944 O.A. (H.C.) 112=1944 A.L.J. 161=A.I.R. 1944 All. 176.

-S. 64-Scope of-Attaching creditor, if can claim to restrict the effects of a private transfer. RAM CHANDRA V. RAM LAL. [See Q.D. 1930-40 Vol. I. Col. 3281.] I.L R. (1940) Ali. 681=191 I.C. 745=13 R.A. 266.

-S. 64 - Scope - Attachment before judgment-Sale by debtor-Subsequent decree in suit -insolvency of judgment-debtor afterwards-Application for sale of uttached property-Official Assignee, if necessary party-sale if void absolu-

A private alienation by a judgment-debtor of property attached by a creditor is, under 5, 64, C. P. Code, not void absolutely, but only void against claims enforceable under the attachment in question. An adjudication of the debtor would automatically put an end to an attachment and vest the property in the Official Assignee free of attachment, but it has no such efficacy as regards an allenation made by the insolvent before his adjudication. Until the alienation is set aside by appropriate proceedings, it stands good, and the Official Assignee would therefore have no present interest in or title to the property in question. Hence the Official Assignee is not a necessary party to an application for sale of the property in execution by the attaching creditor. The appellant who filed a suit against his debtor obtained an order for attachment of the debtor's property before judgment and the property was attached on 19—4—1939. Later on 16—1—1940, the debtor sold the attached property to the respondent On 10-1-1941, the appellant obtained a decree in his suit against the debtor for Rs. 4,043-1-0 and interest. On 25-2-1941 the debtor was adjudged insolvent, and his estate vested in the Official Assignee, Madras. On 3-5-1941, the appellant applied in execution of his decree for sale of the attached property after bringing on record the respondent who had purchased the property pending the attachment. The application was dismissed as not maintainable on the ground that the Official Assignee in whom the debtor's estate was vested was not made a party to the execution proceeding.

Held, that the property would not become the property of the debtor or vest in the Official Assignee until the latter obtained a declaration for setting aside the alienation and therefore the decree-holder (appellant) was not obliged to implead the Official Assignee in his application for sale in execution-Sale set aside under O. 21, R.

#### C. P. CODE (1908), S. 64.

sale in execution. (Krishnaswami Ayyangar and Kunhi Raman, JJ.) Leelavathi Ammal v. Neni Kavur Bai. I.L.R. (1943) Mad. 659=207 I.C. 418=16 R.M. 113=56 L.W. 213=1942 M.W.N. 740=A.I.R. 1943 Mad. 179=(1943) 1 M.L.J.

-S. 54-Scope- Insolvency of Hindu father-Attachment of son's interest in family property in execution-Effect-Sale by Official Receiver pending attachment-Validity as against son of insolvent.

So long as Hindu joint family is undivided the power of the father to sell the son's share is not lost. The attachment of the sons's interest may prevent the alienation taking effect as against claims enforceable under the attachment in view of S. 64 C. P. Code and when a sale of the share is effected in pursuance of the attachment, the power of the tather may be destroyed but the power does not cease till the sale takes place. So long as the power of disposal subsists, there is no reason why it should not vest in the Official Receiver on the insolvency of the father subject to the same disabilities as it would be subject to in the hands of the father at the date of vesting. During the pendency of the attachment, if the Official Receiver chooses to exercise the right of sale the alience will get a title which will prevail against the son though it may not prevail against the claims enforceable under the attackment. In other words it a sale takes place in pursuance of the attachment, the purchaser under that sale would get an indefeasible title and the purchaser from the Official Receiver will not get any. The purchaser from the Official Receiver cannot resist the claim of the attaching decree-holder to bring the properties to sale or to contest the rights of a purchaser at such a sale but the son would have no right against the alience as his interest must be held to have been validly sold. (Venkataramana Rao and Somayya, JJ.) RAYANGI v. JANAKIRAMAYYA. 206 I.C. 477 =15 M. 990=55 L.W. 35=1943 M.W.N. 338= A.I.R. 1942 Mad. 330=(1942) 1 M.L.J. 318.

-S. 64 Expl. and 73-Applicability-Attackment—Application for rateable distribution—Subsequent private purchase by attaching decree-holder— Right of other decree-holder to claim rateable distribution.

A decree holder applying for rateable distribution under S. 73 C.P. Code is not entitled to assert his claim against another decree-holder who had attached the property in his execution and had thereafter purchased it privately from the judgment debtor in satisfaction of his decree after the application for rateable distribution. The explanation to S. 64 C. P. Code does not apply where the court is not in possession of assets from which rateable distribution can be allowed under S. 73. The Legislature could not have intended merely by adding the explanation to S. 64 to include unenforceable claims for rateable distribution in the class of claims enforceable under an attachment. (Divatio and Sen JJ.) MALLAPPA KARBASAPPA v. IRAPPA SHIDLINGAPPA. I.L.R. 1943 Bom, 514 = 208 I.C. 407 = 16 R.B. 80=45 Bom. L.R. 449=A.I.R. 1943 Bom. 261.

-S. 64 and Expl.-Scope-Attachment and

# O. P. CODE (1908), S. 65.

89—Effect of—Private sale by judgment-debtor after sale and before it is set aside—Title of purchaser—Another creditor applying for rai-ble distribution at execution sale and attacking property after private sale and before sale was set aside—Rights of.

Where an execution sale is set aside under O. 21, R. 89 C. P. Code, on deposit of the decree amount the attachment in pursuance of which the sale was held comes to an end. When the attaching creditor's sale is set aside and his claim is satisfied, the particular attachment necessarily comes to an end. Another creditor who had applied for and might get rateable distribution it the sale nad stood, cannot therefore say that he has a claim enforceable under that attachment within the meaning of S. 64, C. P. Code. A private purchaser from the judgment-debtor after the sale and before its setting aside, would bet a good title, because the effect of the setting aside of the sale is to declare that the judgmentdebtor had a good title to convey his property from the date of the sale itself and not merely from the date of its setting aside. A creditor attaching the property after the private sale and before the setting aside of the execution sale is not entitled to rely on his attachment to impeach the private sale and such attachment cannot affect the rights of the private purchaser under S. 64, C. P. Code. (King, J.) SUBRAMANIA AYYAR v. ANNAVI PILLAI. 202 I.C. 451=15 R.M. 503=1942 M.W.N. 412=55 L.W. 274=A.I.R.

1942 Mad. 522=(1942) 1 M.L.J. 556.

Per Shearer J. When in execution of a decree a mukarrari tenure is sold and the sale is in due course, confirmed, the auction purchaser is in the absence of any agreement with the land lord liable to pay the rent, which accrues due, after the date of the sale and the judgment-debtor is liable to account for the profits up to the date of his dispossession.

Per Manohar Lall, J.—There can be no personal liability for such arrears of rent when there is no contract express or implied binding the auction purchaser to pay rent for the tenure to the land lords before the date of confirmation of sale (Manohar Lall and Sharer. JJ.) BHANKUMAR CHAND v. SHREE LACHMI KANT RAO. 22 Pat. 280 = A.I.R. 1943 Pat. 320 = 211 I.C. 212 = 10 B.R. 354 = 16 R.B. 209.

- S. 65—Auction-purchaser's right to possession—When accrues—Right to mesne profits Abbul Ghani v. Lal Chand. [see Q. D. 1936-40 Vol. I. Col. 1143.] I.L.R. (1941) Lah. 91—43 P.L.R. 313.
- S. 65—Scope and effect of Chhatar Singh v. Syed Shah Qasim Ghani. [see Q. D. 1936-40 Vol. I, Col. 3282.] 192 I.C. 213=7 B.R. 344=13 R.P. 444=1940 P.W.N. 994.
- S. 66—Applicability and scope Mahomedan decree-holder—Death of—Execution by some heirs—Purchase of property in execution—Suit by co-heirs for their shares—Maintainability.

  S. 66, C. P. Code, is designed to create some check on the practice of making benami pure

C. P. CODE (1908), S. 66.

chases at execution sales for the benefit of judgment-debtors and in no way affects the title of persons otherwise beneficially interested in the purchase. It cannot apply to the case of persons who by operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as joint property an acquisition made by the use of joint funds by one or other of them in his own name, e.g., members of a joint Hindu family, or joint decree holders where one of them executes the decree for the benefit of all and purchases the property in lieu of the joint decretal amount. Where some out of several coheirs of a deceased Mahomedan decree-holder execute the decree obtained by the deceased and purchase the judgment-debtor's property in execution, without purporting to act on behalf of the rest as well, whether they are regarded as joint decree-holders under O. 21, R. 15, C.P. Code, or not, the purchase enures for the benefit of all the heirs, and the other heirs who have taken no part in the execution proceedings are entitled to recover their shares in the property on paying their proportionate shares of the costs of the execution proceedings leading to the sale, S. 66 is no bar to a suit by them for recovery of their shares. (Harries, C. J. and Fazi Ali, J.) Musammat Bibi Kaniz Ayesha v. Mozibut Hassan Khan. 20 Pat. 855=200 I.C. 546=15 R.P. 5=8 B.R. 716=A.I.R. 1942 Pat. 230.

S. 66—Applicability — Benami purchase—Agreement by such purchaser to convey property to real purchaser and execution of sale deed to real owner—Validity of sale.

Where a benami purchaser at an execution sale not only agrees to convey the property to the real purchaser after the Court sale by an agreement executed after the execution sale, but actually executes a sale deed of the property purchased in Court auction conveying the property to the real purchaser, S. 66 will not apply and operate as a bar to the validity of the sale. (Somayya, J.) NAGAPPA CHETTIAR v. MEENAKSHI ACHI. 57 L.W. 536—A.I.R. 1945 Mad. 32—(1944) 2 M.L.J. 266.

S. 66—Applicability—Purchase at execution sale confirmed before 1908—Suit under S. 106 of B. T. Act brought after 1908.

S. 317 of the C. P. Code of 1882 and not S. 66 of the C. P. Code of 1908, applies to a suit under S. 106 of the B. T. Act brought after 1908 alleging that a purchase made at an execution sale which was confirmed before 1908 was made for the benefit of some person other than the certified purchaser. (Pal, J.) SARAT CHANDRA MITRA V. SANTOSH KUMAR HALDAR. 209 I.C. 569=16 R.C. 374=47 C.W.N. 544=A.I.R. 1944 Cal. 145.

- Tenancy Act—Purchase by judgment-debtor in another name—Suit by latter for possession—Plea of benami purchase—If open to judgment-debtor. See BIHAR TENANCY ACT, S. 173 (2) AND (3). 24 Pat. 279.
- SHRIDEO JANKI RAM v. NATHURAM. [see Q. D. 1936—'40 Vol. I, Col. 3282.] I.L.R. (1941) Nag. 90=195 I.C. 91=14 R.N. 35=A.I.R. 1941 Nag. 84.

notification, (Binney, F.C.) GYAR SILAL & GANPAT RAO. 1944 N.L.J. 61.

——Ss. 63-70 in 196—Order of Collector refusing to direct alienation of judgment-debtor's land-Appeal.

Even before the promulgation of the rules made by the Punjab Government under S 70 C. P. Code, any decrees passed by a Collector to whom execution proceedings had been transfered as the result of the notification under S. 68 were by the operation of S. 96 of the Code decrees subject to appeal to the Court of the Commissioner. An order of the Collector refusing to direct the alienation of any portion of the judgment-debtor's land on the ground that it was barely sufficient for the maintenance of the judgment-debtor and his family is clearly a decree and is appealable as such to the Commissioner. (Alan Mitchell, F.C.) Budhu Ram v. Pandhi. 20 Lah, L. T. 167.

S. 68 -Sale by Collector-Procedure.

It is not necessary that the Collector himself should carry out the sale. The Collector in S. 68 is regarded as the nead of the revenue and administration department and it is this department which would do the work and not necessarily the Collector himself. The papers must however be returned under the signature of the Collector to the Civil Court concerned in token of his satisfaction with the work of the department. (Davies.) GHULAM DASTGIR v. VILLAYAT HUSSAIN. 1941 A. M.L.J. 81.

regard to appeal and revision.

Where a Civil Court has ordered land to be attached and sold in execution of a decree and has transferred the execution proceedings to the Collector in accordance with Punjab Government Notification issued under S. 68, C.P. Code, the proceedings are not proceedings under the Punjab Debtors Protection Act. The procedure of the Collector and the procedure in regard to appeal and revision are, therefore, governed by Sch. III, C. P. Code, and by the rules made under S. 70, C. P. Code, by the Punjab Government. The Collector cannot refuse to take action or postpone the sale of the attached property under R. 1, of Sch. III when there is no possibility of raising the decretal amounts by any temporary alienation. (Mitchell, F.C.) GULAB DIN v. SARDAR LAL. 21 Lah. L.T.

R. 31 of the rules framed by the Punjab Government is intended to convey the sense of O. 21, R. 86, C. P. Code, that is to say, when the purchaser defaults in the deposit of 75 per cent., it is the duty of the Collector to hold that the sale is void and to determine whether in the special circumstances of the case before him, he ought to order forfeiture of the deposit of 25 per cent. made at the time of the sale. That being so, an order of the Collector confirming the sale although 75 per cent. had not been deposited within 15 days or on the date of the order of confirmation, is illegal. (Anderson, F.C.) MANOHAR LAL v. MOHAN LAL. 22 I. L. T. 8.

——S. 70—Rules framed under—Collector not accepting last bid made before Tahsildar—Whether can hold informal sale.

C. P. CODE (1908), S. 73.

The Collector is not authorised, when he does not accept the last bid made before the Tahsildar, to hold an informal sale for the disposal of the property. If he considers it necessary to obtain fresh bids, he must follow the procedure laid down for the holding of a sale, (Binney, F.C.) JANKIDAS v. LAXMAN. 1943 N.L.J. 226.

\_\_\_\_\_ S. 70 (1)—Rules under, R. 13—Scope of—Collector if can adjudicate on disputed adjustment.

R. 13 of the rules framed under S. 70 (1), C.P. Code, only invests a Collector with powers specifically referred to in the notified rules and not with all powers conferred by rules under O. 21 or otherwise by the C. P. Code. The Collector is not a Court within the meaning of the term occurring in O. 21, R. 2. A Collector is justified in filing the proceedings, when there is an amicable settlement admitted by both parties. But he cannot legally come to a decision regarding a disputed adjustment. (Binney, F.C.) DHANRAJ v. BALKISAN. 1941 N.L.J. 300.

\_\_\_\_\_\_S. 70 (2)—If excludes jurisdiction of Civil Court to order stay of sale.

From the provisions of Ss. 69 and 70, C. P. Code, it follows that a Civil Court cannot regulate the sale proceedings before the Collector in execution after the decree has been transferred to him in matters falling within the purview of the third schedule or of the Rules framed under S. 70. In cases which are not covered by the provisions of the third schedule of the rules framed under S. 70 the jurisdiction of the Civil Court is not ousted and the Civil Court is the only Court competent to determine matters arising in execution. In an appeal against the execution of a decree by sale it is open to the Chief Court to order stay of sale pending disposal of the appeal and S. 70 (2) does not exclude the jurisdiction of that Court to pass such an order. (Thomas, C.J. and Ghulam Hasan, J.) HARDWARI PRASAD v. RUDRA PRASAD. 204 I.C. 569 = 15 R.O. 379 = 1943 O.W.N. 28 = 1943 O.A. (C.C.) 6 = 1943 A.W.R. (C.C.) 3 = A. I.R. 1943 Oudh 265.

All proceedings under Ch. XL. of the U. P. Revenue Department Manual are judicial proceedings and hence all orders must be passed after giving a hearing to the parties concerned. (Sathe, J.M.) MEWA RAM v. JAMNA PRASAD. 1942 A.W.R. (Rev) 207=1942 O. A. (Supp.) 233=1942 O.W.N. (B.R.) 361=1942 R.D. 450.

Where a judgment debtor applied for setting aside an execution sale by the Collector on the grounds that the property was protected, the price was inadequate and the proclamation was not properly served and the Collector refused to set it aside and prior to its confirmation the judgment-debtor sought to revise that order, Held that the revision was premature inasmuch as the question may not arise if the sale is not ultimately confirmed. (Sathe, J.M.) MEWA RAM v. JAMNA PRASAD. 1942 A.W.B. (Rev.) 207=1942 O.A. (Supp.) 233=1942 O.W.N. (B.B.) 361=1942 B.D. 450.

Ss. 73 and 47—Appeal against order under S. 73—If lies—Question between rival decree-holders.

An order under S. 73, C. P. Code, determining the question of rateable distribution as between rival decree-

A party cannot approbate and reprobate. A creditor who has obtained a rateable distribution out of funds realised in sale in execution against his judgment-debtor cannot, in a suit against him for the recovery of the sum paid in excess of his share, plead that the execution under which the money was realised was itself void. He cannot both retain the benefit received by the sale and plead its invalidity. (Nivoqi, J.) Co-OPERATIVE CENTRAL BANK LTD., MALKAPUR v. NARAYAN RAMJEE KUNBI, I.L.R. (1942) Nag. 685=202 I.C. 512=15 R N. 85=1942 N.L.J. 462=A.I.R.1943 Nag. 7.

S. 73—Custody Court and Executing Court being same—Receipt of assets—Point of time—Need for formal order—Undertaking by executing creditor to bring back money into Court—Liability for interest.

In a case of rateable distribution, where the custody Court and the executing Court are the same, two things must take place. First, the Court should as the custody Court come to the conclusion that there was no objection to transfer the amount necessary to pay the decree-holder at whose instance the fund was attached; and secondly there must be an order by the custody Court transferring the amount to the credit of the first attaching creditor's suit which it is engaged in executing. It is only then that there can be said to be receipt of assets within the meaning of S. 73, C. P. Code. Where the latter of the two conditions is not satisfied the executing creditor is not entitled to draw out the money and other creditors are entitled to participate in the distribution so long as such an order is not passed. Where an executing creditor drawing out money from Court gave an undertaking to the Court that he would pay back the whole or any portion of the amount drawn by him if so ordered by that Court.

Held, that the undertaking involved an obligation to repay the sum with interest if later on it was found that the money had been wrongly claimed and wrongly paid. (Sonarya and Shahab-ud-din, JJ.) IMPERIAL BANK OF INDIA MADRAS v. BALASUBRAMANIA PANDIA TEVAR. 1945 M.W.N. 492=(1945) 2 M.L.J. 49.

S. 73 and O. 21, R. 72—Decree-holder given permission to hid and set off—Application filed by another decree-holder for execution and rateable distribution after sale—Latter, if entitled to rateable distribution.

When a decree-holder has been given permission to bid and set off and when the amount of the successful bid is less than the decree amount, the whole of the set off must be deemed as made on the date of sale and the whole of the amount must be deemed to have been received or realised co instanti the sale is made and S. 73, C. P. Code, will give no benefit to other decree-holders who apply for execution and rateable distribution after the conclusion of the sale, however soon after its conclusion their application may be made. The fact that the decree-

C. P. CODE (1908), S, 73.

after the sale is immaterial, as such an application is superfluous and under O. 21. R. 72 (2), C. P. Code. All that is required at that stage is that the Court should enter up satisfaction of the decree in part. (Puranik and Diaby, JJ) BALLELAL v. MANOHARLAL. I.L.R. (1944) Nag. 805=1944 N.L.J. 347=A.I.R. 1944 Nag. 295.

----S. 73-Object of.

Per Iqbal Ahmad, J.—The object underlying the enactment of S. 73, C. P. Code was to prevent multiplicity of execution proceedings while at the same time ensuring equitable distribution of assets between various decree-holders who had the right to have their decrees satisfied out of those assets. (Iqbal Ahmad Bajbai and Verma, IJ.) Hoti LAL v. Chatura Prasad, I.L.R. (1941) All 77=194 I.C. 276=13 R.A. 477=1941 A.W.R. (H.C.) 96=1941 O.A. (Supp.) 169=1941 A.L.J. 137=A.I.R. 1941 All. 110 (F.B.).

S. 73—Rateable distribution—Right to—Crucial date—Dismissal of execution application after the receipt of assets—Right. If affected, Bulakhidas v. Murlidhar. [see Q.D. 1936—'40 Vol. I, Col. 1168.] I.L.R. (1942) Nag. 139=A.I.R. 1940 Nag. 302.

S. 73—Rateable distribution—Right to—Deposit of decree amount by one who stood surety to avoid attachment before judgment—Right of other decree-holders to share.

Where to avoid an attachment before judgment a surety gives security and on a decree being passed deposits the decree amount in Court, the other decree-holders against the judgment-debtor are not entitled to rateable distribution out of such amount. (Agarval, J.) KHAGENDRA NATH MITRA v. P. C. RAI. 203 I.C. 671=1942 A.W.R. (C.C.) 343 (1)=1942 O.W. N. 593=15 R.O. 242=1942 O.A. 506=A.I.R. 1942 Outh 491.

——S. 73—Rateable distribution—Right to—Starting point—Date of execution or date of application for rateable distribution.

Where a decree-holder applies for execution and subsequently finding that the assets of his judgment debtor are under attachment in respect of other decrees in other Courts, thereafter applies under Ss. 63 and 73. C. P. Code, for transfer of his decree to the Court holding the assets and for rateable distribution, his right to rateable distribution arises from the date of the execution application itself and not from the date of the application under Ss. 63 and 73, C. P. Code. (Ghulam Hasan, J.) EISTE C. GRIFFIN EDWARD v. W. A. C. HOWARD. 193 I.C. 38=13 R.O. 424=1941 A.W.R. (C.C.) 66=1941 O.L.R. 247=1941 A.L.W. 99=1941 O.W.N. 115=1941 O.A. 138=A.I.R. 1941 Oudh 277.

S. 73—Rateable distribution—Who are entitled to-'Date of receipt of assets'.

The ordinary equitable view is that persons the sale is made and S. 73, C. The ordinary equitable view is that persons the conclusion of the sale, however soon after its conclusion their application may be made. The fact that the decree-tholder nurchaser made an application for the sale, however made an application for the sale, and the sale is the sale, however soon after its conclusion their application. The date of their the sale is the sale, however soon after its conclusion to the sale, however soon after its conclusion their application.

whatever form are attached or if there is no attachment on which they are actually taken into possession by the Court. (*Davies.*) AJMERI LAL V. BAL MUKAND. 1941 A.M.L.J. 19.

—S. 73—Receipt of assets—Date of—Decree against father and son—Official Receiver directed to sell son's share also within time fixed—Failure to sell—Sale subsequently by receiver afterwards ratified by Court—Application by holder of decree for execution after receipt of money by receiver but before payment by him to Court—Right to rateable distribution. Anna-MALAI CHETTIAR v. VEILAYAN CHETTIAR. [see Q.D. 1936—'40 Vol. I. Col. 1168. 193 I.C. 536—13 R.M. 678.

# S. 73-Receipt of assets-Necessity for.

Under S. 73. C. P. Code, no order for rateable distribution can be passed unless asset: are held by the Court. An order allowing an application for rateable distribution made when no sale has been held and no assets have been received by the Court, is liable to be set aside. (Chatterji and Meredith, JI.) DHIRENDRA NATH CHANDRA V. BIMALAYANDA TARKATIRTHA. 196 I.C. 728=8 B.R. 94=14 R.P. 243.

-S. 73-Right to apply-Holder of order under S. 185 (1) Companies Act.

Having regard to S, 36 of C. P. Code, and S, 199 of the Companies Act, a company which holds an order made under S, 186 (1) of the Companies Act can apply for rateable distribution under S, 73, C. P. Code, (Lord Rusell of Killowen). LVAI PUR BANK LTD., RAMJ! DAS, 72 I.A. 85=20 Luck 162=58 L.W. 226=1945 Comp. C 57=47 Bom LR 640=219 I.C. 149=11 BR 406=47 PIR 318=1945 A.L.J. 338=1945 M W.N. 193=49 C W N. 337=A.I.R. 1945 P.C. 60=(1945) 1 M.L.J. 309 (P C.).

—Ss. 73 and 47—Right to rateable distribution—Decree-holder failing to refund amount withdrawn, on sale being set aside—'ttachment of his property already attached by another—Auction-purchaser if entitled to rateable distribution of the sale proceeds of that property. BHIORAI v. SHIOLAI. [see Q D 1936-'40, Vol. I, Col. 1171. ILR. (1942) Nag. 126.

——Ss. 73 and 60(1)(1)—Right to rateable distribution—Decree-holder subsequent to amendment of S. 60 in 1937—If can participate in attachment prior to 1937.

Where there has been an attachment of the judgment debtor's salary by one creditor prior to 1937 and another creditor obtains a decree subsequent to the Amendment of S. 60, C. P. Code in 1937, he can claim rateable distribution in the amount attached in respect of earlier decree. The amendment does not control S. 60. (Res. J.) KHAIRULLAH KHAN v. MIRAJANKHAN. 195 IC. 609 = 14 R.N. 63 = 1941 N. L.J. 331 = A.I.R. 1941 Nag. 239.

S. 73 and Companies Act. Ss. 186 and 198— Right to rateable distribution—Right of decree-holder againt holder of payment order.

A holder of a decree is entitled under S. 73, C. P. Code, to claim rateable distribution against the official Liquidator as the holder of a payment order under S. 186 of the Companies Act. S. 199 of the Companies Act puts the payment order on the same fecting as a decree so far as the execution goes and rateable distri-

#### C. P. CODE (1908), S. 73.

bution under S. 73 is clearly a method of enforcement of a decree or of an order in the nature of a decree. (Yeung C. f and Black r, J.) RADHESHAM BEOPAR COMPANY LTD., OKRA v. KARAM CHAND. IL.R. (1942) Lah. 460 = 14 R.L. 65 = 1941 Comp. C. 229 = 43 P L.R. 310 = 195 I.C. 386 = A.I.R. 1941 Lah. 273.

S. 73—Same judgment-debtor—Decree against debtor during his lifetime and decree against his legal representatives—If 'passed against the same judgment-debtor.' SARIU SUKUL v. RANGIDHAR DUBAY. [see Q.D. 1936—'40 Vol. I, Col. 3283.] 191 I.C. 361 = 13 R. R. 123.

S. 73—"Same judgment-debtor"—Decree against Hindu father and decree against father and sen—Sale of son's share in execution of latter decree. Right of holder of former decree to rateable distribution. SUBRAMANIAM CHETTIAR v. ANNAMALAI CHETTIAR. [rec Q. D. 1936—'40, Vol. I. Col. 1171.] 194 I.C. 803 = 14 R M. 89.

8. 73—"Same judgment-debtors" — Decree against Hindu father and son and decree against father alone as manager of family—If against "same judgment debtor."

The expression, "the same judgment-debtor" in S. 73, C. P. Code, must be construed strictly. A decree against a father and son, members of a Hindu joint family, and a decree against the father alone as manager of the joint Hindu family cannot be regarded as decrees against the same judgment-debtor within the meaning of S. 73, C. P. Code. (Beaumont C. J. and Macklin. J.) LAXMAN ANANT v. GOVIND RAMBHAT. I.L.B. (1941) Bom. 540 = 14 R.B. 148 = 196 I.C. 644 = 48 Bom. L R. 695 = A.I R. 1941 Bom. 324.

——S. 73—"Same independent debtor" — Decree against legal representative of such person—If against "same independent-debtor."

A decree against a person and a decree against his legal representatives are not decrees against the "same indgment debtor" for purposes of S. 73 C. P. Code, "Judgment-debtor" in the section means the same person in law and in fact. It does not include legal representatives. So also, a decree against a person person ally and a degree against him in another capacity, e.g., as trustee would not be decrees against the "same indgment-debtor" within the meaning of S. 73. (Dovis, C.J. and O'Sullivan, J.) Gian. CHAND LAKHIMAL v. PARUMAL CHELLARAM, I.L. R. 1943 Kar. 426 = 212 I.C. 134 = 16 R.S. 232 = A.I.R. 1944 Sind 81.

——8.78—"Same fudgment-debtor"—Decree against person personally and device against him as legal representative of a deceased person—If against same judgment-debtor.

It will not be unduly stretching the language of S. 73, C. P. Code to say that the expression "the same judgment-debton" denotes identity, of individuality and identity of character. Decrees against the same person cannot always be regarded as decrees against the same judgment-debtor for the purposes of S. 73. A decree against a person individually and a decree against that person as representative of a deceased person cannot be held to be decrees against the same judgment debtor within the neaning of S. 73, C. P. Code, so as to enritle the holders of the two decrees to rateable distribution.

(Renumont C. J. and Macklin, J.) JAMIYATRAM GAURISHANKAR v. UMIYASHANKAR PRANSHANKAR.

I.L.R. (1941) EOM. 544=14 R.B. 142=196 I.C. 595

=43 Bom. L.B. 699=A.I.B. 1941 Bom. 327.

8.78—"Same judgment-debtor"—Decree against person during his life time—Decree against his legal representative after his death—If against same judgment-debtor,

Where the first decree was passed against X in his lifetime and after his death is being executed against his legal representative Y to the extent of X's estate in his hands and the second decree is passed after X's death against his legal representative Y, in respect of a debt incurred by X, and is expressly made payable out of X's estate in Y's hands the two decree-holders are entitled to rateable distribution. provided the other conditions laid down in section 73 are fulfilled. (Tek Chand, Dalip Singh and Bhide. 11) SHIV CHARAN DAS v. RAM CHARAN DAS. I L.R. (1943) Lah. 497=209 I. C. 149=16 R.L. 91=45 P.L.R. 239=A.I.R. 1943 Lah. 148 (F.B.).

The legal representatives against whom a decree has been passed in respect of a claim against the deceased and the deceased person against whom a decree was passed in his life-time but which is sought to be executed against his legal representative can be treated as "the same judgment-debtor" within the meaning of that expression in S. 73 C. P. Code and can claim rateable distribution. (Iqbal Ahmad Baipai and Verma, J.). HOTI LAL v. CHATURA PRASAD. IL.R. (1941) All. 77=194 I C. 276=13 R.A. 477=1941 A.W.R. (H.C.) 96=1941 O.A. (Supp.) 169=1941 A.L.J. 137=A.I.R. 1941 All. 110 (F.B.).

Where in a suit against a firm a partner of that firm is served and appears in the suit to defend it as against the firm, the decree passed in such suit can be executed against that partner personally, under the combined operation of O. 30, R. 6 and O. 21, R. 50 C. P. Code. He would therefore be the same judgment-debtor in that decree and also in another decree obtained against him personally in a suit against him in his individual capacity, for purposes of S. 73, C. P. Code. (Divatia, J.) PANNAII DEVI CHAND v. LAKKAJI DOLAJI. I.I. B. (1943) BOM. 306=207 T.C. 221=16 R.B. 9=45 BOM. L.R. 181=A.I.R. 1943 BOM. 156.

Ss. 73 and 64—Scope and effect of—Application for rateable distribution by creditor holding decree—Execution sale set aside and payment made in full to decree-holder bringing property to sale—Effect on right of other creditors to challenge private alienation by debtor as void under S. 64. See C. P. CODE. S. 64. (1942) 2 M.L.J. 607.

S. 73—Scope—If confers mere rights—If controlled by S. 60 (1)—Right of decree holders—Assets realised under S 60 (1) before 1-6-1937—Right to share in—Persons filing suits after 1-6-1937—Right of.

S. 73, C. P. Code, was enacted only to prevent multiplicity of proceedings; it was not intended to confer, and did not in fact confer, on the decree-holder a right which he never possessed or a right to reach the property of the debtor which he could never have reached. The right of the decree-holder against his judgment-debtor is controlled by S. 60, C. P. Code. S 73 must be read with S. 60, and the rights under S. 73 cannot override the rights under S. 60. Where the decree-

C. P. CODE (1908), S. 80.

holder has attached the salary of a railway; under S. 60 (i) as it stood before the amendm 1937 the assets can be distributed only among a the decree-holders as filed their suits before 1-t when the Amending Act (IX of 1937) came into The decree-holders whose suits were filed after 1-t would have no right to share in the distribution (Kania, J.) HIMATMAL DEVCHAND v. A HAKKE. 46 Bom.L B. 757 = A.I.R. 1945 Bom.

Ss. 73 and 145—Simple money decree-ho, Right to share in realisation from security giz another decree holder.

Where under a compromise decree certain propare given under a security bond to the decree hold his decree amount, it is not open to another a money decree-holder against the same judgment-to demand rateable distribution out of the realist in execution of the above security bond. (Iqbal A. C.J. and Plowden, J.) RAGHUBIR LAL GUPT BITTAN. 1943 A.L.W. 17.

In a suit under S 73 (2), C. P. Code, all the debolders who have received the assets of the judg debtor on rateable distribution are proper pa (Pollock J.) RADHAKISSAN v. UTTAMCHAND. R. (1945) Nag. 427 = 1944 N.L.J. 391 = A.I.R. Nag. 313.

S. 79—Suit falling under Clause (a)—Su.
Governor General in Council "through the Mil
Estates Officer, Central Provinces Circle, Jubbul;
—If competent.

Under the present S. 79, C. P. Code, which substituted by the Government of India (Adaptatic Indian Laws) Order, 1937, in the case of suits fa under clause (a), as the Federation of India has been established, the Central Government is the arrity to sue and the suit has to be brought in the nan the Governor-General in Council. The fact that it been instituted in the name of the Governor-General Council "through the Military Estates Officer, Ce Provinces Circle, Jubbulpore", does not affect the 1 tion. Words of this kind are surplusage. (Grille, and Hemeon, 1) MOHANLAL v. GOVERNOR-GENE IN COUNCIL. I.L.B. (1945) Nag. 629 = 1945 N. 375 = A.I.R. 1945 Nag. 255.

——S. 80—Applicability—Decree in favour Crown—Attachment of property in execution—Cl to—Refection — Suit by defeated claimant aga Crown—Prior notice of suit—Necessity.

No notice to the Crown is necessary under S. 80, 6 Code, prior to the filing of a suit where such sui brought under O. 21, R. 63, C. P. Code, to set asid adverse order on a claim petition preferred by plaintiff in regard to property attached by the Crown against ano person; the suit under O. 21, R. 63, C. P. Code, mus deemed to be a continuation of the Claim proceedin (Somayya, J.) MAHOMED VUSUF SAHIB v. PVINCE OF MADRAS. 211 I.C. 113=16 R.M. 48 1943 M.W.N. 181=A.I.R. 1943 Mad. 341=(1944 M.L.J. 251.

-8.80—Applicability—Notice by Municipalit remove alleged encroachment—Suit against Municipal for declaration that there was no encroachment and injunction—Subsequent addition of Government as pato suit on objection of Municipality—Notice under 80—Necessity.

The plaintiff who had built a house on his own land was served with a notice by the Commissioner of a Municipality, who threatened to demolish it, if not removed by the plaintiff within seven days, on the ground that it encroached on a public street. The plaintiff thereupon filed a suit for a declaration that the site alleged to have been encroached really belonged to him and for an injunction to restrain the Municipality from removing the structure. The Municipality which was made sole defendant pleaded that the Provincial Government was necessary party to the suit, and on the Court holding that the Government was a necessary party made the Government a party. Thereupon the plea was raised that the suit was bad because the notice required by S. SO, C.P. Code, had not been given to the Government.

Heid, that the granting of the relief asked for by the plaintiff would affect no right vested in the Government that the latter was not a necessary party to the suit and therefore S. 80. C. P. Code, did not apply. (Leach. C.J. and Clark, J.) APPALANARASAMMA v. COMMISSIONER, MUNICIPAL COUNCIL. VIZAGAPATAM. 58 L.W. 87 (\$)=1945 M.W.N. 179 = A.I.R. 1945 Mad. 224 = 1945) 1 M.L.J. 22.

S. 80 — Applicability — Receiver — Suit against — Notice—Necessity — "Purporting to be done...in his official capacity" — Meaning of — Failure to pay dues — Suit — Notice of suit.

A receiver appointed by a Court of law is a public officer, but no notice of suit is necessary under S 80, C. P. Code, unless the suit is against him in respect of some act purporting to have been done by him in his official capacity. Failure to pay a claim by a public officer cannot be said to be an act purporting to have been done by him in his official capacity. An act "purporting to be done by such public officer in his official capacity," means an act of a public officer which is intended by him to carry forth or convey to the minds of all persons who become aware of that act the impression that he did the act in his official capacity and not as an ordinary private individual and which has the effect of conveying such an impression by its seeming or appearance. (Varma and Sheaver. J.) Surendra v. Jagat. 24 Pat 514—A.I.B. 1946 Pat. 31.

S. 80—Applicability—Receiver—Suit against for Royalty of lands in his possession—Notice—Necessity, JYOTI PRASAD SINGH DEO BAHADUR V. SAMUEL HENRY SEDDON. [see Q.D. 1936—'40 Vol. I. Col. 1178.] 192 I.C. 17=13 B.P. 362=7 B.R. 283.

S. 80—Applicability—Suit against ex-public officer in respect of act done when he was public officer

The notice contemplated by S. 80, C.P. Code, for a suit against a "public officer" is unnecessary in the case of a suit against a person who on the date of the suit has ceased to be such officer. The section cannot be read as including a suit against a person who is not a public officer but was a public officer at the time of the cause of action. To do so would be to extend the section beyond its apparent purport. (Wadsworth, J.) PADMANABHA NAVAR v. APPU. 200 I.C. 813=15 R. M. 127=54 L.W. 172=1941 M.W.N. 734=A.I.R. 1942 Mad. 288 (1)=(1941) 2 M.I.J. 242.

——S 80—Applicability—Suit under S. 14, Madras Survey and Boundaries Act—Government pro forma party—Notice of suit—Necessity.

There is no reason why the Government should not receive the two months' notice required by S. 80. C. P. Code, in the case of a suit brought under S. 14 of the Madras Survey and Boundaries Act, on the ground that

# O. P. CODE(1908), S. 80.

it is a statutory suit or that the suit is in the nature of an appeal. There is nothing in the latter Act which renders the provisions of S. 80, C. P. Code, inapplicable to a suit brought under it. Even if Government is made only a proforma defendant, notice is none the less necessary under S. 80, C. P. Code. (Happell, J.) PROVINCE OF MADRAS v. MAHARAJA OF JEYPORE. 210 I.C. 418 = 16 R.M. 436 = 56 L.W. 50 = 1943 M.W.N. 56 = A.I.R. 1943 Mad. 284 = (1943) 1 M.L.J. 53.

S. 80—'Cause of action'—Construction—Notice of suit to recover amounts realized from plaintiff—Payments actually made after notice—Notice, if invalid.

The words 'cause of action' in S. 80, C. P. Code,

The words cause of action in S. 80, C. P. Code, should not be construed in a narrow sense as the object of the section is merely to inform the defendant substantially of the ground of complaint. A notice of suit to recover amounts realized from plaintiff is not bad merely on the ground that on the date of the notice the amounts had not been paid by the plaintiff but they were paid only later on. It is enough if the cause of action is stated with precision. (Agarwal. J) JANKI PRASAD v. GOVERNMENT OF THE UNITED FROVINCES. 16 Luck. 421=192 I.C. 545=13 R.O. 367=1941 A.Cr. C. 16=1941 A.W.B. (C.C.) 82=1941 O.L.B. 185=4 F.L.J. (H.C.) 75=1941 O.W.N. 63=1941 O.A. 31=A.I.B. 1941 Oudh. 355.

Statement of Reference in notice—Cause of action— Statement of—Reference in notice to possible further claim likely to arise b-fore suit—If invalidates notice—Fresh suit after fresh notice—Necessity.

notice—Fresh suit after fresh notice—Necessity.

A notice under S. 80, C.P. code, to be a valid notice must state the cause of action and the relief claimed. It may be that to state a future cause of action would not be a compliance with S. 80 C.P. code but it does not follow that where a cause of action exists of which notice is given the notice is rendered bad because it refers to a possible further claim which may arise before a suit can be brought. The section must be construed with some regard to common sense and to the object with which it appears to have been passed. The suit cannot be brought for two months after the date of the notice. The cause of action which is to be stated in the notice is the bundle of facts which go to make up the right in respect of which the plaintiff proposes to sue and it is obvious that before the suit can be brought, it may be that that bundle of facts will be added to or subtracted from; and it cannot be said that the notice is invalidated because it refers to a possible additional claim, consequential upon the cause of action specified therein and states that if such additional claim arises the plaintiff will sue also in respect of it. To hold that in respect of any consequential relief which may arise after the date of notice the plaintiff cannot sue in the contemplated suit would not be the right construction of the section; a fresh notice and a fresh suit are not necessary. The object of S. 80 C.P. code was not certainly to multiply suits or increase costs. (Beaumont C.J. Wassoodew, J.) CHANDULAL VADILAL v. GOVERNMENT OF BOMBAY. I.L.R. (1943) Bom. 128-206 I.C. 570-15 R.B. 419-45 Bom. L.R. 197=A.I.R. 1943 Bom. 138.

-Notice-Necessity.

Where in a suit for a declaration against the ciency—Su Secretary of State for India-in-Council it is necessary. averred in the plaint that a notice had been given by the plaintiff to the Secretary of State for India-in-Council as required by S. 80 C P. Code and there is no plea in the written statment that the suit is had on the ground that the notice given was insufficient or invalid under S 80 C. P. Code, it must the taken that any defect in the notice has been waived by the defendant. The invalidity of the notice is a matter of plea and proof and can be waived by the defendant. When the Government is appraised of the fact of the notice and the Government does nothing to raise a plea for five years the court is entitled to raise a presumption of waiver. It is not therefore open to the Government five years later at the trial to raise a plea that the notice is not proper or adequate under S. 80 and to apply to amend the written statement so as to incorporate this plea at a time when a fresh suit by the plaintiff would be barred by limitation. Just as a plaintiff should not be allowed to amend his plaint so as to deprive the defendant of a plea of limitation, the defendant should not be allowed to amend his written statement at a stage which would materially prejudice the plantiff. An order allowing amendment at such a stage is materially irregular and will be set aside in revision under S. 115 C. P. Code. (Divatia, J.) Frachshaw Hormusita, Secretary of State. I.L.R. (1 43) Bom 186=207 I C 474=16 R.B. 33=45 Bom.L.R. 220=A.I.R. 1943 Bom. 160.

——S. 80—Municipal Committee superseded under S. 238 of Punjab Municipal Act—Service of notice on Deputy Commissioner—Validity. MAHOMED SHAFT v. SIALKOT MUNICIPALITY. [See Q.D 1936—'40 Vol. I, Col. 3283.] 192 I.C. 729—13 R.L. 401.

The language of S. 80, C.P.Code, is imperative—not only must notice be given to the public officer, but the plaint must contain a statement that such notice has been given and only then can the suit be instituted. In the absence of the notice or of the statement, no valid suit is before the Court on which it can pronounce judgment and its sole duty is to reject the plaint under O. 7, R. 11 (d), C.P.Code. If instead of rejecting the plaint after it finds the suit is defective on account of non-compliance with S. 80, the Court proceeds to express findings and conclusions upon the issues arising on the pleadings, its findings are not res judicata between the parties and amount to no more than obiter dicta. The fact that no objection was raised by the parties to the issues being decided is immaterial, as the failure to challenge the power of the Court to enter upon those issues will not confer jurisdiction upon the Court. (McNair and Gentle, II.) Hiralal Murarka v. Mangulal. 48 C.W.N. 421.

——S. 80—Notice—Contents and particulars of —Description of plaintiff—Notice giving fathers' —ames and places of residence of plaintiffs—Suffi-

C.P. CODE (1908), S. 80.

ciency—Surnames, caste and occupation—If necessary.

Where a notice under S. 80, C.P. Code, is given within the period required by the law and purports to comply substantially with the provisions of the section, it cannot be held to be defective on the ground that the surnames or the caste or the occupation of the proposed plaintiffs has not been mentioned in the notice. It would be sufficient if the plaintiffs are described in such a manner that they can be easily identified and if the father's names of all the plaintiffs and their places of residence are given, that would be a sufficient description for the purposes of S. 80, C.P. Code. (Divatia and Macklin, J.) SECRETARY OF STATE v. CHIMANLAL JAMNADAS. I.L.R. (1942) Bom. 357=201 I.C. 420=15 R.B. 76=44 Bom.L.R. 295=A.I.R. 1942 Bom. 161.

——S. 80—Notice — Necessity—Suit against Deputy Commissioner appointed mutwalli under a wakf.

A suit against the Deputy Commissioner as the person appointed by the District Judge to perform the duties of mutwalli under a waqf deed, is not a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity and as such no notice under S. 80, C. P. Code, is necessary for such a suit. (Yorke, I.) Huzur Ana Begam v. Deputy Commissioner, Gonna 196 I.C. 797=14 R.O. 217=1941 A.W. R. (C.C.) 274=1941 O.L.R. 764=1941 O.W.N. 906=1941 O.A. 621=A.I.R. 1941 Oudh. 529.

S. 80—Notice not necessary—Liquidator of Co-operative Society—House of member attached by him in executing of award issued by Registrar—Member claiming in suit exemption from attachment as agriculturist.

S. 80, C. P. Code, bars the institution of a suit unless notice has been given, only when the suit is against a public officer and is in respect of any act done or purporting to he done by the public officer in his official capacity. The mere fact that the public officer concerned is a defendant in the suit is not sufficient to determine whether a notice is required under the section. Where, therefore, a Liquidator appointed under the Bihar and Orissa Co-operative Societies Act attaches a house belonging to a member of the Co-operative Society in liquidation in execution of an award issued by the Registrar and the member institutes a suit against the Liquidator to obtain a decision as to whether his house is liable to be attached, he being an agriculturist, the suit does not require the service of notice under the section assuming that the Liquidator is a public servant within the meaning of the section. (Agarwala, J.) Liquidator, Nawadah Bazaar Co-operative Society v. Domi Ram Chaudhary. 193 I C. 142=13 R.P. 549=22 P.L.T. 465=1041 Pt. V. N. 272-7 P. Free-A I.P. 1041 Pt. 1941 P.W.N. 373=7 B.R. 585=A.I.R. 1941 Pat.

\_\_\_\_\_S. 80-Notice-Period of two months-Computation.

In computing the period of two months provided by S. 80, C.P. Code, the day of the delivery of the notice to the Secretary to the Provincial Computer to the

Collector of the District, must be excluded. (Venkatz-ramana Rav, I) MARINA AMMAVI v. SECRETARY OF STATE. 200 I.C. 295=15 R.M. 3=53 L.W. 233=1941 M.W.N. 205=A.I.R. 1941 Mad. 446=(1941) 1 M L.J. 328.

In calculating the period of two months provided for the notice under S. 80, C.P. Code, the day on which the notice is actually served should be excluded. (Happell J) PROVINCE OF MADRAS v. MAHARAJA OF JEYPORF. 210 I C. 418=16 R M. 436=56 L W. 50=1943 M.W N. 56=A.I.R. 1943 Mad. 284=(1943) 1 M.L.J. 53.

In calculating the period of two months under S. 80, C.P. Code, the date on which the notice was severed is to be excluded. A suit filed before the expiry of two months is unsustainable. (Mukhrica ant Ellis, J.) PROVINCE OF BENGAL v. MIDNAPOPE ZEMINDAPY CO., LTD. 49 C.W.N. 395 A.I.R.=1945 Cal. 341.

——S. 80—Notice served under old section—Suit lodged subsequent to Government of India (Adaptation of Indian Laws) Order, 1937—Validity of notice. THARAR DAS v. TULSI RAM. [ee Q.D. 1936—'40 Vol. 1, Col. 3283.] 191 I.C. 182=13 R.L. 267.

——S. 80—Notice under—Valuation given differently in plaint—Only one of the two reliefs mentioned in notice, prayed for in the plaint—Effect.

S. 80, C.P. Code, does not require that the valuation of the suit shall be stated and hence if the plaint gives a valuation different from that given in the notice, any plea based on such a difference is a sheer technicality which cannot operate to defeat the suit. Nor could the giving up of one of the two reliefs mentioned in the notice have such effect where the defendant has not been prejudiced by such giving up. (Collister and Allsop, I) MAHOMED ZIA. v. UNITED PROVINCES.

I.L.R. 1943 All. 860=210 I.C. 128=16 R.A. 167=1943 A.L.J. 463=1943 A.L.W 528= 1943
O.A. (H.C.) 218=1943 A.W.R. (H.C.) 218=1943 O.W.N. (H.C.) 312=1943 R.D. 458=A.I.R. 1943 All. 345.

——S. 80—Notice—Waiver of—What amounts to— Rights to raise plea of want of notice—Party not entitled to notice—Plea by—Sustainability—Delay in raising plea—Effect—When deemed waiver.

It is well settled that the party in whose favour S. 80 prescribes notice to be given can waive his right to notice, and his waiver binds the rest of the parties. But only he can waive. Delay, however long, in raising the plea of want of notice, would not necessarily by itself, be a ground for holding that there has been waiver, but any prejudice to the plaintiff caused by the delay would result in the defendant being deemed to have waived his right to notice. A party who has himself no right to notice is not entitled to challenge a suit on the ground of want of notice to the party entitled to receive it. (\*Rroomfeld and Macklin, JJ.) HIRA CHAND HIMATLAL v. KASHINATH THAKURJI. 204 IC. 89=15 R.B. 282=44 Bom.L.R. 727=A.I.R 1942 Bom. 339.

——S. 80—Notice-Wrong description of subject matter of Suit-If renders notice defective,

C. P. CODE (1908), S. 80.

There can be no doubt that the particulars required by S. 80, C. P. Code to be set out in the notice of suit should be accurately given. An error in the description of the subject-natter of the suit cannot be held to be an insubstantial error. Such an error makes the notice defective and invalid. (Rajamannar, J.) MEENAKSHI AMMA E. PROVINCE OF MADRAS. 58 L.W. 534 (1)=1945 M W N. 655 (2)=A.I.R. 1946 Mad. 78=(1945) 2 M.I.J., 387.

——S. 80—Official Receiver—Notice—Necessity for. ASIA KHATUN v. AMARENDRA NATH BASU. [See Q.D. 1936—'40 Vol. I, Col. 1181.] 191 I.C. 783—13 R.C. 283.

——S. 80—Public Officer—Commissioner of Wakts, Bengal.

It is not certain that the Commissioner of Wakfs, Bengal, is not a 'public officer' within the meaning of S. 80 C. P. Code. (Mukheriea and Pal JJ.) COMMISSIONER OF WAKES, BENGAL z SHAHEBZAPA MAHOMED ZAMANGIR SHAH 214 I.C. 150=17 R.C. 31 =48 C.W.N. 157=A.I.R. 1944 Cal. 206.

—S. 80—'Public officer' -Common manager appointed under S. 95 of B.T. Act—Loan taken by him by executing bond—Suit on such bond—Notice, if necessary.

Per Pal. J.—The common manager appointed under S. 95 of the B.T. Act is a public officer within the meaning of S. 80. C.P. Code. If he takes a loan and executes a bond, the act of taking the loan and executing the bond will be an "act done by a public officer in his official capacity". But his omission to pay either interest or principal cannot be an act purporting to be done by him in his official capacity. Consequently a suit by the creditor for the recovery of the money due under the bond will not come within S. 80, C. P. Code, and a notice under that section is not required for such a suit, (Nasim Ali and Pal, J.). SUKUMARI GUPTA v. DHIRPNDPA NATH ROY. 197 I.C. 869=14 R.C. 401=73 C.L.J. 356=A.I.R. 1941 Cal. 643.

—S 80—Public officer—If should have acted bona fide—Motive of officer in doing act—Relevancy—Notice of suit.

S. 80, C.P. Code, cannot be read as being limited in its application to cases in which an officer has acted bona fide in the exercise of his powers; the duty of the Court is to give effect to the natural meaning of the language used in section. The question of good faith or bad faith of the public officer either as regards his belief in the legality or propriety of his act or the limit of his powers or the existence of facts justifying the exercise of such powers is irrelevant in the consideration of the question whether the officer is entitled to notice under S. 80. The section does not require that the act should have been done in good faith; it merely requires that it should purport to be done by the officer in his official capacity. The motives with which the act was done do not enter into the question at all. The Court has simply to see what act was done by the defendant and whether it purported to be an official act. Where a police officer arrested the plaintiff and led him to the police station as a person accused of theft, that is an act which every police officer has a statutory power to do under S. 54, Cr. P. Code, and it is as a police officer that he must bave taken the plaintiff to the police-staion. Where it is known to all parties concerned that he was a police officer and it is clear that he purported to act as such,

whether in good faith or bad faith, S. 80, C.P. Code, applies and notice of suit has to be severed under the section. Rowland, J.) NOOR MAHOMED & ABDUL FATEH. 194 I.C 263=13 R.P. 696=7 B R. 737=22 Pat L.T. 392=1941 P.W.N. 502=A.I.R. 1941 Pat. 461.

—S. 80—'Public officer'—Liquidator of Cooperative Society—Suitagainst—Notice—Necessity. Govinda Chettiar v. Uttukottai Cooperative Society. [see Q.D. 1936-'40 Vol. J, Col. 1178.]. 194 I.C. 769=14 R.M. 67.

—S. 80—Public officer—Secretary of State.

The Secretary of State is an officer in the service of the crown and therefore a public officer as defined in S. 2 (17) Cl. (h) of the C. P. Code. (Abdul Rashid and Ram Lall. II.) I. M. LALL v. SFCRFTARY OF STATF. 216 I.C. 89=17 R.L. 160=A.I.R. 1944 Lah. 209.

——S. 80—Scope—Act flowing from illegal act of public officer but not done by public officer—Claim in respect of—Notice of suit—Necessity.

The Collector fixed assessment on the plaintiff's land at the rate of Rs. 200 per acre commencing from the year 1925-1926, and in December, 1933, he issued notice to the plaintiffs demanding payment accordingly. On 22-1-1934, the plaintiffs issued a notice under S. 80, C. P. Code, alleging that the assessment was illegal and consequently the notice to pay also was illegal and that they proposed to file a suit to have the assessment declared a nullity and for refund of any amount that the Collector would levy from them. He filed a suit on 16-7-1934, in which they claimed a refund of Rs. 7,369-8-0, which had been paid by them under protest in lanuary and February, 1934, as having been illegaly levied. The trial Court held that the notice was bad as not complying with S. 80, C. P. Code, in as much as the cause of action for the claim for refund had not arisen at the date of the notice; and dismissed the suit.

Held, (a) that the notice was not had because it referred to a claim for refund likely to arise out of the assessment and notice; (b) that the only acts purporting to be done by the Collector in his official capacity complained of by the plaintiffs, were (1) the making of an illegal assessment and (2) the demand for payment in respect thereof, both of which had been specifically stated in the notice and a declaration was to be asked for in respect of them; (3) that the payment which gave rise to the claim for refund was not an act of the Collector, and no notice was therefore required in respect of that; (4) that the notice sufficiently and strictly complied with the requirements of S. 80 C. P. Code, as it gave notice of the acts which the Collector was alleged to have done in his official capacity of which the plaintiffs complained and from which the cause of action resulted; and (5) therefore the cause of action resulted, and (3) inclined the suit was not liable to be dismissed on the ground that there was no notice complying with S. 80, C. P. Code. (Reaumont, C.J. and Wassoodew, J.) CHANDULAL VADILAL V. GOVERNMENT от Вомвау. I.L.R. (1943) Вот. 128=206 I.С. 570=15 R.B. 419=45 Вот.L.R. 197=A.I.R. 1943 Bom. 138.

C. P. CODE (1908), S. 80,

—S. 80—Scope—Duty of Court—Suit instituted during currency of notice—Duty of Court to dismiss—Waiver of plea—What amounts to— Suit failing on facts admitted and alleged by plaintiff—Failure of Secretary of State to deny receipt of notice—If waiver.

S 80, C. P. Code, imposes a statutory and unqualified obligation upon the Court. The Code, though a Procedure Code, must be read in accordarce with the natural meaning of its words. S. 80 is express, explicit and mandatory, and it admits of no implications or exceptions. If a suit is instituted before the expiry of two months prescribed by S 80, the suit is clearly unsustainable in limine and must be dismissed. But a plea that a suit has been instituted during the currency of the notice may be waived. Where the applicability of S. 80 depends upon proof of certain facts, and the Secretary of State does not deny the facts alleged in the plaint then he would be held to have waived his objection to the proof of those facts. When, for instance, a plaintiff states in his plaint that the notice has been served on a certain date which is beyond two months of the date of the institution of the suit and the Secretary of State does not raise any objection, the latter would be deharred from challenging these facts at the trial. So also when it has been alleged in the plaint that notice was sent with all the requisites beyond two months and the Secretary of State does not deny that the notice was received by him, he cannot during the trial he heard to say that he has not received the notice. But where the facts are admitted by the plaintiff himself and he fails under the express provisions of the statute no question of waiver can arise at all. The Secretary of State cannot be held to have waived the objection where the provisions of S 80 have not been complied with on the admitted facts. (Manohar Lall and Chatterji, JJ) Secretary of State v. Sagarmai Marwari 20 Pat. 394=195 I C. 93=14 R.P. 74=7 B.R. 866=23 Pat.L.T. 167=A.I.R. 1941 Pat. 517.

—— S. 80—Scope—Mandatory character of— Failure to raise objection to validity of notice— Effect—Waiver or estoppel—If arises.

S. 80, C. P. Code, is express, explicit and mandatory. Where the section has not been complied with, the Court has no jurisdiction to try the action instituted against Government. There can be no question of waiver and no question of estroppel. It is very desirable that objection to the validity of the notice should be taken at the earliest possible moment, but failure to do so will not deprive the section of its force. (Leach, C. L. and Shahabuddin, J.) Government of Markas 7. Vellayyan Chettiar. I.L.R. (1945) Mad. 263=218 I.C. 377=18 R.M. 36=57 L.W. 436=1944 M.W.N. 475=A.I.R. 1944 Mad. 544=(1944) 2 M.L. J. 65.

S. 80—Scope—Mandatory nature of—Suit within two months—Maintainahility—Plea of absence of proper notice—If can be waived.

S. 80, C. P. Code, is explicit and mandatory and provides that no suit shall be instituted till after the expiry of two months after delivery of the

notice. A suit filed within two months, i.e., before the expiry of the full two months, is premature and ought to be dismissed. It is not open to the Collector representing the Crown to waive the plea as to the want of a proper indice under S. 80, C. P. Code. (Venkataramana Rao, J.) MARINA AMMAYI V. SECRETARY OF STATE. 200 I.C. 205=15 R.M.3=53 L.W. 233=1941 M.W. N. 205=A.I.R. 1941 Mad. 446=(1941) 1 M.L. J. 328.

——S. 80—Scope—Suit against public officers and others—Notice of suit not served on public officers—Effect—Bar—If applies to whole suit—Procedure—Kejection of plaint.

The requirements of S. 80, C. P. Code, cannot be evaded or explained away and a suit instituted in contravention of the section is unsustainable in limine. Where one or some of the defendants are public officers to whom notice of suit is necessary, the bar of S. 80, applies to the suit as a whole and not merely to the claim for relief against these particular defendants. If no notice is served on those defendants, the consequence of instituting the suit in face of the statutory prohibition is that under O. 7, R. 11, C. P. Code, the plaint should be rejected. (Rowland, 1.) Noor Mahomed v. Abdul Fateh. 194 I.C. 263=13 R.P. 696=7 B.R. 737=22 Pat.L.T. 392=1941 P.W.N. 502=A.I.R. 1941 Pat. 461.

See GOVERNMENT OF INDIA ACT, S. 179 (5) AND. C. P. CODE, S. 80. 1943 A.L.J. 1.

S. 82—Applicability—Award by Calcutta Improvement Tribunal—Land Acquisition Act, S. 26 (2).

S. 82, C.P. Code, has no application to an award made by the Calcutta Improvement Trust Tribunal on a reference made to it by the Land Acquisition Collector. Even assuming that the award is a decree, it is certainly not a decree made in a suit against the Crown or a Public Officer.

Per Mukerjea, J.—An award made by the Tribunal is not a decree at all. S. 26 (2) of the Land Acquisition Act which was introduced by the Amending Act of 1921 cannot be taken as a part of the Calcutta Improvement Act of 1911. (Mukherjea and Sen, JJ.) ASMABOO KURBAN HOSSAIN v. PROVINCE OF BENGAL. 203 I.C. 429—46 C.W.N. 927—A.I.R. 1942 Cal. 569—I.L.R. (1942) 2 Cal. 528—15 R.C. 427.

S. 83 and Defence of India Rules (1939)

R. 2—Applicability and scope—Alien enemy—
Singapore—If foreign state at war with Great
Britain owing to military occupation by Japan—
Firm in Singapore carrying on business up to 1941
—Pariners resident in British India and being
British Indian subjects—Right of suit.

The over-running of an allied country by an enemy does not by itself render a person resident in such country or a compay incorporated in such country and carrying on business there an alien enemy. There must be a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland. Residence in any other foreign country, such as Singapore which is over-run by Japan and temporarily occu-

C. P. CODE (1908), S. 86.

pied by Japan at war with His Majesty, or the mere carrying on of business in such country is not enough to render the person or the company an alien enemy disentitled to sue in British Indian Courts, by reason of the bar under S 83, C. P. Code, or the Defence of India Act, 1938 and the rules thereunder. Explanation to S. 83, C. P. Code, can have no application to such Government as may prevail temporarily at Singapore owing to its military occupation by Japan, an enemy country, a Government to which no recognition has been or could be given or accorded by Great Britain. Nor would the mere fact that Singapore has been over-run by an enemy and is in the military occupation of that enemy for the time being render the territory "enemy territory" within the meaning of R. 2 of the Defence of India Rules. Hence British Indian subjects who are the proprietors and partners of a firm and who reside in British India, the firm being in Singapore and carrying on business there till 1941, are therefore not disentitled to sue for the return of money paid to a British Indian subject in respect of a contract made in British India which has become void and frustrated by reason of the outbreak of hostilities between His Majesty and Japan, and for which the consideration to move from the other party has entirely failed for reasons beyond the control of both the parties to the contract. (Chandrasekhara Aiyar, J.) Manasseh Film Co. v. GEMINI PICTURES CIRCUIT MADRAS. I.L.R. (1944) Mad. 124=218 I.C. 235=18 R M. 3=1944 M. W.N. 200=57 L.W. 23=A.I.R. 1944 Mad. 239= (1944) 1 M.L.J. 58.

S. 83—Applicability—Foreign country at war with Great Britain—Meaning of—Country overrun by enemy, if country at war falling under S. 83. See COMPANY—TRANSFER OF SHARES. (1943) 2 M.L. J. 201.

S. 83—German lady interned—If an 'alien enemy'—Right of such person to defend an appeal against decree for maintenance obtained by her against her husband.

Where after a suit for maintenance by a German lady against her British Indian subject husband had been decreed and an appeal filed by the husband is pending a question is raised that the plaintiff was an 'alien enemy' and could not sue in British Courts.

Held, that the mere fact that the lady was interned did not make her an 'alien enemy' and even if she was an 'alien enemy' she was entitled to defend any proceedings instituted against her. (Baipai and Verma, JJ.) PREM PRATAP SINGH v. JAGAT PRATAP KUNWAR. I.L.R. (1944) All. 118=214 I.C. 222=17 R.A. 51=1944 A.L.W. 146=1944 A.W.R. (H.C.) 70=1944 O.A. (H.C.) 70=1944 O.W.N. 41 (H.C.)=1944 A.L.J. 77=A.I.R. 1944 All. 97.

——S. 86—Applicability—Proceeding taken under U. P. Encumbered Estates Act.

Proceeding under U. P. Encumbered Estates Act by debtors against the Patiala State Bank owned by the Maharaja of Patiala cannot be regarded to be in the nature of suits for purposes of S. 86, C. P. Code, so as to necessitate the consent of the Crown Representative. (Monroe and Abdur Rahman, J.). DARBAR PATIALA 2. NARAIN DAS GULAB SINGH. A.I.R. 1944 Lah. 302

C. P. CODE (1908), S. 86 (2).

S. 86, C. P. Code, nowhere provides that the consent under the section is to be given to a particular plaintiff; what it provides is that consent is to be given to a "specified suit". It is not necessary under the section that the names of the persons who are to file the suit should be set out in the certificate of sanction. (Stone C. J. and Kania, J.) STATE OF GONDAL v. GOVIND-RAM SEKSARIA. 46 Bom. L.R. 822 = A.I.R. 1945 Bom. 187.

——S. 86 (2)—Certificate of Crown Representative— When binding on Court—Power of party to dispute validity.

S. 86 (2), requires the fulfilment of one or other of the three conditions to the satisfaction of the Crown Representative for granting consent. That is not a matter to be established in Court. If the Crown Representative is satisfied about the existence of one or other of the conditions and grants a certificate on that footing, it cannot be disputed in Court that the condition did not exist. Unless it appears on the face of the certificate that the Crown Representative did not appear to be satisfied about the existence of one of the conditions the certificate would be binding on the Court. (Stone, C. J. and Kania, J.) STATE OF GONDAL v. GOVIND-RAM SEKSARIA. 46 Bom.LR. 822=A.I.R. 1945 Bom. 187.

S. 88—Interpleader suit—Matter in dispute—Valuation. RAFIQ AHMED v. BABU RAM. [see Q. D. 1936—'40 Vol. I, Col. 3283.] 191 I.O. 531=13 R.A. 233.

S. 88 and O. 40, R. 1.—Termination of interpleader suit—Continuance of Receiver appointed pendente lite or appointment of fresh Receiver—Desirability.

As possession would normally follow upon the determination of title under S. 88, C. P. Code, when the property concerned is in the possession of Court, a receiver appointed pendente lite is not to be continued after the disposal of the suit and the successful party is not to be delayed till the decision of an appeal in the case. Nor should a fresh receiver be appointed in such a case. (Thomas C. J. and Misra, J.) PRATAP BIKRAM SHAH v. DILLIPAT SHAH. 1944 A.W.R. (C.C.) 68=1944 O.A. (C.C.) 68.

S. 91 and O. 1, B. 8—Applicability and relative scope—Village pathway—Obstruction—Right of action—Proof of special damage—Necessity—Sanction of Advocate-General—Necessity—S. 91—If overrides O. 1, R. 8. BIBHUTI NARAYAN SINGH v. GURU MAHADEV ASRAM PRASAD SAHI. [see Q.D. 1936—'40 Vol. I, Col. 1187.] 22 Pat.I.T. 46.

# \_\_\_\_S. 92—Applicability—Conditions.

The form of the suit is laid down by law. The Legislature requires that if a suit of the kind mentioned in S. 92, C. P.; Code is to be instituted it must be instituted in a particular way, and it is not open either to the plaintiffs or to the defendants, to contract themselves out of this section. The fact that the defendants themselves did not object to the fact that one of those to whom consent was given would not join as a plaintiff to the suit cannot make the suit maintainable. A condition precedent to the valid institution of the suit is the fulfilment of the conditions of the consent which has been given. (Davis, C. J. and Twaii .) Must

C. P. CODE (1908), S. 92.

CHAND v. HARKISHINDAS. I.L.R. (1941) Sind 20, 194 I.C. 461 = 13 R.S. 277 = A.I.R. 1941 Sind 88,

——S. 92 – Applicability—Suit by trustee against trustees—Allegation of breach of trust and prayer, accounts and inquiries and directions—Sanction Advocate-General—Necessity.

The plaintiff and defendants were to be the trust under a deed of settlement after the death of the settl who by the deed among other things, created a trust. public purposes of a charitable and religious natu The plaintiff brought a suit against the defendar alleging breach of trust, namely that one of them h appropriated all the rents and profits of the prope, to himself, and praying, among other things, that t settlement deed may be construed, that the trust m be administered by and under the directions of t Court, that accounts may be taken, that defendant No. may be ordered to pay to the plaintiff, or the tri estate, the amount found due and payable to him on t taking of such accounts and that the property may sold, and that the plaintiff may be paid a claimi respect of a debt which he alleged was due to him fro the trust estate.

Held, that the plaintift having alleged a breach trust created for public purposes of a charitable ar religious nature, the suit tell clearly within the expre words of S. 92, C. P. Code, though the plaintiff broughthe suit really for the purpose of enforcing payment the amount alleged to be due to him from the truestate. The suit was not merely a suit by a beneficial for the purpose of enforcing a private right of his own but was one which fell under S. 92, C. P. Code, an hence was not maintainable without the consent of the Advocate-General. (Blackwell, J.) GAJANAN LAMAN v. BHALCHANDRA KESHAV. I.L.R. 1942 Bon 293 = 200 I.C. 371 = 14 R.B. 402 = 44 Bom. L.R. 88. A.I.R. 1942 Bom. 125 (2).

- S. 92-Applicability-Suit to dismiss Pula for misconduct.

A suit to dismiss a Pujari for misconduct is not or coming within the provisions of S. 92. He is not trustee in any sense of the term. He is only responsib for the services in the temple. (Davies.) SINGARI 1 KISHEN LAL.. 1940 A.M.L.J. 66.

No consent under S. 92, C. P. Code, is necessary i order that a trustee may recover trust property in th hands of a stranger to the trust. (Sir George Rankin. O. RM. O. M. SP. FIRM. v. P. L. N. K. M. NAGAPP. CHETTIAR. 67 I.A. 448 = I.L. R. (1941) Mad. 175=I.L. R. (1941) Kat. (P.C.) 1=7 B.R. 466=13 R.P. (139=45 C.W.N. 1385=53 L.W. 522=73 C.L.J. 166=1941 A.L.W. 28=43 Bom. L.R. 440=1941 P.W.N. 299=1941 M.W.N. 571=1941 Comp. C. 231=19 I.C. 1=1941 O.L.R. 108=A.I.R. 1941 P.C. 1= (1941) 1 M.L.J. 393 (P.C.).

S. 92—Applicability—Test—General trustees of temple—Suit by for accounts and recovery of fund con tributed by devotees in the hands of trustee of such fun—Sanction—Necessity.

been given. (Davis, C.J. and Tyabis, J.) MUL. have regard to the capacity of the plaintiffs and the

C. P. CODE (1908), S 92.

purpose of the suit. A suit by the general trustees of a temple against the trustee of a fund contributed by devotees for being made over to the former temple praying for a decree directing accounts and inquiries and for the recovery of the amounts to be ascertained on, such accounts being taken, does not fall within S. 92, C. P. Code, and does not require the sanction of the Advocate General as a condition precedent to its institution. S. 92 does not apply to such a suit as the collection of the fund or the duties of the defendant. (Leach, C. J., Wadsworth, Latshmuna Rav, Patanials Sastri and Happell, J.) TIRUMALAI TIRUPATI DEVASTHANAMS COMMITTEE v. KRISHNAYYA SHAN-BHAGA. I.L.R. (1943) Mad. 619=208 I.C. 47=16 B.M. 155 = 1943 M.W.N. 293 = 56 L.W. 260 = A.I.R.1943 Mad. 466=(1943) 1 M.L.J. 388 (F.B.).

## --- S. 92-Appointment of committee-Directions-Proper procedure.

When deciding a case under S. 92, C. P. Code, if it is decided to appoint a committee, it is best to state so clearly in the judgment and to add that the personnel of the Committee will be decided later on an application by the parties. The personnel can then be determined. (Davies.) KUBRA BEGAM v. MUSTAFA BEGAM. 1940 A.M.L J. 112.

# -S. 92-Appointment of mutawalli by District Judge-Validity.

Where there is an absolute vacancy in the office of mutawalli and a person has been nominated by the deceased mutawallt the District Judge can appoint him as such without any suit under S. 92, C. P. Code. (Madeley, J.) ALLAH RAKHOO v. NASIR-UD-DIN. 207 I.C. 143=16 R.O. 21=1943 A.W.B. (C.C.) 39= 1943 O.A. (C.C.) 96 = 1943 O.W.N. 154 = A.I.R1943 Oudh 278.

# -S. 92-Bona fides of would be tlaintiffs-Desirahility of Advocate-General going into.

In cases of sanction for suits under S. 92, C. P. Code, it would be useful if the Advocate-General would go into the question not only of the condition of the trust but also into the question of the bona fides of the wouldbe plaintiffs and their capacity to represent the public on whose behalf they are purporting to sue. (Allsop and Malik, J.). JUGAL KISHORE v. SHIAM LAL. 217 I.C. 329(1) = 17 R.A. 140 = 1944 O.A. (H.C.) 164 =1944 A.L.W. 374=1944 A.L.J. 303=1944 A.W.R (H.C.) 164 = A.I.R. 1944 All. 231.

# -S. 92—Cost—Suit by trustee against co-trustee -Suit not complying with terms of S. 92 and failing -Liability for costs-Right to costs out of trust estate.

A trustee must be deemed to know the provisions of S. 92, C. P. Code. If a trustee brings a suit which he is not entitled to bring according to S. 92, without complying with its terms, he must bear the consequences for the failure of such a suit. The mere fact that he has brought a suit against a co trustee cannot be allowed to outweigh the ordinary rule that a man who brings a suit in a form not permitted to him, which suit must therefore necessarily fail, must bear the consequence. The plaintiff must be held liable for costs and cannot be permitted to have the costs out of the trust estate. (Blackwell, J.) GAJANAN LAXMAN v. BHALCHAN-DRA KESHAV. I.L.R. (1942) Bom. 298 = 200 I.C., he finds the allegation to be true can only declare that

C. P. CODE (1908), S. 92.

871=14 R.B. 402=44 Rom.L.R. 88=A.I.R. 1942 Bom. 125 (2).

-S. 92 -Court-iee payable in suit under.

The court-fee payable in a suit under S. 92, C. P. Code, is the court-tee payable according to Art. 17 (vi) of the Court-tees Act. (Bennett and Madeley, J.).
Mustafa Hussain v. Mst. Husain Bandi Bibi. 18 Luck. 738 = 1942 A.W.R. (C.C.) 363 = 204 I.C. 314 = plaintiffs are not seeking to control the manner of 15 R.O. 316=1942 O.A. 636=1942 C.W.N. 797=A. I.R. 1943 Oudh 186.

> -S. 92-Court framing schem: - Fower to vary -Scope.

In a suit under S. 92, C. P. Code, the Court which frames the scheme has power to vary it and where a Court reserves to itself the right to confirm elections held under the scheme framed by it, and an application for confirmation of such election is made the order which the Court thereupon makes is a decree in the suit itself and is therefore appealable. (Roberts, C.J. and Dunkley, J.) UKYAW ZAN v. U. SEIN WIN. ALR. 1942 Rang. 75.

#### -S. 92-Interest-What would constitute.

The nature of the 'qualifying' interest may vary widely with the character of the trust itself. If the trust itself is clear, precise and narrow, it may well be that an 'interest' would, in order to quality a plaintiff, to be precise and clear cut too. In other trusts of a more vague and general kind, the qualifying interest might itself be less definite. The interest required is something more than a mere abstract sentimental interest. Whether and to what extent, the interest must be 'actual' is, perhaps, a matter of doubt and may vary in individual cases. Even an abstract interest is in a sense an 'actual' interest. It is genuine interest, even though in the abstract, if it proceeds from a real concern for one's own faith. Where certain plaintiffs in a suit under S. 92 C. P. Code, in respect of a trust for the benefit of Hindus, in various directions, did not even trouble themselves to come into Court and say whether they had any concern at all in the suit they sponsored or what their interest was nor even whether they had one, the qualification required by S. 92 was not satisfied. (Hamilton and Yorke, J.) GAYA NANAND v. JAGDISH CHANDRA BAGCHI. 204 I.O. 153=15 R. A. 317=1942 A.L.W. 418=1942 A.L.J. 334=1942 A.W.R. (H.C.) 274=A.I.R. 1942 All, 315.

-S. 92-Jurisdiction of District Court-If excluded by jurisdiction being conferred on Subordinate Court or limited by S. 15, See C. P. CODE, SS. 15, 37 AND 92 46 Bom.L.B. 653.

-S. 92—Jurisdiction—Suit relating to trust— Compromise decree-Subsequent suit for declaration that compromise petition and decree are fraudilently obtained—Transfer for trial to Munsif—Jurisdiction of Munsif to make new decree under S. 92—Procedure.

Where a compromise decree is made in a suit under S. 92, C.P.Code, and a subsequent suit before the District Judge for a declaration that the terms of the decree and of the compromise petition in the former suit on which the decree was based did not represent the true agreement between the parties and are vitiated by fraud, is transferred for trial to a Munsif, the latter, if

C. P. CODE (1908), S 92.

purpose of the suit. A suit by the general trustees of a temple against the trustee of a fund contributed by devotees for being made over to the former temple praying for a decree directing accounts and inquiries and for the recovery of the amounts to be ascertained on, such accounts being taken, does not fall within S. 92, C. P. Code, and does not require the sanction of the Advocate-General as a condition precedent to its institution. S. 92 does not apply to such a suit as the plaintiffs are not seeking to control the manner of collection of the fund or the duties of the defendant. (Leach, C. J., Wadsworth, Latshmina Ras, Patantoli Sastri and Happell, J./.) TIRUMALAI TIRUPATI DEVASTHANAMS COMMITTEE v. KRISHNAYYA SHAN-BHAGA. I.L.R. 1943 Mad. 619=208 I.C. 47=16 R M. 155 = 1943 M.W.N. 293 = 56 L.W. 260 = A.I.R.1943 Mad. 466=(1943) 1 M.L.J. 388 (F.B.).

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Where there is an absolute vacancy in the office of mutawalli and a person has been nominated by the deceased mutawalli the District Judge can appoint him as such without any suit under S. 92, C. P. Code. (Madeley, J.) ALLAH RAKHOO z. NASIR-UD-DIN. 207 I.C. 143=16 R.O. 21=1943 A.W.R. (C.C.) 39= 1943 O.A. (C.C.) 96 = 1943 O.W.N. 154 = A.I.R1943 Oudh 278.

-S. 92 -- Bona fides of would be tlaintiffs -- Desira. bility of Advocate-General going into.

In cases of sanction for suits under S. 92, C. P. Code, it would be useful if the Advocate-General would go into the question not only of the condition of the trust but also into the question of the bona fides of the wouldbe plaintiffs and their capacity to represent the public on whose behalf they are purporting to sue. (Allsop and Malik, /J.) JUGAL KISHORE v. SHIAM LAL. 217 I.C. 329 (1) =17 R.A. 140 = 1944 O.A. (H.C.) 164= 1944 A.L.W. 374=1944 A.L.J. 303=1944 A.W.R (H.C.) 164=A.I.R. 1944 All. 231.

S. 92—Cost—Suit by truster against co-trustee—Suit not complying with terms of S. 92 and failing -Liability for costs-Right to costs out of trust estate.

A trustee must be deemed to know the provisions of S. 92, C. P. Code. If a trustee brings a suit which he is not entitled to bring according to S. 92, without complying with its terms, he must bear the consequences for the failure of such a suit. The mere fact that he has brought a suit against a co trustee cannot be allowed to outweigh the ordinary rule that a man who brings a suit in a form not permitted to him, which suit must therefore necessarily fail, must bear the consequence. The plaintiff must be held liable for costs and cannot be permitted to have the costs out of the trust estate.

(Blackwell. J.). GAJANAN LAXMAN v. BHALCHAN-DRA KESHAV. I.L.R. (1942) Bom. 298 = 200 I.C. C. P. CODE (1908), S. 92.

371=14 R.B. 403=44 Bom.L.R. 88=A.I.R. 1942 Bom. 125 (2).

S. 92 - Court-fee payable in suit under. The court-fee payable in a suit under S. 92, C. P. Code, is the court-ice payable according to Art. 17 (vi) of the Coart-lees Act. (Bennett and Madeley, J.).
Mustafa Hussain v. Mst. Husain Bandi Bibl. 18 Luck. 738-1942 A.W.R. (C.C.) 363=204 I.C. 314= 15 R.O. 316 = 1942 O.A. 636 = 1942 C.W.N. 797=A. IR. 1943 Oudh 186.

-S. 92-Court framing scheme-Power to vary -Scope.

In a suit under S. 92, C. P. Code, the Court which frames the scheme has power to vary it and where a Court reserves to itself the right to confirm elections held under the scheme framed by it, and an application for confirmation of such election is made the order which the Court thereupon makes is a decree in the suit itself and is therefore appealable, (Roberts, C.J. and Dunkley, J.) UKYAW ZAN v. U. SEIN WIN. AI.R. 1942 Rang. 75.

-S. 92-Interest-What would constitute.

The nature of the 'qualifying' interest may vary widely with the character of the trust itself. If the trust itself is clear, precise and narrow, it may well be that an 'interest' would, in order to quality a plaintiff. to be precise and clear cut too. In other trusts of a more vague and general kind, the qualifying interest might itself be less definite. The interest required is something more than a mere abstract sentimental interest. Whether and to what extent, the interest must be 'actual' is, perhaps, a matter of doubt and may vary in individual cases. Even an abstract interest is in a sense an 'actual' interest. It is genuine interest, even though in the abstract. If it proceeds from a real concern for one's own faith. Where certain plaintiffs in a suit under S. 92 C. P. Code, in respect of a trust for the benefit of Hindus, in various directions, did not even trouble themselves to come into Court and say whether they had any concern at all in the suit they sponsored or what their interest was nor even whether they had one, the qualification required by S. 92 was not satisfied. (Hamilton and Yorke, J.) GAYA NANAND v. JAGDISH CHANDRA BAGCHI. 204 I.C. 153=15 R. A. 317=1942 A.L.W. 418=1942 A.L.J. 334=1942 A.W.R. (H.C.) 274=A I.R. 1942 All. 315.

S. 92-Jurisdiction of District Court-If excluded by jurisdiction being conferred on Subordinate Court or limited by S. 15, See C. P. CODE, SS. 15, 37 AND 92 46 Bom.L.R. 653.

-S. 92-Jurisdiction-Suit relating to trust-Compromise decree-Subsequent suit for declaration that compromise petition and decree are fraudulently obtained—Transfer for trial to Munsif—Jurisdiction of Munsif to make new decree under S. 92-Procedure.

Where a compromise decree is made in a suit under S. 92, C.P.Code, and a subsequent suit before the District Judge for a declaration that the terms of the decree and of the compromise petition in the former suit on which the decree was based did not represent the true agreement between the parties and are vitiated by fraud, is transferred for trial to a Munsif, the latter, if he finds the allegation to be true can only declare that

# **C.P.** CODE (1908), S. 92.

the facts are what he finds them to be and that in consequence the decree of the District Judge in the prior suit must be and should stand as vacated. It would then be for the parties to go to the District Judge and to ask him to revive the prior suit and dispose of it according to law giving them the necessary and proper reliefs. The Munsif has no jurisdiction to make a new decree under S. 92, C.P.Co.le, as that is a matter within the exclusive jurisdiction of the District Judge. (Rowland and Manchar Lall, JJ) MAHOMED IDRIS HAIDAR v. HABIBUR RAHMAN. 196 I.C. 554=14 R.P. 204=8 B.R. 33=22 Pat.L.T. 799=A.I.R. 1942 Pat. 79.

S. 92—Limitation—Cause of action—Fresh cause of action in respect of every breach of trust—If accrues.

In the case of a public trust, every fresh breach of trust affords a fresh cause of action, and a fresh cause of action arises every time the direction of the Court is deemed necessary. (Lobo, J.) DAYAL SING CHARAN SING v. TULSIDAS. I.L.R. (1945) Kar. 224

S. 92—Parties—Transferee of trust property—If can be impleaded—Declaration granted against him—Decree, if liable to be reversed.

In a suit under S. 92, C.P.Code, transferee of the alleged trust property who denies the existence of the trust can be impleaded, and a declaration that the property is trust property can be granted against him. S. 92, C.P.Code, gives the Advocate-General a cause of action which he would not otherwise have and prevants others from instituting suits without his sanction in order to obtain certain definite reliefs in a representative capacity. It contains no provisions for the joinder of parties or causes of action and can create no exception to the general rules on that subject which are to be found in O, 1 and 2 of Sch. I. Even if the impleading of the transferee in a suit under S. 92, C.P. Code, is irregular, a decree passed by a competent Code, after a fair contest is not to be set aside merely because there has been an irregularity of procedure. (Allsop and Hamilton, JJ.) RATAN SEN v. SURAJ BHAN. I.L.R. (1944) All. 20=16 R.A. 211=211 I.C. 157=1944 A.L.W. 579=1944 A.L.J. 535= 1944 A.W.R. (H.C.) 269=1943 O.A. (H.C.) 269 =A.I.R. 1944 All. 1.

Quaers.—Whether in a representative suit affecting a public trust under S. 92, C.P.Code, a compromise can be entered into without leave of Court. (Rowland and Manohar Lall, JJ.) MAHOMED IDRIS HAIDRI v. MAHOMED HABIBUR RAHMAN. 196 I.C. 554—14 R.P. 204—8 B.R. 38—22 Pat. L.T. 799—A.I.R. 1942 Pat. 79.

—S. 92—Public charitable or religious trust—What constitutes—Temple—Public user for long time without objection—If proves public character—Property acquired by sadhu for temple descending from chela and chela—Presumption as to dedication to religious uses.

In order to constitute an express or constructive trust for a public purpose of a charitable or the author or authors of the trust must be ascertained and the intention to create a trust must be indicated by words or acts with reasonable certainty, and further, the purpose of the trust, the trust property and the beneficiaries must be indicated so as to enable the Court administer the trust if required. Public near of a trust

C.P. CODE (1908), S. 92.

for a long period without objection is not conclusive of the temple being a public temple, though it is strong evidence. There is no doubt a presumption that where property has been acquired by a sadhu and has descended from chela to chela it has been dedicated to religious uses. But such presumption is limited to cases where the religious persons concerned are grihasthas and not celibates, so that there may be a conflict between the cheala and the natural heirs of the guru. A Sanyasi's neir is always his chela. Waen in the case of sadhus belonging to a celibate order, there has never been any question of any property held by them, whether trust property or secular property, going by succession to any one but their chelas, the fact that all the properties have been held by chelas does not give rise to any presumption that the properties have been dedicated to religious uses. (Broomnetd and Sen, JJ.) AMARDAS MANGALDAS v. HARMANBHAI JETHABHAI. C. 275=15 R.B. 297=44 Bom.L.R. 643=A.I.R. 1942 Bom, 291.

——S. 92—Removal of shebait from office-Grounds.

A shebait who is given to speculation and ganja smoking is liable to be removed from office. A distinction has to be drawn between the conduct of a private individual and of a shebait who has to perform the worship and to manage the property on behalf of the deity. A higher standared of morality and rectitude is expected of a person who has to perform spiritual functions and has to look after the interest of the idol, Where secular and religious functions are intermingled and interdependent a Court in a proper case will have the power to remove the head of the public religious charitable trust from the performance of both the functions. If it be found by the Court that the functionary, in the exercise of his duties, has put himself in a position in which the Court thinks that the obligations of his office in connection with an endowment can no longer be faithfully discharged without danger to the endowment that is a sufficient ground for his removal, if need be, from both his offices. (Grille, C.J. and Sen, J.) RADHAVALIABH v. MADAN LAL. I.L.R. (1944) Nag. 788=1944 N.L.J. 502=A.I.R. 1945 Nag. 64

\_\_\_\_\_S. 92—Removal of trustee—Ground for— Denial of trust in suit.

Mere assertion in a suit under S. 92, C.P.Code, by a trustee that trust properties are private properties is not by itself a sufficient ground for his removal. If he committed any breach of trust before the suit, his conduct in the course of the suit is an important element to be taken into consideration in deciding whether the breach should be condoned and he should be allowed to retain the office. (Nasim Ali and B. N. Rau, JJ.) LOKE NATH MUKHERJEE v. ABANI NATH. 1941.C. 874 14 R.C. 19=72 C.L.J. 362=A.I.R. 1941 Cal. 68.

S. 92—Removal of trustee—Grounds— Proof of breach of trust or mismanagement—If essential—Trustee putting forward baseless claim to exclusive management—If ground for removal.

Proof of breach of trust or mismanagement is not essential for the removai of a trustee from management. The Court has a wide discretion under S. 92, C.P. Code to take such action as it thinks necessary or desirable for the good of the charity, The fact that a trustee puts forth an unwarranted claim to the right of exclusive management does not necessarily call for the penalty of exclusion from management. (Broomfield and Mackin BAPUGOUDA YADGOUDA V. VINAYAK SADA.

SHIV. I.L.R. (1941) Bom. 556=14 R.B. 169=196 I.C. 826=43 Bom.L.R. 706=A.I.R. 1941 Bom. 317.

——S. 92—Removal of trustee—Grounds— Trustee denying validity of trust and setting up claim adverse to trust—Sufficiency.

Where the interest of the trustee, on his own allegations, are adverse to the trust and he denies the validity of the trust, that is a good and valid ground for removing the trustee from his office. (Davis, C.J. and Tyabii, J.) HASHIM HAROON v. GHOWNSALI SHAH LL R. (1942) K1r. 179=205 I.C. 449=15 R.S. 148=A.I.R. 1942 Sind. 137.

S. 92—Removal of trustee—Grounds— Trustee setting up adverse title—If fit to be trustee.

It is a serious delinquency on the part of the person for the time being administering the trust to set up a case that it was his private property; and generally in such cases, Court should not continue such a person in the post of chief trustee. (Davis.) KUBRA BEGAM v. MUSTAFA BEGAM. 1940 A M.L.J. 112.

——S. 92—Right to sue—Property endowed to temple—Descendants of founder not believing in Hindu Gods—If persons interested.

In a suit under S. 92, C. P. Code, the plaintiffs were zamindars in the village in which the property which was endowed to a temple and dharmashila lay, and they were the son and that grandson of the man who endowed that property.

Held, that the plaintiffs had sufficient interest in the endowed property entitling them to sue under the section, even if they did not believe in the Hindu Gods and that there was no reason why they should not be interested in the upkeep of the dhiramshala. They would have a direct interest in seeing that the property which would have ultimately descended to them should be used for the purpose for which it was endowed. As zamindars they might be interested in the upkeep of a temple in their village for the benefit of their tenants even if they were not in the habit of making use of it themselves. (Allsop and Hamilton, JJ.) RATAN SEN v. SURAJ BHAN. I.L.R. (1944) All. 20=1943 A.L. U. 579=1943 A.L. J. 535=1943 A.W.R. (H.C.) 269=1943 O.A. (H.C.) 269=16 R.A. 211=211 I.C. 157=A.I.R. 1944 All. 1.

——S. 92—Right to sue—Sanction given to certain individuals—Suit instituted by some of them only—Validity.

S. 92 C. P. Code cannot be construed loosely that where consent has been given to two or more persons, only some of those persons, even if they are more than two may institute the suit. A condition precedent to the valid institution of the suit is the fulfilment of the conditions of the consent which has been given. (Davies, C.J. and Tyabii, J.) MULCHAND v. HARKISHINDAS. I.L. R. (1941) Sind. 204=194 I.C. 461=13 R.S. 277=A.I.R. 1941 Sind. 38.

—S. 92—Right to sue—Sanction obtained by several persons—One of them dying before suit—Suit by rest if regular. Sheo Ram v. Ram Chand. [see Q.D. 1936-'40 Vol. I. Col. 3283]. 192 I.C. 429—13 R.L. 378.

C.P. CODE (1908), S. 92.

——S 92—Right to suc—Sanction to institute suit— Some only of persons authorised by Advocate-General— If can suc.

The basis of the rule that all those authorised by the Advocate General to institute a suit must join as plaintiffs is that some alone cannot take it upon themselves to represent the public when all have been authorised to do so. Hence a suit under S. 92, C. P. Code authorised by the Advocate General cannot be filed by three out of four persons. (Allsop and Verma, JJ. Sibte-RASUL V. Sibte NABI. I.L.R. 1943 All. 112=205 I.C. 48=15 R A. 360=1943 A.W.R. (H C.) 197=1943 O.A. (H.C.) 197=1943 A.L.W. 58=1942 A.L.J. 722=A.I.R. 1943 All. 74.

——S. 92—Right to sue—"Two persons"—Father and son constituting members of joint Hindu family—If one person.

The two persons referred to in S. 92, C. P. Code, are two individuals and the fact that the two persons are father and son and members of a joint Hindu family will not convert them into one person for the purposes of that section. (Allsop and Hamilton, JJ.) RATAN SEN v. SURAJ BHAN, I L.R. (1944) All. 20=1943 A.L.W. 579=1943 A.L.J. 535=1943 A.W.R. (H.C.) 269=1943 O.A. (H.C.) 269=16 R.A. 211=211 I.C. 157=A.I.R. 1944 All, 1.

-S. 92-Sanction-Presumption as to.

When a Legal Remembrancer sanctions the institution of a suit under S. 92, C. P. Code the presumption is that he has acted properly and in accordance with law. (Allsop and Verma, IJ.) SIBTE RASUL v. SIBTE NABI. I.L.R (1943) All. 112=205 I.C. 48=15 R.A. 360=1943 A.L.W. 58=1943 A.W.R. (H.C.) 197=1943 O.A.(H.C.) 197=1942 A.L. J. 722=A.I.R. 1943 All. 74.

S. 92—Sanction under—Form of—Application for sanction by several persons—Order granting sanction not setting out name of all applicants—Validity.

The permission or sanction required by S. 92. C. P. Code, must be given to two or more named persons and it is not sufficient for the Advocate-General or the Collector to nominate one person and give him a blank cheque to join any other person or persons whom he chooses as co-plaintiffs. If, however, certain persons apply for sanction for instituting a suit and the application is granted, the omission to set out the names of all the applicants in the order granting sanction does not render it invalid. A suit instituted on such sanction is not incompetent. (Broomfield and Sen, JJ.) Amardam Mangaldam v. Harman-BHAI JETHABHAI. 204 I.C. 275=15 R.B. 297=44 Bom. L.R. 643=A.I.R. 1942 Bom. 291.

— S. 92—Scheme decree—Charitable trust—Clause in scheme empowering District Judge to remove trustee of his own motion or on application—Power of District Judge to make executable order for costs—If Court or persona designata. See C. P. Code, S. 36. 44 Bom. L.R. 11.

- S. 92-Scheme decree—Relief for removal of old trustees—Execution or separate suit.

The relief for the removal of a previous trustee given in a suit under S. 92, C. P. Code, can

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be given effect to 'independent of the constitution framed and embodied in the decree.' In other words this relief is not part of the scheme at all. It is not only directory but executable and relegating the party to a separate suit for such a relief would offend against the principle forbidding multiplicity of suits where one is sufficient. (Bennett and Madeley, JJ.) Sailendra Nath Sanyal v. Ship Dass Gangoli. 20 Luck. 32=219 I.C. 39=18 R.O. 35=1944 O.W.N. 213=1944 A.W.R. (C.C.) 147=1944 O.A. (C.C.) 147=A.I.R 1944 Oudh 289.

S. 92—Scheme decree—Reservation of liberty to apply for alteration or modification of scheme—If ultra vires.

Where under a scheme decree framed under S. 92, C. P. Code, liberty is given to apply to the Court for alteration or modification of the scheme, such reservation is ultra vires as it offends against S. 92. (Mockett and Bell, J.) MUHAMMAD HANEEF SAHIB v. BOARD OF TRUSTEES JAMMA MASJID. 1944 M.W.N. 269=57 L.W. 290=A.I.R. 1944 Mad. 421=(1944) 1 M.L.J. 377.

—Ss. 92 and 151—Scheme—If can be modified by application under S. 151. FAIYAZ ALI KHAN v. SAIFULLAH. [see Q. D. 1936—'40 Vol. I, Col. 1201.] 15 Luck. 730=1940 A.I.R. Oudh 421.

S. 92—Scheme—Provision for its modification by application in suit—Power of Court.

It is not beyond the power of the Court which frames a scheme in a suit under S. 92, C. P. Code, to provide for the modification of the scheme by an application in the very suit itself in which the scheme is framed. (Mitter and Khundkar, JJ.) SRIJIB NYAYATIRTHA v. DANDY SWAMI JAGANNATH ASRAM. 199 I.C. 841=14 R.C. 648=73 C.L.J. 532=A.I.R. 1941 Cal. 618.

Where, in a scheme decree under S. 92, C. P. Code, liberty is given to persons to apply to the Court for directions merely to carry out the scheme already settled, such reservation of liberty in the decree would be intra vires, if the assistance of the Court can be given without offending S. 92, C. P. Code, but where liberty is given to apply to the Court for alteration or modification of the scheme, such reservation is ultra vires as it offends S. 92. The true test as to the legal propriety of such a clause in a scheme is, whether the relief granted by the Court is such that if it was being sought before the scheme was sanctioned, it would have to be sought by suit under S. 92, C. P. Code. Where sweeping alterations and modifications are sought in a scheme embodied in a decree, a separate suit under S. 92, C. P. Code, is necessary and maintainable; an application is not the proper remedy. (Lobo, J.) DAYAL SING CHARAN SINGH v. TULSIDAS. I.L.B. (1945) Kar. 224.

S. 92—Scheme suit—Decree—Executability—Test—Clause vesting trust properties in trustee and empeworing him to realise them

C.P. CODE (1908), S. 92.

through Court if necessary in execution—If part of scheme—Executability.

The provisions of a decree in a scheme suit would be inexecutable if they form a part and parcel of the permanent scheme of administration and are not intended to be given effect to independent of the constitution framed by and embodied in the decree, even if they happen to be directory in their nature. They would be executable even if they happen to stray into the wording of the scheme if they are intended to be immediately executable for the purpose of introducing the scheme or otherwise. The true distinction is not whether a provision in a scheme is directory or declaratory, but whether the provision sought to be executed is or is not in what is really the scheme part of the decree. In a suit under S. 92, C. P. Code, for removal of a trustee and for the settlement of a scheme, a decree was passed under which a scheme was framed by the Court and a new trustee was appointed as a sole trustee for management of the trust. He was to manage the trust as per terms of the scheme and it was provided that the trust property was to be realised and administered by the trustee, and that 'all the trust properties either cash or movables shall vest in the trustee for the time being and he shall take possession of the same through Court if necessary in execution of this decree and manage the same on behalf of the public."

Held, that the decree was not executable and that the realisation of the trust properties was an essential part of the scheme and cannot be held to be executable as a money-decree. (Abdur Rahman, J.) ATCHUTARAMA RAO v. BAPANAYYA, 206 I.C. 466=15 R.M. 985=1943) 1 M.L.J. 504=55 L.W. 627=A.I.R. 1942 Mad. 748.

Ss. 92 and 115—Scheme under S. 92—Absence of any provision as to removal of trustee—Removal of existing trustee on application—Jurisdictian—Proper procedure—Interference in revision.

Where in a scheme framed in a suit under S. 92 C. P. Code. no express provision is made for the removal of a trustee for a breach of trust or for any other cause and no liberty is reserved by the Court in the scheme itself either for the removal of a trustee or the modification of the scheme suo motu or upon the application by any other person interested, the Court has no jurisdiction to remove an existing trustee on a mere application without having recourse to S. 92, C. P. Code, and such an order cannot be sustained in revision. (Ghulam Hasan and Agarwal, JI.) SAADAT HUSAIN v. MOJIZ HUSAIN. 17 Luck. 391=197 I.C. 743=14 R.O. 346=1941 O.W.N. 1269=1941 A.W.R. (C.C.) 375=1941 O.A. 963=A.I. R. 1942 Oudh 135.

S. 92—Scheme under—Variation or overriding of—Competency.

When once a scheme is shown to be a legal and valid one under S. 92 of the C. P. Code, it would not be open to any Court in effect to set it aside or vary it or otherwise seek to override it. (Braund and Waliullah, J.) SURAJ GIR 2. BRAMH NARAIN. 1945 A.W.B. (H. C.) 270-1945 A.L.W. 319-1945 O.W.N. (H. C.) 273.

-S. 92-Scope-Declaratory suits.

Mere declarations are outside the scope of S. 92 C. P. Code. But where reliefs contemplated by the section are claimed and such reliefs cannot be granted without the determination of the question whether a public trust exists or whether a particular property appertains to a public trust the Court in a suit under S. 92 can determine the question whether a public trust exists or a particular property appertains to such public trust. A suit for a mere declaration that a trustee has not been validly appointed may be outside the scope of S. 92. But in a suit under that section the Court has to determine whether a trustee has been validly appointed or not if determination of such a question is necessary for giving reliefs claimed in the suit which properly come under that section. (Nasim Al. and B. N. Rau, JJ.) Loke Nath Mukherjee v. Abani Nath. 194 I.C. 874=14 R.C. 19=72 C.L.J. 362=A.I.R. 1941 Cal. 68. Abani

—S. 92—Scope of suit—Question as to validity of trust.

Questions regarding the validity of a trust or a wakf are beyond the scope of a suit under S. 92, C. P. Code and should not be decided in such a suit (Davis, C. J. and Tyabji. J.) HASHIM HARON v. GHOUNSALI SHAH. I.L.R. (1942) Kar. 179=205 I.C. 445=15 R.S. 148=A.I.R. 1942 Sind 137.

——S. 92—Scope—Suit against purchaser of wakf property—Position of such purchaser—If that of constructive trustee—English Law, if applicable.

If a purchaser of wakf property had taken upon himself the duties of a trustee and became a trustee de son tort, relief against him under S. 92, C. P. Code, may certainly be claimed. But when he has purchased the property not as wakf property, but as the personal property of the mutwalli with or without notice of the wakf-nama and purports to hold it adversely to the trust, he is in the position of a rank trespasser and not that of a trustee either actual or constructive. He cannot, therefore, be a proper party to a suit for execution and administration of a trust which S. 92, C. P. Code, contemplates, and no relief can be granted against him under this section. The doctrine of constructive trust in English law is absolutely inapplicable to such a case as the mutwalli is a mere manager who has not the legal estate in him as in the case of an English trustee and the transferee from the mutwalli therefore does not get the legal estate. Even if the principles of English law are deemed to be applicable a purchaser of wakf property cannot be held to be a constructive trustee from the mere fact that he had notice that the property he was purchasing was comprised in a wakf-nama. It must be further shown that he was aware of the legal effect and implications of that document and actively participated in the fraud and breach of trust committed by the mutwalli. (Mukherjea and Pal, II.) GORINDA CHANDRA GHOSH V. ABDUL MAJD. I.L.R. (1944) 1 Cal. 329=216 I.C. 143=17 R.C. 116=78 C.L.J. 48=48 C.W.N. 225=A,I.R. 1944 Cal. 163,

C. P. CODE (1908), S. 92.

——S. 92—Scope—Suit on allegations contemplated by and asking for reliefs under section— Raising of other issues not appropriate to suit— Effect on maintainability of suit.

Where a plaint undoubtedly contains the allegations necessary to bring the suit within the ambit of S. 92, C. P. Code, and reliefs prayed for and granted all within it, the fact that the suit raises some issues which have no direct bearing on the issues arising under S. 92, and which are not really appropriate to a suit under S. 92 cannot affect the maintainability of the suit. (Broomfield and Sen, J.) Amardas Mangaldas v. Harmanbhai Jethabhai. 204 I.C. 275=15 R. B. 297=44 Bom.L.R. 643=A.I.R. 1942 Bom. 291.

S. 92—Suit for account—Parties—Basis of relief.

In a suit under S. 92, C. P. Code, for accounts against trustees all of them must be joined and they must be asked to account on one of the two basis (a) for the moneys they have received or (b) for the monies they ought to have received—
It is a case of taking accounts on what is known as the basis of wilful default. The account being finally taken, it would then be a matter for direction as to which of the trustees is liable in the first place, though they all would be liable in any event. The primary liability would be on the trustee who has received the money, and the final liabitity on all together. (Stone, C.J. and Bess, J.) NAGORAO v. GULABRAO. 1941 N.L.J. 587.

——Ss. 92 and 93—Suit instituted after obtaining required sanction—Subsequent addition of new defendant—Fresh sanction, if necessary.

Where after the institution of a suit after obtaining sanction as is necessary under S. 92, C. P.Code, a new defendant is added and certain additional reliefs are prayed for against him, the suit will not be maintainable against that defendant and without a fresh sanction being obtained. (Mukherjea and Pal, JJ.) GOBINDA CHANDRA GHOSH v. ABDUL MAJID. I.L.R. (1944) 1 Cal. 329=216 I.C. 143=17 R.C.116=78 C.L.J. 48=48 C.W.N. 225=A.I.R. 1944 Cal. 163.

——S. 92—Suit under—Active prosecution by all grantees of sanction—If essential.

There is nothing in S. 92, C. P. Code which requires that all the plaintiffs to whom sanction have been given for filing the suit should after filing the suit continue actively to prosecute the suit. (Davis, C.J. and Tyabji, J.) HASHIM HAROON v. GHOUNSALI SHAH. I.L.R. (1942) Kar. 179=205 I.C. 449=15 R.S. 148=A.I.R. 1942 Sind 137.

——S. 92—Suit under—Amendment—Powers of Court—Procedure—Sanction of Advocate-General or Collector—Necessity.

It cannot be held that no amendment of the plaint is ever possible in suits under S. 92, C. P. Code. Amendments may be made with the consent of the Advocate-General or of the Collector. Although the Code does not provide for recourse to the Advocate-General or the Collector after the suit has been instituted, it does not follow.

that the Advocate-General or the Collector may not take any further part in the suit. The true position is that it is for the Court to decide in suits under S. 92 whether an amendment is permissible and the consent of the Advocate-General or the Collector as the case may be is really evidence which has to be taken into consideration before deciding whether the amendment should be allowed. There is no reason why amendments which do not substantially change the character of the suit or enlarge the scope of it should not be made by the Court itself without sanction. Amendments which enlarge the scope of the suit, for instance by allowing further reliefs without substantially changing its character, may be made with the sanction of the Advocate-General or the Collector. Amendments substantially changing the character of the suit would not be permissible even with sanction, for in such a case it can hardly be said that the suit in its amended form was ever validly instituted. (Broomfield and Mackim, JJ.) BAPUGOUDA YADGOUDA V. VINAYAK SADASHIV. I.L.R. (1941) Bom. 556=14 R.B. 169-196 I.C. 826-43 Bom L.R. 706=A.I.R. 1941 Bom. 317.

S. 92-Suit under-Appointment of Committee-Counsel of parties-Ij can be appointed for client as members in the Committee.

Where it is decided to appoint a committee, it is most inadvisable that parties' counsel should be appointed as members. It is not right to ask counsel to act on behalf of their clients as committee members in a trust for which they appeared on opposite sides in a court of law. (Davies.) Kubra Begam v. Mustafa Begam. 1940 A.M. L.J. 112.

falling within the scope of.

A suit is properly instituted under S. 92, C. P. Code, when there is an allegation of general mismanagement. Where the dispute really turns out to be between one of the beneficiaries and the trust through its mutwalli, the dispute is not one which properly arose in such a suit. A beneficiary who claims a private right, as distinguished from setting up the rights of the public, can institute a suit to assert that right without the sanction of the Advocate-General. (Allsop and Malik, JJ.) SHAHJAHAN BEGAM v. IBN ALL I.L.R. (1944) All. 561=219 I.C. 349=1944 Q.A. (H.C.) 199=1944 A.L.W. 428=1944 A.W.R. (H.C.) 199=A.I.R. 1945 A. 69.

S. 92—Suit under—Scope of—Settlors asking for the handing over back of trust property—If falls under S 92.

Where the settlors of a trust ask one of the several trustees to hand over trust property to them, the settlors, it is not the sort of case that is contemplated in S. 92, C. P. Code. The section is concerned with vesting of property in trustees, with accounts and enquiries by trustees which requires payment of moneys found due by the trustees by somebody accountable to the trust or accountable in respect of the trust to trustees. (Stone, C. J. and Bose, J.) NAGORAO v. GULABRAO.

C. P. CODE (1908), S. 92.

A charity does not change its nature merely by a change of name. On any view, a change of name is not such a serious breach of trust as to justify the removal of the trustees. (Sir George Ranéin.) BILAS-RAI JOHARMAL v. SHIVNARAIN SARUPCHAND, 71 I.A. 47 = I.L.R. (1944) Kar. (P.C.) 193 = 48 C.W.N. 448 = 1944 A.L. J. 172 = 212 I.C. 433 = 57 L.W. 401 = 16 R.P.C. 206 = 1944 M.W.N. 450 = 10 B R. 566 = 46 Bom. L.R. 518 = 1944 A.W.R. (P.C.) 36 = 1944 O.A. (P.C.) 36 = A.I.R. 1944 P.C. 39 = (1944) 1 M.L.J. 466 (P.C.).

S. 92—Trustee de son tort—Person succeeeding to religious institution as son and chela of his father. SHEO RAM. v. RAM CHAND. [See Q D. 1936-40 Vol. I Col. 3283.] 192 I.C. 429=13 R.L. 378.

It cannot be laid down as a general proposition without qualification that whenever a gift of property is made to an idol, the trust created for the benefit of the idol is necessarily a public trust involving the operation of S. 92, C.P. Code. It is well settled that family idols may be endowed with property without any question of a public trust arising, and the same may be said to be true of some idols which are not family idols. (Broomfield and Sen. JJ.) AMARDAS MANGALDAS v. HARMANBHAI JETHABBHAI. 204 I.C. 275=15 R.B. 297=44 Bom. L.R. 643=A.I.R. 1942 Bom. 291.

S. 92—Trust—Relief in respect of—Forum—Foreign Court—Jurisdiction.

It would be plainly inconvenient if not intolerable that the Courts of a foreign country should interpose their authority upon particular questions arising in the course of administering a trust like a charitable hospital -acting intermittently according as they may be invoked by particular complainants in preference to the courts of the country in which the charity was meant to opeate, and enforcing their orders by removing the trustees and entrusting to others the management of all the charity and its affairs. As a Court of equity acts in personam it may and sometimes does exercise its jurisdiction over trustees and others in respect of foreign land and otherwise in connection with rights to property situated abroad. Where a suit under S. 92, C.P. Code, was brought on the original side of the High Court at Bombay, where part of the trust property was invested, in respect of a public charity in a town in Jaipur statea free hospital for the poor—on the main complaint that the name of the institution was changed, held, that upon settled principles it was a correct exercise of discretion to leave the plaintiffs to their remedy from the Courts of the country in which the hospital was carried on and whose poor were the beneficiaries of the charity. (Sir WHOSE POOF WERE THE DEPRETARIES OF THE CHARTY, (GIF GEOTGE RANKIN.) BILASRAI JOHARMAL v. SHIVNA-RAYAN SARUPCHAND. 71 I.A. 47=I.L.R. (1944) Kar. (P.C.) 193=48 C.W.N. 448=1944 A.L.J. 172=212 I.C. 433=57 L.W. 401=16 R.P.C. 206 =1944 M.W.N. 450=10 B.R. 566=46 Bom. L.R. 518=1944 A.W.R. (PC) 36=1944 O.A. (P.C.) 36=A.I.R. 1944 P.C. 39=(1944) 1 M.L.J. 466 (P.C.) 466 (P.C.).

The phrase "two or more persons"—Meaning of.

Code, means two or more individuals who are named or so described in the consent that they can be identified.

C. P. CODE (1908), S. 92 (1) (h).

(Davis, C.J., and Tyabii, J.) MULCHAND v. HARKI-SHINDAS. ILR. (1941) Sind 204=194 I.C. 461=13 R.S. 277 = A.I.R. 1941 Sind 88.

\_\_\_\_S, 92 (1) (h)—"Further or other relief"— Meaning of.

The words 'further or other relief' in S. 92 (1) (4) C. P. Code, mean relief of the same nature as the reliefs indicated in Cls. (a) to (g). It need not be further relief in the sense of being additional to one or some of the reliefs mentioned in Cls. (a) to (g) also prayed for in the plaint. A prayer for a direction that in the administration of a trust the trustee should apply the income to certain purposes is within Cl. (h) because it is of the same nature as that which is contemplated in Cl (s). (Mitter and Khundkar, 1/1) IIAII MAHOMED NABI v. PROVINCE OF RENGAL. I.L. R. (1942) 1 Cal. 211=46 C.W N. 59=201 I.C. 248=15 R.C. 148=A.I.R. 1942 Cal. 343.

S. 92 (2)—Applicability—Relief covered by Cl. (1) of sub-S (1).

The prohibition contained in S. 92 (2), C. P. Code applies not only to suits brought to obtain the reliefs mentioned in Cls. (a) to (g) of sub-S. (1) but also to those covered by Cl. (h). (Mitter and Khundkar. JI) HAJI MAHOMED NABI v. PROVINCE OF BENGAL IL.R. (1942) 1 Cal 211=201 I.C. 248=15 R.C. 148=46 C.W.N. 59=A I.R. 1942 Cal. 343.

\_\_\_\_\_S. 92 (2)—Retrospective operation.

Per Khunderr, J.—The prohibition contained in S. 92 (2), C.P. Code, applies although the cause of action on which the suit is founded is a right which was in existence prior to its senaturent. (Meter and Khundkar, J.) HAII MAHOMED NABIR, PROVINCE OF BENGAL IL R. (1942)1 Cal 211=201 I.C. 248=15 R.C. 148=46 C.W.N. 59=A I.R. 1942 Cal. 343.

The consent of the Collector should not be in the form of a judgment. Under no circumstances should any formal finding on the merits or expression of opinion of the sanctioning authority be endorsed on the plaint (Davier) CHHITAR MAL v. NAND MAL. 1941 A. M.L.J. 89.

93. 93.—Consent prior to sanction from Local Government.—Legality.

It is illegal for the Collector acting as an Advocate-General to give his consent first and to obtain the sanction of the Local Government afterwards. Such a sanction does not constitute a valid consent on the part of the Collector concerned. (Davies) CHHITAR MAL NAND MAL. 1941 A.M.L J. 89.

S. 95 — Added against or ler under — Proper court-fee See Court-FEES ACT SCH II, ART. 11 AND C.P. CODE, S 95. 1940 A.M L.J. 70.

95—Application under—Maintainability— Depositing money to withdraw attachment—Suit decreed—Subsequent application by defendant for compensation.

A defendant in a suit against whom an order of attachment has been made and who has complied with that order with the result that it automatically terminated and with the result that the money deposited became available to the plaintiff in satisfaction of his decree, cannot apply to the Court for compensation upon the ground that the order of attachment, in respect 1945 N.L.J. 409.

C. F. CODE (1908), S. 96.

of which the Court is functus officio, was obtained upon insufficient grounds, a fortiori when that was not the basis of the only application he has ever made for the vacation of the order of attachment (Yo, ke, 1). Gyan Prakash MITAL v. KISHORI LAL. I.L.R. (1942) All 360=201 I.C 184=15 RA. 45=1942 ALW. 307 = 1942 ALJ 284=1942 A.W.R. (H.C.) 114=AI.R. 1942 All. 261.

A Court may in a proper case allow a suit for compensation to be converted into an application under S. 95, C. P. Code. (Mukherica and Sharpe. Jf) RHUPENDRA NATH CHATTERJEF v. TRINAVANI DEBI L.R. (1944) 2 Cal. 358=48 C.W.N. 348=A.I R. 1944 Cal. 289.

S. 95—Order under—Not a decree. See COURT-FEFS ACT. SCH II ART, 11 AND C. P. CODE. S. 95. 1940 A.M L J. 70.

S. 95—"Plaintiff"—Next friend of minor plaintiff—Order of compensation against—Jurisdiction to make.

The word plaintiff in S. 95, C. P. Code, cannot be read as including the next friend of a minor plaintiff. The Court has no jurisdiction to order a next friend to pay compensation under S. 95, C. P. Code, The injured party is not, however prevented from instituting a suit to recover from the next friend compensation, should he wish to do so. (Leach, C. J. and Somaval) Satyanarayana v. Anjareddi, I.L.R. (1941) Mad 985 = 200 I C. 13=15 R.M. 2=53 L.W. 675 = 1941 M.W.N. 567= A.I.R. 1941 Mad 719=(1941) 1 M.L.J. 765.

\_\_\_\_\_S. 95-Remedy under-Discretionary-Right of suit.

The remedy under S. 95, C. P. Code is entirely discretionary, and the defendant. If he so chooses, may not avail of it and may file a regular suit for compensation. If he files such a suit, he must prove the essential ingredients of a malicious abuse of the Court's processes, although to obtain relief under S. 95 he need not prove malice or want of reasonable and probable cause. (Mukherrea and Sharpe. II) BHUPFNDRA NATH CHATTERIFF & TRINAVANI DERI I L.R. (1944) 2 Cal. 358—48 C.W.N. 348—A I.R. 1944 Cal. 289.

\_\_\_\_Ss. 96 and 2 (2)—Interlocutory order—

No finding or interlocutory order which is not sufficient to dispose of the suit as a whole can in itself give rise to a right of appeal except where an appeal is expressly provided. In no case can a party come up in appeal unless a formal decree is drawn up and signed. If the Court refuses to draw up a decree on an application made by the party aggrieved a wrong omission to do so could be set right in revision. (Nyyei, Bose and Diehv. J/) BALL RAM v. MANOHAR, ILR. (1943) Nag. 241=207 I.C 625=16 R.N. 51=1943 N.L.J. 228=A I.R. 1943 Nag. 204 (F.B.).

S. 96 and O. 34, R. 6—Order dismissing application for personal decree—Appeal.

An order dismissing an application for a personal decree under O. 34, R. 6, C. P. Code. (sposes of the suit finally and has the force of a decree appealable under S. 96, C. P. Code. (Grille, C. J. and Niyegi. J.) RATANIAL v. SAGARBAI. I.L.R. (1946) Nag. 643=1945 N.L.J. 409.

—S. 96—Right of appeal—Decree in favour of defendant—Finding adverse to him—Decree based on such finding—His right to appeal.

A defendant has a right of appeal from a finding which is adverse to him when the decree in his favour is based on such a finding. (Shirreff. S. M. and Sathe, J. M.) NANKI v. JASODIA. 1943 O. W.N. (BR.) 64=1943 R.D. 64=1943 A.W.R. (Rev.) 77.

Where a person not necessary for the adjudication of the case before the Court is added as a party by the consent of all for the purpose of enabling him to protect his interest he must be allowed to do so and to press the matter in appeal in an appealable case. (Stone, C. J. and Bose, J.) KISANLAL HIRALAL v., GANESHDAS GULAB CHAND. 1941 N.L.J. 657.

S. 96 (3)—Consent decree—Decree in accordance with agreement or compromise immediately following order recording compromise under O. 23, R. 3—Nature of. See C. P. CODE, O. 43, R, 1 (m). 46 Bom. L.R. 424.

——S. 98 (2), proviso - Procedure—Difference of opinion—Reference to third judge—Point of law noted in order-sheet—Sufficiency.

Where the two judges hearing an appeal are divided in opinion and there is no one judgment in the case but merely two opinions the order sheet is the proper place where the point of law has to be stated for reference to a third judge. (Fast Ali I.) KAMESHWAR SINGH V. RAIBANSI SINGH 217 I C. 49=17 R.P. 149=11 B.R. 149=A.I.R. 1943 Pat. 433.

Where there is neither prejudice to a party, nor a question of jurisdiction, misjoinder even if it existed cannot by reason of S. 99, C. P. Code, affect a decree passed. (Aparwal, J.) HAR KRISHNA LAL v. QURBAN ALI. 17. Luck, 284=196 I.C. 685=14 R O. 198=1941 O.W N. 1124=1941 O.A. 832=1941 O.L.R. 730=1941 A.W.R. (Rev.) 938=A.I.R. 1942 Oudh 73.

- S. 99—Applicability—Application wrongly filed under S. 86 of the Agra Tenancy Act instead of a suit under S, 207 of that Act—Condonation. See ARGA TENANCY ACT. SS. 207 AND 86 AND C. P. CODE S. 99. 1941 A.W.R. (Rev.) 5.
- ——S. 99—Applicability—Presentation of plaint in mofussil Court by Advocate of High Court (O. S.) without vakalat—If valid—Decree—If liable to be reversed or set aside on appeal. See C. P. CODE, O. 3, R. 4. 47 Bom.L.R. 808.
- ——S. 99—Decision without specific issue—No prejudice—Defect, if cured.

When evidence was given on a point which was raised in both the Courts below, the decision cannot be assailed merely because there was an omission to frame a specific issue on the point. If no prejudice has been shown, S. 99, C. P. Code, would cure the defect. (Chatterii and Shearer, J.) DULHIN RAJ KISHORE KUER v. MAHOMED QAIYAM. 198 I.C. 890—8 B.R. 475=14 R.P. 516—A.I.R. 1942 Pat. 366.

8.99—District Judge entertaining incompetent appeal—Second appeal.

Dhavle, J.—If a District Judge entertains an appea which does not lie to his Court, a second appeal lies to the HighCourt against his decision,

C. P. CODE (1908), S. 100-Second Appeals.

Where an appellate order is passed by a Collector in a revenue matter it will not be beyond the High Courts jurisdiction to revise merely because acting as a Revenue Court he has exercised a jurisdiction which was not vested in him by law. (Dhavle, Manohar Lall and Maredith, J.). ARJUN RAUTARA v. KRISHNA CHANDRA GAJPATI NARAYAN DEO. 21 Pat. 1= 198 I.C. 353=14 R.P. 420=8 Cut. L. T. 53=8 B.R. 361=A.I.R. 1942 Pat. 1 (FB.).

----S. 99-Scope.

The provisions of S. 99 C. P. Code is a direct bar to a dismissal of an appeal by the District Judge on the ground of any misjoinder of plaintiffs. (Davies.) SUKH DEO v. GAURI SHANKAR. 1941 A.M.L.J. 84.

----S. 99—Scope—Joinder of claims in contravention of O. 2, R 4—If ground for reversal of decree, See C. P. CODE, SS. 16, 99, AND O. 2, Rr. 2, 3 AND 4. 43 Bom.L.R. 293.

——S. 99 and O.2, R. 3—Scope—Suit on mortgage by assignee of mortgage—Prayer for decree on mortgage and in the alternative against assignor—If bad for misloinder—Refusal of decree against mortgagor—Right to decree against sasignor.

Where the assignee of a mortgage bond brings a suit against the mortgagor and his assignor praying for a mortgage decree against the mortgagor on the mortgage which has been assigned to him and in the alternative for a decree against his assignor, the suit is not a suit where distinct cause of action are joined. Even if it be held that he is not entitled to a mortgage decree as against the mortgagor, there is no reason why he should not get a decree against the assignor who admits the assignment and consideration therefor. Courts of law and equity always delight in concluding litigations between the parties and preventing them from harassment which would result if they are driven to a separate suit. O. 2, R. 3 C.P. Code is no bar to such a suit or to the grant of relief even if there be misjoinder, S. 99 C. P. Code would be a complete answer to it when there is no failure of justice, and when the result of the trial has not affected the merits of the Case or the Jurisdiction of the court which tried it. (Manchar Lal, J.) CHANDRA KANT LAL v. MST. BASMATIA. 22 Pat. L.T. 196.

——S. 99—Suit for declaration by reversioners that alienation by a Hindu widow was—Right of some plaintiffs to sue admitted—Rights of plaintiff inter se not decided—Remand—If necessary.

Where in a suit to set aside an alienation by Hindu Widow the right of some of the reversioners to sue is admitted and there is no necessity to go into the question of the rights of the other reversioners as it will not affect the merits of the case or jurisdiction there is no necessity to remand the case for a finding on that question. (Binnett and Agarwal, J.) TULSHA v. LACHMAN PRASAD 204 LC. 68=15 R.O 251=1942 O.A. 578=1942 A.W.R (C.C.) 356 (1)=1942 O.W.N. 731=A.I.R. 1943 Oudh 109=18 Luck. 501.

---S. 100-Second Appeals.

Abandoned Plea.
Admission of document
Adverse possession.
Applicability.
Custom.
Decree.
Discretion.
Duty of High Court.

C. P. CODE (1908), S. 100-Abandoned Plea.

Error of defect in procedure. Findings of fact. Interference. New Plea. Powers of High Court. Question of fact. Question of law.

## Abandoned Plea.

-S. 100 and T. P. Act, Ss 76 and 77-Abandoned plea-Raising in second appeal -Question as to whether T. P. Act, S. 76 (h) applied or S. 77.

Where a guestion as to whether S. 76 (h) T. P. Act or S. 77 applied though raised in the lower appellate court is abandoned it cannot be held to estop that party from raising it in second appeal. (Thomas, C.J. and Ghulam Hasan, J.) RAMESHWAR PRASAD Z. RAMAS-REY 18 Luck. 484=15 R.O. 208=203 I.C. 434 =1942 O.W.N. 556=1942 A.W.R. (C.C.) 330 (1)=1942 O.R. 454=A.I R. 1942 Oudh 499.

#### Admission of Document.

-S. 100-Admission of document-Interference.

Where a document is rejected by the trial Court but admitted by the Court of first appeal its admission cannot be called in question in second appeal. (Hemeon f.) SHRI RAM v. MAROTI. 1945 N.L J. 235=A.I. R. 1945 Nag. 212.

#### Adverse Possession.

-S, 100—Adverse possession—Finding as to—In terference.

Though the facts found by the first appellate Court must be accepted in second appeal as final the question whether the proved facts substantiate the plea of adverse possession is a matter of law which can be challenged in second appeal (Yorke and Ghulam Hasan //.) IQBaL ALI v. HUMAYUN QADAR. 194 I C 50 =13 R.O. 515 = 1941 O.L.R. 374=1941 O.W.N 537=1941 O.A. 320=1941 A.W.R. (Rev.) 289= A.I.R 1941 Oudh 436.

-S. 100-Adverse possession-If can be raised in second appeal.

The question whether adverse possession is established or not is a mixed question of fact and law and can be raised in second appeal. (Ghulam Hasan J.) Chandl v. Anant Ball. 19 Luck 216=212 I.C. 555=16 R.O. 290=1943 O W.N 274=1943 O.A. (CC) 205=A.I.R. 1943 Oudh 398.

-S. 100—Adverse possession—Question whether admitted facts constitute open assertion of title-Finding on-If conclusive.

The question whether certain admitted facts constitute an open assertion of title so as to amount to adverse possession is a question of law and the finding of the lower appellate Court on such a question is not binding in second appeal. (King, J.) VENRATACHARLU v. RAJAH OF VIZIANAGARAM. 205 I.C. 67=15 R M 802=55 L. W. 614=1942 M W.N. 803=A I R. 1942 Mad. 725=(1942) 2 M.L.J. 415

#### Applicability.

S. 100—Applicability—Collector's decision under S. 74, Madras Estates Land Act—Appeal to District Court—Decision on—Second appeal— Competency. See MADRAS ESTATES LAND ACT, (1941) 2 M.L.J. 529.

-S. 100-Concession of a fact by the advocate in the first appellate Court-Cannot be re-opened in second appeal.

C. P. CODE (1908), S. 100-Decree.

An advocate has the right to any whether on the evidence he can challerge a particular fact without the previous authority of the client, and where he concedes a fact in the first appellate Court it is not open to the party to have it reopened for arguments in second appeal. (Somoyya, J.) SURYAPRAKASA RAO v. RAJRAM DAS BAVAJI. (1945) 1 M L J. 404.

#### Custom.

-S. 100-Custom-Existence-Finding as to-Interference.

The existence of a custom may in a proper case be regarded as a question of the proper interpretation of the specific facts proved and thus as a question of law which was open in second appeal (Sir George Rankin) BABA NARAYAN v. SABOOSA, I.L.R. 1943 Nag 705=1943 N.L.J. 438 =208 I.C. 560=1943 A.L.J 360=47 C.W.N.923 =16 R.P.C. 81=10 B.R. 84=46 Bom. L.R. 312 =I L.R. 1943 Kar. (P.C.) 152=A.I.R. 1943 P.C. 111=1943 2 M L.J. 186 P.C.

-S. 100—Custom — Existence — Interference. When a wajib ul arz recording a custom is treated as of no value on an erroneous view of the law the decision arrived at as to the existence of custom can be interfered with in second appeal. (Ghulam Hasan. J.) BAJRANG BAHADUR SING v. RAM NEWAZ. 202. I.C. 743=15 R.O. 144=1942 O.W.N. 574=1942 A.W.R. (C.C.) 328 (2)=1942 O.A. 448=A.I.R. 1943 Oudh 29.

-S.100-Custom-Existence-Interference.

Whether a particular custom is proved to exist or not is undoubtedly a question of fact and a mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal. But questions of the existence of an ancient custom are generally mixed questions of law and fact; the Judge first finding what were the things done in alleged pursuance of the custom and then determining whether these facts so found satisfied the requirements of the law. The latter is a question of law and not fact. (Mukheriea and Biswas, //.) JOGESH CHANDRA GHOSH v. SREE DHA-KESWAPIMATA I.L.R. (1941) 2 Cal. 258 = 198 I.C. 837 = 14 R.C. 509 = 73 C.L.J. 544 = 45 C.W.N. 809 =A.I.R. 1942 Cal. 26.

-S. 100-Custom-Finding as to based on evidence-Interference in second appeal.

Where the lower Courts have considered the evidence and found the alleged custom proved, it would not be interfered with in second appeal as there was evidence on which the Courts could come to that conclusion. (Hamilton. J.) SOHAN LAL v. TEJ SINGH. 1944 A.L.W. 291 (2).

-S. 100—Custom—Finding that customs set up had ceased to exist-Interference.

The finding of a lower appellate court that the custom set up by a party did not exist any longer is a finding of fact which is not liable to challenge in second appeal. (Thomas, C.J., and Hasan, J.) ABBUL ALIM v. HAYAT MUHAMMAD. 1945 O.W.N. 3=1945 O.A. (C.C.) 1=1945 A.W.R. (C.C.) 1.

#### Decree.

S. 100—"Decree"—Collector's decision on application under S 20-A, Madras Fstates Land Act—Decision of District Judge on appeal—If "decree"—Second appeal. See MAFFAS ESTATES LAND Act, S. 190. (1942) 2 M.L.J 162.

# C. P. CODE (1908), S. 100—Discretion. Discretion.

A distinction has to be drawn between 'juris-diction' and 'discretion.' When the first appel-late Court exercises its 'discretion', the Court of second appeal should always be reluctant to interfere. In fact when a discretion is vested in a Court by the provisions of the C.P. Code the Court is bound to exercise such discretion one way or other and a refusal to exercise it or the non-exercise of it amounts to a defect in procedure. The Court while exercising such discretion must do so judicially and on sound legal principles. It should not exercise it in a nonjudicial or arbitrary manner. Where a Court has exercised a discretion in a judicial manner there is no error either of law or of procedure, and consequently such exercise of discretion should not be interfered with in second appeal. Where a first appellate Court considers that for the proper decision of an appeal before it a map of the locality concerned is necessary and that a decision without it would not be possible and in the exercise of its discretion issues a commission and admits the map as additional evidence, such exercise of discretion cannot be interfered with in second appeal. (Thomas, C.J., and Madeley, J.)
MADANGOPAL v. HIRDEY NARAIN. 18 Luck 464= 204 I.C 204=15 R O 285=1942 O.W.N. 596= 1942 A W.R. (C.C.) 310 (2)=1942 O.A. 378= A.I.R. 1942 Oudh 485.

# Duty of High Court.

S. 100—Duty of High Court—Competency of second appeal—Duty to specify grounds.

It is the duty of the High Court, when entertaining a second appeal, to clearly specify the grounds upon which they hold the second appeal to be competent. (Lord Clauson). RAHMAT ILAHI 1. MAHOMED HAYAT KHAN. 70 I.A. 225=210 I.C. 507=16 R.P.C. 164=10 B.R. 348=78 C. L.J. 7=1944 M.W.N. 81=I.L.R. (1944) Kar. (P.C.) 40=1943 A.L.J. 569=56 L.W. 762=1943 A.L.W. 616 (2)=48 C.W.N. 109=1943 O.W.N. 531=A.I.R. 1943 P.C. 208=(1943) 2 M.L.J. 606 (P.C.).

# Error or defect in Procedure.

S. 100—Error or defect in procedure—Lower appellate Court not adverting to documentary evidence of party and giving no reason for rejecting opinion of trial Judge as to credibility of witness—Effect—Second appeal—Competency.

Where the lower Court deals with the entire evidence in the case in a few sentences, without any advertence to the documentary evidence on the side of a party and gives no reason for rejecting the conclusions of the trial Judge, as regards the credibility of the witnesses examined on the side of that party its judgment does not satisfy the requirements of law and must be deemed to be a judgment vitiated by an error in procedure. The lower appellate Court is bound, as a matter of law, not to go against the opinion of the trial Judge, who had an opportunity of 1943 Pat. 68.

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seeing and hearing the witnesses before him, in deciding upon the credibility of the witnesses. Unless good reasons are given, any interference with the conclusion of the trial Judge on matters of this kind must be deemed to be erroneous in law. A second appeal is competent in such a case under S. 100, C. P. Code. (Pandrang Row, J.) MANGAMMA v. PAIDAYYA. 53 L.W. 160= 1941 M.W.N. 98=A.I R. 1941 Mad. 393= 1941 M.W.N. 1941 M.J. 174.

\_\_\_\_\_S. 100-Evidence-Failure to consider-Inter. ference, when justified.

Where interference in second appeal is sought on the ground of the failure of the lower appellate Court to consider certain evidence, the question to be decided is really whether there is reason to think that the lower appellate Court omitted to take into consideration any evidence which is so important that had it been considered it would or should have led to a different result, (B-nuett and Madeley, 1/.) KALLU v. MOHAMED GHULAM HAIDER KHAN. 208 I C. 402=16 R.O. 77=1943 O.W N 300=1943 O.A. (C.C.) 185=A.I.R. 1943 Oudh 429.

Where a trial Court fails to frame a separate issue on a particular point and it does not lead to any injustice or inconvenience, that would be no reason to interfere in second appeal with concurrent findings of two Courts. (Sathe, S.M.) SHER BAZ KHAN v. MIR HAS KHAN. 1943 R.D. 362=1943 A.W.R. (Rev.) 312 (1).

# Findings of fact.

A finding of fact based on no evidence, is not binding in second appeal. Pollock and Bose, JJ.) SHANKER SINGH v. GULABCHAND. I.L.R. (1945) Nag. 444=1945 N.L.J. 172=A.I.R. 1945, Nag. 138.

-----S. 100—Finding of fact—Adoption—Finding as to fact of—If can be questioned on the ground of improbability of such adoption.

Where there is a finding as to the fact of adoption, it cannot be attacked in second appeal on the ground of improbability of such an adoption having taken place and the likelihood of its being invented in order to keep the occupancy holding in the family. (Shirreff, J.M.) COLLECTOR. GHAZIPUR v. RAM DEO KOERI. 1941 O.A. (Supp.) 825=1941 A.W.R. (Rev.) 981.

S. 100 - Finding of fact — Adoption—Question whether adoption took place or whether and when flaintiff knew of it—Finding on—Interference by High Court.

The question whether an alleged adoption took place in fact or whether and if so when the plaintiff came to know of the adoption, is one of fact, and the appellate Court should record a finding on the point. It is not for the High Court in second appeal to decide about the correctness of a finding on the point. (Faal Ali J.) KASI PALEI RADHIKADEI. 205 I.C. 133=8 Cut.L.T. 96=9 B.R. 196=15 R.P. 245=A.I.R. 1943 Pat. 68.

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\_\_\_\_\_S. 100 - Finding of fact - Berami - Finding as to-Conclusive character of.

Whether a transaction is a benami one and whether a purchaser at a sale is a benamidar for another are eminently questions of fact and the finding thereon cannot be interfered with in second appeal. (Harries, C. J. and Manchar Lall. J.) BANARSI DAS v. BHAWANI KUER. 202 I C. 57=15 R.P. 83=8 B.R. 843=23 Pat.L.T. 364=A.I.R. 1942 Pat. 386.

Conclusions of fact arrived at by the lower appellate Court, however erroneous or unsatisfactory, are conclusive in second appeal and cannot be challenged before the High Court in second appeal. (Manchar Lall. J.) CHANDRA KANT LAL v. MST. BASMATIA. 22 Pat.L.T. 196

——S. 100—Finding of fact—Concurrent findingthat certificate sale was not vitiated by froud—If conclusive.

A concurrent finding by both the Courts below that a sale under the Public Demands Recovery Act was not vitiated by fraudisa finding of fact and binds the High Court in second appeal. (Manoher Lal, J.) NIZAR MAHOMED KHAN v. TAUQUIR AHMAD. 194 I.C. 479=13 R.P. 729=7 B.R. 782=23 Pat.L.T. 195=A.I.R. 1941 Pat. 529.

——S. 100—Findings of fact—Concurrent findings—Question of custom—Interference in se. ond appeal.

Where the concurrent findings of the lower Courts that a certain custom did not exist is based on the rejection of the evidence which should not have been rejected, the findings could be questioned in second appeal. (\*Rennett. J\*) HARUN RASHID v. KANIZ FATIMA. 16 Luck 626=194 I.C. 394=13 R.O. 593=1941 R.D. 472=1941 O.L.R. 459=1941 O.W.N. 623=1941 A.W.R. (Rev.) 362=1941 A.L.W. 467=1941 O.A. 394=A.I.R. 1941 Oudh 468.

\_\_\_\_\_S. 100—Finding of fact—Conflicting statements made by party—Decision as to which is true—If conclusive.

It is for the Court of fact to decide between two conflicting statements made by a party and to find which is the true version. A finding arrived at by the Courts below as to which is the true statement cannot be interfered with in second appeal. (Harrier, C. J. and Manchar Lall, J.) PARMANANNA PRUSTY V. INIRAMANI MAHANTI. 202 I.C. 113=15 R.P. 93=8 B.R. \$51=5 F.L.J. (H.C.) 178=8 Cut. L.T. 35=23 P.L.T. 740=A.I.R. 1942 Pat. 479.

The construction of a mortgage deed for the purpose of ascertaining whether it contains an admission is a question of fact. (Khundkar, J.) AMAR NATH MISRA v. TRILOCHANDAS DUTTA. 209 I.C. 292=16 R.C. 347=76 C.L.J. 251=A.I.R. 1943 Cal. 565.

—S. 100—Finding of faet—Deed, if executed as guardian of a minor—Minor, if benefitted—Interference with findings on—If justified.

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A finding that a mortgage was not executed by a lady as the guardian of her minor grandson and a finding that the minor had not been benefitted by the mortgage are findings of fact and are binding on the second appellate Court and cannot be assailed or reversed. (Bennett and Ghulam Hasan, JJ.) RAJ BAHADUR SINGH v NAR SINGH MISRA 192 I.C. 712=13 R.O. 397=1941 A.W. R. (C.C.) 54=1941 O.W.N. 204=1941 O.L.R. 217=1941 A L.W. 193=1941 O.A. 17=A.I.R. 1941 Oudh 226.

The evidentiary value of a statement contained in a document is a question of fact. (Khundhar, 1.) Surpnira Prasad Lahiri 2. Gobinda Das. 48 C.W.N. 15.

\_\_\_\_S. 100-Finding of fact-Finality.

A finding that a vendee made his purchase with open eyes and that his allegation that he was not given possession of all the the property is untrue is one of fact which is hinding in second appeal. (Davis, C.J. and Weston. A.) ALLAHDING BACHO v. UDHOGMAL. I.R. (1942) Kar 32=202 I.C. 584=15 R.S. 51 =A.I.R. 1942 Sind 81.

——S. 100—Finding of fact—Finding arrived at after ignoring record of rights and village note—If conclusive,

A finding that the buildings were not erected for the convenient or profitable use or occupation of the occupancy holding and were not consistent with the purpose for which it was let, is a finding of fact. (Grille, C.J. and Niyovi. J.) GANFSH PRASAD v. NANDANLAL. I.L.R. (1945) Nag. 709.

S. 100—Finding of fact—Finding as to negligence. RAMDAS TOPANDAS v. SUKKUR MUNICIPALITY. [See Q. D. 1936—'40 Vol. I, Col. 3285.] 192 I.C. 494—13 R.S. 191.

Where the lower Courts have concurrently found that a Railway Company was guilty of negligence and that it had not acted like an ordinary prudent man dealing with his own goods, such finding cannot be disturbed in second appeal. (Fazi Ali and Chatterii, J.). RENGAL AND NORTH WESTERN RAILWAY CO. v. MAHOMFD MUNSHI 21 Pat. 764=205 I.C. 252=9 B.R. 209=15 R.P. 272=A.I.R. 1943 Pat. 111.

S. 100—Finding of fact—Finding as to rate of rent payable under tenancy—Interferences in second appeal or Letters Patent appeal.

# C. P. CODE (1908), S. 100-Findings of fact.

A finding as to the rate of rent payable under a tenancy is a finding of fact and cannot be disturbed in second appeal or Letters Patent appeal. (Harries, C.J. and Fazl Ali, J.) CHINTIKAHARIN v. KRIPA SHANKAR WARRAT. 7 B.R. 750=13 R.P. 698=194 I.C. 300=1941 P.W.N. 513=A.I.R. 1941. Pat. 488.

A finding of fact based on probabilities and inferences drawn from the various documents produced in evidence in the case is unassailable in second appeal. (Lokur, J.) KASTURCHAND IWAJI v. MANEKCHAND DEWCHAND. 211 I.C. 421=16 R.B. 302=45 Bom. L.R. 837=A.I.R. 1943 Bom. 447.

S. 100—Finding of fact—Finding based on wrong legal view—Interference. HARIHAR PRASAD SINGH v. JANAK DULARI KUER. [See Q.D. 1936—'40 Vol. I Col. 3284.] 191 I.C. 275=7 B.R. 153=A.I.R. 1941 Pat. 118.

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The finding on a question of fraud is a clear finding of fact and so could not be challenged in second appeal. Bennett and Ghulam Havan, JJ.) GOKUL PRASAD v. MAHADEI. 194 I.C. 195=13 R O. 563=1941 O.L.R. 425=1941 A.L.W. 520=1941 O.W.N. 643=1941 O.A 412=1941 A.W.R. (C.C.) 166=A.I.R. 1941 Oudh 341.

——S. 100—Finding of fact—Finding of fraud arrived at after examination of circumstances and conduct of parties—Sustainability.

Where the lower Courts have arrived at a finding of fraud after examining the circumstances of the case and the conduct of the parties and they have not relied on evidence which is not admissible in law, the finding is one which is legal and cannot be attacked in second appeal as being one based on no evidence or based on mere surmise and conjecture. (Harries, C. J. and Mannhar Lall. J.) BANARSI DAS v. PAHAWANI KUER. 202 I.C. 57=15 RP 83=8 B.R. 843=23 Pat.L.T. 364=A.I.R. 1942 Pat 386.

- S. 100—Finding of fact—Finding that dead was tampered with—If conclusive. JANARDAN PARIDA z. PRANDHAN DAS. [See Q. D. 1936—'40 Vol. I, Col. 1233.] 22 Pat. L.T. 666.
- ——S. 100—Finding of fact—Finding that there was no good faith on part of advocate advising party—Interference in second appeal. See LIMITATION ACT S. 14. (1943) 2 M.L.J. 375.
- S. 100—Finding of fact—Finding without considering all the evidence or based on inadmissible evidence.—If conclusive. HARIHAR PRASAD SINGH Z. JANAK DULARI KUER. [St. Q.D. 1936—'40 Vol. I Col. 3284.] 191 I.C. 275—7 B.R. 153—A.I.R. 1941 Pat. 118.
- ——S. 100—Finding of fact—Finality when supported by evidence — Evidence not corroborated — If makes finding inconclusive.

A finding of fact cannot be interfered with in second appeal if there is evidence to support that finding although such evidence is uncorroborated. (Manohar Lall, J.) KRISHNA PANDA v. JHORA CHOWDHURANI. 203 I.C. 65=15 R.P. 152=9 B.R. 50=8 Cut. L.T. 37=A.I.R. 1942 Pat. 429.

# C. P. CODE (1908), S. 100-Findings of fact.

\_\_\_\_\_S. 100-Finding of fact-Grove-If consti.

The finding as to the existence of a particular number of trees on a plot is a finding of fact, but the finding that these do not constitute a grove is not a question of pure fact. (Harper, S. M. and Shirreff, J.M.) MADAN GOPAL v. SANKATHA PRASAD. 1941 A.W.R. (Rev.) 513 (2)=1941 O.A. (Supp.) 472 2=1941 R.D. 526.

S. 100—Finding of fact—Intention of parties to document.

When the determination of the nature of a transaction between the contracting parties depends on the language of the document and the surrounding circumstances, the question of intention of parties is, no doubt, one of fact. But where the appellate Court has not applied its mind to the language of the document as a whole, and has allowed itself to be influenced by irrelevant considerations, its finding as to the intention of the parties can be interfered with in second appeal. (Mchar Chand Mahajan, J.) THAKAR DASS v. TEK CHAND. 214 I.C. 105=17 R.L. 71=46 P.L.R. 101=A.I.R. 1944 Lah 175.

-S. 100—Finding of fact—Inference from entries in settlement record.

Inferences from the entries in the settlement record are inferences of fact with which the High Court cannot interfere in second appeal. Even if there is any error in interpreting a portion of the settlement record, there is no error of law which the Court can be said to have committed. (Mukherjea, J.) NARENDRA CHANDRA DE v. RAJENDRA CHANDRA CHANDRA CHANDRA 45=14 R.C. 292=45 C.W.N. 654=73 C.L.J. 159=A.I.R. 1941 Cal. 506.

S. 100—Finding of fact—Inference from proved facts—If can be ignored in second appeal.

A concurrent finding of fact arrived at by both the lower Courts cannot be ignored in second appeal merely because it is an inference from facts satisfactorily proved by evidence. (Harries, C.J. and Fazl Ali, J.) KANIK MANDAL v. MEDNI RAI. 201 I.C. 560=15 R P. 55=8 B.R. 806=23 Pat.L.T. 213=A.I.R. 1942 Pat. 317.

# --- S. 100—Finding of fact—Interference.

Where in a suit for malicious prosecution the two lower Courts have come to a finding of fact that the case between the parties was not one of a mutual fight or assault, it is neither open to the second appellate Court to assume that there was an incident of mutual assault, nor to re-open the question and come to fresh finding in reversal of the finding of the two lower Courts on an examination of the relevant evidence in the case. (Thomas, C.J. and Ghulam Hasan. J.) KUNJ BEHARI LAL v. FATEH CHAND. 217 I.C. 307=17 R.O. 98=1944 O.A. (C.C.) 63=1944 A.L.W. 127=1944 A.W.R. (C.C.) 63=1944 O.W.N. 64 =A.I.R. 1944 Oudh 232.

# \_\_\_\_S. 100—Findings of fact—Interference.

A finding of fact cannot be interfered with in second appeal unless it is obviously inconsistent with the evidence on record. (Sathe, A. M.) HAR CHARAN SINGH v. KINNO. 1941 O.A. (Supp.) 810=1941 A.W.R. Rev. 890=1941 R. D. 940.

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\_\_\_\_S. 100-Finding of fact-Interference.

A finding on the question as to whether the zamindar entered into possession by voluntary surrender or not, cannot be disregarded merely because a fresh consideration might lead the appellate Court to arrive at a different conclusion. (Harper, S. M.) DURBIJAY SINGH v. RAMZANI. 1941 R.D. 426 (1)=1941 O.A (Supp.) 495=1941 A.W.R. (Rev.) 564.

S. 100-Finding of fact-Interference.

However unsatisfactory, a finding of fact cannot be successfully assailed in second appeal. (Harries, C.J. and Manohar Lall, J.) MAHADFO SARAN PANDE V. SHAIKH KHUDA BAKHSH. 22 Pat. 99=15 R.P. 358=206 I.C. 547=9 B.R. 333 =A.I.R. 1943 Pat. 180.

—S. 100—Finding of fact—Interference—Existence of document not appreciated. SHANKARRAO DAGADUJIRAOV. SAMBHU. [see Q.D. 1936-'40 Vol. I. Col. 3285.] I.L.R. (1940) Kar. (P.C.) 380—43 Bom L.R. i=I.L.R. (1941) Bom. 107—73 C.L. J. 612—(1941) 1 M.L. J. 427 (P.C.).

\_\_\_\_\_S. 100—Findings of fact—Interference—Justification.

Where the judgment of the lower Court is confused and contains mistakes of fact and material evidence bearing on the disputed matters has not been considered, the second appellate Court is not barred from re-opening those matters and examining the evidence. (Tek Chand and Dalip Singh, JJ.) Kesho Das v. Jiwan. I.L.R. (1941) Lah. 568=195 I.C. 786=14 R.L. 98=43 P.L.R. 450=A.I.R. 1941 Lah. 10.

Although it is the policy of the law for the Board not to interfere with the findings of fact in second appeal yet where there is no evidence to support it, and it is obviously based upon an entry in the papers which is clearly a clerical mistake, it is a fit case for interference. (Shirreff S. M. and Sathe, J. M.) BAL KISHUN PASI & KHATRANI. 1941 A.W.R. (Rev.) 685=1941 R.D. 723.

——S. 100—Finding of fact—Interference—Finding of lower appellate Court on remand,

Where the High Court on second appeal remands a case to the lower appellate Court for a clearer finding on certain issues on which the finding of the lower appellate Court is somewhat obscure and the finding is returned to the High Court, the High Court is bound by such finding so far as it touches questions of fact (Stone, C. J. and Bose, J.) NATHUSA PASUSA v. MUNIR KHAN. I.L.R. (1943) Nag. 42 = 206 I.C. 554=16 R.N. 1=1943 N.L.J. 133=A.I.R. 1943 Nag. 129,

If a decision on facts is reached at by disregarding the provisions of law such as for instance by saying that certain papers on the record are something which they obviously are not, there is an obvious mistake of law just as there is a mistake of law if a decision on facts has been arrived at on evidence which was inadmissible. Accordingly a second appeal on that question is competent. (Hamilton, J.) UGAR SENJAIN v. TIRBHUWAN NARAIN. 205 I.C. 76—15 R.A. 367—1942 A.W.R. (H C.) 386=1942 A.L.J. 671—1942 A.L.W. 684—A.I.R. 1943 All. 82.

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S. 100—Finding of fact — Interference—Grounds.

It is not allowable for a learned Judge in second appeal, to say merely that he is not satisfied that matters of fact were proved. He should have to go further in order to impugn the finding of fact of the lower appellate Court, and say that there was no sufficient evidence in law (i. e.) no material at all, from which a deduction and inference could be made. If there is any evidence at all, it is plain that the High Court cannot interfere—High Court can adjudicate on the soundness of conclusions which have been derived from findings of fact, (Roberts, C. J. and Mosely, J) DECKALI PATTAK v. RAMDEVI. 1940 Rang, L. R. 777—193 I.C. 286—13 R.R. 239—A.I.R. 1941 Rang, 76.

S. 100—Finding of fact—Interference—Principle.

In second appeal, the Court will not interfere with questions of fact unless evidence has improperly been admitted (Davit.) RAMA NAND v. HAR NATH 1940 A.M.L.J. 115.

----S. 100—Finding of fact—Interference—Purchase out of savings.

A finding that a party purchased a house "from his own private savings" and was as such, the sole owner of the property cannot be challenged in second appeal. (19bal Ahmad, C. J., Ganga Nath and Dar. JJ.) CHANDRA SHEKAR v. MANOHAR LAL. I.L.R. (1942) All. 832=201 I.C. 695=15 R.A. 79=1942 A.W.R. (H.C.) 241=1942 A.L.W. 478=1942 A.L.J. 367=A.I.R. 1942 All. 233 (F.B.).

——S. 100—Finding of fact — Interference— Question as to how long plaintiff had been ousted— Lower Court not considering real question but proceeding on wrong view of law—Finding—If conclusive in second appeal.

Where in a suit for possession the lower appellate Court has not directed its mind to th) determination of the question as to how long the plaintiff had been ousted from the property being obsessed with the idea that no question of limitation arose in the case, there being a continuing wrong (encroachment) and comes to a perfunctory finding, it cannot be considered a definite finding based upon a consideration of the evidence so as to be binding in second appeal. (Fazl Ali and Meredith, J.J.) KUSESHWAR JHA v. UMA KANT JHA. 197 I.C. 818=14 R.P. 371=8 B.R. 302=22 Pat. L.T. 1001=A,I,R. 1942 Pat. 188.

S: 100—Finding of fact—Interference—Question of consideration in pre emption suit. JAIRAJ SINGH v. HAR NARAIN SINGH. [see Q. D. 1936-40 Vol. I, Col. 1243.] 191 I.C. 759=13 R.A. 270.

——S. 100—Finding of fact—Interference—Question of onus—If material.

Where evidence has been led by both sides and findings have been arrived at on a consideration of the evidence so led, the question of onus in second appeal would be immaterial. But where the lower appellate Court has placed the onus wrongly on the plaintiff and has discussed only the evidence of the plaintiff and his witnesses, its findings are not binding in second appeal (Mitter, J) SURENDRABALA DEBI v. BHUPENDRA KUMAR. 45 C.W.N. 177.

—— S. 100—Finding of fact—Interference—Question raised in trial Court but not in first appeal or in grounds of second appeal.

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The finding of the trial Court on the question of possession cannot be disturbed in second appeal especially where the defendant against whom the question was decided did not raise that question either in the first appeal or grounds of second appeal. (Almond, J. C. and Mir Ahmed, J.) TAJUNNISA v. HARNAM SINGH. 207 I C. 515=16 R. Pesh. 12=A.I. R. 1943 Pesh. 47.

S. 100-Finding of fact-Interference-Question whether conveyance by Mahomedan to wife and relinguishment by latter of dower debt is gift or sale-Finding on-If conclusive in second appeal.

The question whether a transaction by which a Mahomedan conveys certain property to his wife and she in return relinquishes her dower debt is a transaction the nature of a sale or a transaction in the nature of a gift, is a question of fact, and the finding of the lower appellate Court on the question is conclusive in second appeal. (Meredith and Shearer, J.).) MAHOMED ZOBAIR v. MT. BIBI SAHIDAN. 20 Pat. 798=197 I.C. 241=14 R.P. 289=23 Pat. L.T. 72=8 B.R. 179=A.I.R. 1942 Pat. 210.

-S. 100-Finding of fact-Interference-Structure if of a permanent character. See ESTATES ACT, S. 60 AND C. P. CODE, S. 100. 1942 N.LJ. 145.

-8. 100-Finding of fact-Interference-Suit for rent-Finding that plaintiff was unable to prove rate of rent payable-Finality-Lower Courts rejecting plaintiff's documents for insufficient reasons-If ground for interference in second appeal.

A finding of fact by the lower Courts in a suit for rent, that the plaintiff has been unable to prove the rate of rent payable by the defendants, is conclusive and the High Court connot interfere with such a finding in second appeal, although the Courts of fact have rejected the documents filed by the plaintiff for reasons which are not quite satisfactory. (Manchar Lall, 1) RAMGOBIND SAHU v. MOSO DHORI. 193 I C 780 =13 R.P. 647=7 B.R. 639=AI.R. 1941 Pat. 371.

-S 100-Finding of fact-Interference--Tenancy Binding nature. SHANKARRAO DAGADUJIRAO v. SAM-BHU. [See Q.D. 1936—'40 Vol. I. Col. 3285.] I.L.R. (1940) Kar. P.C. 380=43 Rom.L.R. 1=I.L.R. (1941) Bom. 107=73 C.L.J. 612=(1941) 1 M.L. J. 427 (P.C.).

-S. 100—Finding of fact—Interference—Ten. ancy—Sitting tenants—Interference—Admission of new tenant over sitting tenant-Validity.

Where it is found that the plaintiffs were sitting tenants from before the time when the lease is executed in favour of the defendant, the finding is one of fact which will not be interfered with in second appeal. A lease purporting to superimpose a tenant in chief over such sitting tenants held to be invalid by the lower Court was upheld in appeal. (Sathe. A.M.) MARU SINGH v HARBANS, 1941 OA. (Supp.) 961 (2)= 1941 A.W R. (Rev.) 1213 (2).

-Ss. 100 and 101—Finding of fact—When bind ing on High Court.

Since findings of fact by the lower appellate Court are to be treated as final, they should at least be clear and specific-not ambiguous or inferential. A general approval given to the views of the trial Court will not

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ally if accompanied by language which casts doubt on a particular point. If it is in law of importance to the rights of the parties to decide that point the High Court is entitled to decide it upon the evidence before it. (Sir George Kankin.) RAM LALDUTT v. DHIRENDRA NATE ROV. 70 I A. 18=I LR. (1943) 1 Cal. 372=206 I C. 266=9 B.R. 299=15 R.P.C. 81=I.LR. (1943) Kar. (P.C. 39=47 C.W.N. 489=46 Bon. L.R 192=A I.R. 1943 P.C. 24=(1943) 1 M.L.J 514 (P.C.).

-S. 100-Finding of fact-When questionable.

A finding of fact can only be questioned in second appeal if it is without any basis of evidence. It is not enough to show in a second appeal that if the Court were hearing the case either as a Court of first instance or first appeal it might have come to a different conclusion on the evidence on record. To justify interference with a finding of fact, it must be shown that the findings of the lower appellate Court are such that they have no basis whatsoever in the evidence on record. (Sothe J. M.) SUKHDEO v DHANAI SINGH. 1941 R D. 319 =1941 A.W.R. (Rev.) 356=1941 O.A. (Supp.) 270.

#### Interference.

- S. 100-Interference-Amount of damages awar. ded - High Court's power to interfere in second appeal.

Though the High Court would not lightly interfere with a mere question as to the amount of damages, where the amount is substantially reduced by the first appellate Court on a wrong view, that error must be set right in second appeal. (Chandrasekhara Aiyar, J.) LALA PUNNALAL v. KASTURICHAND RAMAJI. 1945 M.W.N. 720 = 58 L.W. 613 = (1945) 2 M.L.J. 461,

-S. 100-Interference Concurrent findings-Findings based on solitary statement. See LANDLORD AND TENANT-ADMISSION TO TENANCY. 1942 O. W.N. (B.R.) 43.

-S. 100-Interference-Incompetent appeal entertained-Second appeal. See MAD. AGRI. REL. ACT, S. 19. (1942) 2 M.L.J. 568.

-S. 100 - Interfenence - Incompetent appeal entertained-Second appeal.

If an appellate Court entertains an appeal which does not lie to that Court, a second appeal lies against the decision of that Court. (Agarwala, J.) LAKHPAT LAL v. Makhan Ram. 201 I.C. 786=15 R.P. 77=8 B.R. 838=23 Pat.L.T. 342=A.I.R. 1942 Pat. 369.

-S. 100—Interference—Incompetent appeal entertained and dismissed on merits—Second appeal—If lies-Jurisdiction of the High Court to interfere.

It is well established that when a lower appellate court entertains an appeal which is not competent and modifies the decision of the trial Court, a second appeal will lie. But it is doubtful whether such a second appeal well lie when the lower appellate Court has dismissed the appeal preferred to it. If the lower appellate Court has dismissed the appeal as incompetent a second appeal against that decision cannot be entertained. If the lower Court wrongly entertains an appeal and dismisses it on the merits, the only order which can be properly passed in second appeal is to set aside the incompetent appellate order. There is no justification for going into necessarily incorporate all its findings in detail—especi. The trial Court's order in such a case which is unaffected

# C. P. CODE (1908) S. 100-Interference.

by the incompetent appellate decision. Should the High Court, when nearing a second appeal against an incompetent appellate order come to the conclusion that the trial Court's order is wrong on the merits, in a proper case the High Court will interfere in revision with the order of the trial Court, (Wadsworth. J.) KALLALAGAK DEVASTHANAM, MADURA V. BASKARAM PILLAI, 206 I.C. 359=15 R.M. 959=1942 M.W.N. 632=A.I.R. 19±2 Mad. 741=(1942) 2 M.L.J. 450.

——S. 100—Interference—Incompetent appeal entertained and decided by lower court—Second appeal— Revision

Where the lower appellate Court entertains an appeal which does not he and decides it on the merits, its order may be challenged by a second appeal to the High Court. Assuming that a second appeal, is incompetent, the decision of the lower Court being one without jurisdiction, is hable to be set aside in revision under S. 115, C. P. Code, the second appeal bring treated as a revision application. (Dhavie and Chatteris, J.) Banka Das v. Srinivas Padhi. 197 I.C. 837=14 R.P. 374=8 B.R. 309=7 Cut.L.T. 41=A.I.R. 1941 Pat. 616.

S. 100—Interference—Plea that valuation of suit for fursidiction is not correct and that trial Court had no jurisaction—If can be given effect to in Second Appeal.

Where the lower Courts have held that the valuation for purposes of jurisdiction placed on the suit was not unreasonable, it is not open to a party in second appeal to plead that the valuation of the suit was not correct, and that the suit, if properly valued, would be beyond the jurisdiction of the trial Court. Such a plea cannot be given effect to in second appeal. (Rowland and Manchar Latl, J.) MAHOMED IDRIS HAIDRI v. HABIBUR RAHMAN. 196 I.C. 554=14 R.P. 204=8 B.R. 38=22 Pat.L.T. 799=A.I.R. 1942 Pat, 79.

——S. 100—Interference—Question of costs—Competency—Interference—Principles. KOZHUVAMMAL AHMAD v. PARUAMMA. [see Q.D. 1936—'40 Vol. I. Col. 1262.] 192 I.C. 82—13 R.M. 529 (2).

—S.100—Interference—Trial Court's finding based on credibility of witnesses—Reversal on mere surmises—Powers of second appellate Court.

Where a lower appellate Court disregards the opinion of the Judge who saw and heard the witness and was in the best position to judge of their credibility and has based his finding on it, and reverses such a finding on mere surmises and suspicions, the High Court can interfere in second appeal and reverse the decision of the lower appellate Court. (Clarke, J.) ANDOLI UDAIBHAN 2. JAMNABAI. 197 I.C. 356—14 R.N. 167—1941 N.L.J. 230.

## New Plea.

#### \_\_\_\_S. 100-New plea.

A point that could easily have been met by evidence if it had been raised at the proper time, cannot be allowed to be taken for the first time in second appeal. (Blacker, J.) THE PEOPLES' INSTALMENTS AND SAVINGS BANK, LTD., LAHORE v. GIAN CHAND. 196 I.C. 619=14 R.L. 161=43 P.L.R. 499=A.I.R. 1941 Lah. 345.

----S. 100-New plea-Competence.

C. P. GODE (1908), S. 100-New Plea.

Per Shirreff, J. M. and Sathe A. M. dissenting—Where the plaintiff's suit to recover possession of certain properties of a deceased person is based on their ciriming to be the daugnter's sons of that person and it is resisted by the defendants on the ground of their being the neater neits, it is found that the plaintiffs are really daugnter's sons and that the defendants are not neater neits, it is not open to defendants in second appeal to raise a new and inconsistent piea, that in the absence of allegation or proof that the mother of the plaintiff who is the neater heir was not alive or that she had surrendered in favour of the plaintiff, the plaintiff had no locus stands to sue. Such a piea cuts at the root of their own case. (Shirreff, J. M. and Sathe, A. M.) Bhusat v. Dirgal, 1941 O.A. (Supp.) 898—1941 A.W.R. (Rev.) 1105.

S. 100—New plea — Discretion of executing Court under 0.21, R. 64, C. P. Code, to order sale of part only of part or property—No request made to Court—Ir can be arged in second appeal. See C. P. CODE, O. 21, R. 04. 22 Pat. L.T. 855.

\_\_\_\_\_S. 100-New plea-Fraudment suppression of particulars.

An objection raised in High Court for the first time to the effect that the application for execution was fraudulent in that the decree-holder had suppressed certain particulars with the intention of misleading the Court cannot be entertained. (Boss, J.) NATHMAL 2. BALKRISHNA. 194 I.C. 641=14 R.N. 4=1941 N.L.J. 319=A.I.R. 1941 Nag. 152.

A new point requiring investigation of matters of fact not raised in the Courts below cannot be allowed to be taken in second appeal. (\*Kowland, \*J.) MIDNA-PORE ZAMINDARY CO., LTD. v. CHINTAMONI MONDAL. 196 I.C. 33=14 R.P. 169=7 B.R. 989=A.I.R. 1941 Pat. 600.

\_\_\_\_\_S, 100-New plea-Limitation-Permissibility.

A question of limitation is not purely dependent upon legal considerations and there may be tacts which may have to be gone into and hence Courts would be reluctant to allow such a question to be raised for the first time in second appeal or to enter into such a question at such a late stage. (Misra, J.) KAII v. RAM AUTAR. 20 Luck. 179=1944 O.A. (C.C.) 198=1944 A.W.R. (C.C.) 198=1944 O.W.N. 278=A.I.R. 1945 Oudh 65.

S. 100—New Plea—New point—cannot be raised for first time in second appeal where it involves investigation of further facts. (Harries, C. J., and Chaterlee, J.) BADRI NARAIN SINGH v. CHANDRA MAULESHWAR PRASAD. 22 Pat. L.T. 655=197

I.C. 361—8 B.R. 194=14 R.P. 296—A.I.R. 1942 Pat, 152.

\_\_\_\_\_S. 100-New Plea-New point of law-Right to raise-Limits of the rule.

A question of law cannot be allowed to be raised for the first time in a Court of last resort where the pleading necessary to sustain the new plea is an inconsistent one and inadmissible for that reason and where if it had been raised earlier it would have been easily met and the point of law is one which is not unanswerably clear. (Shirreff, S. M. and Satte, J. M.) BHUSAI v. DIR-

C. P. CODE (1908), S. 100-New plea.

GAJ. 1942 A.W.R (Rev.) 361 (2) =1942 O.W.N. (B.R.) 496 (2) =1942 O.A. (Supp.) 387 (2).

——S. 100—New plea—New question of fact—Per-missibility.

An argument which raises a new question of fact never pleaded before or considered by the lower Court cannot be allowed to be raised in second appeal for the first time. (Madeley, f.) MUMTAZ HUSAIN v. MANZOOR ALI. 1945 O.A. (C.C.) 272=1945 A.W.R (C.C.) 272=1945 A.L.W. (C.C.) 364=1945 O.W.N. 399.

S. 100-New plea-Plea of furisdiction raised for nut.

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SHAMBHOO N. Laber Plea that suit is bad for nones. 100-New Lider S. 69, Partnership Act-If registration of firm un Lappeal.

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-S. 100-New plea-Point of lat.

fresh findings of fact-If can be raised

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S. 1005 low—Question of fact not raised in Courts be has taken steps to annul incumbrances under at rent salchar Tenancy Act, if can be raised. See BIHAR S. 167, CY ACT, S. 167. 8 B.R. 479.

S. 100—New plea—Question of fact—Submer i land—Constructive possession of true owner—If can seed set up in second appeal. See LIMITATION ACT. S. 28. ADVERSE POSSESSION—SUBMERGED LAND. 1942 P.W.N. 100.

S. 100—New plea—Question of jurisdiction—Plea in lower Court based on one standpoint—Different standpoint in second appeal—If can be considered for first time.

Where a question of jurisdiction can be decided in a Court of appeal without coming to any further finding of fact, the question becomes a pure question of law and can be decided in second appeal even though it is an entirely new

C. P. CODE (1908), S. 100-Question of Law

point not taken even by the parties themselves. Hence the Court can for the first time consider in second appeal a question of jurisdiction from another standpoint than the standpoint adopted by the parties in the Courts below. (Wadia and Macklin, JJ.) SARJERAO APPAJIRAO v. GOVERNMENT OF THE PROVINCE OF BOMBAY. I.L.R. (1943) Bom. 534=213 I.C. 348=17 R.B. 40=45 Bom. L.R. 810=A.I.R. 1943 Bom. 427.

S. 100—New plea—Question of law arising on jacts found by trial Court—If can be raised for first time.

A question of law arising on the facts found by the trial Court, when they are not in dispute may be entertained in second appeal, though not raised in the lower appellate Court. (Rowland and Chatterji, JJ.) Medni Proshad v. Sursse Chandra Tiwari. 21 Pat. 799=204 I.C. 41=9 B.R. 105=15 R.P. 185= A.I.R. 1943 Pat. 96.

S. 100—New plea—Question of law not raised in pleadings—If can be raised in second appeal.

A pure question of law which involves no further investigation of facts, may be raised in second appeal, though not raised in the pleadings. (Chandrastkhar Aiyar, J.) RAMACHANDRA PRABHU v. MAHADEVI. 58 L. W. 566=1945 M.W.N. 683=A.I.R. 1946 Mad. 57=(1945) 2 M.L.J. 416.

# Powers of High Court.

—S. 100—Powers of High Court—Remand—When necessary—High Court's power to set aside findings of lower Courts and to substitute its own findings of fact. Harihar Prasal SINGH v. JANAK DULARI KUER. [see Q.D.:1936-40 Vol, I, Col. 3285.] 191 I.C. 275=7 B.R. 153=A.I.R. 1941 Pat. 118.

#### Question of fact.

——S. 100—Question of fact—Interference— Lower Court not dealing with the entire evidence.

It is not always possible or necessary to refer in the judgment to every document on the record or to the evidence of every witness examined at the trial. Hence if from a perusal of the judgment of the lower appellate Court, the Chief Court is satisfied that all the relevant material was considered, though specific reference in detail is not made to every piece of evidence or the record it will not be right to interfere with the finding of the lower appellate Court on a question of fact. (Kaul, J.) Sheo Kumar Singh v. Mahraj Singh. 1945 O.A. (C.C.) 26: = 1945 A.L.W. (C.C.) 366=1945 O.W.N. 401= 1945 A.W.R. (C.C.) 263.

S. 100—Question of fact—Interference—High

It is not open to the High Court sitting in second appeal to set aside the decision of the lower Court on a pure question of fact. (Varma and Shearer, J. SUNDERBATI KUER v. SUKHDEO SINGH. (1945) F. W.N. 225.

#### Question of Law.

S. 100—Question of law—Burden of proof for correctly laid.

O. P. CODE (1908), S. 100-New plea.

GAJ. 1942 A.W.R (Rev.) 361 (2) = 1942 O.W.N. (B.R.) 496 (2) = 1942 O.A. (Supp.) 387 (2).

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# Question of Law.

-S. 100-Question of law-Burden of proof if correctly laid,

C. P. CODE (1908), S. 100-Question of Law.

Whether the burden of proof has been correctly laid or not is a question of law. (Stone, C.J. and Clarke, J.) RAMGULZARILAL v. BHANUPRASAD. I.L R. 1942 Nag. 441=195 I.C 527=14 R.N. 55=1941 N.L.J. 117=A.I.R 1941 Nag. 188.

\_\_\_\_S. 100 - Question of law-Construction of deed.

The true construction of a deed is always a question of law for the Court to decide, and the High Court can consider it in second appeal. (Patanjali Sastri, J.) Seela Bodi Naicker v. Zamindar of Bodinaickanur. 217 I.C. 126=17 R.M. 273=56 L.W. 608=1943 M.W.N. 661=A. I.R. 1944 Mad. 50=(1943) 2 M.L.J. 622.

—— 8. 100—Question of law—Construction of document. Om Parkash v. Mukhtar Ahmad. [See Q.D. 1936-'40 Vol. I, Col. 3285.] I.L.R. (1941) Lah. 601=13 R.L. 482=193 I.C.789,

The construction of a document is not a point of law unless the document forms the root of title of a party or embodies a contract between the parties. (Das and Adami, JJ.) LAL RAJENDRA SINGH v. MADAN SINGH. 10 Cut. L.T. 62.

——S. 100—Question of law—Construction of docu.

The construction of a document on which the suit is based is a question of law open in second appeal. (Rowland, J.) HADU MAHARANA v. RAMDULAL GHOSE. 213 I.C. 394—10 B R. 601—17 R.B. 19—9 Cut. L.T. 27—A.I.R. 1944 Pat. 35.

3. 100—Question of law—Failure to appreciate and determine question of fact.

There is no difference in principle between a failure to appreciate and determine the real question of fact to be tried and a failure to appreciate and determine question of fact which vitally affects the issue stated in the case. In either case the failure is a failure in the duty imposed by law upon the Court and the question whether there has been such a failure must be a question of law, (Lord Clauson.) RAHMAT ILAHI v. MAHOMED HAYAT KHAN. 1943 A.L.J. 569=56 L.W. 762=1943 A.L.W. 616 (2)=48 C.WN. 109=1943 O.W.N. 531=70 I.C. 225=210 I.C. 507=16 R.P.C. 164=10 B.R. 348=78 C.L.J. 7=1944 M.W.N. 81=I.L.R. (1944) Kar. (P.C.) 40 (P.C.) 47 Born. L.R. 553=A.IR. 1943 P.C. 208=(1943) 2 M.L.J. 606 (P.C.).

8. 100—Question of law-Inference as to intention from document of title.

Per Din Mohammad, J.—It is true that ordinarily the question of intention is a question of fact but when the question of the interpretation of a document of title is at the same time concerned, it is always a question of law two determine what legal inference can be deduced from the contents of the document taken as a whole. (Young, C.J. and Sale, J.) RAM RAKHI v. PEOPLES BANK OF NORTHERN INDIA, LTD. 199 I.C. 677—14 R.L. 415—43 P.L.R. 689—A.I.R. 1942 Lah. 42.

C. P. CODE (1908) S .100-Question of Law.

The question whether on facts proved an inference of there being a permanent tenancy or not can be drawn is a question of law and not a question of fact. (Din Mahomed and Sale, JJ.) MAHOMED YUSAF v. HAFIZ ABDUL KHALIQ. 211 I.C. 366=16 R.L. 210=45 P L.R. 339=A.I.R. 1944 Lah. 9.

The proper effect of a proved fact is a question of law and the question whether a tenancy is permanent or precarious is a legal inference from facts and not in itself a question of fact. Hence a finding by the first two courts that the tenants had the status of permanent tenants is not binding in second appeal. (Harries, C.J. and Fast Ali, J.) RAM LAL |SAHU v. BIBI ZOHRA. 20 Pat. 115=195 I.C. 583=14 R.P. 136=22 P.L.T. 721=7 B.R. 946=A.I.R. 1941 Pat. 228.

S. 100—Question of law—Inference of fraud or collusion from proved or admitted facts—If one of fact or law,

The question whether there was fraud or collusion, when it has to be inferred from proved or admitted facts, is one of law, and not a question of fact. (Kuppuswam: Ayyar, J.) MURUGAAPA CHETTIAR v. CHENGALVARAYA CHEITIAR. 57 L.W. 370=A.I. R. 1944 Mad. 465=(1944) 2 M.L.J. 8.

The High Court may decline to interfere in revision if it is satisfied that substantial justice has been done between the parties. But where it is called upon to decide questions of law in second appeal, no discretion vests in it and it has no right to decide a case on merely equitable grounds if they come into conflict with or ignore the provisions of law, statutory or otherwise. (Abdur Rahman, J.) HARI SINGH v. NARAIN DAS. 47 P.L.R. 130= A.I.R. 1945 Lah. 175.

The interpretation of a lease is a question of law. (Henderson, J.) GOPAL CHANDRA v. DWARIKA. NATH. 195 I.C. 864-14 R.C. 144-74 C.L.J. 535-A.I.R. 1941 Cal. 446.

S. 100—Question of law—Interpretation of order of Judge.

Whether the interpretation of a particular order is a question of fact, or a question of law, or a question of mixed fact and law depends on the circumstances of each particular case. Where intention is to be inferred from the terms of a document, in this case the order, the question is one of law, or mixed question of fact and law; where the intention is to be inferred from the other facts and circumstances tending to show what was the real intention of the Judge in passing that particular order, then the question may be either a question of pure fact or, again, may be a question of mixed fact and law. (Tek Chand and Dalip Singh, II.) MUNICIPAL COMMITTEE, HAFIZABAD v. GOPAL DAS. 193 I.C. 334—13 R.L. 449—A.I.R. 1941 Lah. 62.

-8, 100—Question of low—Legal effect of proved fact—Meaning.

C. P. CODE (1908), S. 100—Question of Law.

The statement that "the proper legal effect of a proved fact is essentially a question of law" does not mean that it is a question of law whether a certain interence should be drawn from proved facts. It only means that the legal effect of a finding of fact is a question of law. (Bennett and Madeley, 11.) Keshri Kumar Singh v. Ram Swaroop Singh. 17 Luck. 158—196 I.C. 175—14 R.O. 138—1941 A.L. w. 877—1941 O.L. R. 654—1941 O.A. 746—1941 A.W.R. (Rev.) 778—1941 O.W.N. 1027—A.I.R. 1942 Oudh 19.

whether facis found constitute "sufficient cause" under S. 5 of Limitation Act.

The question whether facts found by the lower appellate Court are such as to constitute "sumcient cause" within the meaning of S. 5 of the Linutation Act, is a question of law for purposes of second appeal. (Tek Chana, J.) Kishan Chand v. Mohammad Hussain. 199 I.C. 851=14 R.L. 434=43 P.L.R. 502=A.I.R. 1942 Lah. 94.

S. 100—Question of Law-Question whether usuiructuary mortgage and lease back to mortgagor are parts of one transaction—If open in second appeal. See C. P. Code, O. 34, R. 14. 22 Pat. 320.

stablish nuisance.

The question whether certain proved facts establish a nuisane is a question of law. (Munit, J.) JUGAL KISHORE v. RAM DARAN DAS. 209 I.C. 462=46 P.L.R. 125=16 R.L. 130=A.I.R. 1943 Lah. 306.

S. 100—Question of law—Question whether inam grant is personal to grantee—Question depending on inferences to be drawn from Wallace's register and Traverse's register—Finding by lower appellate Court—If conclusive.

The proper effect of a proved fact is a question of law. Where the Court has to decide what are the inferences to be drawn from the entries in certain registers, e.g. Wallace's register and Traverse's register about inams, the question is one of law. A finding that an inam grant was personal to the grantee, based on the inferences drawn from such entries, is not one of fact, but one of law which can be challenged and interfered with in second appeal. (Leach, C. J. and Shahabuddin, J.) Sherfuddin v. Kairoon Bi. I.L.R. (1945) Mad. 194=57 L.W. 366=1944 M.W.N. 513=A.I.R. 1944 Mad. 468=(1944) 2 M.L.J. 56.

S. 100—Question of law—Whether lower Court had misconceived or failed to appreciate some real question of fact—Interference in second appeal.

The question whether the lower Court had or had not misconceived or failed to appreciate and determine some real question of fact which vitally affected the case and required to be determined, is essentially a question of law justifying interference in second appeal. (Lobo and Tyabji, II.) MOULEDINA v. PARCHOMAL,

C. P. CODE (1908), S. 100—Question of Law. I.L.R. (1944) Kar. 223=219 I.C. 139=18 R.S. 34=A.l.R. 1944 Sind 209.

-S. 100—Question of law and fact—Custom if made our—Second appellate Court—Power to took into facts.

The question, whether, on the materials on record, it can be said that the custom set up has been made out, is a mixed question of law and fact. It is open to the High Court in second appeal to look into the facts. (Iqbal Ahmad. C.J. and Sinha, J.) SAHU BISHESHAR DAYAL v. CHHEDALAL. 1945 A.L.W. 284—1945 O.W.N. (II.C.) 263—1945 A.W.R. (H.C.) 249—1945 R.D. 459.

S. 100—Trial Court accepting objections to award and giving decision on merits—Appellate Court holding award valid and passing decree thereon—Second appeal—It competent. See C. I'. Code, Scii, II. Paras. 10 and 21. A.I.R. 1945 Lah. 127 (F.B.).

The decision of Court must in law be based on the evidence parol and otherwise legally recorded therein. A Court will be committing an error of law it it completely disregards material evidence on the record when arriving at any conclusion. Entirely to ignore a piece of evidence which constitutes a tatal bar to the success of a party must be counted an error of law. (Davies.) Sukh Deo v. (Jauri Shankar, 1941 A.M.L.J. 84.

dure—Lower Court misdirecting itself in apprecioung evidence and requiring nigher standard of proof—Interference by High Court.

Where the lower appellate Court misdirects itself in appreciating the evidence and requires a standard of proof migher than that laid down by the Evidence Act, that is an error of law or procedure which would justify interference under 5. 100 (1) (c), C.P. (ode. The High Court in second appeal is entitled to interfere in such a case, even though the inding of fact is against the appellant. (King J.) Venkata Rao v. Venkayya. 207 1.C. 163=16 R.M. 47=55 L.W. 772=A.I.R. 1943 Mad. 38 (2)=(1942) 2 M.L.J. 427.

S. 100 (c)—Error or defect—Finding of fact—Inference from facts without consideration of facts—Interference in second appeal.

Where the judgment of the District Judge on first appeal is one of reversal and the finding which arrived at by him is in the nature of an inference from the facts and circumstances of the case, his failure to take into consideration the very facts and circumstances upon which the findings of the Munsif were based amounts to such an error as would justify interference by the High Court in second appeal. (Fast Ali and Varma, II.) R. P. Ghosh v. Bengal and North-Western Ry. Co. Ltd. 22 Pat. 154=15 R.P. 354=206 I.C. 525=9 B.R. 330=A.I.R. 1943 Pat. 177.

C.P. CODE (V OF 1908), S. 101.

-Ss. 101 and O. 47, R 1 (b)—Dismissal under S. 101-Remedy for amendment thereafter.

Where a second appeal is dismissed under S. 101, C. P. Code and the decree is sought to be amended then it has to be obtained by a review application. O. 47, R. 1 (b) permits a review application, because the second appeal was not one allowed by law. (Davies, J.). Wali Uddin v. Mohammad Shafi. 1941 A.M.L.J. 54.

\_\_\_\_\_S. 102—Applicability—Suit for cess of value below Rs. 500—Second appeal—Competency.

A suit for arrears of cesses is excepted from the cognisance of the Small Cause Court. S. 102, G. P. Code, does not therefore bar a second appeal in the case of a suit for cess valued at less than Rs. 500. (Fazl Ali, C. J., and Sinha, J.) BALWANT v. BISHWANATH. 24 Pat. 307=1945 PW.N. 419=AI.R. 1945 Pat 417.

-S 102—Applicability—Suit of Small Cause nature—Co-sharer—Suit for rent against tenant—Dispute as to share of plaintiff in land—Other cosharers made parties to suit—Decision in—Second appeal—If barred. Vizia Ramamurthi v. Suryanarayana Murthi. [See Q.D. 1936-40, Vol. I, Col. 1264.] 191 I.C 496=13 R.M. 496.

by a holder of an inam village against minor inamdars for damages for their unauthorised use of his water, for cess paid by him for poruppu and for interest on the sums due— Suits if of a small cause nature, Madras Local Boards Act, S. 88, First Proviso.

The landholder of an inam village brought a suit against some minor inamdars for damages for their unauthorised use of his water, for cess paid by him under the Madras Estates Land Act to Government on their lands, for poruppu and for interest on the above sums due. In second appeals on a preliminary objection as to their maintainability,

Held, that the suits were of a small cause nature and that hence no second appeals lav. The defendants not being tenants of the plaintiff what has to be paid by them for their unauthorized use of the plaintiff's water could not be 'rent.' Nor could it be 'rent' under the Madras Estates Land Act because the defendants were not 'ryots' of the landholder. As it was conceded that the defendant's minor inamdars were not intermediate landholders within the meaning of the first proviso to S. 88 of Madras Local Boards Act, it followed that the zamindar was not bound to pay to Government the cess due by the defendants and that the cess cannot therefore be regarded as 'rent." Poruppu is not 'rent' and hence a claim for poruppu is of a small cause nature. As the principal claims were of a small cause nature, it followed that interest on the sums due on those claims were also of a small cause nature. (Horwill, J.) Madura, etc., Devasthanams v. Solai Alagu Kudumban. 57 LW. 359=A.I.R. 1944 Mad. 442=(1944) 1 M.L J. 456.

-Second appeal—Suit for money below Rs. 500-Small Cause nature-Second appeal-Competency. No second appeal lies against the decision in a case where the claim is one for money below Rs. 500, the suit being of a small Cause nature. (Sinha, J.) RAMESHWAR MISTRI v. BABULAL (1945) P.W.N.

-S. 102—Second appeal—Suit of Small Cause nature tried as original suit. See Provincial Small Cause Courts Act, S. 16. (1941) 1 M.L.J. 635.

C.P. CODE (V OF 1908), S. 104.

-S 102—Suit of small cause nature—Co-sharer landlord in possession under S. 22 (2), Bihar Tenancy Act-Suit against for money due to co-sharers-Second appeal. See Bihar Tenancy Act, S. 22 (2).

23 Pat LT 348.
——S 102—Suit of Small Cause nature—Matter in execution of decree-Second appeal, if lies. SITA-RAM v. BADRI DASS. [See Q.D. 1936-40, Vol. I, Col. 3286.] 191 I.C. 227=13 R.O. 239=A.I R. 1941 Oudh 101.

-S. 102-Suit of Small Clause nature-Suit for money levied under illegal distress and interest thereon-Second appeal-Maintainability. See Provincial Small Cause Courts Act, Sch. II, Art. 35 (j). 47 Bom. L.R, 38 (F B.).

-S 102-Suit of a Small Cause nature-Test-

Right of second appeal.

Any suit of a valuation of less than Rs. 500 cannot be said to be of a nature cognizable by a Court of Small Causes without regard to the second schedule to the Small Cause Courts Act. Hence a second appeal would not be barred where though the valuation is less than Rs. 500 the suit is excluded from the cognizance of the Court of Small Causes by the second Schedule to the Small Cause Courts Act. (Bennett, J.) Mohammad Ahmad Said Khan v. Kishan, 1945 A L.W. 285=1945 O.W.N. (H.C.)

-Ss. 102 and 115—Suit to declare non-liability to pay tax and to recover tax realised—Nature of decree
—Second appeal if lies—Revision.

Where a suit is to declare that the plaintiff is not liable to pay a particular tax and to recover the tax alleged to be illegally realised from him, the Small Cause Court is not competent to try it in view of the prayer for declaration. But the claim is substantially one for refund of tax and the suit is one of a Small Cause nature and a second appeal cannot lie from the decree in such a suit, but a revision is competent. (Collister, J.) Bansi Lal v. Chairman, Town Area Committee, Saidpur. I.L.R. (1941) All. 216=193 I.C. 633=13 R.A. 434=1940 A. L.J. 889=1941 A.W.R. (H.C.) 13=1941 A.L. W. 1=A.I.R. 1944 All. 144.

-S. 103—Second appeal—Power of High Court

to go into evidence and determine a question.
Under S. 103, C.P. Code, it is open to the High Court in second appeal to go into the evidence and determine the question arising in the case, and it will do so if it thinks such a course advisable to save a remand upon that question. (Fazl Ali and Meredith, 77.) Kuseshwar Jhav. Uma Kant Jha. 197 I.C. 818=14 R.P. 371=8 B.R. 302=22 Pat. L.T. 1001=A.I.R. 1942 Pat. 188.

against order under O. 7, R. 10—Second appeal, if lies. An order dismissing an appeal against an order under O. 7, R. 10, C.P. Code, returning the plaint for presentation to the proper Court is not open to a second appeal. (Bennett, J.) MATHURA PRASAD RAM DHAN v. MANOHAR DAS RAM PRASAD. 202 I. C. 378=15 R.O. 120=1942 A.W.R. (C.C.) 322 (1)=1942 O.A. 426=1942 O.W.N. 494= A.I.R. 1942 Oudh 480.

-S. 104 (1) (a) and Sch. II para. 8-Refusal of extension of time to file award and supersession of arbitration-Appealability.

Where a Court in refusing to grant extension of time to file an award also supersedes the arbitration and sets aside the reference, the order is appealable. The

O. D. I-60

# C.P. CODE (V OF 1908), S. 104.

latter portion of the order being of no importance cannot have the effect of precluding the applicant from appealing against the refusal of extension of time. (Ghulam Hasan and Madeley, JJ) Симман v. Виј Монан Das. 18 Luck. 425=204 I С. 144 =15 R.O. 273=1942 O.A. 298=1942 O.W.N. 407=1942 A.W.R. (C.C.) 270=A.I.R. 1943 Oudh 117.

S. 104 (c), O. 43, R. 1 (m) and Sch. II, Para. 16 (2)—Award—Agreed modifications—Objections

-Disposal—Appealability—Revision.

Where an award is by consent of parties ordered to be modified and a decree in the light of such modification is also ordered to be drawn up, an order disposing of objections to such modified award is not appealable under S. 104 (c), C.P. Code, for it is not an order modifying or correcting the award. Nor is it a decree which could be appealed against under Sch. II, Para. 16 (2). Neither does it amount to an order recording or refusing to record an agreement or compromise which could be appealed against under O. 43, R. I (m). Being an interlocutory order it is not revisable either. (Thomas, C.J. and Agarwal, J.) RAM GOPAL v. RAM SHANKAR. 17 Luck 17=196 I.C. 496=14 R.O. 183=1941 O. L.R. 695=1941 A.W.R. (C.C.) 329=1941 O. A. 785=1941 A.W.R. 896=1941 O.W.N. 1077 =A.I.R. 1941 Oudh 598.

-S. 104 (1) (f)—Applicability.

S. 104 (1) (f), C.P.Code applies only to orders filing an award in an arbitration which took place in 1939 without the intervention of the Court. (Harries, C. J. and Manohar, Lall, J.) RAM BHADUR JHA v. SREE KANT JHA. 22 Pat. 108=211 I.C. 137=16 R.P. 201=10 B.R. 344=A.I.R. 1943 Pat.

S. 104 (1) (f) and (2)—Application under Sch. II, para. 20—Decree passed on award without recording formal order filing award—Appeal filed against whole decision but directed against only award and not decree—Second appeal—If competent. TRAILOKYA NATH BANERJI v. SUKUMAR BASU. [See Q.D. 1936-1940, Vol. I. Col. 1268]. I.L.R. (1940) 2 Cal. 551=194 I.C. 610=14 R.C. 2=A.I.R. 1941 Cal. 202.

-S. 104 (1) (f) and (2)—Order filing award-Validity of reference challenged-Second appeal-If competent. Trailokya Nath Banerji v. Sukumar Basu [See Q.D. 1936-1940, Vol. I, Col. 1269]. I.L.R. (1940) 2 Cal. 551=194 I.C. 610=14 R.C. 2=A.I.R. 1941 Cal. 202.

S. 104 (f) and Sch. II, Para. 21-Relative scope of—Filing followed by judgment and decree—Appeal—Competency. Kesho Lal. v. Laxman Rao. [See Q.D. 1936-1940, Vol. I, Col. 1269]. 192 I.C. 371=13 R.N. 244.

S. 104 (f) and O. 43, R. (1) (v)—Remand in appeal against refusal to file award—Second appeal.

Where in an appeal against a refusal to file an award, the appellate Court remands the case to the lower Court for the award being filed the order is one under S. 104 (f) and hence no second appeal lies against it. It cannot be appealed against as one under O. 43, R. (1) (v). (Davies.) SUKHDEO v. NATHU LAL. 1941 A.M.L.J. 40.

-S. 104 (h) and O. 21, R. 98-Order directing imprisonment of obstructor—Appeal.

Where an order of imprisonment is passed in

execution proceedings against a person denying delivery of possession an appeal does not lie. (Almod,

C.P. CODE (V OF 1908), S. 105.

J. C.) MAHOMED YUSAF v. MASALLI. 207 I C. 607=16 R. Pesh 16=A.I.R. 1943 Pesh, 58

-S. 104 (2)—Interpretation of.

The words of sub-S. (2) of S. 104, C.P. Code. are perfectly general and there is no reason to restrict their meaning by interpreting them to mean an order deciding the appeal on the merits. (Verma, 7.) UMMATUR RABAB v. MAHADEO PRASAD. 196 I.C. 574=14 R.A. 173=1941 A.W R. (H.C.) 251=1941 O W.N. 1010 (2)=1941 A.L.W. 826 =1941 O.A. (Supp ) 681=1941 A.L.J. 516=A. I.R. 1941 All. 338.

Second appeal. See G.P. Code, O. 22, R. 10. 43 Bom. L.R. 719.

-Ss. 104 (2) and 95-Second appeal in respect

of orders under S. 95-Maintainability.

In view of the provisions of S. 104 (2), C.P. Code, a second appeal is not comptetent where an appeal against an order awarding compensation under S. 95, C.P Gode, is dismissed. (Yorke, 7.) Gyan Prakash Mital v. Kishori Lal. I.L.R. (1942) A. 360=201 I.C. 184=15 R.A. 45=1942 A.L. W. 307=1942 A.L.J. 284=1942 A.W.R. (H.C.) 114=A.I.R. 1942 All. 261.

-Ss. 105 and 108—Appeal from order—Previous

interlocutory order—If can be agitated.
S. 105 C.P. Code is explicit that it is only when there is an appeal from a decree that the orders previous to that decree which could not originally be appealed from could be questioned. But where there is no decree but only an order of stay under S. 34 Arbitration Act, it is not open to a party appealing against such order to agitate the question as to whether the trial judge was right in superseding the reference to arbitration entered into in Court or not. (Almond, J. G. and Mir Ahmad, J.) MITHA SHAH v. DEVI DASS. A.I.R. 1944 Pesh. 33.

-S. 105 and O. 47, R. 7—Granting of review-Difference in scope between appeal against order grant-

ing review and appeal against final decision.

Where a review is granted and an appeal is filed against that order, the attack has to be confined only to the grounds set out in R. 7 of O. 47, C.P. Code. But if an appeal is preferred against the final decision itself after review, there is no such restriction. Only if the order granting review is attacked it could be done only on the grounds set out in R. 7 of O. 47, C.P. Code. (Bose, 7.) Anandrao Baliramu. Parwati-BAI. I.L.R. (1942) Nag. 487=197 I.C. 221=14 R.N. 153=1941 N.L.J. 519=A.I.R. 1941 Nag. 308,

-S. 105-Interlocutory order-Appeal against withdrawn-If dehars party from challenging same in appeal against final decree."

An interlocutory order could only be question in an appeal from the final decree and it does not make any difference that the party had filed an appeal against the first order. He will not be debarred from challenging that order in the appeal against the final decree after he had withdrawn his appeal against that earlier order. (Almond, J.C. and Mir Ahmad, J.) AMIR KHISRO v. FEROZ SHAH. 207 I.C. 282=16 R. Pesh. 7=A.I.R. 1943 Pesh. 37.

S. 105—Interlocutory orders—Rule as to appeal - Affecting the decision of the case.'—Meaning.

Any defect in any interlocutory order affecting the decision of the case may be set forth as a ground of objection in the memorandum of anneal whether it is

# C.P. CODE (V OF 1908), S. 105.

appealable or not. The words "affecting the decision of the case" mean affecting the decision of the case on the merits. (Ghulam Hasan and Agarwal, 37.) MOHAMMAD NAJIB-UZ-ZAMA V. SHI-O SHANKER. 207 I C 38=16 R O. 6=1943 O A. (C.C.) 125=1943 O.W N 195=A.I.R. 1943 Oudh 288.

——S 105—Scope—Suit for redemption of kanom under Malabar Tenancy Act—Application by defendant for renewal—Order on renewal application not appealed against—Appeal from decree in redemption suit—Validity of order on renewal application—If can be agitated.

There is nothing in S. 105, C. P. Code to indicate that in cases where an appeal is provided, a defect in an order affecting the decision of the case cannot be set forth as a ground of objection in the memorandum of appeal against the decree in the suit merely because no appeal had been filed against that order. Consequently in an appeal against the decree in a suit for redemption of kanom under the Malabar Tenancy Act, the error, defect or irregularity or validity of the order passed on an application for renewal by the defendant (tenant) can be set forth as a ground of objection, though the order on the renewal application has not been appealed against. (Kuppuswami Ayar, J.)
NARAYANAN NAMBISAN v. KRISIINAN NAIR. 57 L.
W. 512=1945 M.W.N. 23 (2)=A.I.R. 1945 Mad. 3=(1944) 2 M.L.J. 202.

S. 105 (1)—Construction—"Affecting the decision of the case"—Meaning of—Preliminary issue in suit decided for plaintiff—Reversal by High Court in revision—Suit dismissed in consequence—appeal to High Court—Order in revision—Correctness of—If can be considered in appeal. Pichu Ayyangar v. Ramanuja Jeer Swamigal. [See Q.D. 1936-40, Vol. I, Col. 1271]. 194 I.C. 809=14 R. M. 84.

S. 105 (1) and O. 9, R. 6—Refusal to permit filing of written statement after order to proceed with suit ex parte—Agitation in appeal from final decree—Effect

of order to proceed ex parte.

Where on the defendant's absence a Court orders the suit to proceed ex parte and adjourns it but refuses to permit the defendant to file his written statement and decrees, the suit ex parte on the adjourned day the propriety of the Courts refusal of leave to file the written statement could be agitated in an appeal from the final decree under S. 105 (1), C. P. Code, in as much as the order is not appealable under O. 43, R. 1 and defendant was not bound to apply under O. 9, R. 13. An order to proceed ex parte does not forbid the absent party from attending Court and taking part in the further stages of the proceedings. So no permission is necessary to take such part and the order to proceed ex parte need not be formally set aside by an order of the Court. (Salle, S.M. and Ross, A. M.). HARCHARAN v. RAI RAMKISHORE. 1943 R.D. 537=1943 A.W.R. (Rev.) 324=1944 A.L.J. (Supp.) 17.

- ——S. 107 and O. 41, R. 27—Additional evidence in appeal—Filling up of gaps in evidence—Evidence of attesting witness—Production in second appeal—If permissible. Kali Charan v. Suraj Bali. [See Q.D. 1936-40, Vol. I, Col. 3286]. 191 I.C. 215=13 R.O. 222=A.I.R. 1941 Oudh 89.
- ——Ss. 107 (2) and 148—Powers of an appellate Court to extend time—Limits. See U. P. Tenancy Act, S. 163 (4) and C. P. Code, Ss. 107 (2) and 148. 1944 A.W R. (Rev.) 159 (1).
- ——Ss. 107 (2) and 141—Scope and effect— BATORE. I.L.R. (1942) Mad. 618=202 I.C. 170 Civil Revision Petition in High Court—Return under O. 7, R. 10 for presentation as appeal in District = A.I.R. 1942 Mad. 535=(1942) 1 M.L.J. 296.

# C.P. CODE (V OF 1908), S 109.

Court—Application for—Maintainability. See C. P. Code, O. 7, R. 10. (1942) 2 M.L.J. 99.

S 109—Applicability—Application to set aside ex parte decree in appeal—Application to excuse delay in making application—Order dismissing—Right to grant of leave to appeal.

Neither an order dismissing an application for setting aside an ex parte decree in an appeal nor an order refusing to excuse the delay in making the application can be held to fall under S. 109 (a) or (b), so as to entitle the applicant to the grant of leave to appeal to His Majesty in Council. (Venkataramana Rao and Horwell, JJ.) RAMASWAMI UDAYAR v. RAMANATHAN CHETTIAR. 202 I C 75=15 R.M. 428=55 L W. 163=1942 M.W.N. 142=A.I R. 1942 Mad. 357 (1)=(1942) 1 M.L.J. 291.

——Ss. 109 and 110—Applicability to proceedings under U. P. Land Revenue Act. See U. P. Land Revenue Act. See U. P. Land Revenue Act, S. 234 and C. P. Code, Ss. 109 and 110. 1944 R.D. 616.

Ss. 109 and 110—Application for leave to appeal—Leave asked for purpose of raising new point for first time—If to be granted. Mahomed Shadak Koyi Saheb v, Venkata Komaraju. [See Q.D. 1936-40, Vol. I, Col. 1273]. 193 I.C. 353=13 R. M. 656.

S. 109—Leave to appeal to Privy Conncil—Point

of law already decided.

Where the point of law involved is clearly laid down in the provision of law itself and has also been laid down by the decisions of the Courts, no leave to appeal to the Privy Council can be granted. (Sathe, S.M.) NIZAMUDDIN v. SHEO PRAKASII. 1944 A W.R. (Rev.) 31=1944 R.D 72.

Ss. 109 and 110—Scope and effect of—Decree of affirmance—Right of appeal—When available.

Where the decree of the High Court is one of affirmance, there is no right of appeal unless the appeal involves some substantial question of law. (Harries, C.J., Fazl Ali, and Manohar Lall, JJ.) RAJA BRAJASUNDER DEB v. RAJENDRA NARAYAN BHANJ DEO. 20 Pat. 459=195 I.C. 344=14 R.P. 109=22 Pat.L.T. 736=7 B.R. [906=A.I.R. 1941 Pat. 269 (S.B.)

Ss. 109 and 110—Subject-matter of valuation of appeal—If to include interest subsequent to appellate decree sought to be appealed against.

The grant of interest subsequent to the date fixed for payment in a mortgage decree is discretionary and grantable under S. 34, C. P. Code, prior to 1929 and the law is the same even after 1929. Therefore even if the Judicial Committee is likely to reverse the decision of the High Court on appeal on the facts of the particular case it might refuse to awaid interest from the date fixed for payment in the lower Court. Therefore what may or may not be awardable is not to be included as part of the claim and if without adding the interest the value is less than Rs. 10,000 a party is not entitled to leave to appeal to the Privy Council

Quaere.—Whether after the amendment of 1929 even interest after the date of suit comes within S. 34, C. P. Code and whether the grant of interest at the contract rate up to the date fixed for payment is obligatory. (Venkataramana Rao and Somayya, JJ.) RANGASWAMI GOUNDAR v. OFFICIAL RECEIVER, COMBATORE. I.L.R. (1942) Mad. 618=202 I.C. 170=15 R.M. 453=1942 M.W.N 399=55 L.W.120=A.I.R. 1942 Mad. 535=(1942) 1 M.L.J. 296.

C.P. CODE (V OF 1908), S. 109.

-Ss. 109 and 110-Substantial question of law-Question raised for the first time in the application for leave to appeal.

A question of law raised for the first time in the application for leave to appeal to the Privy Council is not a substantial question of law which would justify the granting of leave to appeal to the Privy Council. (Ross, J.M.) Anant Prasad Singh v. Lal Moham-(Ross, J.M.) MAD SINGH. 1945 A.W.R. (Rev.) 203 (2)=1945 R.D. 405.

\_S 109 (a)—"Decree or final order"-Interlocutory order in execution refusing to allow pleas of want of jurisdiction and limitation at a late stage—Not "decree."

In 1923, a money decree was passed by the Senior Subordinate Judge, Ambala, against X and some others. In April, 1927, the first application for execution was made in that Court and proceedings continued till July 1931, when it was consigned to the record room. On 19th August, 1931, the decreeholder assigned the decree to Y and after proceeding under O. 21, R. 16, C. P. Code, Y's name was substituted as the decree holder and execution ordered to proceed. In August, 1932, on an application by  $\Upsilon$  the decree was transferred to Delhi for execution issuing the certificate to the Subordinate Judge, Delhi, Province under O. 21, R. 5, the certificate should have been addressed to the District Judge, Delhi in whose Court it should have been presented and he in turn should have sent it to the Subordinate Judge for execution. The mistake was not noticed at the time and  $\Upsilon$  on the 12th January, 1933, presented the transfer certificate with a formal application for execution in the Court of the Senior Subordinate Judge, Delhi. X's right title and interest in some partnership property were attached and sold after overruling objections raised by X. At the conclusion of enquiry on remand in the Letters Patent Appeal X for the first time raised two new objections, (1) that all proceedings were null and void as the decree had not been transferred for execution to the District Judge as it should have been under O. 21, R. 5, C.P. Code, but had been sent direct to the Subordinate Judge; and (2) that the application presented on 12th January, 1933, was time barred as the first application filed on 26th April, 1927, had been presented more than three years after the High Court decree. The objections were rejected as belated and the sale confirmed and on appeal to the High Court a single Judge reversed the order holding that the subordinate Judge had assumed jurisdiction which he did not have. On L. P. Appeal the order of the Subordinate Judge was restored on the ground that X's objections as to jurisdiction and limitation were belated. In an application for leave to appeal against that order to His Majesty in Council,

Held, so much of the judgment as held that the pleas of want of jurisdiction and limitation could not be raised at that late stage will not be tantamount to a "decree. or final order." Accordingly the case does not fall unde S. 109, C. P. Code. (Tek Chand, Bhide and Beckett, JJ.) BARKAT RAM v. BHAGWAN SINGH. 208 I.C. 89=16 R L. 29=A I.R 1943 Lah. 140 (F.B.).

S 109 (a)-"Decree or final order"-Order of High Court decreeing plaintiff's claim for possession of property upon payment of money to be ascertained by trial Court—Appeal to Privy Council.

Where the High Court reverses the decree of the trial Court and passes a decree in favour of the plaintiff the case back to the lower Court with a direction

C.P. CODE (V OF 1908), S. 109.

entitling him to recover possession of certain properties valued at more than Rs. 10,000 on condition of his paying a sum of money which is to be ascertained by the trial Court according to the directions contained in the judgment of the High Court,

Held, that the order of the High Court is a decree and a preliminary decree and is, therefore, appealable

to the Privy Council.

Obiter: The order is also a final order within the meaning of S. 109, C. P. Code. (Mitter and Khundkar, 37.) Surendra Nath Sarkar v. Silendra Nath Kundu. 203 I C. 518=46 C. V N 857=A I.R. 

Compromise decree in partition suit-Setting aside on application by minor parties long after decree-Appeal to High Court-Order reversing order setting aside-Leave to appeal

-Grant of.

The expression "final order" in S. 109 (a), C.P. Code, contemplate a final order passed in a suit or a proceeding known to law. In a partition suit of 1928, there was a compromise decree passed on 11-12-1930. On 15-11-1937, the defendants in that suit who were minors at the date of the compromise applied for an order setting aside the compromise decree on the ground that the provisions of O. 32, R. 7, C. P. Code, were not complied with and that their guardians ad litem were guilty of gross negligence. The trial Court allowed the application and set aside the compromise decree, holding that the application was competent under S. 151 and O.47, Rr. 1 and 2, C. P. Code. The High Court in appeal, set aside the order of the trial Court, allowing the appeal. The defendants applied for leave to appeal to the Privy Council.

Held, that the order of the High Court could not be described as and was not a "final order" as contemplated by S. 109 (a), C.P. Code, and hence leave could not be granted. (Fazl Ali, C. J. and Agarwala, J.)
RAMESH CHANDRA v. RAMANUI. 23 Pat. 903=1945
PWN. 13=AI.R. 1945 Pat. 149.

-S. 109 (a)—'Final order'—Meaning—Order that a party is entitled to be substituted in place of deceased

party-If open to appeal to Privy Council.

An order of an appellate Court is not final order within the meaning of S. 100 (a), C. P. Code, unless it finally disposes of the rights of parties in relation to the suit and hence an order which merely decided that a particular person was entitled to be substituted in place of a deceased party is not a 'final order' as contemplated by S. 109 (a), C. P. Code, and is not appealable as such. (Agarwal and Madeley, JJ.)

HARI SARAN DAS v. HAR KISHAN DAS. 198 I.C. 658

=14 R O. 426=1942 A.W.R (C.C.) 75=1942 R.D 173=1942 O A 53=1942 O.W.N. 100= A.I.R. 1942 Oudh 283.

-S.109 (a)—"Final order"—Order dismissing appeal for non-prosecution.

An order dismissing an appeal for non-prosecution is neither a decree nor a final order passed on appeal within the meaning of S. 109 (a), C.P. Code. (Thomas, C.J. and Agarwal, J.) JAGDISH KUMAR SINGH v. HARI KRISHEN DAS. 199 I C. 835=14 R.O 525=1942 O.A. 135=1942 O.W.N 206=1942 A.W. R. (C.C.) 156=A I.R. 1942 Oudh 362.

Ss. 109 (a) and (c) and 110—'Final order'
Order of remand—Application for amendment of decree under S. 8 of the U. P. Debt Redemption Act directed to be

The High Court in disposing of an appeal remanded

# C.P. CODE (V OF 1908), S. 109.

"that the application of the judgment-debtors under S. 8 of the U. P. Debt Redemption Act be restored to its original number and the amount due to the decree-holders under S. 8 of the U. P. Debt Redemption Act be ascertained, and the decree be amended, and after the decree has thus been amended in execution should proceed in due course of law " On a question whether leave to appeal to the Privy Council against such order could be granted,

Held, that the application for execution remained a subsisting application and the execution remained pending. In other words proceedings which had given rise to the present applications still remained live proceedings and the case, therefore, did not fulfil the requirements of S. 109 (a) or of S. 110 of the C. P. Code. (Iqbal Ahmad, G.J. and Sinha, J.)
NARAIN DAS v. ALAUDDIN KHAN. I.L.R (1945)

All. 443.

S. 109 (a)—Final order passed on appeal-Order by High Court in revision under S. 75 (1), First Proviso, Provincial Insolvency Act—Leave to appeal to Privy Council—If can be granted. See FROVINCIAL INSOLVENCY ACT, S. 75 (1), FIRST PROVISO. I.LR (1944) Kar 216.

S. 109 (a)—Final order—Order under S. 115, C. P. Code—If one "passed on appeal."

An order passed under S. 115, C. P. Code, which can be only made when there is no "appeal" cannot be said to be an order passed "on appeal" within the meaning of S. 100 (a) C. P. Code. (Wedgeworth) the meaning of S. 109 (a), C. P. Code. (Wadsworth, and Patanjali Sastri, JJ.) ADAIKAPPA CHETTIAR v. RAMARAJA THEVAR. 56 L.W. 385=1943 M.W. N. 563=I.L.R. (1944) Mad. 372=213 I.C. 82 =17 R.M. 1=A.I.R. 1943 Mad. 614=(1943) 2 M.L.J. 158.

Ss. 109 (a) and 110—Final order—Orders under S. 66, Income-tax Act—Appeal to Privy Council—If

governed by Ss. 109 and 110.

Appeals from orders passed under S. 66 of the Indian Income-tax Act are regulated by Ss. 109 and 110, C. P. Code. (Harries, C. J., Fazl Ali and Manohar Lall, JJ.) HARIHAR GIR v. COMMISSIONER OF INCOMETAX, B. & O. 20 Pat. 561=195 I.C. 589=14 R.P. 133=7 B.R. 951=22 Pat L.T. 341=1941 I.T.R. 246=1941 P.W.N. 267=A.I.R. 1944 Pat. 225.

S. 109 (a)—Final order—Remand by High Court directing disposal of remaining issues—Appealability.

An order of remand passed by the High Court

directing the trial Court to dispose of the remaining issues in the case which had been left undetermined is not a final order within the meaning of S. 109 (a), C. P. Code, and as such it is not appealable. (Thomas, C.J. and Ghulam Hasan, J.) RAJESHWAR BALI v. RAJENDRA BAHADUR SINGH. 1944 A.W.R. (C. C.) 289 = 1944 O.A. (C.C.) 289.

\_\_\_\_S. 109 (a) and U. P. Encumbered Estates Act (1934), S. 13—'Final order'—Remand to lower Court to enable filing of written statement by credi-

Where the High Court remands a case under the U. P. Encumbered Estates Act and directs the lower Court to allow an opportunity to the respondents to file their written statements and then to proceed to adjudicate upon the rights of parties in accordance with the Act it is not a "final order" within the meaning of S. 109, C.P. Code and hence leave could not be granted to appeal to the Privy Council. (Ighal held by the Chief Court to raise a question of juris-

C. P. CODE (V OF 1908). S. 109.

=14 R.A. 153=1941 O.A. (Supp.) 514=1941 R.D. 656=1941 A.L.W. 738=1941 O.L.R. 674 =1941 A.W.R. (H.C.) 219=1943 A.W.R. (Rev.) 585=A.I.R. 1944 All. 333.

-S. 109 (a)—Order rejecting application for review

-Appeal.

An order by the High Court rejecting an application for review of a decree passed by it on appeal, is not an order made "on appeal" within S. 109 (a), C. P. Code, and is not, therefore, appealable to His Majesty in Council. (Mitter and Akram, 37.) DWAR-KADAS KEDAR BUX v. GAJANAN. 49 C.W.N. 758.

——Ss. 109 (a) and 110—Valuation—Subject-matter in dispute in trial and appellate Court less than Rs. 10,000—Decree for more than Rs. 10,000—Appeal

to Privy Council if lies.

Where the subject-matter in dispute both before the District Court and the Judicial Commissioner's Court was less than Rs. 10,000 though the decree passed by the Judicial Commissioner was for more than Rs. 10,000 leave to appeal to Privy Council could not be granted. (Davies.) GIRDHAR LAL V. LISHAN DEVI. 1942 A.M.L.J. 29.

-Ss. 109 (a) and 110—Valuation—Suit for redemption-Value of property if can be taken into account

when question of ownership is not involved.

Where in a suit for redemption the question of the ownership of the property is not in dispute, its value cannot be taken into consideration in computing the valuation for purposes of appeal to the Privy Council under S. 109 (a) read with S. 110, C. P. Code. (Thomas, C.J. and Ghulam Hasan, J.) RAM ASREY v. RAMESWAR PRASAD. 218 I.C. 338=18 R.O 21=1944 O.A. (C.C.) 91=1944 A.L.W. 176=1944 A.W.R. (C.C.) 91=1944 O.W.N. 120-A I.B. 1044 Ondb 238 129=A.I.R. 1944 Oudh 238.

Act, S. 33—Application under—Rejection by single Judge of High Court—Appeal rejected as incompetent—Appeal to Privy Council—If lies—Leave—If can be granted. See Arbitration Act, S. 39 (2). 45 Bom. L.R. 384.

S. 109 (c) and U. P. Encumbered Estates Act (1934), S. 6—Appeal—Competency—Order in revision quashing an order under S. 6, U.P. Encumbered Estates Act.

Where an order is passed in revision quashing an order passed under S. 6 of the U. P. Encumbered Estates Act, there is nothing to prevent an appeal to the Privy Council lying against such an order under Cl. (c) of S. 109, C. P. Code, provided it is certified to be a fit one for appeal to His Majesty in Council. (Shirreff, S. M. and Sathe, J.M.) KHU-SHHAL SINGH v. GOKAL CHAND. 1942 A.W.R. (Rev.) 117 (2)=1942 O.A. (Supp.) 134 (2)= 1942 O.W.N. (B.R.) 254=1942 R.D. 343.

Ss. 109 (c) and 115—Certificate of fitness to appeal to Privy Council-When could be granted-Revision

against award.

A case should be certified to be a fit one to appeal to His Majesty in Council under S. 109 (c), G. P. Code, when it is of wide public importance and the principle, when finally decided by their Lordships of the Privy Council would be of benefit not only to the people who were directly involved in the litigation but also to the public at large. Where the question was whether a revision against an award was rightly Ahmad, A.C.J. and Verma, J.) AIDAL SINGH v. MATA diction the decision on that point, would not be a Prasad. I.L.R. (1941) All. 573=196 I.C. 340. decision on a matter of general public inportance

# C.P. CODE (V OF 1908), S. 109.

and leave could not be granted under S. 109 (c), C. P. Code. (*Yorke and Agarwal*, 77.) Mool Chand v. Phool Chand. 192 I.C. 778=13 R.O. 408=1941 A.W.R. (C.C.) 63=1941 O.R. 233=1941 O.W.N. 130=1941 O.A. 135=A.I.R. 1941 Oudh 245.

S. 109 (c)—Certificate of fitness under—When

should be granted.

A certificate of fitness under S. 109 (c), C.P. Code, should be granted only if the decision affects not only parties to the suit but is of such great public importance depending on general principles and of such a nature that it may govern numerous cases. (Grille, C. J. and Puranik. 7.) GANGARAM v. BAPUJI. I.L.R. (1943) Puranik, J.) Gangaram v. Bapuji. I.L.R. (1943) Nag. 580=204 I.C. 338=15 R.N. 155=1942 N. L.J. 386 = A.I.R. 1943 Nag. 76.

-S. 109 (c)—Certificate under—When may be

granted.

Under S. 109 (c), C.P. Code, a case can be certified to be a fit one for appeal to His Majesty in Council only when it involves a question of great public or private importance. It is not enough that there is a substantial question either of fact of of law. (Mitter and Akram, JJ.) DWARAKADAS KEDAR BUX v. GAJANAN. 49 C.W.N. 758

-S. 109 (c)—Certificate of fitness under—When

to be granted.

In order that a High Court may be justified in granting a certificate under S. 109 (c), C.P. Code the legal questions for decision must be of great public or private importance. (M. R. Davies.) Umrao Mal Setii v. Sethani Mukand Kanwar. 1941 A.M.L.J. 134.

When to be granted. Musaheb Khan v. Raj Kumar BARSHI. [See Q.D. 1936-1940, Vol. I, Col. 1279.]. Luck. 716.

plaint-If can be granted.

The meaning of the expression fit one for appeal, in S. 109 (c), C.P. Code, is that al' in S. 109 (c), C.P. Coc question should be either great general importance to the public at or great private importance to the particular litigant and the matter is not measurable in money. it could not be said that a refusal to stay a criminal complaint would be a matter of great private importance to the particular accused, leave to appeal to Privy Council against such refusal cannot be granted. (Collister and Bajpai, JJ.)RADHEY LAL v. NIRANJAN NATH. I.L.R. (1941) All. 364=194 I.C. 606=14 R.A. 3=1941 A.Cr C. 98=1941 A.L.J. 265=1941 A.L.W. 319 (2)=42 Cr.L.J. 370=1941 O.W.N. 455=1941 O.A. (Supp.) 193=1941 A.W.R. (H.C.) 120-A I.R. 1941 All. 211 W.R. (H.C.) 120=A.I.R. 1941 All. 211.

-S. 109 (c)—"Final order"—Order in summary restitution proceedings-Appeal to Privy Council-Com-

An order passed in summary proceedings for restitution, is not a "final order" within the meaning of S. 109, C. P. Code, so as to permit of an appeal to the Privy Council. An order cannot be said to be final unless it finally disposes of the rights of the parties. (Fazl Ali, C.J. and Manohar Lall, J.) INDO SWISS TRADING CO. v. HEMENDRALAL ROY. 24 Pat. 614.

-S. 109 (c) and 110—Leave to appeal-Grounds for granting-Appeal involving large stakesufficient ground.

#### C.P. CODE (V OF 1908), S. 109.

The fact that large stakes are involved in an appeal would not in itself be a ground for granting leave to appeal to His Majesty in Council. (Pandrang Row and Abdur Rahman, JJ.) MAHADINA ROYAL v. VEERABASAVA CHIKKA ROYAL. 204 I.C 456=15 R.M. 764=1942 M.W N 136—A.I.R. 1942 Mad. 368=(1942) 1 M L J 309.

-S 109 (c)—Leave under—When can be granted

Where matter not of public importance.

When the question involved is not of public importance leave to appeal can be granted under S. 100 (c) only in special cases in which the matter in dispute is incapable of being valued in money. (Agarwal and Madeley, 77.) HARI SARAN DAS v. HAR KISHAN DAS. 198 I.C. 658=14 R.O 426-1942 A.W.R. (CC) 75=1942 RD 173 1942 O.A. 53= 1942 O.W N. 100 -A I R 1942 Oudh 283.

-S 109 (c): -Public importance,

Where the order of the Board of Revenue decides a question as to whether the decision of a special Judge as to proprietary rights should be accepted or whether it should be overruled by a further inquiry by the Collector, it is not a matter of such public importance as would justify a reference to the Privy Council, (Harper, S.M.) Mahabir Prasad v Shah Mukhtar Ahmad. 1941 R D 792=1941 A W.R. (Rev.) 1090=1941 O.A (Supp.) 880.

-S. 109 (c)-Public importance-Interpretation

of Ss. 76 (h) and 77 of the T.P. Act.
The interpretation of Ss. 76 (h) and 77 of the T.P. Act which must be necessarily arrived at on a consideration of the document in issue, is not a question which is either of public importance or of private importance which will serve as a precedent for cases likely to arise in future. (Thomas, C. J. and Ghulam Hasan, J.)
RAM ASREY v. RAMISWAR PRASAD. 218 I.C 338=
18 RO. 21=1944 O.A. (C.C.) 91 1944 A.L.
W. 176=1944 A.W R. (C.C.) 91-1944 O.W.
N. 120-A T.P. 1044 O. db 222 N 129=A.I.R. 1944 Oudh 238.

-S 109 (c)—Pulie or private importance— Question of interpretation of sections of a temporary enactment-

Delaying tactics to be guarded against.

The question involving the interpretation of two sections of a temporary Act cannot be said to be a question of 'public importance'. Where the amount in dispute is relatively small in proportion to the whole claim, it is not of 'great private importance' either. One of the matters which must invariably be taken into consideration in this connection is whether the permission to appeal is likely to delay the settlement of the substantive dispute between the parties unduly. (Ghulam Hasan, J.) RAM DULARI v. GAYA PRASAD. 20 Luck. 259=1945 A.W.R. (C.C.) 36 (2)=1945 A.L.W. (C.C.) 38=1945 O.A. (C.C.) 36 (2)=1945 O.W.N. 38=A.I.R. 1945 Oudh 241.

-S. 109 (c)—Public or private importance—Test. The mere existence of a substantial question of law does not give jurisdiction to appeal under S. 109 (6), C.P. Code and the question involved in the case must be one of great public or private importance. If a question which does not affect any large bodies of persons or communities is not one of great public importance. By private importance is meant private importance to both parties to the litigation and not only to one of them. A certificate should not be granted where it would not be right to call upon a party whose financial interest in the matter is too small to incur the risk of the cost of the appeal.

CP. CODE (V OF 908), S. 109.

(Ghulam Hasan and Madeley, JJ.) BARKHANDI MAHESH Pratap Narain Singh v. Radana. 204 I.C. 608= 15 R.O. 381=1943 O.W.N. 23=A.I.R. 1943 Oudh 266.

-S. 109 (c)—Scope.

When there is no question of great public importance and the suit is one for property only and so definable in money value, the case does not come within S. 109 (c) of C. P. Code. (R. C. Mitter, Khundkar and Pal, JJ.) BIBIIABATI DEVI v. RAMENDRA NARAYAN ROY. 202 I.C. 551=15 R C. 355=47 C.W.N. 9 =A.I.R. 1942 Cal. 498 (S.B.).

S. 109 (c)— Substantial question of law-Question whether report of enquiry into pauperism by Subordinate Court is binding on appellate Court. See C. P. Code, O. 41, R. 2 AND S. 109 (1). 1942 O. W.N. 305.

other allowed—Only one decree issued—Application for leave to appeal by party whose appeal is dismissed -Competency. Chokkalingam Chetti v. Official Assignee, Madras. [See Q.D. 1936-1940, Vol. I, Col. 3286.]. A.I.R. 1941 Mad. 227.

-S. 110—Affirming decree—Chief Court affirming everything and only correcting a mistake which was an

oversight.

Whether a decree is one of affirmance or not must depend upon the facts and circumstances of each case. Where the Special Judge owing to an oversight awarded interest at a rate not permissible under S. 27, Encumbered Estates Act and the Chief Court apart from correcting it did nothing and dismissed the appeal the decree of the Chief Court affirmed the decree of the Special Judge. (Thomas, C.J. and Ghulam Hasan, J.) DUPUTY COMMISSIONER, HARDOR v. MST. MUNNU BIBI. 202 I C. 767=15 RO 153=18 Luck 457=1942 O.W N. 527= 1942 A.W R (C.C.) 324 (2)=1942 O.A. 435= A.I.R. 1942 Oudh. 478.

-S. 110-Affirming decree-Decision reversed in part and maintained as to be remainder—Right of appeal If the decree under appeal to His Majesty in Council varies in any way the decision of the Court immediately below, then the proposed appellant has a right of appeal notwithstanding that no substantial question of law is involved. (Almond, J.C. and Mir Ahmad, J.) SARAN SINGH v. DWARKA NATH. 208 I.C. 162=16 R. Pesh. 20=A.I.R. 1943 Pesh. 45.

S. 110—Affirming decree—Decree partly maintaining lower Court's decision and partly reversing it.

If the High Court partly affirms and partly reverses the decision of a Court immediately below, the person aggrieved by the affirmed portion of the decree has no right of appeal to His Majesty in Council against that portion of the decree merely because in the other portion of the decree a variation has been made entirely to his satisfaction and he has no appealable grievance in respect thereof. For the purposes of S. 110, C.P. Code, a decree or order to be appealed from, where it partly maintains the decision of the Court immediately below and partly reverses it, is deemed to be one of affirmance when the subejet-matter of the appeal to His Majesty in Council is confined only to that part of the decree or order which affirms the decision of the Court below on that matter. (Din Mahomed, Blacker and Abdur Rahman, 33.) WAHID-UD-DIN v. MAKHAN LAL. 218 I.C. 1=A.I.R. 1944 Lah. 458 (F.B.).

C.P. CODE (V OF 1908), S. 110.

-S. 110—Affirming decree—Decree varied only as to costs.

A decree of the High Court which only varies that of the Court below on a matter of costs is a judgment of affirmation within the meaning of S. 110. (Almond, J.C. and Mir Ahmad, J.) NATHU MAL v. ABDUT GHAFUR. 209 I.C. 577=16 R. Pesh. 41=A.I. R. 1943 Pesh, 81.

by consent of parties—Effect—Leave to appeal.

Where in appeal to the High Court, the decree of the Court below is varied in some respects by consent of parties, the decree is one of affirmance under S. 110, C.P.Code, and leave to appeal to the Privy Council cannot be granted unless a substantial question of law is involved in the case. (Fazl Ali, C.J. and Manohar Lall, J.) Prandhandas v. Promode Chandra Deb. 24 Pat. 637=A.I.R 1946 Pat. 19.

-S. 110—Affirming decree—Defendant remaining ex parte—Appeal by other parties—Finding called for on application by other defendants under Madras Act. IV of 1938—Decree scaled down as regards them but left intact as regards ex parte defendant not appealing—Application by latter for leave to appeal—Maintainability -Question of fact—Grant of leave

The petitioner was the 1st respondent in a suit to recover money on mortgage deeds and promissory note executed by him, the other defendants being the members of the family of which the 1st defendant (petitioner) was manager. The 1st defendant was ex parte and the other defendants pleaded that they were not liable for the debts incurred by the petitioner. Some of the defendants were exonerated and a decree was passed against the rest. All the parties except the petitioner filed appeals and in appeal the High Court held that all the defendants were liable for the debts. In the meantime the Madras Agriculturists' Relief Act came into force and the defendants 2 to 7 applied for scaling down the debt. The case was sent down to the trialCourt for findings as to whether the debtors were agriculturists. The lower Court found that the debtors were agriculturists, but this finding was objected to in the High Court by the creditors. The High Court accepted the finding as regards defendants 2 to 7 and allowed scaling down, but did not accept the finding as regards the petitioner and held that as he had not appealed against the decree and had not himself filed any application under Madras Act IV of 1938, the decree against him should stand undisturbed.

Held, (1) that the decree of the High Court was one of affirmance of the decision of the trial Court within the meaning of S. 110, C.P. Code; (2) that the fact that a fresh right was given to the defendants by the Legislature under Madras Act, IV of 1938 and on that question as to whether the petitioner was entitled to the benefits of the Act, the two Courts differed did not make any difference; (3) that the right of the petitioner did not involve any question of law and involved only a pure question of fact and consequently the appeal did not involve a substantial question of law within the meaning of S. 110, C.P. Code, which would justify the grant of law to appeal to His Majesty in Council (Sameway) of leave to appeal to His Majesty in Council. (Somayya and Happell, 37.) KAILASA TEVAR v. VISWANATHA CHETTIAR. I.L.R. (1944) Mad. 890=218 I.C. 227=18 R.M. 14=57 L.W. 158=1944 M.W.N. 143=A.I.R. 1944 Mad. 269=(1944) 1 M.L.J.

# C.P. CODE (V OF 1908), S. 110.

S. 110—Affirming judgment—Dismissal of appeal and allowing of cross objections partly-Right of appeal to

Privy Council.

Where an appeal and cross objections are filed against a decree and the High Court in the main appeal confirms the decree of the lower Court but allows the cross objections partially the mere fact of the cross objections being allowed, and the decree of the lower Court being modified accordingly would not give the right of appeal to the party who would not otherwise have that right under S. 110 of the C.F. Code. (Ghulam Hasan and Madely, JJ.)
RAM NARESH SINGH v. JAI RAJ SINGH. 20 Luck.
256—1944 O.A. (C.C.) 255—1944 O W.N 372
=1944 A.W.R. (C.C.) 255—A.I.R. 1944 Oudh

-S. 110—Affirming decree—High Court maintaining decree of lower Court but superseding order as to costs-

Decree, if one of affirmance.

Where the High Court in appeal maintains the decree of the lower Court, the decree is one of affirmance notwithstanding that the High Court interferes with the lower Court's decision in regard to costs and supersedes the lower Court's order as to costs. (Panarang Row and Abdur Rahman, JJ.) MAHADEVA ROYAL v, VEERABASAVA CHIKKA ROYAL. 204 I C. 456=15 R.M. 764=1942 M.W.N. 136=A.I.R. 1942 Mad. 368=(1942) 1 M.L.J. 309.

-S. 110—Affirming decree—Meaning of.

Where the decree of the High Court as a whole does not affirm the decision of the Court below taken as a whole it cannot be said to be an affirming decree and an aggrieved party will be entitled to appeal to His Majesty in Council without showing that a substantial question of law is involved. (Harries, C. J., Fazl Ali and Manoha, Lal, JJ.) RAJA BRAJASUNDER DEB v. RAJENDRA NARAYAN BHANJ DEO. 20 Pat. 459=195 I.C. 344=14 R. P. 109=22 Pat.L.T. 736=7 B.R. 906=A.I.R. 1941 Pat. 269 (S.B.).

-S. 110—Assirming judgment—Variation introduced in decree due to voluntary relinquishment of relief formerly

Where so far as the High Court has occasion to deal with the matter in controversy before it, the decree of the Court below has been affirmed, and the only variation that is introduced in the decree is due to the voluntary relinquishment of a relief sought for before and granted by the lower Court, and not the result of an adjudication by the High Court, the decree of the High Court is to all intents and purposes, a decree of affirmance within the meaning of S. 110, C.P. Code. (Din Mahomed, Ram Lall and Beckett, JJ.) BRAHMA NAND v. SHREE SANATAN DHARAM SABHA. 216 I.C. 33=A.I.R. 1944 Lah. 329 (F.B.).

-S. 110—Affirming decree—Variation of order as to costs exceeding Rs. 10,000—Party benefitted by variation if entitled to appeal to Privy Council-Such variation if

relevant for purposes of variation.

The language of S. 110, C.P. Gode, is wide enough to cover the case of any variation in the decree, but the language should be restricted to variation with regard to the subeject-matter of the suit and should not be extended to those variations which are not strictly the subject-matter of the suit and which are matters in the discretion of the Court. For the purpose of the valuation of appeal to His Majesty

## C.P. CODE (V OF 1908), S. 110

and are treated as extraneous to the subject-matter of the suit. Where a decision of the Court below was affirmed by the High Court in all matters except in regard to costs which exceeded Rs. 10,000 and the party benefitted by the variation sought leave to appeal to Privy Council, held that the appeal to the Privy Council could not be taken by such party as of right. (Iqhal Ahmed, C.J. and Dar, J.).

MADHO PRASAD v. GAURI SHANKAR PRASAD. 209 I.

C. 532=1943 O.A. (H.C.) 187.=1943 A.L.W.

495=1943 O.W.N. (H.C.) 293=1943 A.W.R. (H C.) 187=I.L.R. (1943) All 840=16 R.A. 146=1943 A L. J. 378=A I. R 1943 All. 358.

-S. 110-Affirming decree - What is-" Decree"

-"Decision"—Meaning of.
The term "decree" used in connection with the High Court and the expression "decision" in regard to the lower Court in S. 110, C.P. Code. do not mean exactly the same thing; a single decree may comprise several decisions, and each decision may relate to a distinct matter. It cannot be said that any variation in a decree is enough to take it out of the last paragraph of S. 110. A suit on behalf of a trust for reveovery of possession of certain properties was dismissed; in appeal the High Court also rejected the prayer for possession but directed the defendant to pay into Court a sum of Rs. 12,100 for the benefit of the trust, on the offer and undertaking of the defendant's counsel as a matter of concession and not as a decision of the Court. The High Court also gave certain directions regarding the amount.

Held, that the decree of the High Court as regards prayer for possession was affirming the decisions of the lower Court within the meaning of S. 110, G.P. Code, that as regards the sum directed to be paid into Court it did not form the subject-matter of the proposed appeal, having been fully satisfied, and leave to appeal could not be granted as there was no substantial question of law. (Abdur Rahman and Somayya, 37.) KARUNALAYA VELANGAPULT PANDIAN v. REV. FATHER PIGNOT. 208 I.C. 65=16 R.M. 163=55 L.W. 589=1942 M.W.N. 565= A.I.R. 1943 Mad. 67=(1942) 2 M.L.J. 350.

-S. I10—Applicability—Clase under S. 66 (3), Income-tax Act—Order of summary rejection—Application for leave to appeal to Privy Council-If can be granted—Seriousness of question involved—If ground for grant of leave. See INCOME-TAX ACT, S. 66 (3). 20 Pat. 561.

-S. 110—Construction—"Directly or indirectly Possible future suits.

The phrase 'directly or indirectly ' in S. 110, C.P. Code, refers to suits in existence and not to suits in germio futuri. (Ghulam Hasan and Madeley, JJ.)
BARKHANDI MAHESH PRATAP NARAIN SINGH v. RADHANA. 204 I.C. 608=15 R.O. 381=1943 O.W.N. 23=A.IR. 1943 Oudh 266.

-S. 110—Court 'immediately below'—Single Judge of High Court.

Where a Bench of two or more judges has affirmed on a Letters Patent Appeal the judgment of a Judge of the High Court, sitting singly on the original side, the decision of the single Judge is the decision of the Court immediately below the Court passing the decree or final order within the meaning of S. 110, C. P. Code. In such a case, a certificate of fitness for leave to appeal to His Majesty in Council can be in Council costs are not taken into consideration granted only if the appeal involves some substantial

question of law. (Derbyshire, C.J. and Panchindge, J.) Рковнаматі Канwar v. Panmal Lodha. 45 С.W. N. 1002.

-S. 110—Court immediately below—Single Judge

of High Court.

Per Full Bench (Blacker, J., dissenting).—For the purposes of S. 110 a Judge sitting singly, not on the original side, but on the appellate side of the High Court is not a Court immediately below the Letters Patent Bench which hears an appeal from his decision. (Din Mohamed, Blacker and Abdur Rahman, JJ.)
WAHID-UD-DIN v. MAKHAN LAL. 218 I.C. 1=A.I.R. 1944 Lah. 458. (F.B.).

-S. 110—Right of appeal—Modification of extent

of hability.

An appellant is entitled to challenge the decision of the High Court even if the High Court has modified in his favour a decision of the trial Court, where the amount involved is Rs. 10,000 or upwards. the trial Court awarded interest to the plaintiff which amounted to Rs. 18,700 and the High Court on appeal by the defendant reduced only the amount of interest to Rs. 12,380 and the defendant denied his liability for interest, since the decision of the trial Court in regard to the extent of the liability has been modified by the High Court the defendant is entitled to a certificate under S. 110 of the C. P. Code. (Thom, C.J., Collister and Ganga Nath, JJ.)
JAGGO BAI v. HARIHAR PRASAD SINGH. I.L R.
(1941) All. 180=192 I.C. 461=13 R.A. 325=
1941 A.W.R. (H C.) 14=1941 O.A. (Supp.) 40
=1941 A.L.W. 2=1940 A.L.J. 869=A.I.R. 1941 All. 66 (F.B.).

S. 110—Subject-matter—Contract giving rise to recurring claims—Suit for damages limited to Rs. 6,000 for two years and for injunction—Injunction valued at Rs. 100 for Court-fee—Leave to appeal—Right to grant of—Approbate and reprobate—Application of doctrine.

The sum of money actually at stake in a suit or appeal may not represent the true value of the subjectmatter in dispute. The proceeding may, in many cases, such as a suit under a contract, raise the entire question of the contract relations between the parties, and that question may when settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities. in a suit on a contract giving rise to recurring rights and liabilities, claiming damages to the extent of Rs. 6,000 for a period of about 2 years and for a mandatory injunction, the plaintiff values the relief of injunction at Rs. 100, it cannot be said that the valuation given in the plaint is conclusive. The question of the contract relations between the parties would affect a much larger amount than Rs. 6,000 claimed in the plaint, the claim for damages being a recurring one. Nor would the valuation be binding upon the plaintiff so as to preclude him from contending that the value of the subject-matter of the suit is more than the valuation which he himself chooses to put in the plaint. When the plaint is not required to be valued for purposes of Court-fee according to the real or market value but upon some other basis, the doctrine of "probate and reprobate" does not apply, and the plaintiff may show when applying for leave to appeal to the Privy Council

C. P. CODE (1908), S. 110.

& Co. v. Premji Damodar. IL.R. (1944) Kar-163=220 I.C. 314=A.I.R. 1944 Sind 190.

S. 110—Substantial question of law.

Where there can be no two opinions on a point of law or where a point of law has been finally settled by their Lordships of the Privy Council, then there is no substantial question of Law involved. the rules in question are in themselves so clear that there can be no two ways of interpreting them no substantial question of law arising in the appeal. (Almond, J.C. and Mir Ahmad, J.) NATHU MAL v. ABDUL GHAFUR. 209 I.C. 577=16 R. Pesh. 41=A. I.R. 1943 Pesh.81,

-S. 110—Substantial question of law—Decision

as to admissibility of documents—Leave to appeal.

The words "substantial question" in S. 110, C. P. Code, must be understood in their being of substance to the parties, a decision holding that certain documents, which are of great importance, are inadmissible in evidence, is a substantial question of law which would justify the grant of leave under S. 110, C. P. Code. (Pandrang Row and Abdur Rahman, 37.) MAHADEVA ROYAL v. VEERABASAVA CHIKKA ROYAL. 204 I.C. 456=15 R.M. 764=1942 M. W.N. 136=A.I.R. 1942 Mad. 368=(1942) 1 M. L.J. 309.

-S. 110—Substantial question of law—If exists

when appeal is dismissed for non prosecution.

When an appeal is dismissed by the chief Court of Oudh for non-prosecution under R. 18 of Chapter XVII of the Chief Court rules, the only question is whether the discretion has been properly exercised and it is not a substantial question of law within the meaning of S. 110, C. P. Code. For the purposes of deciding the competency of the appeal the questions of law decided in the trial Court cannot be taken into consideration. (Thomas, C.J. and Agarwal, J.)
JAGDISH KUMAR SINGH v. HARI KRISHEN DAS. 199
I.C. 835=14 R O. 525=1942 O A 135=1942
O.W N. 206=1942 A.W.R. (C.C.) 156=A I.R. 1942 Oudh 362.

-S. 110—Substantial question of law—Judges differing—Whether there was sufficient deliberation—Question, is one of fact not law.

Where Judges happen to differ they need not confer with each other till the last moment with a view to bring unanimity amongst them. Even if they do not, the separate judgments which they deliver can be regarded as judgments. It is quite true that there must be discussions and exchange of views amongst judges composing a Division Bench before the judgments are prepared and delivered. But if there are consultations amongst them, it is for them and them only to judge if further discussions would be fruitful and for them only to say at what stage the discussions amongst them should cease. There cannot be an absolute rule of law as to what will amount to a sufficient conference for the purpose. The question whether or not the conference or discussions amount to a sufficient deliberation by which the Judges composing the Division Bench mutually assist each other in arriving at a decision is at most a question of degree, and as such, a question of fact to be determined with reference to the facts and circumstances of each particular case. Such a point is not a question of law much less a substantial question of law. (R. C. that the value exceeds Rs. 10,000, as required by S. law much less a substantial question of law. (R. C. 110, C. P. Code, although the Court-fee was paid on a lesser amount or upon a notional valuation put upon an injunction. (Lobo and Tyabji, JJ.) Govindji 355=47 C.W.N. 9=A.I.R. 1942 Cal. 498 (S.B).

\_\_\_\_\_S. 110—Substantial question of law—Question as to weight to be given to evidence and value to be given to statement or admission.

The question as to the weight to be attached to the evidence in the case and the value to be given to a statement or admission in a document is a question of fact and is not a question of law which would justify the giant of leave to appeal to the Pirry Council under S. 110, C. P. Code. (Pandrang Row and Abdur Rahman, Jf.) Mahadeva Royal. v. Veerabasava Chikka Royal. 204 I.C. 456—15 R.M. 764—1942 M W.N. 136—A.I.R. 1942 Mad. 368—(1942) 1 M.L.J. 309.

well settled in previous decisions.

No substantial question of law arises when the question has been well settled in previous decisions and when the judgment sought to be appealed against followed rulings consistently held, then leave to appeal cannot be granted. (Ross, 1.M.). Stra RAM v. JAGANNATH PRASAD. 1944 R.D. 168=1944 A.W.R. (Rev.) 103.

S. 110—Substantial question of law --Whether family business is ancestral or not—Whether entry of stranger partner makes ancestral business otherwise—Leave to appeal—Grant of.

Whether a Hindu family business is ancestial or not is necessarily a question of fact, and does not involve any question of law so as to entitle a party to leave to appeal to His Majesty in Council under S. 110, C. P. Code. Whether the taking of a stranger partner into the ancestral business of a Hindu joint family causes that business to cease to be ancestral is a question of law. But since that is a question on which there is no absence of authority and since that has been decided by the Courts and there is no conflict of view on the point, it cannot be said to be a substantial question of law within the meaning of S. 110, C. P. Code, justifying the grant of leave to appeal, merely because it is not entirely covered by a decision of the judicial Committee. (Mockett and Kunhi Raman, JJ.) NALLATHAMBI v. RAGHUNATH BIVI. 212 I.C 272=16 R.M. 587=1943 M W. N. 285=A.I.R. 1943 Mad. 581=(1943) 1 M.L. J. 375.

S 110—Valuation—Appeal valued at below Rs. 30,000—Decree involving dispute about property worth more than Rs. 10,000—Leave to abbeal—Grant of

more than Rs. 10,000—Leave to appeal—Grant of.

The plaintiff (appellant) sucd for a declaration that a certain property could not be attached and sold in execution of a certificate, basing his claim on a purchase of the property in execution of a mortgage decree obtained by himself against the former owner of the property. The suit and the appeal were valued below Rs. 10,000 according to the value of the certificate, but it was found that the value of the property itself which was involved was over Rs. 10,000

itself which was involved was over Rs. 10,000.

Held, that if the plaintiff did not succeed in the litigation, the property which he had purchased in execution of his mortgage decree would be liable to be sold and the property being worth more than Rs. 10,000, it must be held that the decree sought to be appealed from did not involve indirectly a question respecting property of more than Rs. 10,000 in value and the case was fully covered by the second paragraph of S. 100, C. P. Code, the case was a fit one for appeal to His Majesty in Council and leave should therefore be granted. (Harries, C.J., and Fazl Ali, J.) Ishwari Prasad Singh v. Kameshwar Prasad Singh. 1941. C 654—14 R.P. 13—7 B. R. 812—22 Pat. L. T. 284—A I.P. 1041 Pat. 288

C. P. CODE (1908), S. 110.

Valuation of suit found defective and appeal re-valued at over Rs. 10,000 without objection by defendant—Objection to valuation later. Not open.

Where the re-valuation of the suit was accepted without demur and a decree for costs based on such valuation actually enforced, it is not open to the successful defendant so executing the decree to contest the valuation for purposes of appeal to the Privy Council. (Hames, C.J., Fazl. ili, and Manohar Lall, J.) RAJA BRAJASUNDAR DIEB v. RAJENDRA NARAYAN BHANI DEO. 20 Pat. 459 = 195 I.C. 344 = 14 R P. 109. 22 Pat L T. 736 = 7 B R. 906 = A.I R 1941 Pat 269 (SB).

- -S. 110 -Valuation -Decree refusing partition of share of nornt family property - If involves question respecting whole of that property.

In an appeal from a decree refusing partition of a share of joint tamily property on the ground of limitation, the value of the subject-matter in dispute is the value of the share claimed by the plaintiff. Such a decree does not involve "directly or indirectly" some claim or question to or respecting" the joint family property as a whole. If, therefore, the value of the share claimed by the plaintiff is less than Rs. 10,000 leave to appeal to Privy Gouncil, cannot be granted under the second paragraph of S. 110, G. P. Gode, although the total value of the joint family property exceeds Rs. 10,000. (Lord Glauson) Sill. Vantibal v. Janardhan Raghunarii. 71 I.A. 142=I L.R. (1944) Bom. 745—I.L.R. (1944) Kar (P.C.) 235–219 I.C. 225–18 R.P.C. 22=11 B.R. 413==1944 O.A. (P.C.) 51-257 L.W. 516 (2)=1944 A.L. J. 382–46 Bom. L.R. 849=1944 A.W.R. (P.C.) 51–48 C.W.N. 820=A.I. R. 1944 (P.C.) 65—(1944) 2 M.L. J. 218 (P.C.).

----S. 110 - Valuation - Conditions.

The second paragraph of S. 110, C. P. Gode, means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards, not that the rights affect properties whose value is Rs. 10,000 and upwards. (Agareal and Madeley, JJ.) Prag Naram Trivedi v. Faktirui. Nisa. 197 I.C. 313=14 R.O. 292-1941 O.L.R. 880-1941 A. W.R. (Rev.) 1059-1941 O.W.N. 1234-1941 O.A. 937-A.I.R. 1942 Oudh 174.

interest subsequent to suit—If can be added.

Where the difference between the amount claimed and the amount decreed is less than Rs. 10,000 the costs and interest subsequent to the institution of the suit cannot be added for the purpose of reaching the sum of Rs. 10,000, for obtaining a certificate for leave to appeal to His Majesty. (Almond, J.G. and Mir Almad, J.) KALYAN SINGH & Co. v. NORTHERN INDIA FARMS. 198 1.C. 392—14 R. Pesh. 74—A.I.R. 1942 Pesh. 6.

S. 110—Valuation—Decree of trial Court for amount less than Rs. 10,000—Award for future interest and costs amounting to over Rs. 10,000—Defendant appealing—Dismissal of suit by High Court—Application for leave to appeal—Valuation—Interest and costs awarded by trial Court—If to be taken into account.

Fazl Ali, J.) Ishwari Prasad Singh v. Kameshwar Prasad Singh. 194 I.C 654=14 R.P. 13=7 B.

R. 812=22 Pat. L.T. 284=A I.R. 1941 Pat. 288.

It is well settled that where a plaintiff's suit is decreed by the High Court and the defendant wishes to appeal against the whole decree, the value of the defendant's appeal is the principal sum decreed

together with interest awarded on the principal sum up to the date of the decree of the High Court. This rule, however, cannot be applied entirely when the plaintiff proposes to appeal from an appellate decree of reversal dismissing his claim either in whole or in part. Where the plaintiss in a suit obtains a decree from the trial Court for an amount below Rs. 10,000 with future interest and costs, bringing the total amount over Rs. 10,000, but on appeal by the defendant, the decree is reversed and the suit is dismissed in its entirety, the plaintiff seeking to appeal to His Majesty in Council, cannot as a matter of right, claim to add to the amount decreed in his favour by the trial Court interest on the principal sum decreed at the rate allowed by that Court up to the date of the decree of the High Court, and the costs, so as to bring the value of the subjectmatter to over Rs. 10,000. For the purpose of valuing an appeal, the material date is the date of the decree against which the appeal is to be made. Interest and costs being in the discretion of the Court cannot be included invaluing the appeal. It mays be if interest is not in the discretion of the Court, but payable under some law or statute, different considerations may arise. But where that is not the case, and the plaintiff who has not appealed from the decree of the trial Court claiming a larger amount than that allowed by that Court and claims, in the proposed appeal from the appellate decree dismissing the suit, the restoration of the decree of the trial Court, which is all that he can claim, the value of the appeal cannot be more than the amount decreed by the trial Court. This amount cannot be enhanced by adding either the cost or interest directed to be paid under the decree of the trial Court. (Harries, C.J., Fazl Alı and Manohar Lall, JJ.) Brijmohan Singh v. Bhuneshwar Prasad Singh. 20 Pat. 481=195 I.C 196=7 B.R. 884=14 R.P. 94=1941 P. W.N. 287=22 Pat. L.T. 363=A.I.R. 1941 Pat. 255 (F.B.)

S. 110—Valuation—" Involve directly or indirectly, etc."—Ejectment suit valued at Rs. 330—Decree directing defendant to hand over vacant possession after removal of superstructures—Value of superstructure and of business amounting to more than Rs. 10,000—Leave to appeal to Privy Council—Right to grant of.

The decree passed by the High Court in second

appeal, in a suit for ejectment, ordered the defendant (tenant) to hand over to the plaintiff (landlord) vacant possession of certain items of immovable property after removing superstructures standing thereon which were erected by the defendant. The superstructures consisted of a ginning factory and its appurtenances. The suit was valued by the plaintiff at Rs. 330 on the assessment of the plots. The defendant applied for leave to appeal to His Majesty in Council, alleging, that the loss to him on account of the decree ordering removal of the superstructure was more than Rs. 10,000 or upwards, as the value of lease-hold rights to him and the loss of business consequent on the removal of the ginning factory would be more than Rs. 10,000 and that therefore the decree involved directly or indirectly a claim or question respecting property worth at least Rs. 10,000 under S. 110, C. P. Code.

Held, that the word "involve" meant an adjudication by which the party who is adversely affected is bound and in the present case there was no doubt that the defendant's right to have the ginning factory on the suit property as a permanent tenant was finally adjudicated upon; and therefore if it was

C. P. CODE (1908), S. 111.

proved that the value of the ginning factory affected by the decree and the consequent loss by business to him were Rs. 10,000 or upwards, his case would fall under S. 110, C. P. Code, and he would be entitled to a certificate. (Dwatia and Rajadhyaksha, 37.) Maneklal Mansukhbai v. Hormusji. I.L.R. (1945) Bom. 268=16 Bom. L.R. 798=A.I.R. 1945 Bom. 113.

S. 110—Valuation—Test—Amount of decree less than Rs. 10,000 but value of property involved more than Rs. 10,000.

Where a suit is to declare the non-liability of certain property valued at over Rs. 10,000 to attachment and sale in execution of a decree for an amount less than Rs. 10,000 leave to appeal to Privy Council could not be granted as the test laid down by paia. (2) of S. 110, C. P. Code, is not satisfied by the case. (Bennett and Ghulam Hasan, JJ.) Sudaman Prasad v Mahomed Abdul Alim. 16 Luck. 737=193 I. C. 639=13 R.O 486=1941 O.L R 311=1941 A.W.R. (C.C.) 134=1941 O.A. 365=1941 A. L.W. 424=1941 O.W.N. 562=A.I.R. 1941 Oudh 407.

S 111—Appellate decree of single Bench—Appeal to Privy Council—If hes—Letters Patent (Lahore), Cl. 29.

No appeal lies to His Majesty, in Council, either under the C. P. Code, or the Letters Patent, from a decree passed on appeal by a Single Bench of the High Court. (Tek Chand, Dalip Singh and Blacker, JJ.)

Administrator, Lahore Municipality v. Bakshi Ram. I.L.R. (1942) Lah. 592—201 I.C. 468—15 R L. 51—44 P.L.R. 318—A.I R. 1942 Lah. 169 (F.B.).

——S. 111—Scope—If abrogates S. 109 (b). See Arbitration Act, S. 39 (2). 45 Bom.L R. 384.

——S. 112—Appeal admitted by special leave— Objection that appeal is incompetent as value was below Rs. 10,000 and that appeal is other wise not fit for appeal —Not open.

When an appeal has been admitted by the special leave granted by His Majesty in Council an objection by the respondent that the appeal is incompetent as the sum involved is below Rs. 10,000 and the case is otherwise not a fit one for appeal under the C. P. Code is of no force. (Sir Madhavan Nair). Hem RAJ v. Khem Chand. 71 I.A. 171=16 R.P C. 106=10 B.R. 174=1944 M.W N. 99=77 C. L.J. 488=46 Bom. L.R. 543=I.L.R. (1943) All. 727=209 I.C. 344=1943 A.L.J. 458=56 L.W. 600=1943 A.W.R. (P.C.) 31=48 C.W. N. 7=1943 O.A. (P.C.) 31=1943 O.W.N. 519=1943 A.L.W. 597=A.I.R. 1943 P.C. 142=(1943) 2 M.L.J. 397 (P.C.).

S 113 and O. 46, R. 1 and C.P. Relief of indebtedness Act, S. 20—Right of reference if a substantive right—Proceedings under C.P. Relief of Indebtedness Act, if a 'suit'—Applicability of O. 46, R. 1—District Court acting under S. 20, Relief of Indebtedness Act, if can make reference to High Court.

The right of reference given by S. 113, C. P. Code, is a substantive right and not a mere matter of procedure. Unless this power is given specifically by statute, a Court has no power to make a reference. The proceedings under the C. P. Relief of Indebtedness Act are not 'suits' and as they are neither 'suits' nor 'appeals' nor proceedings in execution of a 'decree,' the provisions of O. 46, R. I are not attracted. Hence the Court acting under S. 20 of the C. P. Relief of Indebtedness Act has Court no power of making a reference to the

High and the High Court has no jurisdiction to entertain a reference. (Stone, C.J. and Bose, J.) DISTRICT JUDGE v. SETH SRIKISANDAS. I.L.R. (1941) Nag. 588=1941 N.L.J. 485=198 I.C. 824=14 R.N. 247=A.I.R. 1942 Nag. 8.

-S. 114—Power under—If a matter of substantive law. See U. P. ENCUMBERED ESTATES ACT RULES, R. 6 AND C. P. CODE, S. 114. 1940 R.D. 604 (2).

Ss. 114, 151 and 152—Scope of powers under. Ss. 114, 151 and 152, C. P. Code, definitely give jurisdiction to a Court which has passed a final order, to review it and amend or correct it in ceitain definite circumstances. Such circumstances include a 'mistake or error apparent on the face of the record 'as explained in R. 1 of O. 47. (Dible, S.M. and Acton, A.M.) KAILASH BUX SINGH v. BEDNATH. 1945 A.W.R. (Rev.) 161=1945 R. **D**. 337.

S. 115-Revision.

Absence of evidence.

Acting illegally in exercise of jurisdiction.

Amendment of decree.

Amendment of plaint.

Applicability.

Arbitration.

Case decided.

Court-fee.

Court subordinate.

Discretion.

Discretionary order.

Error of law. Finding of fact.

High Court's powers.

Illegality or material irregularity.

Interference.

Interlocutory order.

Jurisdiction. Limitation.

Material irregularity.

Miscellaneous proceedings.

New evidence.

New plea.

Other remedy open.

Pauper application.

Scope.

Substantial justice done.

Withdrawal of suits.

#### Absence of evidence.

-S. 115—Absence of evidence—Illegal decision. If a decision is reached for which there is no evidence it must be held to be illegal. (Davies,) RISHI MUNI DEVI v. OFFICIAL RECEIVER. 1941 A.M.L.J. 108.

# Acting illegally and with material irregularity.

-S. 115—Acting illegally and with material irre-

gularity—Erroneous finding.

It cannot be said that to arrive at an erroneous finding even if it be on a point of law comes within the scope of illegality or material irregularity to justify interference under S. 115, C. P. Code. (Yorke, J.)
MATHURA PRASAD v. CHUNNI LAL. 1943 A.L.W.

206 (1).

S. 115—Acting illegally in the exercise of jurisdiction—Lower Court misdirecting itself regarding basis for decision of matter before it—Interference in revision. See Madras Hindu Religious Endow-ments Act, S. 9 (5). (1941) 1 M.L.J. 250.

C. P. CODE (1908), S. 115.

#### Amendment of decree.

-S 115-Amendment of decree if revisable Mujawir Husain v. Kishwar Jehan Begam, [See Q D., 1936-40, Vol. I, Col. 3287]. 16 Luck. 252=191 I.C. 185=A.I.R 1941 Oudh 66.

#### Amendment of Plaint.

-S 115 and O. 6, R. 17-Amendment of plaint-Order refusing-If revisable. Purshottam LALJI v. HARA NARAYAN DASS. [See Q D., 1936-1940, Vol. I, Col 3287]. 191 I.C 729=13 R.O. 273=1941 O.L.R. 21=A I R. 1941 Oudh 87.

115 and O 6, R 17-Amendment of plain

-Order refusing-Revision, if Ites.

Where the effect of refusal of permission to amend a plaint is to shut out a part of the plaintiff's claim it is a "case decided" within the meaning of S. 115, C.P. Code, and where the effect of allowing a revision in a matter in which an appeal might also lie will be a convenience to the parties and will save expense the Court will interpret S. 115 liberally. (Clarke, J.) SITH MANGHAL v. ZAMSINGH. I.L.R. (1942) Nag. 478=196 I.C. 190=14 R.N. 85=1940 N L.J. 340=A I.R. 1941 Nag. 289.

-S 115--Amendment of plaint-Revision.

An order allowing an amendment of plaint by which a suit for possession and damages for unlawful occupation was sought to be converted into one for ejectment and rent cannot be revised. (Aganval, J.) RAM PYARI v. GOVIND PRASAD. 196 I.C. 432=14 R.O. 170=1941 O.W.N. 1100=1941 O.A. 811=1941 R.D. 850=1941 O.L.R. 684=1941 A.W. R. (Rev.) 873=A.I.R. 1941 Oudh 623.

-S. 115—Appeal when treated as revision.

An appeal preferred in a case in which no appeal lies may be treated as an application in revision if the question raised is one of jurisdiction. (Fazl Ali, C. J., Manohar Lall and Chatterjee, JJ.) RAM RAN VIJAY PRASAD SINGH v. KISHUN SINGH. 23 Pat. 61 211 I.C. 593=10 B.R. 429=16 R.P. 250=25 P.L.T. 35=1944 P.W.N. 33=A.I.R. 1944 Pat. 54 (F.B.).

#### Applicability.

-S. 115—Applicability—Jurisdiction—Question of fact or law affecting jurisdiction involved in case-Plea that arbitrators has no power to proceed because of pendency of suit in Civil Court relating to same subject-matter in part—Order deciding question—Revision.

An application in revision under S. 115, C.P. Gode, will lie only if some question of fact or law which affects jurisdiction is involved. The section applies to jurisdiction alone, the irregular exercise of or non exercise of it, or the illegal assumption of it. It is not directed against conclusions of law or fact in which question of jurisdiction is not involved. If the question raised is one that primarily affects jurisdiction, an application in revision is competent. Where it is contended that the arbitrators who made awards had no jurisdiction to proceed with the arbitration because a suit relating to the same subjectmatter, in part at least was pending at the time in a Court, a question of jurisdiction is involved, and a revision petition will lie. (Davis, C.J. and Weston, J). Gohram Shambay v. Jumo Oddiayo. I.L.R. (1941) Kar. 570—199 I.C. 291—14 R.S. 175—A IR 1942 Sind 41 A.I.R. 1942 Sind 41.

-S. 115—Applicability—Orders passed under U. P. Encumbered Estates Act.

If S. 115, C.P. Code, is made applicable to orders passed under the U. P. Encumbered Estates Act, it would be inconsistent with S. 47 of the Act. Hence it is not applicable to such orders, (Ghulam Hasan and Agarwal, JJ.) HARI RAM v. SIIYAM BAHADUR. 198 I.C. 21=14 R.O 371=1941 O.W.N. 948=1941 O.A. 673=1941 A.W.R. (Rev.) 647=1941 R.D. 708=A I.R. 1941 Oudh 566.

S. 115—Applicability—Suit or proceedings under

U. P. Tenancy Act.

S. 115, C.P. Code, is not applicable to suits or proceedings under the U.P. Tenancy Act in view of the clear provision in S. 243 and list 1 of the second schedule of the U.P. Tenancy Act. (Agarwal, J.)

JAGANNATH SINGH v. SITA RAM. 16 Luck. 775= 194 I.C. 543=1941 R.D. 488=1941 O.W.N. 819=1941 A.W R. (Rev.) 533=14 R.O. 5= 1941 A.L.W. 669=1941 O.A. 554=A I.R. 1941 Oudh 497.

## Arbitration.

S. 115-Arbitration-Wrong view as to what

constitutes misdeonduct—If a ground for interference.

The scope of S. 115, C.P. Gode, is very limited and the High Court cannot interfere in revision merely because the lower Court has taken a mistaken view as to what does or does not constitute misconduct on the part of the arbitrator. (*Puranik*, J.) Kesho-LAL v. LAXMAN RAO. I L.R. (1940) Nag. 659= 1940 N.L.J. 393=192 I.C. 371=13 R.N. 244= A.I.R. 1940 Nag. 386.

#### Award.

-S 115-Award -Decree on, after rejecting objections—If revisable.

Where on objections being raised to the passing of a decree on an award the Judge holds that no grounds as those mentioned in para. 15 of Sch. II, C.P. Code, existed and passes a decree, it cannot be said that he has acted illegally or with material irregularity in the exericise of his jurisdiction and hence it cannot be revised under S. 115, C.P. Code. (Iqbal Ahmad, C. J. and Mathur, J.) Munna Lal v. Mukat Behiari. 1942 A.L W. 701.

# Case decided.

-S. 115-"Case decided". See U. P. Agri-CULTURISTS' RELIEF ACT, Ss. 5 AND 30. A.I.R. 1945 All. 377,

-S. 115—"Case decided"—Appeal under S. 17 of payment of Wages Act. See Payment of Wages Act, S. 17. 1945 N.L.J 281.

-S 115-"Case decided"-Decision as to Court-fee-See C.P. Code, S. 115-Court-EEE.

S. 115—'Case decided'—Decision of part of a case—Preliminary point as to jurisduction to entertain

application—Decision on, if can be revised.

The decision of a part of a case does not amount to 'a case which has been decided by a Court' within the meaning of S. 115, C.P. Code. But where an irreparable damage would be done to a party, if the order were allowed to stand, Courts would take a wide equitable view of the meaning of S. 115, in order to give the relief which seem to them to be fair. A decision that a Court had jurisdiction to entertain an application for the removal of certain turstees cannot be revised. (Bennett and Madeley, JJ.) PRITHVI NATH v. BHAGIRATH TONDON. 197 I.C. 677=14 R.O 336=1942 A.W.R (CC) 6=1942 A.L.W. 16=1941 O.A. 1042=1941 O.W.N. 1350=A.I.R. 1942 Oudh 208.

C. P. CODE (1908), S. 115.

-S 115—Case decided—Decision on one issue -Revision-Competency-Interference. Muthusami CHETTIAR v. PERIYAL ACHI. [See Q.D., 1936-1940. Vol. I, Col. 3287]. A.I.R. 1941 Mad. 84.

-S 115—Case decided—Dismissal of appeal against order asking plaintiff to amend plaint as remedy lay in revenue Court—Revision.

Where a Munsiff in whose Court the suit was instituted was of the opinion that the plaintiff's remedy was in the revenue Court and ordered the plaintiff to amend the plaint and the Civil Judge dismissed an appeal against such order a "case has been decided" within the meaning of S. 115, C.P. Code and a question of jurisdiction being involved a revision lies. (Bennett and Agarwal, JJ.) Mohd. Mehdi v. Janki Das. 206 I.C. 358=1943 O.W N. 101=1943 A.W.R. (C.C.) 24=15 R.O. 489=1923 O. A (C.C.) 61=A.l.R. 1943 Oudh 307.

S 115 and O. 32, R. 15-' Case decided'-Dismissal of application under R. 15 of O. 32, C.P. Code, for appointment of guardian ad litem—Revision—Competency—Scope of enquiry on such an application.

The dismissal of an application under R. 15 of O. 32, C.P. Code, is not a 'case decided' within the meaning of S. 115, C.P. Code, and hence a revision of such an order is incompetent. The enquiry on such an application is not a case or an independent proceeding. It is one which is essential to the further progress of the suit and cannot be dissociated from the suit and regarded as a proceeding independent of it. (Thomas, C.J. and Ghulam Hasan, J.) DRIGRAJ KUNWAR v. SRI AMAR KRISHNA NARAIN SINGH. 1945 O.A. (C.C.) 140=1945 A.W.R. (C.C.) 140=1945 O.W.N. 205=1945 A.L.W. (C.C.) 190= A.I.R. 1945 Oudh 255.

-S 115—Case decided—Interlocutory order—Revision. The word 'case' is wide enough to include a decision on any substantial question in controversy between the parties affecting their rights, even though such order is passed in the course of the trial of the suit. An interlocutory order deciding a question of this kind (as distinguished from purely formal and incidental order) is a 'case decided', but it will be open to revision only if the other conditions expressly laid down in S. 115, C.P. Code, are satisfied and the order has resulted or his likely to result in such gross injustice or irreparable injury as cannot be remedied otherwise than by the exericise of the extraordinary jurisdiction of the High Court at that stage.

Per Dalip Singh, Abdul Rashid and Beckett, It is, impossible to evolve a formula which will draw a clear, haid and fast line between those orders which do not amount to the decision of a 'case' and orders which do amount to the decision of 'case'. (Tek Chand, Dalip Singh, Monroe, Bhide, Abdul Rashid, Blacker and Beckett, JJ.) Gurdevi v. Mahomed Bakijash. I.L.R. (1943) Lah. 257=206 I.C. 157=15 R.L. 302=45 P.L.R. 85=A.I.R. 1943 Lah. 65 (F.B.).

——S. 115—'Case decided'—Interlocutory order— Order staying suit under Soldiers Litigation Act.

An order deciding the question of staying the suit under the Soldiers Litigation Act is "case decided." It depends on the nature of the interlocutory order passed whether it is a "case decided" or whether it is a routine order, which does not put an end to any controversial matter. (Almond, J.C. and Mir Ahmad, J.) JIWAN SINGH v. MAHBOOB JAN. 211 I.C. 313=16 R. Pesh. 65=A.I.R. 1944 Pesh. 4.

S. 115—"Case decided"—Judge allowing amendment adding issue against party's wishes after case is already referred to arbitration—Revision—Maintainability.

Where the Subordinate Judge has in effect decided that whether the plaintiff likes it or not, some particular issue, not agreed by the plaintiff to be referred to arbitration, is despite his objections, to be referred to arbitration that is a decided case within the meaning of S. 115, C.P. Code. (Davis, C.J. and Weston, J.) SITALDAS POHUMAL v. NIHALCHAND ISSARDAS. 198 I.C. 847=14 R S. 168=A.I.R. 1942 Sind 7.

-S. 115—Case decided—Order impounding document-Revision.

An order impounding a document is not a mere interlocutory order but a case decided within the meaning of S. 115, G.P. Code, and a revision, therefore, lies from such an order. (Din Mahomed, J)
UTTAM CHAND v. PERMA NAND 203 I.C 7=16 R.
L. 160=44 P L R. 188=A.I R 1942 Lah 265.

-S. 115—'Case decided'—Order refusing to allow

amendment of pleading—Reevision.

The word 'case' in S. 115, C.P. Code, has to be interpreted in a very large and comprehensive sense to include any cause which has been decided judicially. A revision lies against an order refusing to allow an amendment of a pleading. (Sen, J.) LILADHAR v. FIRM RADHAKRISHNA RAMSHAYANA. L.R (1945) Nag 634.

-S. 115 and O. 41, R. 23—Case decided—Order of remand.

Though the appeal is decided in an order of remad and the proceedings completed so far as it is concerned, the appeal does not in any way dispose of the suit. It leaves the suit as it was before the decision of the trial Court and it does not decide any point in the suit itself. Hence it cannot be said that an order of remand constitutes a 'case decided' within the meaning of S. 115, C.P. Code. (Bennett, 7.) SITAL v. ANANT LAL. 200 I.C. 256=14 R.O. 588=1942 O.W.N. 236=1942 O.A. 183=1942 A.L. W. 216=1942 A.W.R. (C.C.) 171=A.I.R. 1942 Oudh 334.

-S. 115 and O.1, Rr. 8 and 10—Case decided-

Order on application to be made a party—When revisable.

A distinction ought to be drawn between a case where a person applies to a Court to be made a party and his application is refused and a case where the application is granted. When the application is refused, a case is decided so far as that party is concerned, but not so when he is made a party and the former order is revisable while the latter is not. (Bennett and Agarwal, JJ.) CHANDRA PRATAP SINGH v. BINDESHWARI PRASAD SINGH. 200 I.C. 259=14 R.O. 592=1942 A.W.R. (C.C.) 193=1942 O. A. 178=1942 O.W.N. 245=A.I.R. 1942 Oudh 340,

-S. 115—Case decided—Order overruling objection as to maintainability of application for amendment of decree If revisable.

Where an application for amendment of decree obtained on a mortgage under Ss. 4, 5 and 30 of the U. P. Agriculturists' Relief Act was dismissed as also an application for its restoration and a fresh application was thereafter put in for amendment and a preliminary objection as to its maintainability was dismissed, on a question whether such an order was revisable under S. 115, C.P. Code. Held, that the question involved though one of jurisdiction, before it could be interfered with it must be shown

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was only an interlocutory one, no case was decided and hence the order was not revisable under S. 115. (Bennet and Madeley, J.J.) Kushal Chand v. Sri Narain. 196 I.C 698=1941 R D. 930=1941 O. L.R. 744=1941 O.W.N. 1136=1941 O.A. 861=1941 A.W R. (Rev.) 947=A.I.R. 1942 Oudh 79.

S. 115—Case decided—Order overruling objection that debt was wiped out under S. 13 (3) of Punjab Relief of Indebtedness Act-Revision.

A revision lies from an order overruling an objection that a debt which is the subject-matter of a suit must be deemed to have been wiped out on account of the plaintiff's failure to comply with the requirements of Ss. 13 and 14 of the Punjab Relief of Indebtedness Act and the suit is for that reason liable to be dismissed. (Harnes, G.J. and Abdur Rahman, J.) BHERI RAM v. RAM JIWAYA MAL. 218 I.C. 375=18 R.L. 18=46 P.L R. 77=A.I.R. 1944 Lah. 323.

-S. 115-Case decided-Order refusing to add party.

Refusal to add a party is subject to revision under S. 115, C.P. Code, being a 'case decided'. In certain circumstances the dismissal of an application to add a party would amount to an irregularity in the exercise of jurisdiction. (Madeley, J.) QADIR AHMAD V ABDUL KHALIQ. 209 I C 308=16 R.O. 114=1943 O.A. (C.C.) 86=1943 O.W.N 138=A.I. R. 1943 Oudh 315

-S. 115—Case decided—Order refusing to implead third party-Distinction between party to suit applying for inclusion of third party and the latter applying himself.

An order made by a Court refusing to implead a third party on his own application is open to revision because so far as that party is concerned the order must be considered final, that is to say, against him there is a case decided and he can only challenge the decision in an application in revision. The position is otherwise where the third party has not made the application, but it has been made by one of the parties to the suit, and the question of joinder of parties can be afterwards raised in appeal. (Bennett, J.) PUTTU SINGH v. HEM SINGH. 211 I.C. 317=16 RO. 221=1944 A.W R. (C.C.) 2=1944 O.A. (C.C.) 2=1943 O.W.N. 535=A.I.R. 1944 Oudh 116.

-S. 115 and O 14, R. 2-Case decided-Order refusing to aecide issue of law first.

Where a Court refuses to decide an issue of law first under O. 14, R. 2, C.P. Code, it has not decided a case, so as to bring S. 115, C.P. Code, into application. (Yorke, J.) HAR PRASAD v. SHIAM LAL. 1943 A.L.W. 327.

S. 115—"Case decided"—Order refusing to decide preliminary issue as to jurisduction.

Where a Judge refuses to decide a question of jurisdiction as a preliminary issue, it cannot be said that any case has been decided. The only decision is that the question of jurisdiction will be considered with other issues. Its consideration is only postponed. Nothing is decided which affects the rights of parties. Where after the whole of the plaintiff's evidence had been recorded a request to decide a question of jurisdiction as a preliminary issue was refused, held it was an exercise of a perfectly reasonable discretion and that neither S. 115, C. P. Code, applied nor was revisable under S. 115, C.P. Code. Held, that the question involved though one of jurisdiction, before it could be interfered with it must be shown that there was a 'case decided' and as the order of the order of the control of the control of the code, applied that there are sufficient ground for interference even if it applied. (Bennett and Madeley, JJ.) The District Board, Bahraich v. Ramendra Prasad Singh. 204 I.C. 410=15 R.O. 338=1942 O.A.

639=1942 O.W.N. 812=1942 A.W.R. (C.C.) 363=A.I.R. 1943 Oudh 147.

S. 115 and O. 26, R. 4—Case decided—Order

refusing to issue a commission.

The mere refusal of an application to issue a commission cannot be considered to be a decision of any case. Further O. 26, R. 4 gives the Court discretion to issue a commission, and if a Court in the exercise of that discretion comes to the conclusion that a commission should not be issued, it cannot be said that it exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity and hence its order cannot be revised in revision. (Agarwal and Madeley, 37.) IOBAL ALI BEG v. ABDUL ALI. 199 I.C. 831 = 14 R.O. 523=1942 A W.R. (C.C.) 203=1942 OW.N. 307=1942 O.A. 215=A.I.R. 1942 Oudh 344.

-S. 115—Case decided—Order scoring off on issue

-Revision-Competency.

Where an issue is scored off, it would be open to challenge in an appeal from the final decree. No revision would lie against such an order. (Bajpai and Dar, 77.) Sheo Prasad v. Laciman Das. 1943 A.L W. 85.

-S 115—Case decided—Order staying suit on receipt of intimation from Debt Conciliation Board-

An order of a Civil Court staying a suit pending before it on receipt of robkar from a Debt Conciliation Board under S. 25 of the Punjab Relief of Indebtedness Act, is a 'case decided' within the meaning of S. 115, C. P. Code. If in passing the order the Court erroneously assumes that it is not competent to consider whether the Board has jurisdiction to issue the robkar, it fails to exercise jurisdiction vested in it by law, and the order is liable to be set aside in revision. (Tek Chand, Dalip Singh, Monroe, Bhide, Abhid Rashid Blacker and Beckett, JJ.) Gurdevi v Mahomed Bakhshi. I L.R. (1943) Lah 257=206 I.C. 157=15 R L. 302=45 P.L.R. 85=A I.R. 1943 Lah. 65 (F.B.).

-S. 115—Case decided—Pauper application— Grant or refusal—Revision. See C. P. Code, S. 115-Pauper Application.

-S. 115—Case decided—Proceedings under S. 476, Cr. P. Code-Interference by High Court, if and when

S. 476, Cr.P. Code, confers the power to prosecute. That power is conferred on the Court in which, or in relation to a proceeding in which the offence appears to have been committed, and if that Court refuses to prosecute, then the power is transferred to the appellate Court under S. 476-B. Excepting these two Courts, no other Court, not even the High Court, unless it happens to be the appellate Court contemplated by S. 476-B has power to prosecute. Before a prosecution can be launched, the Court must be of opinion both that an offence appears to have been committed and that it is expedient to prosecute. If the lower Courts consider the matter under Ss. 476 and 476-B and deal with them judicially and come to the conclusion that it is not, in their opinion, expedient in the interests of justice to prosecute, the High Court has no power to compel them to do so. The discretion is theirs and theirs alone.

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the conclusion to be. The High Court can, it is possible, interfere in revision, if the lower Courts do not consider the matter under these sections or if they direct their minds to matters which are foreign to those sections or if they act arbitrarily or capriciously. (Bose, J.) RAMBILAS v. JAI KISAN. I.L.R. (1942) Nag. 388=194 I.C. 583=14 R.N. 1=1941 N.L. J. 91=A.I.R. 1941 Nag. 155.

115—"Case decided"—Proceedings under S. 476, Cr. P. Code—Order by Civil Court—Revision to High Court—If governed by C. P. Code, S. 115 or by S. 439, Cr. P. Code.

Proceedings under S. 476, Cr. P. Code, are proceedings subject to the High Court's invisition.

ceedings subject to the High Court's jurisdiction under S. 439, Cr. P. Code, even when the Court inquiring is a Civil Court. The power to inquire is given under the Cr. P. Code, and the proceedings are in the nature of criminal proceedings. An older of the Court under S. 479, Cr. P. Code, even when made by a Civil Court is not a 'case decided' within the meaning of S. 115, C. P. Code. S. 439, Cr. P. Code, and not S. 115, C. P. Code, applies to a revisional application against an order under S. 476, Cr. P. Code. (Davies, C. J. and Weston, J.) Valiram LILARAM v. GOBINDRAM. I.L.R. (1941) Kar. 422 = 197 I.C. 774=14 R.S. 120=43 Cr. L.J. 259 =A.I.R. 1941 Sind 217.

-S. 115 and O. 22, R 5—Cases decided— Question as to who was the proper legal representative left to be determined during trial of the suit-Revision-

Gompetency—Duty of Court under R. 5, O. 22.

Where a question arises as to whether X or  $\Upsilon$  is the legal representative of a deceased defendant and the Court instead of deciding it brings both of them on record leaving the question of the determination of the proper legal representative during the trial of the suit, it constitutes a "case decided" within the meaning of S. 115, C. P. Code, and a revision against such an order is quite competent. Under R. 5 of O. 22, C. P. Code, it is the duty of Court to determine as to who was the proper legal representative when the question arises and not to put it off till the end of the trial. (Misra ana Kaul, JJ.) Ambika Prasad Singh v. Jagadamba Prasad Singh. 1945 O.W. N. 238=1945 A.W.R. (C.C.) 170=1945 O.A. (C.C.) 170=1945 A.L.W. (C.C.) 223.

-S. 115 and O. 9, R. 9—Case decided—Restoration after dismissal for default-Propriety-Revision.

The question whether an application to sue as pauper dismissed for default is properly restored could not be raised in an appeal from a decree passed in the suit and therefore there is a 'case decided' within the meaning of S. 115 and an application in revision will be in respect of it. (Bennett and Ghulam Hasan, JJ.) BAIJNATH v. RAM NARAIN. 194 I.C. 354=1941 O.L R. 448=13 R.O. 587=1941 A.W.R. (C.C.) 170=1941 O.N. 678=1941 O.A. 427=A.I.R. 1941 Oudh 367.

-S. 115—Case decided—Reversal of decision on question of jurisdiction and remand-Order if revisable.

An appellate order setting aside the decision of the trial Court on a preliminary question of jurisdiction and remanding the suit for disposal on merits cannot be sought to be revised under S. 115, C. P. Code, inasmuch as the decision does not amount to the decision of a case within the meaning of the section. The High Court has no jurisdiction whatever to interfere in revision under S. 115, C. P. Code, however wrong or erroneous the High Court may consider I.C. 278=1944 O.W.N. 174=1944 A.L.W

247=1944 O.A. (C.C.) 122=1944 A.W.R. (C.C.) 122=A.I.R. 1944 Oudh 260.

S. 115—Case decided—Suppression of award in arbitration with permission of Court. See C. P. CODE, O. 23, R. 3 and S. 115. 1941 N.L. J. 333.

-S. 115—Gase decided—Trial Court holding that there was no valid reference to arbitration—Appellate order

reversing trial Court's order.

The trial Judge held that there was no valid reference to arbitration as all the interested parties had not signed the agreement to refer and he directed that the suit should be tried regularly. On appeal it was held that the reference to arbitration was valid and the trial Court should proceed to deal with the case under the Arbitration Act. On revision, held, that the order of the appellate Court amounted to a "case decided." (Almond, J.C. and Mir Ahmad, 7.) DEVI DAS GULZARI LAI. v. MITHASHAH RAM DITT M.L. 205 I.C. 319=15 R. Pesh. 91=A.I. R. 1943 Pesh 8

-S. 115 and O. 6, R. 17—Case decided—What may amount to-Rejection of application to explain array of parties—Revision, if lies. Jagdish Saran v. Bhagwat Saran. [See Q.D., 1936-40, Vol. I, Col. 1305]. 191 I.C. 294=13 R.A. 223.

#### Court-fee.

-S. 115—Court-fee—Court-fee due according to trial Court decree—Revision when such fee not paid.

The Judicial Commissioner's Court should not

hear a revision application against an order in an appeal from a decree on which the proper Court-fee, arising from the decree of the trial Court, has not been paid by the applicant. (Davis, C. J. and Weston,

S. 115—Court-fee—Decision as to—Revision—

Competency.

A revision petition lies to the High Court when a Court subordinate to the High Court has held that the plaintiff has inadequately stamped his plaint, but a petition for revision does not lie when a defendant has unsuccessfully challenged the adequacy of the stamp affixed by the plaintiff, unless a further question of jurisdiction is involved. (Leach, C.J., Mockett and Lakshmana Rao, JJ.) Murthiraju v. Subbaraju. I.L.R. (1944) Mad. 626=217 I.C. 5=17 R.M. 247=57 L W 247=1944 M.W.N. 243=A.I.R. 1944 Mad. 315=(1944) 1 M.L.J. 328 (F.B.).

-S. 115—Court-fee—Decision of prelimi-

nary point regarding—Revision.

By the mere decision of a preliminary point regarding Court-fee no case is decided within the meaning of S. 115, C. P. Code, and hence it cannot be revised. (Thomas, C J, and Ghulam Hasan, J,)
Dy. Commissioner of Bara Banki v. B. K.
DHAON. 1942 O.A. 501=1942 A.W.R. (C.C.) 342 (3).

Revision lies against an order relating to Court-fees where the question is not one as to the proper valuation on which the Court fee is to be computed but whether an ad valorem fee for a fixed fee is payable on the plaint. But if the decision is not final and is open to appeal, this itself would be a bar to the Court interfering with the order in revision. (Biswas and Rox-

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GIRINDRA MOHAN. 196 I.C. 762=14 R.C. 276= 73 C.L.J 240=A.I.R. 1941 Cal. 518.

An order demanding Court-fees in excess of what the plaintiff has paid, holding that the Court-fee paid is insufficient is virtually a refusal to exercise jurisdiction, and as such, if it is erroneous, the High Court will interfere in revision. (Lokur and Weston, JI.) MAHADEO GOPAL v. HARI WAMAN. 47 Bom.L.R. 350=A. I.R. 1945 Bom. 336.

An order of a Subordinate Court adverse to the plaintiff upon a Court-fee matter is open to revision by the High Court. (Chatterji and Meredith, JJ.) RAMAWTAR SAO v. RAM GOBIND SAO. 20 Pat. 780=198 I.C. 866=14 R.P. 512=23 Pat. L.T. 218=8 B.R. 471=A.I.R. 1942 Pat. 60.

-S. 115—Court-fee—Order directing plaintiff to give market value of land and calling on him to pay additional Court-fee-Revision-

Competency.

An order directing a plaintiff to give the market value of the land in suit and to pay additional Court-fees thereon, the plaintiff having paid Court-fee on the basis of the nett profits from the land for the previous year, can be made the subject of a revision petition under S. 115 of the C. P. Code. An order by a Court calling upon a plaintiff to pay additional Court-fee and adjourning the suit to a latter date for that purpose amounts to a refusal to proceed with the J.) Gobindram Tarach nd v. Ramchand suit until the proper sum is put into Court, even Chindram. I.L.R. (1942) Kar. 61=200 I.C. if there is no specific order refusing to proceed 545=14 R.S. 213=A.I.R. 1942 Sind 76. with the suit. (Chandrasekhara Ayyar, J.) RATNAVFLU PILLAI v VARADARAJA PILLAI. 203 I.C. 457=15 R.M. 641=1942 M.W.N. 352=55 L.W. 293=A.I.R. 1942 Mad. 585=(1942) 1 M. L.J. 569.

> S. 115-Court-fee-Order requiring additional Court-fee-Revision.

> The Court of the Judicial Commissioner will not interfere with an order requiring the payment of an additional Court-fee as such order is only interlocutory. (Almond, J.C.) SARFRAZ KHAN v. MAHOMED YAKUB KHAN. 201 I.C. 83=15 R. Pesh. 13=A.I.R. 1942 Pesh. 23.

> -S. 115—Court-fee—Rejection of plaint for want of sufficient Court-fee - Appeal - Order remanding suit for trial on merits on allegation made in plaint—Appeal held incompetent—Revision—Interference by High Court. See C. P. Code, O. 43, R. 1 (10). (1945) 1 M.L.J. 259.

#### Court subordinate

-S. 115 - Court subordinate - Authority appointed under Payment of Wages Act. See PAYMENT OF WAGES ACT, Ss. 15 AND 14. 1944 N. L.J. 256.

S. 115—"Court subordinate"—Collector acting under S 201, Orissa Tenancy Act-Orders of—Revision — Powers of High Court. See Orissa Tenancy Act (as amended in 1938), S. 204. A.I.R. 1942 Pat. 1 (F.B.).

S. 115 - "Court subordinate" - Collector acting under S. 204 (5). Orissa Tenancy Actburgh, II.) RABINDRA NATH CHAKRAVARTHY v. Order of-Revision-Power of High Court.

The Collector acting under S 204 (5) of the Drissa Tenancy Act is a Court subordinate to the High Court within the meaning of S. 115, C. P. Code; and therefore the High Court has power o revise an order made by the Collector under 5. 204 (5), Orissa Tenancy Act, whether his order sone accepting or refusing the order of the Court subordinate to him (Deputy Collector). (Agarwala, J.) 'UMAKANTA NAYAK V JNANENDRA PRASAD BOSE. 10 Cut L T. 85=A I.R 1945 Pat 128

S. 115—"Court subordinate" — Commissioner for workmen's compensation See Workmen's Compensation Act, Ss. 19 and 23. 21 Pat L T. 1067 (F.B.).

-S. 115—"Court subordinate" — Commisnoner for workmen's compensation—Orders of— Turisdiction of High Court to revise.

A Court over which the High Court has appelate jurisdiction is a Court subordinate to the High Court within the meaning of S 115, C. P. Code, and is therefore subject to the revisional urisdiction of the High Court. The Commissioner for workmen's compensation under the Workmen's Compensation Act being subject to he appellate jurisdiction of the High Court is a Court subordinate to the High Court and his orders are therefore revisable by the High Court inder S. 115, C. P. Code, when no appeal lies. (Agarwala and Meredith, JJ.) DIRJI v GOALIN. 21 Pat 173=198 I C. 529=14 R P. 476=8 B. R. 437=22 Pat L T. 1023=A I.R. 1942 Pat.

-S. 115—"Court subordinate"—Debt Adrustnent Board under Bombay Agricultural Debtors' Relief Act—Order of-Revision-Jurisdiction of

High Court.

A debt Adjustment Board set up under the Bombay Agricultural Debtors' Relief Act, 1939, s not a "Court" subordinate to the High Court within the meaning of S. II5, C P. Code, and nence no revisional application lies from orders of the Debt Adjustment Board to the High Court. (Chagla, J.) PEOPLE'S OWN PROVIDENT AND GENERAL INSURANCE CO v GURACHARYA. 47 Bom.L.R. 852.

S. 116—"Court subordinate" - Deputy Colector confirming award of Revenue Officer in inquiry under S. 74, Madras Estates Land Act— District Collector setting aside same under S. 205—Jurisdiction—Interference by High Court. See MADRAS ESTATES LAND ACT, S 205. (1944) 2 M. L.J. 199.

Judge holding election inquiry under S. 15, Bombay Municipal Boroughs Act-If Court or persona

designata—Order—Interference in revision.

The High Court under S. 115, C. P. Code, has no jurisdiction to correct any mistakes committed by a persona designata, whether he exercises jurisdiction not vested in him or fails to exercise jurisdiction vested in him or acts with material irregularity in the exercise of his jurisdiction. As far as the High Court's revisional powers are concerned under S. 115. C. P. Code, they can only be exercised against a Court subordinate to the High Court. A District Judge acting in an election inquiry under S. 15, Bombay Municipal Boroughs Act is not a Court but a persona desigrata, and the High Court therefore has no juris-

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diction to revise his order under S. 115, C. P. Code, whatever the nature of the order (Chagla, J.) Keshav Ramchandra v. Municipal Boroughs JALGAON. 47 Bom. L.R. 851=A I.R. 1946 Bom.

-S. 115—Court subordinate—District Judge holding inquiry under S. G-C, Mussalman IVakf Act (as amended by Bombay Act)—Order by—

Revision—Competency.

The decision made by a District Judge in an inquiry under S 6-C of the Mussalman Wakf Act of 1923, as amended by Bombay Act XVIII of 1935, is the decision of a Court which is subordinate to the High Court, and therefore a revision application to the High Court against the order of the District Judge is maintainable under S. 115, C. P. Code (Lokur, J.) TYEBHOY ESSOFALITY. COLLECTOR OF AHMEDABAD. 212 I C. 372=16 R.B 353=45 Bom.L.R. 1055=A.I.R. 1944 Bom. 91.

S. 115— "Court subordinate"—Election Commissioner—Bihar District Board Election Petition Rules-District Judge acting as Election Commissioner-If Court subordinate to High

A District Judge acting as an Election Commissioner under the Bihar District Board Election Petition Rules, 1939, is a Court and a Court subordinate to the High Court within the meaning of S. 115, C. P. Code. (Manohar Lall, J., on difference of opinion between Meredith and Chattern, JJ.) ABDUL RAZAK v KULDIP NARAIN. 22 Pat. 577=214 I.C. 59=17 R.P. 22=10 B.R. 614=A.I R. 1944 Pat 147.

-S. 115-Court subordinate-Judge acting under S. 19, Bombay Local Boards Act—If Court or persona designata—Order by—Revision—

Maintainability

It cannot be disputed that a Judge acting under S. 19 of the Bombay Local Boards Act acts as a persona designata. If the question decided by him is clearly within the competence of the Judge as a persona designata his decision is not that of a Court and therefore S. 115, C. P. Code, will not apply and a revision application to the High Court is incompetent. On the other hand, if the Judge, as a persona designata, exceeds the powers conferred upon him by the section, or acts outside it, he ceases to act as a persona designala, and becomes a Court subordinate to the High Court under S 115, C. P. Code. If the Judge entertains and decides an application made by a person not competent to make it under S 19, e.g., by one who is not qualified to vote in the election, he clearly acts outside his powers. (Davis, C.J. and Weston, J) PIR BAKHSH KHAN v. DARYA KHAN. I.L. R (1943) Kar. 345=210 I.C. 19=A.I.R. 1943 Sind 233.

-S.115-"Court subordinate"-Magistrate or bench of Magistrates hearing appeal under 5.86, Bombay District Municipal Act-If Court or persona designata—Revision—Competency.

A Magistrate or bench of Magistrates hearing an appeal under S. 86 of the Bombay District Municipal Act is a persona designata and not a Court, and the decision of the Magistrate or bench of Magistrates is not open to revision under S. 115, C.P. Code. (Wadia, J.) VITA MUNICIPALITY v. GANGARAM TATYAJI. I.L.R. (1941) Bom. 427=197 I.C. 23=14 R.B. 188=43 Bom.L.R. 333=A.I.R. 1941 Bom. 184.

S. 115 and Cr. P. Code, S. 476-B—Court subordinate—Revenue Court deciding under S. 476-B, Cr. P. Code. appeal

An order passed by a Revenue Court on appeal under S 476-B, Cr. P. Code, is not a decision by a Court subordinate to the High Court and as such not open to revision under S. 115, C.P. Code. (Agarwal and Madeley, JJ.) JANG BAHADUR SINGH v. EMPEROR 19 Luck. 245=208 I.C 247=16 R.O. 72=1943 A. Cr.C. 71=44 Cr.L. J 757=1943 O.A. (C.C.) 106=1943 A W.R. (C.C.) 41=1943 O.W.N. 176=A.I.R. 1944 Oudh 23.

-\$115-"Court subordinate"-Sub-Collector hearing application under S. 15 (4), Madras Act IV of 1938 by tenants in "estate"—District Collector purporting to revise order of Sub-Collector under S. 205, Estates Land Act-If "Court"—High Court's powers of revision. See Madras Agriculturists' Relief Act, S. 15 (4), EXPLANATION. (1943)2 M.L.J. 615.

—— S.115—Court subordinate to High Court —Deputy Collector acting under S.3 (5) of Madras Estates Land Act—Order by—Revision—

Competency.

Proceedings under S. 3 (5) of the Madras Estates Land Act are purely of an executive or administrative character, and a Deputy Collector acting under the section is not a Court subordinate to the High Court within the meaning of S. 115, C. P. Code. No revision therefore lies from an order passed under S. 3 (5) of the Estates Land Act (Byers, J.) Syed Mahomed Ghouse Sahib Suthari v. Syed Mahomed Groves Sahib Suthari v. Syed Sahib Suthari v. Syed Sahib Suthari v. Syed Mahomed Groves Sahib Suthari v. Syed Sahib GHOUSE SAHIB. 204 I.C. 376=15 R.M. 763=55 L.W. 644 (1)=1942 M.W.N. 791 (1)=A I.R. 1942 Mad. 742 (2)=(1942) 2 M.L.J. 511.

S. 115—Court subordinate to High Court-

Single Judge of the High Court.

A single judge of a High Court is not a Court subordinate to the High Court within the meaning of S. 115, C. P. Code, and hence his orders could not be revised under that section. (Ghulam Hasan and Madeley, JJ.) DWARKA NATH SINGH v. RAJ RANI. 1944 O.A. (C.C.) 264=1944 A.W. R. (C.C.) 264=A.I.R. 1945 Oudh 54.

S. 115—Court subordinate—Tribunal constituted under Nagpur Improvement Trust Act.

The High Court has no power to revise an order passed by the President of the Tribunal constituted under the Nagpur Improvement Trust Act, as it is not a Court subordinate to the High Court. "(Pollock and Sen, JJ.) LAXMAN RAO DESHMUKH v. COLLECTOR OF THE NAGPUR DISTRICT. I.L.R. (1945) Nag. 399=1945 N.L.J. 274=A.I. R. 1945 Nag. 146.

#### Discretion.

-S. 115-Discretion-Decision on preliminary issue as to maintainability of application— Unsuccessful part not challenging decision in revision—Revision after final decision—Interfe-

rence on preliminary point—Rule.

The power of revision under S. 115, C. P. Code, is a discretionary power conferred upon the High Court and there is no right of revision as such in an aggrieved party. Where the lower Court decides on a preliminary issue that an application under S. 192 of the Succession Act is maintainable, but the aggrieved party fails to take the matter in revision and takes the chance of a deci-

C P. CODE (1908), S. 115.

Court will not be too ready to assist him in his revision after the final decision on the preliminary point. (Dhavle and Chatterjee, JJ.) KRISH. NADEVANAND RAMJEE v. KAPILDLO RAMJEE. 21. Pat. 197=198 I C. 535=14 R.P. 468=23 P L. T 547=8 B R. 429=1941 P.W.N. 755=A.I.R. 1942 Pat. 251.

-S. 115—Discretion—Interference—Principles—Defective order setting aside even more defective order—If to be interfered with.

The powers conferred under S. 115, C. P. Code,

are discretionary and the High Court will not properly interfere to set aside an order in order to restore an order which is clearly contrary to the provisions of statute. Though the order under revision is defective, the High Court will not interfere with it when it sets aside an order which is even more defective. (Davis, C.J. and Weston, J) PIR BAKHSH KHAN v. DARYA KHAN. I.L R. (1943) Kar. 345=210 I.C. 19=A.I.R. 1943 Sind 233.

S. 115—Discretion—Order as to costs—Interference See C. P. Code, S. 35. A.I R. 1945 Pat. 184.

-S. 115—Discretion—Order returning plaint to be presented to Court of lowest pecuniary jurisdiction — Confirmation on appeal — High Court will not revise. Sec C. P. Code, S. 15 and O. 7, R. 10. 47 C.W.N. 720.

-S. 115—Discretion—Revisional powers—

Conditions for exercise of.

The powers of the High Court are discretionary and will not be exercised save and except for the prevention of injustice; but when the matter is before the High Court, the High Court, for the purpose of preventing a misunderstanding of the rights of the parties, if it considers that it is desirable that the matter should be clarified will interfere to that extent and make the necessary orders. (Agarwala, J.) Sheo-NARAIN PBASAD v. JAWAHIR LAL. 199 I.C. 312= 8 B.R. 536=14 R.P. 568=23 Pat. L.T. 135=A. I.R. 1942 Pat. 293.

#### Discretionary order.

-S. 115—Discretionary order — Interference—Grounds—Order refusing to fix smaller number of instalments under Bihar Money-Lenders Act—Discretion—Inferference. See BIHAR MONEY-LENDERS ACT (1939), S. 11. 1941 P.W.N. 507.

sig to exercise inherennt powers—Revision—Sale set aside on failure to furnish requisite stamp-No appeal—Application to vacate order setting aside sale under inherent powers—Refusal—Inter-

ference in revision.

A decree-holder who purchased the properties at an execution sale having failed to deposit the full stamp required for the sale certificate, the Court set aside the sale. No appeal was filed against the order setting aside the sale, but long afterwards the decree-holder applied to the Court to vacate the previous order under its in-herent powers under S. 151, C. P. Code, or to accept the amount deposited as sufficient for such of the items of property on the sale of which the stamp would amount to the amount deposited, though the decree-holder had not asked the Court previously to confirm the sale of such sion on the merits and fails ultimately, the High items only. The Court refused to interfere

holding that there was no reason to exercise its inherent powers. The decree-holder applied to

the High Court in revision.

Held, that the decree holder having failed to appeal against the order setting aside the sale, though he had a right of appeal, the lower Court was right in refusing to interfere with its order in its inherent powers, even if it had such powers, and the High Court could not interfere in revision. (Harries, CJ. and Fazl Ali, J.) BINRAJ MARWARI v RAM SAHAI MAIITO 194 I.C 21= 13 RP. 672=7 BR. 685=22 Pat. L.T. 818= A.I.R. 1941 Pat. 408.

 $\cdot$ S. 115-Discretionary orders-Order under O. 22, R. 10—Revision—Maintainability.

The power to add the name of any person

upon whom any interest has devolved as a party to the proceedings is one within the discretion of the Court, hence an order under O. 22, R. 10, C. P. Code, adding or refusing to add a party is not subject to revision by the High Court. (Wadia and Wassoodew, JJ) Krishnaji Ramchandra v. Bhikchand Ramkaram. I L R. (1941) Bom. 629=14 R B 395=200 I.C. 160=43 Bom. L R. 719=A I.R 1942 Bom. 82.

\_\_\_\_\_S. 115—Discretionary order—Revision— Interference — Instalments—Bihar Money-Lenders Act (1939), S. 12-Order allowing payment of decree in instalments-Reasons not given-Effect-Interference-Decree holder objecting to order but withdrawing money deposited under—
If precluded from challenging order in revision.
The High Court is related to the control of the court in the court is related to the court in the court in the court is related to the court in the court in the court is related to the court in the

The High Court is reluctant to interfere with orders passed by Subordinate Courts in exercise of their discretionary powers, such as an order for payment of a decree by instalments under S. 12 of the Bihar Money-Lenders Act. Such discretionary power must, however, be exercised judicially and the Court should be careful to indicate in its order the reasons for it so that the High Court may be satisfied that the discretion has been exercised judicially and all the relevant matters specified in S. 12 of the Bihar Money-Lenders Act have been taken into consideration. Where the order does not show that all the circumstances have been taken into consideration and does not give reasons the High Court will not hesitate to interfere in revision and will set aside the order. The mere fact that the decreeholder who objects to the instalments subsequently withdraws from the Court an amount of instalment deposited in Court will not debar him from challenging the instalment order in revision on the ground that he has taken a benefit under that order. There is no benefit to the decree-holder merely because an instalment order is passed as he is entitled to the money deposited under his decree. (Agarnala, J.) RAM NARAYAN SHARMA V SITA RAM PATHAK. 201 I C. 484=15 R.P. 52=8 B R. 792=23 Pat. L.T. 194=A.I.R. 1942 Pat. 451.

-S. 115—Discretion of Court—Interference

in revision. See Ounh RENT ACT, S. 124-D AND C P. Code, S. 115. 1942 O.A. 235.

S. 115—Error in the exercise of jurisdiction—Application under Madras Village Courts Act, S. 73-Pleader of petitioner absent-Refusal to adjourn case for a few minutes to enable him to appear—Dismissal of petition—Interference in revision. See C. P. CODE, O. 9, R. 9. (1942) 2 M.L.J. 390 (2),

C. P. CODE (1908), S. 115.

#### Error of Law.

-S. 115-Error of law-Erroneous decision on question of limitation-Revision-Interference. An erroneous decision on the question of limitation does not justify interference in revision as it cannot be said to be one without jurisdiction.

(Wadsworth, J.) NATARAJA GRAMANI v SIVA-KOLUNDU GRAMANI 207 I C. 274=16 R.M. 74= (1942) M.W.N. 789=55 L.W. 844 (1)=A.I.R. 1943 Mad. 245=(1942) 2 M.L.J. 735.

-S 115-Error of law-If ground for inter-

A wrong view of the law taken by the lower Court does not justify interference in revision. (Dhavle and Chattery, JJ.) KRISHNADEVANAND RAMJEE v. KAPILDEO KAMJEE. 21 Pat. 197=198 I.C. 535=14 R.P. 468=8 B.R. 429=1941 P.W. N. 755=23 Pat.L.T. 547=A.I R. 1942 Pat. 251.

115-Error of law-Interference-If justified.

An erroneous conclusion of law does not warrant interference in revision. (Dhavle, J.) Punya Raulo v Khetra Gauda. 197 I.C. 655=14 R.P. 329=8 B.R. 275=7 Cut.L.T. 58=A.I.R. 1942 Pat. 133.

-S. 115-Error of law-Misunderstanding of proceedings by Court.

An erroneous decision on a point of law does not, no doubt, entitle a party to file a revision under S. 115, C. P. Code, but where such decision is a result of a misunderstanding by the Court of the nature and scope of the proceedings before it, it is open to revision, as where an application is taken to be for filing an award, which it is not, and is erroneously held to be barred by limitation under Ait. 173 of the Limitation Act. (Abdur, Rahman, I) JAI KISHEN v. RAM LAL GUPTA. 46 P.L.R. 232=A.I.R. 1944 Lah. 398.

S 115-Error of law-Omission to consider certain pieces of documentary evidence-Interference in revision.

The omission to consider certain pieces of documentary evidence will not come within the mischief of S. 115 (c), C. P. Code, which applies only to errors committed in connection with the exercise of jurisdiction or errors committed in respect of procedure, and not to every error of law committed by a Judge. (Sen, J.) ASHUTOSH DEY v. FOOLCHAND KESHABDEO. 203 I.C. 368=15 R.C. 421=46 C.W.N. 838=A.I.R. 1942 Cal.

-S. 115-Error of law-Order holding application to be barred by limitation-Revision-Competency.

An order rejecting an application under O.21, R. 95, C. P. Code, for possession of the property purchased by the applicant as auction purchaser, on the finding that it was barred by limitation, is not open to revision by the High Court under S. 115, C. P. Code. A finding on a question of limitation, whether right or wrong, is a finding on a question of law which does not bring the case within the ambit of S. 115, C. P. Code. There is no question of jurisdiction or illegality or material irregularity in the exercise of jurisdiction. A revision application is therefore incompetent. (Broomfield and Macklin, IJ.) MITHALAL RANCHHODDAS v. MANEKLAL MOHAN-LAL. 195 I.C. 601=14 R.B. 67=43 Bom.L.R. 480=A.I.R. 1941 Bom. 271.

S 115—Error of law—Refusal to execute decree owing to absence of right to execute-Revision

Though a Court refuses to execute a decree owing to a mistake of law as to the absence of the right to execute by the applicant, it cannot be interfered with in revision. The Court cannot be said to have acted with any material irregularity or failed to exercise a jurisdiction vested in it by law (Allsop, J) Sukhdeo Singh v. Dal Chand. 1943 A L W. 281.

# Failure to exercise jurisdiction.

Order rejecting application under S 33 of Arbitration Act-Revision

An order rejecting an application made under S. 33 of the Arbitration Act erroneously holding that the Court has no jurisdiction to entertain it, is revisable under S 115, C P. Code. (Abdur Rahman, J) RADHA KISHEN v. BOMBAY Co., LTD. 212 I C. 411=17 R.L. 16=45 P L.R. 287 =A.I.R. 1943 Lah. 295.

S. 115-Failure to exercise jurisdiction-What amounts to.

If a Commissioner quashes a Collector's appellate order solely on the ground that no appeal lay to him, when an appeal did in fact he, there will be a failure of jurisdiction which will justify interference in revision. But if he reverses the Collector's order on the merits and not on the sole ground that no appeal lay to him, there is no refusal to permit the exercise of jurisdiction by the Collector, and no revision has from the order (Mitchell, F.C.) GHULAM MURTAZA KHAN v. SAMPURAN SINGH. 21 Lah.L.T. 23.

#### Finding of fact.

S. 115—Finding of fact—Binding nature.

A finding of fact even if incorrect is binding in revision. Accordingly a finding that an agreement was not proved cannot be gone into in revision. (Gruer, J) AMRITRAO ATMARAM v. NAR-SINGRAO. I.L R. (1942) Nag. 625=199 I C 702 =14 R.N. 296=1942 N.L.J. 106=A.I.R. 1942

Mag. 47. S. 115-Finding of fact-Interference.

There can be no interference in revision with findings of fact arrived at by the lower Court. (Thomas, C.J) C. D. LINCOLN v. NOOR ELAHI. 204 I.C. 531=15 RO. 364=1942 O.A. 626= 1942 O.W N. 801=1942 A.W.R. (C.C.) 361= A.I.R. 1943 Oudh 192.

-S. 115-Finding of fact on circumstantial

evidence-Interference.

A finding of fact though based on what may be called circumstantial evidence is a finding of fact and cannot be questioned in a revision application under S. 115, C. P. Code. (Ghulam Hasan, J.)
MURLI SHUKUL v LALTA SINGH. 208 I.C 45=
16 R.O. 57=1943 O.A. (C.C.) 108=1943 O.W. N. 169=A.I.R. 1943 Oudh 300.

#### High Court's Powers.

-S. 115 and Agra Tenancy Act (III of 1926), S. 253-High Court-Powers of, in revi-

What come under the review of the High Court when once it is siezed of the revision are the proceedings as a whole from start to finish and the

C. P. CODE (1908), S. 115.

RATI RAM v NIADER MAL. 194 IC 640=1941 O W.N 546 (2)=1931 A W R. (Rev) 308= 1941 O.A (Supp) 238=1941 A L.J 230=1941 R.D 462=1941 A.L W 397 (2)=14 R A 4= 1941 AWR. (HC) 130=AIR 1941 All. 215.

S 115-High Court's powers of revision-Abuse of powers by the execution Court-Interference

Though the High Court was ordinarily reluctant to use its powers under S. 115 of the C P. Code, when there is a simple remedy by way of suit, yet where the powers of the executing Court have been abused it would be justified in interfering and directing the executing Court to pass the proper orders. (Wadsworth, Offg. CJ. and Patanjah Sastri, I) BAGYALAKSHMI AMMAL V BAPPU AIYAR 1945 M W N. 761=58 L W. 634=(1945) 2 M.L.J 567,

Dismissal for default—Subsequent restoration without notice to judgment-debtor—Revision— Interference Sec C P Cope, O. 9, R. 9. 22 Pat.L.T. 965.

#### Illegality or Material irregularity.

-S. 115—Illegality or material irregularity— Failure to consider important point of fact—Effect of-Interference in revision.

Where the lower Court fails to take into consideration an important question of fact which is indeed conclusive in the case, and the consequence of which is that it has given a decision which otherwise it would clearly not have given, S. 115 (c) applies, and the lower Court must be held to have acted illegally or with material irregularity so as to justify interference by the High Court in revision (Davis, C.J. and Weston, J) AYARAM ATAMPARKASH v. SUKHDEV & Co. I.L.R. (1941) Kar 587=199 I.C. 707=14 R,S. 197=A I.R 1942 Sind. 57.

-S 115—Illegality or material irregularity Following one ruling instead of another.

Where a lower Court has two conflicting rulings before it and it chooses to follow one rather than the other, it could not be said that by so doing it acted with illegality or material irregularity in the exercise of its jurisdiction to justify interference in revision (Yorke, J) SATIAWATI v. KANHAIYA LAL. 1943 A L.W. 232.

-S. 115—Illegality or material irregularity— Summary proceeding—Exclusion of secondary or indirect evidence—If justifies interference.

Where in a summary inquiry in proceedings

under S. 182 of the Succession Act, the District Judge excludes certain statements which are in the nature of secondary or indirect evidence on the ground that the admission thereof would unduly prolong the inquiry, it cannot be said that he acts illegally or with material irregularity so as to justify interference in revision. (Dhavle and Chatterjee, JJ) Krishnahevanand Ramjee v. Kapildeo Ramjee 21 Pat. 197—198 I C 535—8 B.R. 429—14 R.P. 468—1941 P.W.N. 755— 23 Pat L T. 547=A.I.R 1942 Pat. 251.

#### Interference.

-S. 115-Interference in revision-IVrong decree set aside in appeal which is incompetent.

The High Court will not in exercise of the powers under S. 115, C. P. Code, restore a wrong object of the scrutiny of the High Court powers under S. 115, C. P. Code, restore a wrong decree set aside in appeal although the appellate Court had no jurisdiction to entertain the appear

if it appears that the defendants, if they had not appealed would have obtained relief under S. 25 of the Provincial Small Cause Courts Act. (Henderson J.) Sudhansu Kumar Roy v Banamali Roy. 49 C W N. 711

-S 115-Interference under-Principles-

Interlocutory orders-If revisable

A strict compliance with the conditions laid down in S. 115, C. P. Code, is the sine qua non to the exercise of jurisdiction under that section. Considerations of possible irreparable injury or failure of justice cannot be invoked to give jurisdiction to the Oudh Chief Court to interfere with any interlocutory order. If interference with orders of lower Courts in interlocutory matters are allowed on such grounds the trial of suits in the lower Courts will be unduly hampered and protracted Hence an order remodelling an issue being an interlocutory order and not amounting to a case decided cannot be interfered with in revision. (Thomas, C.J. and Ghulam Husan, J.) Deputy Commissioner, Rae Bareli v Bhola Nath 201 I.C 317=15 R O 70=1942 O.A 260=1942 A.W R. (C.C.) 239=1942 O.W. N. 384=A I.R. 1942 Oudh 432.

-S. 115—Interference—Refusal to amend decree according to U. P. Debt Redemption Act.

A refusal to amend a compromise decree in respect of a promissory note according to the U P Debt Redemption Act could not be interfered with in revision when there has been no failure to exercise jurisdiction and there has been no material illegality or irregularity in the exercise of jurisdiction by the trial Court. (Madeley, J) CHANDRA NATH v RAJA RAM. 203 I.C 234=15 RO. 182=1942 A W.R. (C. C.) 341 (2)=1942 O.W.N. 624=1942 O.A. 491

#### Interlocutory order.

-S 115-Interlocutory order-Court-fee-Order as to-Revision. See C P COUE, S 115-COURT-FEE.

-S 115-Interlocutory oider-Order reviving proceedings which had terminated—If open

to revision.

An order passed on review setting aside an order of dismissal of an application for the removal of a mutwalli, is one reviving proceedings which had definitely terminated and so cannot be described as an interlocutory order so as to bar a revision under S. 115. (Bennett, J.)
MAJID-UN-NISSA v ANWARULLAH. 18 Luck. 48
=200 I C 142=14 R.O 553=1941 O.W.N. 1361=1941 O.A. 1066=1942 A.W.R. (C.C) 11 =A.I.R. 1942 Oudh 210.

**-S. 115**—Interlocutory order—Refusal to recast issue—If revisable.

An order rejecting an application to recast an issue frmed in a case so as to remove the burden of proof wrongly placed upon a party is only an interlocutory order and hence is not revisable and the decision is at best a wrong decision which cannot be the subject of interference under S. 115, C. P. Code. (Thomas, C.J. and Ghulam Hasan, J.) RAM CHANDRA v. BIRENDRA BIKRAM SINGH. 201 I C. 277=15 R.O. 68=1942 A.W.R. (C.C.) 256 (1)=1942 O A. 283=1942 O W.N. 377=A I.R. 1942 Oudh 431.

entertaining and disposing of appeal under Orissa matter, his order is liable to interference by the

#### C P. CODE (1908), S. 115.

Tenancy Act entertainable by District Judge— 

Court entertaining incompetent appeal and deciding same-Revision. See C. P. CODE, S. 100. 7 Cut L T. 41

-S. 115-Jurisdiction-Absence-Order for sale under Partition Act in contravention of Ss. 2 and 4 of that Act—Revision—Interference. See Partition Act, Ss. 2 and 4 (1944) 1 M.L. J 296.

-S. 115—Jurisdiction—Absence of—Pauper application-Dismissal on ground of want of cause of action not apparent on the application-Court looking into evidence and rejecting on 

designata—Order by Judge acting under S. 15, Bombay Municipal Boroughs Act—Revision—Powers of High Court. See Bombay Municipal Boroughs Act, S. 15. 46 Bom. L.R. 371.

S. 115-Jurisdiction-Decision as to absence of—Confirmation in appeal—Revision if lies.

The High Court has power to interfere in revision with an order passed in appeal confirming the trial Court's decision that it had no jurisdiction to try the particular suit before it (Nivogi and Gruer, JJ.) Kesheorao v. Ganeshrao. I.L. R. (1941) Nag. 543=198 I.C. 34=14 R.N. 201= Ĭ.L. 1941 N L.J. 245=A.I.R. 1941 Nag. 278.

-S. 115 - Turisdiction-Fullure to distinguish between condition in India and England—Following decision of High Court of another Province and not considering decision of own High Court-Interference-If salisfied-Error of law.

It cannot be said that merely because the lower Court has not sufficiently distinguished between conditions in India and England or has not considered a relevant decision of the High Court of the Province and has followed a decision of the High Court of another Province, any question of jurisdiction arises. At the most it amounts only to an error in law which it is in the jurisdiction of the Court to make, and it does not justify interference in revision. (Davis, C. J. and Weston, J.) AYARAM ATAMPARKASH v. SUKHDEV & Co. I.L R. (1941) Kar 587=199 IC. 707=14 R.S. 197=A.I.R. 1942 Sind 57.

-S. 115—Jurisdiction—Failure to exercise jurisdiction—Application under O. 21, R. 89— Consideration on merits—Sufficiency. See C. P. Code, O. 21, R. 89 AND S. 115. 1941 O.W.N. 835.

-S. 115-Jurisdiction-Failure to exercise-Commissioner for workmen's compensation— Failure to decide whether particular person falls within the category of persons enumerated in the class of defendants—Effect.

Where the Commissioner for workmen's compensation has no jurisdiction to decide that the persons designated in S. 2 (1) (d) of the Workmen's Compensation Act are not dependents or that persons not designated in the section are dependents, he has power to decide whether a Jurisdiction.

-S. 115—Jurisdiction— Absence—Colletor rtaining and disposing of appeal under Orison

particular person has the status of any of the persons referred to in the section. Where the fails to exercise this power and decide the matter his order is liable to interference by the

Pat.L.T. 1023=A I R. 1942 Pat. 33.

-S 115-Jurisdiction-Failure to exercise-Costs-Court failing to make order-Revision.

Where a Court makes no order as to cost, and does not even consider the matter, it fails or omits to exercise a jurisdiction vested in it, and the High Court in such a case will interfere in revision under S. 115, C. P. Code. (Davis, C. J. and Lobo, J.) Hemandas Topandas v Bakhshu Singh Dharam Singh ILR. (1943) Kar. 242 =210 I. C. 12=A.I R. 1943 Sind 185.

**-S. 115**—Jurisdiction—Failure to exercise-Decree on promissory note-Execution-Application by judgment-debtor on date of sale to fix value of property under S. 13, Bihar Money-Lenders Act—Dismissal—Interference in revision. See Bihar Money-Lenders Act, S. 13. 23 Pat.L T. 14.

Failure to exercise jurisdiction vested by law-Misconception as to law-Revision, if lies.

If the Court proceeds on a wrong view of the law as regards the scope and object of O. 21, R. 88, C. P. Code, it must be deemed to have failed to exercise jurisdiction vested in it by law and can be interfered with in revision. (Puranik, J.) MUNNALAL v. GOPILAL I.L.R. (1941) Nag. 150=191 I.C. 217=13 R.N. 190=1940 N.L.J. 453=A.I.R 1940 Nag 337.

——S. 115—Jurisdiction—Failure to exercise— Rejection of application for relief under Sind Agriculturists' Relief Act—Revision—Competencv.

A revision under S. 115, C. P. Code, will lie on any question of law or fact which affects jurisdiction, and where the lower Court has declined to exercise jurisdiction, e.g., by declining to grant relief under the Sind Agriculturists' Relief Act, in such a case it may be said that a question of jurisdiction is involved and the High Court is not debarred from dealing with an application in revision. But the High Court should not, by way of revision, give to the applicant in effect a right of appeal which is denied him under the Act itself. (Davis, CJ and O'Sullivan, J) NAZO v. NARUMAL. I L.R. (1944) Kar. 46=215 I.C. 192=A.I.R. 1944 Sind 162.

S. 115-Jurisdiction-Irregular exercise of-Order of Panchayat Court unjust and without jurisdiction—Refusal by District Munsif to interfere under S. 73, Madras Village Courts Act—Revision—Jurisdiction of High Court. See MADRAS VILLAGE COURTS ACT, S. 73. (1943)1 M.

To extend for payment of deficit Court-see—Revision—Interference. See C. P. Code, S. 149. 1941 P.W.N. 516.

## Limitation.

-S. 115 and Limitation Act, Art. 181-Limitation.

No special period is prescribed for an appli-cation for revision and therefore if any article is applicable it is Art. 181 of the Limitation Act which prescribes a three years period from the time when the right to apply accrues. Where an application is within 3 years, of the order com-

## C. P. CODE (1908), S. 115.

High Court under S. 115, C. P. Code. (Agarwala plained of, no question of limitation strictly and Meredith, JJ.) Dirji v Goalin. 21 Pat. speaking arises. (Bennett and Agarwal, JJ.) 173=198 I C 529=8 B.R 437=14 R.P 476=22 CHANDRA PRATAP SINGH v BINDESHWARI PRASA speaking arises. (Bennett and Agarwal, JJ.)
CHANDRA PRATAP SINGH v BINDESHWARI PRASAD
SINGH 200 I C 259=14 R O 59?=1942 A.W.
R. (C.C.) 193=1942 O.A. 171=1942 O.W.N. 245 =A.I R 1942 Oudh 340.

-S 115-Limitation-Application made be-

youd 90 days—Maintainability—Practice.

Although the Limitation Act makes no provision for application for revision under S. 115, C. P. Code, the usual practice of the Court is not to entertain applications presented beyond 90 days. (Dhavle and Chatterjee, JJ.) KRISHNA-DEVANAND RAMJEE v. KAPILDEO RAMJEE, 21 Pat. 197=198 I.C 535=8 B.R 429=14 R.P. 468=1941 P.W N. 755=23 Pat.L.T. 547=A.I. R. 1942 Pat. 251.

-S. 115 —Limitation—Practice.

There is no limitation presc ibed for the application for revision but the Chief Court has held that if an application is unduly delayed it can be thrown out on that very ground and that ordinarrly if an application is filed beyond the period of limitation prescribed for an appeal it ought to be considered to have been unduly delayed. (Agarwal, J.) KALLU MAL v MUNICIPAL BOARD, NAWABGANJ 200 I C. 608=15 R O. 25=1942 O.W N 335=1942 A.W R (C C.) 220=1942 O. A. 241=A I R. 1942 Oudh 392.

S. 115—Locus standi to apply.

Under S. 115, C. P. Code, it is not necessary for a party to apply. Any person can bring an irregularity to the notice of the Court, although the Court will very seldom act unless the aggrieved party comes before it. (Bose, J) Percy Wood v. Mrs. Samuel. 211 I.C 210=16 R.N. 181=1943 N L. J 510=A.I.R. 1943 Nag. 333.

#### Material Irregularity.

-S. 115—Material irregularity—Application for leave to sue as pauper - Applicant possessed of share in inheritance but not having possession -Grant of leave—Failure to consider whether applicant could raise money with inheritance-Effect—Revision—Interference. See C. P. Cope, O. 33, R. 1, Expl. 7 Cut.L.T. 28.

S. 115-Material irregularity-Application under scheme framed under S. 92-Order decid-

ing only some of questions raised—Revision.

Where on an application filed under a scheme under S. 92, C. P. Code, the District Judge does not give his decision on all the points raised by the parties, and an appeal is incompetent from his order, the High Court can interfere in revision under S. 115 (c), C. P. Code, not only to the extent of supplying those omissions in the District Judge's order by giving the directions on those points but can consider and reopen in revision the points on which the District Judge has given his decision, when the consideration of the former would necessarily involve a re-consideration of the latter. (Mitter and Khundkar, JJ.)
SRIJIB NYAYATIRTHA v. DANDY SWAMIJAGANNATH ASRAM. 199 I C. 841=14 R.C. 648=73
C.L.J. 532=A..I.R. 1941 Cal. 618.

S. 115—Material irregularity—Consideration of chiection to leaghty of ground raised for

tion of objection to legality of award raised for

first time in appeal.

The consideration by the appellate Court of an objection to the legality of an award which had not been raised before the trial Court, is a

material irregularity covered by S. 115 (c), C. P. Code. (Abdur Rahman, J.) HARI SHANKAR v. MST. AMRAOTI. 219 I C 70=18 R.L. 39=46 P. L.R. 108=A.I.R. 1944 Lah. 280.

S. 115-Material irregularity-Court having jurisdiction to decide a question deciding it

wrongly.

Where a Court having jurisdiction to decide a question as to whether there was or was not material irregularity in the conduct of a sale, decides the question, though wrongly, there is no question of any material irregularity committed by that Court so as to bring the matter under S. 115, C. P. Code. (Yorke, J.) MAHABIR PRASAD v. SARJU DEVI. 1943 A.L.W. 323.

-S. 115 — Material irregularity — What amounts to.

It is established by the decisions of the Rangoon High Court that in the following instances a Court acts "with material irregularity"
"if not illegally" within the meaning of S, 115 (c), C. P. Code:—(i) If it shuts its eyes to a proposition of law or to an important fact in evidence before it as distinct from misapplying the one or ottoching a from misapplying the one or attaching a wrong legal consequence to the other; (ii) If it saddles the wrong party with a burden of proof; (iii) If it decides an appeal on a point of fact not raised at all before the Court from which the appeal is brought; (iv) If it decides an appeal on a point of law which the party in whose favour it decides has waived and which is not one of which the Court is bound to take cognizance irrespective of the parties. (Blagden, J.) BHAWANI SANKAR JAISI v. GANGA PRASAD. 198 I.C. 516=14 R.R. 204=A.I.R. 1941 Rang. 244.

S. 115—Material irregularity—Failure of Subordinate Court to follow the decision of the

High Court.

Failure on the part of a Subordinate Court to follow a decision of the High Court, unless it holds it to be not applicable even though mistakenly, is a material irregularity and his order is liable to be set aside. (Hamilton, J.) RAM BHAROSE v. TEKCHAND. 1943 A.L.W. 237.

S. 115—"Material irregularity"—Failure to note that certain decision followed does not apply

to the case.

Failure of the Courts below to notice that a Ruling of another High Court relied on does not apply to the case is a material irregularity. (Mir Ahmad, J.) TILA MAHOMED v. MUNICIPAL COM-MITTEE, PESHAWAR. 196 I.C. 648=14 R. Pesh. 36=A.I.R. 1941 Pesh. 76.

The ignoring of a reported ruling of the High Court or complete failure to grasp its essentials, must be taken as material irregularities. (Baguley, J.) U Po HLAING v. DAW NGWE. 192 I.C. 801=13 R.R. 197=A.I.R. 1941 Rang. 22.

-S. 115-Material irregularity in the exercise of jurisdiction—Failure of judge to apply his

mind to the points in issue.

Where a Judge of the lower Court fails to apply his mind to the points in issue it amounts to material irregularity in the exercise of jurisdiction within the meaning of S. 115, C. P. Code. (Mathur, J.) RAM LAL v. RAGHUNANDAN. 1944 A.L.W. 227.

#### C. P. CODE (1908), S. 115,

-S 115-Material irregularity-Misapplication of law-Interference.

Where as a result of a misapplication of the law there has been a denial of justice, it would amount to a material irregularity entitling a Court of revision to interfere under S. 115 C. P. Code. (Smha, J.) Sukhia v. Kirpa Ram. I.L.R. (1945) All. 604=1945 A.L.W. 194=1945 A.W. R. (H.C.) 193=1945 R.D. 353=1945 O.W.N. (H.C.) 179=A.I.R. 1945 All. 348.

-S. 115—Material irregularity—Misreading evidence.

Misreading the evidence and completely over-looking the dates and arriving at wrong findings amounts to a material irregularity. (Mir Ahmad, J.) Mt. Zura v. Mahomed Ayub. 205 I.C. 603 = 15 R. Pesh. 99=A.I.R. 1943 Pesh. 17.

--S. 115-Material irregularity-Order allowing amendment of written statement materially prejudicing plaintiff—Revision—Interference. See C. P. Code. S. 80. 45 Bom.L.R. 220.

S. 115—Material irregularity—Order

granting leave to withdraw suit in case not falling

within O. 23, R. 1.

An order granting leave to withdraw suit in the absence af a formal defect or "other sufficient grounds' within the meaning of O. 23, R. 1, C. P. Code, is a material irregularity or an illegality within the meaning of S. 115 (c), C. P. Code. (Bose, J.) SUKHAIN MILAI v. LIQUIDATOR, CO-OPERATIVE SOCIETY, PONDI SIMARIA. I.L.R. (1944) Nag. 458=217 I.C. 303=17 R.N. 114= 1944 N.L.J. 160=A.I.R. 1944 Nag. 183.

-S. 115- Material irregularity - Order granting permission to withdraw suit with liberty Failure to issue notice to defeudant and to record reasons—Effect—Interference in revision. See C. P. Code, O. 23, R. 1 (2). I.L R. (1944)
Kar. 169.

S 115, O. 3, R. 1, and O. 11, R. 1-Material irregularity—Order of Court rejecting act performed by party through recognised agent— No direction to perform it in person—Interference in revision.

When the Code expressly gives a party a right to perform a certain act through a recognised agent and the Court has not directed him to perform it in person, the Court cannot arbitrarily reject that act and mulct the party in costs because he has chosen to do that which the Code expressly allows him to do. That is a material irregularity on a question of procedure and justifies interference in revision. (Bose, J.) K. C. MAJUMDAR v. SURAJ SINGH. I.L.R. (1942) Nag. 258=193 I.C. 707=13 R.N. 345=1941 N.L. J. 418=A.I. R 1941 Nag. 205.

-S. 115 and O. 33, R. 1—Material irregularity-Order resusing leave to sue in forma

pauperis-Revision.

Where in disallowing an application for leave to sue in forma pauperis the Court has entirely misdirected itself and has taken wholly irrelevant matter into consideration and no evidence is on the record for the Court to have arrived\_at a decision in favour of the respondent, the Court has acted with material irregularity in giving a decision calling for interference in revision. (Abdul Rahman, J.) MAHOMED ASHRAF v. MAHOMED BIBI. 47 P.L.R. 402.

-S 115-Material irregularity-Reference to arbitration by next friend of minor plaintiff-

Failure to conform to O. 32, R. 7-Revision-Interference Loung Tahir v. Ramsing Takhatram. [See Q D 1936-'40, Vol I, Col 1333.] 191 I. C 291=13 R S 129.

-S 115-Material irregularity—Reference under Land Acquisition Act-Order of District Judge declining to make award-Interference in revision See Land Acquisition Act, S 18. (1944) 2 M L J. 130.

-S. 115-Material irregularity-Refusal to stay trial of suit pending decision of Special Judge under U. P. Encumbered Estates Act—If revisable. MAHOMED IHTISHAM ALI V. LACHII-MAN PRASAD. [See Q.D. 1936'-40, Vol. I, Col. 1333] 15 Luck, 641.

aside ev parte decree without considering of question jurisdiction to do so—Interference in revision. See C. P. Code, O. 9, R. 13 AND Ss. 115 AND 151. ILR (1942) Nag. 675.

115— Material irregularity— Wiong

interpretation of provision of law.

A wrong interpretation of a provision of law would, in certain cases, amount to a material irregularity and the High Court can interfere in revision (Sinha, J.) ABDUL WAHAB v. RAGU-NANDAN LAL. 1945 O.W.N. (H.C.) 167=1945 A.W.R. (H.C.) 189=1945 A.L W. 182

#### Miscellaneous proceedings.

-S. 115-Miscellaneous proceedings-Decision of District Judge on appeal against decision of special Judge, second grade—Revision—Maintainability. See U. P. Encumbered Estates Act, S. 46 and C. P. Code, S. 115. 1941 O.W.N. 1160.

-S. 115 and C. P. Land Alienation Act-

Miscellaneous proceedings—Revision, if lies.

A revision lies to High Court against an order passed on an application under S. 25 (2) of the C. P. Land Alienation Act. (Clarke, J.) JANKHAL v. THE D. C. BILASPUR I.L.R. (1942) Nag. 602= 196 I.C. 360=14 R.N. 101=1941 N.L.J. 224= A.I.R. 1941 Nag. 163.

## New evidence.

-S. 115-New evidence-Admissibility.

Where parties to a suit were misled into not filing a letter of authority under the belief that no objection was being taken in respect of its absence, and there was no issue also about it, in the interests of justice it should be admitted in revision against a decision based on the absence of such letter of authority. (Shirrest, S.M. and Sathe, J.M.) GOKARAN AHIR v. SAMMATH. 1941 R.D. 719=1941 O.A. (Supp.) 622=1941 A.W. R. (Rev.) 682.

#### New Plea.

-S. 115-New plea-If can be raised in arguments in revision for the first time.

A plea not raised in the written statement on which there was no issue and which was not raised even in the grounds of revision could not be allowed to be raised for the first time in arguments on the revision petition. (Ghulam Hasan, J.) BRIJ LAL v. SURAJMAN. 194 I.C. 662=14 R.O. 32=1941 O.L.R. 519=1941 O.A. 562= 1941 A.W.R. (Rev.) 583=1941 O.W.N. 832= A.I.R. 1941 Oudh 420.

S. 115—New plea—Interference—Practice. Bulakhidas v. Murlidhar. [See Q.D. 1936-'40, Vol. I, Col. 1335.] I.L.R. (1942) Nag. 139.

C. P. CODE (1908), S. 115.

-S 115 and O. 33, R. 5-New plea under

O 33, R. 5-If can be raised in revision. The plea under O. 33, R. 5 that the applicant was being financed by some one acting behind the scenes depends on facts which when neither pleaded nor proved cannot be gone into for the first time in revision. (Grier, 1) Amritrao Atmaram & Narsingrao ILR (1942) Nag. 625=199 IC 702=14 R.N. 296=1942 N.L J. 106=AIR 1942 Nag. 47.

-S 115 and C P Code, Sch II, para. 21-Order directing award to be file !- Revision-If

confined to question of jurisdiction.

In a revision against an order directing an award to be filed, objection could be taken only on the question of jurisdiction (Davis, C. J. and II eston, J) JETHANAND P'IAMBARDAS v. MIRABAI I.L.R (1942) Kar 36=202 I.C 152=15 R.S. 24=A I R. 1942 Sind 79.

-S 115 and O 21, R 63-Order in claim

proceedings-Competency of recusion

The provisions of O. 21, R 63, C. P Code, do not bar a revision under S 115 of an order made in claim proceedings. (Davies.) Governor-General in Council v. Udawal. 1943 A.M.L.J. 45.

appeal" within the meaning of S 109 (a) of the Code See C P Copt, S. 109 (a). (1943) 2 M.L.J.

S 115—Other remedy available—Revision—Vaintainability See C. P Code, O. 21, Rr. 46 AND 49 AND S. 52. (1945) 2 M.L.J. 531.

# Other Remedy open.

-S. 115—Other remedy open.

It is by no means an inflexible rule that where another remedy by way of a regular suit is open, revisional jurisdiction should under no circumstances be exercised. (Din Mahomed, Teja Singh and Achhruram, JJ.) RAM CHARAN DAS v. HIRA NAND. 222 I.C. 177—A.I.R. 1945 Lah. 298 (F.B.).

-S. 115-Other remedy open-Appeal competent - Revision - Order dismissing suit as against some defendants as suit cannot proceed against them for want of compliance with S. 270 (1), Government of India .ict-If decree-Appealability-Revision-Competency-C. P. Code, O. 7, R. 11.

It is the established practice of the High Court not to exercise its powers of revision in cases where a party entitled to appeal has not appealed. An order dismissing the suit as against some of the defendants in a suit on the ground that so far as they are concerned, S 270 (1) of the Govern-ment of India Act applied but was not complied with and holding that as against them the suit cannot proceed, is a decree within the meaning S. 2 (2), C. P. Code, and is therefore appealable. The order is one rejecting the plaint as against those defendants, and as such an order conclusively determines the rights of the parties so far regards the Court which decided the matter, it is a decree and hence an appeal lies against that order. Consequently the plaintiff cannot be allowed to invoke the special remedy afforded by S. 115, C. P. Code. The fact that the Court purports to act under O. 1, R. 10, C. P. Code, by expunging the names of the defendants concerned, does not alter the nature of the order

because in substance, it is an order under O. 7,

R 11, C. P. Code.

Quaere.—Whether in such a case when the suit cannot proceed against some of the defendants the Court should reject the entire plaint as a whole and not merely as against some of the defendants. (Fast Ali and Rowland, JJ.) NAND KUMAR SINHA v PASUPATI GHOSH. 20 Pat. 417=193 I.C 276=42 Cr L J 375=13 R.P. 576=7 B.R. 506=4 F L J (H C) 161=1941 P.W N. 25=22 Pat. L.T. 779=A.I R. 1941 Pat. 385.

S. 115—Other remedy open—. Ippeal com-

petent to lower Court-Revision.

The fact that an appeal hes to a lower Court will not take away the powers of the High Court to revise an order passed by a Munsif. The appeal referred to in > 115, C. P. Code, must be an appeal to the High Court. (Bennett and Madeley, IJ.) HARCHARAN SINGH v MAHOMED HUSAIN KHAN. 18 Luck 668=206 I.C 79=15 R C 463=1943 A.W.R. (C C.) 17=1943 O.W. N. 71=1943 O.A. (C.C.) 41=A.IR. 1943 Oudh 241.

-S 115-Other remedy open-Appealable order not appealed from -Revision-Maintain-

ability.

The dismissal of an application for a final decree in a suit for sale on a mortgage is appealable as a decree under S. 96, C. P. Code, and a civil revision petition against the order of dismissal is therefore incompetent. (Wadsworth and Patanjali Sastri, JJ.) SUBBAYYA v. VEN-KATA HANUMANTHA BHUSHANARAO. I L R. (1942) Mad. 60=200 I.C. 520=15 R M. 69=54 L.W. 107=1941 M.W.N 741=4 F.L J. (H.C.) 280=A.I R. 1941Mad. 817=(1941) 2 M.L.J.

Remedy-Revision-Competency

The proper remedy of a person who is adversely affected by an order under O 21, R. 63 is by way of a suit and not by way of a revision application under S. 115, C. P. Code. The fact that the order is erroneous does not give the party a right in revision; the maintainability of a revision application is not a matter to be judged by the merits of such application. (Davis, C.J. and Weston, J.) Dewandas Udhomal v. Bhojibai. I.L.R. (1942) Kar. 160.

-S. 115-Other remedy open-Interference. Where the effect of allowing a revision a matter in which an appeal might in a matter also lie, will be a convenience to parties and will save expense, the Court will interpret S. 115 liberally (Clarke, J) Mangi LAL v. ZAM SINGH. I.L R. (1942) Nag. 478=196 I.C. 190=14 R N. 85=1941 N.L.J. 340= A.I.R. 1941 Nag. 289.

-Ss 115 and 73 (2)—Other remedy open-Order allowing rateable distribution-Revision.

If a Court passes an order for rateable distri-bution on a wrong view of law, the High Court will interfere in revision at the instance of a party aggrieved by that order although he has a right of suit under S. 73 (2), C. P. Code, when the assets are rateably distributed, if it considers it undesirable to delay the execution proceedings. (Puranik and Digby, JJ) BALIELAL v. MANO-HARLAL. I L.R. (1944) Nag. 806=1944 N.L.J. 347=A.I.R. 1944 Nag. 295.

C. P. CODE (1908), S. 115.

----S. 115-Other remedy-Order refusing review-Failure to appeal-Revision-Compe-

tency.

S. 115, C. P. Code, does not apply to an order refusing to review a judgment. S. 115 cannot be invoked when a remedy is available by means of an appeal. A party who has allowed his remedy by way of appeal to lapse is not entitled to invoke the High Court's discretionary powers by the circuitous method of a civil revision petition against an order refusing to review a judgment; no question of jurisdiction arises in such a case, as the lower Court has complete jurisdiction to decide whether or not it should review its order. (Mockett, J.) VISWANTHAM V VARADHACHAR-YALU. 209 I.C. 160=16 R M 284=56 L.W. 82 (1)=1943 M.W.N. 116=A.I.R. 1943 Mad. 377 (1)=(1943) 1 M L.J 168.

S. 115—Other remedy open—Remedy by way of suit available—Interference in revision—Jurisdiction of High Court. Official Receiver Guntur v. Seshayya [See Q. D. 1936-'40, Vol. I, Col. 3287.] A.I.R. 1941 Mad. 262.

\_\_\_\_\_S. 115-Other remedy open-Rent execution case dismissed-Appeal competent but not

filed-Revision-Maintainability.

The decree under execution was a rent decree passed by a Munsif in a suit valued at Rs. 99-15-3. As the amount claimed in the suit exceeded Rs. 50, an appeal lay from the order of the Munsif dismissing the rent execution case to the District Judge. No such appeal was filed, but an application in revision was presented directly to the High Court against the order of the Munsif

dismissing the execution case:

Held, that under S 115, C.F. Code, no revision lay against an order which was appealable and therefore the revision application was not maintainable. (Facl Ali, C. J., Manohar Lall and Chaterjee, JI) RAM RAN VIJAY PRASAU SINGIL V. KISHUN SINGH 23 Pat. 61=211 I C 593=10 B R. 429=16 R.P. 250=25 P L.T. 35=1944 P W N 33=A I.R 1944 Pat. 54 (F.B.). -S 115-Other remedy open-Revision-

Competency.

The High Court will not ordinarily interfere in revision when the aggrieved party has another remedy open, e.g., a regular suit. (Dhavle and Chatterjee, II) Krishnadevanand Ramjee v. Kapildeo Ramjee. 21 Pat. 197=198 I.C. 535=14 R P. 468=8 B.R. 429=1941 P.W.N. 755=23 Pat. L.T. 547=A.I.R. 1942 Pat. 251.

-S. 115—Other remedy—Revision—Inter-

Where a party aggrieved by an order of the Court below has an alternative remedy, the High Court will not ordinarily interfere in revision. (Sinha and Das, JJ) CHINTAMONI SAHU v. JAHURI MAL. 11 Cut L.T. 21=1945 P.W.N. 311=A.I.R 1945 Pat. 296.

-S. 115 and C. P. Relief of Indebtedness Act (1939), S 6 (3)—Other remedy open—Revision—Maintainability—Stay of passing decree absolute on receipt of notice under S. 6 (3), C. P. Relief of Indebtedness Act-Proper remedy of aggreieved party.

Where on receipt of a notice issued under S. 6
(3) of the C. P. Relief of Indebtedness Act, a
Civil Court stays the proceedings for the passing of a decree absolute, the remedy of the aggrieved party is to go before the Debt Relief Court and

Q. D. I-63

if that Court come to a conclusion adverse to him, to apply, under S. 20 of the Act to the District Court for redress of his grievance cannot omit that procedure and agitate the questions in the High Court in the guise of an application for revision of the Civil Court's order, which was merely carrying out the directions of the Debt Relief Court to stay proceedings. (Clarke, J.) KULESHWAR PRASAD v DWARK-NATH I.L.R. (1942) Nag. 577=199 I.C. 453=14 R N. 280=1941 N.L.J. 391=A.I.R. 1941 Mag. 268.

# Pauper application.

-S. 115—Pauper application—Granting of —Revision.

An order granting leave to sue as a pauper is not open to revision under S. 115, C. P. Code. (Ismail and Mulla, JJ.) PAUHARI OPENDRA DAS W. RAM KUMAR DAS. 202 I.C. 575=15 R.A. 172=1942 A.L.W. 610=1942 A.L J. 419=1942 A.W.R. (H.C.) 257=A.I.R. 1942 All. 347.

-S. 115-Pauper application — Leave to

amend-Refusal-Revision.

An order refusing leave to amend an applicacation to sue in forma pauperis is not revisable under S. 115, C. P. Code. (Collister and Baipai, JJ.) Tej Singh v. Jagat Singh. 1942 A.L.W. *6*02.

Estates Act, Ss. 45 and 47—Pauper application -Leave to appeal as pauper against decree of

special Judge-Revision.

An order granting or refusing leave to appeal as a pauper against an order of a special Judge though passed in connection with an appeal under the U.P. Encumbered Estates Act is one passed on an application governed by the C. P. Code. There is no provision in the U. P. Encumbered Estates Act to govern such applica-cations and hence proceedings prior to the admission of an appeal under the Act cannot be said to be proceedings under the Act. They are proceedings under O. 44, C. P. Code, and the question of revision is governed by the C. P. Code, and not the U. P. Encumbered Estates Act. (Bennett, J.) RAM DULARI v. ALIAN BIBI. 17 Luck. 628=199 I.C. 614=14 R O. 503=1942 R.D. 181=1942 O.A. 57=1942 O.W.N. 106=1942 A.W.R. (C.C.) 79=A.I.R. 1942 Oudh 240 Oudh 240.

-S. 115—Pauper application—Order reject-

ing-Limits of revisional Jurisdiction.
S. 115, C. P. Code, is definitive of the limits within which the revisional powers of the High Court can be exercised. The section applies to jurisdiction alone the irregular exercise of it or non-exercise of it or the illegal assumption of it. Where a Court exercises its jurisdiction in the prescribed way, but its decision is based upon erroneous conclusions of fact or law, it cannot be said to have acted illegally or with material irregularity in the exercise of its jurisdiction. It only decides wrongly but does not necessarily exercise its jurisdiction wrongly. Judged by this test an order dismissing an application for leave to sue in forma pauperis is not open to

C. P. CODE (1908), S. 115.

277=1944 O.A (C.C) 277=A.I.R 1945 Oudh

115-Pauper application-Rejection-Revision.

An order rejecting an application for leave to sue as pauper is open to revision. It cannot be said that it is merely an interlocutory order or that the petitioner had another remedy open to him of bringing a suit on paying full Court-fee. (Mir Ahmad, J.) FAIZ MOHD. v JUMA KHAN. 200 I.C. 519=15 R. Pesh. 7=A.I.R. 1942 Pesh. 29 (1).

Revision See C. P. Code, O. 33, R. 5 (d) AND S.115. 1941 N.L.J. 473.

S. 115-Pauper application-Rejection-Revision.

The proceedings on an application for permission to sue as a pauper are anterior to, and independent of, the suit and an order under O 33, R. 7, C. P. Code, whether it grants or rejects the application, terminates those proceedings and is a "case decided" within the meaning of S. 115, a "case decided" within the meaning of the C. P. Code, and is open to revision on any of the Chand grounds mentioned in that section. (Tek Chand and Din Mohammad, JJ) HARI CHAND v. MST. DURGA DEVI. I.L.R. (1941) Lah 697=195 I.C. 742=14 R.L. 92=43 P.L.R. 82=A.I.R. 1941 Lah 128.

-S. 115-Pauper application-Rejection-Revision

An order rejecting an application for leave to sue in forma pauperis is revisable under S. 115, C. P. Code. (Ismail and Mulla, II.) CHANDA BEGUM v. MAQSOOD HUSAIN KHAN. I.L.R. (1942) All. 859=202 I.C. 620=15 R.A. 175=1942 A.W.R. (H.C.) 256=1942 A.L.W. 416= 1942 A.L. J. 340=A.I.R. 1942 All. 319.

-S. 115—Pauper application—Rejection on 

Pauper application—Rejection or grant of— Revision.

An order either rejecting or granting an application for leave to sue in forma pauperis amounts to a case decided within the meaning of S. 115, C. P. Code and the same principle would apply to applications for leave to appeal. (Bennett, J.) RAM DULARI v. ALIAN BIBI. 17 Luck. 628=199 I.C. 614=14 R.O. 503=1942 A.W.R. (C.C.) 79=1942 R.D. 181=1942 O.A. 57=1942 O.W.N. 106=A.I.R. 1942 Oudh 240.

S. 115 and O. 33, R. 2 (Oudh)—Pauper application—Sufficiency of substantial compliance with R. 2 of Ö. 33, C. P. Code—Failure to give schedule of immovable property—Rejection— Revision.

It is sufficient if there is a substantial compliance with the provisions of R. 2 of O. 33, C.P. Code. Where an application contains only a schedule of movable property while the plaint gives the particulars of the suit immovable property, there is a substantial and sufficient compliance with the requirements of R. 2, O. 33. Where a Court rejects such an application for revision under S. 115 if no question of jurisdiction is involved. (Thomas, C.J. and Misra. J.)

MAQBUL BAHADUR v. PRATAP BHAN PRAKASH
SINGH. 1944 O.W.N. 440=1944 A.W.R. (C.C.)

Where a Court rejects such an application for leave to sue as a pauper on the ground that there has been no sufficient compliance with R. 2, O. 33, it acts with material irregularity and its order is C. P. CODE (1908), S. 1<sub>1</sub>5.

revisable under S. 115. (Bennett and Agarwal, JJ.) LACHMI NARAIN v BAHADUR LAL. 17 Luck. 605=198 I.C. 828=1942 A.L.W. 144=1942 A.W.R. (CC.) 73=14 R.O. 445=1942 O.A. 51=1942 O.W.N. 95=A.I.R. 1942 Oudh

S. 115—Powers of High Court—Appeal from decree not lying to it but only to subordinate Court—'Thereto'—Meaning of.

No doubt the High Court will not ordinarily interfere in revision where the petitioner has a right of appeal, whether the appeal lies to the High Court or to a Court subordinate to a High Court. At the same time, it cannot be held that where there is only one appeal provided by the Code and that lies to the lower appellate Court, revision is shut out by the express words of S. 115, C P. Code. The word thereto in the section refers only to the High Court and not to 2 Court subordinate to the High Court. (Khund-kar and Biswas, JJ.) NILIMAPROOVA NANDY v. KADAMBINI DASI. 48 C.W.N. 501=A.I.R. 1944 Cal. 309.

-Ss. 115 and 151-Relative powers under -Dismissal of restoration application on merits

-Interference.

Where a trial Court dismisses an application for restoration upon its merits even though recognizing at the same time that it had jurisdiction to order it, the order cannot be interfered with either under S. 115 or S. 151, C. P. Code. (Yorke, J.) Beni Ram v. Bhagwan Das Bank, LTD. 1944 A.L.W. 299.

#### Revision.

-S. 115 and O. 47, R. 7—Revision against, review order not disclosing whether it had been heard on merits-Procedure.

Where a review order does not mention anything about an allegation which is the basis for the review application, it is difficult to say whether it has been heard on the merits or not and hence it has to be returned to the lower Court for disposal on merits. (Davies.) BEATEY v. KISTURA 1944 A.M.L.J. 14.

-S. 115—Revision—Competency—Appellate order setting aside order for return of plaint for presentation to proper Court. See C. P. Code, O. 7, R. 10, O. 41, R 23, O. 43, R. 1 (a) AND SS. 104 AND 115. 1942 O.W.N. 313.

S. 115—Revision—Competency—Appellate orders under S. 45 (2) or revisional orders under S. 46, U. P. Encumbered Estates Act. See U P. ENCUMBERED ESTATES ACT, Ss. 45 (2) AND 46 AND C. P. CODE, S. 115. 1941 A L. J. 85 (F.B.).

-S. 115 and Stamp Act. S. 33 (1)—Revision-Competency-Impounding of tocuments not impoundable—Jurisdiction of High Court over Collector or Chief Controlling Revenue Autho-

Where a lower Court impounds documents which it had no jurisdiction to impound, the order is revisable by the High Court under S. 115, C. P. Code. But the High Court has no jurisdiction apart from that conferred by Ss. 57 to 60 of the Stamp Act over the Collector or the Chief Controlling Revenue Authority. (Bose, J.)
NARAYANDAS NATHURAM, In re. I.L.R. (1943)
Nag. 520=204 I.C. 94=15 R.N. 151=1942 N.
L.J. 564=A.I.R. 1943 Nag. 97.

C. P. CODE (1908), S. 115.

-S. 115-Revision-Competency-Order for furnishing accounts under Charitable Religious Trusts Act.

Where a District Judge orders under Charitable and Religious Trusts Act a person to furnish accounts of a certain trust, the order of the District Judge is not revisable under S. 115, C. P. Code (Bennett, J) NAGESHWAR DASS v. HARNAM DASS. 200 I.C. 611=15 R.O. 29=1942 O.W.N. 337=1942 A.W.R. (C.C.) 225= 1942 O.A. 246=A I.R. 1942 Oudh 387.

-S. 115-Revision-Competency-Order of remand directing Civil Court to take cognizance.

Where in an appeal against an order directing the plaint to be returned to be presented to the Revenue Court, the appellate Court wrongly remands the case to the lower Court to take cognizance of it and dispose of it according to law, its order can be interfered with in revision under S. 115, C. F. Code. (Yorke, J.) NIZAKAT ALI v. SHAUKAT HUSAIN. I.L.R. (1943) All. 661=1943 O.W.N (H.C.) 340=1943 O.A. (H.C.) 133=1943 R.D. 328=1943 A.L.W. 397=1943 A.L.J. 395=16 R.A. 91=209 I.C. 101=1943 A.L.J. 395=16 R.A. 91=209 I.C. 101= 1943 A.W.R. (H.C.) 133=A.I.R. 1943 All 300.

S. 115 and O. 9, R. 13-Revision-Competency-Order under O. 9, R, 13.

Where an order has been made under R. 13 of O. 9, that order is revisable if it be found that in making it the Court below has brought itself by any means within the mischief of the provisions of S. 115, C. P. Code. (Yorke, J.) MAHADEO v. SUBEDAR SINGH. 1943 A.L.W. 544.

115—Revision — Competency—Order under S. 61 (2), Stamp Act. See STAMP ACT, S. 61 (2) AND C. P. CODE, S. 115. 1942 O.A. 632. -S. 115— Revision— Competency— Wrong decision.

Where the Court below decides a question which it has jurisdiction to decide, it does not matter for the purposes of S. 115, C. P. Code, whether it is right or wrong. In the absence of any illegality or irregularity the lower Court's order cannot be assailed in revision. (Yorke, J.) BANJARI LOHAR v. HANUMAN LOHAR. 1944 A.L. W. 490.

115—Revision—Stay—Right of trial Court to demand production of stay order.

When a Court is informed that a revision application against any order has been filed in the High Court, that Court is at liberty if so desired to demand a stay order. But it must grant a reasonable opportunity for its production (Davies.) BHURI v. ABDUL RAHMAN. 1942 A. M L.J. 71.

#### Scope.

-S. 115—Scope—Construction of S. 23 of Madras Agriculturists' Relief Act-Revision. SUBBA NAICKER v. SAVARIMUTHU PILLAI. [See Q. D. 1936-'40, Vol. I, Col. 3287.] A.I.R. 1941 Mad. 73 (2)

-S. 115—Scope—Interference in one applica-

tion of several irregular orders.

There is nothing in S. 115, C. P. Code, to prevent a High Court considering as many illegal or materially irregular orders in any one case as the Judge in the Court below may be deemed to have made. (Davies.) HARDEO KOER v. CHHOTAN LAL. 1944 A. M.L.J. 19. 1945 Bom. 60.

# C. P. CODE (1908), S. 115.

-S 115-Scope-Order granting permission to withdraw suit with permission to file fresh suit under O. 23, R. 1—Interference. JAGABAMBA) V. SUNDARAMMAL [See Q D. 1936-40, Vol I, Col.

1346] A I R. 1941 Mad 46

S 115—Scope—Order under S. 37, Bombay
Agricultural Debtors' Relief Act—Revision—
Competence—Jurisdiction of High Court to inter-

fere. An order by a Court under S. 37 of the Bombay Agricultural Debtors' Relief Act, holding that the judgment-debtor was "a debtor" and that his debts amounted to more than Rs 15,000 and transferring the execution proceedings to the Debt Adjustment Board, is one which can be made the subject of revision application to the High Court under S. 115, C.P. Code The fact that such an order is made "final" in S. 37 does not exclude the revisional jurisdiction of the High Court. Neither S. 37 nor S 73 of the Act bar the jurisdiction of the High Court to interfere with such an order on the ground of a material irregularity. (IVadia and Rajadhyaksha, II) Vinayak PANDURANGRAO v SHESHADASACHARYA ILR. (1944) Bom. 558=46 Bom.L.R. 711=AI.R.

CODE, S. 115—Subordinate Court. Code, S. 115—"Court subordinate." Sec C. P.

-S 115—Substantial justice done-Interference on a technical point-Rule and limits of the rule as to.

The rule that where substantial justice has been done between the parties, even if the lower Court has erred in law the High Court ought not to exercise its discretion in favour of the party relying on a technical plea, though a sound one, has to be applied with care. The substantial justice referred to above relates to rights to which a party has a legal right as opposed to a purely moral claim. The rule applies when owing to some technical rule of procedure or to some stupid blundering the claim is likely to fail whereas had the proper rule or remedy been applied it would have succeeded. It does not refer to cases where whatever the plaintiff had done his claim could not in any event have succeeded. If a plaintiff's suit is barred by time, the rule referred to 1s not attracted to such a case. (Bose, J.)
MOHAMMAD HUSSAIN KILAN v. BALA LAXMAN.
196 I.C. 201=14 R.N. 88=1941 N.L.J. 324= A.I.R. 1941 Nag. 261.

-S. 115-Withdrawal of suit-Revision, if lies. See C. P. Code, O. 23, R. 1 And S. 115—Revision. 1941 O.A. 343.

S. 115 and U. P. Encumbered Estates
Act (1934), S. 45—Wrong assumption of juris-

diction-Revision-Competency.

Where the District Judge to whom no appeal lay under S. 45 of the U. P. Encumbered Estates Act wrongly assumes jurisdiction and entertains the appeal, a revision under S. 115, C. P. Code, is competent. (Malik, J.) NARSINGH DUBE v. DHANESHRA KUER. I.L.R. (1944) All. 514=219 I.C 146=18 R A. 45=1944 R.D. 580=1944 A. L.J. 484=1944 A.L.W 532=1944 O.W.N. (H. C.) 215=1944 O.A. (H.C.) 172=1944 A.W.R. (H.C.) 172=A.I.R. 1944 All. 247.
S. 115-Wrong decision-Interference.

A Court having jurisdiction to decide a ques-

C. P. CODE (1908), S 141.

material irregularity so as to justity interference under S 115, C P. Code. (Ghulam Hasan, J.)
MURLI SHUKUL V. LALTA SINGH 208 I C 45=
16 R O 57=1943 O A (C C) 108=1945 O.W. N. 169=A I R. 1943 Oudh 300

-Ss 122 and 128-Rules framed by High

Court—Validity—Conditions.

It will be seen from the provisions of Ss. 122 and 128, C P Code, that (i) the delegated power of legislation conferred on the High Court in Part X of the Code is limited to annulling, altering or adding to the rules in the First Schedule of the Code, (u) the rules framed must relate to matters regulating the procedure of the High Court or Subordinate Court; and (111) such rules must not be inconsistent with any provision in the body of the Code lt is essential for the validity of every rule framed by the High Court that these conditions are satisfied. (Tek Chand and Beckett, JJ) KISHAN SINGH v. BACHAN SINGH I L.R. (1943) Lah. 569=201 I.C. 667=15 R.L. 68=44 P.L R. 253=A.I.R. 1942 Lah. 201.

-S. 132 (1)—'l'ersonal appearance'—Mean-

 $ing_of.$ 

The words "personal appearance" used in S. 132, C. P. Code, mean "personal attendance." (Eduley, I) KISSEN LAL KANKORIA & PURSHOT-TAM DAS. I L R (1941) 2 Cal 155=199 I.C. 150=14 R C. 521=A I R. 1942 Cal. 143.

-Ss 136 and 46—Property beyond jurusdiction of Court-Attachment before judgment-Procedure-S. 46, if applies to such a case.

S. 136, C. P Code, directs that where property is situated outside the local limits of the Court to which an application for attachment before judgment is made and the Court passes an order for attachment, it has to send the order of attachment to the District Court and the District Court on receipt of the order, has to cause the attachment to be made by its own officers or by a Court subordinate to the District Court and after making the attachment the District Court has to inform the Court which had ordered the attachment, of its compliance. It is not open to the Court ordering such attachment to send its order for compliance directly to any other Court except the District Court and an attachment made by any Court except the District Court, and without the intervention of the District Court, would be unauthorised and invalid. S. 46, C. P. Code, could have no application to such a case, for it only applies to matters which arise after a decree has been made. (Dar, J.) SURAJ BALI v. MOHAR ALI. 195 I.C. 891=14 R.A. 118= 1941 A.W.R. (H.C) 135=1941 A.L.J. 225 =1941 O.A. (Supp.) 245=1941 A.L.W. 401= 1941 O.W.N. 550-A.I.R. 1041 A.I. 212 1941 O.W.N. 550=A I.R. 1941 All. 212.

-S. 141-Applicability-Execution\_application—Preliminary mortgage decree—Death of decree-holder—Application by legal representative to come on record and for final decree— Dismissal for default-Fresh application-If in

order.
S. 141. C. P. Code, does not apply to applications for execution, but only to 'original matters in the nature of suits such as proceedings in pro-A Court having jurisdiction to decide a question though it decides it wrongly cannot be said to have exercised its jurisdiction illegally or with decree the decree-holder dies and his legal re-

presentative applies to be brought on record and also applies for a final decree and they are dismissed for default, he is not bound under S. 141, C. P. Code, to apply to set aside the dismissal under O. 9, R. 9, C. P. Code. A fresh application by him to be brought on as the legal representative is quite in order (Mya Bu and Shah, JJ)
MA THAN SEIN v. MA HLA YI. 1941 Rang. L.
R. 246=195 I.C. 342=14 R.R. 39=A.I.R. 1941 Rang. 201.

Ss. 141 and 151—Powers under—Second application after dismissal for default of prior application under O. 9, R 9-Maintainability

On the dismissal for default of an application under O 9, R. 9, C P Code, a second application to set aside the order of dismissal can be enter-tained and relief given either under S. 141 or S. 151, C. P. Co le, if sufficient cause is established. (Sathe, S. M and Dible, JM) HARAKH TELI v. HARNARAIN SAHAI. 1944 A.W R (Rev.) 142=1944 R.D. 289.

141-Scope-If creates substantive right of appeal—Order under S. 74, Trusts Act—Appeal Sec Trusrs Acr, S. 74. I L.R. (1943) Kar. 213

S. 141—Scope—O. 7, R. 10—Application of to Civil Revision Petition in High Court. See C. P. Code, O. 7, R. 10 (1942) 2 M.L.J. 99.

S. 142-Duty of Court-Drawing up of interlocutory order-Obligation of mofussil Courts-Appeal against order not drawn up-

Competency.

The practice of mofussil Courts not drawing up interlocutory orders is improper and must be abandoned. Such a practice is inconsistent with S. 142, C. P. Code, which requires orders to be in writing. It is not enough to produce for the purpose of an appeal, directions given by the Judge as to the order which he intends to make. The Judge should consider the exact form of the order which he intends to make and sign such order. If a party desires to appeal from an order which has not been drawn up, his proper course is to ask the Judge to draw up the order and it is the duty of the Judge to comply with such re quest. If the order is not drawn up, the appeal will be dismissed on the ground that there is no order (Beaumont, C.J. and Rajadhyaksha, J)
BOMBAY GOVERNMENT v. LIMDI DARBAR. 213 I.
C. 131=17 R B. 68=45 Bom L R. 961=A.I.R. 1944 Bom 24

-S 144—Restitution. Appeal Applicability. Appointment of receiver. Construction and scope. Court-fee Duty of Court. Inherent powers. Interest. Jurisdiction. Mesne profits. Mode of restitution. Notice. Parties. Restitution. Scope.

Appeal.
-Ss. 144, 145 and 151-Appeal-Application by supratdar for recovery of costs incurred | costs was made in the claim proceedings. The exe-

#### C. P. CODE (1908), S. 144.

in respect of attached property from decreeholder—Order on—If appealable. See C. P. Code, Ss. 47 and 151 1943 N.L.J. 172.

#### Applicability.

S. 144—Ipplicability.
S. 144, C. P. Code, only applies when a decree or order is varied in appeal. (Sathe, J.M.) AMJAD 'ALI v. MAHESHWAR NATH. 1941 R D. 429 = 1941 A W. R. (Rev.) 481=1941 O. A. (Supp ) 440.

S. 144—Applicability—Appeal from money decree-Application for stay of execution-Order granting stay on condition of security— Defendant depositing decree amount—No execution pending—Appeal allowed—Application by defendant for award of interest on amount depos-

ited-Competency.

Where a defendant against whom a decree for money is passed appeals against the decree, and applies for stay of execution of the decree pending appeal although no application for execution is pending, and obtains stay on condition of his furnishing security in the form of immovable property, but the defendant instead of turnishing such security, deposits the decree amount in cash, he cannot, on reversal of the decree in appeal, claim interest on the amount deposited by him, by way of restitution under S. 144, C. P. Code. S. 144 does not apply to such a case. The plaintiff in such a case is clearly not liable to pay interest on the amount. (Leach, C. J. and Krishnaswami Aiyangar, J.) SITARAMAYYA v. VENKANNA. 54 L W. 594=1941 M W N. 1072=201 I C. 202=15 R.M. 269=A I.R. 1942 Mad. 166=(1941) 2 M.L J. 768.

S. 144—Applicability—Change of position in consequence of decree-Meaning of-Property held by receiver until one of rival claimants establishes his title—Property handed over to party obtaining decree-If direct consequence of that

decree.

It is settled law that S. 144, C. P. Code, does not apply only when execution has been taken out, but applies also when property has passed in consequence of the decree which has been reversed. The section will not apply if it can be found as a question of fact that the change of position does not result from the decree which is set aside. When property is being held by a receiver until one of the rival claimants succeeds in esta-blishing his title and the property is then made over to one of the parties who has obtained a decree to this effect, then it is difficult to see how this can be regarded as anything but the direct consequence of the decree, whether the decree is one for possession or not. (Tek Chand and Beckett, JJ) Salfhon Shah v Zawar Husain Shah. 197 I.C 574=14 R.L. 258=43 P.L.R.

467=A I.R 1941 Lah 343.

——Ss 144 and 151—Applicability—Claim proceedings—Dismissal—Order for cost—Subsequent suit under O. 21, R. 63 decreed—Application by successful plaintiff for refund of costs awarded in claim—Jurisdiction to order.

An order for costs made by the executing Court against the unsuccessful party in claim proceedings under O. 21, R. 58, C. P. Code, cannot be regarded as automatically set aside by the decree in the regular suit under O. 21, R. 63, in favour of the party against whom the order for

cuting Court has therefore no power either under S. 144, C. P. Code, or under its inherent jurisdiction under S. 151, C. P. Code, to make an order for refund of costs recovered by the successful party in the claim proceedings in pursuance of the order for costs made therein on the application of the successful plaintiff in the subsequent suit. (Divatia, J) AMBALAL SANKALESHVAR v. Punjabhai Trikamlal. I.L R. (1943) Bom 171=208 I C. 225=16 R.B. 59=45 Bom, L.R. 203=A I.R 1943 Bom 129.

S. 144—Applicability—Decree for money—Execution sale—Subsequent reduction of decree amount in second appeal—Such reduced amount higher than price fetched at sale—Application for restitution—Maintainability—Finding that judgment-debtor unable to pay up even reduced amount on date of sale or within 30 days thereof—Effect. Gansu Ram v. Parvati Kuar. [See Q D. 1936-40, Vol. I, Col. 3288] 193 I C. 411=7 B R. 604=13 R P. 587=1940 P.W.N. 1037=A I R. 1941 Pat. 130

S. 144—Applicability—Decree for possession of cotate. Paragraph on accord. Fractions.

sion of estate-Reversal on appeal-Execution-Subsequent restoration of decree of original Court on appeal to Privy Council—Right to restitution—Extent of right—Trial Court refusing to pass decree for future mesne profits—If bars claim to future mesne profits by way of restitution. Zamindar of Sannakhimidi v. Suse Iamala Patta Mahadevi. [See Q D., 1936-40, Vol. I, Col. 1354]. 194 I C. 486=13 R M. 782.

a result of decree in another suit—Application for restitution-Competency-Inherent powers.

S. 144, C.P. Code, does not require that the variation or reversal of the decree should have taken place in the same suit, on an appeal, review, or revision; it applies also to cases where the decree has been set aside by a decree passed in another suit. Hence an auction-purchaser under a decree, whose sale has been confirmed can recover his purchase money from the decree-holder by way of restitution, if the decree and the sale are set aside as a result of a decree passed in another suit. In any case, the jurisdiction of a Court to grant restitution does not merely rest on S. 144, but is part of the inherent powers of the Court (Tyabji, J.) PIRUJI HAZARIJI v. AMRATI. I.L.R. (1944) Kar. 284= 218 I.C. 486=18 RS. 27=A.I.R. 1944 Sind

of possession under S, 60. Oudh Rent Act—Restoration to tenant under mistake—Proper remedy

of zamindar to regain possession.

Where after possession was delivered to the zamindar under S. 60 of the Oudh Rent Act and on an appeal being preferred by the other party and a stay being obtained, possession was restored to the tenants under a misapprehension of the stay order, on a question as to the proper remedy of the zamindar,

Held, that an application under S. 144, C. P. Code, would not lie as the original decree for ejectment was not reversed or modified in any way in appeal and that as the zamindar has already once obtained possession under S. 60 of Rent Act, it was not open to him to apply once again under it and hence the only remedy open to him was to apply under S. 151, C.P. Code. restitution of that sum.

C. P. CODE (1908), S. 144.

(Sathe, J.M.) AUSAN v. PRAG NARAIN. 1941 R.D 670=1941 A W.R. (Rev.) 856=1941 O.A (Supp) 757.

-Ss 144 and 151—Applicability-Execution sale-Rateable distribution-Subsequent suit by judgment debtors to declare sale void-Decreeholder consenting—Other holders of decree not parties—Decree-holder purchaser getting benefit from judgment-debtor behind back of other decree-holders-Right to apply for restitution gf

amounts-Remedy-Separate suit.

Though a Court can, in a case to which S. 144 does not apply, invoke S. 151, when the equities demand it, the section should not be invoked to obtain an order which only sets right one injustice by the infliction of another. Where after the confirmation of an execution sale and rateable distribution of the sale proceeds, the decreeholder purchaser consents to the sale being declared void in a suit by the judgment-debiors to which the other decree-holders who had obtained rateable distribution are not parties, in consideration of a benefit derived by him from the judgment-debtor behind the back of the other decre e-holders, he cannot maintain an application under S. 144 or S. 151, C P. Code, to recover from those decree-holders the amounts which they got as rateable distribution. Neither S. 144, nor S. 151 will apply. The remedy, if any, is by a regular suit. (Leach, C. J. and Shahabuddin, JJ.) UMMAJI JAVICHAND v. SUBBARAO, IL.R. (1945) Mad 482=57 L W 587=1944 M.W.N. 671=A.I R. 1945 Mad. 108=(1944) 2 M.L.J. 318.

——Ss 144 and 151—Applicability of S. 144— Modification of decree by trial Court itself—Inherent powers of Court to give relief in such

There is nothing in the wording of S. 144, C. P. Code, which definitely restricts its application to cases where a decree is varied by an appellate authority only. It can apply even to cases where the modification or reversal of the decree is by the trial Court itself. Moreover S. 144 does not exhaust all the powers which a Court possesses in order to put the parties in the position which they should occupy according to the latest orders, Under S. 151 the Court has inherent power to make such orders as will be necessary in the ends of justice or to prevent abuse of the process of the Court. Hence if the trial Court's final orders modify or set aside the decree originally given by it, it possesses powers at least under S. 151, if not under S. 144 to put the parties in the position they should occupy under its later orders. (Sathe, J.M.) KAPURTHALA ESTATE v. SANT BUX SINGH. 1942 R.D. 443=1942 A.W.R. (Rev.) 232 (2)= 1942 O.A. (Supp.) 258 (2)=1942 A.L.J. (Supp.) 39=1942 O.W.N. (B.R.) 354.

-S 144-Applicability-Modification or set-

ting aside by trial Court itself.
S. 144, C. P. Code, applies also to cases where an order or decree is set aside or modified by the trial Court. (Sathe, J.M.) Kunwar Dhuj Pratap Singh v. Shiv Din. 1942 O.W.N (B.R.) 524=1942 A.W.R. (B.R.) 364 (2)=1942 O.A. (Supp.) 390 (2).

-S. 144 — Applicability — Person payinsmaller sum than is due from him-If can claim

A person who only paid in a sum which was less than the sum which turned out to be due from him cannot claim restitution, namely, payment back to him of the sum which he had paid into Court and which the other party had taken out. S. 144, C.P. Code, has no application to such a case. (Lord Atkin) KEDAR NATH GOENKA v. BAGESWARI PRASAD SINGH. 69 I A. 10=1942 O. W N. 399=8 B.R. 734=1942 A.L.J. 397=1942 A.L.W. 405=1942 O.A. 328=1942 A.W.R. (P. C.) 21=14 R.P.C. 150=1942 P.W.N. 182=44 Bom.L.R. 765=I.L.R. (1942) Kar. (P.C.) 14=200 I.C. 337=A.I.R. 1942 P.C. 30=(1942) 2 M.L.J. 107 (P.C.).

persons—Contest by one only—Joint and several decree against all—Revision application by contesting defendant—Withdrawal of suit as against him pending revision—Effect—If benefits other defendants—Right of other to claim restitution.

Where in a suit against several defendants, one alone contests the suit and the Court makes a joint and several decree against all, but pending revision by the contesting defendant, the suit is permitted to be withdrawn as against that defendant only the order permitting withdrawal, would not have the effect of a reversal or variation of the decree against all the defendants. The original decree must be regarded as still in force against the other defendants and the latter cannot take advantage of the order of withdrawal and claim restitution of the amount recovered from him in execution before the withdrawal of the suit was ordered. (Divatia, J.) ANANT BABURAO v. Vyasa Charya Madhya Charya. 218 I.C. 479 =18 R.B. 48=46 Bom.L.R. 525=A.I.R. 1944 Bom. 264.

S. 144—Applicability—"Varied or reversed"—If to be in appeal or the like—Claim order—Suit under O. 21, R. 63—Decree setting aside claim order—If reversal—Application for restitution by successful plaintiff in respect of costs faid by him in the claim to the other party—Competency—Limitation—Starting point.

S. 144, C. P. Code, is not confined to cases where an order is reversed only in further stages like appeal, etc., but applies to any reversal. A suit brought under O. 21, C. P. Code, cannot be dissociated from the claim petition which has given rise to it, and is in fact an action in the nature of an appeal from the order passed on the claim petition. Where an order passed on a claim petition is set aside by the decree in a suit under O. 21, R. 63, C. P. Code, it is in effect a reversal for purposes of S. 144, C. P. Code and therefore the party succeeding in the suit is entitled to restitution of the costs of the claim petition which he has had to pay to the unsuccessful party who succeeded in the claim. S. 144 does not provide that for an order of restitution to be made the decree or order must have been varied or reversed in any particular form of proceeding or by any particular Court. The starting point of limitation for an application for restitution in such a case under Art. 182 is the date of the decree in the suit under O. 21, R. 63 or if there be an appeal the date of the final order in the appeal and not the date of the order on the claim petition.

C. P. CODE (1908), S. 144.

I C. 434=16 R.M. 115=55 L.W. 820=(1942) M.W N. 689=A.I.R. 1943 Mad. 248=(1942) 2 M.L.J. 791.

——S. 144—Applicability—Variation of decree by scaling down under Madras Act IV of 1938—Restitution—Right to recover sums collected in excess of what is recoverable under Act IV of 1938—Madras Agriculturists' Relief Acts, S. 8 (4).

S. 144, C. P. Code, is applicable provided a decree is varied or reversed, however the variance or reversal is effected. Where a decree is varied as the result of an application for scaling down under Madras Act IV of 1938, an application under S. 144, C. P. Code, would be competent to obtain restitution of the amount recovered by the decree-holder in execution in excess of what could be recovered under that Act. S. 8 (4) of Act IV of 1938 cannot be understood as justifying the retention of sums recovered in excess of what was legally due at the time of the recovery; the sub-section does not affect rights to restitution in respect of collections wrongfully made. (Palanjali Sastri, I) Ankamma v. Basava Punnayya. 1945 M.W.N. 316=A I.R. 1945 Mad. 360=(1945) 1 M.L.J. 386.

#### Appointment of receiver.

\_\_\_\_S. 144—Appointment of receiver—Propriety—Applicant for restitution entitled to joint

possession-Futher appeal pending.

Where all that could be given to an applicant for restitution is some sort of joint possession over the land in suit, and the previous relations between the parties do not hold out much hope that they are likely to arrive at an amicable working arrangement between themselves, more particularly while a further appeal is pending and one of the parties still claims the right to exclusive possession of the whole of the land, it is proper to make over the property to a receiver until the claims of the parties are finally decided. (Tek-Chand and Beckett, II) SALEHON SHAH v. ZAWAR HUSSAIN SHAH. 197 I.C. 574=14 R.L. 258=43 P.L.R. 467=A I.R. 1941 Lah 343.

#### Construction and scope.

Meaning of—If confined to original party—Assignment of decree—Realization of decree by assignee—Restitution on reversal—Right of defendant as against original decree-holder. Kadirvelu Chettiar v. Kempu Chettiar. [See Q. D., 1936-'40, Vol. I, Col. 3288.] I.L.R. (1941) Mad. 498=195 I. C. 127=14 R. M. 131=A.I.R. 1941: Mad. 315.

S. 144—Construction—"Place the parties in the position which they would have occupied but for such a decree"—Meaning of, ZAMINDAR OF SANNAKHIMIDI v. SUSI JAMALA PATTA MAHADEVI. [See QD, 1936-'40, Vol. I, Col. 1361.] 194 I C. 486=13 R.M. 782.

Court-fee.

S. 144—Court-fee—Nature of order under for purposes of Court-fees. See C. P. Code, Ss. 47 and 144 and Court-Fees Act, Sch. II, Art. 11. 1941 N.L J. 459.

Duty of Court.

S. 144—Duty of Court—Justice to both parties to be done.

The S. 144—C. P. Code the matter is one

the light not solely of the interests and position of the one party, but of both parties, and the duty of the Court is, so far as may be, to do justice to the interests of both sides. (Rowland and Chatterji, JJ.) Gourf Duir Ganesi Lal & Madho Prasad 211 IC 84=16 R P 194=10 B.R. 330==1942 PW N. 103=A I.R 1943 Pat. 427.

#### Inherent power of Court.

——Ss. 144 and 151—Inherent power of Court—Decree vacated in separate suit after its execution—Restitution—Power of executing Court.

Where a decree, after it is executed and satisfied, is vacated and held invalid in a separate suit but not in appeal or revision, an application to the executing Court for restitution is not comp-tent under S 144, C P Code, but that Court can entertain the application under its inherent powers under S. 151, C. P. Code, and set aside the order passed by it. A decree can be varied or reversed within the meaning of S. 144 only by a Court of appeal or revision when it is exercising its appellate or revisional powers. A decree may be vacated or held to be invalid by a Court of concurrent and competent jurisdiction in certain circumstances in a separate suit but that decision cannot finally dispose of the first suit and does not either vary or reverse the decree passed in that suit by substituting a different decree instead. It only sets aside the first decree in certain circumstances and as a result of that decision the first suit is reopened for a fresh decision. Moreover, the expression "the Court of first instance" is used in the section to convey the "trial Court" as distinguished from the Court of appeal and is not intended to convey a Court of concurrent jurisdiction which is competent in a second suit to set aside or vacate the decree passed in the first suit on account of fraud, etc., (Abdur Rahman, J.) ALFRED ZAHIR v. SIRAJ-UD-DIN. 216 I C. 97=17 R.L. 168=46 P.L R 111 A.I.R. 1944 Lah. 165.

# Interest.

Unless very special circumstances are shown, the proper rate of interest to be awarded in claims for restitution under S. 144, C. P. Code, is the Court rate of six per cent. (Rowland and Chatterji, JJ.) Gouri Duft Ganesh Lal v Madho Prasad. 211 I.C. 84=16 R.P. 194=10 B.R. 330=1942 P.W.N. 103=A.I.R. 1943 Pat. 427.

S. 144—Interest—Date from which to be awarded—Execution of decree—Stay—Condition for deposit of money—Withdrawal of deposit by plaintiff—Subsequent reversal of decree on appeal—Restitution—Interest on amount withdrawn—From which date to run—Date of deposit or date of withdrawal.

of withdrawal.

Where as a condition for stay of execution of a decree pending appeal, the judgment-debtor deposits money in Court as per order of Court and the plaintiff withdraws the same from Court, but subsequently the decree is reversed on appeal, the Court in allowing restitution will allow interest on the amount deposited and withdrawn, not necessarily from the date of deposit or the date of withdrawal, but from the date on which there was no longer; hetacle to the with-

## C. P. CODE (1908), S. 144.

drawal of the money by the plaintiff. (Rowland and Chatterys, 11.) Gourt Durr Ganesii Lalv. Madio Presso. 211 I C 84=16 R P 194=10 B R 330=1942 P W N 103=A I.R. 1943 Pat. 427.

# Jurisdiction.

-S. 144—Turisdiction—Mesne profits by way of restitution—Assessment—Forum-Trial Court or appellate Court—Practice.

When a decree is varied or reversed in circumstances giving rise to a right of restitution, the right arises automatically and is claimable under S 141, C.P. Code, before the trial Court. The usual practice and the course laid down by the Code is that mesne profits for which security is given under 5 144, are to be assessed by the trial Court and not by the appellate Court (Sir George Rankin) Roll and RAM and INGHEMAL PRASAM SINGHEMAR PRASAM SINGHEMAR PRASAM SINGHEMAR PRASAM SINGHEMAR (1944) Kar (PC) 16—48 CW.N. 254—211 I C. 361—16 R PC. 179—10 B.R 420 P.C =47 Bom L R 557—1943 A W R (PC.) 34—1943 A L W. 585—1943 O A (PC.) 34—1943 O W N 493—56 L W. 733—1943 A.L J. 603—A I R. 1943 PC 189—(1943) 2 M.L J. 460 (PC.).

#### Mesne P.rof.its

——S. 144—Mesne profits by way of restitution—Calculation—Ejectment suit against tenant—Fenant claiming occupancy right—Decree and possession by landlord—Decree reversed on appeal to Privy Council—Claim by tenant to mesne profits by way of restitution—Basis of assessment—Rent due by tenant—Deduction of—Interest. Venkatappayya v. Ramaswam [See ().D. 1936-40, Vol. I Col. 328). I.L R. (1941) Mad 212=192 I.C 607=13 R.M. 575=1941 M.W.N. 14=1941 O.W.N. 79=1941 R.D. 77=1941 A.W.R. (Rev.) 360 1941 O.A. (Supp) 274=1941 A.L.W. 81 =A I.R. 1941 Mad. 36 (F.B.).

way of restitution—Assignability—C. P. Code, S. 146 and O. 21, R. 16.

A right to recover mesne profits by way of restitution under S. 141, C. P. Code, under a decree, is assignable. The assignee is competent to apply for restitution and recovery of mesne profits in the same way as his assignor. Whether O. 21, R. 16, C.P. Code, is strictly applicable or not, it would be open to the Court to recognise the transfer under S. 146, C.P. Code, and allow the transferee to apply for restitution. (Venkataramana Rao and Horwill, JJ.) SATYANARAYANA v. RANGAYYA. 199 I.C 23=14 R.M. 507=1941 M.W.N. 216=53 L.W. 283=A.I.R. 1941 Mad. 480=(1941) 1 M.L.J. 469.

## Mode of restitution.

S. 144—Mode of restitution—Decree charging several properties for virious amounts—Sale of one item—Subsequent reduction of amount in appeal—Sale if to be deemed cancelled—Appellate Court not apportioning liability but directing apportionment by trial Court—Apportionment made by trial Court subsequently—Application for restitution—Right to re-delivery of property—Limitation—Limitation Act, Art. 182.

m the date on which It is not every variation of a decree by an hetacle to the with- appellate Court that would entitle a judgment-

debtor whose property had been sold in execution of the original decree to put forth a claim for restitution on the basis that the sale is invalid or must be considered to have been set aside; the extent of variation would be one of the circumstances to be taken into consideration in determining how the restitution should be made. In a suit by the plaintiff-respondent for recovery from the appellant's predecessor-in-interest of an additional amount paid by the plaintiff in respect of a certain property, over and above what he was bound to pay he claimed a charge on several items of property. On 30-3-1929 he obtained a decree and a charge was created over a number of items of property. In execution of that decree an item of property in which the appellants were interested was put up for sale and at the sale the plaintiff decree-holder himself purchased it on 12-7-1933 In appeal from the decree, the amount decreed originally was reduced. The appellate decree which was passed long after the sale directed that the liability should be apportioned by the original Court as between the several items of property under S. 45 of the Madras Revenue Recovery Act and did not itself fix the liability in respect of each village. On 26-10-1936, an application was made to the original Court for apportioning the liability as between the various properties and this was ordered and the hability fixed in 1942. Meanwhile in 1941, the appellants applied for restitution by re-delivery of the property which had been sold in execution, contending that the sale must be deemed to have been set aside by the variation of the decree in execution of which it had been sold. The decree-holder respondent pleaded that the variation could not be held to have the effect of setting aside the sale and that that application was barred by limitation as more than three years had elapsed after the appellate

Held, (1) that from the mere variation of the decree it could not be said, in the circumstances of the case, that the sale must be deemed to have been set aside and that the only way in which restitution could be ordered in the case was by directing the decree-holder purchaser (respondent) to refund the additional amount which was realised by the sale of the property over and above the amount for which the particular property could be sold; (2) that the starting point of limitation for restitution under Art, 182, Limitation Act, was not the date of the decree of the appellate Court which varied the original decree, but the date on which the liability in respect of the particular village was fixed, viz., 1942 and therefore the application was not barred by limitation. (Kuppuswami Ayyar, JJ) CHENGAL. REDDI v. MOHAMMAL CHORDIA. 1945 M.W. N. 287=A.I.R. 1945 Mad. 133=(1945) 1 M.L.J. 143.

#### Notice.

-S. 144-Notice-Necessity.

There is nothing in the C. P. Code or the U. P. Tenancy Act which either requires or forbids a notice to be issued to the party concerned before an order is passed under S. 144, C. P. Code. When a trial Court does not issue a notice there and Sathe, A.M.) AMAR SINGH v. KARAM SINGH.

S. 144 and O. 21, R. 89 Resignate the lower Court to issue notice. (Shirreff, J. M. Deposit made under O. 21, R. 89 Order for and Sathe, A.M.) AMAR SINGH v. KARAM SINGH. fund if justified by S. 144 Right of suit.

C. P. CODE (1908), S. 144.

1941 OA. (Supp.) 956=1941 A.W.R. (Rev.)

S. 144-Notice to parties prior to orders under-Necessity-Absence of notice, if a good

ground of appeal.
S. 144, C. P. Code, does not lay down anywhere that a notice should issue to the parties before any orders are passed under the section. It is no doubt desirable that in most judicial proceedings orders should be passed after due notice to the parties concerned. But in the absence of a statutory requirement as to the necessity for notice, its absence cannot be made a ground of appeal unless the party has been materially prejudiced thereby. (Sathe, S.M.) RAJ RANI DEVI v. BAIJ NATH. 1944 A.W.R. (Rev.) 150 (1)= 1944 R.D. 313.

-S. 144—'Parties'—Meaning of—Assignee and attaching creditor of party. [See Q.D. 1936-40 Vol. I, Col. 3289] Mangal Singh Lakh-Bir Singh v. Jaggat Ram. 191 I.C. 209=13 R. Pesh. 31.

#### Restitution.

-Ss. 144 and 151—Restitution—Decree in suit challenging defendant's title and praying for declaration of plaintist's possession reversed by Privy Council—Finding of title in favour of defendant by Privy Council—Title extinguished by plaintiff's adverse possession—Defendant if entitled to possession by way of restitution.

Where a suit of the plaintiff challenging the title of the defendant and praying for a declaration of his possession is decreed by the lower Courts but dismissed by the Privy Council on a finding of title in favour of the defendant, but such title has been extinguished, by the plaintiff's adverse possession, the defendant is not entitled to get possession by way of restitution under Ss. 144 and 151, C. P. Code. (Sir Madhavan Nair.) NARAYAN JIVANGOUDA v PUTTABAT 49 C.W N. 6=1944 M.W.N. 711=47 BomL R. 1=A.I.R. 1945 P.C. 5=(1944) 2 M.L.J. 358 (P.C.).

Deposit under O. 21, R. 89—Restitution— Deposit under O. 21, R. 89 as sale held in spite of objection as to decree being barred—Decree held to be barred in appeal—Payment if one under coercion within the meaning of S. 72, Contract

Where in spite of the judgment-debtor's objection in execution that the decree was barred a sale is held without deciding it and the judgmentdebtor deposits the requisite money under O. 21. R. 89 and the sale is set aside but his objection as to bar of limitation is overruled by the executing Court but it is upheld in appeal, the judgmentdebtor is entitled to restitution in respect of the deposit made by him under O. 21, R. 89 and with-drawn by the decree-holder. The deposit made by him could also be regarded as a payment made under coercion within the meaning of S. 72 of the Indian Contract Act. (Iqbal Ahmad, C. J. and Dar, J.) Mohammad Taoi Khan v. Raja Ram. I.L.R. (1943) All. 510=208 I.C. 425=16 R.A. 78=1943 O.A. (H.C.) 103=1943 A.L.J. 208=1943 A.W.R. (H.C.) 103=1943 O.W.N. (H.C.) 177=1943 A.L.W. 277=A.I.R. 1943 All. 267

An order for refund of money deposited under O. 21, R. 89 is not justified by S. 144, C. P. Code, at any rate it is not an order which can be made on an application in restitution and probably not one which can be made even in a suit. (Yorke, J.) RAJA RAM v. MAHOMED TAQI KHAN. 198 I.C. 633=14 R.A. 295=1941 O.A. (Supp.) 771 =1941 A L W 910=1941 A.W.R. (H.C.) 278= A.I.R. 1942 All. 14,

S. 144 and Limitation Act (1908), Art 181—Restitution - Limitation - Starting point -Conditional order granting review of ejectment

order-Final order granting review.

Limitation for an application for restitution of possession by an ejected tenant who has got the ejectment set aside on review is three years under Art. 181 of the Limitation Act. When the order granting the review is conditional on the judgment-debtor paying the full decree amount and the amount is paid and a final order granting review is passed, limitation for restitution of possession would start only from the final order granting review. (Sathe, J.M.) KUNWAR DHUJ PRATAP SINGH v. SHIV DIN. 1942 O.W.N. (B. R.) 524=1942 A.W.R. (B.R.) 364 (2)=1942 O.A. (Supp.) 390 (2).

-S. 144-Restitution of property by Insolvency Court-Inherent jurisdiction of Court-Movables in the hands of executing Court direct-ed to be handed over to interim receiver-Withdrawal of insolvency application—Procedure as to

restitution.

Where certain movables attached in execution were directed to be handed over to an interim receiver on the judgment-debtor applying for adjudication and later on the judgment-debtor was allowed to withdraw his application, the proper course for the Insolvency Court was to follow the principle of S. 144, C. P. Code and to restore the property to the executing Court and not to the judgment-debtor and thereby place the parties in the position which they would have occupied but for the insolvency proceedings. Though S. 144, C P. Code, may not in terms apply, the duty or jurisdiction to place parties in status quo ante did not arise merely under S. 144, C. P. Code, but was inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved and the restitution of the property to the judgment-debtor was manifestly unfair and prejudicial to the creditor. (Niyogi, J.) SURAJ RATAN DAGA v. KASHISHWAR BANER-JEE. I.L.R. (1943) Nag. 599=15 R.N. 116=203 I.C. 206=1942 N.L.J. 500=A.I.R. 1942 Nag. 132.

a. S. 144—Restitution of property to theka-dar—Land Revenue paid by person in prior pos-

session-Credit for.

Where restitution of the property is ordered to be made to the thekadar under S. 144, C. P. Code, the person in prior possession of the property should be given credit for payments of land revenue made by him. ((Shirreff, S. M. and Sathe, J. M.) GANGA SINGH v. MAKKA LAL. 1942 O.A. (Supp) 107 (1)=1942 A.W.R. (Rev.) 94 (1)=1942 R.D. 520 (2)=1942 O.W.N. (B.R.) 430 (2).

-S. 144—Restitution—Possession of property passing as a result of a decree for specific perfor-

mance-Reversal of that decree.

#### C. P. CODE (1908), S. 144.

Where as a result of a decree for specific performance of contract to sell, possession is transferred, then, when that decree for specific performance is reversed, the property must be directed to be returned to the former owner by way of restitution under S. 144, C. P. Code. (Allsop and Hamilton, JJ.) R. H. SKINNER v. JAMES R. R. SKINNER I.L.R. (1943) All. 312=206 I C. 639= 15 R A. 532=1943 A.L.J. 80=1943 O.W.N. (H. C.) 78=1943 O.A. (H.C.) 29=1943 A.L.W. 149=1943 A.W.R. (H.C.) 29=A.I R. 1943 All. 202. -S. 144 and Sch II—Restitution proceedings

-Reference to arbitration—Competency.
Sch. II of the C. P. Code does not apply to restitution proceedings and the Court has no jurisdiction to refer such a matter to arbitration. (Collister and Bajpai, 11.) RAM GOPAL v. SHANTE LAL. I.L.R. (1941) A11. 807=14 R.A. 383=199 I C 346=1941 A.W.R. (H.C) 302=1941 A.L. W 977=1941 O.A. (Supp.) 844 (1)=1941 A.L. J. 596=A I.R. 1942 All 85.

-S. 144—Restitution—Right to interest—

Where after execution, the amount due under a decree is reduced in appeal, the amount that the judgment-debtor can recover is not only the excess amount paid by him but also an additional amount by way of interest or an additional amount by way of damages which the Court is empowered by S. 144 to grant. As regards the rate of interest, the Court rate must always be taken as the rate that fairly compensates litigants in the absence of special reasons to the contrary. (Stone, C.J. and Clarke, J) Surajmal v. Baxi-RAM. I.L.R. (1942) Nag. 273=200 I.C. 574=15 R.N. 25=1941 N.L.J. 94=A.I.R. 1941 Nag. 195. Scope:

S. 144—Scope—Restoration of possession of holding to tenant in chief on setting aside of ejectment order—Sub-tenant continuing in actual possession without break—Liability to pay damages to landlord for period when tenant-inchief was deprived of possession.

Where an order for ejectment of a tenant-inchief under the Agra Tenancy Act was set aside on review and possession of the holding is restored to the tenant-in-chief, the sub-tenant in actual possession throughout the period without any interruption cannot resist a suit by the landholder for damages for the intervening period on the ground that he must be deemed to have continued to be sub-tenant of the tenant-in-chief by virtue of the restoration of possession under S. 144, C. P. Code. (Sathe, S.M.) DULAREY v. BRAHMA PRASAD. 1944 R.D. 523=1944 A.W.R. (Rev.)

266 (2).

S. 144 – Scope and operation of — Decree—
Execution and sale of property pending appeal—
—Reversal of decree in appeal—Application for restitution—Sale—If to be set aside—Right of purchaser in execution to plead bona fide purchase

for value-Rule.

S 144, C. P. Code, embodies a well-established rule of equity that on the reversal of a decree the party against whom the wrong decree was passed should, as far as possible, be placed in the same position which he would have occupied but for such decree, it being the duty of the Court to act rightly and fairly according to the circumstances towards all the parties involved and to remove as far as possible the consequences of a wrong or

unjust decree. One can understand this rule being relaxed in those cases where it conflicts with another rule of equity, namely, that a bona fide purchaser for value should not be allowed to suffer on account of the mistakes or irregularities committed by a Court of law but there is no reason why it should be relaxed in favour of a party who had due notice of the fact that the decree in execution of which he was purchasing a property was liable to challenge and had been challenged, because such a party cannot be deemed to have acted with due care and caution if in spite of such notice he proceeded to pur-chase the property at the execution sale. A stranger to the decree is no doubt, not bound to inquire into the merits of the plaintiff's claim or into the validity of the decree; in his case therefore the presumption would be that he is unaware of this matter; but where there is clear and cogent evidence that he was fully aware of the merits of the controversy in regard to the property purchased by him and that he was also aware that the validity of the decree was under challenge, there is no room for such a presumption. Where the purchaser of a property at an execution sale was a mortgagee of the property in question he must be deemed to have known all about the property; and when, further, he himself became a party to the proceedings in appeal from the decree under execution, he cannot invoke the benefit of the doctrine applicable only to a bona fide purchaser for value. He cannot therefore contend that a sale in his favour should not be set aside on an application by the successful party for restitution. (Fazl Ali, C.J. and Sinha, J.) CHOTA NAGPUR BANKING ASSCIATION v. C. T. M. SMITH. 22 Pat 315=207 I.C. 80=16 R.P. 1=9 B.R. 366=A.I.R. 1943 Pat. 325.

144-Scope-If exhaustive-Inherent

powers.

Courts have power to order restitution under their inherent powers even in cases not strictly falling within the terms of S. 144, C.P. Code. (Patanjali Sastri, J.) ANKAMMA v. BASAVA (Patanjali Sastri, J.) ANKAMMA v. BASAVA PUNNAYYA. 1945 M.W.N. 316=A.I.R. 1945 Punnayya. 1945 M.W.N. 3 Mad 360=(1945) 1 M.L.J. 386.

-S. 144—Scope—If exhaustive — Inherent powers to order restitution-Power to compel third party to bring back money paid to him under erroneous order of Court—S. 151.

Courts in ordering restitution after a decree has been varied or reversed are not cenfined to cases which fall strictly within the provisions of S. 144, C. P. Code. The inherent jurisdiction vested in them by virtue of S. 151, C. P. Code, may be invoked where an order of Court would otherwise do injury to one of its suitors. There is inherent jurisdiction in the Court to call back money paid, owing to an erroneous view, to a person not entitled to it, and a person who is not in any technical sense a party to the decree can be compelled to make restitution of the money paid to him. Whether the inherent powers of the Courts to order restitution should be invoked in a particular case must depend on the facts of that case. The 4th respondent brought a suit to enforce a mortgage executed by the 1st respondent seeking relief against the 1st respondent alone on the ground that the property mortgaged was his self-acquired property and that the

# C. P. CODE (1908), S. 145.

Respondents 2 to 3 who belonged to the same joint family as the respondent and who were also impleaded in the suit contended that the propertywas family property and that there was no family necessity for the loan secured by the mortgage. The suit was decreed on 10-8-1932, and in execution of his decree the 4th respondent brought the property to sale and purchased it himself for Rs. 7,200. The defendants in the suit, however, applied under O. 21, R. 89, C. P. Code, and deposited the requisite sum amounting to Rs. 11,470-10-5 and the sale was set aside. The appellant who held a decree against the 4th respondent applied for attachment of Rs. 9,000 out of the amount of Rs. 11,470-10-5, in Court, and after attachment he applied for transfer of the attached sum to his own execution petition. This was ordered on 7-8-1935 and payment also was made out to him on the same date. Meanwhile an appeal against the mortgage decree was pending in the High Court, and on 9-11-1937, the appellate Court delivered judgment holding that the mortgaged property was family property, and as it had never been the 4th respondent's case that the mortgage was for purposes binding on the family the suit of the 4th respondent was dismissed. The respondents 1 to 3 the mortgage suit) then (defendants in applied for restitution of the amount deposited by them under O. 21, R. 89, C. P. Code, with interest thereon. They prayed for recovery of the whole amount from the 4th respondent with interest at 6 per cent, and for recovery of Rs. 9,000 with such interest from the appellant.

Held. (1) that there was inherent jurisdiction in the Court to order restitution though the case did not fall under S. 144, C. P. Code, and that a person in the position of the appellant, not in any technical sense a party to the decree, could in law be compelled to make restitution of the money to him; (2) that if there were no other circumstances affecting the equities as between the respondents 1 to 3 and the appellant, it was the duty of the Court to set right the wrong done to its suitors (respondents 1 to 3) by reason of its own errors. (King and Happell, JJ.) Rego v. Ananthamathi. I.L.R. (1942) Mad. 949=202 I.C. 159=15 R.M. 450=55 L.W. 369=1942 M. W.N. 388=A.I.R. 1942 Mad. 472=(1942) 1 M. T. T. 575

L.J. 575.

-S. 144-Scope-Order for restitution-If

The wording of S. 144, C. P. Code, is imperative, and the Court shall cause restitution to be made where the order has been reversed. (Grille, C.J and Puranik, J.) SEMABI v. GANPATRAO. I.L.R. (1944) Nag. 451=210 I C 634=16 R.N. 167=1943 N.L J. 527=A.I.R. 1944 Nag. 59.

-S. 145—Default—Liability under security, -Extent-Surety bond-Scope and nature of-Forfeiture of bonds-If permissible.

The C. P. Code, does not contemplate forfeiture of bonds by way of penalty or by way of punishment. The security is a security for the default committed and is liable to that extent not necessarily to the full extent of the amount for which security is given. (Davis, C.J.). GIRI-RAJMAL v. JETHANAND. IL.R. (1945) Kar. 116= A.I.R. 1945 Sind 146.

-S. 145—Object and scope of—Surety bond money was taken by him for his own purposes. | -Execution-Effect-Rights and remedies of

parties and surety.
The object of S. 145, C. P. Code, appears to be two-fold; it provides a summary remedy by way of an application available to the party entitled to enforce the surety bond and at the same time confers on the surety proceeded against a right of appeal as if he were a party within the meaning of S. 47, C. P. Code. The ordinary remedy by suit is left untouched by the section, and either party may, if he so chooses, avail himself of it. By the mere execution of a surety bond in favour of a party to the suit, a stranger does not entitle himself to the privileges of a party, nor is he bound by those restrictions which bind the latter. (Krishnaswami Ayyangar and Kunhi Raman, JJ.) NARAYANASWAMI IYER v. NARAYANA IYENGAR.
I.L.R. (1943) Mad. 509=210 I.C. 268=16 R.
M. 409=56 L.W. 25=A I.R. 1943 Mad. 288= (1943) 1 M.L.J. 114.

**-S. 145**—Scope—Supurtdar — Liability to produce property entrusted — Satisfaction of decree, if puts an end to—Order against supurtdar-In whose interest could be passed.

Where a decree in a suit in which the property is attached and entrusted to a supurtdar prior to decree, is wholly satisfied and the property is returned to the judgment-debtor, the supuridar cannot be made liable for its neturn on the appli-cation of persons not parties to the suit and in respect of attachment in a different suit Courts" can act in the interests of the parties or suitors in particular cases. (Clarke, J.) SETH HEMRAJ SINGH v. ANOOP SINGH. I.L.R. (1942) Nag. 198 =196 I.C. 140=14 R.N. 82=1941 N.L.J. 514= A.I.R. 1941 Nag. 339.

-S. 145 –Surety bond—Application by surety for cancellation of bond on ground that it has beeome discharged owing to happening of events subsequent to execution of bond-Maintainability before initiation of proceedings to enforce bond-Jurisdiction.

Where a surety does not dispute the validity of the bond when it was executed, but only states that by reason of events that subsequently happened it had become discharged, and applies on that ground for cancellation of the bond, the question properly falls within the jurisdiction of the Court in whose favour the bond was executed. Such an application by the surety is maintainable before proceedings are taken to enforce the bond against him in execution. S. 145, C. P. Code, does not impose a bar to the surety invoking the aid of the Court independently of an application under the section. (Krishnaswami Ayyangar and Kunhi Raman, IJ.) NARAYANA-SWAMI AYYAR v. NARAYANR IYENGAR. I.L.R. (1943) Mad. 509=210 I.C. 268=16 R.M. 409=56 L.W. 25=A.I.R. 1943 Mad. 288=(1943) 1 M.L.J. 114.

S. 145—Surety bond—Enforcement—Pro-

cedure—Bond not binding sureties to any indivi-

dual-Mode of enforcement.
An instrument which does not bind the sureties to any individual can only be enforced by the Court making an order in the suit, upon an application to which the sureties are parties, that the property charged be sold, unless before a day named the sureties find the money. (Sir George Rankin.) Rohani Ramandhwaj Prasad Singh v. Har Prasad Singh. I.L.R. (1944) Kar. (P.C.)

C. P. CODE (1908), S. 145.

179=10 BR. 420=47 Bom. L.R. 557=1943 MWN. 734=1943 AWR. (PC) 34=1943 A,LW. 585=1943 OA (P.C.) 34=1943 O.W. N 493=56 LW. 733=1943 ALJ. 603=AIR. 1943 PC 189=(1943) 2 M L J 460 (P.C.).

S. 145-Surety bond-Form-If can be taken in the name of the Court.

The Court is not a juridical person and cannot be sued. It cannot take property and consequently cannot assign it. Subordinate Courts should take care to see that bonds are taken in the name of some officers of the Court who can enforce them. The only mode of enforcing such bond must be by making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before day named the sureties find the money, (Davis, CJ) GIRLRAJMAL v. JETHANAND. I.L.R (1945) Kar 116=A.I R. 1945 Sind 146.

The words in S. 145, C. P. Co le, "in the manner herein provided for the execution of decrees" clearly refer not to the mode of applying for execution but to the mode of effecting execution Where a person has incurred a forfeature of a bond and action is sought to be taken against him under S. 145, C. P. Code, the bond can be enforced against him in the manner provided in O 21, C. P. Code, for the execution of decrees, that is to say, by his arrest, by attachment of his movable property, by attachment of his immovable property, or in any other suitable manner provided in O. 21, for the enforcement of decrees. It is not necessary that the judgment creditor should apply for execution in the form set out in O.21, R.11, C. P. Code. (Lobo and Tyabji, JJ) ASSANDAS v. HARDASMAL. I.L. R. (1942) Kar. 79=201 I.C. 750=15 R.S. 18=A.I.R. 1942 Sind 134.

order granting stay of execution—Surety "agreeing to stand surety and to make movable and immovable properties liable for any deficiency"— Personal liability—T. P. Act, S. 68—Applicability.

Where a person executes a security bond in pursuance of an order granting stay of execution pending an appeal on furnishing security and the bond recites, "I hereby stand surety . . . and agree that my movable and immovable properties detailed hereunder shall be liable for making good the deficiency etc." it must be held that the liability is limited to a charge on the properties and other properties of the surety cannot be proceeded against as no personal liability is created. Even if the security has been impaired by the conduct of the surety, the provisions of S. 68. P. Act, cannot be availed of by a charge holder in proceedings in execution without resort to a suit. (Sir Madhavan Nair.) KESARCHAND v. UTTAMCHAND. 72 I A 165=47 Bom L R. 945=49 C.W.N. 685=58 L.W 375=1945 P.W.N. 342=1945 M.W.N. 541=A.I.R. 1945 P.C. 91

=(1945) 2 M L.J 160 (P.C.).

S. 145-Surety making himself personally liable and mortgaging property for performance of decree—Application in suit for sale of mort-gaged property—Procedure, if proper—Order rejecting application—Appeal.

The respondent as surety made himself personally liable and in addition mortgaged certain pro-16=48 C.W.N. 254=211 I.C. 361=16 R.P.C. perties as security for the performance of any

decree that may be passed in a suit. The appellant after obtaining a decree filed an application in the suit asking for the sale of certain property mortgaged by the respondent. The Munsif rejected the application and an appeal to the District Court was dismissed.

Held, (1) that the procedure adopted by the appellant was not proper, (2) that an appeal from the order was not competent. (Henderson, J.) TOKANI PROSAD v. SHYAMAPADA BANERJEE. ILR (1944) 1 Cal 563=79 CLJ 118=219 I.C. 380=48 C.W.N. 190=A.I.R. 1945 Cal. 193.

-Ss 145, 47 and 11—Surety's property declared liable for sale in execution of a decree-Effect -Surety, if can later on file a suit to declare his property not hable to sale—Bar of res judicata.

Where on a question as to the liability of surety's property being sold in execution of a decree being raised, the executing Court being the only Court competent to decide it, decides that it is liable to be sold, it becomes binding on the parties till set aside in appeal. The surety becomes a party under S. 47, C. P. Code, and any order for the sale of the surety's property amounts to a decree which would bind the parties and would operare as res judicata in a later suit brought by the surety to declare her property not liable to be sold. (Allsop and Verma, JJ.)
BHAGGO BIBI V ISHWAR RADHA RAMANJI. 202
I C. 12=15 R.A 94=1942 A W.R. (H.C.) 160=
1942 A.L W. 365=1942 A.L.J. 439=A.I.R. 1942 All. 260 (1).

-S. 145—Surety undertaking to pay decretal amount, if judgment-debtor does not pay by certain date-Judgment-debtor applying to Debt Relief Court-Decretal amount reduced as against him-Liability of surety for full amount.

A surety who undertakes to pay the decretal amount due if the judgment-debtor does not satisfy the decree by a certain date, is liable for the entire decretal amount although that amount is reduced as against the judgment-debtor by the Debt Relief Court on an application to it by him for relief. The liability of the surety is different from that of the principal debtor and if the surety does not apply to the Debt Relief Court for relief, any thing done by that Court is not in any way intended to affect the liability of the surety. (Puranik, J.) BALKRISHNA v. ATMARAM. 1944 N.L.J. 271=A.I.R. 1944 Nag. 277.

S. 145 and O. 21, R. 54-Unregistered security bond hypothecating immovable properties of over Rs 100-Attachment in pursuance of

If can be made.
Where a security bond hypothecating immovable properties of over Rs. 100 in value for the performance of a decree happens to be unregistered the decree-holder is not thereby in any way prevented from enforcing the personal liability of the surety which is implicit, in the bond, by attachment and sale of the property which was invalidly mortgaged. Such an attachment is legally competent. (Ghulam Hasan and Misra, JJ.) PARBHU DAYAL v. KANHAIYA LAL. 1944 O.A (CC) 142=1944 OWN. 204=1944 A.W. R. (CC.) 142=A I R. 1944 Oudh 264.

S. 146 and O. 21, R. 16—Applicability and scope—Assignee of future decree—Right to apply for execution after decree is passed.

#### C. P. CODE (1908), S. 146.

execute the decree subsequently passed. The transferee can apply for execution under S. 146, C. P. Code, though not under O. 21, R. 16, C. P. Code, which cannot apply to a case where there is no decree in existence at the time of the assignment. O 21, R. 16 does not, however, prohibit an application by a transferee who obtains an assignment of a decree before it is actually passed. The rule is not all-inclusive in this matter. (Pandrang Row and King, JJ.)
MAHANANDI REDDI v. VENKATAPPA. 54 L.W.
429=201 I.C. 148=14 R.M. 245=1942 M.W.N. 148 (2)=A.I.R. 1942 Mad. 21=(1941) 2 M.L. J 631.

146—Applicability—Ejectment suit— Partition decree pending such suit-Property involved in ejectment suit allotted to son of lessor (plaintiff)—Decree for ejectment—Appeal by defendant—Application by son to implead him as party in appeal—Competency. [See Q D. 1936:40 Vol. I, Col. 3290], RATNASABAPATHI PILLAI v. GOPALA IYER. 193 I C. 637=13 R.M. 705.

-S. 146-Applicability-Right to recover mesne profits by way of restitution-Transfer of -Application by transferee-Power of Court to allow. See C. P. Code, S. 144. (1941) 1 M L.J. 469.

S. 146-Applicability-Suit for sale on mortgage-Preliminary decree-Sub-mortgagee made party defendant to suit-Right of to apply for final decree for sale. See C. P. CODE, O. 34, R. 5. (1945) 2 M.L.J. 122.

-S. 146—Heirs of deceased decree-holder-Right to continue proceedings without fresh application.

According to S. 146 of the C. P. Code, the heirs of a deceased decree-holder would be entitled to continue the execution proceedings started by the deceased during his lifetime and pending at the time of his death without filing a fresh application for the execution of the decree. (Sathe, J. M.) BADRI PRASAD v. KISHANPAL SINGH. 1942 O A. (Supp.) 240=1942 A.W.R. (Rev.) 214=1942 O.W.N. (B.R.) 385=1942 R.

D. 474. -S. 146 and O. 5, R. 20—Representation of

person in enemy country—Procedure

The C. P. Code makes no provision for the representation of a person who is still alive by a person who intermeddles with his estate. Hence when a person is alive but is detained in enemy country, a person who is looking after his interests and property in British India cannot be added as a representative of such a person in a suit against him. The proper procedure would be to issue processes for substituted service under O. 5, R. 20 of C. P. Code. (Malik, J.) AMBIKA PRASAD v. KODAI UPADHYA. 1944 A.L. J. 482=1944 O.A. (H.C.) 296=1944 A.W.R.

(H.C.) 296. S. 146 and O. 21, R. 103-Scope-Representative of judgment-debtor—Right of appeal from order under O. 21, Rr 98, 99 and 101.

It is not correct to say that R. 103 of O. 21, C. P. Code, makes an exception only in favour of the judgment-debtor and not in favour of his representative and that therefore a representative of the judgment-debtor affected by an order. under Rr. 98, 99 or 101 of O. 21, has no right of nothing else) has been expressly assigned can S. 146, C. P. Code, under which a representative

can take any procoedings and make any applications which could have been taken or made by the person under whom he claims. (Krishna-swami Ayyangar and Kunhi Raman, JJ.) An-JAYYA v. GUNDARAYUDU. I.L.R. (1943) Mad. 702 =213 I.C. 406=17 R.M, 103=56 L W. 756= (1943) M W.N. 89=A.I.R. 1943 Mad. 381= (1943) 2 M.L.J. 539.

-S. 148-Applicability-Compromise after preliminary decree-Provision for payment and in default foreclosure decree-Effect-Court if can extend time.

Where after a preliminary decree the parties enter into a compromise by which, it is agreed that in default of certain payments on a certain day a foreclosure decree should follow it is a compromise having an automatic result. It does not leave the Court any discretion in the matter of preparation of the final decree. When such a decree is automatically passed on the date agreed though the judgment-debtor was absent, it could not be attempted to be set aside on the ground of its being an ex parte decree. (Yarke, I) Z DA BIBI v. IMAD-UD-DIN. 1943 A.L.W. 519.

Ss. 148 and 151—Applicability—Decree for money-Judgment-debtor to pay certain instalments and to get some concession on such payment—Default in payment—Power of Court to relieve against clause providing for payment on default-Equity-Rule.

In a case where a judgment-debtor is to pay a certain amount of money, but there is a clause under which if he pays certain instalments promptly a certain concession would be made to him and a smaller sum would be accepted in full satisfaction of the debt, there is no case of penalty or forfeiture, and the party seeking to take advantage of the concession must carry out strictly the condition on which it is granted. This class of cases must be distinguished from the class of cases where there is an agreement to pay a sum of money by a particular date with a condition that if the money is not paid on that date, a larger sum should be paid; this latter condition is in the nature of a penalty, while in the former class of cases, it is not a penal clause and hence the Court has no power to grant relief from the obligation to abide strictly by the condition which is in the nature of a concession. The principle is the same whether the sum involved is large or small, and the fact that the default is only in respect of small margin is no ground for the grant of relief. There is no general principle of equity that the Court can relieve a party in default in respect of money payments whenever the Court thinks just. (Davis, C.J. and Weston, J.) SHAMSUDDIN DOST MAHOMED v. SHIVJI PREMJI. I.L.R. (1941) Kar. 389=198 I.C. 174=14 R.S. 132=A.I.R. 1941 Sind 196.

Ss. 148 and 149-Deficiency in Court-fee-Time for payment-Case to stand dismissed on default of payment within time allowed-Default -Further time, if could be granted.

Where a Court grants time for payment of Court-fee found to be deficient and makes it a condition that in the event of its not being made good within the time allowed the case shall stand dismissed and there is a default in the payment, no more extension could be granted because the prior order itself operated as a dismissal and the Court has no jurisdiction to grant an extension A Paris

C. P. CODE (1908), S. 149.

of time thereafter. (Misra and Kaul, IJ.) SHEO PRASAD KUAR v. BHANU. 1945 ALW (C.C.) 287=1945 O A. (C.C.) 227=1945 A.W R. (C.C.) 227=1945 O.W.N. 322.

-Ss 148 and 107 (2)—Power to extend time

Appellate Court's powers.

The powers of an appellate Court under S. 107 (2) of the C. P. Code are limited to the powers enjoyed by the original Court. Hence where the original Court passes an order for restoration on condition of payment of certain damages by a particular date in default of which the petition is to stand dismessed, neither the original Court nor the appellate Court can extend the time for payment when default has been made in the payment of the damages as ordered. (Sathe, S.M. and Ross, AM.) PARTAB BAHADUR v. YAWARALI. 1944 R.D. 314.

-S. 148—Resusal to extend time—Appeal-

ability.

An order refusing to extend time under S. 148. C. P. Code, is neither a decree within the meaning of S. 2 nor is stappealable as an order under S. 104. (Yorke, J.) SHANKER LAL v. HUKAM DEI. 1943 A.L.W. 456.

S. 148—Scope—Order directing payment of money within specified time—In default proceedings to stand dismissed—Failure to comply with, due to mistake of Court's officer-Application for extension of time-Power of Court to extend-S. 151.

Where a Court has granted time within which a payment must be made and has declared that in default of payment within the time specified the proceedings will stand dismissed, there is no power under S. 148, C. P. Code, after the date on which the proceedings would stand dismissed to extend the time in which the payment was to be made. But when the application for extension is not made under S. 148 but under S. 151, C. P. Code, invoking the inherent powers of the Court, and the mistake which led to the failure to pay was not a mere mistaking of the party but the mistake of the Court's officer, the Court has inherent power to prevent the party from being damnified by the mistake of the Court's own officer and can extend the time for the ends of justice. (Wadsworth, J.) BALAIAH v. RAMAYYA. 199 I.C. 432=14 R.M. 578=53 L. W. 631=1941 M.W.N. 455=A,I.R. 1941 Mad. 706—(1941) 1 M.T. I. 528 706=(1941) 1 M.L.J. 638.

S. 148-Time for payment allowed by trial Court in pre-emption suit—If can be extended by

appellate Court by interlocutory order.

Time for the payment of the money under a pre-emption decree cannot be extended under S. 148, C. P. Code, by the trial Court at any rate and it cannot be extended under that section even by an appellate Court. The order of the original Court fixing the time under which payment is to be made forming as it does part of the decree of the original Court can only be set aside by the decree of a superior Court. The appellate Court cannot set aside any portion of that decree by an interlocutory order especially one passed ex parte. (Almond, J.C. and Mir Ahmad, J.) MALIK KHAN v. MIRAM KHAN. 213 I.C. 5=16 R. Pesh. 87=A I.R. 1944 Pesh. 22.

S. 149 and O. 7, R. 11—Appeal memo. insufficiently stamped—Grant of time to make up

deficiency-Discretion of Court.

It is not incumbent upon the Court to grant time to an appellant to make good the court-fee on his memorandum of appeal on the analogy of O. 7, R. 11. S. 149 is the general rule, giving the Court a discretion to allow time for making up a deficiency of court-fee while O.7, R. 11 is a particular rule which applies in the case of plaints only. (Almond, J.C. and Soofi, J.) MUKARRAM KHAN v. S. HARDIT SINGH. 196 I.C. 301=14 R. Pesh 25=A.I.R. 1941 Pesh. 69.

\_\_\_\_S. 149—Applicability—Application for leave to sue as pauper—Rejection—Power of Court to treat application as plaint and to grant time for payment of court-fee either simultaneously or subsequently. See C. P. Code, O. 33, R. 15. 45 Bom.L.R. 1002.

-S. 149—Applicability—Grant of time for payment of court-fee on pauper appeal, after expiry of limitation.

Where on the rejection of an application for leave to appeal in forma pauperis, time is prayed for payment of Court-fee after the time for the

appeal had expired and is granted,

Held, the scope of S. 149, C. P. Code, is wide enough to cover such an order granting time and even otherwise the delay could be condoned under S. 5, Limitation Act. (Misra and Madeley, JJ.)
GUR DULAREY v. DURGA PRASAD. 1945 O.A.
(C.C.) 5=1945 A.W.R. (C.C.) 5=1945 A.L.W.
(C.C.) 20=1945 O.W.N. 20=A.I.R. 1945 Oudh 172.

S. 149 and O. 33—Discretion to extend time-If can be-exercised in case of mala fide application to sue in forma pauperis. OFFICIAL RECEIVER, AMRITSAR v. SOHAN LAL RAMJI DASS. [See Q.D. 1936-'40 Vol. I, Col. 3291.] I.L.R. (1941) Lah. 652=191 I.C. 335=13 R.L.

S. 149—Order to pay deficit court-fee by certain date or suit to stand dismissed-Deficiency not paid by that date—Effect—Subsequent application for leave to sue in forma pauperis—If can be entertained.

Where the Court orders the plaintiff to pay deficit court-fees by a certain date and directs that if he fails to do so the suit will stand dismissed, but the deficiency is not paid by that date, the suit must be regarded as having been rejected on that date. The Court has, therefore, no jurisdiction thereafter to entertain an application for leave to sue in forma pauperis. (Agarwala, J.) CHANDRASEKAR MISSIR v. HARIHARSAHU. 197 I.C. 80=14 R.P. 265=8 B.R. 148=23 Pat.L.T. 418= A.I.R. 1942 Pat. 302.

\_\_\_\_\_S. 149-Powers of Court-Order fixing sime for payment of deficit court-fee and providing that on default suit will stand dismissedjurisdiction to extend time—Refusal to extend-Revision.

Where a Court passes a decree in a suit, and provides that the decree shall be subject to the condition of plaintiff's paying the deficit courtfee by a certain date failing which the suit will stand dismissed with costs, there is a final order which cannot be subsequently altered or amended except with regard to clerical errors or on review. The Court has no jurisdiction to extend time under S. 149, C. P. Code, for payment of the deficit court-fee, whether the application for extension of time is made before or after the expiry of the time fixed for payment. The suit amounts to.

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stands dismissed under the order already made. If the Court refuses to grant time and holds that the suit already stands dismissed, it is not without jurisdiction, and cannot be interfered with in revision. (Chatteria and Meredith, JJ.) RAMLA-KHAN PANDEY v. TRIBENI DAS. 197 I.C. 433=14 R.P. 302=8 B.R. 204=1941 P.W.N. 516=A.I.R. 1942 Pat. 234.

-S 149 and O. 7, R. 11—Relative scope of. SHIVA CHARAN LAL v. BEHARI LAL. [See Q. D. 1936-'40, Vol. I, Col. 3291.] A.I.R. 1941 Oudh 30.

S. 149—Scope—Grant of time for payment of deficit court-fee after limitation—Effect of. VENUGOPAL PILLAI v. THIRUGNANAVALLI AMMAL. [See Q. D. 1936-'40, Vol. I, Col. 3290.] 194 I C. 840=14 R M. 109.

-S. 149-Scope-Time to pay requisite court-fee-Grant of-Conditional on pendency of proceeding.

It is obvious that under S. 149, C. P. Code, time can be granted to pay the requisite court-fees only in respect of a document pending proceeding. (Broomfield and Lokur, JJ.) MAHADEV GOPAL v. BHIKAJI VISHRAM. 208 I.C. 543=16 RB. 88=45 Bom.L.R. 544=AIR. 1943 Bom. 292.

-Ss. 150 and 152-Amendment-Forum-Transfer of business to another Court—Decree of the Judicial Commissioner of Oudh—If can be amended by the Oudh Chief Court.

As the business of the Court of the Judicial Commissioner of Oudh has been transferred to the Chief Court of Oudh, a decree of the former Court can now be amended by the Chief Court. (Agarwala and Madeley, JJ.) BACHAN SINGH v. SHATRANAJI. 17 Luck. 739=198 I.C. 479=14 R O. 403=1941 A.W.R. (C.C.) 407=1941 O.A. 1030=1941 O.W.N. 1384=A.I.R. 1942 Oudh 226.

S. 150—Applicability—"Court to which the business is so transferred"—Meaning of. See GOVERNMENT OF INDIA (CONSTITUTION OF OPISSA)

GOVERNMENT OF INDIA (CONSTITUTION OF ORISSA) ORDER, 1936, S. 20. (1943) 2 M.L J. 31.

S. 150—"Transfer of business"—If includes assignment of business under S. 13 (2) of Bengal, Agra and Assam Civil Courts Act.

An assignment of business under S. 13 (2) of the Bengal, Agra and Assam Civil Courts Act is not a transfer of business within the meaning of S. 150, C. P. Code and the decree-holder cannot take advantage of the order. (Mukherjea and Biswas, J.). MASRAB KHAN v. DEBNATH MALL. I.L.R (1942) 1 Cal. 289=201 I.C. 234=15 R.C. 144=46 C.W.N. 141=75 C.L.J. 255=A.I.R. 1942 Cal. 321.

·S. 151. Abuse of process. Addition of parties. Amendment of decree. Appeal. Applicability. Inherent powers. Injunction. Joinder of parties. Refund of Court-fee. Remand. Scope. Stay of execution. Stay of suit.

Abuse of process. -S. 151—Abuse of process of Court—What

No act done or proceeding taken as of right and in due course of law, is an abuse of the process of the Court simply because such proceeding is likely to embarrass the other party. Nor is the failure to conform to a mere rule of practice, an abuse of process in every case; the Court must find in each case what exactly the abuse is (Sale, I.) Sharbati Devi v. Kali Parshad. 200 I.C. 606=14 R.L. 469=44 P.L.R. 106=A.I.R. 1942 Lah. 119.

#### Addition of parties.

-S. 151-Addition of parties-Party against whom appeal has become time-barred—Inherent power of Court. See C. P. Code, O. 41, R. 20. 45 P.L.R. 248.

### Amendment of decree.

-Ss. 151 and 152—Amendment of decree—Refusal -Interference under S. 151 in revision.

It is open to the Chief Court to interfere in revision under S. 151, C. P. Code, with an order refusing to amend a decree, even if S. 115 was not applicable. (Agarwal, 3.) Kallu Mal v. Municipal Board, Nawadganj. 209 I.C. 608=15 R.O. 25=1942 O. W.N 335=1942 A.W.R. (C.C.) 220=1942 O.A. 241=A.I.R. 1942 Oudh 392.

-S. 151—Amendment—Scope—Amendment of Proceedings and documents—Competency.

When there was a serious dispute as to what was the subject-matter of the mortgage, proceedings for amendment of the relevant documents in the case are not appropriate. A case of misdescription can be dealt with by amending the plaint and decree but not a dispute as to the identity of the properties which are the subject-matter of the mortgage. (Harries, C.J., and Fazl, Ali, J.). SHYAMAKANT LAL v. RAM LAL. 193 I.C. 748=13 R.P. 617=7 B.R. 636=22 Pat. L.T. 267=A.I.R. 1941 Pat. 399.

Ss. 151 and 152—Amendment of decree—Application for—Forum—Appeal dismissed under O. 41, R. 11, C. P. Code. See C. P. Code, O. 41, R. 11 and Ss. 151 and 152. 1941 O.W.N. 1. S. 151—Amendment of decree—When could be had under. See C. P. Code, Ss. 152 and 151. 1941 O.W.N, 1239.

### Appeal.

-S. 151—Appeal—Discretion used to enlarge provision of procedural law-Order, if appealable.

Where the discretion permitted under S. 151, C. P. Code, is used to enlarge a provision of procedural law under any other section or order of the Code, the matter is appealable. (Grille, C. J. and Puranik, J.) Manorath Kanhaiv. Atmaram Kheduram. I.L.R. (1944) Nag. 370=214 I.C. 12=17 R.N. 19=1943 N.L.J. 521=A.I.R. 1943 Nag. 335.

-S. 151—Appeal—Order of restitution under-

If a party is ordered to make restitution under S. 151, C. P. Code, he must have a right of appeal. The proceedings are analogous to proceedings under The proceedings are analogous to proceedings under S. 144, G. P. Code, and hence the order is appealable. The right of appeal which is available under S. 144, C. P. Code, is not lost under S. 151. (King, J.). Ball Reddi v. Nagi Reddi. 200 I.C. 36=14 R.M. 671=1941 M.W.N. 255 (1)=53 L.W. 356=A.I.R. 1941 Mad. 564=(1941) 1 M.L.J. 407.

See C. P. Code, S. 47. I.L.R. (1943) Kar. 245.

S. 151—Appeal—Order under—When appealable. S.151—Appeal—Order under-Orders passed under S. 151, C. P. Code, are appeal-

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able when the powers under that section are used to extend the provisions of orders under C. P. Code. (Grille, C. J. and Purank, J.) SIMABI V. GANPAT RAO. I L R. (1944) Nag 451=210 I C 634=16 R.N. 167=1943 N.L.J. 527=A.I.R. 1944 Nag. 59.

### Applicability.

-S. 151—Applicability—Absence of other provision. S. 151, C.P. Code, is a section which can be applied to make orders necessary for the ends of justice in those cases only where no other provision is applicable. (Fazl Alı, J.) RAM SANKAR BANDOPADAYA v. KHUDI RAM DUTT. 198 I C 672=8 B.R. 447=14 R.P. 487=A I.R. 1942 Pat 328.

-S. 151—Applicability—Application challenging decree as not executable—Decree already executed and satisfied—Proper remedy.

Objections as to the validity of a decree and to its executability should be raised at the time when the decree is made a rule of Court and at the time when the decree is put into execution. After the decree has been fully satisfied and possession of the property under terms of the decree has actually been delivered to the decree-holder, no such objection can properly be raised by means of an application under S. 151, C. P. Code. The appropriate remedy of the applicant, if so advised is by a regular suit in the Civil Court and not by an application invoking the inherent powers of the Court. (Bennett and Ghulam Hasan, 33.) Tulsa Devi v. Suraj Nakain. 17 Luck. 121=195 I.C. 610=14 R O. 100=1941 O.W N. 965=1941 O A. 678=1941 O.L.R. 601=1941 A.L W. 815= 1941 A.W.R. (C.C.) 275=A.I.R. 1941 Oudh

-S 151 and O. 9, R. 13—Applicability—Decree against firm—Application to set aside—Applicant not wishing to appear on behalf of firm but appearing under protest under O. 30, R. 8—Procedure—Inherent powers.

Where a decree against a firm has been passed; O. 9, R. 13, C. P. Code, does not apply. Where a person wishes to appear under O. 30, R. 8 and deny that he is a partner and not to contest the suit on the merits, S. 151 of the C. P. Code can be applied and the applicant can be heard to show cause why he should not be allowed to put on record his protest that he is not a partner and his liability if any shall be considered in execution. He will then be able to dispute the hability, which it is sought to place upon him under O. 21, R. 50 (2), C. P. Code. (Davies, C. J. and Weston, J.) VILAITIRAM TULARAM v. CHANGOMAL. IL. R. (1942) Kar. 220=202 I.C. 177=15 R.S. 26=

A.I.R. 1942 Sind 99.

S. 151 and O. 9, R. 13—Applicability—Ex parte decree against firm as such-Application by some of partners to set aside decree on ground that they were fixed with liability as partners without summons being served on

them-Maintainability-Inherent powers.

Where after ex parte decree has been passed against a firm two partners claim that service has never been made upon them at all, that they had no notice of the summons, they had no opportunity to defend the suit, and some opportunity should be given to them at some time and place to deny their liability as partners. The Judge should hear the application under S. 151 and deal with the question of applipartners. cants' absence for non-service by analogy with the provisions of O. 9, R. 13, and if he comes to the conclusion that the contention of the applicants that no summons were duly served on them was true, he should pass orders upon such application as will allow the applicants, if execution of the decree was to be sought against them, to take advantage of the provisions of O. 21, R. 50 (2) and dispute their liability as partners.

(Davies, C.J. and Weston, J.) RADHA KISHIN NATHURAM v. HARBHAGWAN & Co. ILR. (1942) Kar. 218=203 I.C. 357=15 R.S. 77=A.I.R. 1942 Sind 97.

-S. 151—Applicability—If can be invoked when

special provisions exist.

It is a well-known principle of law that where special provision exists in the Code, S. 151 cannot be invoked. (King, J.) Gangaraju v. Venkatarajulu Naidu. 205 I C 557=15 R M 892= (1942) M W.N 676=55 L W.811=A.I.R. 1943 Mad. 235=(1942) 2 M L.J. 716.

----S 151 and O 9, R 9-Applicability of S. 151 -Restoration when no reason for non-appearance is adduced. Where no reason has been adduced for the nonappearance of the plaintiff, S. 151, C. P. Gode, cannot be applied to the case of an application for restoration because O. 9, R. 9, C. P. Code, is exhaustive in such a matter. (Davies, C.J.) Durga Prasad v. Jodh Raj. 1942 A M.L.J. 1.

-S. 151—Applicability—Order amending decree of Small Cause Court without notice to party affected—Application by latter to recall order of amendment—O. 9, R. 13—Applicability—Provincial Small Cause Courts

Act, S. 17.

Where a consent decree passed in a small cause mended by the Court under suit is subsequently amended by the Court under Ss. 151 and 152, C. P. Code, without notice to the party affected by the amendments the latter is entitled to ask the Court under S. 151, C. P. Code, to recall order of amendment. It is not a case of setting aside an ex parte decree, and S. 17 of the Provincial Small Cause Courts Act need not be complied with. The mere fact that the applicant mentions not only S. 151 but also O. 9, R. 13, C. P. Code does not affect the case. The case is properly based on S. 151 and the addition of O. 9, R. 13, C. P. Code must be ignored. (Dhavle, J.) SATYABADI PRADHAN v. KANHEI PRADHAN. 205 I.C. 103=16 R.P 242=8 Cut. L.T. 105=9 B.R. 192=A.I.R. 1943 Pat. 72.

See U. F. Eng. Est. Acr., S. 14 (1) AND C. P. Code, S. 151. 1942 O.W.N. 182.

S. 151—Applicability—Preliminary partition decree

-- Application to proclaim share.

A person obtaining a preliminary decree for partition is not entitled to ask the Court under S. 151, C. P. Code, to direct the making of a proclamation about his share. No ground for action under S. 151 arises where a remedy is provided by the Code itself. A preliminary partition decree is of a declaratory nature and it is implicit in it that further proceedings are required to complete the partition. (Bennett, 7.)SUKHPAL DASS v. KEDARNATH. 16 Luck. 765=194 I.C. 175=1941 O.L.R 423=13 R.O. 562=1941 A.L W. 560=1941 O.W.N. 718=1941 O A 478 =1941 A.W.R. (C.C.) 183=A.I.R. 1941 Oudh 383.

S. 151-Applicability-Specific remedy available -Plea of fraud practised in respect of compromise.

S. 151, C. P. Code, should not be applied when a party has a specific remedy expressly provided. Where a party pleads that fraud was practised upon him in respect of a compromise he has an express remedy by suit and cannot invoke S. 151 to correct the decree passed on the compromise. (Dible, J.M.).

AUSAN v. TRIMBAK SHAH. 1942 O.A. (Supp.) 521= 1942 R.D 941=1942 A.W.R. (Rev.) 495=1942 O.W.N. (B R.) 765.

Ss. 151 and 152-Clerical mistake in mortgage deed repeated in plaint and decree-Power to amend.

C. P. CODE (1908), S. 151.

Where a clerical mistake as to boundary in a mortgage deed is repeated in the plaint in a suit on the mortgage and copied in the decree, the Court which passed the judgment has power in execution to amend the decree under Ss. 151 and 152, C. F. Code. (Bennett and Madeley, JJ.) RUHULGHANI v. UMA SHANKAR. 210 I.C 95=16 R.O. 138=1943 A.W.R. (C.C.) 92=1943 O.W.N. 375=1943 O.A. (C.C.) 224= A.I.R. 1944 Oudh 5.

#### Inherent Powers.

-S. 151—Inherent powers—Absence of express provision to grant relief or to enforce right granted by Code—Power of Court to apply analogous provisions. See C. P. Code, O. 21, Rr. 15 AND 16. 47 Bom. L.R. 108.

-S. 151—Inherent powers—Appeal—Dismissal for non-payment of costs of preparation of paper book—Restoration—Jurisdiction of Court. See C.

P. Code, O. 41, R. 19. 44 Bom. L.R. 367.

——S. 151—Inherent powers—Appeal dismissed for default—Application for restoration made beyond the college of Court to allow Sec. C. P. time allowed—Powers of Court to allow. See C.P. Code, O. 41, R. 19. I L.R. (1943) Kar. 409.

-S. 151—Inherent powers—Compromise decree -Setting aside on ground of fraud-Powers of Court. See Compromise—Consent Decree. P.W.N. 186. (1942)

-S. 151—Inherent powers—Consolidation of suits-Separate suits presented simultaneously but based on same cause of action-Power of Court to consolidate—Dismissal as barred under O. 2, R. 2. (2), C.P. Code—Propriety. See C.P. Code, O. 2, R. 2 (2). 44 Bom L.R. 819.

——S. 151—Inherent powers—Copy application dismissed for non-production of copy stamps—Fresh application—Application to restore original application—Power of Court, to treat later one as continuation of original application.

of Court to treat later one as continuation of original appli-cation—Computation of time for limitation for appeal.

Where an application for copies of the decree and judgment is dismissed under R. 129 of the Civil Rules of Practice, and the applicant again applies afresh for copies and also applies to restore the original application for copies, the Court has power to order copies to be granted on the original applicationt The later application has to be regarded as a continuation of the original application and the Cour. has inherent jurisdiction to do, so as to enable the applicant to compute the time for filing an appeal on the basis of the original application. (Patanjali Sastri, J.) BERUMAL SOWCAR v. VELU GRAMANY. 204 I.C. 523=15 R.M. 780=55 L.W. 113=1942 M.W.N. 261=A.I.R. 1942 Mad. 369=(1942) 1 M.L.J. 372

-S. 151—Inherent powers—Delay in applying under O. 41, R. 21, to set aside ex parte decree in appeal—Power to excuse. See Lim. Act, S. 5. (1944) 2 M.L.J. 121.

S. 151—Inherent powers—Execution petition dismissed for default—Power of Court to restore.

See C.P. Code, O. 9, R. 9. 22 Pat. L.T. 965.

S. 151—Inherent powers—Exercise of—Existence of other remedy—If a bar.

Badan Prasad v.

Амвіка Разад. [See Q.D., 1936—1940, Vol. I, Col. 3291.] 16 Luck. 294—1941 О.L.R. 115—192 I. C. 332—13 R.O. 349—А.І.R. 1941 Oudh 91.

-S.151—Inherent powers—Exercise of—Other remedy

available—Order under, if justified.

When a remedy by way of appeal is open to an aggrieved party, an order under S. 151. C.P. Code, is not justified. (Sathe, J.M.) AMJAD ALI v. MAHESHWAR NATH. 1941 R.D. 429—1941 A.W.R. (Rev.) 481=1941 O.A. (Supp.) 440.

-S. 151—Inherent powers—Exercise of, to correct its own proceedings where fraud has been practised on the Court.

Where fiaud has been practised upon a Court it is always within the inherent powers of that Court to correct its own pioceedings. (Davis). MUKAND KUNWAR v. UM RAO MAL. 1945 A.M.L.J. 1

S. 151—Inherent powers—Extension of time for payment —Order fixing time for payment and providing for dismissal on default of payment-Failure to comply due to mistake of Court's officer—Power to extend time. See C.P. Code, S. 148. (1941) 1 M.L.J. 638.

S. 151—Inherent power—Fraud on Court-

Interference.

The weight of authority in the Calcutta High Court supports the inherent jurisdiction of the Court to interfere in cases involving a fraud on the Court, although there is a remedy by suit and it is the most арргоргіаte remedy. (*Henderson*, J.) Акіма Віві г. Маномар Аці Shaha. I L.R. (1941) 1 Cal. 405—196 I.C. 269—14 R.C. 202—74 С.L. J. 397— 45 C.W.N. 392=A.I.R. 1941 Cal. 336.

A Court cannot invoke its inherent power under S. 151, C.P. Code, for the purpose of granting a temporary injunction. Apart from the provisions of O. 39, C.P. Code, a Court has no inherent jurisdiction to pass an order of temporary injunction. (Chatterji and Sinha, J.J.) H.L. Roy v. Indo Swiss Co. 24 Pat. 496.

S. 80, C.P. Code—Maintainability.

"Justice" in S. 151, C.P. Code, means that standard of justice which the C.P. Code is designed to achieve. There is no general right to present petitions and when a suit lies to obtain a relief, it is not competent to a party to present a petition for such relief instead of a suit in order to evade the bar imposed by S. 80, C.P. Code. S. 151, C.P. Code; does not give the Court power to award relief in such petitions without suits being filed. (Blagden, J.) Hubli Electricity Co., Ltd. v. Government of Bombay. 47 Bom. L. 415=A.I.R. 1945 Bom. 370.

-S. 151 and O. 25, R. 1-Inherent powers-Limits-Resort to inherent powers in regard to security

for costs—Jurisdiction.

Where a matter has been specifically provided for by the legislature, no discretion is left in the Court to resort to its inherent power. As specific provisions relating to security for costs has been made in O. 25, R. I, C.P. Code, it is not possible for the Court to extend the scope of those provisions by resorting to its inherent jurisdiction and if it does it acts without urisdiction. (Mulla, J.) GOKUL CHAND v. CHANNOO LAL. 1943 A.L.W. 453.

S. 151—Inherent powers—Limits to the exercise of. See EVIDENCE ACT, S. 135 AND C. P. Code, S. 151. 1941 A.L.J. 345.

S. 151—Inherent powers—Mortagage suit— Sale of mortaged property to satisfy prior claim— Surplus sale proceeds—Final decree entitling mortgagee to recover surplus sale proceeds-Power of Court to pass. See C.P. Code, O. 34, R. 5 (3).

Cut. L.T. 49.

S. 151—Inherent powers —Order for delivery of property under S. 185, Companies Act, reversed on appeal

C. P. CODE (1908), S. 151.

to the official Liquidator in the summary proceedings and in execution of that order the liquidator came into possession but the appellate Court said that possession could be taken only by means of a suit restitution must be granted by restoring possession. (Fazl Alı, C.J. and Chatterji, J.) Hemendra Lal v. B. GUPTA, OFFICIAL LIQUIDATOR OF GIRIDIH ELECTRIC Supply Corporation, Lfd. 23 Pat. 24=10 B.R. 594=213 I.C. 340=17 R.P. 14=A.I.R. 1944. Pat. 192.

——S. 151—Inherent powers—Other remedy open —Exercise of inherent powers—If justified—Execution application—Dismissal for default—Inherent power to restore and revive.

The Court has an inherent power under S. 151, G.P. Code, to restore an application in execution proceedings which had been dismissed in default, notwithstanding the fact that the applicant has an alternative remedy open. The property of the judgment-debtor was attached in execution of a decree against him and the Court ordered a sale proclamation to issue. The judgment-debtor then produced in Court a certificate under S. 10 of the Bombay Wakf Act (Bombay Hereditary Village Offices Act of 1874) issued by the District Deputy Collector to the effect that the property attached was Wakf property not hable to attachment and sale in execution of the decree. The application for execution was thereupon dismissed and the attachment raised. The decree-holder appealed to the Collector who cancelled the certificate of the District Deputy Collector. The decree-holder then applied to the Court to revive the execution petition which had been dismissed and the Court called back and revived the application and proceeded with it from the stage which it had previously reached.

Held, that it was the duty of the Court to redress the wrong and rectify what turned out to be an error and had power to restore the execution application, though the decree-holder had another remedy open, viz., a fresh execution application or an application for review of the order dismissing the earlier application. (Wadia and Rajadhyaksha, JJ.) Внімарра Saheb Gireppasaheb v. Ramappa. 219 І.С. 192—46 Вот. L.R. 725—A.I.R. 1945 Вот. 85.

-S. 151—Inherent powers—Recall of invalid orders -Power of Court.

It is well-settled that a Court has inherent jurisdiction to recall and cancel its invalid orders, especially when such orders are based upon a mistake and the party in whose favour the order is made is responsible for the mistake and when the Court has been induced by his misrepresentation to make an order to the prejudice of another party in the latter's absence and without notice to him. (Fazl Ali and Chatterji, JJ.) GAJANAND SHA v. DAYANAND THAKUR. 21 Pat. 838=205 I.C. 561=15 R.P. 296=9 B.R. 243=A.I.R. 1943 Pat. 127.

-S. 151—Inherent powers—Refusal to take evidence

-If a material irregularity.

There is no provision in the C.P. Code like the one found in Cr. P. Code which specifically empowers a Court to refuse to take down the evidence of a witness tendered by a party. But S. 151, C.P. Code, gives similar powers even to a Civil Court. Therefore where the trial Court refuses to take down the evidence of all the witnesses tendered by a party its action where the Court of first instance decided under S. 185, Companies Act, that possession should be given 7. M.) Mithoo Singh v. Parshadi. 1942 O.A. (Supp.) 243=1942 A.W.R. (Rev.) 217=1942 R.D. 506=1942 O.W.N. (B.R.) 416. cannot be said to be a material irregularity.

\_\_\_\_\_S. 151—Inherent powers—Reopening of surt after decree—Defendants in pending suit applying to Debt Relief Court—Relief granted to defendant I alone — Suit thereupon decreed against defendant 2—Order of Debt Relief Court set aside in revision—Plaintiff applying for reopening of suit against defendant I—Proper remedy.

The defendants in a pending suit applied to the

Debt Relief Court which allowed relief to defendant No. 1 but not to defendant No. 2 The plaintiff then filed an application for revision which was eventually allowed with the result, the defendant No. I's application for relief was dismissed. In the meanwhile the Court proceeded with the suit and decreed it against defendant No. 2. The plaintiff made an application under S. 151, C.P. Code, for reopening the suit against defendant No. 2, which was dismissed, on revision.

Held, (i) that the remedy of the plaintiff could not be by way of an appliction for review as the ground on which his application was founded, namely the dismissal of defendant No. 1's application for relief in revision, did not exist at the date of the decree of the lower Court; (11) that the proper remedy of the plaintiff was by way of an application under S. 151, C.P. Code, and that the Court is not acting under the section if in the circumstances it failed to exercise jurisdiction vested in 1t by law. (Bobde, J.) BALMUKUND v. SHEKH SARDAR. I.L R (1944) Nag. 379=215 I.C. 210=17 R.N. 42=1944 N.L.J. 143 =A.I.R. 1944 Nag. 148.

S. 151—Inherent powers—Restitution and compensation on reversal of decree by trial Court See C.P. Code, Ss. 144 and 151. 1942 R.D. 443=1942 O.W.N. (B.R.) 354.

-S. 151—Inherent powers—Restitution—Decree vacated in separate suit after its execution-Inherent powers. See G. P. Code, Ss. 144 and 151. 46 P.L.R.

S.151—Inherent powers—Restitution—Powers of Court apart from S. 144. See C.P. Code, S. 144. I.L R. (1944) Kar. 284.

151 — Inherent powers—Restitution— Powers of Court to order restitution under inherent jurisdiction. See C.P. Code, Ss. 144 and 151. (1944) 2 M.L.J. 318.

-S. 151—Inherent powers—Restitution—Power to order. See C.P. Code, S. 144. (1945) 1 M.L.J. 386.

S. 151—Inherent powers—Restitution—Power of Court to order as against person not party to decree.

See C.P. Code, S. 144. (1942) 1 M.L.J. 575.

S. 151—Inherent powers—Restoration—Application for possession of property sold in execution, dismissed for default.

An application to obtain possession of property sold in execution is itself an application for execution of the decree. An order of dismissal of such an application cannot be made under O. 9 nor could an order of restoration be made under that order. Such dismissal must be made under the provisions of S. 151 of the Code, and they can also in appropriate cases, be restored under the provisio n of the same section. (Almond, J.C. and Mir Ahmad, J.) KARAM CHAND v. UMAR BAKSH. A.I.R. 1945 Pesh. 31.

-S. 151—Inherent powers—Restoration of appeal withdrawn.

It is impossible to restore an appeal which was dismissed on the application of the appellant that he wished to withdraw it, though the appellant might have acted under a misapprehension. (Allsop nd Verma, JJ.) RAMLAL SHAU v. DINA NATH. 201 Bom. L.R. 638.

C. P. CODE (1908), S. 151.

I.C. 768=15 R.A. 85=1942 A.L.J. 382=1942 A.W.R. (H.C.) 161=1942 A.L.W. 361=A.I.R.

Civil Revision Petition dismissed for default-Jurisdiction of High Court. See C.P. Code, O. 9, R. 9. (1945) 1 M.L.J. 4.

S. 151—Inherent powers—Restoration of copy application dismissed for non-payment of printing 

application.

The provisions of O. 9, C.P. Code, do not apply to execution applications. But a Court does possess inherent powers under S. 151, C.P. Code, to restore an execution application if the ends of justice demand it. (Sathe, S.M. and Ross, J.M.) DHARAM SINGH v. SURAT SINGH. 1943 R.D. 524=1943 A.W.R.

(Rev.) 328.
S. 151—Inherent powers—Restoration of execution

application dismissed for default.

An execution Court can under its inherent powers restore an application for execution dismissed for default. (Sinha, J.) BHAGWAN RAM v. RAM JIWAN. I.L R. (1944) A 599=1944 A.L.W. 325=1944 O.A. (H.C.) 136=1944 A.W.R. (H.C.) 136= 1944 A L.J. 437.

-S. 151-Inherent powers-Restoration of execution application dismissed for default after fresh application is barred. See C. P. Code, O. 9, AND S. 151. 1945 O.A. (C.C.) 102.

\_\_\_\_\_S. 151—Inherent powers—Restoration of execution application dismissed in default—Power of Court.

If the analogy of the provisions of O. 9, C. P. Code, is disregarded and a Court dismissed an application under O. 21, purely in exercise of its inherent powers, the caually entitled under those powers to restore the case to file. (Grille, C. J. and Puranik, J.) Semabi v. Ganpat Rao I.L.R. (1944) Nag 451=210 I.C. 634=16 R.N. 167=1943 N.L.J. 527=A I. R 1944 Nag. 59.

-S. 151—Inherent powers—Review—District Judge transferring application for registration of wakf estate to additional District Judge—Power of latter to reconsider or vacate order by District Judge passed previously. See Mussalman Wake Act, S. 2, 1942 P.W.N. 94.

-S. 151—Inherent powers—Review—Hardship -Not sufficient ground for exercise of powers. C. P. CODE, O. 47, R. I. 1944 1 M.L.J. 259.

-S. 151—Inherent powers—Scope of.

Though a Court does possess inherent powers to cancel its own invalid orders, it is doubtful if it possesses powers under S. 151, C. P. Code, not only to cancel its previous incorrect orders but to substitute other orders in their place, for, it would practically mean reviewing previous orders without following the restrictions imposed in the matter by the provisions of the C. P. Code. (Sathe, S. M. and Ross, A.M.) MADAN GOPAL v. SHEO KUMAR. 1943 A.W.R. (Rev.) 78=1943 R.D. 152.

S. 151—Inherent powers—Setting aside of execution sale—Application for on ground of noncompliance with S. 13, Bihar Money-Lenders Act-If falls under O. 21, R. 90—Limitation. See Limitation Act, Art. 166. 23 Pat. L.T. 139.

S. 151—Inherent powers—Setting aside of execution sale—Loss or deterioration of property sold after sale and before confirmation if ground for setting aside sale. See C. P. Code, O. 21, R. 91. 44

-S. 151—Inherent powers—Stay of proceedings-Appeal against order refusing to set aside ex parte preliminary decree—Stay of passing final decree pending disposal—Inherent power of Court.

An application to have the passing of a final decice stayed pending disposal of an appeal against an order dismissing an application for setting aside an ex parte preliminary decree in a suit is maintainable under S. 151, C. P. Code, and the Court has inherent jurisdiction under S. 151, to stay the passing of the final decree, irrespective of O. 41, R. 5, C. P. Code. In matters in which the Code is exhaustive the inherent powers of the Court under S. 151 cannot be invoked. But where the Code is silent, such powers can be exercised so long as such exercise is not opposed to or prohibited by the provisions of the Code (Kuppuswami Aiyar, J.) Ankalu Reddi v. Chinna Ankalu Reddi. 1943 M W N 731=56 L W. 698=216 I.C. 44=A.I R. 1944 Mad. 161=(1943) 2 M L. **J**. 557

S 151—Inherent powers—Stay—Criminal com-plaint filed by defendant in Court of another Province— Injunction against defendant restraining him from proceeding

with complaint—Power of High Court to grant.

The High Court has junisdiction under S. 151, C. P. Code, to grant an injunction in personam against a person who has submitted to the jurisdiction to restrain him from proceeding with a criminal complaint in a Court which is not subject to the jurisdiction of the High Court, if in the exercise of its discretion the High Court thinks proper to do so. But this is a jurisdiction which should be exercised with extreme caution. (Blackwell, J.) KANHAIYALAL HARKARANDAS v. MOHANLAL RAMVALLABII. 194 J.C. 814=14 R B. 9=43 Bom. L.R. 287=A.I.R. 1941 Bom.

-S. 151—Inherent powers—Suit for possession of properties alleged to be allotted to plaintiff or in the alternative for partition—Plea that properties are self-acquisitions—Order for interim maintenance— If justified. Latchanna Doravaru v. Mallu Doravaru. [See Q.D., 1936-40, Vol. I, Col. 3291.] 13 R.M. 634=193 I.C. 175=A.I.R. 1941 Mad.

S. 151 and O. 45, R. 13 (2) (d)—Inherent power of High Court-Income of property in suit accruing after decree, lying in deposit in High Court pending appeal—Order for its preservation—If may be passed after and before application for leave to appeal to Privy Council is filed. See C. P. Code. O. 45, R. 13 (2) (d) and S. 151. 45 C.W.N. 1023.

Ss. 151 and 152—Inherent powers of Court to amend decree—Notice to party affected—Necessity for.

It cannot be disputed that when the Court acts in

the exercise of its jurisdiction under Ss. 151 and 152, C. P. Code, to amend a decree, it should only do so after notice to the party to be affected by the amendment—all the more so in the case of a decree that was passed on consent. The Court has no inherent power to alter orders passed with the consent of the parties unless at least notice is given to the parties affected. (Dhavle, J.) Satyabadi Pradhan v. Kanhei Pradhan. 205 I.C. 103=15 R.P. 242=9 B.R. 192= 8 Cut. L.T. 105=A.I.R. 1943 Pat. 72.

S. 151 and O. 47, R. 1 and U. P. Encumbered Estates Act, S. 24—Inherent power to cancel invalid order-Cancellation of exemption from sale wrongly

A Court has inherent powers under S. 151, C. P. Code to recall and cancel its own invalid order. Where a prior order exempting under S. 24 of the U. P. Encumbered Estates Act the residential house

### C. P. CODE (1908), S. 151.

of the debtor from sale is subsequently cancelled on the ground that it was mortgaged, the order of cancellation though it cannot be justified if passed under O. 47, R 1, C P. Code, can still be supported as falling under S. 151, C. P. Code, masmuch as the first order was really an invalid order. (Sathe, S.M) AHMAD HUSAIN KHAN v. ASHIK HUSAIN. 1942 R.D 965=1942 O A (Supp.) 534 (2)=1942 A W R (Rev.) 508 (2)=1942 O.W.N. (B.R.) 783.

### Injunction.

-S.151-Injunction-Jurisdiction of High Court -Injunction restraining defendant from litigating m another Court—Power to grant. Sa C. P. Code, Ss. 10 AND 151. I L.R. (1941) 1 Cal. 490.

### Joinder of Parties.

Power of High Court—Addition of party to appeal after

Apart from O. 41, R. 20, C. P. Code, the High Court has ample power under S. 151, C. P. Code, to add a party to an appeal even after the expiry of the period of limitation prescribed for appeals, if, in the circumstances of the particular case before it, it thinks fit to do so. Where a person's name was omitted from the array of parties to an appeal by the mistake caused by an error in the certified copy of the judgment of the lower appellate Court, which had been supplied to the appellant and which did not contain his name, it is a fit case for the High Court to grant the application of the appellant to add him as a party and condone the delay under S. 5 of the Limitation Act, although the clerk of the appellant's counsel could have discovered the mistake if he had compared the list of parties in the copy of the judgment with that in the copy of the decree. (Tek Chand and Beckett, JJ.) SHANTI LALV. HIRA LAL SHEO NARAIN. I.L.R. (1942) Lah. 603=198 I.C. 726=14 R.L. 351=43 P.L.R. 471=A.I.R. 1941 Lah. 402.

-S. 151—Order refusing to exercise inherent jurisdiction by restoring application for execution dismissed for default—Not appealable. See C. P. Code, Ss. 47 and 151. A.I.R. 1944 All. 218.

### Other remedy.

S. 151—Other remedy open—Jurisdiction to act ex debito justitiae.

The jurisdiction of a Court to act ev debito justitiae under S. 151, C. P. Code, cannot be ousted simply because another and perhaps an inconvenient remedy is also available, in the absence of any specific words to that effect in the section itself. (Abdur Rahman, J.) ALFRED ZAHIR v. SIRAJ-UD-DIN. 216 I.C. 97=17 R. Alfred Zahir v. Siraj-ud-din. L. 168=46 P.L.R. 111=A.I.R. 1944 Lah. 165.

-S. 151—Refund of costs—Restitution—Order for costs against defeated claimant under O. 21, R. 58 -Subsequent suit—Decree setting aside claim order— Application for refund of costs ordered in claim-Competency—Power of Court to order refund. See C. P. Code, Ss. 144 and 151. 45 Bom. L.R. 203.

### Refund of Court-fee.

-S. 151-Refund of Court-fee-Duplicate certificate -Grant of on loss of original-Proper order-Form of

Where the Court is satisfied that the original certificate for refund of court-fee paid on a memorandum of appeal is lost, the proper order to make is to grant a duplicate certificate and to state therein that it is issued on the representation that the original has not been cashed. There is no statutory rule governing the matter and the Court in this matter

acts only in the exercise of its inherent jurisdiction 

Rejection of latter-Power to refund Court-fee.

A plaint presented with insufficient Court-fee was rejected on failure to make up the deficiency. An application for review of the order of rejection was then made along with the necessary Court-fee to make up the deficiency. This application was also rejected. The plaintiff thereupon applied for refund of the Court-fee which he paid subsequently. The Court

refused the prayer.

Held, in revision, that since the deficit Court-fee paid was not meant to be utilised until the application for review was granted by the Court, the said Court-fee ought to be refunded on the rejection of the application for review. Though Ss. 13 to 15 of the Court-Fees Act aid not apply, the Court had inherent powers to order refund of Court-fee under S. 151, C. P. Code. 

of powers to refund.

The Courts have an inherent power to order refund of court-fee paid by mistake or inadvertence, or through ignorance of law. Ignorance of law on the part of the person paying the court-fee need not prevent the Courts from exercising their inherent powers, where it is clear that the document in respect of which the court-fee was paid has proved to be infructuous or is inoperative for the purpose for which it was obtained. (Wadia and Divatia, JJ.) AHMED EBRAHIM v. GOVERN-MENT OF BOMBAY. I.L.R. 1943 Bom. 25=205 I. C. 536=15 R.B. 372=44 Bom. L.R. 912=A.I.R 1943 Bom. 50.

S. 151—Refund of Court-fee—Powers of High Court to order refund of fee paid in excess under mistake or under order of Court.

The High Court has ample powers and can make a declaration and assist a party to recover the excess amount of Court-fee erroneously paid by him under its own order or under orders of Courts subordinate to it. (Abdur Rahman, J.) VEDARANYASWAMI DEVASTHANAM, In re. 202 I.C. 420=15 R.M. 498=55 L.W. 250=1942 M.W.N. 206=A.I.R. 1942 Mad. 464=(1942) 1 M L.J. 451.

#### Remand.

Where the whole suit was not disposed of upon any preliminary point and the trial Court decided the several issues on their merits and except for one issue in respect of which the lower appellate Court remanded the suit, the decision upon all the other issues was affirmed by it, the order of remand is neither in form nor in substance one under O. 41, R. 23, C. P. Code. It can only be made under the inherent jurisdiction of the Court under S. 151, C. P. Code, and no appeal is permissible where a 

on merits-Appeal.

### C. P. CODE (1908) S. 151.

A remand can be ordered under O. 41, R.23, C. P. Code, only in a case where the Court, from whose decree the appeal is preferred, has disposed of the suit upon a preliminary point and the decree is reversed on appeal, and not in a case decided upon the whole evidence and upon all the issues which were raised. If in the later case an appellate Court concludes that the trial Court has wrongly decided the case and remands it for re-trial in the exercise of its inherent jurisdiction, the order of remand is not appealable. (Harries, C. J. and Fazl Ali, J.) PRADYAT KUMARA TAGORE v. JYOTISH CHANDRA DAS. 197 I. C. 13=8 B.R. 186=14 R.P. 288=A.I.R. 1942

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S. 151—Remand under—When justified.
S. 151, C. P. Code, should seldom be restored to for the purpose of making a remand. The trial would have to be so radically defective as not to amount to a trial at all before its provisions could be availed of for such a purpose. (Bose, J.) Anandrao Baliram v. Parwatibai. I.L.R. (1942) Nag. 487 = 197 I.C. 221=14 R.N. 153=1941 N L.J. 519= A.I.R 1941 Nag. 308.

S. 151 and O. 41, Rr. 23 and 25—Remand

under S. 151-When justified.

The power of an appellate Court to remand is not circumscribed within the Rr. 23 and 25 of O. 41, C. P. Code. An order of remand under S. 151, C. P. Code, would be a proper order, if it is made by the appellate Court in a case in which the evidence on the record is not sufficient for a correct decision on the point at issue to obtain further evidence before the trial Court which had refused to give an opportunity to produce that evidence. (Ghulam Husan, J.)
RAM DHANI v. NAGAR MAL. 1941 O.A. 503=1941
O.W.N. 754=194 I.C. 755=14 R.O 36=1941
A W R (C.C) 205=1941 R D 578=1941 A.L. W 592=1941 O L.R 525=A.I.R. 1941 Oudh. 561.

-S. 151 and O. 41, R. 1 (u)—Remand under

inherent powers—Appeal, if lies.

Where an order of remand does not fall under R. 23 of O. 41 and is hence under the inherent powers of Court, no appeal would lie under O. 41, R. 1(u). (Ghulam Hasan, and Agarwal, JJ.) Noor Монам-мар v. Suleman Khan. 203 I C. 236=15 R.O. 166=1942 O.W.N. 520=1942 A.W.R. (C.C.) 322 (2)=1942 O A. 430=A.I.R. 1943 Oudh 35. Scope.

-S. 151—Scope of.

S. 151, C. P. Code, provides only for an extraordinary procedure and action under it is not in any sense obligatory. The section could only be invoked where no other remedy is possible. It does not confer any substantive lights on parties but is mainly meant to get over difficulties arising from rules of procedure, which would otherwise prevent courts from dealing out justice between the parties. (Sathe, J.M.), JAGANNATH SINGH v. DRIGPAL SINGH. 1941 A.L.J. (Supp.) 10=1940 R.D. 515=1940 A.W.R. (B. R.) 203=1940 O.A. 1077=1940 O.W.N. 1072.

S. 151—Scope. See Limitation Act, S. 14

AND ART. 173. A I.R. 1945 All. 377.

S. 151—Scope of jurisdiction under.

A superior Court cannot entertain an appeal under its inherent jurisdiction under S. 151 of the Code where the law has not made any provisions for an appeal. (Malik, 7.) BHAGWATI PRASAD v. COLLECTOR OF ETAH. I.L.R. (1944) All.381=1944

A.W.R (H.C.) 133=218 I C. 269=18 R.A. 6 =1944 O.A (H C) 133=1944 A L J. 298=A. I.R. 1944 All, 218.

S. 151—Scope—Party having appropriate remedy under specific provision in Code but failing to avail hunself of same-Right to invoke inherent powers. Ratnasabapathi Pillai v. Gopala Iyer. [See Q. D. 1936-40, Vol. I, Col. 3293] 193 I C. 637 =13 R M. 705.

-S. 151-Scope-Power of Court to relieve against condition in decree to pay instalments promptly —Clause giving concession to judgment debtor only on regular payment—Effect of—If penal. See C. P. Code, Ss. 118 AND 151. I.L.R. (1941) Kar. 389.

## Stay of Execution.

To attached property filing declaratory suit under Specific Relief Act—Sale of attached property, if can be stayed.

Where a claimant to attached property withdraws his claim pention and later files a declaratory suit under the Specific Relief Act to declare that the decree in execution of which the property was attached is not binding on the estate of the judgment debtor of whom the plaintiff claimed to be sold legal representative, it is not open to the Court trying the case to stay the execution sale under that decree. The sale cannot affect the plaintiff's right, and if he succeeds then his interests in the property would be deemed not to have been disposed of by the sale. S. 151, C. P. Code, cannot be invoked, for it is not necessary in the ends of justice, or to prevent the abuse of the process of the Court, to stay execution when the right, title and interest cannot be affected by the sale. (Moseley, J.) NARAYANAN CHETTIYAR v. MA SAW HLA. 1940 Rang, L.R. 749=192 I.C. 582=13 R.R. 185=A.I.R. 1941 Rang 60.

### Stay of Suit.

-S. 151—Stay of suit—Application for—Plea of jurisdiction involving difficult questions—If can be dealt with. Abdul Shakoor v. Ali Mahomed Ebrahim Shakoor. [See Q.D., 1936-40, Vol. I, Col. 1417]. 195 I C. 257=14 R.C. 63=A.I.R. 1941 1417]. 19 Cal. 236.

-S. 151—Stay of suit—Inherent power.

Where the subject-matter in two suits pending in different Courts is identical but the trial Court rejects an application under S. 10, C. P. Code, for stay of one of the suits, though the order being interlocutory may not be open to revision the High Court can interfere in the exercise of its inherent powers under S. 151, C. P. Code, to avoid an idle multiplicity of suits and can order the stay under S. 10, C.P. Code. (Almond, J.) WAQF MASJID v. SARDAR KHAN. 194 I.C. 268=13 R. Pesh. 77= A.I.R. 1941 Pesh. 34.

——S. 151—Stay—Powers of Court—Discretion.
Where an application to stay a new suit is made on the ground of similar question of law being involved in a pending appeal, the principle of S. 10 does not apply to the exercise of discretion by the Court. Its discretion is wholly unfettered and in exercising it the Court cannot but have regard to the history of the proceedings between the parties and the conduct of the applicant who is in default in the matter of payments decreed in prior proceedings. (Braund and Yorke, 77.) KAILASH CHANDRA JAIN v. JHAMOLA KUNWAR. 1942 A L.W. 291

S. 151 and O. 41—Summary dismissal of appeal

for non-payment of costs of adjournment—If justified.

A summary dismissal of an appeal for the nonpayment of costs of an adjournment is neither justified

C. P. CODE (1908), S. 151.

by any provision in O. 41, C. P. Code, nor could it be justified as being necessary for the ends of justice or to prevent abuse of the process of the Court within the meaning of S. 151, G. P. Code. (Sathe, S.M. and Dible, J.M.) Jugai. Kishore Rai v. Samujii. 1943 R. D. 450=1943 A. W. R. (Rev.) 267

151 and Court-Fees Act (VII of 1870), S. 13-Belated application for refund of court-fees -Right to relief.

Along with an appeal filed long out of time, the appellant filed a petition under Ss. 5 and 14 of the Limitation Act to condone the delay in filing the appeal. The latter was dismissed. The appellant applied more than three years thereafter for the refund

of the court-fee paid on the appeal.

Held, that in the circumstances, he was not entitled to the relief asked for because it would not be expedient in the interests of justice to order the refund of the Court-fee paul. (Thomas, C.J. and Chulam Hasan, J.)

MAHOMED AZIM KHAN v SANDAT ALI KHAN. 1945

O A (C C.) 220=1945 O.W.N. 329=1945 A.

W.R. (C.C.) 220=1945 A.L.W. (C.C.) 294.

-S. 152-1ccidental slip or omission—Correction – $E aut v. \,$ 

Unless it is inequitable to do so, mistakes in the judgment arising out of accidental slips or omissions Should be corrected. (Agarwala and Madeley, 33.)

BACHAN SINGH v. SHATRANAJI. 17 Luck. 739=
198 I.C. 479=14 R.O 403=1941 A W R. (C. C.) 407=1941 O A. 1030=1941 O.W.N 1384 =A.I R. 1942 Oudh 226.

-S. 152—Accidental slip or omission—Mistake of

Court owing to ignorance of law.

The fact that a Court made a mistake and passed a wrong decree is no ground for holding that the mistake arose from an accidental slip or omission. A Court's ignorance of the law cannot by any stretch of imagination, be brought within the words "accidental slip or omission" used in S. 152, C. P. Code. (Verma, J.) JANGLI SINGH v. RAMJAG SINGH. I.L.R. (1944) All. 588=1944 A.L.J. 494=1944 O.A. (H.C.) 151=1944 A.L.W. 361=1944 A.W.R. (H.C.) 151=A.I.R. 1944 All. 198.

S. 152—Amendment—Forum—Merger of trial

Court's decree in that of the appellate Court.

Ordinarily the trial Court has no jurisdiction left in cases where the decree of that Court has merged in the decree of the appellate Court. But the trial Court may, under S. 152, C. P. Code, amend such a decree in cases where the correction is merely of a clerical or arithmetical mistake. (Bennet, J.) Khairati Khan v. Munney Khan. 193 I.C. 53=1941 A.W.R. (C.C.) 104=1941 O.L.R. 252=1941 A. L.W. 200=13 R.O. 429=1941 O.W.N. 270= 1941 O.A. 217.

-S. 152 and O. 41, R. 11—Amendment of decree—

Forum—Dismissal of appeal under 0. 41, R. 11.

In the Allahabad High Court even when there is a dismissal under O. 41, R. 11, C. P. Code, there is a decree and hence it is the High Court alone that can amend it. (Hamilton, J.) SRINATH DAS v. BALLABH DAS SETH. 1943 A.L.W. 77.

-S. 152—Amendment of decree—Forum—Dismissal of appeal after withdrawal by one of the appellants.

Where an appeal has been dismissed on the merits though one of the appellants might have withdrawn his appeal earlier, an application for amendment of the decree lies only to the appellate Court and not to the trial Court. (Davies.) CHHOGA v. CHANDA. 1942 A.M.L.J. 31.

S. 152—Amendment of decree—Powers of Court. If the alleged mistake is not clerical or arithmetical or has not arisen from an accidental slip or omission the Court has no jurisdiction under S. 152, C. P. Code, to correct it. In those cases the remedy of the aggrieved party is to appeal, or to apply to the Court by way of review. Where the Judge instead of passing a decree in Form No. 9 in Appendix D, C. P. Code, deliberately passes a decree in a different form, the error cannot be said to be due to accidental omission or slip and cannot be amended under S. 151 or 152. (Tex Chand, J.) RAM RAKHA MAL v. DINA NATH. I.L.R. (1942) Lah. 212=197 I.C. 728=14 R.L. 267=43 P.L.R. 519=A.I.R. 1941 Lah. 419.

-S. 152—Amendment—Powers of Court—Limits -Correction after Court had become functus officio-When justified Lapse of time, if a bar to correction.

Although after the case has been decided and the decree has been satisfied, the Court becomes functus officio, yet it does not debar the Court in appropriate cases, to rectify an error which has crept into its record either by accident or by design. The only limitation upon the exercise of such a power by Court, may be found in cases where third parties have acquired rights under the erroneous judgment in the interval. Lapse of time however considerable, is no bar to the correction of errors either under S. 151 or 152, C. P. Code. (Ghulam Hasan, J.) SANWALEY RAI V. SANT RAI. 193 I.C. 727=1941 A.L.W. 359 (1)=1941 O.L.R. 319=13 R.O. 495=1941 R.D. 505=1941 O.W.N. 474=1941 O.A. 312=1941 A.W.R. (Rev.) 281=A.I.R. 1941 Oudh 344.

-S. 152—Amendment under—Person not a party

to suit—If can apply for.

It is not necessary that the applicant for amendment should have been a party to the suit. (Agarwal and Madeley, JJ.) BACHAN SINGH v. SHATRANAJI. 17 Luck. 739=198 I.C. 479=14 R.O 403=1941 A W.R. (C.C.) 407=1941 O A. 1030=1941 O W. N. 1384=A.I.R. 1942 Oudh 226.

-Ss. 152 and 151—Amendment under S. 152-

When lies—S. 151, when applicable
In the case of an amendment under S. 152, C. P. Code, the Court has only to see whether the decree contains any clerical or arithmetical mistake or any error arising from any accidental slip or omission. In the absence of any such thing amendment could not be had. Under S. 151, amendment could not be obtained unless it is necessary for the ends o justice or to prevent abuse of the process of the Ccurt and when a remedy by way of appeal or cross-objection is open and is not availed of, resort to S. 151 could not be had. (Gulam Hasan and Agarwal, JJ.)
TAJAMMUL HUSAIN KHAN v. AMIRUDDIN. 17 Luck.
297=197 I.C. 471=14 R.O. 314=1941 O.L.R.
905=1941 O.A. 951=1941 A.W.R. (Rev.) 1078
=1941 O.W.N. 1239=A.I.R. 1942 Oudh 189.

-S. 152—Amendment suo motu—Limits to powers

of.
Though a Court has power to correct clerical mistakes in its order suo motu under S. 152, C. P. Code, it cannot made such changes in its order as would go to the very root of the matter decided. (Sathe, S.M. and Ross, A.M.) RAM DAS TEWARI v. MUNNA LAL. 1943 A.W.R. (Rev.) 127 (1)=1943 R.D. 245.

S. 152—Applicability—Conditions.

C. P. CODE (1908), S. 152.

where the question before the Court is more or less. of a contentious nature. (Fazl Ali, J.) RAMSANKAR BANDOPADAYA v. KHUDI RAM DUTT. 198 I.C. 672 BANDOPADAYA v. KHUDI RAM DUTT. 198 I.C. 672 =8 B.R. 447=14 R.P. 487=A.I.R. 1942 Pat. 328.

Mistake in creeping into order—Power to correct.

Where a mistake in the heading of a petition the operative portion of which was correct) has found its way into the formal order, it can be corrected under S. 152, C. P. Code. The section is just as much applicable to this kind of mistake as to one in which there has been a miscalculation in arithmetic which originates in a plaint and persists in the decree. A.I.R. 1942 Rang 56.

-S. 152—Applicability—Mistake in deed repeated

in plaint and decree in suit on deed—Amendment.
S. 152, G. P. Code, is not restricted to mistakes or errors which occur for the first time in the plaint or the subsequent proceedings in Court. The section applies also to cases where the mistake occurred in the earlier document evidencing the transaction itself and was copied in the plaint and the decree in the suit brought to enforce the transaction. (Patanjali Sastri, J.) Ranga Rao Naidu v. Seth Balaksonlal. Jankiprasad. 199 I.C. 594=14 R.M. 609=54 L.W. 344=1941 M.W.N. 828=A.I.R. 1941 Mad. 940 (1)=(1941) 2 M.L.J. 452.

-S 152—Applicability—Substantial modification of predecessor's order.

Where a successor by an addition to his predecessor's order substantially modifies it and the addition does not amount to a correction of any mere clerical mistake, the amendment is not justified by S. 152, C. P. Code. (Shirreff, S.M. and Sathe, J.M.) RAJNATH LAL v. JADUNANDAN LAL. 1942 O.A. (Supp.) 486 = 1942 O.W.N (B.R.) 662 (2).

152—Inherent power—Insolvency—Dismissal of cieditor's application for default-Applica. tion by another creditor for substitution of his name and to revive original petition-Power of Court to restore. See Provincial Insolvency Act, S. 16. 47 Bom. L.R. 441.

S. 152-Jurisdiction-Appeal-Abatement in part-Decree on merits as against surviving respondents-Amendment of decree-Forum-Trial Court or appellate Court. Zuleka Biv. Kulsum Br. [See Q.D., 1936-40, Vol. I, Col. 3292.] A.I.R. 1941 Mad. 123.

-S. 152—Laches—Mistake of Court.

Where the mistake sought to be corrected by the application for amendment is not one made by a party but by the Court, no question of laches can arise. (Agarwal and Madeley, JJ.) BACHAN SINGH v. SHAT-RANAJI, 17 Luck 739=198 I.C 479=14 R.O. 403=1941 O.W.N. 1384=1941 A.W.R. (C.C.) 407 =1941 O.A 1030=A I R. 1942 Oudh 226.

-S. 152—Mistake of a clerical nature—Redemption suit-Decree-Entire amount paid-Decree for half of the property by mistake. - Correction.

Where a suit for redemption was decreed and the entire amount due on the mortgage paid and the mortgage extinguished, by a mistake the decree was drawn up with reference to only half the property, but the mortgagee obtained possession over the whole, the mistake was one of a clerical nature arising from an accidental slip or omission and could be Before S. 152, C. F. Code, can be held to apply to a particular case, it must be shown that the alleged mistake is either clerical or arithmetical or due to an accidental slip or omission. It cannot be invoked C.L.R. 319=1941 R.D. 305=1941 O.W.N,

474=1941 O.A. 312=1941 A.W.R. (Rev.) 281 =A.I.R. 1941 Oudh 344.

S. 152—Order amending or refusing to amend

–Appeal—Revision. judgment-

An order passed under S. 151 or S. 152 allowing or refusing an application to amend a judgment, decree or order is not appealable under the Code and the only remedy in such cases is by way of revision. (Tek Chand, J.) RAM RAKHA MAL v. DINA NATH. I.L.R. (1942) Lah. 212=197 I.C. 728=14 R.L. 267=43 P.L.R. 519=A.I.R. 1941 Lah. 419.

 $-\mathbf{S.~152}$ —Power of trial Court to amend its order after it had merged in the appellate order—Mutation case—Inclusion by trial Court of costs after order in appeal—

Once an order has been passed by the appellate Court the order or decree of the trial Court merges in the order or decree of the appellate Court and the trial Court has no junisdiction to amend its own decree or order in any way thereafter. In a mutation case the previous amount of legal fees which are to be included in the memo. of costs has to be fixed by the presiding officer of the Court in every case under para. 64 of the Revenue Manual. Where there has been no such fixation either in the trial or appellate Court, the trial Court has no power to include the legal fees after the final order in appeal. (Shirreff, S.M. and Sathe, J.M.) JATINDRA MOHAN SINGH v. BIND-BASINI KUER. 1942 R.D. 586=1942 A.W R. (Rev.) 305=1942 O.A. (Supp.) 331=1942 O. W.N. (B.R.) 469.

S. 152—Power to correct accidental mistake in

award and decree thereon—Reference to arbitrator—Pro-

priety.

A Court can after an award has been made a decree of Court amend the award and the decree when it is satisfied that there has been an accidental mistake in the award and the decree. It can for this purpose refer to the arbitrator to find out if the mistake was clerical as alleged or not. (Bennett, J.) BHAGWAN DIN v. BHAGWAN DIN. 201 I.C. 127=15 R.O. 57 = 1942 O.W.N. 429=1942 A.W.R. (C.C.) 269 =1942 O.A. 297=A.I.R. 1942 Oudh 426.

-S. 152—Procedure—Decree based on award in arbitration on reference in pending suit-Amendment after calling for report from arbitrators—Propriety—Proper procedure—Necessity for evidence.

A Court which amends its decree on account of a clerical or accidental slip or omission must be itself satisfied that such a slip or omission has occurred; and it can only be satisfied either because, from a perusal of the decree, the slip or omission is obvious on the face of the decree, or because of evidence before the Court. In the case of a decree passed on an award made in arbitration on a reference in a pending suit, the Court is not justified in amending the decree merely on the basis of a report called for by the Court and submitted by the arbitrators. The Court must take evidence and for that purpose it is open to the Court to examine the arbitrators for the purpose of forming an opinion for itself whether a slip or omission has occurred. (Horwill, J.) NARA-YANAN NAIR v. DEVAKI AMMA. 1945 M.W.N. 275 YANAN NAIR v. DEVAKI AMMA. 1945 M.W.N. 275 =58 L.W. 221=A.I.R. 1945 Mad. 230=(1945) 1 M.L.J. 354.

S. 152—Rights of third party intervening before

application.

The fact of the opposite party having created certain perpetual leases in respect of the property could not prevent the Court from granting relief to an applicant for amendment. (Agarwal and Madeley, 37.) BACHAN SINGH v. SHATRANAJI. 17 Luck. 739

C P. CODE (1908), O. 1, R. 3.

=198 I.C. 479=14 R.O. 403=1941 O.W.N. 1384=1941 A.W.R (C.C.) 407=1941 O.A. 1030=A.I.R. 1942 Oudh 226.

Ss 152 and 153—Scope—Mortgage decree— Amendment application—Question as to identity of property mortgaged in mortgage suit-If can be dealt with. See BENGAL ESTATES PARTITION ACT, S. 99. 22 Pat L.T. 267.

-Ss. 152 and 153—Scope—Powers of Court— Mortgage—Subsequent partition—Mortgagor allotted other properties than those mortgaged-Suit on mortgage ignoring partition—Decree and sale—Obstruction to delivery—Application by decreeholder purchaser for amendment of plaint and decree and execution petition, sale proclamation and sale certificate-Competency-Power of Court. See Ben-GAL ESTATES PARTITION ACT, S. 99. 22 Pat. L.T. 267

Expiry of limitation for filing of appeal by opposite party.

Amendment can be allowed even if the application for it is made after the expiry of the period of limitation for the filing of an appeal by the opposite party. (Aganval and Madeley, JJ) BACHAN SINGH v. SHAT-RANAJI. 17 Luck. 739=198 I.C. 479=14 R.O. 403=1941 O.W.N 1384=1941 A.W R. (C.C.) 407=1941 O.A. 1030=A.I.R. 1942 Oudh 226.

-Ss. 153, 151 and O. 2, R. 2 (1)—Amendment of plaint-Alteration of forum by relinquishing part of claim—Permissibility.

O. 2, R. 2 (1), C. P. Code, gives no power to the plaintiff to obtain leave to amend on relinquishing part of his claim so as to alter the forum of the suit. A Court which is empowered to dispose of the case whether part of the claim is withdrawn or whether it is not withdrawn, should not permit a plaint to be amended simply and solely for the purpose of depriving itself of the jurisdiction which it possesses. It is true that the plaintiff can choose the forum in the first place by deciding how much property or how many years' accounts he wishes to be included in the suit, but having once chosen the forum he has no power to alter the forum merely because he relinquishes part of his claim. (Nivogi and Digby, JJ.) SOBHAG SINGH YESHWANT SINGH v. RANJIT SINGH BHAIROA SINGH. I.L.R. (1943) Nag. 603=209 I.C. 585= 1943 N. L.J. 463=16 R.N. 131=A.I.R. 1943 Nag. 293

O. 1, R. 1-Joinder of plaintiffs-Test for. It is not essential that every plaintiff should be interested in the entire subject-matter of the suit for the purposes of O. 1, R. 1, C. P. Code. (Collister and Bajpan, JJ.) MAMOMED KHALIL KHAN v. MAHBOOB ALL I.L.R. (1942) All. 103=199 I.C 190=14 R.A. 346=1941 A.L.J 721=1041 A.W.R. (H.C.) 370—A.I.R. 1042 All. 122 1941 A.W.R. (H.C.) 379=A I R. 1942 All 122.

O. 1, R. 3—Applicability—Conditions.

In order that the provisions of O. 1, R. 3, C. P. Code, should be applicable it is necessary that the right to relief should arise out of the same act or transaction or series of acts or transactions and this implies, that the acts or transactions, where they are different should be so connected as to constitute a single series which could fairly be described as one entity or fact which would constitute a cause of action against all the defendants jointly. Further, the case should be such that it could be said that the Court in which the suit was instituted had local jurisdiction in the first instance to deal with the controversies arising between the plaintiffs and

each of the defendants. (Allsop and Verma, II.) KARAM SINGH v KUNWAR SEN. I.L.R. (1942) All. 862=206 I C 222=15 R.A. 498=1942 A.L. W 399=1942 A.W.R. (H.C) 270=A.I.R. 1942 All. 387.

O. 1, R. 3—Scope—If mandatory.
O. 1, R. 3 is only an enabling provision.
(Wadsworth and Patanjali Sastri, JJ.) MUTHIAH CHETTIAR v NAGASWAMI AYYAR AND Co. 1943 M.W N. 653=(1943) 2 M.L J. 548.

--- O. 1, R. 3-Scope of enquiry on an application under-Effect of observation in order

The only point which is before the court and which alone it has to consider when a person applies to be impleaded as a defendant is whether he ought to be made a party. If the order impleading him states that he is a necessary party that observation is not binding on the parties. (Thomas, C.J. and Agarwal J) Sheo Prosad v. Mst. Prakash Rani 18 Luck. 601=204 I C. 444=15 R. O 350=1942 O W.N. 766=1942 O. A. 567=(1942) A. W R. (C C.) 355=1942 A.L.J. 766-A I R. 1943 Ough 164 766=A I.R. 1943 Oudh 164.

defendants holding possession under different demises-Common questions of fact involved-No multifariousness. See MADRAS CITY TEN-ANTS PROFECTION ACT—APPLICABILITY. (1942) 1 [Affirmed on L. P. Appeal in (1943) 1 M.L J 92 M.L.J. 102]

O. I. Rr. 3 and 10-Suit for ejectment-Plea of sub-tenancy from a co-sharer in the sir-

Co-sharer if can be added.

Where the defendant in a suit for ejectment for trespass pleads that he is a sub-tenant of a co-sharer to whose sir the land in suit belonged and the co-sharer applies to be made a defendant, he should be added as a party as his presence is necessary for the decision of the case and to avoid multiplicity of proceedings. (Made-Jey, I) QADIR AHMAD v. ABDUL KHALIQ. 209 I. C. 308=16 R.C. 114=1943 OA (C.C.) 86=1943 O.W N. 138=A.I R. 1943 Oudh 315.

O. 1, R. 3 and O 2, R 3-Suit on mortgage by transferee of mortgagee rights-Mortgagor and original mortgagee made parties—Suit against mortgagee, if premature, or bad for

multifariousness,

In a suit by the vendee of mortgagee rights on the mortgage, to which both the mortgagor, and the original mortgagee are made parties, com-mon questions of fact and law do arise and the suit is not barred by the provisions of O. 1, R 3, C. P. Code, To such a suit, the original mort-gagee may be impleaded and the plaintiff is entitled to ask for a relief against him, if he failed to obtain a decree against the mortgaged property. Such a suit could not be said to be either premature or had for multifariousness. (Yorke, J.)
KHAT KHATA NAND V SURAJPAL SINGH. 16
Luck, 113=190 I C. 334=13 R O. 133=1940 O.
W N 807=1940 O.L R. 568=1940 A W.R. (C. C.) 366=1940 O. A. 766=A.I.R 1941 Oudh 56, O, 1. R. 3-Suit for specific performance of contrict of sale—Parties—Persons in possession and claiming adversely to vendor—Joinder of—Specific Relief Act, S 27 (c).

In a suit for specific performance, the general rule is that a stranger to the contract cannot be sued upon it. Only the parties to the contract

### C. P. CODE (1908), O. 1, R. 8.

are necessary and sufficient parties. But there are exceptions to this rule and, in a suit for specific performance against the vendor persons claiming adversely to the vendor may be joined as defendants especially when they are in possession at the date of suit and when such possession, is likely to defeat the claim of the plaintiff to possession. (Wassoodew, J.) SHIVSHANKAREPPA MAHADEVAPPA v. SHIVAPPA PARAPPA 204 I.C. 340=15 RB 312=44 Bom.L.R. 874=A.I.R. 1943 Bom. 27.

1, R. 8—Applicability—Case likely to affect large number of persons having similar

rights—Proper procedure.

In cases where a large number of persons having similar rights are affected it is desirable to resort to the provisions of O. 1, R. 8, C. P. Code. (Stone, C. J. and Divatra, J.) BHIKAJI YASHWANT v. SECRETARY OF STATE. 47 Bom.L. R, 843

O. 1, R. 8—Applicability—Suit by creditor to set aside alienation by insolvent or to assert claim on behalf of insolvent's estate against third party-Leave of insolvency Court or permission to sue on behalf of all creditors—Necessity See T. P. Acr, S 53. (1945) 2 M.L J 318.

O 1, R. 8—Applicability—Suit by Shami-

lat Committee -Nature of the body.

A Shamilat Committee is not a legally constituted corporation either by prescription or by any other operation of law. It is a kind of representative body of the khewatdars of a village. Before a suit in respect of the lands in the khewat could be brought all the khewatdars must join together for that purpose. The course to be followed is set out in O 1, R. 8, C. P. Code. (Davies) Ghazi v. Shamlat Committee. 1941 A. M. L. J. 14.

-O. 1, R. 8—Applicability—Suits under S. 92.

O. 1, R 8, C. P. Code, is not applicable to suits under S. 92, C. P. Code; it cannot therefore be said that the procedure laid down in O. 1, R. 8 must be followed in suits under S. 92. (Broomfield and Macklin, JJ.) BAPUGOUDA YADGOUDA v. VINAYAK SADASHIV. I.L.R. (1941) Bom 556=14 R B 169=196 I C. 826=43 Bom.L.R. 706= A.I.R. 1941 Bom. 317.

-O. 1, R. 8—Applicability—Unregistered society having common fund vested in itself— Representative suit against for damages for

wrongful dismissal—Maintainability.

A representative suit against an unregistered society represented by some only of its members, for recovery of damages for wrongful dismissal, will lie and can be maintained, when there is a common fund in which all the members are interested and that fund is vested in the society itself, ie., in the members thereof and is not vested in any individual. (Kania, J.) HARISCHANDRA KHUNDERAO v. A. B. CRAIG. 47 Bom. L.R. 465.

union—Suit against member signing contract as representative of other members—Not maintainable. See Contract Act, S. 230 (3). (1943) 1 M.L.J. 425.

O. 1, R, 8—Compromise—Defendant sued in representative capacity-Power to compromise

# C. P. CODE (1908), O. 1, R, 8.

Persons defending a suit on behalf of themselves and others with leave of the Court can enter into a compromise so as to bind those whom they represent. (Leach, C. J., and Lakshmana Rao, J.) MUTHUKARUPPA ETHANDAR v. mana Rao, J.) MUTHUKARUPPA ETHANDAR v. APPAVOO NADAR. I.L.R. (1943) Mad. 267=207 I.C. 407=16 R.M. 105=55 L.W. 837=1942 M.W.N. 775=A.I.R. 1943 Mad. 161=(1943) 1 M.L.J 453.

O. 1, R. 8—Construction—Basis of rule— Persons interested—If actual parties—How far

bound by decision.

The provisions of O. 1, R. 8, C. P. Code, are, it is obvious designed to save time and expense and to ensure a convenient trial of questions in which a large body of persons are interested, while avoiding at the same time a multiplicity of suits and consequent harassment to parties. The rule cannot be construed to mean that the entire body of persons interested in the litigation are or should be deemed to be actually parties to it. The basis of the rule is that persons other than those on the record are not parties to the suit in the full sense of the term. Although they may be bound by the decision passed in so far as it affects the common interests of the entire body of persons interested in the suit; they cannot be personally bound by the decree unless they are actually impleaded as parties to the action (Krishnaswami Ayyangar and Horwill, JJ.) SETH NANDARAMDAS ATMARAM v. ZULIKA BIBL. I.L.R. (1944) Mad 133=212 I.C. 533=16 R.M. 634= 1943 M.W.N. 304=56 L.W. 583=A.I.R. 1943 Mad. 531=(1943) 2 M.L.J. 1.

1, R. 8.

A decree for injunction can be executed against defendants who are represented by other persons selected to represent them under O. 1, R. 8, C. P. Code, unless the injunction obtained applies only to the persons who are chosen as representatives. The whole object of a representative suit would be defeated if it is held that a decree obtained in such a suit cannot be executed against any persons except the chosen representatives (Bhide, J.) WARYAM SINGH v. SHER SINGH. 200 I.C. 875=15 R.L. 25=44 P.L R. 114=A.I.R 1942 Lah. 136.

-O. 1, R 8-Non-mention of names of chosen defendants in notice -Validity of decree.

The mere fact that the names of the persons chosen to represent the defendants is not mentioned in the notice issued under O. 1, R. 8, C. P. Code, is not sufficient to render the decree passed in the suit a nullity. (Bhide, J) WARYAM SINGH v. SHER SINGH. 200 I.C. 875=15 R.L. 25=44 P.L.R. 114=A.I.R. 1942 Lah. 136.

O 1, R. 8—Parties—Suit in respect of dispute between two communities—Government, if necessary party—Orders passed by Government from time to time to maintain heave

from time to time to maintain peace.

Government is not a necessary party to a suit filed under O. 1, R. 8, C. P. Code, on behalf of one community against another in respect of a dispute between them regarding the ownership and user of the water collected on certain land, when Government does not claim any right in it. The mere fact that Government has from time to time passed certain orders restraining one or

C. P. CODE (1908), O. 1, R. 8.

order does not make it incumbent on the parties seeking relief by way of declaration to join Government as a party. (Purantk, J.) AMIR AUV. KADTU PATIL. IL.R. (1945) Nag. 273=1945 N.L J. 80=A.I R. 1945 Nag. 106.

-0.1, R 8-Representative suit-Plaintiffs not described in cause title in representative

capacity—Effect of.

Per Khundkar, J.—Where on the application of the plaintils an order is recorded permitting them to sue under O 1, R. 8, C. P. Code, and the plaint contains a sufficient indication of the fact that the plaintiffs are bringing the suit in a representative capacity, the suit is a properly constituted representative suit, although in the cause title the plaintiffs are not described in their representative capacity (Mitter and Khundkar, JJ.) HAJI MAHOMED NABI & PROVINCE OF BENGAL. I.L.R. (1942) 1 Cal. 211=201 I.C. 248=15 RC. 148=46 C.W N. 59=A I.R. 1942 Cal. 343.

O. 1, R. 8—Representative suit—Suit on behalf of inhabitants of contiguous villages to restrain discharge of surface water from defen-

dant's mouza-Maintainability.

A representative suit on behalf of the inhabitants of a group of contiguous villages the object of which is to restrain the discharge of suplus rain water from the defendant's mouza to the plaintisfs' lands in those villages which are at a lower level, is maintainable under the provisions. of O. 1 R. 8, C. P. Code. It is not necessary for the plaintiffs to sue the defendants in their representative capacity. (Biswas, J) NATABAR SASMAL v. KRISHNA CHANDRA 205 I.C. 22=15 R.C. 564=74 C.L.J. 95=A.I.R. 1942 Cal. 261.

O. 1, R. 8—Scope—Mandatory character of-Non-compliance-Effect on application of principle of res judicata in repesentative suits, See C. P. Code, S. 11. PARTIES AND REPRESENTA. TIVES. I L.R (1944) Kar. 62.

O. 1, R. 8-Scope-Permission to sue as representatives—Grant of after publication of notice in District Gazette—Sufficiency.

The object O. 1, R. 8, C. P. Code, is to permit a

person who has an interest in the subject-matter of the suit to apply to the Court to be made a defendant. Where the Court gives to the plaintiffs as representatives of a village permission to sue the defendants as the representatives of another village after the Court has notified by public advertisement in the District Gazette, there is sufficient compliance with O. l. R. 8, C. P. Code. The fact that the Court does not pass orders on the applications for leave when admitting the plaint and does not leave the publication of the notice of the suit to a later stage cannot prejudice any one or make the proceedings invalid or irregular. (Leach, C.J. and Lakshmana Rao J.) MUTHUKARUPPA ETHANDAR v. APPAVOO NADAR. I.L.R. (1943) Mad 257=207 I C 407=16 R M. 105=55 L.W. 837=1942 M.W.N. 775—A.I.R. 1943 Mad. 161=(1943) 1

M.L.J. 453.

O. 1, R. 8—Suit against desendants in reNature of decree to be presentative capacity—Nature of decree to be passed—Personal decree—If can be made—Plaint

not in proper form—Leave to sue—Grant of.
In a suit where a defendant or defendants are sued in a representative capacity all that the the other party for the maintenance of peace and planitiff is entitled to against them is a declara-

tion of his right as against the class whom the named defendant or defendants represent. He is not entitled to a personal decree against them, but is only entitled to be paid out of the funds or the property and assets belonging to the class in which all the members of the class are interested. Where the plaint in a representative suit does not ask for a declaration of liability on the part of the members of the class represented but merely asks for a personal decree against the defendants, and contains no suggestion or undertaking that the decree which the plaintiff might obtain would be restricted to the funds of the class in the hands of the defendants or any other body in whom the fonds are vested, it is not a proper plaint and leave to sue under O. 1, R. 8, should not be granted. (Chagla, J.) HARISCHANDRA KHANDERAO v. A S. CRAIG. I.L.R. (1942) Bom. 504=200 I.C. 618=15 R B. 13=44 Bom. L.R. 251=A I.R. 1942 Bom. 136.

O. 1, R. 9 and U. P. Tenancy Act, S. 246 (3)-Non-impleadment of necessary party-If curable.

Where no usage has been proved whereby each cosharer is entitled in the suit patti to sue alone for his share of the rent of a holding the case is governed by Cl. (3) of S 246, U.P. Ten. Act and according to that clause all co-sharers in the patti who do not join in the plaint must be made defendants. They are therefore necessary parties and their non-impleadment would be fatal to the suit. That is the difference between a necessary and a proper party. O. 1, R. 9, C. P. Code cannot cure the defect in the case of a necessary party. (Sathe, S. M. and Ross, A. M.)

NARPAT SINGH v. JANKI SITAL PRASAD. 1944 A.

W. B. (Par.) 220—1042 B.D. FER W.R (Rev.) 329=1943 R.D. 553.

O. 1, R. 9—Scope—Applicability to mort-gage suit See C. P. CODE, O 34, R. 1 AND O. 1, R. 9. A.I R. 1943 Oudh 218.

O. 1. R. 10—Addition of party—Interest in the subject-matter and responsibility-Durgah Khawaja Committee.

Where the Durgah Khawaja Committee is interested in the subject-matter of a proceeding and is responsible for that so far as maintenance repairs, etc., are concerned, they should be added as a party to the proceeding. (Davies.) AKHTAR ALI v. ALE RASUL ALI KHAN SYED. (1943) A. M.L J 25.

O. 1, R. 10 and S. 151—Benamidar plainliff's death—Real owner, if can be joined

It is open to the real owner to apply to be joined in a suit brought by the benamidar, after the latter's death He can be added either under O 1, R. 10 or S. 151, C. P. Code. He can be joined at any stage provided the suit broght by the benamidar is still alive and provided course no injustice or inconvenience is caused to the other side. (Bose, J.) SETH THAKURDAS v. DEGPULAL. 196 I C. 25=14 R N. 72=1941 N.L. J. 293=A.I.R. 1941 Nag. 178.

O. 1, R. 10-Discretion of Court-Addition as party to suit of representative of person

against whom suit has abated.

Under O. 1, R. 10, C. P. Code the representatives of a person against whom a suit has abated can be added as a party for the purpose of giving effect to the rights of the parties. (Sir George to the language of S. 205 (2) of the Constitution Rankin) MAHOMADALLY TAYEBALLY v. SAFIA- Act, if it should hold that notwithstanding such BAI. 67 I.A. 406=I.L.R.(1941) Bom. 8=I.L.R. joinder as a party, the Advocate-General or the

C. P. CODE (1908), O. 1, R. 10.

(1940) Kar. (P.C.) 410=191 I.C. 113=13 R.P. C. 113=53 L.W. 1=45 C.W. N. 226=7 B R. 210 =1941 A.W R (PC) 1=43 P.L R. 63=73 C L J. 214=1941 O W.N. 734=1941 P.W N. 316=1941 M W N 729=1941 A.L.W. 567=1941 O A. 119=43 Bom. L R 388=A.I, R. 1940 P.C. 215=(1941) 1 M L. I. 594 (P.C.) P.C. 215=(1941) 1 M.L.J. 594 (P.C.).

titled to maintain suit—Party defendant having right to sue-Power of Court to transpose party defendant as plaintiff and to pass decree in his favour.

Although the original plaintiff in a suit is not entitled to maintain a suit, there being no subsisting cause of action in him, it is competent to the Court exercising its discretion under O. 1, R. 10, C.P.C., to transpose a party defendant to the place of the plaintiff, such a party defendant being entitled to maintain the suit as assignee of the plaintiff, and to pass a decree in favour of the newly added plaintiff. (Chagla, J.) SANTU-RAM HARI .v. TRUST OF INDIA ASSURANCE CO. 46 Bom. L.R. 752=A.I.R. 1945 Bom. 11.

O. 1, R 10 and Government of India Act (1935), S. 205 (2)—Dispute between private parties—Validity of provincial statute in issue—Proper parties—Addition of the Advocate-General as party in High Court—Propriety—Advocate-General, if can claim right of appeal to Federal Court.

Per Gwyer, C. J.—It can but rarely happen, in cases between private persons involving the constitutional validity of a statute, that an Advo-cate-General is a 'necessary' party. He is a proper party in the sense that without him the Court cannot effectually and completely adjudicate upon and settle all questions involved in such cases, and where the executive authority of the province is likely to be affected by the decision. It by no means follows that because the Advocate-General of a province has been permitted to be placed on record as an intervener he is also entitled to prefer an independent appeal to the Federal Court.

Per Sulaiman, J.-In a suit between a landholder and his tenant, the Provincial Government cannot be considered a necessary party at all. But when in such a suit the validity of an Act of the Provincial Legislature is in question, the adjudication would affect a large section of the public and the Provincial Government would be indirectly interested in such an adjudication. Where the Provincial Government has been made a party in the High Court in the absence of any restriction in the language of S. 205 of the Government of India Act and in view of the fact that an appeal lies even on a constitutional question alone without raising any other ground, it cannot be held that the Provincial Government who were a party in the High Court have no right of appeal at all to the Federal Court

Per Varadachariar, J.—The Indian C. P. Code does not contemplate an intervention by the Advocate-General as distinguished from an addition of the Advocate-General or the Government as a party. When either of them has been impleaded as a party with a view to give them a hearing, the Court would fail to give full effect to the language of S. 205 (2) of the Constitution Act, if it should hold that notwithstanding such

Government had no right to prefer an appeal. The right of appeal being a creature of the statute, the right of one who is within the terms of the statute cannot reasonably be denied when, even on the broader ground of interest in the litigation, it is conceded that he is sufficiently interested to justify his claim being heard. (Gwyer, C. J., Sulaiman and Varadachariar, JJ) UNITED PROVINCES v. ATIQA BEGAM. I.L.R. (1941) Kar (F.C.) 72=72 C L.J. 550=1941 A. L.J. 170=1941 R.D 121=3 F.L.J 97=192 I.C. 138=1941 O.L.R 121=7 B.R 433=58 L.W. 397=138 R.F.C. 15=1941 A.L.W 201=1941 M.W. N 581=22 Pat L.T. 578=45 C W.N (F.R.) 27=1941 A.W.R. (Rev.) 109=1941 O.A. 159=1941 O.W. R. (Rev.) 109=1941 O.A. 159=1941 O.W. R. (F.C.) 3=A I. R 1941 F C 16=(1941) 1 M.L.J. (Supp.) 65.

tates Act, Ch. V-Exercise of the power to add parties-Limits to-Addition of parties during

liquidation proceedings, if justified.

The power to join parties conferred by O 1, R. 10, can only be exercised before a final decree is passed. There can be no joinder of new parties after a final decree has been passed; certainly not by the Court executing the decree which is the position of the Collector in proceedings under Ch. V of the Encumbered Estates Act. (Sathe, S. M. and Dible, J. M.) OM PRAKASH v. CHHAIL BEHARI LAL. 1943 R.D. 324=1943 A.W.R (Rev.) 145 (2).

quent correction and appointment of guardian—If affects date of filing of suit.

Where in a suit the defendant, a minor was described as a major and on the mistake being found out subsequently a guardian was appoin-

ted.

Held, it was open to the plaintiff to correct the mistake without entailing any change of dates as regards the filing of the suit. (Sathe, S. M. and Ross, A. M.) Chhotey Lal v, Durgawati. 1944 R.D. 152=1944 A.W.R. (Rev.) 95.

decree for sale -Addition of parties at stage of

final decree—Permissibility.

It is no doubt permissible in certain cases to add parties after the preliminary decree for sale; but it is not desirable to do so at the stage of final decree in cases where by introducing a fresh party at that stage, a simple suit on a simple mortgage would be converted into a complicated title suit. (Sinha and Das, II.) CHINTAMONI SAHU v. JAHURI MAL. 11 Cut L.T. 21=1945 P. W N. 311=A.I R. 1945 Pat. 296.

Power of Court under O. 1, R. 10-Limits—Suit by plaintiff as minor—Bona fide mistake as to age—Amendment—Applicability of S. 22, Limitation

Act.

Where on the last day of limitation a suit is filed on behalf of a minor plaintiff and it is found later that the plaintiff was in fact a major on the date when the plaint was filed and that a mistake had been made thereto in good faith under O 1, R. 10, C. P. Code, the court has got ample power to correct the error, if it is satisfied that the mistake is a bona fide one. To such a case, S. 22, Limitation Act has no application as no new plaintiff is added after the institution of the suit. The plaintiff is already on the record and

C. P. CODE (1908), O. 1, R. 10.

continues to be on the record and the only effect of the amendment would be that his age would be corrected and he could prosecute his suit without a next friend. (Ghulam Hasan, J.) INDERPAL SINGH v. BHAGWATI SINGH 16 Luck. 256=191 I C 150=13 R O. 204=1940 O.W.N. 1007=1940 O A 984=1940 A W R. (C.C.) 431=1940 O.L.R 683=A.I.R. 1941 Oudh 43.

=1940 O.L.R 683=A.I.R. 1941 Oudh 43.

O, 1, R. 10—Power of Court—Mortgage suit—Preliminary decree—Impleading of parties subsequent to—Legality—Attaching decree-holder withdrawing surplus sale proceeds subsequent to preliminary decree—If can be impleaded and

bound by final decree

O 1, R 10, C. P. Code, gives complete power to the Court to add any necessary party at any stage of the proceedings; and parties may be added even after the preliminary decree in a mortgage suit. Where mortgaged property is sold for arrears of revenue and subsequent to the preliminary decree in the suit, a money decree-holder who has previously attached the surplus sale proceeds to which the mortgagee is entitled under S. 73, T. P. Act. withdraws it from the collectorate, the attaching decree-holder who so withdraws the money can be made a party to the mortgage suit, and a final decree can be passed against him entitling the mortgagee plaintiff to recover from him the money which he has withdrawn from out of the surplus sale proceeds. It is not necessary that he should have been im-pleaded before the preliminary decree, for the attachment would not confer any right on the decree-holder, and it would not also prevail against the mortgagee's claim to the surplus sale proceeds under S. 73, T. P. Act. The mortgagee would therefore not be bound to implead the attaching decree-holder before he actually with-drew the money. (Chatterji, J) KUNJA BEHARI MISRA v. BENUDHAR PANDA. 197 I.C. 739=14 R. P 350=23 Pat LT. 412=8 BR. 291=7 Cut.L. T. 49=A.I.R. 1942 Pat. 185 (2).

1, R. 10—Powers of Court—Transposition of parties—Suit for dissolution of partnership and accounts—Death of sole plaintiff—Application by defendant to transpose him as plaintiff and to make plaintiff's heirs defendants—

Competency.

Under O. 1, R. 10, C. P. Code, the Court has jurisdiction in proper cases to transpose a defendant as a plaintiff. Where in a suit by a person for dissolution of partnership between him and the defendant and for accounts, the plaintiff dies, the Court, on an application by the defendant, can, under O 1, R 10, transpose him as plaintiff and bring the heirs of the original plaintiff on the record as defendants to the suit. (Chagla, J.) Devsey Khetsey v. Hirji Khairaj I.L.R. (1942) Bom 35=198 I.C 408=14 R.B. 298=43 Bom L.R. 993=A I.R 1942 Bom 35.

—O. 1, R. 10—Procedure—Application by persons to be impleaded as additional plaintiffs—Duty of Court—Dismiscal of application on dismissal of suit—Propriety of. BALAVENKATARAMA CHETTIAR v. H R E BOARD [See Q.D. 1936.40, Vol. I, Col. 3292.] A.I.R. 1941 Mad. 79.

O, 1, R. 10— Transposition—Effect on limitation.

Under O 1, R. 10 (2) a Court has got ample power to order transposition at any time. No question of limitation is involved where a party

# C. P. CODE (1908), O. 1, R 10.

is transposed from the array of the defendants to that of the plaintiffs. (Grille, C. J. and Sen, J.) Krishnabai v Parvati Bai I.L R. (1944) Nag. 885=1944 N L.J. 479=A I.R. 1944 Nag 298.

-O. 1, R 10-Transposition of parties-When permissible—Promissory note in renewal of earlier one-Insufficiently stamped-Prior note not wiped off. NARAYANA v. GURAMMA [See Q D. 1936-40, Vol. I, Col 3292.] 1941 M.W.N 30=A.I.R. 1941 Mad. 364.

Act (1881), Ss 8 and 78 - Suit on pronote— Parties—Addition after limitation of person having one half interest in pronote-Effect.

A person who has an interest to the extent of one half in a promissory note is a necessary party to a suit on it because one of the several payees of a negotiable instrument cannot sue alone without joining the other promisees either as plain-tiffs or defendants. Where in a suit such a per-son is added as a defendant after the expiry of the period of limitation, there is no properly constituted suit within the period of limitation and such suit is therefore barred by time. (Agarwala, J.) JAGANNATH PRASAD v PARANA. 198 I. C. 98=14 R.O. 376=1941 O.W.N. 1357=1942 A.W.R. (C.C.) 8=1942 A.L.W. 14=1941 O.A. 1061=A.I.R. 1942 Oudh 202.

 $\cdot$ **O. 1**, R. 10 (2)—Pre-emption suit—Vendor pleading agreement for reconveyance with vendee

-Right to continue as party,

Where a vendor defendant pleading an agreement with the vendee for reconveyance of the property back to him was discharged from the suit and he applied under O. 1, R. 10, C. P. Code, that he should be permitted to remain as a defendant to the suit, held in view of the nature of the defences raised by the vendor it appeared that it was necessary to allow the vendor to remain as a defendant to the suit so as to ensure effectual and complete adjudication of the questions involved in the suit. Such a course had the additional advantage of eliminating multiplicity of suits to Ghulam Hasan, J.) Brij Narain v. B H. K. Dhaon. 200 I.C. 504=15 R.O. 10=1942 O.W. N. 237=1942 O A. 186=1942 A.W.R. (C.C.) 174

—A.I R. 1942 Oudh 366.

—O. 1, R. 10 (2) which the vendor might or might not be driven

O. 1, R. 10 (2) and S. 115—Suit for preemption-Vendee pleading that he was benamidar for another—Application by real vendee to be impleaded as party—Rejection—Material irregu-

Where the application of a person applying to be impleaded as a defendant on the ground that the defendant vendee on record was only a benamidar, and that as such the applicant should be added is rejected by the court for the reason that the applicant has no locus standi to make such an application and that she was not entitled to put forward the contention that she was the real owner, it considers the case from the wrong point of view and its order amounts to a wrong exercise of jurisdiction amounting to material irregularity and is liable to be set aside in revision. It is clearly in the interests of both the parties that the applicant should be made a party to the suit so that the question raised can be finally disposed of in these proceedings. (Bennett, J.) GHURAN =199 I.C. 190=14 R v Buggan. 18 Luck. 56=200 I.C. 238=14 R.O. A.I.R. 1942 All. 122.

C. P. CODE (1908), O 2, R. 2.

578=1942 O A. 167=1942 A.W R. (C.C.) 170= 1942 O.W N. 240=A.I.R. 1942 Oudh 338.

Under O. 1, R. 10 (5)—Scope and effect.

Under O. 1, R. 10 (5), C. P. Code, when a new defendant is added the proceedings must be deemed to have begun against him only on the service of summons. (Sathe, SM. and Ross, A.M.) CHHOTEY LAL v. DURGAWATI. 1944 R.D. 152=1944 A.W.R. (Rev.) 95.

O. 1, R. 13-Applicability-Irregularity as to joinder of parties under U. P. Tenancy Act. See U. P. Tenancy Act. See U. P. Tenancy Act. A.W.R. (Rev.) 687=1941 R.D. 733.

--- O. 1, R. 13-Applicability-Rent reduction case under S. 112-A, Bihar Tenancy Act-Objection as to non-joinder of parties if open in appeal

for first time.

In view of S. 143 of the Bihar Tenancy Act, O 1, R. 13, C. P. Code, must be held to apply to rent reduction cases under S. 112-A of the Bihar Tenancy Act, and where an objection as to nonjoinder of parties is not taken in the trial court, it cannot be allowed to be raised in appeal. (Lee.) BIBI TASLIMAN v. KHFDAN. 11 B R. 342.

--- O. 2, R. 1-Joinder of claims-Claim as heir to maternal grandfather-If can be joined as alternative claim along with claim as legatee under will of maternal grand-mother as full owner-Non-joinder-Effect. See C. P. Cope, S. 11, EXPL. IV. I.L.R. (1943) Kar. 386.

-O, 2, R, 2-Abandonment of part of claim after filing sult—Amendment of plaint to deprive Court of its jurisdiction—Permissibility.

O. 2, R. 2 (1), deals with the frame of the suit and does not refer to a case of abandonment of part of the claim after the suit is filed, or impose on any Court an obligation to allow a plaint to be amended This provision gives no power to the plaintiff to obtain leave to amend or relinquish part of his claim, and on general principles a Court which is empowered to dispose of the case whether part of the claim is withdrawn or whether it is not withdrawn, should not permit a plaint to be amended simply and solely for the purpose of depriving itself of the jurisdiction which it possesses. (Niyogi and Digby, JJ.) Sobhag Singh v. Ranjit Singh. I L.R. (1943) Nag. 603=209 I.C. 585=16 R.N. 131=1943 N.L. J. 463=A.I.R. 1943 Nag 293.

-O. 2, R. 2—Applicability—All plaintiffs and defendants not being parties to both suits.

The fact that some of the plaintiffs or defendants to the former suit are not parties to the subsequent suit does not necessarily render the second suit so different as to make O. 2, R. 2 inapplicable. Where two trespasses on two villages in an estate the succession to which had opened were similar in character and formed part of the same transaction and the evidence to prove the facts which it was necessary for the plaintiffs who claimed as heirs to prove, if they wanted the judgment in their favour, was the same and the bundle of essential facts was also the same a subsequent suit in respect of one village which was not included in the prior suit will be barred by the provisions of O. 2, R. 2. (Collister and Bajpai, JJ.) MAHOMED KHALL KHAN v. MAHEOOB ALI. I.L.R. (1942) All. 103=1941 A.W.R. (H.C.) 379=199 I.C. 190=14 R.A. 346=1941 A.L.J. 721=A I.D. 1042 All. 122

ding set-off-Omission to plead part of claim-

Effect-0.8 R. 6.

A defendant who pleads a set-off under O. 8, R. 6, C. P. Code, is to be deemed to be a plaintiff within the meaning of O.2, R.2, and is bound by that provision of law, and consequently has to suffer the consequences of an omission. O 8, R. 6 (2) requires the written statement put in by a defendant pleading a set-off to be such as to enable the Court to pronounce a final judgment both in respect of the plaintiff's claim and of the defendant's claim, and the omission by the defendant to set up part of his claim makes him lose for ever his right in the part of the claim so omitted. (Leach, C.J. and Byers, J.) KATHERSA ROWTHER v. ABDUL RAHIM SAHIB ILR (1942) Mad. 836=202 I.C. 674=15 R.M. 537=55 L.W. 407=1942 M.W.N. 638=A.I.R 1942 Mad 580—(1942) 2 M.T. I. 42 =(1942) 2 M L.J. 43.

O. 2, R. 2-Applicability-Genuine amend-

ment of original plaint.

The provisions of O. 2, R. 2, C. P. Code, cannot apply to a genuine amendment of the original plaint made under O. 6, R. 17, C. P. Code. (Sathe, S.M.) Lalji Singh v Mst. Kallo. 1944 A.W.R. (Rev.) 152 (2)=1944 R.D. 322.

covers accidental omission—Sunt for declaration of title in respect of lands in holding—Decree— Certain plots left out from suit—Subsequent suit for declaration of title, and for possession of

plots left out—Bar.
O. 2, R. 2, C. P. Code, covers cases of accidental omission and is not confined to a deliberate omission. A subsequent suit purely to rectify a mistake committed in a prior suit is barred by O. 2, R. 2, C. P. Code. The respondent owned a holding in two khatees. At a rent sale, the appellant, a stranger, purchased certain lands comprising the holding. Shortly after this purchase, in 1934 the respondent brought two suits for declaration of his title over the plots which had formed the subject of the sale, and obtained decrees in his favour. By an accidental omission, two plots were omitted from the respondent's claim. To remedy this omission the respondent in 1936, brought fresh suits for a declaration of his title to these two plots and for recovery of possession.

Held, that the recovery of possession was merely a consequential relief dependant upon the prior establishment of the respondent's title; the omission in the prior suit was in respect of a portion of the claim which he could have and should have included in the prior suits and not as regards any additional relief. The suits were therefore barred by O. 2, R. 2. (Fazl Ali and Meredith, JJ.) RAM PRASAD SINGH v. RADHA PANDAY. 192 I.C. 527=13 R.P. 499=7 B.R. 478=21 P.L. T. 790=A I R. 1941 Pat. 37.

O. 2, R. 2—Applicability—Prior and latter suit based on substantially same cause of action—

suit based on substantially same cause of action— Omission to claim relief in prior suit—If bars second suit.

In a prior suit for certain movable and immovable properties in the possession of a Hindu lady, the plaintiff relied on a contract by N, and also claimed that a will alleged to have been

C. P. CODE (1908), O. 2, R. 2,

the contract was true and that the plaintiff was the stridhanam heir of N and entitled to the property on her death. In a subsequent suit for recovery of property of N on the ground of the plaintist being the stridhan heir of N, the defendant pleaded O. 2, R. 2, C. P. Code, in bar of the later suit.

Held, that the real cause of action in both the suits was the same, namely, the unlawful withholding of the property of N after her death by the defendant who was not entitled to it and hence the second suit will be barred under O 2, R. 2, because the plaintiff could not only have asked for relief in the first, but was bound to do so. (Horwill, J.) VENKATANARASIMHAM v. Subba Redoi. 57 L.W. 286=1944 M W.N. 529 = A.I.R. 1944 Mad 435=(1944) 1 M.L.J. 393.

-O. 2. R. 2—Applicability—Suit against Hindu Coparcener on mortgage by him as absolute owner—Finding that property was joint family property and decree against share only—Subsequent suit to enforce mortgage against share of other coparceners on footing that mortgage was

executed by him as de facto manager—If barred.
O. 2, R. 2, C. P. Code, only compels a plaintiff to include in his suit the whole of the claim arising out of the cause of action; it does not compel him to join in the same suit every cause of action or every claim which he has. The cause of action for enforcing a mortgage against a member of a Hindu family as the absolute owner of the hypotheca is not the same as the cause of action against him and his coparceners as co-owners of the property. Neither O. 2, R. 2, nor S. 11, read with explanation would operate to bar a suit against the other members of the family to enforce the mortgage against their shares on the footing that the mortgagor executed it as manager for family purposes, by reason of the fact that the plaintiff instituted a prior suit against the mortgagor-executant alone to enforce the mortgage against the property as his absolute property and obtained a decree against his share alone in the property on the finding that the property was joint family property. Although the plaintiff might implead the other members in the prior suit on the ground that the debt was for family purposes by the mortgagor as manager and the joinder would have been justified by O. 1. R. 3, C. P. Code, the plaintiff was not bound to do that so as to attract the operation of Explanation IV to S. 11. O. I. R. 3, is only an enabling provision. (Wadsworth and Patanjali Sastri, JJ.) MUTHIAH CHETTIAR v.R. NAGASAMI AYYAR AND CO. 1943 M.W.N. 653 = 216 I C 338=A.I.R. 1944 Mad. 98=(1943) 2 M.L.J 548.

S. 2 (3)—Applicability of O. 2, R 2—Suits for arrears of rent—Rent when becomes an arrear.

By the definition of "arrear" in S. 2 (3) of the C. P Tenancy Act, rent cannot become an arrear on the date on which it is payable, it only becomes an arrear after midnight on that day and a suit for rent payable on the 1st of May would be premature if filed on the 1st of May. Hence where rent is payable on the 1st of May a suit for arrears is filed on the first May 1937 and a made by N was not true and binding on him. It was found that the will was not genuine, but that barred by the operation of O. 2, R. 2, C. P. Code

inasmuch as the claim in the later suit could not have been included in the earlier one. (Grille, J.) HIRALAL HARI SINGH v. NIRBHESINGH.

I.L.R (1943) Nag. 321=202 I.C. 779=15 R.N.

103=1942 N L.J 487=A.I R. 1943 Nag. 20.

O. 2, R. 2—Applicability—Omission to sue

owing to ignorance of law.

The word 'intentionally' in O. 2, R. 2 (2) is intentionally used by the legislature in order to show that in the case of relinquishment it must be intentional, whereas in the case of omission it may be intentional or accidental. Hence O. 2, R. 2 would apply even when the omission is accidental. If the omission was due to ignorance of law, that omission must be taken to be intentional because it must be presumed that every body knows the law. (Mathur, J.) GANGA NARAIN v. MISIR RAMESH CHAND. 1944 A L.W. 52= 1944 A.W.R (H.C.) 59=1944 O.A. (H.C.) 59=1944 O.W.N. (H.C.) 23 1944 O.W.N. (H.C.) 23.

O. 2, R. 2-Applicability-Part assignment

of debt—Suit by assignee—If barred.
O. 2, R. 2, C. P Code, has the effect of barring a particular plaintiff from splitting up his cause of action. In the case of a part assignment of a debt, the assignment itself gives the cause of action and the assignee, is therefore, not prevented from maintaining a suit on the actionable claim assigned to him (Dalip Singh and Sale, IJ.) RAM KRISHEN MOHAN LAL v. GURDIAL MAL SAGAR MAL. 197 I.C. 735=14 R.L. 268=43 P.L.R. 439=A.I.R. 1941 Lah. 337.

-O. 2, R. 2—Applicability—Test—Suit for specific sum of money and suit for rendition of

accounts-Causes of action, if different.

In order to ascertain whether a suit is barred by the provisions of O. 2, R. 2, C. P. Code, it is necessary to consider what facts had to be proved in the first suit and what facts have to be proved in the second suit. Where in the earlier suit what had to be proved was the fact that the defendants had received certain sums of money from the military department on behalf of the plaintiff in respect of bills which had been sub-mitted by the latter and in the later suit what had to be proved was the terms of a sub-contract between the plaintiff and the defendant and the liability of the defendant to render account, the cause of action in the two suits are different and the provisions of O. 2, R. 2 do not operate as a bar. (Collister, J.) RADHAKISHEN v. IKRAMUDDIN. 1941 A.L.J. 288=194 I C. 586=1941 A.L.W. 490=14 R.A. 2=1941 R.D. 364=1941 (O.A. Supp.) 334=1941 O.W.N. 676=1941 A.W.R. (H.C.) 169=A.I.R. 1941 All. 217.

O.2, R. 2—Applicability—Two suits based on same cause of action presented simultaneously -Inherent power to consolidate suits—Dismissal

of one as offending against rule—Not proper.
Where two suits based on the same cause of action, are filed simultaneously on the same day, it cannot be said that 0.2, R. 2 (2) is infringed, as it is not the case of a plaintiff afterwards suing in respect of a portion of a claim omitted from a former suit. It cannot be assumed that one of the two suits presented simultaneously has been presented afterwards. In such a case, the Court has power to consolidate the two suits in its inherent jurisdiction and it would not be proper to dismiss one of the suits as offending against O. 2, R. 2 (1). (Broomfield and Macklin,

C, P. CODE (1908). O. 2, R. 2.

JJ.) GANESH RAM CHANDRA v. GOPAL LAKSH-MAN. I.L.R. (1943) Bom. 104=204 I.C. 402= 15 R.B. 319=44 Bom. L.R, 819=A.I.R. 1943

O. 2. R 2—Bar of suit—Claim for title in first suit—Claim of right of easement in second suit. See C. P. Code, S. 11 AND O. 2, R. 2. 1943 A.L.W 515.

-O. 2, R. 2 and Agra Tenancy Act (1926) S. 81—Bar of suit—Failure to include in application under S. 81, Agra Tenancy Act, claim for

prior arrears.

Where an applicant for the demand of a notice under S, 81, Agra Tenancy Act, fails to include in it a claim for prior arrears, even though they had been the subject of distraint proceedings, O. 2, R. 2, C. P. Code, bars a subsequent Suit in respect of such claim. (Shirreff, S. M.)
ONKAR NATH SINGH v. NAIN SINGH. 1942 R.D.
206=1942 O.W N. (B.R.) 140=1942 A.W.R. (Rev.) 163=1942 O A. (Supp.) 183.

--- O. 2, R.2-Bar of suit-Ignorance of existence of right-Second suit-If barred.

Where the plaintiff was unaware of her assets and liabilities in respect of 1339 and 1340 fasli at the time of the institution of the prior suit in respect of arrears of revenue for 1337 fasli, a second suit in respect of 1339 and 1340 it not barred by O. 2, R. 2. (Ghulam Hasan, J.) BHAGWAN DASS v. TAJUNNISSA BIBI. 17 Luck. 84=194 I C. 363=1941 R D. 562=13 R.O. 585 =1941 O.L R 452=1941 A.L.W. 528=1941 O. W N 681=1941 O.A. 465=1941 A.W. 528=1941 O. W.N. 681=1941 O A. 465=1941 A.W.R. (Rev.)

tity of cause of action—Allegations in plaint—

How far decisive.

In order to apply the provisions of O. 2, R. 2, C. P. Code, to bar a suit, it shall have to be found out, (1) what was the cause of action in respect of which the claim was made in the previous suit, (2) what is the claim made in the present suit; (3) whether the claim made in the present suit could have been made either wholly or in part in respect of the cause of action of the previous suit. In order to arrive at these findings, the two plaints must be compared. But this does not mean that in order to apply 0.2, R. 2 all the allegations made in the two plaints shall have to be taken and the bar imposed shall apply only when these are identical. The allegations are to be looked into only to find out to what extent they disclose any cause of action. Cause of action for this purpose would mean all the essential facts constituting the right and its infringement. If the plaintiff obtained a judgment in his favour on a particular cause of action in the previous suit his claim in that suit must be taken to have been based on that cause of action, and that judgment ought to be conclusive as to the cause of action in respect of which that claim was made. In o der then to see what is the cause of action in respect of which the claim in the subsequent suit is made and what is the claim made in it we are to look to the plaint in the subsequent suit. If a certain allegation in the plaint discloses the self same cause of action which could have supported the claim made in the plaint then, simply because other additional allegetions have been made in it, the plaintiff could also

not thereby escape the bar imposed by O, 2, R. 2. If without the additional allegations in the second plaint, the cause of action for the claim made in it be complete, then in that case the additional allegations will not constitute the cause of action at all, and the Court after finding that will have to dismiss the claim under O. 2, R. 2. If the additional allegations go to constitute a fresh cause of action for the claim made, then certainly the cause of action as alleged in the second plaint is different from the cause of action of the first plaint. If the plaintiff fails to establish the additional allega-tions, he may fail for want of cause of action but his suit will not be hit by the provisions of O. 2, R. 2. (Pal, J.) SHERALI MRIDHA v, TORA-PALI. 202 I.C. 280=15 R.C. 312=75 C.L.J. 216=46 C.W.N. 513=A I.R 1942 Cal. 407.

\_\_\_\_O. 2, R. 2—Bar of suit—Prior suit for cancellation of lease—Decree—Subsequent suit for mesne profits - Maintainability. VENUGOPAL PILLAI v. THIRUGNANAVALLI AMMAL. [See Q. ]). 1936. 40, Vol. I, Col. 1453.] 194 I.C. 840=14 R.M. 109.

O. 2, R. 2-Bar of suit-Prior suit for mesne profits—Subsequent suit for possession-

Where a plaintiff sues for mesne profits where a claim for possession is also open to him, the subsequent suit for possession is barred. And where the suit for possession is thus barred by the operation of O. 2, R. 2, C. P. Code, a subsequent suit for mesne profits is also barred, as a person who is not entitled to obtain possession of property is not entitled to obtain possession of fits thereof. (Almond, J. C.) MAHOMED YUNAS v. JAHAN SULTAN. 198 I.C. 803=14 R. Pesh. 76=A I.R. 1942 Pesh. 9.

O. 2, R. 2-Bar of suit-Prior suit for possession of land-Subsequent suit for mesne profits-Bar of.

A right to the rents and profits of properties wrongfully alienated by the adoptive mother of the plaintiff rests on exactly the same facts and law as the claim to the corpus of those properties. If in a suit for possession of the properties, the plaintiff does not ask for mesne profits, a subsequent suit for such mesne profits is barred by O. 2, R. 2, C. P. Code. (Beaumont, C.J. and Sen, J.) CHANNAPPA GIRIMALLAPPA V THE BAGALKOT BANK. I.L.R. (1943) Bom. 49=204 I.C. 255=15 R.B. 296=44 Bom. L.R. 735= A.I.R. 1942 Bom. 338.

O. 2, R. 2-Bar of suit-Prior suit-Person suing only for mesne profits—Second suit for possession or mesne profits—If lies. SAGHIR Possession or mesne profits—It fles. SAGHIR HASAN v. TAYAB HASAN. [See Q.D.1936-40 Vol. I, Col. 3293] I.L.R. (1940) All. 781=192 I.C. 677=13 R.A. 356.

O. 2, R 2—Bar of suit—Right to retain possession of one property and right to recover SAGHIR

possession of another-Separate causes of action.

The right of an owner to maintain his possession over a particular item of property is quite distinct and apart from his right to recover possession of another item of property from which he has been ousted by a trespasser. Where there is an infringement of two separate rights by two separate acts of trespass committed by the same trespasser they give rise to two separate causes of action. No doubt if the several acts of tres- W.R. (Rev.) 240.

# C. P. CODE (1908), O. 2, R. 2.

pass are so connected together in point of time as to form part of the same transaction they may not give rise to separate causes of action. But where the separate acts of trespass are far removed in point of time and are also different in character they cannot be said to form part of the same transaction. O. 2, R. 2, C. P. Code, does not make it incumbent upon the plaintiff to combine separate causes of action in the same suit. (Ismail and Mulla, JJ.) HAR SARUP v. ANAND SARUP.
I.L.R. (1942) All. 624=15 R.A. 261=203 I C.
371=1942 A.L.J. 506=1943 A.W.R. ((H.C.) 272=1943 O.A. (H.C.) 272=A I R. 1942 All. 410.

O 2. R 2-Bar of suit-Suit for rent regarding some plots—Subsequent suit regarding

other plots.

A suit for arrears of rent or for determination of rent on some plots is no bar to subsequent suits as regards other plots as the cause of action need not be in any way the same. (Harper, S.M. and Shirreff, J.M.) LAL NAR SINGH PRATAP BAHADUR SINGH v. BINDHA DIN. 1941 O.A. (Supp.) 861=

1941 A.W.R. (Rev.) 1052.

O. 2, R. 2 and S. 11, Expl. IV—Bar of suit

—Title suit for possession dismissed—Subsequent suit for redemption of mortgage—If barred, Kali Nath Shaha v. Manindra Nath Das, [See Q. D. 1936-40, Vol. I, Col. 1456.] 191 I.C. 398=13 R.C. 226.

O. 2, R. 2—Cause of action different.
O. 2, R. 2 (3), C. P. Code, has no application where the cause of action in the subsequent suit is not the same as that in the earlier suit. A suit should include the whole claim with respect to one and the same cause of action, but need not include every cause of action or every claim which the plaintiff may have had against the defendant at the time. (Tek Chand and Sale, JJ.) SHUJA-UD-DIN v. SIRAJ-UD-DIN. 195 I.C. 81=14 R.L. 30=43 P.L.R. 44=A.I.R. 1941 Lah. 139.

O. 2, R. 2—Mortgage—Suit for interest alone-Subsequent suit for principal and interest-Maintamability.

If a mortgage deed contains a separate personal covenant for the payment of interest and compound interest, such a covenant could not be ignored simply because in a previous suit to recover arrears of interest this stipulation in the mortgage deed was not made the basis of the claim. A prior suit and decree for interest only does not bar a subsequent suit for principal and interest as the causes of action in the two suits are distinct. (Abdul Rashid, J.) NIDHAN SINGH v. PREM SINGH. 194 I.C. 524=13 R.L. 543=A. I.R. 1940 Lah. 498,

-O. 2, R. 2 and Specific Relief Act, S. 42, Proviso-Principle underlying-First suit for declaration of title and later suit for possession after ejectment-Maintainability.

The law does not encourage multiplicity of litigation and with that end in view requires that all the reliefs which can be claimed at the same time should be claimed in one and the same suit. Failure to do so is penalised both by the proviso to S. 42, Specific Relief Act and by O. 2, R. 2 (2). Where a suit for a bare declaration alone is filed in the first instance and subsequently a suit is filed for possession after ejectment of the defendants it would not be maintainable. (Sathe, S.M.) MAIKWA v. JAGESHWAR. 1943 R.D. 393=1943 A.

O. 2, R. 2-Scope-Contract for sale of immovable property-Subsequent sale in derogation of-Suit for specific performance by prior vendee—Subsequent suit for possession—If barred. See C. P. Code, Ss. 16, 99 AND O. 2, RR. 2, 3 AND 4. 43 Bom.L.R 293.

O. 2, R. 2 - Scope of.
R. 2 of O. 2, C. P. Code, is not directed to the

inclusion in one and the same action of different causes of action even though they arise from the same transactions. (Roberts, C.J. and Mosely, J.)
U Sin v. Ma Ma Lay 1941 Rang, L.R. 14=194
I.C. 482=13 R.R. 311=A.I R. 1941 Rang 118.

O. 2, R. 3-Joinder of causes of action-

Conditions permitting.

O. 2, R. 3 which permits joinder of causes of action is subject not only to the provisions of R. 6 of the same order which allow the Court to order separate trials where it appears that such causes of action so added cannot be conveniently tried or disposed of together but also to the condition that the Court should have jurisdiction in respect of all the causes of action involved. (Allsop and Verma, JJ.) KARAN SINGH v. KUNWAR SEN. I.L.R. (1942) All. 862=206 I.C. 222=15 R A. 498=1942 A.L. W. 399=1942 A.W.R. (H.C.) 270 =A.IR 1942 All. 387.

and 4. Limitation Act. See Limitation Act, Ss. 3 AND 4 (1941) 2 M.L.J. 244.

O.2, R. 3—Scope of—Plaintiff if can plead

inconsistent alternatives.

R. 3 of O. 2 is designed to meet a case in which a plaintiff, not being certain whether his cause of action rested on ownership or merely right of way, finds himself under the necessity of pleading each in the alternative. He has a right to plead the alternatives, though inconsistent, in the form of a right of ownership or alternatively an easement. (Braund, J.) THE MANAGING COMMITTEE of Jumamasjid v. Ghasi Ram. 1942 A.L.W. 202. ---O. 2, R. 3—Scope—Suit on mortgage by assignee of mortgage—Prayer for mortgage decree—Alternative prayer for decree against assignor—Misjoinder. See C. P. Code, S. 99 AND O. 2, R. 3. 22 Pat L.T. 196.

O. 2, R. 3—Suit for redemption of mortgage with possession—Claim for rent paid by mortgagor to mortgagee's use—If can be joined. Subedar Mian v. Sheo Shankar Missir. [See Q. D. 1936-40, Vol., I, Col. 1457.] 1940 P.W.N. 1028.

——O. 2, R. 3—Suit to set aside alienation by karta of joint Hindu family—All alienees made parties—Suit if bad for misjoinder of causes of action.

Where a member of a joint Hindu family sues to set aside the alienations made by the karta of the family ranging over a number of years and all the aliences are made defendants, the various sets of defendants have a community of interest in the sense that they all derive their title from one and the same person (i.e.) the karta, and the cause of action against them is the same as it would have been against the karta, if he were alive, and hence the suit is not bad for misjoinder of causes of action. (Collister, J.) INDER BAHA-DUR SINGH v. SITA RAM. I.L.R. (1941) All. 370 =195 I C. 145=14 R.A. 21=1941 O.A. (Supp.) 233=1941 A.L.J. 260=1941 A.L.W. 324=1941 O.W.N 457=1941 A.W.R. (H.C.) 124=A.I.R. 1941 All. 209.

C. P. CODE (1908), O. 3, R. 1.

-O. 2, R. 4—Scope—Suit for specific performance of contract of sale of immovable property-Joinder of claim for possession also-Vendor and subsequent vendees made parties— Leave of Court—If necessary. See C. P. Code, Ss. 16, 99 And O. 2, Rr. 2, 3 And 4. 43 Bom.L.R.

-O.2, R.6—Proper procedure to be adopted:

by Court proceeding under

It was not the intention of the legislature, that where the Court proceeds under O. 2, R 6, C. P. Code, the plaintiff should be required to file separate plaints. The proper order to pass in such a case is that the plaintiffs should be given an opportunity so to amend his plaint that the allegations against each set of defendants in respect of the various alienations shall be separately set out in order that separate issues may be framed in respect of each transaction, thus enabling the Court to try the suit in sections, each section forming part of the same proceeding and when this has been done, the Court will proceed with the trial of the suit. (Collister, J.) INDER BAHADUR SINGH v. SITA RAM. I.L.R. (1941) All. 370=195 I.C 145=14 RA. 21=1941 O.A. (Supp.) 233=1941 A.L.J. 260=1941 A.L.W. 324=1941 O.W.N. 457=1941 A.W.R. (H.C.) 124=A.I.R. 1941 All. 209.

·O. 3, R. 1-'Any law'-Meaning-If refers

to other parts of the Code.

The words "except where otherwise expressly provided by any law for the time being in force, in O. 3. R. 1, C. P. Code, do not mean other parts of the Code but refer to laws other than the Code. (Bose, J.) K.C. MAJUMDAR v. SURAJ SINGH. I.L.R. (1942) Nag. 258=193 I.C. 707=13 R.N. 345=1941 N.L.J. 418=A.I.R. 194%

Is "acting" not "pleading" which can be permitted to be done by another expert with special power of attorney. (Clarke, J.) THUNNUBEO RAGHVL v. BALDEO RAGHVI. 1942 N.L.J. 449.

——O. 3, R. 1—'Party to suit'— Next friend of minor plaintiff—Right to appoint recognised agent -Power of attorney by next friend authorising grantee to act on own account-If empowers grantee to file suit and take proceedings on behalf f minor—Plaint and vakalat signed by attorney-

alidity—Amendment—Permissibility

The next friend of a minor plaintiff is not technically a party to the suit, but for the purpose of appointing a recognised agent to take some step in the suit, the next friend is to be regarded as a party to the suit within the meaning of O. 3, R. 1, C. P. Code, and the next friend of a minor plaintiff can appoint a recognised agent under O. 3, R. 1. But a general power of attorney granted by the next friend on the latter's own account authorising the grantee to do various acts including filing suits and taking proceedings on the grantor's behalf would not enable the attorney to file suits in the name of an unspecified minor using the grantor's name as next friend. If the plaint in the suit by the minor is signed by such an attorney and is presented by a pleader under a vakalatnama executed by such attorney, the plaint is not a valid plaint and the suit is not validly commenced. The defect cannot be cured by an amendment by striking out the signature of the attorney and inserting that of

the grantor of the power of attorney, The only course open is to file a fresh suit. (Beaumont, C. J.) CHUNILAL BHAGWANJI v. KANMAL LALCHAND. I.L.R. (1944) Bom. 66=46 Bom L.R. 350=214 I.C. 298=17 R.B. 101=A.I.R. 1944 Bom. 201.

O. 3, R. 1 and O. 41, R. 1—Presentation of plaint or appeal by person other than plaint:ff or appellant or their recognised pleader or agent -Validity. See C. P. Code, O. 41, R. 1 AND O. 3, R. 1. 46 P L.R. 96.

O. 3, R. 1—Representation of defendant absent in enemy-occupied territory.

The position of a defendant in a suit in British India who is absent in enemy-occupied territory, is anomolous. There is no legislation for his representation in the suit. A defendant in a partition suit was carrying on business in Burma, and a notice of the suit was served on his daughter describing her as the local agent of the defendant. The plaintiff averred that during his absence in Burma the defendant had entrusted the management of his properties to his daughter. daughter.

Held, that the defendant was not represented in any real sense by his daughter. (Akram and Blank, IJ.) RASHID AHMAD v. RAUSANNESSA BIBL. 49 C.W N. 262.

applicability of—Presentation of plaint, if an 'act in any Court'—Presentation by unauthorized

Person-Curability-Stage.
O. 3, R. 1, C. P. Code, contains a general provision relating to procedure in Courts and is as much applicable to the presentation of suits as to that of appeals and applications for execution. O. 41, R 1 is in fact a combination of the provisions of S. 26 and O. 3, R. 1. The presentation of every document in Court must therefore be governed by O. 3, R. 1. The presentation of a plaint, memorandum of appeal, or an application to the munsarim of a Court is undoubtedly an act in any Court so that it is imperative that, presentation should be made by the party in person or by his recognized agent or by pleader. Though the presentation of a plaint by a person not duly authorized is an irregularity curable at the discretion of Court, when no attempt has been made to get it cured in the trial Court, it is too late to get it cured in appeal. (Thomas, C. J. and Zia-ul-Hasan, J.) All India Barai Maha-sabha v. Jangi Lal. 191 I.C. 821=1941 A.W. R (C.C) 10=1941 O.R. 32=13 R.O. 296=1949 O.A. 1206=1940 O.W.N. 1253=A.I.R. 1941 Oudh 160 1941 Oudh 169.

O. 3. R. 2—Recognized agent—Representative of Co-operative Bank duly authorized by rules of the Bank—If can present petitions and

act in Courts of law.

A representative of a Co-operative Bank duly authorized by the Bank under its rules is incapable of acting on behalf of the Bank in Courts of 1aw as he is not a recognized agent. (Davies.)
ATTAULLAH KHAN v, THE URBAN CO-OPERATIVE
BANK, LTD. 1945 A.M.L.J. 24.
O. 3, R. 2 (b)—Persons indicated in—Who

The persons indicated in O. 3, R. 2 (b) C. P. Code, are those who carry on trade or business in the name of parties who permanently reside C. P. CODE (1908), O. 3, R. 1.

merely stay there temporarily although it may be for an extended period. (Gentle, J.) Bengal Jute Mills v Jewraj Heeralal. 46 C. W N 957=204 I C. 191=15 R.C. 480=77 C.L. J. 15=A I.R 1943 Cal. 13.

O. 3, R. 4—"Acting"—Handing over appeal

to clerk of Court—If amounts to.

The mechanical act of handing over the appeal to the clerk of Court or another officer appointed for receiving appeals does not amount to "acting" as contemplated by C. P. Code. It is only a ministerial work and similar in nature to the payment of process-fee, etc., which the clerks of counsel usually do. Consequently a counsel can present an appeal on behalf of another duly authorized under O 3, R. 4 without a document in writing authorising him to do so. (Almond, J. C. and Mir Ahmad, J.) GHULAM SARWAR v. NABI BAKHSH. 192 I.C 833=13 R. Pesh. 47= A.I R. 1941 Pesh. 1.

O. 3, R. 4-Application to set aside ex parte decree-Fresh vakalatnama-Necessity.

Where after the passing of an ev parte decree, the vakil appearing for the defendant files an application for setting it aside, it cannot be said that it is bad because no fresh vakalatnama was filed by the vakil—a vakalatnama in the usual torm without any expression indicating limitation on the powers of the vakil, necessarily implies that the vakil would have the right to do everything that was necessary for the proper conduct of the case; and if the case had been decided ex parte there is an implied authority given to the vakil to have that order set aside and the case heard on the merits. (Malik, J.) JWALA DEVI v. BIRIGUNATH SAHAI. I.L.R. (1944) All. 592=1944 O.A. (H.C.) 129=1944 A.W.R (H.C.) 129=1944 A.L.J. 378=A.I.R. 1944 All 238.

O. 3, R. 4—Appointment of pleader—Duration—Termination—Appointment of receiver for the estate of party—Effect.

Where after a party is represented by counsel, a receiver is appointed for the estate of that party unless there is a written intimation to the Court from the receiver that the previous counsel's power of attorney is cancelled, the same counsel who acted prior to the appointment of the receiver is at liberty to proceed with the litigation in respect of which he was previously briefed. (Davies.) SOBHAG MAL v. WAZIR BUX. 1942 A.M.L.J. 65.

orally authorising another pleader to appear Authority of latter to agree to consent decree.

If a pleader engaged by a party orally authorises another pleader to appear for him, the latter can only 'plead' but not "act". He has, therefore, no authority to agree to a consent decree being passed against the party. (Tek Chand and Sale, JJ.) GHANSHAM LAL V BAIJ NATH SYAL. 46 P.L R. 372.

Court (O. S.)—Right to act in mofussil Court without vakalat—Presentation of plaint without vakalat—Effect—Irregularity—Decree—If invalid -C. P. Code, S. 99.

An advocate enrolled on the original side of the Bombay High Court is not exempted from outside the jurisdiction of the Court and not ing him to act on behalf of his client in a Court

<sup>4</sup>C. P. CODE (1908), O. 3, R. 4.

in the mofussil. If he files a plaint in a mofussil Court without such a vakalat or document as is required under O. 3, R. 4, C. P. Code, there is no proper presentation of the plaint. But the failure to comply with the provision regarding presentation of a plaint is a mere irregularity; it does not oust the jurisdiction of the Court. If the plaintiff and his pleader have acted in good faith and without gross negligence, the Court would allows it to be cured. The suit must be deemed to have been filed when it was first instituted, and under S. 99, C. P. Code, the decree passed will not be reversed in appeal on the ground of such irregularity. (Divatia and Lokur, JJ.) Hirabai Gondala v. Bhagirath & Co. 47 Bom.L.R. 808.

——O. 3, R. 4 (2)—Scope of appointment of pleader—Power to consent to setting aside exparte decree—Fresh appointment if necessary.

An application to set aside an ex parte decree or dismissal order is part of the proceedings in a suit and so in the same way to oppose or consent to such an application is also part of the proceeding in a suit. Hence ordinarily a pleader appointed for the purposes of a suit has power to consent to the restoration of the suit dismissed for default. He does not require a fresh power or appointment for that purpose. (Ba U, J.) U OAK v. MA KHIN. 1941 Rang.L.R. 254=197 I.C. 406=14 R.R. 121=A.I.R. 1941 Rang. 314.

——O. 3, R. 5—Applicability—Appeals to High Court from original decree of Subordinate Court—Service of notice—Procedure—Affixing of copy to office of advocate for respondent—Sufficiency—O. 41-A. R, 6 and R. 22.

O. 3, R. 5, C. P. Code, is a general provision governing all processes of Civil Courts, and O. 41-A, is a special order relating to the procedure in appeal to the High Courts from the original decrees of Subordinate Courts. It must therefore be inferred that the special provisions of O. 41-A, in so far as they are in conflict with the provisions of the parts of the Code, must prevail and must govern the procedure relating to appeals in preference to the general provisions. Since R. 6 of O. 41-A, excludes a notice of appeal from the category of processes which can be properly served by being left at the address for service of the party to be served, the inference is that such a notice must be served regularly either on the respondent or his advocate, and that service by merely affixing to the office of the advocate as provided in O. 3, R. 5 is not service on the party or his pleader for purposes

registered clerk of pleader—If effective.

of limitation for filing memorandum of crossobjections under O. 41, R. 22, C. P. Code. (Wadsworth and Patanjali Sastri, JJ.) VEN-

KATARAJU v. RAMABHADDIRRAJU. 201 I.C. 785= 15 R.M. 418=1942 M.W.N. 182 (2)=55 L.W. 115=A.I.R. 1942 Mad. 403=(1942) 1 M.L.J.

245.

A process served on the registered clerk of the pleader is as good a service and as effective as if it had been served at the pleader's office. (Shirreff. S.M.) LAL BAHADUR v. MANKUER. 1942 O.W.N. 402=1942 R.D. 491=1942 A.W. R. (Rev.) 293 (2)=1942 O.A. (Supp.) 319 (2).

C. P. CODE (1908), O. 5, R. 17.

—O. 5, R. 17—Compliance—Defendant accepting summons and copy of plaint—Refusal to sign acknowledgment and to hand back summons

-Effect-If due and proper service.

Where the defendant, having got the copy of the writ of summons and a copy of the plaint from the serving officer, refuses to sign an acknowledgment of such service on the original writ and runs away without handing back the copy of the summons and the copy of the plaint to the serving officer, the defendant is duly served. O. 5, R. 17 is mandatory and requires that the serving officer should affix a copy of the summons on the outer door or other conspicuous part of the defendant's residence. But where the defendant by his own conduct renders it impossible for the serving officer to affix the copy of the summons on the defendant's house, and to carry out the provisions laid down in O. 5, R. 17, it does not lie in his mouth to urge that the service effected upon him is not a proper service. (Chagla, J.) M. R. VED & Co. v. S. B. HAYEEM. 210 I.C. 64=16 R.B. 164=45 Bom.L.R. 695=A,I.R. 1943 Bom. 340.

——O. 5, R. 15—Defendant prisoner of war in enemy occupied territory—Service on-Proper procedure—Soldiers Litigation Act (IV of 1925), Ss. 6 and 7.

When a defendant is a prisoner of war in enemy occupied territory the Courts should first ascertain whether there is any male member of the family on whom service can be effected under O. 5, R. 15, C. P. Code, if not and if there is no authorised agent, recourse should be had to the procedure laid down in Ss. 6 and 7, Indian Soldiers Litigation Act. (Tek Chand and Sale, Jl.) RAGHBIR SINGH v BHIM SINGH. 210 I.C. 593=16 R.L. 170=45 P.L.R. 369=A.I.R. 1943 Lah. 327.

---O. 5, R. 17—Affixture on deliberate evasion—Precautions to be taken and procedure to be followed.

Where it is made to appear that any party is deliberately avoiding being served, it would be best to obtain an affidavit from the village lambardar or other official that the party had been in his house shortly before the attempt to serve, that the house was the house of the party desired to be served and that in his opinion the party was deliberately avoiding service. In such circumstances the notice could with reason be handed to any other person in the house of reasonable responsibility or firmly affixed to the door of the house. (Davies.) Sudarshan Das v. Rugha. 1944 A M.L.J. 42.

Where persons who were to be served with notice did not themselves refuse to sign the acknowledgment but all that the peon said was that "one of the servants refused to take the notice," and it was not shown that that servant had been authorised by the persons, upon whom the notice was to be served, to receive such notice, service by affixing the copy is not sufficient. (Fazl Ali, C.J., Manohar Lall and Chatter-ji. JJ.) Pirthvi Chand Lal v. Prabhabatiji. 23 Pat. 31=212 I.C. 504=10 B.R. 525=16 R.P. 299=1944 P.W.N. 37=A.IR. 1944 Pat. 41 (F.B.).

O. 5, R. 17—Proper service—Proof—Peon sending summons through maid servant-Latter not examined—Effect of—Proper service—If can be inferred. Snehalata Devi v. Janardan Prasad Singh. [See Q D., 1936-'40, Vol. 1, Col. 1465]. 191 I.C. 288=13 R.P. 292=7 B.R. 168. —O. 5, R. 17—Proper service—Service by affixture—Sufficiency—Evidence of inquiry by

process-server—Sufficiency.

Before a Court accepts service by affixture as satisfactory, it should satisfy itself that the conditions prescribed in O 5, R. 17, C. P. Code, are satisfied. Where there is no evidence to show that the process-server made any enquiries as to whether there was any local agent or any relative upon whom he could serve the notice, service by affixture during absence cannot be held to be proper service or due service. (Chatterji and Meredith, 11.) GURANNA v. KSHETRI MOHANTY. 23 Pat. 442=1944 P.W.N. 485=25 Pat.L.T. 116=10 Cut.L.T. 51=A.I.R. 1944 Pat. 297.

-O. 5, R. 20 -Substituted service -When to be ordered—Appeal adjourned owing to service on respondent being insufficient-Notice issued for fresh date—Appellant directed to apply for substituted service, if respondent evaded service -Substituted service, if can be ordered before

date fixed in notice.

Where an appeal is adjourned owing to the service on the respondent being declared insufficient and notice for fresh future date is issued and the appellant is directed to apply for substituted service if the respondent evaded service, it is not open to the Court to pass an order for substituted service before the date fixed in the notice to the respondent for the hearing of the appeal. (Thomas, C. J. and Ghulam Hasan, J)
NANHIN v. DEPUTY COMMISSIONER, KHERI. 17
Luck. 683=200 I.C. 251=14 R.O. 582=1942 O.A. 160=1942 A.W.R. (C.C.) 163=1942 O. W.N. 215.

-O. 6—Obscure pleadings—Clarification—

Duly of Court.

Where a portion of the written statement is too vague and too general to indicate what is meant by the defendant and though no attempt is made on behalf of the plaintiff to seek a clarification of the plea contained therein, it is the duty of the Court to call upon the defendant to furnish definite particulars of the plea. The practice of introducing obscure pleadings with a view to taking the adversary by surprise is open to grave objection and is not unoften likely to lead to grave miscarriage of justice. The law imposes a duty on the Judge to clarify the pleadings. (Thomas, C. J. and Ghulam Hasan, J.) FAOIR BUX 11. THAKUR PRASAD. 16 Luck. 832=194 I. C. 588=14 R.O. 6=1941 O.W N. 801=1941 A. L.W. 640=1941 O.A. 519=1941 A.W.R. (C. C.) 222=A.I.R. 1941 Oudh 457.

of inferences from them must be set out,

In India as in England, the duty of a pleader is to set out the facts upon which he relies and not the legal inference to be drawn from them. (Lord Porter) Gouri Dutt Ganesh Lall v. Madho Prasad. I.L.R. (1944) Kar. (P.C.) 85 = 10 B.R. 149=209 I.C. 192=16 R.P.C. 100=56 L.W 661=24 P.L.T. 314=1943 M.W.N. 737=48 C.W.N. 36=A.I.R. 1943 P.C. 147= (1943) 2 M.L.J. 417 (P.C.).

C.P. CODE (1908), O. 6, R. 6,

-O 6 Rr. 2 and 4-Pleadings-Statement

of necessary particulars-Object

Per Pal, J.—Although pleadings in this country are not to be strictly construed, parties should not be allowed to ignore altogether the rules of pleading which have been laid down by the statute According to these rules, all necessary particulars must be embodied in the pleadings which must not only be concise but also be precise. The whole object of pleadings is to bring the parties to an issue and the importance of the rules is to prevent the issue being enlarged, which would prevent either party from knowing, when the case comes for trial, what is the real fact to be discussed and decided. (Syed Nasim All and Pal, JJ.) LONDON AND LANCASHIRE IN-SURANCE CO LTD. v BENOY KRISHNA MITRA. 78

C.L.J. 129=A.I.R. 1945 Cal. 218.

O. 6, R. 2-Suit for damages for use and occupation Facts to be pleaded by plaintiff.

In a suit for damages for use and occupation, all that the plaintiff need plead is that the land belongs to the plaintiff, that the defendant was let into possession by him, that he is in use and occupation of it and that the claim is for a certain figure. Though it is usual to plead that the defendant was in occupation with the plaintiff's permission, this is strictly unnecessary, because the law presumes this in the plaintiff's favour once it is shown that he or his predecessor let the defendant into possession. (Bose, J.) GULABCHAND v HIMAT KHLTSING. 208 I.C. 358 =16 R.N. 84=1943 N.L.J. 143.

O. 6, R 4-Fraud-Absence of pleadings-

Relief on evidence disclosing fraud.

Where a person relies on the fraud of another, it is his duty to say so in his pleadings. In the absence of any pleading, even if there is evidence of fraud, the Court would not be able to consider it. (Clarke, J.) Andoli Udaibhan v. Jamnabai. 197 I.C. 356=14 R.N. 167=1941 N L.J. 230.

-O. 6, R. 4—Fraud—Particulars of to be

set forth in the plaint.

General allegations of fraud however stong they may be are insufficient. Where fraud is the ground of action, the particulars thereof must be set forth in the plaint. The mere use of general words as 'fraud,' 'bogus' or 'collusion' are ineffectual to give a fraudulent colour to the particular of forth (Thomas C.) cular statements of facts. (Thomas, C.J.) C. D. LINCOLN v NOOR ELAHI. 204 I.C. 531=15 R. O. 364=1942 O.A. 626=1942 O.W.N. 801= 1942 A.W.R. (C.C.) 361=A.I.R. 1943 Oudh

O. 6, R. 5-Particulars-Power to order and to dismiss suit, if not furnished—Order of dismissal—Interference by appellate Court—Attitude of Courts with reference to failure to give particulars. BAXIRAM RUDMAL v. GOKUL-DAS KISANLAL (See Q. D., 1936-'40, Vol. 1, Col. 1468) I.L.R. (1942) Nag. 20.

O.6, R. 6-Scope-If to be read with O.8, R. 2-Suit by landlord for eviction-Notice-If to be alleged-Duty of tenant to plead want or

insufficiency of notice.

O 6, R. 6, C. P. Code, must be read along with
O. 8, R. 2. It is for a defendant to raise by his pleading all matters which show that the suit is not maintainable. O. 6, R. 6 merely says any condition precedent, the performance or occurr-

ence of which is intended to be contested, shall be distinctly specified in the pleadings. A landlord suing his tenant for eviction cannot anticipate, in the first instance, any contest on the point of notice. It is not for him to plead the condition precedent at first. It is for the defendanttenant to raise the point if he wishes to contest the point. A general averment of the performance of all the conditions precedent is implied in every pleading and therefore it need not be alleged. (Meredith and Sinha, JJ.) KRISHNA PRASAD SINGH v. ADYANATH GHATAK. 22 Pat. 513=216 I.C. 111=11 B.R. 97=17 R.P. 115= A.I.R. 1944 Pat. 77.

O. 6, R. 7-Inconsistent alternative case-Introduction in replication—Permissibility.

Although an alternative and inconsistent case can be set up in the plaint, it is not open to the plaintiff to introduce by means of a replication a case inconsistent with the allegations in the plaint. (Abdur Rahman, J) HARDIAL SINGH v. JASWANT KAUR 209 I.C. 252=16 R.L. 105=45 P.L.R. 190=A.I.R. 1943 Lah. 159.

-O. 6, R. 7—Pleadings—New and different ground of exemption from limitation-If permissible.

Where a suit is instituted after the expiration of limitation, the plaintiff should no doubt state the ground of exemption, but where he has stated a particular ground, he is not precluded thereby from relying on any other ground, and particularly when such ground is a ground furnished by an act of the legislature. Where in the plaint, the plaintiff relied only upon an acknowledgment to save limitation, it is open to him to rely upon S. 5 of the U.P Temporary Postponement of Execution of Decrees Act, 1937 as saving his suit from the bar of limitation (Hasan, J) Raj Bahadur v. Raja Ram 191 I.C. 305=13 R.O. 224=1940 A.W.R. (C.C.) 462=1940 O.W.N. 988=1940 O.A. 971=A.I.R. 1941 Oudh 111.

eviction-Notice-If to be alleged-Cause of action.

O. 6, R. 11, C. P. Code, does not lay down that notice must be pleaded in a suit for eviction. It merely prescribes the form which the pleading should take in such cases as it is material to allege notice. It governs the statement in the pleading of anything which is a part of the cause of action, as notice may sometimes be. Strictly speaking however, a condition precedent, merely as such, does not form part of the cause of action. (Meredith and Sinha, JJ.) Krishna Prasad Singh v. Adyanath Ghatak 22 Pat. 513=216 I.C. 111=11 B.R. 97=17 R.P. 115= A.I.R. 1944 Pat. 77.

o. 6, R. 14—One of the plaintiffs not signing plaint—Others not empowered to file suit on

his behalf-Effect.

Where one of the plaintiffs has not signed the plaint filed in a suit and the others are not shown to have been empowered to file the suit on his behalf there is no suit filed by him or on his behalf at all. (Shirreff, S. M. and Sathe, J.M.) SARDAR HIRA SINGH v. GANGA BHAJAN. 1942 R.D. 587=1942 O.W N. (B.R.) 470=1942 A. W.R. (Rev.) 301=1942 O.A. (Supp.) 327.

O. 6, R. 14—'Person duly authorised'— Oral authority—If sufficient.

C. P. CODE (1908), O. 6, 17.

A person is duly authorised as contemplated by O. 6, R. 14, C.P. Code, even if he is only orally authorised. (Gentle, J.) BENGAL JUTE MILLS v. JEWRAJ HEERALAL. 204 I.C. 191=15 R.C. 480=77 C.L.J. 15=46 C.W.N. 957=A.I.R. 1943 Cal. 13

O. 6, R. 15-Applicability-Copy of plaint filed by orders of Court on original plaint found

to be missing.

Where on a plaint being found missing from the custody of Court, the plaintiff is ordered to file a copy of the plaint, it cannot be expected to bear all the verifications as in the case of the original plaint and hence from their absence it cannot be pleaded that there is no proper plaint before the Court. (Sathe, S. M. and Ross, A.M.) CHHOTEY LAL & DURGAWATI. 1944 R.D. 152=1944 A.W.R. (Rev.) 95.

-O. 6, R. 16—Expunging statement—Test

Considerations for Court.

In an application under O. 6, R 16, C. P. Code, for expunging allegations or remarks in pleadings, the question to be considered by the Court is whether the words complained of amount to an allegation necessary for the formulation of the case set up, either in the way of establishing a cause of action or relevant for the purpose of the decision of any of the issues arising on the face of the pleadings. The test would be whether the allegation or statement could form part of the evidence-in-chief which the party making the allegation or statement would be bound to lead for the purpose of obtaining the relief asked for. If the allegation or statement is scandalous or is irrelevant in the sense that it does not form any part of the cause of action and has no bearing on any of the issues raised, it will be expunged. (Coya!ee, J.) SHAMDASANI v. CENTRAL BANK OF INDIA LTD., (No. 2) 216 I.C. 226=17 R.B. 137 = 46 Bom. L.R. 335=A.I.R. 1944 Bom. 197.

-O. 6, R. 16—Scope—Amendment of valua-

tion of relief-Permissibility.

There is no authority for holding that a valuation of a relief cannot be allowed to be mended under (). 6, R. 16, C. P. Code. The amendment of a relief, when it does not change the nature of the suit at all, may be allowed as it is within the competence of the Court to grant. (Divatia and Macklin, JJ.) SECRETARY OF STATE v. CHIMAN-LAL JAMNADAS. I.L.R. (1942) Bom. 357=201 I.C. 420=15 R.B. 76=44 Bom. L.R. 295= A.I.R. 1942 Bom 161.

-O. 6, R. 17—Addition to pleadings—Objec-

tion for first time in appeal.

It is within the power of the Court to allow parties to add to their pleadings and where this is done without any objection by the parties, it is too late in the day for one of the parties to raise objections to it in appeal for the first time, (Yorke and Agarwal, JJ) MAHOMED EJAZ RASUL V SALVID ALI MAHOMED. 16 Luck. 812=194 I.C. 615=1941 O A. 506=14 R.O. 18=1941 R.D. 431=1941 A.L.W. 613=1941 A.W.R. (Rev.) 518=1941 O.L.R. 512=1941 O.W.N. 768= A.I.R. 1941 Oudh 498.

O 6, R 17—Alteration in form of relief—

Amendment of plaint—Permissibility.

The plaintiff, a servant of the defendant corporation was suspended from service as from 1st October, 1935 and subsequently dismissed. In the plaint he alleged that he was wrongfully

# C.P. CODE (1908). O. 6, R. 17.

dismissed from service on 14th July, 1941 and made a claim for salary from 1st October, 1935, to 14th July, 1941, as damages for wrongful dismissal. In the written statement, the plaint allegation regarding the date of dismissal was denied and it was stated therein that the plaintiff was dismissed on 29th May, 1936. The plaintiff applied to amend the plaint enabling his claim to be made simpliciter for salary instead of as damages for wrongful dismissal.

Held, that the amendment related only to the form of the relief claimed and not to the substance of the case pleaded in the plaint and should be allowed to determine the real question in controversy. (Gentle, J.) JATINDRA NATH PAL v. CORPORATION OF CALCUTTA I.L.R. (1944) 1 Cal.

463=A.I.R. 1945 Cal. 144.

-O. 6, R. 17—Amendment—Application to amend written statement after decree in partition suit under O. 12, R. 6 - Permissibility. See C. P. Code, O. 12, R. 6. (1945) 2 M.L.J. 439.

-O. 6, R. 17-Amendment, after limitation

-Permissibility.

An amendment of the plaint may be allowed even where it has the effect of depriving the defendant of his right to plead limitation if the circumstances are peculiar and special. But where a plaintiff in a pre-emption suit deliber-ately omitted a house from the list of the properties sought to be pre-empted, he cannot be allowed to amend the plaint by adding that item of property after the expiry of the period of limitation and the accrual of a valuable right to the defence. (Ghulam Hasan, J.) Sheo Narain v-Ram Khelawan. 1944 A.W.R. (C.C.) 302=1944 O.A. (C.C.) 302=1944 A.L.W. 634=1944 O.W.N. 501=A.I.R. 1945 Oudh 135,

O. 6, R. 17-Amendment-Allowing of-

Principles.

Rules of procedure have no other aim than to facilitate the task of doing justice. Though full powers of amendment must be enjoyed and should always be liberally exercised, it cannot be permitted so as to enable one distinct cause of action to be substituted for another, or the action to be substituted for another, or the subject-matter of the suit to be changed. (Verma, I.) NASIR UDDIN v. BABOO LAL I.L.R. (1945) All. 109=1945 A L.W. 32=1945 O.W.N. (H. C.) 32=1945 A.W.R. (H C.) 36=1945 A.L.J. 136=A.I.R. 1945 All. 197.

O. 6, R. 17-Amendment-Alteration in nature and complexion of suit-Suit for possession of partitioned property-Alternative case on footing of parties being joint-Whether can be

brought in by amendment.

Where the suit as brought is for possession of partitioned property, an alternative case for partition on the footing of the parties being joint cannot be brought in by way of an amendment of the plaint because the effect of the amendment would be to alter the nature and complexion of the suit and the cause of the suit itself. (Yahya Ali, J.) Seshacharvulu v Lakshminarayana Charyulu. 1945 M.W.N. 707=58 L.W. 612= (1945) 2 M L J. 542.

O. 6, R. 17—Amendment altering nature of suit, cause of action and reliefs—Permissibility in

C. P. CODE (1908), O. 6, R. 17.

for allowing the whole matter to be gone into over again by an amendment of the plaint in appeal, which alters the nature of the suit, the cause of action and the reliefs, when the suit has failed (Broomfield and Macklin, JJ.) Man-HAVSANG HARIBHAI v DIPSING JIJIBHAI. I.L.R. (1942) Bom. 312=202 I.C. 648=15 R B. 178 =44 Bom. L.R. 661=A.I.R. 1942 Bom. 280.

-O. 6, R. 17-Amendment altering uature of suit-Introduction of new cause of action arisina

after suit-Permissibility.

The power of amendment given to the Court, wide though it is, does not cover the granting of an amendment to introduce into a suit a cause of action which has arisen during the pendency of the suit. (Lobo, J.) SOBHRAJ PRITAMBAS v. VARIOMAL HOLARAM. 198 I.C. 69=14 R.S., 127 =A.I.R. 1942 Sind 4.

-O. 6, R. 17—Amendment by striking out relief beyond Jurisdiction—If can be allowed.

Where of the two reliefs prayed one is within and the other beyond the jurisdiction of the Court in which the suit is filed and the plaintiff prays for amendment of his plaint by striking out the latter relief, the Court can allow the amendment and proceed to try and decide the suit with reference to the other remaining relief. (Ismail and Mullah, JJ.) DAYAWATI v. KESHO DAS. 1944 A.L W. 262.

O. 6. R. 17—Amendment of plaint in appeal—Plaintiss suing to recover property in personal capacity—If can be allowed to sue as

trustee.

Where a plaintiff sued to recover property in his personal capacity, and when the written statement stated that the property was debutter, he adduced evidence to show that it was not, and thus throughout asserted a hostile title in defiance of the trust or endowment, he cannot be allowed to amend his plaint in appeal so as to sue as trustee, as that would introduce a totally different, new and inconsistent case. (Nasim Ali and Blank, JJ.) KALYANI PROSAD SINGH v. BORREA COAL CO. 49 C.W.N. 810.

-O. 6, R. 17—Amendment of plaint—Date

of institution of suit.

Per Akram, J.—An amendment of the plaint should be allowed when it does not amount to introducing new matter or new cause of action, and the suit should be taken to have been instituted on the date when the plaint was originally presented. (Akram and Pal, JJ.) ROHINE KUMAR CHAKABARTY V. NIAZ MAHOMED KHAN. 212 I C. 421=16 R.C. 598=77 C.L.J. 93=A.I. R. 1944 Cal. 4.

-O. 6, R. 17—Amendment—Delay in suing -Effect-Suit filed almost at end of period of limitation—Leave to amend—If to be granted. See Mortgage—Mortgage Suit. 45 Bom.L.R. 489.

O. 6, R. 17—Amendment—Duty of Court. While a rigid practice of refusing leave to amend pleadings is far from commendable, Courts should not entertain a case of which the pleadings contain no suggestion without taking O. 6, R. 17—Amendment altering nature of suit, cause of action and reliefs—Permissibility in appeal—Plaintiff under honest mistake as to legal rights—If ground for allowing amendment.

The fact that the plaintiff was under an honest mistake as to his true legal right is no ground pleasing contain ho suggestion without taking steps to have it pleaded. (Sir George Rankin.) MURALIDHAR CHATTFRJEE v INTERNATIONAL FIRM. Co., LTD 70 I.A 35=I.L.R. (1943) 2 Cal. 13=1943 O.A. (P.C.) 56=46 Bom L R. 178=I.L.R. (1943) Kar. P.C. 30=15 R.P.C. 71=9 B R. 287=1943 A.L.J. 387=1943 M.W.N. 744=206 I. C. P. CODE (1908), O. 6. R. 17.

C. 1=47 C.WN. 497=56 L.W. 283=A.I.R. 1943 P.C. 34=(1943) 2 M.L.J. 369 (P.C.). O. 6, R. 17—Amendment of plaint—Effect

on limitation.

In the absence of an express provision amendment does not as a rule extend limitation. (Braund, J.) CHIEF INSPECTOR OF STAMPS v. KALLU SINGH. 1942 A.L.W. 296.

arging subject-matter of claim-Permissibility.

Though the subject-matter of the claim is enlarged by including the right to enforce the mortgage bond in suit against the properties which the plaintiffs were entitled in law to enforce by the right of subrogation which they possessed and to which they had expressly referred in their written statement in an earlier suit an amendment is justified provided it is not barred by limitation. (Harries, C, J. and Manohar Lall, J.) TIKA SAO v. HARI LAL. 195 I.C. 428=7 B.R. 924=14 R.P. 122=A.I.R. 1941 Pat.

O. 6, R. 17 and C. P. Court of Wards Act (1899), S. 26-Amendment of plaint-General principle—Suit on pronotes—Rule in case where notice of suit is required to be given under S. 26 of the C. P. Court of Wards Act.

When a plaintiff sues on a promissory note and finds that he cannot succeed for some technical defect such as want of the proper stamp or because the document is not a promissory note but a receipt, leave to amend is freely given, provided one distinct cause of action is not thereby substituted for another and the subject-matter of the suit is not thereby changed. In cases where notice of suit is required by statute to be given as a condition precedent, there can be no defect in the frame of the suit if the cause of action set out in the notice is substantially the J.) SUNDARA BAI v. RAMLAL MADHAORAO. 1942 N.L.J. 229.

-O. 6, R. 17-Amendment of plaint-Grounds.

A plaintiff has a right to amend his plaint in any manner he likes and so long as amendments prayed for are not contrary to law, or are likely to lead to injustice they should be granted. (Ganganath and Dar, JJ.) Mohri Kunwar v. Keshri Chand. I.L.R. (1941) All. 558=195 I.C. 758=14 R.A. 78=1941 A.L.W. 550=1941 A. L.J. 376=1941 A.W.R. (H.C.) 188=1941 O.W. N. 704=1941 O.A. (Supp.) 394=1941 R.D. 394 =A.I.R. 1941 All. 298.

-O. 6, R. 17-Amendment of plaint-Late

where the plaintiff's case thoughout had been that the property in suit was non-ancestral and an issue as to the ancestral character of the property was actually framed, evidence led and a finding recorded that it was non-ancestral an amendment of the plaint by stating that the property was ancestral cannot be allowed at a late stage in the appeal as it introduced an inconsistent case. Even if such amendment were allowed it would necessitate a remand for further enquiry as to ancestral nature of the property which cannot be allowed. (Tek Chand and Din Mohammad, JI.) KARAM DAD v. MOHAMMAD BIBI. I.L.R. (1942) Lah. 59=198 I.C. 340=14 R.L. 324=43 P.L. R. 737=A.I.R. 1942 Lah. 1 (F.B.).

C. P. CODE (1908), O. 6, R. 17.

-O. 6, R. 17-Amendment of plaint-Late stage-Amendment necessitated by defence plea-

When permissible.

The plaintiff brought the action to recover Rs. 4,000 on the basis of a stamped acknowledgment executed by defendant I in the plaintiff's account book on 9-2-1936 The action was The action was brought on the last day of limitation for such a suit namely on 9th February, 1939. The defendants admitted executing the acknowledgme nt but denied that cash consideration was received from the plaintiff on 9th February, 1936. According to them the acknowledgment was executed on the taking of an account of the previous transactions between the parties. They contended that the document on which the plaintiff sued was a bare acknowledgment which could not form the basis of the suit. In the alternative they demanded that the previous transactions should be reopened under the C. P. Debt legislation and that they should be given relief in respect of the rate of interest charged on the debt and also an instalment decree. The plaintiff applied for amendment of his plaint explaining that there was an agreement to treat the transaction as one of cash advance and as the defendants denied it the plaintiff by amendment sought to base the suit on the original transaction, the limitation being saved by acknowledgments.

Held, the amendment although it may seek to introduce a new case does not seek to introduce an inconsistent case and the special circumstances of the case justified an amendment. (Clark, J.)
SETH MANGILAL 2'. ZAMSINGH. I.L.R. (1942)
Nag. 478=196 I.C. 190=14 R.N. 85=1941 N.
L.J. 340=A.I.R. 1941 Nag. 289.

—O. 6, R. 17—Amendment of plaint—Limitation—Surt for rent—Amendment to include prayer in alternative for damages for use and occupution-Permissibility.

Where a mortgagee in possession sued for rent alleging that he had leased the land to the defendant but on the defendant denying the lease asked for leave to amend the plaint by claiming in the alternative damages for use and occupation, and

on that date the suit was beyond time.

Held, that the amendment ought to be allowed as it involved only the addition of a prayer because the new cause of action arose out of facts already pleaded and placed in issue in the case. (Bose, J.) GULABCHAND v HIMAT KHET-SING. 208 I.C. 358=16 R.N. 84=1943 N.L.J.

O. 6, R. 17-Amendment of plaint-Mistake—No injustice done and nobody misled-Suit in the name of a deity when property is bequeathed to temple—Amendment justified.

Where a suit is wrongly instituted in the name of the deity when the property is bequeathed to the temple, but the irregularity had neither occasioned any injustice nor misled any of the parties to the suit and had not resulted in any of the questions at issue being improperly tried, it would not be right to dismiss the suit altogether and amendment would meet the ends of justice. (Stone, C.J., and Bose, J.) SHRI MAHADEOJI v BALDEO PRASAD. I.L.R. (1942). Nag. 92=201 I.C. 220=15 R.N. 33=1941 N.L. J. 184=A.I.R. 1941 Nag. 181.

Order allowing—Effect of—If relates back to

C. P. CODE (1908), O. 6, R. 17,

date of application for amendment. See T. P. ACT (AS AMENDED IN 1929), S. 52. 1945 2 M. L.J. 72.

-O. 6, R. 17—Amendment of plaint—Power

of Court-Limitations.

It is quite true that Courts are and ought to be not strict but liberal ln the matter of allowing amendments, since they exist to decide the rights of the parties and not to punish them for the mistakes they make in the conduct of their cases. Yet, on the wide powers of allowing amendment two limitations are now well established. One is that an amendment can in no case be allowed which would have the effect of substituting one distinct cause of action for another or changing the subject-matter of the suit. The other is that an amendment ought not ordinarily to be allowed which would take away from the defendant a legal right which had accrued to him by lapse of time—the relevant point of time being not the date of the suit or that of the written statement but the time when the question falls to be considered. (Chakravartti, J) BIRENDRA KISHORE ROY v. NARUZZAMAN PEADA. 49 C.W.N. 649.

O. 6. R. 17—Amendment of plaint—Prayer for—Procedure to be followed. EUSOOF KARWA v. Mrs. NIEMEYER (See Q.D., 1936-'40, Vol. I, Col. 3293) 194 I.C. 177=13 R.R. 275=A.I.R. 1941 Rang. 37.

O. 6, R. 17—Amendment—Suit in individual capacity-Objection by defendant to frame of suit—Plaintiff persisting in going to trial without amendment—Amendment in appeal to make suit representative suit-Permissibility. MADINA BIBI SAHIBA v. ISMAIL DURGA ASSOCIATION [See Q D, 1936-40, Vol. II, Col. 2686.] 194 I.C. 766=14 R.M. 58.

-O. 6, R. 17—Amendment of written state-

ment—Delay—Effect of.

Mere delay in applying for amendment of a written statement is no ground for refusing the application, in so far as it may be compensated for by the award of costs. But where a new case is thereby sought to be sprung upon the plaintiff for the first time, and there is nothing to show that the facts newly set up were not within the knowledge of the defendant or could not be ascertained by him earlier, the Court will be justified in rejecting the application. (Edgley and Biswas, JJ.) SARADINDU MUKHERJEE v. JAHARLAL AGARWALIA. I.L.R. (1942) 1 Cal. 326=74 C.L.J. 61=46 C.W.N. 33=201 I.C. 353=15 R.C. 174=A.I.R. 1942 Cal.

O. 6, R. 17-Amendment-Written statement-Failure to plead invalidity of notice under S. 80, C. P. Code-Amendment raising plea at late stage when suit would be barred by limita-tion—Permissibility. See C. P. Code, S. 80. 45 Bom. L.R. 220.

O. 6, R. 17—Amendment—If can be allow-

ed in Second appeal.

The plaintiff who brings a suit to set aside a sale held by a township officer in Lower Burma for arrears of Land Revenue cannot be allowed to amend his plaint at the stage of second appeal to the effect that parts of Ss. 55 and 56, Burma

O. P. CODE (1908), O. 6, R. 17.

Twe v. MA MAI SEIN. 1941 Rang. L.R. 7=193 I.C. 372=13 R.R. 248=A.I.R. 1941 Rang. 97, O. 6, R. 17-Amendment-Stage-Test-Order for costs.

As R. 17 of O 6, C. P. Code, permits alteration or amendment of the pleadings at any stage of the proceedings in such manner and on such terms as may be just, it may be allowed after the trial or before the final decree in the case or in appeal, or in second appeal, or in revision, or even in an appeal before the Privy Council. The test to be applied for allowing an amendment is really to see whether it can be permitted with. out causing injustice or injury to the opposite party. No doubt adequate compensation could be ordered to be made by way of costs to the o posite party. (Dible, S. M and Acton, A. M.)
ROSHAN SINGH V BHIKAM SINGH 1945 A.W. R. (Rev.) 208=1945 R.D. 420.

-O. 6, R. 17—Amendment of plaint-Application to amend suit filed as against a firm into one against an individual in personal capacity— When permissible.

Apart from the question whether a firm should be considered a legal entity the nature of a suit filed against a firm is different from the nature of a suit filed against individual members composing that firm. Where therefore a suit is filed against a firm it cannot be allowed to be amended into a suit against an individual who happens to be a partner of that firm. It is a case where the plaintiff sought to substitute one defendant for another and also sought to change the nature of the suit he had filed. (Davis, C. J. and Weston, J) AHMED MOOSA BROS. v LILARAMFIKAMDAS I.L.R. (1942) Bros. v Lilaramfikamdas I.L.R. (1942) Kar. 210=207 I.C. 23=16 R.S. 4=A.I.R. 1942 Sind 93.

-O. 6, R. 17 and O. 7, R. 10-Amendment of plaint-Suit against firm of S-Amendment at late stage seeking to substitute individual for the firm-Permissibility.

Where an application for amendment was not a bona fide one to correct an error of misdescription but to substitute one defendant for another and was made at a late stage when the claim against the proper defendant had become time-barred it must be dismissed. Where it is found that a suit is filed against a firm which did not exist the plaintiff cannot be allowed to amend the suit as one against an individual. The proper procedure is to dismiss the suit as filed against a non existent person. (Davis, CJ. and Weston, J.) Kewalram Tekchand & Co. v. Shewaram Rochiram. I.L.R. (1942) Kar. 207 = 203 I.C. 344=15 R.S. 76=A.I.R. 1942 Sind

O. 6, R. 17-Amendment of plaint-Suit for sale on mortgage—Finding that mortgage is opposed to statute and unenforceable-Amendment in second appeal to include prayer for possession on the basis of acquisition of title as owner by prescription - Permissibility. Maksu-DAN LAL SAHU v. NIRANJAN NATH DAS [See Q.D., 1936.40, Vol. I, Col. 1483]. 1940 P.W.N. 986.

O. 6, R. 17—Amendment of plaint—When not permissible.

While leave to amend will be usually granted Land and Revenue Act, were ultra vires. "for the purpose of determining the real ques-(Roberts, C.J., Mosely and Dunkley, JJ.) AH tions in controversy between the parties" and a

delay by a party is not a sufficient ground for refusing permission to amend even at a late stage of a trial, yet he cannot be permitted to do so if the proposed amendment happens to introduce a totally inconsistent case and the application for leave to amend is made after a great deal of delay. No power has been given to enable one distinct cause of action to be substituted for another nor to change by means of amendment the subject-matter of the suit. (Abdur Rahman. J) Haridial Singh v. Jaswant Kaur. 209 I. C. 252=16 R.L. 105=45 P L.R. 190=A.I.R. 1943 Lah. 159.

——O. 6, R. 17 — Applicability — Leave to amend written statement in appeal—Amendment introducing new and inconsistent case of justertii in suit for possession—Permissibility.

It is indisputable that leave to amend a pleading is more or less a discretionary matter and the power to grant leave ought to be liberally exercised. Although mere delay would not be a ground for refusing leave to amend, where the amendment is being proposed with the object of introducing an entirely new and inconsistent case, it cannot be allowed. It might be possible for a defendant to raise an inconsistent or an alternative case when he files his written statement, in the begining, but he cannot be permitted to advance new positions at the time of arguments before the trial Court or ask for the written statement to be amended before the appellate Court. Leave to amend a written statement so as to set up a plea of jus tertii, in answer to the plaintiff's claim for recovery of possession of property, ought not therefore to be granted on an application preferred to the appellate Court. (Abdur Rahman, I.) Subbayya v. Chandrayya 198 I C. 506=14 R M. 439=A.I.R. 1941 Mad. 811=(1941) 2 M L.J. 442.

—O. 6, R. 17—Applicability—Suit for ejectment of mortgagee of occupancy holding—Defendant if and when can set up new plea that mortgagor died leaving heirs.

In a suit for the ejectment of a mortgagee of an occupancy holding where it is alleged that the mortgagor had died leaving no heirs though O. 6, R. 7, C. P. Code, would ordinarily prevent the defendant from setting up a new plea that the mortgagor had not in fact died childless, yet if persons claiming to be such heirs apply to be made defendants, it would be advisable to add them as parties and decide the case once and for all so as to avoid multiplicity of proceedings. (Shirreff, S. M. and Sathe, J. M.) BADRI NARAIN SINGH v. JAGNARAIN. 1942 R.D. 354—1942 O. W.N. (B.R.) 265—1942 A. W.R. (Rev.) 254—1942 O.A. (Supp.) 280 (1).

not alteration—Suit on promissory note by deceased brother of joint Hindu family against survivor—Amendment that debt was for family benefit—If can be allowed.

Where a suit on a promissory note executed by the deceased elder of the two brothers of a joint Hindu family was brought against the survivor on the ground that the defendant had only acknowledged the debt of the deceased and an amendment, that the debt in question was borrowed for the benefit of the joint Hindu family was sought to be made,

### C. P. CODE (1908), O. 6, R. 17.

Held, that the amendment did not alter the cause of action upon which the plaintiff came into Court but merely elucidated the reasons on which the liability was sought to be enforced and that it should be allowed even though on the date of the amendment the suit was barred by limitation. (Ghulam Hasan, J.) SAMPAT SHUKUL v. SUBKARAN TEWARI. 17 Luck. 226=1941 O.W.N. 1112=1941 A.L.W. 928=1941 O.A. 827=196 I.C. 511=14 R.O. 187=1941 A.W.R. (C.C.) 319=1941 O.L.R. 699=A.I.R. 1942 Oudh 161.

—O. 6, R. 17—Change in the nature of suit —Amended claim based on prior loan—Original claim based on pronote in renewal of original loan—Amended suit by plaintiff as executrix—Character of suit if altered—Liability of executrix for costs. Eusoof Karwa v. Mrs. Niemeyer. [See Q. D. 1936 '40, Vol. I, Col. 3293] 194 I.C. 177=13 R.R. 275—A.I.R. 1941 Rang. 37.

ance of cost by opposite party—Right to challenge amendment.

Where an amendment of the plaint is ordered on condition of payment of costs to the opposite side and the opposite side has accepted such costs without demur, it is not thereafter open to that party to challenge the order. (Cla·ke, J.) DISTRICT COUNCIL, WARDHA v. ANNA DAULATRAO. I.L.R. (1942) Nag. 294=14 R N. 156=197 I.C. 76=1941 N.L.J. 371=A.I.R. 1941 Nag. 273.

O. 6, R. 17—Discretion of Court—Exercise of—Reasonable grounds for amendment—Necessity—Amendment contrary to original case and made at late stage to meet objection as to court-

fee—Permissibility.

The granting of an amendment of the plaint under O. 6. R. 17, C. P. Code, is discretionary and the discretion should be liberally exercised in the plaintiff's favour; but reasonable grounds must be shown for such exercise of discretion hypothetical argument being no substitute therefor. Where the amendment is applied for at a late stage, its object being to meet an objection with regard to the adequacy of the court-fees paid on the plaint and the proposed amendment is not consistent with but constitutes a direct contradiction of the original case pleaded, the amendment cannot be allowed. (O'Sullivan, J.) HIRANAND DEOOMAL v. MURIJMAD KUNDANMAL. I.L.R. (1945) Kar. 84=A.I.R. 1945 Sind 128.

—O. 6, R. 17—Order directing party to amend his plaint—If justified—Revision—Interference. Bhagwar Prasad v Fanishleo Tewari. [See Q. D. 1936-'40, Vol. 1, Col. 3294.] 1941 A.W.R. (Supp.) 3=1941 O.A. (Supp.) 60 =A.I.R. 1941 Pat. 44.

Do. 6, R. 17—Powers of Court—Suit on basis of agreement to pay remuneration for service rendered—Amendment in appeal converting suit into one on basis of service on agreed salary—Permissibility—Suit on basis of service barred on date of amendment—If bar to amendment.

The plaintiff brought a suit claiming a sum of

The plaintiff brought a suit claiming a sum of Rs.1,500 due to him under a writing in the account books of the defendant dated 6-1-1937 which stated that the plaintiff had helped the defendant for the last two years and worked for him, and

that a khata for Rs. 1,500 was therefore executed for his remuneration. The cause of action was based on the agreement and the suit was tried as a suit based on that agreement, although an issue was framed and found in favour of the plaintiff as to the plaintiff having been engaged on a salary of Rs. 750 a year. The trial Court dismissed the suit on the ground that the agreement could not be regarded as a promissory note, but on appeal, the appellate Court, on the facts found, allowed an amendment of the plaint so as to enable the plaintiff to base his claim on the fact of the plaintiff having served for two years on an agreed salary of Rs. 750 a year, although a suit on that claim would, on the date of the amendment, be time barred. In second appeal the defendant contended that the amendment ought not to have been allowed.

Held, that the plaintiff's claim was in no way changed, but was still a claim for a sum of Rs. 1,500, that the difference between the suit upon an agreement recognising service and the suit upon the service itself when service was held to be proved, was no more than a technical difference, and the defendant was not entitled to rely on a plea of limitation at the stage on a ground which was purely technical. The amendment was therefore within the powers of the Court under O. 6, R. 17, C. P. Code, and was rightly allowed. (Macklio, J.) BAI KAMAIA v. SHANKERRAO LAX BANKAO. 209 I.C. 445=16 R. B. 141=45 Bom.L.R. 791=A.I.R. 1943 Bom.

407.

- O. 6. R. 17 and S. 115—Power to allow amendment—Object of— Amendment, changing nature of suit—Interference in revision. LACH-MIN v. BHAIRON BAKHSH SINGH. [See Q.D. 1936-'40. Vol. I, Col. 1481.] 16 Luck. 65.
- ——O. 6, R. 17—Refusal of amendment—Revision if lies. See C.P. Code, S. 115 and O. 6, R 17—Case decided. 1941 N.L.J. 340.
- \_\_\_O. 6, R. 17—Scope—Minor—Next friend granting general power of attorney on his own account-Attorney filing plaint on behalf of minor and vakalat engaging pleader—Plaint filed by such pleader—Validity—Amendment inserting next friend's signature after striking out attorney's signature—Permissibility. See C. P. Code, O. 3, R. 1. 46 Bom.L.R. 350.

O. 6, R. 18—Failure to amend within time -Effect—Decree, if inoperative.

If a party does not avail himself of the leave to amend that has been given to him within the time prescribed by O. 6, R. 18, C, P. Code, it may be that he loses the right to do it thereafter. But the decree does not thereby cease to be operative, when it is not expressed to be nor is in fact conditional upon the amendment being made. (Lord Romer.) GADADHAR DHIR SAMANTA v. LABANYABATI DEI. 202 I.C. 373=15 R.P.C. 31=1942 A.L.J. 650=1942 A.L.W. 671=I.L.R. (1942) Kar. (P.C.) 143=1942 O.W.N. 715=9 B.R. 1=47 C.W.N. 68=56 L.W. 3 (P.C.).

O. 6, R. 18-Plaint not amended within period allowed by Court-Effect-Liability of suit to dismissal.

Failure to amend a plaint within the period allowed by the Court does not render the suit Liable to dismissal but merely operates to preven

C. P. CODE (1908), O. 7, R. 6.

the plaintiff at any subsequent period being permitted to amend his plaint. (Mitchell, F.C.) RAHMAT-ULLAH v. KARIMU. 20 Lah.L.T. 145.

-O. 7, R. 2-Applicability-Future mesne profits.

R. 2 of O. 7, C. P. Code, has no application to future mesne profits; consequently no question of putting a separate valuation upon that relief can arise. (Kaul and Walford, JJ.) CHANDRANI v. BABU SINGH. 1945 A.L.W. (C.C.) 363=1945 O.A. (C.C.) 262=1945 O.W.N. 398.

-O. 7, R. 3 and O. 20, R. 9—Immovable property—Discrepancy between two descriptions

-Leading description should prevail.

If there is a discrepancy between the descriptions given of an immovable property, the leading description should be accepted. Where the description by plot numbers is not complete the description by boundaries and extent must prevail for identifying the property. (Verma and Beevor, JJ.) MUNDER LAL SAHU v. JIWAN RAM. 23 Pat. 145=220 I.C. 335=11 B.R. 501=1944 P.W.N. 287=A.I.R. 1944 Pat. 254.

O. 7, R. 6-Applicability-Mortgage suit-Personal remedy—Bar of limitation—Grounds of exemption from limitation—If to be stated in plaint itself—Statement at time of application for

personal decree-Sufficiency.

O. 7, R. 6, makes it incumbent on a plaintiff seeking exemption from limitation to state the ground or grounds of exemption, but this does not mean that he must state the ground before the occasion arises for seeking exemption. In a mortgage suit if the mortgaged property, when sold is sufficient to discharge the debt due to the mortgagee, it would not be necessary to apply for a personal decree at all or to show a ground of exemption from limitation in respect of the personal decree. Of course, the suit itself must be in time; but if the suit is brought in time, the plaintiff can plead the ground of exemption when it becomes necessary to apply for a personal decree (that is, after the mortgaged properties are sold and have not realised sufficient to pay off the mortgage). (Leach, C. J. and Lakshmana Rao, J.) GOPALASWAMI RAJA-(1944) Mad. 572=211 I C 630=16 R.M. 559= 1943 M W.N. 698=56 L.W. 649=A.I.R. 1944 Mad. 65= (1943) 2 M.L.J. 501.

O. 7, R. 6-Exemption from limitation-

New plea in second appeal—Permissibility.

O 7, R. 6, C. P. Code, enjoins on the plaintiff instituting a suit after the expiry of limitation the duty of stating in his plaint the grounds on which experts from the design of the which exemption from limitation is claimed. The plaintiff cannot claim such exemption at a late stage as e.g., in second appeal. (Grille, C. J. and Puranik, J.) GIRDHARILAL v. RANOO RAGHOJI. I. L.R. (1943) Nag. 764=213 I.C. 23=16 R.N. 251=1943 N.L. J. 611=A.I.R. 1944 Nag. 37.

O. 7, R. 6-Exemption from limitation not

pleaded cannot be allowed.

Exemption from limitation should not be allowed on a ground that has not been pleaded. No issue arises except when a material proposition of fact or law is affirmed by one party and denied by the other, and unless the plaintiff set tout in his pleadings the grounds on which he

claims exemption from limitation no issue on the point arises and it is not open to the Court to look into evidence in proof of something that has not been pleaded. Where however there was an oral statement by the plaintiffs' pleader that the plaintiffs relied on the debtor's admission before the Debt Conciliation Board as saving limitation it will be unduly technical to hold that the plain-tiff cannot rely on that ground of exemption in second appeal more particularly when no objection was taken in the lower appellate Court. (Pollock, J.) GHANSIAM BHOLARAM v. GIRIJA SHANKAR. I L.R. (1944) Nag. 244—A.I.R. 1944 Nag. 247

O. 7, R. 6-"Ground"-Meaning.

The word 'ground' used in R. 6 of O. 7, C. P. Code, means a fact and not a reference to the law governing a subject. A Court is bound to take judicial notice of all legal enactments. (Shirreff, S.M. and Sathe, J.M.) Durga Narain Singh v. Ramgopal. 1942 O.A. (Supp.) 498 (2)=1942 O. W.N. (B.R.) 731=1942 A.W.R. (Rev.) 472 (2). O. 7, R. 10 and U. P. Revenue Court Manual, Para. 1011-Appeal against rejection of judgment-debtor's objections by sales officer— Incompetency—Procedure to be followed by Commissioner.

An appeal against the rejection of the judg-ment-debtor's objections by the sales officer cannot be dismissed by the Commissioner on the ground that no appeal lies to him from the orders complained against under Para. 1011 of the U. P. Revenue Court Manual. He should only return the memorandum of appeal as required by 0.7, R. 10, C. P. Code. (Shirreff, S.M. and Sathe, J. M.) Sohan Lal v. Kedar Nath. 1942 O A. (Supp.) 249=1942 A W.R. (Rev.) 223=1942 O. W.N. (B.R.) 396=1942 R D. 485.

O. 7, R. 10, O. 41, R. 23, O. 43, R. 1 (u) and Ss. 104 and 115—Appellate order setting aside order for return of plaint for presentation to proper Court—If appealable—Revision.

An appellate order setting aside an order for return of plaint for presentation to proper Court and directing the Court to decide the suit according to law is not open to a further appeal. O. 41, R. 23, C. P. Code has no application to such an order inasmuch as that rule clearly refers to a decree of the lower Court upon a preliminary point against which an appeal is preferred and does not contemplate the case of an order, as distinguished from a decree under O 7, R. 10 of the C. P. Code. The order that the lower Court had C. P. Code. The order that the lower Court had jurisdiction is merely an interlocutory order which does not decide or terminate the suit and hence there is no room for the application of S. 115 of the C. P. Code. (Ghulam Hasan and Agarwala, JJ.) BHAGOLEY v. BALA DIN. 200 I.C. 512=15 R.O. 14=1942 O.A. 221=1942 A. W.R. (C.C.) 208=1942 O.W.N. 313=A.I.R. 1942 Oudh 370.

O. 7, R. 10-Applicability-Court holding that it has no jurisdiction-Procedure.

Where a Court holds that it has no jurisdiction to entertain the suit it should not dismiss the suit but should return the plaint for presentation in the proper Court. (Dhavle, Manohar Lall and Meredith, JJ.) ARJUN RAUTARA v. KRISHNA CHANDRA GAJPATI NARAYAN DEO. 21 Pat. 1= 198 I.C. 353=14 R.P. 420=8 B.R. 361=8 Cut. L.T. 53=A.I.R. 1942 Pat. 1 (F.B.). C. P. CODE (1908), O. 7, R. 10.

-O. 7, R. 10-Applicability-Some of the reliefs in plaint within the jurisdiction of Civil Court and some not-Procedure.

Where a plaint filed in a Civil Court raises issues some of which are within the jurisdiction of the Civil Court and the rest are within the jurisdiction of the Revenue Court, it is wrong to apply the provisions of R. 10 of O. 7, C. P. Code, in its entirety to the case. The Court might exercise its powers under O. 6, R. 16 and strike out those portions of the plaint which relate to issues not within its jurisdiction as tending to prejudice, embarrass or delay the fair trial of the part relating to issues within its jurisdiction and proceed to try the latter part alone. (Braund, J.)
LATU v. MAHA LAXMIBAI. I.L.R. (1942) All.
129=199 I.C. 748=14 R.A. 400=1941 A.W.R.
(Rev.) 1141=1941 O.A. (Supp.) 922=1941 A.
L.J. 713=A.I.R 1942 All. 130.

O.7, R. 10—Application—Civil Revision Petition in High Court—Application for return for presentation to the District Court as an appeal

-Competency—Ss. 107 (2) and 141.

A prayer for the return of a memorandum of Civil Revision Petition from the High Court for presentation of the same, as an appeal to the District Court on the ground that an appeal would lie to the latter Court, cannot be allowed. The provisions of O. 7, R. 13, read with S. 107 (2) and S. 141, C. P. Code, are not applicable to such a case. (Patanjali Sastri, J.) RAMA KURUP v. KUNHIPATHUMMA. 208 I.C. 353=16 R.M. 224=55 L.W. 425=1942 M.W.N. 508=A.I.R. 1942 Mad. 657 (2)=(1942) 2 M.L.J. 99.

O. 7, R. 10—Court returning plaint for presentation to proper Court—Power of such Court or of appellate Court to fix time within which plaint should be re-filed.

Where a Court returns a plaint for being presented to the proper Court under O. 7, R. 10, C. P. Code, neither such Court nor the appellate Court to which an appeal is filed from the order of that Court has power to fix a date or otherwise allow time within which the plaint is to be refiled. It is for the Court in which it is so presented to consider whether the plaint is within time, and whether, having regard to the provisions of the Limitation Act, the plaintiff is entitled to the deduction of any time in computing limitation, (Biswas and Roxburgh, JJ.) Surendra NATH v. JATINDRA NATH. 45 C.W.N. 524.

O. 7, R. 10—Institution of suit in Court of

higher grade—Order returning plaint after suit reaching certain stage involving considerable expenses—Revision. See C. P. Code, S. 15. 47 C. W.N. 720.

-O. 7, R. 10-Juritdiction-Order returning plaint-Condition precedent for payment of costs before presentation of plaint to proper Court— Power of Court to impose. See C. P. Code, S. 35 AND O. 7, R. 10. (1941) 2 M.L.J. 450.

O.7, R. 10—Order returning plaint for presentation to Court of lower grade—Latter Court, if may be directed to begin from stage.

reached in Court of higher grade.

Per Mukerjea, J.—When a plaint is filed in a new Court after being returned by another, it is a new suit to all intents and purposes, and not merely a continuation of the old one. The new Court, cannot, therefore, be directed to take up the suit from the stage at which it was left in the

Court returning the plaint, although the latter Court is of a higher grade. (Mukherjea and 

Court originally not having but subsequent by invested with jurisdiction—If ean return plaint for

presentation to itself.

Where at the time of the institution of a suit, a Court had no territorial jurisdiction to enter-tain it, but before it could pass an order under O.7, R. 10, C. P. Code, it acquired that jurisdic-tion by virtue of a Government notification it cannot thereafter pass an order un ler O. 7, R. 10. (Yorke and Ghulam Hasan, JJ.) ABBULLA KHAN v. TIRBHUAN DUTT SINGH, 16 Luck, 402=13 R.O. 265=191 I.C. 708=1941 A.W R. (C.C.) 3=1940 RD 590=1940 OW.N. 1212=1940 O.A. 1148=1941 O.L.R. 9=A.I.R. 1941 Oudh 161.

-O.7, R 10—Procedure—Suit against firm -Firm found to be non-existent-Return of plaint for presentation to proper Court on ground that detendant was an agriculturist— Propriety of. See C. P. Code O. 6, R. 17 and O. 7, R. 10. A.I.R. 1942 Sind 104.

-O. 7, R. 10 -Return of plaint-Representation to proper Court—Date of institution.

It a plaint is returned under R, 10, O. 7, C. P. Code, and is presented to another Court in the same condition in which it is returned, it must be deemed to have been instituted on the date on which it was originally filed in the deemed to have been instituted first Court and the date of institution does not alter with the change in the Court. (Harper, S. M. and Sathe, J. M.) GOBARDHAN SINGH v. SPECIAL MANAGER, COURT OF WARDS, MAHEWA ESTATES. 1941 O.W.N. 713=1941 O.A. (Supp.) 365 (2)=1941 R.D. 412=1941 A.W.R. (Rev.) 435=1941 A.L.J. (Supp.) 92.

—O. 7, R. 10—Return of plaint—When to be made and when not to be made. Mangia v. Sakia. [See O. D. 1936-'40, Vol. I, Col. 1486] I.L.R. (1941) Nag. 96=191 I.C. 200=13 R.N. 164,

O. 7, R 10—Second appeal against dismissal of appeal against order under, if lies. See C. P. Code, S. 104 and O. 43, R. 1. 1942 O.W.N. 494.

-O. 7, R. 10 (1)—Order returning plaint for presentation to particular Court-Legality.

Where the Court finds that the valuation of the subject-matter of the suit for the pirpose of jurisdiction is not made bona fide but in order to effect an improper purpose, the proper order to be made under O. 7, R. 10 (1), C. P. Code, is to direct the return of the plaint to the plaintiff for presentation to the Court in which the suit should be instituted after a proper valuation has been made. An order directing the return of the plaint for presentation to a particular Court is not a proper order. (Mya Bu and Sharpe, JJ.)

KHEM RAJ v. Durgi. 198 I.C. 673=14 R.P. 219=A.I.R. 1942 Rang. 10.

-O. 7, R. 11—Applicability—Application to AMRITSAR v. SOHAN LAL RAMJI DASS. (See O. D. 1936-'40, Vol. 1, Col. 3294.] I.L.R. (1941)
Lah. 652=191 I.C. 335=13 R.L. 286.

C. P. CODE (1908), O. 7, R. 11.

O. 7, R. 11—Applicability—Memoranda of

appeal.
O. 7, R. 11, C. P. Code, applies to memoranda of appeal. (Meredith, I.) GAJADHAR BHAGAT v. MOTI CHAND. 190 I.C 671=13 R.P. 265=7 B.R 126=22 Pat. L.T. 549=A.I.R. 1941 Pat. 108

-0.7. R 11-Applicability-Non-production of document under R. 1+-Rejection of plaint-Legality.

A Court has no power unler O 7, R. 11, to reject a plaint for failure to produce a document on which the plaintiff relies and which the Court directs him to produce under O. 7, R. 14. punishment for non-production of such a document is not the rejection of the plaint but that set out in R. 18 of O. 7 (Horwill, J.) Munuswamy Mudaliar v. Chengalvaraya Naicker. 210 I.C. 13=16 R.M 350=56 L.W. 396=1943 M W N. 436 (2)=A.I.R. 1943 Mad, 645 = (1943) 2 M L.J. 133.

-O. 7, R 11 -Applicability-Suit by one indeterminate body against another similar body

of the same community.

Where a suit is by one indeterminate body of one community against a similar body of the same community, and no attempt is made to explain to the Court the true position of the respective bodies, the plaint is bad and should be rejected under O 7, R 11, C. P. Code. (Davis.) ROOF CHAND v. ONKAR LAL. 1941 A.M.L.J. 15.

O. 7, R. 11—Costs—Appeal—Rejection for non-payment of additional Court-fee within time fixed—Costs of preliminory hearing in order for additional Court-tee—Right of respondent. See BOMBAY HIGH COURT RULES (A.S.), R. 130. 43 Bom. L.R. 475.

-O 7, R. 11—Dismissal of entire suit for non-payment of deficit Court-see when plaintiff abandons part of his claim - Legality. See C. P. CODE, O. 23, R. 1 AND O. 7, R. 11. (1945) 2 M. L.J. 473.

-O 7, R. 11 and O. 41, R 23—Order dismissing suit after deciting preliminary issue as to its maintainability—Nature of—Remand by

appllate Court for further proceedings—Appeal.

The trial Court framed the following two preliminary issuess:—(1) Has this Court jurisdiction to hear this action and grant the plaintiff the relief claimed against defendant No I. (2) Do not the allegations in the plaint disclose a cause of action? After deciding them it dismissed the suit with costs which were taxed on the ordinary scale applicable to the decision of the suit on the merits. On appeal by the plaintiff, the appellate Court remanded the case to the trial Court for further proceedings.

Held, that the trial Court dismissed the suit as being not maintainable and did not merely reject the plaint under O 7, R. 11, C. P. Code, and that consequently an appeal is competent against the remand order under O. 43, R. 1 (u). (Abdul Rashid, J.) ROYAL CALCUTTA TURF CLUB, CALCUTTA v. KISHEN CHAND 201 I.C. 619 =15 R. L. 53=44 P.L.R. 236=A.I.R. 1942 Lah. 179.

-O. 7, R. 11—Plaint not disclosing cause of action-Proper order.

If a plaint does not disclose a cause of action, the only legal order that can be passed in the

circumstances is one of rejection of plaint under O. 7, R. 11, and not of dismissal. The difference is obvious, as in case of rejection by virtue of R. 13 of the same order the plaintiff is not precluded from bringing a fresh suit on the same cause of action, and this highly prejudices the case of the plaintiff while in case of dismissal this course is not open to him. (Din Mohammad, J.) MUNILAL RAM CHAND v. KALAM SINCH. 210 I.C. 91=16 R.L. 151=45 P.L.R. 133=A,I.R. 1943 Lah. 121.

\_\_\_\_O. 7, R. 11—Power of Court—Suit under S. 15-D of Dekkhan Agriculturists' Relief Act— Valuation for Court-fee and juri-diction—Relief of plaintiff, See DFKKHAN AGRICULTURISTS' RELIEF ACT, S. 15-D. I.L.R. (1942) Kar. 488.

—O. 7, R. 11—Procedure—Failure to pay additional court-fee—Correct order to pass—

Dismissal of suit-Propriety

Under O. 7, R. 11, C. P. Code, where the plaintiff fails to pay the additional court-fee, required of him within the time fixed, the correct order is to reject the plaint and not to dismiss the suit, though there is very little difference between an order rejecting a plaint and an order dismissing the suit. (Davis, C. J. and Lobo, J.)
FAZILAT KHATUN v. RAHIM BUX. I.L.R. (1941)
Kar. 102=197 I.C. 590=14 R.S. 112=A.I.R. 1941 Sind 154.

O. 7, R. 11-Procedure-Order for payment of required Court-fee within specified time -Non-compliance-Proper order-Dismissal of suit-Propriety. See Court-Ffes Act, S. 7 (11) AND Sch. II, Art. 17 (vi). I.L.R. (1942) Kar. 424.

O. 7, R. 11—Return of plaint—When justi-

fied and when not.

When once a plaint has been presented, that is final and unless it is rejected or returned according to O. 7, R. 11, C. P. Code, it is to be immediately registered and a copy of it forwarded with notice to defendant. Return of plaint for without notice to defendants is not proper inasmuch as the defendant is denied any benefit that might accrue to him from the mistake of the plaintiff. (Davies.) Shiam Sunder v. Hari Kishen. 1940 A.M.L.J. 129.

O. 7, R. 11-Scope of Court's powers in

regard to improper valuation.
O. 7. R. 11, C. P. Code indicates that if a wrong or an arbitrary valuation is made by the plaintiff the Court can compel him to correct it on pain of dismissal of suit. But the Code does not afford any warrant for the Court itself to amend the valuation put upon the claim by the plaintiff. (Misra and Koul, JJ.) BHAGWATI PRASAD MISRA v. Dy. Commissioner of Barabanki. 1945 O.W. N 67=1945 A.W R. (C.C.) 50=1945 A.L.W. (C.C.) 67=1945 R D. 172=1945 O.A. (C.C.) 50 =A.I.R. 1945 Oudh 177.

O. 7, R. 11—Scope—Order dismissing suit against some defendants—Finding that suit cannot proceed against them for want of sanction of Provincial Governor—If decree— Plaint—If to be rejected as a whole. See C. P. Code, S. 115. 1941 P.W.N. 25.

-O. 7, R. 11-Scope-Suit for contribution -Prayer for relief against specified properties-Absence of prayer for personal decree—If bar to grant of personal decree.

#### C. P. CODE (1908), O. 8, R. 1.

It cannot be said that in a suit for contribution praying for relief against specified properties on which the plaintiffs claimed a lien, no personal decree can be given to the plaintiffs in the absence of a specific prayer therefor. Such a contention ignores the provisions of O. 7, R. 11, C. P. Code, under which a personal decree may be given on the analogy of a personal decree given in a suit in a mortgage. (Meredith and Shearer, JI) MUSAMMAT JAGPATI KUAR v. DAMI SAHU HALKHORI RAM. 20 Pat. 811=198 I.C. 521= 14 R.P. 460=8 B.R. 421=23 Pat. L.T. 588= A.I.R. 1942 Pat. 204.

-O. 7, R. 11 (a)—Applicability—Frivolous

suit-Inconsistent allegations.

Where the suit is a frivolous one based on inconsistent allegations, it could be dismissed under 0.7, R. 11 (a), C. P. Code. (Sathe, J. M.) Chhattardhari Ahir v. Ganesh Ahir. 1942 O. W.N. (B.R.) 287=1942 O.A. (Supp.) 195=1942 R.D. 376=1942 A.W.R. (Rev.) 175.

- O. 7, R. 11 (c)-Power to reject plaint or

memorandum of appeal after admission. See Court-Fees Act, Ss. 5 and 28. 21 Pat. 720.

O. 7, R. 13—Applicability—Rejection of plaint under R. 11 of O. 7—Application under Ss. 149 and 151, C. P. Code, to accept deficit court-

fee and restore suit.

Where after the rejection of a plaint under R. 11 of O. 7, C. P. Code, the plaintiff files an application under Ss. 149 and 151, C. P. Code, asking the Court to accept the deficit Court-fee and restore the suit to its original number, there is no bar to the Court treating it as a fresh plaint under R. 13 of O. 7 even though there was no such specific prayer in the application. (Thomas. C. J. and Ghulam Hasan, J.) MUNSHI RAM v, The Sun I IFE Assurance Company of Cana-DA. 20 Luck. 268=1944 O.W.N. 336=1944 O. A. (C.C.) 228=1944 A.W.R. (C.C.) 228=A.I. R. 1944 Oudh 327.

O 7, R. 14—Non-compliance - Rejection of plaint—Legality. See C. P. Code, O. 7, R. 11. (1943) 2 M.L.J. 133.

O. 7, R. 14 (2)—Documents included in list annexed to plaint—If part of plaint.

Obiter: The list of documents mentioned in

O. 7, R. 14 (2), should be treated as part of the plaint. (Beckett, J.) JANKIDAS v. KHUSHALYA Drvi. 209 I.C. 349=45 P.L.R. 217=A.I.R. Drvi. 209 1.0 1943 Lah. 207.

-O. 8, Rr. 1 and 10-Failure to file written statement on the date of first hearing-Discretion

of Court—How to be exercised.

The policy of the law is not to dispose of a case on mere technicalities but decide it as far as possible on merits after hearing parties. Hence though a Court would be within its rights in permitting or not permitting the written statement to be filed, when the party had failed to so file it on the day of the first hearing, the discretion should be exercised judicially. (Sathe, S. M. and Ross, A. M.) HAR CHARAN v. RAI RAM KISHORE. 1943 R.D. 537=1943 A.W.R. (Rev.) 324=1944 A.L.J. (Supp.) 17.

document—Duty of defendants—Production on day of hearing—Rejection—Propriety.
According to O. 8, R. 1 (2) (Oudh) it is the

bounden duty of the defendants to file a list of

the documents to be relied upon on the date of the written statement and to summon the documents, at any rate for the date of issues. If they are unable to procure the documents by that date they could ask leave of the Court to produce them at a later stage. Not doing any of these things where a defendant seeks to file two documents on the date fixed for evidence, the trial Court has perfect discretion to disallow the production of those documents. (Ghulam Hasan, J.) MATA DIN v. IMPAD KHAN. 1941 O.A. 886 = 1941 O.L.R. 839=197 I.C. 158=14 R.O. 266 = 1941 A.W.R. (Rev.) 1005=1941 O.W.N. 1179=A.I.R. 1942 Oudh 145.

O. 8, R. 2—Scope—If controls O. 6, R. 6. See C. P. Code, O, 6, R. 6. A.I.R. 1944 Pat. 77.
O. 8, R. 5—Applicability—Admission of execution of bond for a particular sum on taking accounts

The admission by the defendant in the suit that he executed a bond for certain sum on certain date on taking accounts and that he agreed to pay the amount on certain date, is an express admission which will not fall under O. 8, R. 5, C. P. Code. This is an example of an express admission. (Stone, C. J. and Vivian Bose, J.) UDHAO NANAJI v. NARAYAN VITHOBA. 194 I.C. 120=13 R.N. 356=1941 N.L.J. 134=A.I.R. 1941 Nag. 95.

—O. 8, R. 5—Applicability—Defendant not filing written statement.

Obiter.—O. 8, R. 5, does not apply to a case where the defendant has not put in a written statement. (Davies, C. J. and O'Sullivan, J.) MT. HAVA v. LOKUMAL SOBHRAJ. I.L.R. (1943) Kar. 420=212 I.C. 56=16 R.S. 270=A.I.R. 1944 Sind 61.

—Statement, that allegation needs no reply.

A mere averment in the written statement that an allegation in the plaint needs no reply cannot be a denial by necessary implication of such fact. (Roberts, C.J. and Dunkley, J.) U LUN v. U CHIT HLAING. 1941 Rang.L.R. 101=193 I.C. 114=13 R.R. 228=4 P.L.J. (H.C.) 114=A.I. R. 1941 Rang. 49.

Malabar Compensation for Tenants' Improvements Act, S. 6 (2)—Suit for redemption of Kanom—Decree for arrears of rent in favour of landlord getting barred by limitation—Right to set-off against value of improvements due to tenant. See Malabar Compensation for Tenants' Improvements Act, S. 6 (2). (1942) 1 M. L.J. 166.

To be fulfilled. GIRDHARILAL V. SURAJMAL. [See Q. D. 1936-40 Vol. I, Col. 1496]. I.L.R. (1941) Nag. 753.

Of Court. GIRDHARILAL v. SURAJMAL. [See Q.D. 1936-'40, Vol. I, Co. 1496.] I.L.R. (1941) Nag. 753.

—O. 8, R. 6—Equitable set-off or payment—

Where in a suit for arrears of royalty due under a mining lease, the defendant raises a plea that the plaintiff in fact had been paid all the royalty due by adjustments of over-nauments

C. P. CODE (1908), O. 8, R. 6.

paid by him under a mistake and that the defendant is entitled equitably to set-off those overpayments against the royalty due and to become due, though it cannot be said that the defendant is altempting to set up a right to set off under O. 2, R. 2, C. P. Code, it must be held that there is raised a plea of equitable set-off or payment which can and ought to be considered by the Court. (Harries, C. J. and Manohar Lall. J.) Shiva Prarad Singh v. Sris Chandra Nandr. 22 Pat. 220=210 I.C. 426=16 R.P. 147=10 B. R. 259=A.I.R. 1943 Pat. 327.

—O. 8, R. 6—Equitable set-off—Permissibility—Set-off on basis of agreement—Limits.

It is well settled that the provisions of O, 8,

It is well settled that the provisions of 0. 8. R. 6, C.P. Code, are not exhaustive because apart from a legal set-off expressly provided in regard to an ascertained sum of money legally recoverable by the defendant from the plaintiff, an equitable set-off may also be pleaded in the Indian Courts if the defendant's claim is shown to have arisen from the same transaction as the plaintiff's claim. Where set-off is claimed on the basis of an agreement, no set-off can be allowed outside the terms of the agreement which the Court finds to be proved. The question of set-off can arise only in regard to dues which are outstanding and have not been adjusted in the past. (Fast Ali and Chatterji, JI.) Shiva Prasad Singh v. Lalit Kishore Mitra 22 Pat. 5=206 I.C. 401=15 R.P. 331=9 B.R. 316=A.I.R. 1943 Pat. 152.

——O. 8, R. 6—Right to set-off—Suit by receiver appointed ünder S. 69-A, T. P. Act—Prior debt due to defendant from mortgagor—If can be set-off.

If the defendant is sued by the agent he cannot set-off a debt due from the principal, unless it can be shown that the agent has assented to such a set-off. A receiver appointed under S. 69-A of the T. P. Act is an agent of the mortgagor, and if he sues the defendant to recover a sum of money on the basis of a new contract entered into by him, the defendant cannot seek to set-off against the plaintiff's claim a debt incurred by the mortgagor prior to the date of his appointment. Such a debt is not legally recoverable by the defendant from the plaintiff-it is recoverable from the plaintiff's principal who is not a party to the suit. (Derbyshire, C. J. and Mukherjea, J.) Banerjee & Co. v. Wilfered John Younie. 195 I.C. 141=14 R.C. 50=45 C.W.N. 169=A.I.R. 1941 Cal. 308.

——O. 8, R. 6—Scope—Defendant pleading set-off—Position of—If bound by O. 2. R. 2. See C. P. CODE, O. 2, R. 2. (1942) 2 M.L.J. 43.

— O. 8, R. 6—Scope—Suit by landlord for rent—Counter-claim by defendant-tenant for damages for dispossession—Propriety—Failure to pay Court-fee on counter-claim—Right of defendant to relief. Jowala Prasad v. Harihar Prasad. [See Q.D. 1936-'40, Vol. I Col. 3294.] 192 I.C. 776—7 B.R. 490—13 R.P. 523—A.I.R. 1941 Pat. 106.

O.8, R. 6—Set-off and counter-claim— Distinction—Defendant's claim not barred at date of suit but barred at date of written statement—If can be set up.

If the claim set up by the defendant is in rescat of an ascertained sum of money which is

#### C. P. CODE (1908) O.8, R. 6.

less than or equal to the plaintiff's claim in the suit, it is a plea of set off pure and simple, but if it exceeds the plaintiff's claim it is to the extent of the excess a cross claim, for, for the excess he is to be given a decree against the plaintiff in the same action. By the terms of O. 8, R. 6, C. P. Code, the claim must be legally recoverable, that is, must not be a dead claim. If the defendant does not claim a sum in excess of the plaintiff's claim, on principle the relevant enquiry would be whether it was a dead claim at the date of the plaintiff's suit. Where however the defendant pleads for a sum of money which is in excess of the plaintiff's claim, he occupies to the extent of the excess the position of a plaintiff in a cross suit, and in such a case and for the excess amount time is to be reckoned not from the date of the plaintiff's suit but from the date when he filed his written statement. (Mitter and Khundkar, Jl.)
HARENDRA NATH CHAUDHURY v. SOURINDRA NATH.
I.L.R. (1942) 2 Cal. 485—15 R.C. 418—76 C.L. J. 396=203 I.C. 336=46 C.W.N. 882=A.I.R. 1942 Cal. 559.

-O. 8, R. 6 and O. 20, R. 19-Set-off-Court-fee payable-Equitable set-off-Nature of. In suits other than money suits, no matter what sort of set-off or counter claim is made, either the written statement will take the form of a suit for

accounts or no matter what other form it may take

it must be accurately assessed by the defendant and thereon an ad valorem court-fee will be payable. In money suits according to R. 6 of O 8, C. P. Code, only an ascertained sum may be set-off. In such suits the written statement is precluded from taking the form of a suit for accounts or from taking any form whatever except that of a claim for an ascertained sum to be credited to the defendant. The court-fee will be payable ad

valorem on the ascertained sum claimed and the defendant will be precluded from obtaining any greater amount in the decree. In Indian law no such thing as equitable set-off exists. It is only a legal fiction. (Davies.) BEGUM BIBI v. ONKAR 1945 A. M.L.J. 16. LAL.

O. 8, R. 6 and Court Fees Act, Sch. I, Art. 1—Set-off—Payment of Court-fee—Necessity—Amount. GIRDHARI LAL v. SURAJMAL. [See Q. D. 1936-'40, Vol. I, Col. 1499.] I.L.R. (1941) Nag. 753.

O. 8, R. 6—Set-off and counter-Claim— Withdrawal of plaint-Effect.

In the case of a regular set-off, such as is con-templated by O, 8, R. 6, C. P. Code, if the plaintiff's claim breaks down for any reason including withdrawal then the defendant would be entitled to have his set-off considered by the same Court and he could be given a decree for a set-off in the same suit, but where his claim is not a regular set-off but is a counter-claim, then, if the counterclaim lies in the Small Cause Court he cannot agitate it in the regular Court. (Clarke, J.)
JAMNABAS v. BFHARILAL. 196 I.C. 544=14 R N.
110=1941 N.L.J. 382=A.I.R. 1941 Nag. 258.

O. 8, R. 6—Set-off under and set-off in liquidation proceedings—Difference between. See Company-Winding up-Set-off. 1941 O. W.N. 548.

-O. 8, R. 10-Applicability-Failure to file written statement as required by R. 1-Order under R. 10-Legality.

#### C. P. CODE (1908), O. 9, R. 2.

O. 8, R. 10, C. P. Code, applies only to some default of a party under R. 9, an order under R. 10, cannot be passed if a defendant fails to file a written statement when required to do so under R. 1 of O. 8. (King and Bell, JJ.) NAGARATH-NAM PILLAI v. KAMALATHAMMAL. 58 L.W. 179 = 1945 M.W.N. 225=A.I.R. 1945 Mad. 299= (1945) 1 M.L.J. 394.

-O. 8, R. 10, O. 15, R. 1 and O. 17, R. 2-Summons giving a date for filing written statement and a later date for settlement of issues-Defendant neither appearing nor filing written statement on the date fixed for it—Ex parte decree—Legality—Applicability of O. 8, R. 10, O. 15, R. 1 and O. 17, R. 2.

The summons issued to the defendants fixed the 25th Eebruary for filing the written statement and the 5th of March for the settlement and framing of issues. The defendants did neither appear on the 25th February nor file the written statement. The suit was decreed ex parte on the 28th February. On an application to set aside the exparte decree on the 5th of March,

Held, that the defendants were not compelled to file a written statement as they were not definitely directed to do so by the Court. In the circumstances the defendants were not bound to appear on the 25th of February. The Court was not entitled to pass a decree against the defendants on the 28th February. None of the provisions of R. 10 of O. 8, R, 1 of O. 15 and R. 2 of O. 17, C. P. Code, apply to the case. (Allsop and Malik, JI.) RAM RAKHAN v. GOVIND DAS. I.L. R. (1945) All. 499=1945 O W.N. (H.C.) 176=1945 A.L.J. 245=1945 A.W.R. (H.C.) 186=1945 A.L.W. 191=A.I.R. 1945 All. 352.

-O. 9—Applicability—Execution proceedings -Power of Collector to dismiss such proceedings in default.

There is no specific provision of law authorising a Collector to dismiss execution proceedings in default. O. 9 does not apply to such proceedings. (Binney, F.C.) KALKA PRASAD v. Mt. SAHIDABI. 1943 N.L J. 509.

\_\_\_\_O. 9 and S. 151—Restoration of execution application dismissed for default after fresh ap-

plication is barred-Powers of Court.

Although O. 9, C. P. Code, does not govern execution proceedings, the Court has jurisdiction to restore an execution application dismissed for default under its inherent powers, even though a fresh application has become time barred. (Thomas, C.J. and Ghulam Hasan, J.) BAJRANG Tresn application has become time barred. (Thomas, C.J. and Ghulam Hasan, J.) BAJRANG BAHADUR SINGH v. SURAJ NARAIN SINGH. 20 Luck, 317=1945 O.W.N. 224=1945 A L.W. (C. C.) 209=1945 A.W.R. (C.C.) 102=1945 O.A. (C.C.) 102=A.I.R 1945 Oudh 210.

-O. 9, R. 2-Powers of Court-Plaintiff not depositing full process-fee for service on all defendants-Court, if bound to serve some defendants only with process-fee at its disposal—Defendants not served and absent on date fixed for hearing— Dismissal of suit—If without jurisdiction.

If a plaintiff does deposit sufficient processfees for service on all the defendants and fails to deposit the balance of fee before the date fixed for the hearing of the suit, the Court will be justified in dismissing the suit for default. The fact that the defendants are not present on the date of hearing makes no difference, because

their absence is due to the non-payment of the process-fee. It is not open to the plaintiff to contend that the Court should serve at least the defendants for whose service the money paid will be sufficient. If the plaintiff wishes the Court to issue process to some of them he must specify which of them he desires to serve. It is not for the Court to decide which of the defendants are to be served, because the plaintiff must afterwards complain that the Court had exercised an unwise discretion by serving unsubstantial defendants and omitting to serve notice on substantial defendants. The plaintiff cannot be allowed to put the Court in such a position. (Agarwala, J.)
BHUNESHWARI KUER v. SAMA KUER. 194 I.C. 47
=13 R.P. 650=7 B.R. 678=A.I.R. 1941 Pat. 402.

— O. 9, R. 3—Applicability—Date fixed for proof of service—No steps taken and plaintiff failing to appear — Dismissal for default—

Legality.

O. 9, R. 3, C. P. Code, has no application unless a date has been fixed for the appearance of the defendant and neither party appears when the suit is called on for hearing. Where a date is fixed merely for proof of service on the defen-dant if the proof is not forthcoming on the date so fixed, an order dismissing the suit on that date for default on the ground that the plaintiff does not appear and has not taken steps, is illegal. (Varma and Rowland, JJ.) RAM RANEIJAYA PRASAD SINGH v. SAKALPAT TEWARY. 196 I.C. 592=14 R.P. 212=8 B.R. 45=22 Pat.L.T. 952 =A.I.R. 1942 Pat. 56.

O 9, Rr. 3 and 5-Applicability-"Hearing"—Meaning of—Summons returned as served
—Plaintiff ordered to prove service and to file
registered cards by a certain date—Failure to
comply—Plaintiff absent when suit called on—

Dismissal for default-Propriety.

The word "hearing" in R. 3 of O. 9, C. P. Code, cannot be read as meaning hearing of the evidence in the case. It is used to indicate that when a summons has been issued upon the defendant calling upon him to appear on a particular date, if the parties fail to appear when the suit is called on for hearing on that date, the plaintiff's suit is subject to dismissal for default. Summons were issued to the defendants in a suit fixing 17-7-1940 for settlement of issues, By that date the summons had been returned as served and the plaintiff was called upon to prove service and to file registered cards by 29-7-1940. On that date the plaintiff filed hazri but did not comply with the order of 15—7—1940. He was directed to comply with that order by 1—8—1940 positively. On that date the case was called out, but the plaintiff did not appear and no steps were taken on his behalf. The suit was then dismissed for default. It was contended that the Court should have proceeded under O. 9, R. 5.

Held. (1) that R.5 of O.9 applied only when summons had been returned as unserved and as in this case the summons had been returned as served, R.5 had no application; (2) that as neither of the parties were present, the conditions requisite for an order under O. 9, R. 3 were present and the suit was rightly dismissed for default, (Agarwal, I.) RAM RAN BIJAYA PD. SINGH v. ACHAIYA KUMAR TEWARI. 22 Pat.L.T,

950.

C. P. CODE (1908), O. 9, R. 5.

-O. 9, Rr. 3 and 1-Dismissal of suit for default-When can be made.

A suit cannot be dismissed for default unless and until a date was fixed for the appearance of the defendant and the plaintiff did not appear on that date. (Mir Ahmad, J.) MT. HAMIDAN v. MT. SHARIFAN. 207 I.C. 174=16 R. Pesh. 1 =A.I.R. 1943 Pesh. 51.

ouit under O. 9, R. 3 and O. 22, R. 4-Dismissal of suit under O. 9, R. 3-Death of defendant prior to-Restoration and substitution-Time for.

Where after a suit was dismissed under 0.9, R 3, it was found that the defendant had died a day earlier and application for restoration and substitution was made more than 30 days after the dismissal but within 90 days of the death of the defendant and it was allowed in the lower Court, held, that in the circumstances of the case there was no reason to interfere in revision with the order passed. (Shirreff, J.M.) UMMAT-UL-HABIR BEGUM v. IMTIAZ BEGAM. 1941 O.A. (Supp.) 609=1941 R.D. 662 (2)=1941 A.W.R. (Rev.) 669.

- O. 9, Rr. 3 and 4 and S. 151-Suit stayed under S. 10 C. P. Code-Neither party appearing on date subsequently fixed-Order dismissing suit -Application for its revival-Remedy of ptaintiff.

If a Court has made an order under S. 10, C. P. Code, staying the proceedings in a suit. it has no jurisdiction to fix further dates for the hearing of the suit unless moved to do so by either party. If therefore neither party appears on adate subsequently fixed, the Court cannot dismiss the suit under O. 9; R. 3, C. P. Code. The remedy of the plaintiff to revive the suit is, therefore, not by an application under O. 9, R 4, but under S. 151, C. P. Code. (Bobde, J.) GOVERDHAN v. HEMPAJ SINGH. I.L. R. (1944) Nag. 408=
1944 N.L.J. 354=A.I.R. 1944 Nag. 335.

O. 9, R. 4—Restoration of suit—Notice of hearing of suit—If should be given to defendant

—Ex parts decree bassed against him. Particles

-Ex parte decree passed against him-Revision

-Limitation.

Although a defendant is not entitled as of right to a notice of an application for restoration of the suit made by the plaintiff under O. 9, R. 4, C. P. Code, it is but equitable to hold that if such an application is made and allowed, the Court should fix the case for hearing parties and give notice of the hearing to the defendant, and not proceed ex parte against him. If however, the Court proceeds ex parte against the defendant and pass a decree against him, an application in revision filed by him within time from the date of his knowledge of such decree is not barred by time, atthough it is long after the date of the decree. (Puranik. J.) RAMCHANDRA v. SARADEO. I.L.R. (1945) Nag. 312=1945 N.L. J. 156=A.I.R. 1945 Nag. 185.

O. 41, C. P. Code, provides so complete a Code to govern appeals in the matter of payment of charges for notices to respondents and the consequences for any default therein, that not only is recourse to O. 9, R. 5 unnecessary but it is by implication excluded in the case of appeals. (Braund, I.) RATAN LAL v. ZAHOOR-UL-HASAN. 1942 A.L.W. 56.

-O. 9, R. 5-Applicability-Summons returned served-Plaintiff failing to comply with

order requiring him to prove service and to file registered cards by date of hearing—Procedure—Dismissal for default—If justified See C. P. CODE, O. 9, RR 3 AND 5. 22 Pat. L.T. 950.

- O. 9, Rr. 6 and 8-Calling of the case and disposal in the absence of parties-Proper procedure.

When a case is called on in its turn and all the parties are not present, it should be put aside for sometime and then called on again, though there is no legal obligation to do so. If then a party fails to appear, an order may be passed ex parte against him without waiting till it (the Cour rises for the day. (Sathe, S.M. and Dible, J.M.) BHORE v. MAHOMED ALI KHAN. 1944 R.D. 364 =1944 A.W R. (Rev.) 181.

—O. 9, Rr. 6, 7—Decision to proceed exparte—Effect—Defendant if can appear at sub-

sequent stage.

Where the Court decides to proceed ex parte under O. 9, R. 6, it means that it proceeds ex parte not for the rest of the suit but only until the defendant re-appears. (Pollock. J) DEVIDAS GANPATRAO 7. SUNDERIAL I.L.R. (1944) Nag. 442=211 I.C. 377=16 R.N. 199=1944 N.L.J. 142=A.I.R. 1944 Nag. 77.

-O. 9, R. 7—Applicability—Defendant declared ex parte and case adjourned for evidence -Application on adjourned date to set aside exparte proceedings-Duty of Court.

Where after declaring a defendant ex parte the case is adjourned for evidence the defendant applies on the adjourned date to set aside the ex parte proceedings, the case is governed by O. 9, R. 7, and the Court is bound to give the applicant an opportunity to support his contentions There is no reason why a defendant should ordinarily not be allowed to take part in the proceedings of pending case from the stage at which he puts in his appearance. (Shirreff, S.M. and Sathe, J.M.) RAM SARUP SINGH V. MAHABIR SINGH. 1942 R.D. 722=1942 A.W. R. (Rev.) 395 (2)=1942 O.W.N. (B.R.) 594= 1942 O.A. (Supp.) 42 (2).

—0. 9, R. 7—Applicability—Soldier defendant declared ex parte—Right to intervene and defend suit thereafter—Conditions—Suspension of proceedings—When to be ordered—Soldiers Litigation Act, Ss. 6 and 10.

A defendant who has made default in appearance and against whom the Court has decided to proceed ex parte is not entitled to appear and defend the suit at any subsequent time (before suit) as of right and without assigning good cause. The fact that he is a soldier serving in the Army, makes no difference. The position is the same both under O, 9, R. 7, C. P. Code and under S. 10, Indian Soldiers Litigation Act. The words of O. 9, R. 7 are unequivocal and make it plain that the only circumstance in which a defendant who has omitted to obey the summons can be heard in answer to the suit is when he appears and assigns good cause for his previous non-appearance. A soldier defendant who has been declared ex parte cannot also succeed in obtaining suspension of proceedings under S. 6 of the Indian Soldiers Litigation Act, while the

#### C. P. CODE (1908), O. 9, R. 6.

defendant in the proceedings is "merely of a formal nature" within the meaning of the second part of proviso (b) to S. 6, and therefore the Court will not suspend the proceedings under S. 6. It is always a serious step to suspend litigation indefinitely and the Act is designed to ensure that a suit shall not be held up unless justice really requires it. (O'Sullivan, J.) HARIRAM v. PRIBHDAS. I.L.R. (1945) Kar. 1= A.I.R. 1945 Sind 98.

-O. 9, R. 8—Dismissal for default of transferred cases-Duty of transferring Court.

If a case is transferred during the course of the day, from the principal Court to the extra Court, the fact must be announced in the original Court and if names are called out, they should be called out by the Court peon of the Court from which the case has been transferred. It is obviously necessary to take great care in this connection for parties can hardly expect that their cases will be transferred without warning. Where such a procedure is not followed an order of dismissal for default by the transferee Court is liable to be set aside. (Davies, C.J.) ABDUL RASHID v. NASIRABAD URBAN BANK, LTD. 1943 A.M.L.J. 62.

-O. 9, R. 8-Non-appearance of plaintiff-Day fixed for written statement—Dismissal if justified.

On the date fixed for the filing of written statement there is no necessity for the plaintiff to be present. A dismissal for his absence on that date is illegal (Davies.) BISAL SINGH v. BAJ MAL. 1941 A.M.L.J.39.

9, R. 9-Applicability - Appeal-Pleader for appellant absent—Procedure—Dismissal for default=Presence of party—Effect.

Where the pleader authorized to appear for the appellant in an appeal is absent, the Court is bound to treat the appeal as one in which the appellant is absent, though he may be physically present in Court and to dismiss it for default. The appeal cannot be disposed of on the merits in such a case. (Horwill, J.) China Basava Satyanarayana v. H. R. E. Board Madras. 1945 M.W.N. 328—58 L.W. 297—A.I.R. 1945 Mad. 300=(1945) 1 M.L J. 331.

O. 9, R. 9—Applicability—Application for probate of will—Dismissal for default—Remedy.
The provisions of O. 9, R. 9 have no application to the case of an application for grant of probate of a will. The dismissal of such application for default cannot debar a second application tor probate. (Harries, C. J. and Manohar Lal, J.) Gorak Ahir v. Jamuna Ahir. 22 Pat. 273=208 I.C. 536=16 R.P. 73=24 P.L.T. 221=10 B.R. 73=A.I.R. 1943 Pat. 281.

onder O. 21, R. 100-Dismissal for default-Application for restoration—Competency.
O. 9, R. 9. C. P. Code, is not inapplicable to pro-

ceedings under O. 21, R. 100; hence an application under O. 9, R. 9 does lie in respect of order dismissing applications under O. 21, R. 100, C. P. Code, for default. (Varma and Imam. II.) Gupteswar Chandra Deo v. Narasimham. 219. I.C. 30=18 R.P. 11= B.R. 343=26 P. L. T. 42=Cut.L.T. 84=A.I.R. 1945 Pat. 132. 219

ex parte order is in force. So long as the ex and order order is in force, the interest of the soldier under S. 73, Madras Village Courts Act—Dis-

missal for default due to absence of pleader for applicant—Restoration—Remedy of applicant— Refusal to adjourn case for short time to enable pleader to appear—Revision—C. P. Code, S, 115.
There is no provision in the Madras Village
Courts Act or in the C. P. Code for the restorration of petition under S. 73 of the former Act which are dismissed for default. O.9, R. 9, C.P. Code, does not apply to proceedings under the Village Courts Act and S. 141, C.P. Code, cannot be invoked in order to enable an applicant to avail himself of the remedy under 0, 9, R. 9, C. P. Code. Where an adjournment of a petition under S. 73 so as to enable the petitioner's pleader to be present is refused and the petition is dismissed for default, such a refusal will be an error in the exercise of jurisdiction and the order of dismissal may be interfered with by the High Court under S. 115, C. P. Code. SOMANNA v. CHINNAYYA. (Byers, J.)1945 Mad. 107=(1944) 2 M.L.J. 390 (2).

—O. 9, R. 9—Applicability—Civil Revision Petition—Dismissal for default—Jurisdiction to restore S. 151.

The High Court has no jurisdiction to restore to the file Civil Revision Petitions which have been dismissed for default of appearance. O.9. R. 9. C. P. Code, does not apply to Civil Revision Petitions; nor does S. 151, C. P. Code, confer upon the Court the power to exercise a jurisdiction which it does not otherwise possess. (Byers, J.) RAMAMURTHI IYER v. MEENAKSHISUNDARAM-MAL. 57 L.W. 616=A.I.R. 1945 Mad. 103= (1945) 1 M.L.J.4.

O. 9. R. 9-Applicability-Dismissal on report of no instructions by plaintiff's counsel on refusal of a further adjournment on the adjourned date. See C. P. Code, O 17, Rr. 2 and 3 and O. 9, R. 9 (All.). 1943 A.L.W. 500.

— O. 9, R. 9—Applicability—Execution petition dismissed for default—Power of Court to restore—Inherent powers under S. 151—Restoration without notice to judgment-debtor-Legality

-Revision-Interference.

A Court has no power under O. 9, C. P. Code, to restore an execution petition which has been dismissed for detault of the decree-holder in remedying the defects as ordered by the Court. Nor can the inherent power of the Court under S. 151, C. P. Code, be utilised for this purpose. The proper remedy of the decreeholder in such a case is to file a fresh execution application within the period of limitation or to apply for review. Even in the case of a review notice has to go to the judgment-debtor. The Court has no jurisdiction at all to restore the application without notice to the judgment-debtor. If it does so, it acts legally in the exercise of its jurisdiction and the High Court can interfere in revision. (Agarwala, J.) RAJ KISHORE PD. NARAIN SINGH v. MOJIBUL RAHMAN. 22 Pat.L.T. 965.

-O 9, R. 9 and S, 151-Applicability-Execution application dismissed for default-Sufficient cause should be shown for restoration.

Where an execution application is dismissed for default and a fresh application is made under S. 151 for its restoration, sufficient cause must be shown before it could be ordered. (Davies.)
PARAS RAM v, GANESHI LAL. 1944 A.M.L.J. 43.

C. P. CODE (1908), O. 9, R. 9.

-O. 9, R. 9-Applicability-Plaintiff's vakil reporting "no instructions" after case was passed over-Plaintiff not taking part in proceedings-Dismissal—If one for default—Application for restoration—Competency. See C. P. Code, O. 17, Rr. 2 And 3. (1943) 2 M.LJ. 350.

O. 9, R.9 and S. 115—Application for restoration dismissed for default—Application made for setting aside that dismissal—Court taking into account merits of previous application -Revision.

Where an application under O. 9, R. 9, C. P. Code for restoration of a suit dismissed for default is also dismissed for default, and an application is then made for setting aside that dismissal, the Court acts with material irregularity in exercising its jurisdiction if in considering that application it takes into account the merits of the previous application under O. 9, R. 9. If on the facts and circumstances which the lower Court has itself accepted there is sufficient cause for non-appearance, the High Court in revision has the power to set aside the order dismissing the application for restoration. (Bobde, J.)
PREMSHANKAR DAVE 2. RAMPYARELAL. I.L.R.
(1944) Nag. 558=1944 N.L.J. 269=A.I.R. 1944 Nag. 317.

O. 9, R. 9—Application under O. 21, R. 13 —Dismissal on failure to satisfy condition imposed—Subsequent application to restore prior application—Competency—Dismissal—Appeal against order of dismissal—Competency—C. P. Code, O. 43, R. I. See Venkatachariar v. Faizuddeen Sahib. [Q D., 1936-'40 Vol. I, Col. 1509.] A.I.R. 1941 Mad. 17.

-O. 9, R. 9-Cause of action-Meaning-Dismissal of suit for ejectment for default-If

bars subsequent suit for arrears of rent

'Cause of action' means the whole bundle of material facts necessary to maintain a suit. The dismissal of a suit for ejectment for default cannot bar a subsequent suit for arrears of rent though the issue whether the defendants were sub-tenants of the plaintiff was common to both the suits. The cause of action is different in the two suits. (Shirreff, S. M. and Sathe, J. M.) SHEO HARAKH v. DWARIKA KURMI. 1942 A.W. R. (Rev.) 329=1942 O.A. (Supp.) 355=1942 O.W.N. (B.R.) 541.

-O. 9, R. 9-Dismissal for default-Procedure to be followed.

It is not right to say that orders of dismissal in default should not be passed till the end of the day when the Court rises when only there can be a default. Litigants are ordinarily required to attend the Court at 10 A.M. and when they fail to do so without sufficient cause, there is no reason why they should not be penalised. To reason why they should not be penalised. To allow them to attend at any time of the day before the Court rises, might make it impossible to carry on the work of the Court properly, by putting it in the power of litigants to obstruct it. (Bennett and Agarwal, JJ.) BAIJNATH v. IQIIDAR FAIJMA 17 Luck. 243=1941 O.W.N. 1045=1941 A.W.R. (Rev.) 775=196 I.C. 257=1941 O.L.R. 664=14 R.O. 145=1941 R.D. 796=1941 O.A. 743=A.I.R. 1942 Oudh 75.

-O. 9, R. 9 and S. 151—Dismissal in default When should be ordered—Dismissal early in the

#### C.P. CODE (1908), O.9, R.9.

day and under misapprehension—Restoration under inherent powers. BADRI PRASAD v. AMBIKA PRASAD. [Q.D., 1916-'40 Vol. I, Col. 3294.] 16 Luck 294=13 R.O. 349=192 I.C. 332=1941 O. L.R 115=A.I.R. 1941 Oudh 91.

O. 9, R. 9-Dismissal of application for certification of payment for default-Fresh application-If can be treated as a restoration appli-

Where on an application for certification of payment being dismissed for default a fresh application is filed in which the reasons for absence on the prior occasion are also given, the latter can be treated as an application for restoration of the prior application dismissed for default. (Sinha, J.) BHAGWAN RAM V. RAM JIWAN. I.L.R (1944) All. 599=1944 A.L.W. 325=1944 O.A. (H.C.) 136=1944 A.L.J. 437= 1944 A.W.R. (H.C.) 136.

-O. 9, R. 9 and O. 43-Dismissal of application to set aside order of dismissal for default, of rent suits—Applicability—Madras Estates Land Act (I of 1908), Ss. 189 and 192 (as amended)— Scope and applicability.

A batch of rent suits was dismissed both on the ground that the plaintiff had not taken out process to the defendants and also on the ground that neither the plaintiff nor his pleader was present. An application to set aside that order was dismissed. On the question of appealability

of the order,

Held, the wording of the Madras Estates Land Act, S. 192 (as amended) does not suggest that the provisions of the C. P. Code can be applied only with regard to purely procedural matters and there is nothing in that section even when read with S. 189 which suggest that an application under O. 9, of the Code would be precluded. Accordingly an appeal would lie from the order dismissing the application to set a side the order of dismissal. (Horwill. J.) VENKATARAMIAH CHETTI. v. VENKATASWAMI CHETTI. I.L.R. (1943) Mad 732=209 I.C. 600=1943 M.W N 40=56 L.W. 89=A.I.R. 1943 Mad. 387= (1943) 1 M.L.J. 80,

-O. 9, R. 9—Pauper application—Dismissal

for default-Restoration-Grounds.

When an application to sue as pauper is dismissed for default and an application for restoration is made on the same day and it is shown that the applicant was present in Court that day, that the applicant when case called, restoration of the application is justified. (Bennett and Ghulam Hasan, JJ.) BAIJNATH v. RAM NARAIN. 194 I. C. 354=13 R.O. 587=1941 O.L.R. 448=1941 A.W.R. (C.C.) 170=1941 O.W.N. 678=1941 O.A. 427=A.I.R. 1941 Oudh 367.

—O. 9, R, 9—Restoration—Considerations—

Merits of the case—Relevancy.

An application for restoration of an application dismissed for default should be judged on the validity or otherwise of the excuse given for non-attendance of the party concerned. The merits of the original application cannot justify the rejection of the restoration application, (Shirreff, S. M. and Sathe, J. M.) Hoti Lal. v, GAURI SHANKAR, 1942 A.W.R. (B.R.) 72=1942 O.A. (Supp.) 78=1942 O.W.N. (B.R.) 103=1942 R.D. 135.

#### C. P. CODE (1908), O. 9, R. 13,

-O. 9, R. 9-Sufficient cause-Departure to

different place
It is not a "sufficient ground" for restoration of a suit dismissed for default to say that the applicant was not present in Court on the day fixed as he had gone to another place instead. (Davis.) Aboul Karim v. Sujan Mal. 1943 A. M.L.J. 32.
O. 9, R. 9—"Sufficient cause"—Inability to

be present-Meaning.

O. 9, R. 9, C. P. Code, permits the setting aside of an order of dismissal of a suit for default only when the plaintiff is unable to be present; and that liability does not mean inability to raise the wherewithal to continue the suit,whether by lack of funds or absence of witnesses —but some physical inability such as the break-down of a conveyance or illness. \*(Horwill. J.) SUNDARESAM PILLAI 7. RAMACHANDRA PILLAI, 204 I.C. 640=15 R.M. 795=55 L.W. 725=1942 M.W.N. 665=A.I.R. 1943 Mad. 38 (1)= (1942) 2 M.L.J. 572.

-O. 9, R. 9-Sufficient cause-Missing an early train—Absence of any negligence or core-lessness in the conduct of the suit.

Where a suit was dismissed for default and the plaintiffs' absence was due to circumstances beyond his control, (i.e.) missing an early train and arriving in Court after the dismissal of suit, and there was nothing to show that he was negligent or careless in the conduct of the suit, there Was sufficient cause to restore the suit. (Ghulam Hasan, I.) Shib Sahai v. Tika 18 Luck. 104 = 200 I.C. 233=14 R O. 579=1942 A W.R. (C. C.) 195=1942 A,L.W. 218=1942 O A. 180=1942 O.W N. 242=A.I.R. 1942 Oudh 350.

-O. 9. R. 9 and S. 151-Sufficient cause not shown-Restoration under inherent powers.

The Court in exercising powers under 0.9, R. 9, C. P. Code, cannot restore a case under its inherent powers under S. 151, C. P. Code, if sufficient cause is not shown for the non-appearance of the plaintiff. (Roxburgh and Blank, JJ.)
SURUIMAL KESHAN v BAIRAM PRASAD SHAH.
77 C.L.J. 342=48 C.W.N. 415.

Under S. 115, C. P. Code, the High Court will not go into the question whether or not a certain cause was sufficient, although its powers under that section are wide enough to allow it. (Roxburgh and Blank, JJ.) SURUJMAL KESHAN v. BALIRAM PROSAD SHAH. 77 C.L.J. 342=48 C. W.N. 415.

-O 9, R. 13 and O. 17, R. 3 (All.)—Adjournment on payment of costs—Costs not paid and party in default not appearing on adjourned date—Decision of case on that date—If an exparte one or one under 0.17, R. 3.

Where the defendant's request for an adjournment was granted on condition of costs being paid to the other side but on the adjourned date neither the costs were paid nor was the defendant present and the Court decided the suit on that date, held that as the decree passed was not an ex parte decree within the meaning of O. 9, an application under R. 13 of that order was not maintainable and that the decision was under R. 3 of O 17. (Yorke, J.) MOHAN LAL v. INDER JIT. 1943 A.L.W. 454.

### C. P. CODE (1908), O. 9, R. 13.

-O. 9, R. 13-Applicability-Decree against firm-Application by partner to set aside-Applicant not seeking to appear on behalf of firm but under protest under O. 30, K.8—Procedure—Inherent powers. See C. P. Code, S. 151 and O. 9, R. 13. A.I. R. 1942 Sind 99.

O. 9, R. 13—Applicability—Decree against

firm ex parte—Application by individual partners to set aside on ground of non-service of summons on them—Maintainability—Procedure. See C. P. CODE, S. 151 AND O. 9, R. 13. A.I.R. 1942 Sind

Small Cause Court-Subsequent amendment without notice to party—Application by latter to set aside order of amendment—If one to set aside ex parte decree—Inherent power of Court to set aside, See C.P. Code, S. 151. 8 Cut.L.T. 105.

O. 9, R. 13—Applicability—Defendant's application for further adjournment refused— Decree after hearing plaintiff's evidncee—If ex parte—Remedy of defendant.

In dealing with an adjourned case under O. 17, R. 2, C. P. Code, in the absence of the defendant all that is open to the Court is either to grant an adjournment to enable the defendant to appear or to proceed in his absence ex parte. If the latter course is adopted, the defendant is entitled to apply to get the decree set aside under O. 9, R. 13, C. P. Code. The Court can hear the evidence of the plaintiff in the absence of the defendant and make such order as that evidence justifies. Where on the date to which the hearing of a suit is adjourned, the defendant applies for a further adjournment which is refused, and the Court hears the evidence of the plaintiff and gives a decree in his favour, the decree is one made ex parte and the defendant therefore is entitled to apply under O. 9, R. 13, C. P. Code, to have it set aside. It is not necessary for him to appeal against the decree, treating it as one passed on the merits. (Beaumont, C.J. and Wassoodew, J) GURUNATH EKNATH v. LAXMIBAI GOVIND. 203 I. C. 645=15 R.B. 272=44 Bom.L.R. 844=A.I.R. 1942 Bom 344.

O. 9, R 13-Applicability-Disposal of suit under O. 17, R. 3 in the absence of the defendant. See C. P. Code, O. 17, R. 3 and O. 9, R. 13. 1943 A.L.W. 517.

O. 9, R. 13 and S. 141-Applicability of O. 9, R. 13 to liquidation proceedings under U. P. Encumbered Estates Act.

Applications before Sub-Divisional Officers can be treated as originating in themselves and not arising from any other suit. Hence under S. 141, C. P. Code, the provisions of O. 9, R. 13 will apply to them. (Shirreff, S.M. and Sathe, J.M.)
YADUNATH SINGH v. NANHU MAL. 1943 A.W.
R. (Rev.) 183=1943 R.D. 220.

O. 9, R. 13-Application under-Conver-

sion into review application by Court-Legality.

An application under O. 9, R. 13, cannot be converted into a review application by the Court itself. In any case there is no obligation on the part of the Court to do so. (Shirreff, S.M. and Sathe, J.M.) YADUNATH SINGH v. NANHU MAL. 1943 A.W.R. (Rev.) 183=1943 R.D. 220.

-O 9, R. 13-Application under-Limitation.

C. P. CODE (1908), O. 9, R. 13.

decree. (Sathe, S.M. and Dible, J.M.) RAM SUNDER RAM v. MANSA RAM. 1944 R.D. 469= 1944 A.W.R. (Rev.) 250.
O. 9, R. 13—Application under—Maintain-

ability after decree is satisfied by execution.

Where though an ex parte decree is obtained and is also satisfied by process in execution there is nothing in those circumstances to prevent the judgment-debtor who at that late stage becomes aware of the proceedings taken behind his back, from successfully prosecuting an application under O. 9, R. 13 (Yorke, J.) MAHADEO v. SUBEDAR SINGH. 1943 A.L.W. 544.

O. 9, R. 13—Application under—Oppor-

tunity to other side to contest-Necessity.

Where an application for restoration is made under O. 9, R. 13 an opportunity should be given to the other side to contest it, before it is sanctioned. (Harper, S.M. and Sathee, J.M.) JAGDISH Pal Kunwar v. Baij Nath 1941 R.D. 418 (2) = 1941 O.A. (Supp.) 484=1941 A.W.R. (Rev.) 553.

O. 9, B. 13-Application under-Relevant considerations.

In an application to set aside an ex parte decree or order, the merits or demerits of the case are irrelevant. (Lobo, J.) GOCULDAS MAHADEV V. DILSUKHRAM. I L.R. (1943) Kar. 255=209 I.C. 406=16 RS. 97=A.I.R. 1943 Sind 188

O. 9, R. 13-Application under-Relevant considerations.

A restoration application must be decided on the merits of the excuse for non-attendance and not on the merits or demerits of the ex parter decree itself. (Sathe, S.M. and Ross, AM) LACHMAN PRASAD v. SHEO RAJ SINGH. 1943 R. D. 331=1943 A.W.R. (Rev.) 155.

O. 9, R. 13—Application under—Relevant

considerations.

In disposing of a restoration application the question whether the plaintiff had taken any steps to discharge the onus placed on him for proving the issues in the main suit is quite irrelevant. The only grounds which can be considered in disposing of it are the excuses put forward by the applicant for his non-appearance on the date fixed for the hearing of the suit. (Sathe, S.M.) SADHO RAM v. LOKAI. 1944 A.W.R. (Rev.) 46= 1944 R.D. 73.

O. 9, R. 13—Application under—S. 5, Limitation Act, not applicable. See Limitation Act, S. 5. 1943 A L.W. 517.

of Court—Express finding as to sufficient cause or want of due service—Court if bound to record—Failure to record—If justifies interference in revision—Order—If without jurisdiction. VIRE-SAM v. ADINARAYANA. [Q.D., 1936-40 VOL. I, COL. 3295.] A.I.R. 1941 Mad. 114.

appeal against ex parte decree—If a bar to application under R. 13 of O. 9 for setting aside the ex parte decree.

The fact that an appeal against an ex parte decree is dismissed for default cannot operate to bar an application under R. 13 of O. 9 for the setting aside of the ex parte decree. (Allsop and The limitation for an application under —Limitation. Malik, JJ.) RAM RAKHAN v. GOVIND DAS. I.L. O. 9 runs, not from the date of the exparts of the decree but from the date of knowledge of that decree but from the date of knowledge of of knowl

## C. P. CODE (1908), O. 9, R. 13.

—O. 9, R. 13—Ex parte decree—Adjournment to enable defendant to produce evidence of defendant on adjourned date—Advocate having no instructions—Decree on plaintiff's case—If ex parte. See C. P. Code, O. 17, Rr. 2 And 3. I.L R. (1942) Kar 547.

Even after an appeal against an ex parte decree has been dismissed, it would be open to the trial Court to pass an order on a petition to set aside the decree passed ex parte which was filed before the appeal was heard, and to set aside the ex parte decree. (Kuppuswami Ayyar, I) Venka-TASUBB RAMIAH In re. 218 I.C. 432=18 R.M. 74=1945 M.W.N. 23 (1)=57 L.W. 529=A.I.R. 1944 Mad. 576=(1944) 2 M.L.J. 261.

——O. 9, R. 13—Ex parte decree—Defendant's pleader withdrawing for want of instructions—Decree on evidence for plaintiff—If exparte. See C. P. CODE, O. 17, RR. 2 AND 3. 45 Bom. L.R. 697.

—O. 9, R. 13 (Allahabad)—Ex parte decree, setting aside—Defendant though not served aware of date.

An ex parte decree cannot be set aside on the ground of irregularity of service of summons if it is found that the defendant though not served was in fact aware or had knowledge of the date of hearing. (Shirreff, S. M. and Sathe, J. M.) MANPHOOL v. MURARI LAL. 1942 O.W. N. (B.R.) 204 (1)=1942 R.D. 270 (1)=1942 A.W.R. (Rev.) 146 (2)=1942 O.A. (Supp.) 166 (2).

—O. 9, R. 13 and Ss. 115 and 151—Ex parte decree—Setting aside without considering question of jurisdiction to do so—Interference in revision.

There is no power under S. 151, C. P. Code, to entertain an application to set aside an ex parte decree which can only be made under O. 9, R. 13. Under that rule the Court has no power to set it aside except on the grounds stated in that rule. Where an order setting aside an ex parte decree is made without consideration of the question whether it had jurisdiction or not, it is made illegally or with material irregularity within the meaning of cl. (c) of S. 115 and is therefore liable to be set aside in revision. (Pollock. J) DAMROG LAL v. GOKUL PRASAD. I.L.R. (1942) Nag. 675.

——O 9. R. 13—Ex parte decree against firm— Suit against firm—Application to set aside—Competency.

The terms of O. 9, R. 13, C. P. Code, are wide enough to cover a case where a firm is the defendant and where the person served on behalf of the firm is absent and asked that he should be heard so that the ex parte decree against the firm should be set aside. (Davi s, C. J. and Weston. J.) VILAITIRAM TULARAM v. CHANGOMAL. I.L.R. (1942) Kar. 220=202 I.C. 177=15 R.S. 26=A.I.R. 1942 Sind 99.

——O. 9, R. 13—Ex parte decree—Test—Recital in decree—Value—Ex parte decree against one of the defendants not served properly—Appeal by other defendants—Application to set aside ex parte decree after appellate decree—Competency.

### C. P. CODE (1908), O. 9, R. 13.

In order to determine whether a decree is exparte or not, the facts of each case have to be considered. The mere non-recital in the court's order that a decree is ex parte is not conclusive that it was not ex parte. Where one of the defendants is not properly served and an exparte decree is passed against him, and the other defendants appeal, it is open to the defendant against whom the exparte decree was passed to apply under 0.9, R. 13 to the court which passed the decree originally, even though the appeal by the other defendants is dismissed by the appellate court. So far as he is concerned there can be no merger of the trial court decree in that of the appellate court. (Ross. J.M.) BAL KARAN PANDE In re. 1945 R.D. 222=1945 A.W.R. (Rev.) 108.

— O. 9, R. 13 and O. 17, R. 2—Ex parte final decree for foreclosure—Power of Court to set aside.

A Court has power to set aside an exparte final decree for foreclosure on sufficient cause being shown under the provisions of O. 9, R. 13 and O. 17, R. 2, C. P. Code. (Bose, J.) MAHAJAN RAGHUBIR PRASAD v. PYARFLAL AMARCHAND, 1944 N.L.J. 119=A.I.R. 1944 Nag. 181.

——O. 9, R. 13—Ex parte order directing execution to proceed—Application to set aside—Order rejecting—Appeal—Competency—O. 43. R. 1 (d).

An order made in execution proceedings rejecting an application purporting to be made under O. 9, R. 13 (which does not apply to execution proceedings) to set aside an exparte order directing execution to proceed, is not appealable under O. 43, R. 1 (d), C. P. Code. (Davis, C.J. and O. Sullivan, J) DADAN KHAN v. HUSSEIN BANU. I.L.R. (1944) Kar. 39=216 I.C. 223=17 R.S. 62=A.I.R. 1944 Sind 216.

——O. 9, R. 13—Non-appearance of defendant —Effect - Legality of decree based merely on non-appearance—Remedies open.

The absence of the defendants entitles the Court to proceed ex parte against them but not to decree the suit merely on the ground of the defendant's absence. If it so decrees the suit, two remedies are open to the defendants (1) to file a restoration application under O. 9, R. 13, C. P. Code or (2) to appeal on the merits, (Sothe, S. M. and Ross, A.M.) JHANJHAN SINGH v. NAURANG SINGH. 1944 R.D. 429=1944 A.W.R. (Rev.) 211.

\_\_\_\_O. 9, R. 13—Order setting aside ex parte decree—Revision.

The exercise of the powers in revision is discretionary and where substantial justice has been done between the parties powers of revision should neither be invoked nor exercised. Where therefore an order setting aside an ex partie decree on payment of costs is eminently a just order, the power of revision cannot be exercised to reverse that decision, (Harries, C.J and Mehr Chand Mahaian. J.) HARI SINGH v. MOIN-UD-DIN KHAN. 46 P.L.R. 230—A.I.R. 1944 Lah. 397.

prior to consideration of application—Legality.

An order calling upon a judgment-debtor to furnish security before his prayer for setting

# C. P. CODE (1908), O. 9, R. 13.

aside the ex parte decree against him could be considered is not warranted by the terms of O. 9, R. 13, C. P. Code. (*Plowden and Sinha, J.J.*) KUNJ BEHARI LAL v. KASHI PRASAD. I.L.R. (1944) All. 504=209 I.C. 111=18 R.A. 44= 1944 O.A. (H.C.) 169=1944 A.L.J. 353=1944 A.L.W. 540=1944 O.W.N. (H.C.) 223=1944 A.W.R. (H.C.) 169=A.I.R. 1944 A11. 236.

O. 9, R. 13-Order under, if revisable. See C. P. Code, S. 115 and O. 9, 13. 1943 A.L. W. 544.

-O.9, R. 13—Power of Court under— Order for deposit of costs or security for decree amount pending trial of application—Legality. NARAYANAN CHETTIAR v. CHIDAMBARAM CHETTIAR. [Q.D., 1936-40 Col. 1517.] 191 I.C. 880=13 R.M. 533 (1).

O. 9, R. 13 and O. 23, R. 1—Scope—Suit against several defendants—One remaining exparte—Plaintiff withdrawing against others and getting ex parte decree against one only—Sub-sequent setting aside of ex parte decree—Right of plaintiff to proceed against other—Procedure.

RAJAGOPALA RAO v. BHANOJI RAO. [Q.D. 1936-40

Vol. I. Col. 1519.] 192 I.C. 799=13 R.M. 614.

O. 9, R. 13—Sufficient cause—Clemency or

sympathy.

Where an ex parte decree has been passed there can be no restoration of the suit out of clemency or sympathy to the judgment-debtors. A restoration application must be disposed of on the merits of the cause for non-attendance. (Sathe, S. M.) RAM MANORATH v. BRIJ RAJ. 1943 R.D. 383=1943 A.W.R. (Rev.) 252 (1). -O.9, R. 13-Sufficient cause-Confusion

between different cases. Where the failure of the applicant for restoration of an ejectment case to contest the case was due to confusion between it and another, it is a fit case for restoration. (Shirreff, S. M. and Sathe, J.M.) DHARA v. KHACHERU. 1942 O.W. N. (B.R.) 165 (1)=1942 R.D. 231 (1)=1942 A.W.R. (Rev.) 147 (1)=1942 O.A. (Supp.)

O. 9, R. 13-Sufficient cause—Defendants' ignorance of direction to file his written statement-When ground for setting aside ex parte

decree,
Where in setting aside an ex parte decree the defendant was directed to file his written statement within three weeks failed to do so and an ex parte decree was again passed, that decree cannot be set aside where the defendant fails to prove that he had made inquiries from his attorney as to the direction for filing written statement (Pankridge, J.) GOPALKRISHNA NABA-KISHORE v. CHINOHARAN. 199 I.C. 394=14 R.C. 536=A.I.R. 1941 Cal. 254.

Court—Examination of defendant to obviate recording of plaintiff's evidence—Legality.

The power given by O. 10, R. 2, C. P. Code, to examine any party present in Court is to be used by the Judge only when he finds it necessary to obtain from such party information. to obtain from such party information on any material questions relating to the suit. It ought not to be employed so as to supersede the ordinary procedure at a trial as prescribed in O. 18
C. P. Code. (Davis, C. J. and Lobo, J.) VASUMAL v. KARAM CHAND. I.L.R. (1444) Kar. 146

=194 I.C. 81=13 R.S. 243=A.I.R. 1941 Sind 41.

### C. P. CODE (1908), O. 11, R. 13.

-0. 11, R. 1 and O. 3, R. 1-Party ordered to answer interrogatories-If can answer through recognised agent.

O. 3, R. 1, governs O. 11, R. 1, C. P. Code. The former order is a general one and has general application. Therefore, unless there is something specific to show that its provisions are not intended to apply to some act or appearance in some particular case, it ought to be applied. If a party to a suit is ordered to answer interrogatories, he is not bound to answer personally in the absence of a special direction to that effect, and he can answer through some recognised agent, who knows the facts. In other words, an affidavit need not be sworn to by the party himself and this can be done by a recognised agent. (Bose, J.) K.C. MAJUMDAR SURAJ SINGH. I.L.R. (1942) Nag. 258=193 I.C. 707=13 R.N. 345=1941 N.L.J. 418=AI. R. 1941 Nag. 205.

-O. 11, Rr. 12 and 13-Compliance with-If necessary to raise presumption from non-production of documents.

No presumption can be drawn against a party for non-production of a document unless the party which wants that party to produce it has served upon him the necessary notice and followed the procedure prescribed by Rr. 12 and 13 of O. 11, C. P. Code. (Verma and Yorke, JL.) GORDHAN DAS v. ANAND PRASAD. I.L.R. (1942) All. 247=205 I.C. 261=15 R.A. 400=1942 A. L. J. 246=1942 A.W.R. (H.C.) 118=1942 Comp. C. 184=1942 A.L.W. 186=A.I.R. 1942 All. 242.

O. 11, Rr. 12 and 15-Relative scope-Right of defendant to discovery and inspection of plaintiff's documents before filing written statement.

Under R. 15 of O. 11, C. P. Code, the rights of parties are not the same as under R. 12. Under R. 15, notice may be given at any time for production of documents for inspection, but the rule only refers to a document to which reference has been made in the pleadings or affidavits of the party to whom notice is given. To bring his application within the rule a defendant applicant must show that the plaint has referred to any such document. In the case of documents referred to in the plaint, the defendant can inspect them even before filing his written statement. But he is not so entitled to inspect, before filing his written statement, documents which are not referred to in the plaint, under R. 12 of O. 11, even though they relate to a matter in question in the suit. (Rowland and Reuben, JJ.)
GOPAL BUX RAI v. SYED MAHOMED. 22 Pat. 644
=215 I.C. 98=17 R.P. 83=11 B.R. 48=A.I.R. 1944 Pat. 177.

-O. 11, R. 13—Affidavit of documents—Evidence to contradict or cross-examination-If allowed.

If a party states in his affidavit of documents that he has no document relating to the matters in question in the suit other than those set forth in the affidavit his oath is conclusive and the other party cannot cross-examine upon it, nor adduce evidence to contradict it nor, administer interrogatories asking whether he has not in his possession or power documents other than those set forth in his affidavit. (Abdul Rashid and C. P. CODE (1901), O. 11, R. 14.

Ram Lall, JJ.) I. M. LALL v. SECRETARY OF STATE. 216 I.C. 89=17 R.L. 160=A.I.R. 1944 Lah. 209.

——0. 11, R. 14—Discretion of Court—Order directing defendant to apply for certified copies of income-tax returns and profit and loss statements and produce them at plaintiff's cost—Legality—Income-tax Act, S. 54.

An order under O. 11, R. 14, C. P. Code, is a discretionary order, and the power should be exercised with great caution. Further the rule deals only with existing dycuments and documents which at the time of the application are in the possession or power of the party against whom the order is sought to be made. On an application by the plaintiff in a suit, the lower Court ordered the defendant to apply for a certificate copy of his income-tax returns and profit and loss statements with particulars submitted by him to the income-tax department and to produce them at the plaintiff's cost.

Held, (1) that there being no document in existence, it could not be in the power of the defendant; (2) that the Court was prohibited from ordering a defendant to produce his income-tax returns in view of S. 54 of the Income-tax Act; (3) and that the order was therefore contrary to law and should be set aside. (Mockett, J.) Velayudham Pillai v. Subramania Pillai I.L.R. (1941) Mad. 716=14 R. M. 346=197 I.C. 224=1941 I.T.R. 275=1941 M.W.N. 569=53 L.W. 543=A.I.R. 1941 Mad.

709=(1941) 1 M.L.J. 617.

207.

----O. 11, R. 15-Inspection of documents-Right of party.

Inspection must be allowed under O, 11, R. 15, when the documents in question are themselves material facts supporting the plaintiff's claim and there is any sort of direct or indirect reference to them in the plaint itself. (Beckett, JJ.) JANKIDAS V. KHUSHALYA DEVI. 209 I.C. 349=16 R.L. 129=45 P.L.R. 217=A.I.R. 1943 Lah.

—O. 11, R. 19 (2)—Inspection of documents for which privilege is claimed on grounds of "affairs of state"—Power of Court. See EVIDENCE ACT, S. 162.

----O. 11, R. 21 and S. 151-Non-compliance with order for production-Penal order, if can be

made-Inherent power of Court.

O. 11, R. 21, C. P. Code, gives the Court power to make such a penal order as striking out the defence only in the case of non-compliance with an order to answer interrogatories or for discovery or inspection of documents, and not where there has been a failure to carry out an order for production. In the latter case, it is very doubtful whether the Court can pass such an order in the exercise of its inherent jurisdiction in view of the express provisions contained in O. 11, R. 21. (Biswas and Latifur Rahman. JJ.) KHALILUDDIN HYDER v. SM. MATLUBA KHATOON BIBI. 48 C.W.N. 677.

——O. 11, R. 21—Powers under—When may be exercised.

The dismissal of the suit or striking out of the defence under O. 11, R. 21, C. P. Code, is a drastic remedy. The power given to the court under that rule ought to be sparingly used and used only in exceptional circumstances. (Mitter

C. P. CODE (1901), O. 12, R. 6.

and Sharpe, JJ.) JAGAURAM SAHU v. CHANDULAL. AGARWALA. 49 C.W.N. 132.

——O. 11, R. 21—Scope—Penalty when to be imposed—Failure to produce document before Commissioner—No application for production before Court—Presumption under S, 114. Evidence Act—If must be drawn.

O. 11. R. 21, imposes a penalty which is of a

very drastic nature, and before it is imposed it is just that the procedure laid down in O. II should but be complied with. Where in an injury as to mesne profits on the basis of a decree, the defendant applies to the Commissioner conducting the inquiry for calling upon the plaintiff to produce certain documents but the plaintiff does not produce the same, in spite of the direction by the Commissioner to produce the documents it is still open to the defendant when the Commissioner's report comes before the Court to press for the production of the documents by following the procedure laid down in O. 11, for the discovery of documents. When the defendant does not do so and does not ask the Court not to decide the case until the discovery has been ordered he cannot ask the Court to apply R. 21 of O. 11, or to draw an inference adverse to the plaintiff from the fact of non-production of the documents, because it cannot be said in such a case that the plaintiff has been legally required to produce them. The Court is not in error in not drawing the presumption under S. 114 of the Evidence Act when the procedure indicated in O. 11 has not been complied with. S. 114 of the Evidence Act is not mandatory and merely enables the Court tomake a certain presumption in certain circumstances and though S. 114 of the Evidence Act is quite independent of the provisions of O. 11, the Court may refuse to draw the inference. (Fazl Ali and Shearer, JJ.) RAM KISHUN LAL v. ABU ABDULLAH SAYED HUSSAIN IMAM. 21 Pat. 735—205 I.C. 294—15 R.P. 277—9 B.R. 220—A.I.R. 1943 Pat. 69.

— 0.12, R.6—Decree on admission under— Finality of—Decree allotting properties in partition suit—Reservation as to re-allotment at final decree stage if considered necessary or desirable— Subsequent amendment of written statement to embody contentions contrary to statements madeoriginally—Permissibility.

Cl. III of R. 6 of O. 12, C. P. Code, does contemplate an order having the status of a decree being passed on an application under O. 12, R. 6, C. P. Code. Such a decree may be either preliminary or final, and may be partly preliminary and partly final. Where in a suit for a share in the family properties by a Hindu widow basing her right under the Hindu Women's Rights to Property Act, and a decree, which is partly preliminary and partly final, is made, allotting certain properties to each of the parties, on the basis of the admissions contained in the written statement of the defendant on the representations of the advocate of the defendant, subject to a reservation as to re-allotment of the properties if considered necessary or desirable at the final decree stage in order to provide for family debts or maintenance claims, etc., there can be no variation of that decree afterwards either by consent of parties or by order of Court so far as the conceding of the right of the plaintiff to a share in the

### C. P. CODE (1938), O. 13, R. 1.

divisible properties. The existence of the reservation as to re-allotment does not detract from its character as a decree. It would not be open to the defendant to amend his written statement so as to embody contentions directly opposite to what had been urged in the original written statement. When the admissions made by the defendant have gone beyond the stage of a decree duly passed, it would not be open to the defendant to apply for an amendment thereafter. (Yahya Ali, in other cases on its own motion—If precluded 1.) Sivaling A Pathar v. Narayani Ammal. from using them though not included in list of documents.

O. 13, R. 1-First hearing-Small Cause suit—Document in support of plea in written statement tendered on day of hearing—Rejection—

If justified.

In a small cause suit the date of the first hearing is not the date on which the written statement is filed, but the date which the Court appoints for the trial to begin after the pleadings have been completed. Hence documentary evidence in support of a plea in the written statement tendered on the duty of hearing of the suit should not be rejected on the ground that the document in question was not filed along with the written statement. (Wadsworth, J.) SWARNAM IYER v. VEERAGU AMMAL 210 I.C. 53=16 R.M. 355=1943 M.W.N. 66=56 L.W. 208=A.I.R. 1943 Mad. 286=(1943) 1 M.L.J. 41.

-O. 13, R. 2-Sufficient cause-Delay in filing documents-Illness and subsequent death of

defendant's father.

Where owing to the illness and subsequent death of his father the defendant is not able to file the document in support of his case and produces them after some delay, it is sufficient cause to permit the documents being produced even at a third hearing. (Shirreff, J.M. and Sathe, J.M.) RAMDAYAL v. JOTI PRASAD. 1941 O.A. (Supp.) 830=1941 A.W.R. (Rev.) 986=1941 R.D. 939

iyat-Inadmissible in evidence-Procedure to be

followed.

When a qabuliyat is held to be inadmissible in evidence owing to its being not registered, the Court should scrupulously avoid making any reference to its contents and in fact the qabuliyat should be returned to the person who filed it an I Should not be allowed to remain on record. (Shirreff, S.M. and Sathe. J.M.) CHHEDA LALV. GHEE RAM. 1942 A.W.R. (Rev.) 503—1942 O. A. (Supp.) 529—1942 O. W.N. (B.R.) 690.

—O. 13, R. 4—Endorsement "admitted against the plaintiffs"—Meaning.

An endorsement that a document is "admitted against the plaintiff" or "admitted against the defendants" means that the document is admitted in evidence as proved. (Sir George Rankin.) GOPAL DAS V. SRI THAKURJI. I.L.R. (1943) Kar. (P.C.) 69=207 I.C. 553=16 R.P.C. 47=47 C. W.N. 607=1943 A.L.J. 292=1943 O.W.N. 334=1943 A.L.W. 466=56 L.W. 593=1943 A.W. R. (P.C.) 14=10 B.R. 7=1943 O.A. (P.C.) 14=46Bom.L.R. 220=A.I.R. 1943 P.C. 83-(1943) 46Bom.L.R. 220=A.I.R. 1943 P.C. 83=(1943)

2 M.L.J. 51 (P.C.).

O. 13, R. 5—Summoning of a file of papers

Admission to record—Procedure to be followed. An office or departmental file does not become part of the record merely because it has been

## C. P. CODE (1908), O. 14, R, 1.

by the Court itself. Whatever paper of the summone i file are relied upon by the parties must be brought on the record of the case which is pending before the Court in accordance with the provisions of O. 13, R. 5, C. P. Code, before such papers can be considered as evidence in the case. (Sathe, S.M.) GAJODHAR v. RAM KUMAR. 1943 R.D. 549=1944 A.W.R. (Rev.) 299.

-O. 13, R. 10-Court sending for judgments

documents.

Where though the plaintist did not mention in his list of documents certain judgments to prove instances of a custom alleged, the Court is not precluded from using such judgment sent for on its own motion. (Almond, J.C. and Mir Ahmad, J.) SARDAR BEGUM v MASOOM SHAH. 218 I.C. 367=18 R.Pesh. 5=A.I.R. 1945 Pesh. 9.

-0.13, R. 10-Requisitioning under-Use as

part of evidence-Procedure.

The record of a case does not become part of the evidence merely by being requisitioned in a subsequent case under O. 13, R. 10, C. P. Code. Any original statement or other document on the record of the previous case which is relied upon in a subsequent case must be duly proved according to the provisions of the Evidence Act before it can be utilised as part of the evidence in the later case. (Harper, S.M. and Sathe, J.M.) DINA v. GIRWAR SINGH. 1941 O.A. (Supp.) 371=1941 R.D. 390=1941 A.W.R. (Rev.) 441.

-0. 13, R. 10 (1)—Power of Court under-Limits -Admission of document concerned-Pro-

per procedure.

The power to send for the record of another case and to inspect the same does not carry with it the power to treat the whole of the record or a part thereof as evidence in the case. If upon inspection, the trial Court comes across an important document which in its opinion throws important light on the question at issue or is of material assistance in ascertaining the truth, it is open to it to bring it on record and prove it according to law, before using it as evidence in the case. Mere summoning of the record does not, however, render the entire record ipso facto evidence in the case. (Bennett and Ghulam Hasan, JJ) GOKUL PRASAD v. MAHADEI. 194 I. C. 195=13 R.O. 563=1941 O.L.R. 425=1941 A. L.W. 520=1941 O.W.N. 643=1941 O.A. 412= 1941 A.W.R. (C.C.) 166=A.I.R. 1941 Oudh

O. 14, R. 1—Failure to frame issue-Absence of prejudice—Interference in second appeal. See C. P. Code, S. 100 and O. 14, R. 1. 1943 R.D. 362.

-O. 14, R. 1-Failure to frame issue-If fatal to suit.

The failure to frame an issue is not necessarily fatal to a suit, and if substantial justice has been done there is no need to remand the suit merely on the technical ground. (Almond, J.C. and Sook J.) HIRA SINGH v. MAHOMED AFFALKHAN. 196 I.C. 17=14 R. Pesh. 22=A.I.R. 1941 Pesh. 59. -O. 14, R. 1 -Issues-Duty of Court-Fram-

ing of express issues—Suit under O. 21, R. 63, C. P. Code.

The object of framing an issue is to direct the attention of the parties to the main questions of summoned at the instance of one of the parties or fact or law to be decided, and the duty of fram-

### C. P. CODE (1908), O. 14, R. 1.

ing and recording the proper issues has been placed on the Court by C. P. Code. In framing such issues Courts of law should exert themselves so as to make them sufficiently expressive of the matters which they desire to consider under such issues. Where in a suit filed under O. 21, R. 63, C. P. Code, the issue raised was: "Is the suit maintainable according to law and in its present form?"

Held, that the issue did not cover the point whether the decree sought to be executed was not available against the execution debtors named in the application for execution, as it was not a defect in the frame of the suit and did not touch the maintainability of the suit. (Akram and Pal, JJ.) HIRANMOY v. PROBAL KUMAR. 205 I.C. 138 = 15 R.C. 582=76 C.L.J. 108=46 C.W.N. 289= A.I.R. 1942 Cal. 338.

O. 14, R. 1—Issues—When to be raised-Re-settlement of issues after evidence is led and

arguments heard in part—Propriety.

Issues in a suit should be raised before evidence and before arguments. It is on the issues based on the pleadings that the evidence is led and arguments directed. It is not a correct procedure to resettle issues after the evidence is led and arguments heard in large part, (Davis, C.J. and Lobo, J.) JASRAJ FAOJI v. SUGRABAI. I L.R. (1943) Kar. 315—A.I.R. 1943 Sind 242—211 I. C. 321=16 R.S. 181.

——O. 14, R. 1-Object of-Application to appellate Court. See APPEAL. 1943 P.W.N. 117.

 $\mathbf{O.14}$ ,  $\mathbf{R.1}$  (5)—Issues raising questions of relevancy of evidence—If may be framed—"Material proposition"—Meaning.

It cannot be the object of a proceeding under O. 14, R. 1 (5), C. P. Code, to find out what evidence would be necessary. The question of relevancy of evidence cannot be determined before the issues have been framed, nor can issues be framed merely for the purpose of determining in advance what evidence may or will have to be given or allowed. That is a matter which must be left to the trying judge to determine if and when evidence is offered in accordance with the provisions of the Evidence Act. The issues must be confined to the real questions in controversy. The mere fact that certain allegations are made on the one side and denied on the other does not make them "material" for the purpose of the framing of issues. (Biswas and Latifar Rahman, JJ.) DANDY SWAMI JAGANNATH v. SRIJIB NYA-YATIRTHA. 48 C.W.N. 635.

-O. 14, R. 2-Preliminary issue one of law -Recording of evidence-Necessity.

Where the preliminary issue relates to a matter purely of law, there is no necessity to record any evidence. The issue of law may be decided as a preliminary issue. (Davies). SHIRE SINGH v. RAMBIR SINGH 1944 A.M. L.J. 13.

-O. 14, R. 2-Refusal to decide issue of law first—If revisable under S 115 See C. P. CODE, S. 115 AND O 14, R. 2. 1943 A.L.W. 327.

O 14, R. 3-Framing of issues-Presence

of parties-Necessity.

It is most necessary for the parties to be present when issues are framed. As pleadings are frequently not all they should be, it is on many occasions necessary to question the parties before

C. P. CODE (1908), O. 17, R. 1.

accurate issues can be drawn up. (Davie Heera Lal v. Sardamani. 1942 A.M L J. 52. (Davies).

-O. 14, R. 5—Adding new issue on date of hearing—Propriety—Appellate courts powers.

There is nothing extraordinary and still less improper in the framing of a new issue on the day of the hearing. If this had the effect of taking a party by surprise, that might be a good reason for giving him time to collect evidence to meet the new issue. It is not a ground for setting aside a dicree on appeal and ordering the case to be retried. The really material question with which the appellate Court is concerned with is to see whether the parties had gone to trial knowing what the really material question between them was and had an opportunity of giving evidence on that question. (Braund, J.) RAM PRA-SAD SINGH v. SAIEZ ALI SHAH. 1942 A.L.W. 48.

O. 16. R. 1 (Lahore Amendment)-Examination of witnesses not mentioned in list-Discretion of Court.

R. I. of O. 16, C. P. Code, is a technical one and in the absence of any prejudice to either party, the Court should not refuse to examine witnesses on the ground that they were not mentioned in the list, especially where the property in dispute was of large value and an important question of custom was also involved. (Bhide and Din Mahomed, JJ.) KARIM BAKHSH v. THAKAR DASS RAM LAL 193 I.C. 166=13 R.L. 436=A.I R. 1941 Lah. 38.

O. 16, R. 1-Refusal to summon witnesses Belated application-Discretion of Court.

Where a Court refuses to issue summons on the ground that the application for it was very belated, it is a matter of discretion exercised by the judge and when it is not shown that such a discretion has not been exercised wisely, the appellate Court will not interfere. (Bennett and Madeley, JJ.) MAHOMFD ASAD ALI KHAN v. Sidio Ali Khan. 18 Luck. 346=205 I.C. 433=14 R. O. 411=1942 O.A. 536=1942 O.W.N. 657=1942 A.W.R. (C.C.) 346 (2)=A.I.R. 1943 Oudh 91.

\_\_\_\_O. 16, R. 14—Discretion of Court—Refusal to exercise—Privy Council—Exercise by—

The power of the Court under O. 16, R. 14, C. P. Code, to examine witnesses on their own motion is discretionary, and when the Courts in India have refused to exercise it, the Judicial Committee will not exercise the same (Sir M. dhavan Nair.) AGHA VIR AHMED SHAH v. MUDASSIR SHAH. 71 I.A. 171=1944 A.L. J. 513 =47 P.L.R. 20=216 I.C. 262=11 B.R. 162=17 R.P.C. 48=47 Bom. L.R. 591=1945 A.W.R. (P.C.) 12=1945 O A. (P.C.) 12=49 C.W.N. 52 =1944 M.W.N. 661=57 L.W. 608=A.I.R. 1944 P.C. 100=(1944) 2 M.L.J. 354 (P.C.),

O. 17, R. 1—Award of costs—Rule as to.

Costs of adjournment of a suit must be such as can reasonably be held to be occasioned by the adjournment and should not be in the nature of a penalty or punishment, nor should costs be awarded against a party who is not substantially at fault in the matter of an adjournment. (Tek Chand and Beckett, JJ.) МАНОМЕД ВАКИЗН 20. SHAHU. 201 I.C. 240=15 R.L. 36=44 P.L.R. 186=A I.R. 1942 Lah. 162 (2).

C. P. CODE (1908), O. 17, R. 1.

O. 17, Rr. 1 and 3 (All.)—Dismissal of suit for non-payment of adjourment costs-Bar

of fresh suit.

Where in granting an adjournment asked for by the plaintiff, the Court orders the payment of costs in default of which the suit would be struck off, and the plaintiff fails to pay such costs and the suit is dismissed, it is an order which falls under R. 3 of O. 17 (as amended in Allahabad) and not R. 1 of that order and hence it would bar a fresh suit. (Thomas, C. J. and Ghulam Hasan, J.) HAR DAYAL v. RAM GHULAN. 1943 O.W.N. 461=1943 O.A. (C.C.) 282 (2)=1943 A.W.R. (C.C.) 150 (2)=210 I.C. 462=16 R.O. 188=A.I.R. 1944 Oudh. 39.

-O. 17, Rr. 1 and 3—Dismissal of suit for non-payment of adjournment costs-Plaintiff's

An appeal lies from an order dismissing a suit for non-payment of adjourment costs. No restoration of the suit can be made by exercise of inherent power of the Court. (Digby, J.) RAD-HABAI V. PURNIBAI. I.L.R. (1943) Nag. 613=208 I.C. 67=16 R.N. 57=1943 N.L.J. 177=A. I.R. 1943 Nag. 149.

---- O. 17, R, 1-Prayer for adjournment-De-positing of case sine die-Effect.

Where a Court deposits a case sine die at the request of plaintiff for an adjournment, it does not amount to dismissal of the case and it can be revived on the application of the plaintiff (Sathe, J.M.) MATBAR v. BHAGWAN DASS. 1941 R.D. 176=1941 O.A. (Supp.) 164=1941 A.W.R. (Rev.) 230.

O. 17, R. 1 and O. 33, R. 8-Suit in formapauperis—Trial—Plaintiff not ready—Grant of adjournment conditional on paying day costs within next hearing—Costs not paid—Power of Court to dismiss suit—Pauper, if exempted from

payment of adjournment costs.

In a suit filed in forma pauperis, the plaintiff was not ready at the date of the hearing and on his application the Court adjourned the case directing as a condition precedent that the plaintiff should pay day costs to the defendants within the next hearing date. By the adjourned date, the plaintiff had not paid the costs. On a contention as to the propriety of attaching such a condition and the procedure to be adopted on breach thereof,

Held, the Court has jurisdiction under O. 17, R. 1, C. P. Code, to pass an order of adjournment conditional on payment of costs by the plain-tiff on failure of which the suit should straight-

away be dismissed.

Held, further, that under O. 33, R. 8, a pauper plaintiff is not exempted from the payment of costs of adjournment; the Court has therefore power to direct him to pay the costs of an adjournment granted at his instance. (Krishnaswami Ayyan-gar, J.) RAJU CHETTIAR v. RAMAKKAL. 199 I. C. 790=15 R.M. 12=53 L.W. 206=1941 M.W. N. 303=A.I.R. 1941 Mad. 437=(1941) 1 M.L. J. 305.

—0.17, Rr. 2 and 3—Applicability—Adjo-urnment for defendant's evidence—Defendant absent—Further adjournment refused and advocate reporting no instruction—Decree—If ex parte—0, 9, R. 13—Applicability.

After the close of the plaintiff's case, a suit was

adjourned for the purpose of enabling the defen-

C. P. CODE (V OF 1908), O. 17 E. 2.

dant to appear and give evidence on his behalf. He did not appear on the adjourned date, and the Court refused further adjournment. The defendant's advocate reported no instructions and the Court decreed the suit against the defendant on the merits on a consideration of the plaintiff's case. The defendant applied under O. 9, R. 13 to set aside the decree, which he alleged was ex

Held, that the adjournment having been granted specially for the purpose of the defendant producing his evidence, it was in the discretion of the Court to apply R. 3 of O. 17, C. P. Code, not R. 2 of O. 17; (2) that Rr. 2 and 3 of O. 17 were not exclusive; (3) that of O. 17 were not exclusive; (3) that although a judge should not ordinarily exercise the power vested in him under R. 3 of O. 17, unless the case of both sides is on the record. and arguments have in the main been heard, where the defendant was found to be trifling with the Court, and to be purposely absenting himself, the Judge would be justified in applying R. 3 especially when the plaintiff's case was closed and the defendant was the only remaining witness (Davis, C. J. and Weston, J.) TEKCHAND NE-NOOMAL v. KALUSING MANJUSING. I.L.R. (1942) Kar. 547=207 I.C. 165=16 R.S. 14=A.I.R. 1943 Sind 94.

-O. 17, Rr. 2 and 3-Applicability and scope-Issues framed and suit adjourned for production of evidence by parties—Plaintiff failling to appear—Procedure—Disposal on merits—Propriety—Discretion of Court—Judicial exercise. Rukmansa Rajansa v. Shankar Gouda Basangouda. Sec [O.D., 1936-'40, Ol. I. Col. 3295] I.L.R. (1941) Bom. 150=193 I.C, 768=13 R.B. 348=A.I.R. 1941 Bom. 83.

O. 17, Rr. 9 and 3—Applicability—Case passed over at request of plaintiff's valil—Subsequent reporting of "no instruction"—Plaintiff present in Court with witnesses but taking no part in proceedings—Dismissal—If one default or on merits-Application under O. 9, R. 9 -Maintainability.

Where a plaintiff's vakil comes to Court merely to ask for an adjournment and upon that being refused, reports no instructions, the vakil fails to appear; unless the plaintiff himself takes some further part in the proceedings thereafter he himself also fails to appear, and an order of dismissal of the suit falls under O. 17. R. 2. An application under O. 9, R. 9, will therefore lie. Where a suit on being taken up is passed over for come in suit on being taken up is passed over for the suit on the suit of the suit some time at the request of the plaintiff's vakil, and subsequently the vakil reports "no instruction", and the plaintiff himself though present in Court with his witnesses, does not take any part in the proceedings, and the suit is thereupon dismissed, the dismissal falls under O. 17, R. 2, and not under O. 17, R. 3. The arranging of the day's work by the Court is not a judicial act; and a request by a practitioner to pass over a case for some time is not a step taken in the prosecu-tion of the suit or proceeding. When the vakil appears later and reports no instruction, the position is the same as if he had reported no instructions in the first instance. (Horwill, I.) BALIREDDI v. LAKSHMAMMA 213 I.C. 15=17 R.M. 21=56 L.W. 488 (2)=1943 M.W.N. 634=A,I.R. 1943 Mad. 728=(1943)2 M.L.J. 350. C. P. CODE (1908), O. 17 R.2.

dant's pleader withdrawing from case for want of instruction—Decree on evidence led by plaintiff—If one on merits or exparte—Application under 0.9, R. 13—Competency.

A decree passed by the Court on evidence led by the plaintiff after the defendant's pleader has withdrawn from the case for want of instructions is an ex parte decree and not a decree on the merits. It falls under O. 17, R. 2, and therefore an application to set it aside under O. 9, R. 13, is maintainable. Mere withdrawal from the case would not be sufficient to attract the application of O. 17, R. 2, read with O. 9, R. 6. The withdrawal must be on account of the pleader being not duly instructed and able to answer all material questions relating to the suit as provided in O. 5, R. 1. A withdrawal on the ground of not being ready with the evidence would fall under R. 3 and not under R. 2 of O. 17. (Beaumont, C.J., Divatia and Weston, JJ.) SHIDRA-MAPPA IRAPPA v. BASALINGAPPA KUSHAPPA. I.L. R. (1944) Bom. 1=16 RB. 146=209 I.C. 450 =45 Bom. L.R. 697=A.I.R. 1943 Bom. 321

(F.B.).
O. 17, Rr. 2 and 3—Applicability—Test. Where it is not clear as to whether an order passed falls under R. 2 or R. 3 of O. 17, C. P. Code, the order should be held to fall under R. 3 if it is found that the date was given at the request of a party and in other cases it might be taken to fall under R. 2. (Sathe, S.M.) PURAN SINGH v. BIJAI SINGH. 1944 R.D. 241=1944 A.W.R. (Rev.) 125.

---O. 17, R. 2 and O. 9, R. 13-Ex parte decree for forecloure-Power of Court to set aside.

A Court has power to set aside an ex parte final decree for foreclosure under O. 17, R. 2, C. P. Code. O. 9, R. 13, C. P. Code, applies to the first hearing and not to an adjourned hearing The provisions relating to adjourned hearings are contained in O. 17, R. 2. As the mortgage suit continues till the final decree is passed, then clearly the final decree proceedings are all conducted at adjourned hearings of the suit. (Bose, I) RAGHUBIR PRASAD v. PYARILAL. I.L.R. J.) RAGHUBIR PRASAD v. PYARILAL, I.L.R. (1944) Nag 425=218 I.C. 200=18 R.N. 6=1944 N.L.J. 119=A.I.1. 1944 Nag. 181.

——O. 17, Rr. 2 and 3 and O. 9, R. 9 (All.)— Refusal of further adjournment on adjourned date—Report of no instructions by plaintiff's counsel—Dismissal of suit—Restoration under

O. 9, R. 9—Jurisdiction.

Where on the refusal of a further adjournment on the adjourned date the counsel for the plaintiff reports that he has no instructions to proceed with the suit and the suit is dismissed it is a dismissal under O. 17, R. 3 and as such the Court has no jurisdiction to restore it under O 9, R. 9. (York, J.) SHANTI LAL v. MAHADEVI, 1943 A.L.W. 500.

-O. 17, R. 2—Scope—Adjourned hearing-Defendant's application for further adjournment refused—Procedure—Decree after hearing evidence of plaintiff—If ex parte—Remedy of defendant—Appeal or application under O. 9, R. 13. See C. P. Code, O. 9. R. 13. 44 Bom. L.R. 844.

C. P. CODE (1908), O. 17, R. 3.

——O. 17, R. 2 (2) (Allahabad)—Applicability —Disposal under—Restoration, if possible.

Where after the filing of certain documents by defendants the case is adjourned to another day for arguments and for certain rebutting evidence to be produced by the plaintiffs if they chose to, and on the adjourned day the plaintiffs fail to appear and the Court disposes of the case on the evidence available, the disposal is one under para. (2) of R. 2 (2) of O. 17, C. P. Code (Allahabad) on the merits. There can be no restoration application in such a case. (Sathe. A.M.) RAM LAL v. KHIALI. 1941 O.A. (Supp.) 787=1941 A,W,R. (Rev.) 913=1944 R.D. 922.

-O. 17, R. 3 and O. 6, R. 17—Adjournment for amendment on condition precedent—Condition not fulfilled—Effect,

Where a case is adjourned for the filing of an amendment on a condition precedent and the condition is not fulfilled it must be taken that the adjournment was not given and the amendment as not filed, even if it is in fact filed. (Davies.) HEERA LAL v. CHAMPA LAL. 1941 A.M.L.J. 33,

-O. 17, R. 3 and O. 9, R. 13 (All.)-Adjournment to enable compliance with order of Court—Non-appearance and non-compliance on adjourned date—Disposal of suit—Applicability of O. 9, R. 13.

Where an adjournment is granted to enable a party to comply with an order of Court and on the adjourned date the party concerned is absent and the order of Court is not complied with and the Court disposes of the suit, it is a decision on the merits under O. 17, R. 3. In such a case appearance on behalf of the defendant will be assumed whether he was in fact present or not. The decree passed under the rule cannot be regarded as an ex parte decree so as to entitle the defendant to apply for restoration under R. 13 of O. 9. (Yorke, J.) Sidh Nath v. Ganga Prasad' 1943 A.L.W. 517.

— O. 17, R. 3-Applicability-Conditions— No evidence led before default-Decree on

evidence led after default—If ex parte.
R. 3 of O. 17 applies only if the previous adjournment was granted for any of the purposes mentioned in the rule, and the party has committed default in complying with the same on the adjourned date. It cannot apply to a general adjournment under O. 15, R. 3. Where no evidence had been led before the default took place and the whole evidence on which the decree is passed was led after the default, it is an ex Weston, JJ.) SHIDARAMAPPA IRAPPA v. BASA-LINGAPPA KUSHAPPA. I,L.R. (1944) Bom. 1=16
R.B. 146=209 I,C. 450=45 Bom. L. R. 697= A.I.R. 1943 Bom. 321 (F.B.).

-O. 17, R. 3 (All.)—Applicability—Dismissal for non-complaiance with order to pay costs of adjournment. See C. P. CODE, O. 17, Rr. 1 AND 3 (ALL). 1943 O.A. (C.C.) 282 (2).

\_\_\_O. 17, R. 3—Applicability—Ex parte decree on date to which suit was adjourned on

defendant's request.
Where on the date to which a suit was adjourned on the defendant's request, the defendant is absent and the Court passes a decree ex parte, it

# C. P. CODE (1908), O. 17, R. 3.

is not a decree on the merits under O. 17, R. 3. C. P. Code, and hence could be set aside on application. It is a mistake to think that the mere absence of parties is enough either to dismiss or to decree a suit. A suit cannot be decreed even ex parte unless the plaintiff makes out a prima facie case in support of his claim. (Sathe, S. M.) BIMAL CHANDRA v. HEMKUER. 1943 R.D. 483=1943 A.W.N. (Rev.) 314 (2).

-O. 17. R. 3-Case when falls under-Remedy.

If an adjournment is given specially at the request of the defendant in order to enable him to perform any particular act or produce particular evidence and there is default, the case falls under R. 3 of O, 17. The remedy of the aggrieved party is only an appeal, not an application under O. 9, R. 13 for restoration. (Shirreff, S. M. and Sathe, J. M.) BINDRABAN v. ALAYAR KHAN. 1942 O.A. (Supp.) 72=1942 O.W.N. (B.R.) 105=1942 A.W.R. (Rev.) 66=1942 R. D. 127 D. 137.

-O. 17, R. 3 (All.)—Decision under—Court becoming aware subsequently of existence of 'reasonable excuse' for party's absence-Competency

to set aside decision.

Under O. 17, R. 3, C. P Code, it lies with the Court to decide the case on the merits on the postponed date of hearing, but as will be manifest from the rule itself, the absence of the party or his failure to produce evidence must be with-out reasonable excuse. When after dismissing a suit under O. 17, R. 3 the Court becomes aware of the existence of 'reasonable excuse' for the party's absence, the Court itself has no jurisdiction to set it aside, inasmuch as it was not an order passed under R. 2 of O. 17 but was one passed under R. 3 of that order. When the matter comes upon appeal it would be open to the appellate Court to take note of the "reasonable excuse" and set aside the decision. (Allsop and Sinha, II.) UDAI RAM GOPI RAM v. RAGHU-215 I.C. 304=17 R.A. 73=1944 A.W.R (H.C.) 126=1944 A.L.J. 370=1944 O.A (H.C.) 1244 A.L.W. 324=A.I.R. 1944 All. 211.

-O. 17, R. 3-Decision when one under-

Remedy open.

Where a case is adjourned to another date at the request of defendants to enable him to produce certain witnesses and on the adjourned date the defendant is absent but the plaintiff is however present and the Court after recording the evidence produced by him proceeds to dispose of the case on the merits and writes a considered judgment, the order must be held to be one under 0.17, R.3 and not under either the first or second paragraph of R.2 of O.17. The only remedy the defendants can have against such an order is by way of appeal and not by way of a restoration application. (Shirreff, J. M. and Sathe, A. M.) (1941) A.W.R. SURYAPAL SINGH v. BAKHARI. (Rev.) 1096=1941 O.A. (Supp.) 889.

be led—Plaintiff's witnesses if can be cross-examined after the closing of the defence evidence.

### C, P. CODE (1908), O. 18, R. 18.

The order in which evidence is led is not invariable and depends upon the issues in the case. If the cross-examination of the plaintiff's witnesses has been left out inadvertently the Court has inherent power to allow the cross-examination at a later stage after the closing of the defence evidence. (Sathe, S M.) MUKHTAR HUSAIN V., MST. BATOOLAN. 1944 R.D. 383=1944 A W.R. (Rev.) 192 (2).

-O. 18, R. 8 and S. 99-Failure to maintain memorandum of evidence-Irregularity-Condo-

nation.

The failure of an Assistant Collector to maintain a memorandum in English of the evidence taken by the Court Ahalmad is an irregularity, but where it has not prejudiced the case of either party it may be condoned under S. 99, C. P. Code. (Shirreff. S. M. and Sathe, J. M.) SHAMSHUDDIN AHMAD v. FAQIRE. 1942 O.A. (Supp.) 501=1942 O.W.N. (B.R.) 707=1942 A.W R. (Rev ) 475.

-O. 18, R. 18—Object of local inspection— Time for local inspection-Inspection after whole arguments are over-Propriety-Duty of judge to record facts observed by him without recording impressions or opinions-Proper procedure-

Evidentiary value.

It is always desirable in cases where local in-spection is necessary that the Judge should carry out the inspection at any stage before the arguments are heard and if he conducts the inspection at the request of the parties it should be made clear whether the parties have left the matter to be decided as he thinks proper from his inspection or that he is merely inspecting under O. 18, R. 18, C. P. Code. If the Judge records his impressions or opinions in his notes of inspection, the parties must have an opportunity to urge their arguments on those notes at the time when the case is generally argued before the Court. It would generally be desirable for the Judge to confine his notes to the facts which he observes without recording his impressions or opinions. His notes are not only a relevant but an important piece of evidence in the case and his findings based on his local inspection are entitled to great weight by the Court of appeal in the same manner in which findings based on appreciation of oral evidence would be. The Judge is entitled to form his impressions, but if he records them in the notes, the parties should have an opportunity to meet them in their arguments and he should not decide the case merely from his impressions without giving due weight to the evidence. The Court of appeal would no doubt give due weight to what the Judge observes in his inspection, but the purpose of local inspection is not to make it a substitute for the evidence but to assist in its appreciation. To make a local inspection after the arguments of both sides are over without an opportunity to the parties or their pleaders to challenge the notes before judgment is pronounced is not a proper procedure. (Stone, C. J. and Divatia, J) Amratlal v. Land Acquisition Officer, Ahmedabad. 47 Bom. L.R. 95-A. I.R. 1945 Bom. 302.

-O. 18. R. 18—Opinion formed on local inspection-When to be accepted in place of evidence.

### C. P. CODE (1908), O. 19, R. 2.

It cannot be said that in an ordinary case the opinion of the Judge formed on a local inspection under O. 18, R. 18, could take the place of evidence. But where the parties agree to accept the opinion of the Judge on that point, and for that reason lead no evidence, in such special circumstances, the opinion of the Judge could be MUNICIPAL COMMITTE, BILASPUR v. WAMANRAO VINAYAKRAO. I.L.R. (1942) Nag. 269=197 I. C. 300=14 R N 157=1941 N.L.J. 403=A.I.R. 1941 Nag. 292.

—O. 19, R. 2—Applicability—Application under O. 9. R. 13.
R. 2 of O. 19, C. P. Code, applies only to inter-locutory applications like applications for attachment before judgment, for temporary injunction, for issue of commission and the like. It does not apply to applications of a substantive nature such as an application under O. 9, R. 13 for setting aside an ex parte decree. Substantive applications are those which initiate proceedings, the interlocutory applications being incidental to such proceedings and made while they are pending. (Bobde, J.) Federal India Assurance Co. v. Anandrao Dixit. I.L.R. (1944) Nag. 436=216 I.C. 184=19 R.N. 64=1944 N. L.J. 134=A.I.R. 1944 Nag. 161.

·O. 20—List of preliminary decrees—If exhaustive.

The list of preliminary decrees mentioned in O. 20, C. P. Code, does not exhaust the whole list of preliminary decrees. (Mitter and Khund-kar, JJ.) SURENDRA NATH SARKAR v. SAILENDRA NATH KUNDU. 203 I.C. 518=15 R.C. 438=46 C.W.N. 857=A.I.R. 1942 Cal. 537.

— O. 20, R. 1-Applicability-Proceedings under Punjab Land Revenue Act.

O. 20, R. 1, C. P. Code, does not apply to proceedings of revenue officers under the Punjab Land Revenue Act, and there is no provision of law which requires orders of Revenue Officers under that Act to be pronounced formally in open Court on a specified day. (Mitchell, F.C.)
TAJ MAHOMED v. NUKH RAM. 20 Lah.L.T. 115.

O. 20, R. 2-Judgment written by Judge who has ceased to be Judge and pronounced by his successor-Validity.

A judgment written by a Judge who has ceased to exercise jurisdiction and pronounced by his successor is a valid judgment. (Almond, J.C.) GHULAM RASUL v. MT. GUL JAN. 205 I.C. 197=15 R. Pesh. 85=A.I.R. 1943 Pesh. 11.

-O. 20, R. 3-Dating of judgment-Duty of Court.

Judgments in judicial proceedings are of permanent value and can be quoted at any time in future. Courts should be careful to give the number of the day, month as well as year while dating their judgments. A date which does not give the year also is of very little value in future references. (Sathe, S.M) MAHOMED ADIL v. MAIMUNA BIBI. 1943 A.W.R. (Rev.) 189 (1)=1943 O.W.N. (B.R.) 78=1943 R.D. 78.

-O. 20, R. 3—Dating of judgment—Duty of judge.

A judge must not fail to give the year in which the judgment is given as otherwise it would be

### C. P. CODE (1908), O. 20, R. 4.

difficult to trace the identity of the judgment in future years. (Sathe. J.M.) Budh Sen v. Madho Singh. 1942 O.A. (Supp.) 491 (2)= 1942 O.W.N. (B.R.) 712=1942 A.W.R. (Rev.)

-O. 20, R. 3—Dating of judgment—Duty of judge.

The dating of judgments must be complete inall respects (i.e.) it must give the date of the month and the number of the month as well as the year. Unless this is done the identification of the judgment in future years would become difficult. (Shirreff, S.M. and Saihe, J.M.) RAM CHAND v. HANUMAN DAS. 1942 O.A. (Supp.) 491 (1)=1942 O.W.N. (B.R.) 711=1942 A.W. R. (Rev.) 465 (1).

-O. 20, R. 3 and Oudh Rules, Ch. II, R. 97 -Order for costs on dismissal — Subsequent direction as to taxation of costs of witnesses not examined—Validity—If contravenes, O. 20, R. 3.

Where after an order of dismissal with costs, the Court by giving directions to the office to tax the costs of witnesses who have not been examined as required by Oudh Rules, Ch. II, R. 6, cannot be deemed to be altering or adding to the judg-ment pronounced already by it. The rule itself does not say when the direction is to be given. Such a direction suo motu or on application is not ineffective if given after order of dismissal. (Ghulam Hasan, J.) MAHABAL PRASAD v. LACHMICHAND. 197 I.C. 760=14 R.O. 350=1941 A.W. R. (C.C.) 361=1941 O. A. 950=1941 O.W.N. 1265=A.I.R. 1942 Oudh 109.

\_\_\_\_O. 20, R. 4 (1)—Small Cause judgment— Complicated case—Statement of reasons for decision—Desirability.

Where a case is complicated, it is desirable that a Judge of the Court of Small Causes should briefly state the reasons for his decision and the process by which he has reached the conclusion, in order to enable the High Court to decide under S. 25 of the Prov. S. C. Courts Act whether the decision is according to law. (Sen. J.) Noorbux v. Kalyandas. I.L.R. (1945) Nag. 475=1945 N.L.J. 267=A.I.R. 1945 Nag. 192.

-O. 20, R. 4 (1)—Small cause judgment— Contents—Reasons for decisions—When to be given—Provincial Small Cause Courts Act, S. 25.
O. 20, R. 4 (1), C. P. Code, should be considered along with the provisions of S. 25 of the Provincial Small Cause Courts Act, and the latter provision impliedly requires the Judge deciding a small cause suit to make his judgment suffi-ciently intelligible to enable the High Court to be satisfied that his decision is according to law. O. 20, R. 4 (1) does not debar the Judge from making his judgment intelligible by giving a few reasons, if he thinks it necessary, especially when complicated questions of law are raised. On a reasonable interpretation of O. 20, R. 4 (1) and S. 25, Provincial Small Cause Courts Act, in a small cause suit, on a question of fact, the Judgeneed not give more than a clear statement of the points which he has to decide and his decisions thereon, and if he thinks them to be sufficiently intelligible, he is not bound to give his reasons for those decisions. But on a question of law, if

a bare finding is not likely to indicate the reason-

ing by which it is arrived at, the Judge is bound

C. P. CODE (1908), O. 20, R. 4 (2).

to set out so much of his reason as will make clear the road by which he reached his conclusion. (Lokur, J.) TRIBHOVANDAS MANCHHARAM v. C. R. CONTRACTORS' CO. AT BROACH. 210 I.C. 33=16 R.B. 161=45 Bom.L.R. 806=A.I.R. 1943 Bom. 416.

——O. 20, R. 4 (2) and O. 41, R. 31—Judgment—Contents—Desirability of omitting summaries of oral evidence and arguments.

The practice of giving in the body of the judgment a summary of the oral evidence, and counsel's arguments or of a tabular list of documentary evidence filed, is to be deprecated. A trial Court must after giving a general narrative of the case and detailing the issues framed consider the evidence both oral and documentary on each issue separately and give its own findings thereon. Similarly an appellate Court should after giving a general narrative of the case state the points pressed in the appeal before it and give its own findings on each point separately after considering (1) the views of the lower Court, (2) the arguments of counsel, and (3) the evidence on record. If in any special case a tabular list or summary has to be given it should generally form an appendix or schedule to the judgment instead of being incorporated in the body of the judgment. (Shirreff, S.M. and Sathe, J. M.) Jokhu Mal v. Sheo Ghulam Mal. 1942 R.D. 971=1942 O.A. (Supp.) 538=1942 A.W.R. (Rev.) 512=1942 O.W.N. (B.R.) 789.

—O. 20, R. 4 (2)—Judgment—Requirements. Where a judgment does not contain a concise statement of the case, the points for determination the decision of the Court and the reasons for such a decision but merely gives reference to the report of the Ahalmad and relies on it entirely it does not satisfy the requirements of law. (Sathe, J.M) RAMPAL SINGH v. MOHAR SINGH. 1943 O.A. (Rev.) 53=1943 R.D. 140=1943 A. W.R. (Rev.) 53.

findings on all issues to avoid remand by appellate Court.

In all cases open to appeal the trial judge should determine and give findings on all issues, so that the appellate Court may have the benefit of the view of the evidence taken by the trying judge and need not remand the case. (Divatia and Sen, II.) SHIVSHANKAR CHHAGANLAL v. LAXMAN CHIMANLAL. I.L.R. (1943) Bom. 441=206 I.C. 318=15 R.B. 393=45 Bom.L.R. 78=A.I.R. 1943 Bom. 83.

\_\_\_\_O. 20, R. 5—Duty to decide all issues to avoid remand on appeal.

The normal practice for Courts in trying suits is to decide all the issues which have been framed so as to make it unnecessary thereafter for the appellate Court again to refer the matter to the trial Court and to require the parties to adduce fresh evidence. It is not in accordance with the correct practice to limit the decision of the suit out of which an appeal, and possibly an appeal to the Judicial Committee as well, lies, to some of the issues only. (Macpherson and Fazl Ali, JJ) SRI GOPINATH JEA v. BIRALEAR BHRAMARBAR ROY. 11 Cut.L.T. 10.

C. P. CODE (1908), O 20, R. 7.

—O. 20, R. 5 and O. 41, R. 31—Judgments of trial and appellate Court—Contents—Examination of evidence—Necessity.

Though R. 5 of O. 20 does not specifically state that the trial Court must also examine the evidence led on each issue, it is implied in the direction contained in the rule which requires that the reasons of the Court must be stated in the judgment. The reasons can depend only upon an examination of the evidence and the law on the subject. Hence an examination of all the evidence on record whether oral or documentary is essential before a trial Court comes to decide the case. Similarly under O. 41, R. 31, the appellate court must examine the evidence on both sides before arriving at a decision and the judgment itself must contain the reasons for the decision and indicate that the Court has applied its mind to an examination of the evidence. (Sathe; S.M. and Ross, J.M.) MANSINGH v. JUGUL. S.M. and Ross, J.M.) Mansingh v. Jugul. Kishore. 1944 A.W.R. (Rev.) 29=1944 R.D. 78.

——O. 20, R. 5—Procedure—Court disposing of suit on one issue only—Duty to record findings on all relevant issues.

The Subordinate Courts in all appealable cases should pronounce their decision on all the relevant issues so that if the superior Courts take a different view upon the issue which alone has been decided by the Subordinate Court, the parties litigant would be saved from the harassment of a consequent remand. (Fazl Ali and Manohar Lall, JI.) DEB PRASANNA MUKHERJEE V. LAKHI NARAIN MANDAL. 196 I.C. 641=14 R.P. 222=8 B.R. 67=1941 P.W.N. 565=A.I. R. 1942 Pat. 108.

—O. 20, R. 6 (2)—Decree—Contents—Preemption decree.

Decrees of Court should be drawn up by Judges in such a way as to make them self-contained and capable of execution without referring to any other document. Where a pre-emption decree merely reproduces the words of an order as to amendment of the order as to costs it is not a self-contained decree; but far from it. The Court should clearly specify the cost and also how it should be adjusted with reference to the pre-emption money. (Ghulam Havan, I.) MAHOMED ZAFAR v. MATA BADAL. 210 I.C 614 = 16 R.O. 200=1943 O W.N. 393 (2)=1943 O. A (C.C.) 249=1943 A.W.R. (C.C.) 117=A.I.R. 1944 Oudh 42.

point of limitation for filing of appeal.

Under O. 20, R. 7 the decree shall bear the date on which the judgment was pronounced and the date of the decree to be appealed against must therefore be taken to be the day on which the judgment was pronounced and not the date of the signing of the decree if that is later. (Shirreff, S M.) SHIAM MOHAN NATH RAJA MISAR V. AMJAD ALI KHAN. 1942 R D 286 (2) = 1942 O.W.N. (B R.) 220 (2)=1942 A.W.R. (Rev.) 250 (2)=1942 O.A. (Supp.) 276 (2).

operates—Limitation for execution.

C. P. CODE (1908, O. 20, R. 9.

The provisions of R. 7, of O. 20 of the C. P. Code, is mandatory. The date of the decree must correspond with the date of the judgment irrespective of the date when the decree is actually drawn up. The decree is to operate from the date of judgment though actually it may have been drawn up subsequent to judgment. Hence it must be executed within the time limited starting from the date of the judgment. (Ghulam Hasan, J) Harbans Singh v. Ram Chandra. 197 I.C 12=1941 A.W.R. (Rev.) 1057=14 R. O. 264=1941 O.A. 935=1941 O.W.N. 1232= A.I.R. 1942 Oudh 139.

——O. 20, R. 9—Immoveable property—Description by extent and by numbers—Conflict—Which to prevail. See C. P. Code, O. 7, R. 3 and O. 20, R. 9. A.I.R. 1944 Pat. 254.

-O. 20, R. 10-Movables-Suit for return of-Value-Computation-Crucial date.

In a suit to recover a quantity of wheat which the defendant promised to return to the plaintiff, the question as to when the cause of action arose is absolutely foreign to the assessment of the price by the Court under O. 20, R. 10, C. P. Code. The value according to the rate prevailing during the days when the suit was instituted is to be found out and not at the rate prevailing on some other day as for example the date of the promise to return the wheat. (Mir Ahmad, C.J. and Mahomed Ibrahim, J.) THOK CHAND v. DAMO-DAR DASS. 218 I.C. 177=17 R. Pesh. 27= DAR DASS. A.I.R. 1945 Pesh. 5.

— O. 20, R. 11 (2)—Order under—Appeal. An order under O. 20, R. 11 (2), is appealable, whether it is regarded as one under S. 47, C. P. Code, or as a decree in itself. (Bose, J.) JAGRUTESHWAR DEOSTHAN V. ATMARAM. I.L.R. (1943) Nag. 456=206 I.C. 72=15 R.N. 236=1943 N. L.J. 103=A.I.R. 1943 Nag. 155.

— O. 20, R. 12—Appeal—Proceeding under —If one in suit or in execution—Appeal from order for mesne profits in preliminary decree—Maintainability. See C. P. Code, Ss. 2 (2) And 47. I.L.R. (1941) Kar. 563.

-O.20, R. 12—Applicability—Suit for assess-

ment and recovery of additional rent.

O. 20, R. 12, C.P. Code, does not apply to a suit for assessment and recovery of additional rent. The plaintiff in such a suit is not, therefore, entitled to get a decree for arrears of rent during the pendency of the suit and for a further period of three years. (Mitter and Khundkar, JJ.) MIDNAPORE ZEMINDARY CO., LTD. v. KUMAR CHANDRA SINGH. I.L R. (1943) 2 Cal. 245= 210 I.C. 594=16 R C. 472=77 C.L.J. 347=47 C.W.N. 733=A.I.R. 1943 Cal. 544.

-O. 20, R. 12-Costs-Final decree awarding mesne profits as ascertained-Plaintiff paying court-fee thereon—Right to recover amount of court-fee from defendant—Decree silent on the point—Effect.

A plaintiff is entitled to recover from the

C. P. CODE (1908), O. 20, R. 12.

decree in his suit. The fact that the decree itself does not mention that the plaintiff is entitled to recover this court-fee from the defendant and is silent about it cannot be taken as equivalent to a case of no award of such relief, and would not disentitle the plaintiff from recovering the same from the defendant, (Chandrasekhara Ayyar, J.) Subba Rao v. Subba Rao. 211 1.C. 263=16 R.M. 501=56 L.W. 513=1943 M.W N. 819=A.I.R. 1943 Mad. 689—(1942) 2 M.J. I. 210 =(1943) 2 M.L.J. 319.

O. 20, Rr. 12 and 18—If exclusive.

Rr. 12 and 18 of O. 20, C. P. Code, are not necessarily exclusive. The two rules must be read together. (Davis, C.J. and Weston, J.)

SAHIJRAM RUPCHAND V. ALU TUNDU. I.L.R. (1941) Kar. 563—200 I.C. 74—14 R.S. 205— A I.R. 1942 Sind 60.

——O. 20, R. 12—Interest on mesne profits— Whether can be allowed.

Interest is a part of mesne profits. It there are no special circumstances, simple interest at six per cent. per annum is a fair rate and can be allowed on the mesne profits. (Mitter and Khundkar, JJ.) KALIDAS RAKSHIT V. SARASWATE DASSI. I.L.R. (1942) 2 Cal. 268=75 C.L.J. 447=206 I C. 508=15 R.C. 715=46 C.W.N. 982=A.I.R. 1943 Cal. 1.

-O. 20, R. 12-Scope-Decree for possession-No direction for inquiry into future puisne

profits-Proper remedy.

O. 20, R. 12, C. P. Code, specially contemplates the passing of a decree and it is not intended to be put into operation after the decree has been passed. The order to direct an inquiry must come as part of the decree itself. Unless the decree in a suit for possession directs an inquiry, there can be no such inquiry ordered in any final decree. The remedy in such a case is by way of Suit and not by an application. (King, J.)
SUBBIAH v. KOTAMMA. 58 L.W. 39=1945 M.
W.N. 116=A.I.R. 1945 Mad. 222=(1945) 1.
M.L.J. 204.

-O. 20, R. 12 (1) (c)—Accidental omission to give direction regarding future mesne profits

-Power of Court to remedy.

If the omission to give an express direction, in the decree in terms of O. 20, R. 12 (1) (c), C. P. Code, regarding mesne profits pendente lite and thereafter is an accidental one, the Court assessing the mesne profits can supply the omission under the powers given by S. 152, C. P. Code. (Mitter and Khundkar, JJ.) KALIDAS RAKSHIT V. SARASWATI DASSI. I.L.R. (1942) 2 Cal. 268 =75 C.L.J. 447=206 I.C. 508=15 R.C. 715=46 C.W.N. 982=A.I.R. 1943 Cal. 1.

O. 20, R. 12 (1) (c) (iii)—Scope—Mesne, profits—Decree for—Time-limit—Decree without time-limit—Construction of.

Under O. 20, R. 12 (1) (c) (iii), mesne profits can only be decreed for three years after the date of the decree. A decree which provides for mesne profits till realisation without specifying any limit other than the date of realisation must be read as one providing for mesne profits till defendant the court-fee that he had to pay on the amount of mesne profits ascertained to be limit of three years. (Wadsworth and Patanjali due to him and decreed in his favour by the final | Sastri, JJ.) GODAVARTI RAJA v. RAMACHANDRA- C. P. CODE (1908), O. 20, R. 13.

SWAMI VARU. 209 I.C. 116=16 R.M. 278= 1943 M.W. N. 421=56 L.W 178=A.I.R. 1943 Mad 354=(1943) 1 M.L.J. 253.

-O. 20, R. 13-Administration suit-Nature and incidents of-Duty of Court-Receiver in-Status and powers of-Property-If vests in Court or receiver.

An administration suit under O. 20, R. 13, is in essence a suit for an account and application of the estate of a deceased debtor for the satisfaction of the dues of all his creditors. The entire administration and settlement of the estate are assumed by the Court. The assets are marshalled and a decree is made for the benefit of all the creditors. For this purpose the Court has to appoint a receiver, but that receiver has no better status than that of a receiver appointed under O. 40, R. 1. The property does not vest in him as it does in a receiver appointed in an insolvency proceeding. O. 20, R. 13 (2) has nothing to do with the vesting of the property in the receiver. The receiver's possession is the possession of the Court which takes upon itself the management during the continuation of the litigation. The interest in the property is not thereby transfer-red either to the Court or to the receiver. It is, however, the duty of the Court to see that all the assets are realised and equitably distributed among all the creditors. (Lokur, J.) Abdul Rahim v. Lingappa Vaijappa. 213 I C 146=17 R.B. 21=45 Bom. L.R. 534=A.I.R. 1943 Bom. 273.

-O. 20, R. 14 and O. 21, R. 36-Payment into Court of purchase money by pre-emptor—Effect of O. 20, R. 14—Pre-emptor's subsequent failure to take symbolical delivery under O. 21, R. 36— If can defeat title acquired by him.

Where in respect of property capable of symbolical possession only, the pre-emptor deposits the purchase money into Court within the allowed time, then under O. 20, R. 14, he acquires automatically a title to the property from that date. Hence his subsequent failure to obtain symbolical delivery under O. 21, R. 36, or failure to take further steps like mutation or correction of names cannot defeat the title so acquired. HASAN 20 Luck. 356=1945 O.A. (C.C.) 121=1945 A.W.R. (C.C.) 121=1945 A.W.R. (C.C.) 121=1945 A.L.W. (C.C.) 116=1945 O.W.N. 123=A.I.R. 1945 Oudh 200.

-O. 20, R. 14-Pre-emptor's right to mesne

profits from date of deposit.

The addition of the words in O. 20, R. 14, C. P. Code, that, "title to the property shall be deemed to accrue from the date of the payment" leave it open to no doubt that after the date of such payment the pre-emptor is entitled to mesne profits of the land. (Almond, J.C.) AKBAR SULTAN v. TAJ MAHOMED. 211 I.C. 443=16 R. Pesh. 69= A.I.R. 1944 Pesh 11.

O. 20, R. 16-Commissioner to take accounts-Duty of-Rights and liabilities fixed by preliminary decree—If can be varied.

A commissioner appointed to take accounts is bound to take accounts in accordance with the preliminary decree. He has no power to vary it. Rights and liabilities fixed in the preliminary decree cannot be varied in proceedings taken

C. P. CODE ((1908), O. 20, R. 18.

thereafter. (Lobo and O. Sullivan, JJ.) TIKA-I L.R RAM KASHIRAM v. GANESHMAL JOGUMAL. (1943) Kar. 429=214 I.C. 256=17 R.S. 23=A. I.R. 1944 Sind 73.

-O. 20, Rr. 16 and 17 - Suit for accounts-Duty of Judge-Clear directions-Necessity.

In a suit for accounts the Judge must first of all make up his mind whether the defendant is an accounting party. If he is, then the Judge must next determine whether the defendant has already accounted or is relieved from accounting, If he decides that an account has to be rendered, then he should pass a preliminary decree in accordance with R. 16 of O 20, and when doing so it is of the utmost importance that he should bear in mind that in most cases special directions are necessary. (Stone, C.J. and Bose, J.) Rab-ніка Prasad v. Nand Kumar. I.L.R. (1944) Nag. 63=217 I.C. 39=17 R.N. 86=1942 N.L.J. 355=A I.R. 1944 Nag. 7

-O. 20, R. 18—Applicability—Partition suit -Compromise decree allotting specific properties—If preliminary or final—Engrossing on stamp—Limitation—Stamp Act, Art 45.

A compromise decree in a partition suit allotting specific properties to the parties and specifying the properties allotted to share of each party is not a preliminary decree contemplated by O. 24, R. 18, C. P. Code, but is the final decree in the suit, and nothing more remains to be done except to engross it on a stamped paper under Art. 45 of the Stamp Act. There is no time limit for so engrossing it on stamp of the requisite value. The decree to be engrossed will bear the date of the decree and will declare the position of the parties in respect of the properties on that date. Mere engrossment of the decree on stamp of the requisite value will not in any way affect the interests of the parties though changes may have occurred in respect of the properties after decree and before engrossment. (Sinha and Pande, JJ.) RAGHUBIR 24 Pat. 427=A.I.R. 1945 Pat. 482. RAGHUBIR v. AJODHYA.

-O.20, R. 18-Direction under-If indispensable.

The direction to the Collector contemplated by R. 18 of O. 20, C. P. Code, is not indispensable. Hence where there has been a compromise decree in a partition case, mutation can be made, though the Civil Court has not given the necessary directions under O. 20, R 18 to the Revenue Courts to take action. (Shirreff. J.M.) BAL MAKUND v. SHIVA KUMAR MISRA. 1941 R.D 425=1941 A. W.R. (Rev.) 569=1941 O.A. (Supp.) 500.

-O. 20, R. 18-Limitation-Decree for partition of revenue paying lands-Direction to effect partition-Application to Court to send papers to Collector—If to be made within three years—Period of limitation. See LIM. Act, ARTS, 181 AND 182. 47 Boin. L.R. 447 (F.B.).

-O. 20, R. 18-Powers of Court under-Partition decree—Contents—Execution by Collector—Discretion of Collector. See C. P. Cons. S. 54 AND O. 20, R. 18. I.L.R. (1942) Kar. 162. C. P. CODE (1908), O. 21, R. 1.

The word "decree-holder" in O. 21, R. 1, although in singular means, all the decree-holders jointly when there are more than one. One of the joint decree-holders whose share has not been specified cannot separately settle up with the judgment-debtor even so far as his share of the decree is concerned. (Mir Ahmai, J.): KARTAR SINGH v. GURDIAL SINGH. 202 I O. 59=15 R. Pesh. 32=A.I.R. 1942 Pesh. 58.

O. 21, R. 2—Adjustment—Assignment of decree to defendant's son benami for defendant—Effect of, See C. P. CODE, O. 21, R. 16, I.L.B. 1942 Kar. 168,

——O. 21, R. 2—Adjustment—Execution—Reference to arbitration—Award—Validity—Power of Court to give permission for reference and file award in execution—Sch. II. ZUMAKLAL MOTIRAM v. FULCHAND TARACHAND. [see Q. D. 1936—40, Vol. I, Col. 1552.] 192 I.C. 583=13 R.B. 259=A.I.R. 1941 Bom. 20.

If there is a completed contract which immediately extinguishes and takes the place of the decree, that contract is an adjustment within the meaning of O. 21, R. 2, C. P. Code, although it is to be performed at some future date. If, on the other hand, there is only an agreement to adjust the decree on the fulfilment of a future condition and the decree is still left in existence pending the fulfilment of the condition, then there is no adjustment. It is of course, a question to be decided in each case by the executing Court whether there has been a completed contract or not. (Young, C. J. Delip Singh and Monroe, J.). UDHAM SINGH v. ATMA SINGH. I.L.R. (1941) Lah. 383=194 I.C. 1=1941 O.W.N. 815=13 B.L. 507=1941 R.D. 574=1941 O.A. (Supp.) 560=1941 A.L.W. 665=1941 A.W.R. (Rev.) 657=43 P.L.R. 192=A.I.R. 1941 Lah. 149 (F.B.).

——0. 21, R. 2—Adjustment of rent decree—Deed appointing one of decree holders manager of interest of eleven annas ludgment-debtors—Other decree-holders and judgment-debtors not parties—Effect.

A deed by which one of the holders of a rent decree is appointed a manager of the interest of the eleven annas judgment-debtors and to which the other decree holders as well as the remaining judgment-debrors are not parties, does not have the effect of an adjustment of the decree. It cannot be said that the other decree-holders became impliedly parties to the deed from the mere fact that they were paid some portion of the rents that subsequently fell due. (Derbyshire, C.J. and Mukherjea, J.) Jananendra Narayan Bagchi 7. Bholanath Mondal 194 I.C. 764=14 R.C. 15=72 C.L.J. 443=A.I.B. 1941 Cal. 252.

### ---- O. 21, B. 2-"Adjustment"-What is.

Where there is a completed contract which immediately extinguishes and takes the place of the decree, such contract is an adjustment within the meaning of O. 21, R. 2, C. P. Code, where on the other hand there is only an agreement to adjust the decree on the fulfilment of a future condition and the decree is still left in existence pending the fulfilment of the condition, there is no adjustment within the meaning of O. 21, R, 2. (Shearer, J.) BANKA DAS v. ODDI ARJUN SUBUDHI 215 IC, 35=17 R.P. 82=11 B.R. 46=10 Cut.L.T. 35=A.I.B. 1944 Pat. 279.

C. P. CODE (1908), O. 21, R. 2.

--- O. 21, B. 2—Adjustment—What may amount

Where all that had been awarded by the original decree was extinguished by the mew agreement there is an "adjustment" within the macen ing of O. 21, R. 2, C. P. Code. (Roberts, C. J. and Dankely, J.) KORBAN BIBI v. V. M. R. P. CHETTY AR FIRM. A.I.R. 1942 Rang. 56.

R. 2 of O. 21, C.P. Code, only refers to a stage after the passing of a decree and hence would not be applicable to an adjustment made between the parties prior to a decree being passed. (Malken, J.) DEVI DAS MADHOJI v. RAMCHANDRA BAROTHIA. 1943 A.L. W. 35.

——0. 21, B. 2—Applicability—Application to scale down decree debt under S. 19, Machas Agriculturists' Relief Act—Uncertified payments—Proof of—Permissibility.

S. MADRAS AGRICULTURENS' RELIEF ACT, S. 19. (1942) 2 M.L.J. 185.

——O. 21, B. 2—Applicability — Compromise of mortgage sait. See C.P. CODE O. 23, R. 3 and O. 21, R. 2. A.I.R. 1941 Rang. 315.

The adjustment of a decree for possession of immovable property without any payment of money, falls within the ambit of 0.21, R.2 (1), and the executing Court cannot recognise such adjustment if it has not been certified. The words "the decree" in R.2 (1) mean a decree of any kind and should mot be read as meaning a decree of any kind under which money is payable. (Pollock, J.) MARNIRILA LV\_M ADURNATH. 210 I.C. 316=16 R.N.153=19-43 N.L.J. 512=A,I.R. 1943 Nag 339.

-0. 21, R. 2 and O 28, R. 8—Applicability and relative scope—Mortgage still—Application for final decree under 0.34, R. 5—PTes of a discount of mortgage debt before preliminary discuss—Power of Court to inquire into.

O. 21, R. 2, C P. Code, only a pplies in execution but execution does not begin until after a final decree for sale has been passed in the case of mortgage suits. When the question is whether a final decree should or should not be passed by reason of an adjustment or agreement arrived at between the parties, R. 2, of O. 21, C. P. Code, does not apply. The suit continues up to final decree, and hence any ad just ment or satisfaction up to that time may be take nimto account up to that time, under O. 23, R. 3 C. P. Code . Though a decreeholder need not agree to any adjustruen tor accept payment otherwise than into Court, it is open to the debtor to allege and prove that an adjus tmemt has taken place or payment in whole or in part has been made and received. There is nothing to qualify the wide terms of O. 23, R. 3, nor any grounds for limiting its application. There is no time limit for recording the agreement arrived at as there is under O .21, R. 2, C. P. Code. (Lord Porter.) MADAN T. HEATRES, LTD. v. DINSHAW & CO. 1945 M.W.M. 573 = 58 L.W. 504=A.I.R. 1945 P.C. 152= (1948) 2 M.L.J. 367 (P.C.).

— O. 21, R. 2—Application to record part payment — Nature of — If "application". See MMILATION ACT, ART. 182 (5). 43 Born. L.R. 8-80.

O. P. GODE (1908), O. 21, &. 2.

-0.21, 8.2 -Cohector to Johan decree is transferred for execution—If our record attestment—Issury by Cont Court without notice to decree-hilder on information from Cotlector—If amounts to recording of adjustment.

The Collector to whom a decree is transferred for execution is not a Court and has no power to record the adjustment of the decree. If the Civil Court on information from the Collector makes an entry in its register without notice to the decree-holder that the decree has been satisfied, it cannot be said that the adjustment is recorded by it. It has no power to record the adjustment without notice to the decree-holder. The judgment-dector may have other remedies open to minimulate cannot dispute the executing Court's power to execute the decree in yiew of the plain words of substate (3) of R, 2 of O. 21, C.P. Code. (Pollock J.) PRABHARAR JOSHI 2. SHANKAR. I.E.R. (1944) Nag. 740—220 1.C. 34—1944 N.L.J. 210—A.I.R. 1944 Nag. 231.

——O. 21, R. 2—Notice—Necessity for and form of —Taking initials of decree-holder's vakil in order sheet on application by Judgment debtor—Sufficiency.

Under O. 21, R. 2, C. P. Code, where a judgment-debtor informs the Court of any payment or adjustment, the Court must issue notice to the decree-holder in the form prescribed. To merely send the order sheet through the court-peon to the decree-holder's pleader and to take his initials on it, cannot be regarded as compliance with the rule. An order recording adjustment in such circumstances is not a legal order and must be set aside, (Shearer, J.) RAMCHANDA PARIDA v. NARAYAN DAS. 217 I.C. 118=17 R.P. 163=11 B.R. 171=10 Cut. L.T. 28=A.I.R. 1944 Pat. 251.

O. 21, R. 2—Scope—Mortgage—Final decree for sale—Agreement before preliminary decree that part of hypotheca should not be sold—If can be pleaded in execution. See C.P. CODE, S. 47 AND O. 21, R. 2. (1941) 2 M.L.J. 344.

The question whether a decree was adjusted by a compromise as alleged by an applicant under O. 21. R. 2, C. P. Code, is a question of fact; the question whether such a compromise should be certified under O. 21, R. 2, C. P. Code is one of law. It is only if the former question which is one of fact, is answered in the affirmative that the latter question (of law) will arise for decision. Where on a consideration of the facts and the inferences thereof it is found that there was no effective compromise and as such there was no valid adjustment to extinguish the decree, the question of law as to whether the adjustment should be certified, does not arise for decision. (Sir Madhavan Nair.) AISHI RAM ASA RAM v. HARKARAN DAS. I.L.R. (1943) Kar. (P.C.) 83=213 I.C. 1=10 B.R. 590=17 R.P. C. 7.

entered after its assignment on basis of payment to eriginal decree holder-Finding, if binds assignee.

U. P. 00 DE (1508), O. 21, d. 2 (1).

Where all an assignment of a decree an application under O. 21, R. 2, Cole, Code, for entering up satisfaction or that decree on the basis of payment in full to the original decree-Pooler become the assignments inade and anowed on admission by the latter, the making will not be use assigned. (Tenarson, J.) ARKOENDRA AUMAR V. ABINASH CHANDRA 48 C. W.M. 419.

cheser it sate in execution—Prea of uncertified adjustment of accree in alfence—Sustainability.

It is not open to a juggittent-action or any one standing in his modes to pread an uncollined adjustment of the decree of way of the once to a suit by the auction-parentaer in execution of that decree for possession. Once the side has been commend, it conters absolute title on the parentser, whether he be the decree-holder of a stranger, provided there was title in the judgment-decree. (Leach, C. J., Lassianan Kio and Kapperson Appers, J.) ABDUL SUBHAN SAHIB v. KAMANNA. 210 I.O. 402-03 L.W.163=1940 M. W.N. 160-2A.I.L. 1940 midd. 151-(1940)1 M.I.J. 240 (F.B.).

-0. 21, B. 2-Scope - Uncertified adjustment between accree-holder and tadgment-debtor—If can be taken anto account in suit by surety.

Although an uncertified adjustment connot be recognised by the executing Court, it can be taken into consideration by a Court officer than the executing Court in a suit to recover damages by the judgment-debtor for breach of the contract represented by the adjustment, and a surety for the judgment-debtor can also rely upon such an adjustment in a suit by nim for declaring that he is discharged from hability by reason of the adjustment of the decree as between the decree-holder and judgment-debtor. (Divatra, J.) BONDRU AVASU 2. DAGADU EKOBA. I.L.R. (1943) Bom. 382—209 I.C. 435—45 Bom. L.R. 438—A.I.R. 1943 Bom. 246.

—0. 21, R. 2—Uncertified payment—Filing of execution petition by decree-holder—If gives judgment-debtor cause of action to sue for return—Right of judgment-ment-autor to full amount paid by him

The filing of an execution application by a decree-holder against a judgment debtor who alleges that he has paid off the decree-holder privately in itself gives the judgment-debtor a cause of action to bring a suit for relief and for doing so the judgment debtor need not want till he is made to pay twice over or suffers some damage. Amount which such judgment-debtor can recover indicated. (Mir Ahmad, J.) AZIM KHAN. MT. SHIB JAN. 205 L.C. 20=15 R. Pesh. 82=A. I.R. 1943 Pesh. 13

—0. 21, B. 2 (1)—Application by decree-holder— If binding and final—Right to withdraw certificate.

There is nothing in O. 21, R. 2 (1), C.P. Code, which would prevent a decree-holder from withdrawing his application before it is recorded. There is nothing in the sub-rule which says that the moment a certificate is presented it becomes binding for all time, and that the parties cannot change their minds and withdraw from the compromise. (Beaumont, C.J. and Sen, J.) DATTATRAYA KASHINATH v. BHAGWANDAS VITHALDAS.I.L.R. (1942) Bom. 132=198 I.C. 557=14 R.B. 315=43 Bom. L.R. 1022=A.I.R. 1942 Bom. 59.

C. P. CODE (1908), O. 21, R. 2(1).

—0. 21, R. 2 (1)—Construction - Function and duty of Court under—Duty to consider whether adjustment is legal adjustment before recording same;

Although in an application by the decree-holder under O. 21, R. 2 (1), C. P. Code, to record adjustment or satisfaction of the decree the Court is not concerned to consider the merits of the adjustment, it is concerned to consider whether the arrangement to be recorded is a legal adjustment. In a case where the judgment-debtors or some of them are minors the Court is bound under O. 32, R. 7, C. P. Code, to consider and satisfy itself that the compromise is for the benefit of the minors before recording it. It is undoubted that the Court has to satisfy itself that the adjustment which it is asked to record, is a legal adjustment; it is not a mere recoding machine under O. 21, R. 2 (1). (Beaumont, C.J. and Sin, J.) DATTATRAYA KASHINATH v. VITH. LDAS BHAGWANDAS. IL.R. (1942) Bom. 132=198 I.C. 557=14 R.B. 315=43 Bom. L.R. 1022=A.I.R. 1942 Bom. 59.

—0. 21, B. 2 (2)—Adjustment—Agreement to sell debtors, property by private contract during Encumbered Estates Act proceedings—Absence of sauction under S.7 (3) of Encumbered Estates Act—Effect—Binding nature of the agreement.

In the absence of sanction under S. 7 (3), Encumbered Estates Act, any agreement to sell the debtors' property by private contract cannot amount to an adjustment under O. 21, R. 2 (2) and is not binding and can be resiled from by either party, (Sathe, S.M. and Ross, A.M.) RAGHUNATH JI SHRI v. RAFIQ MOHAMMAD KHAN. 1943 A.W.R. (Rev.) 130=1943 R.D. 267=1943 A.L.J. (Supp.) 23.

—0. 21, R. 2 (3)—Applicability—"Court executing the decree"—Assignce of decree—Application to Court which passed decree under 0. 21, R. 16—If one for execution—Power of Court to recognise uncertified payment or adjustment.

It cannot be said that the Court which passed the decree and which is hearing an application under O. 21, R. 16, C. P. Code, is not a Court executing the decree within the meaning of O. 21, R. 2 (3). An application by the assignee of a decree to the Court which passed the decree under R. 16 of O. 21, C.P. Code, is an application for leave to execute the decree. The Court which passed the decree and which hears the application under R. 16 is hearing it as an executing Court and is accordingly bound by the prohibition in O, 21, R. 2 (3). It cannot therefore recognise or give effect to an uncertified payment or adjustment. (Beaumont, C.J., Macklin and Sen, J.) KRISHNA GOVIND PATIL v. MOOLCHAND KESHAVCHAND. I.L.R. (1941) Bom. 596—196 I.C. 1=14 R.B. 116—43 Bom. L.R. 751=A.I.R 1941 Bom. 302 (F.B.).

— 0. 21, R. 2 (3)—Applicability—Prohibition of uncertified payment or adjustment—If confined to case of total discharge.

The prohibition enacted under O. 21 R. 2 (3), C.P. Code, of the recognition of any uncertified payment or adjustment applies just as much to a total discharge as to a parial discharge. (Leach, C.f. and Wadsworth, I.) AMMANIAMMA v. MUDDAPPA. 57 L.W. 592 (1)=1944 M.W.N. 696 (1)=A.I.R. 1945 Mad, 80=(1944), 2 M.L.J. 336 (1).

O. F. CODE (1903), O. 21, R. 5.

for delivery of possession—Plea by judgment-debtor that he was to be in possession under agreement between him, decree-holder and third party—If open.

O. 21, R. 2, C.P. Code, is concerned only with satisfaction and adjustment of a decree and the manner in which it should be brought to the notice of the Court and the consequences of failure to do so. It cannot possibly apply to a situation in which the decree-holder has realised his money by selling the judgment debtor's property in execution and receiving the sale proceeds either in cash if some one else has purchased the property or by set off if he has purchased it himself. A clear distinction has to be drawn between prooceedings for execution of the decree and the proceedings in execution. Where a decree-holder purchaser's application for delivery of the property parchased by him under O. 21 R. 95, C. P. Code, is resisted by the judgmentdebtor, his plea being that under an agreement between him, the decree-holder and a third person he was to be let in possession of the property sold in execution, the Court cannot refuse to consider such a plea by reason of O. 21, R. 2 (3). Since at such a stage, execution in the strict sense of the term is over before an application for delivery of possession is made the plea is open to the judgment debtor and the Court should consider the plea on its merits. (King and Bell, JJ.) CHOKKALINGAM CHETTIAR v. LAKSHMANAN CHETTIAR. I.L.R. (1945) Mad. 348=1944 M.W.N. 649=57 L.W. 555=A.I.R. 1945 Mad. 1=(1944) 2 M.L.J. 303.

\_\_\_\_O, 21, R. 2 (3)-"Or"-If means "and".

The disjunctive "or" between the words "certified" and "recorded" in O. 21, R. 2 (3), C. P. Code, must be read as the conjunctive "and" (Beaumont, C.J. and Sen, J.) DATPATRAYA KASHINATH v. VITHALDAS BHAGWANDAS. I.L.R. 1942 Bom. 132=198 I.C. 557=14 R.B. 315=43 Bom. L.R. 1022=A.I.R. 1942 Bom. 59.

O. 21, R. 2. (3)—Scope and effect of—Failure to certify—Adjustment—Application forexecution by transferee—Plea of benami—If open.

O. 21, R. 16, 47 Bom, L.E. 829.

— 0. 21, B. 4—Scope—If superseded by O. 19, R, 30, Madras High Court Original Side Rules—Decree by High Court on original side—Jurisdiction of Presidency Small Cause Court to execute.

The Presidency Court of Small Causes, Madras, has no jurisdiction to execute a decree transferred to it from the original side of the High Court of Madras, unless it satisfies the provisions of O. 21, R. 4. Two conditions have to be fulfilled: (1) the decree must have been passed in a suit in which the value set forth in the plaint should not exceed Rs. 2000; (2) the suit as regards the subject-matter must not be excepted by the law for the time being in force from the cognizance of either a Presidency or Provincial Small Cause Court. O. 19, R. 13 of the Madras High Court Original Side Rules was not intended to overrule or supersede O. 21, R. 4. C. P. Code. (Horwill, J.) ABDUL KHADER SAHIB v. CHINNIAH NAIDU, 209 I.C. 582=1943 M.W.N. 54=56 L W. 376=A.I.R. 1943 Mad. 271=(1943) 1 M.L.J. 49.

— O. 21, B. 5—Decree not transferred through District Court—Effect, BARKAT RAM v. BHAGWAN SINGH. [See Q. D. 1936-'40 Vol. I, Col. 1568.] 191 I.C. 612=13 B.L. 307.

---- O. 21, B. 5-Non-compliance with-Belated objection-Waiver,

### C. P. CODE (1908), O.21, B.5.

The senior Sab Judge, Ambala instead of sending the certificate to the District Judge, Delhi, as required by O. 21, R. 5 sent it direct to Sub-Judge. Delhi for execution. On execution by such transferee court,

Held, that the case was merely one of irregular assumption of Jarisdiction. The judgment-debtor having allowed the proceedings in the transferee Court to go on without objection for a long time must be taken to have waived it and the proceedings before the Sub Judge in Delhi were therefore not null and void. (Tek Chand and Beckett, J.). BHAGWAN SINGH v. BARKAT RAM. 207 I.C. 61=16 R.L. 11=A.I.R. 1943 Lah. 129.

----O. 21, B. 5-Object and effect of a decision under.

A decision under R. 5 of O. 21, C. P. Code, is merely for the purpose of the continuance of the proceeding. It is not for the purpose of deciding claims to succession to the property in suit. (Dible, S.M. and Acton, A.M.) SARWAN GIR v. CHANDER DEO CHAUDHARI, 1945 A.W.R. (Rev.) 122=1945 R.D. 285.

——0. 21, B. 6—Absence of certificates under – Jurisdiction of Court to proceed with execution application.

In the absence of anything to show that the decree-holder made any effort to obtain the necessary certificates under O. 21, R. 6, the executing Court cannot proceed with the application for execution in the absence of such certificates. (Ahmond, J.C.) KARIM BAKSH P. AGHA MOHAMED. 208 I.C. 488=16 R. Pesh. 27 - A.I.R. 1943 Pesh. 67.

-0. 21, R. 6-Failure to send decree in time-Irregularity.

Where the decree-holder has applied for transfer of the decree in time, the failure of the Court which passed the decree to send the decree in time to the transferee Court is a mere irregularity. (Henderson, J.) HOSAI-NALI RAJ v. BARISAL RINDAN SAMITY, LTD. 219 LC. 112=18 B.C. 77=79 C.L.J. 110=A.I.R. 1945 Cal. 141.

The transfer of a decree to another Court for execution comes into effect from the date when the order of transfer is made and when once such an order is made the Court to which the decree is transferred has jurisdiction to entertain the application for execution even though a copy of the decree has not been received by it. Hence, when an execution application is presented to the transferee Court after an order for transfer of the decree had been passed, but the order of transfer is not filed, that Court is not justified in dismissing it even without registering it on that ground. It is open to the Court to receive it and give time for furnishing the necessary papers and to dismiss the application if they are not filed even then. (Yahya Ali, J.) PERUMAL CHETTIAR 2. KOTTAYYA. 1945 M.W.N. 783 (2) = 58 L.W. 669 = (1945) 2 M.L.J. 555.

——0. 21, R. 7—Applicability—Application by decree-holder under O. 21, R. 2 (1)—Duty of Court to consider whether adjustment is beneficial to minor judgment-debtor. See C. P. CODE, O. 21, R. 2 (1). 43 Bom.L.R. 1022.

— 0. 21, R. 7—Executing Court—Refusal to execute decree on ground of having been made by Court without jurisdiction—Propriety—Power to question

C. P.ODDE (1908), O. 21, Rr. 12 and 13.

jamidiction of Court which passed decree. See Exe. GUTION -- EXECUTING COURT. 45 Bom. L.R. 877.

— 0.21. R. 11—Execution application—Form of Application praying for issue of notice under 0.21, R.22—If one in proper form.

An application for execution in the usual prescribed form which mentions in the last column, in respect of the mode in which the assistance of the Court is required the words "by issuing a notice under O. 21, K. 22", cannot be next to be an irregular or improper application. Such an application must be considered to be a proper application for execution as required under O. 21, K. 11. (Kanix, J.) ODHAVJI ANANDJI v. HARIDAS KAN CHHORDIAS. 209 1.C. 593=16 R.B. 153=45 Bom.L.R. 400=A.I.R. 1943 Bom. 238.

O. 21, R. 11 (2) (b)—Requirements of. All that O. 21, R. 11 (2) (b) requires is that the names of the parties should be specified in the application. It says nothing about the addresses. (Boss, J.) NATHMAL J. BALKRISHNA. 194 I.C. 641=14 R.N. 4=1941 N.L. J. 319=A.I.R. 1941 Nag. 152.

All that O. 21, R. 11 (2) (e)—Requirements of. All that O. 21, R. 11, Sub-Cl. (e) requires is that the payments made should be specified in the application. It says nothing about the dates of these payments. (Bose, J.) NATHMAL v. BALKRISHNA. 1941.C. 641—14 R.N. 4—1941 N.L. J. 319—A.I. R. 1941 Nag. 152.

"Results" of previous application—If mean completed results—Levy of execution—If operates as stay of further execution of decree. MORARJEE GOKULDAS & CO. v. SHOLAPUR SPINNING AND WEAVING CO. LTD. [See Q.D. 1936—'40 Vol. I, Col. 3296.] I.L.R. (1941) Bom. 89-13 R.B. 282=192 I.C. 698=A.I.R. 1941 Bom. 37.

— O. 21, R, 11 (2) (h)—Particulars as to costs—Mistake in—Effect.

If the decree-holder asks for more costs than are actually due to him, that might be another matter, but when he asks for something less, and the difference is of a trivial character, it cannot be held that the application is so vitiated as to be incapable of execution at all. (Bose, f.) NATHMAL v. BALKRISHNA. 194 I.C. 641=14 R.N. 4=1941 N.L.J. 319=A.I.R. 1941 Nag. 152.

----O. 21, Rr. 11 (2) (j), 12 and 13-Application not showing particulars of movables to be attached-If in accordance with law.

All that the decree-holder is required to set forth is the mode in which he seeks the assistance of the Court. This mode is sufficiently indicated when he states that he seeks attachment of the movables of the judgment-debtor. It is impossible to state that an application which does not specify particulars of movables to be attached is not in accordance with law. (Bose, J.) NATHMAL v. BALKRISHNA. 194 I.C. 641=14 R.N. 4=1941 N.L.J. 319=A.I.R. 1941 Nag. 152.

——O. 21, Rr. 12 and 13—Execution application in respect of equitable mortgage decree— List of properties—If to be filed.

In the case of an execution application in respect of a decree on an equitable mortgage, it is not necessary to file a list of properties under O. 21, Rr. 12 and 13 C.P. Code. (Mukherica and Blank, J.) BANSARI LAL

C. P. CODE (1908), O. 21, R. 13.

SARKAR v. RABINDRA NATH BISWAS. 208 I.C. 26 =16 R.C. 129=76 C.L.J. 35=A.I.R. 1943 Cal.

-O. 21, R. 13-Applicability-Rent decree under Bihar Tenancy Act-Execution-Application for-Contents—Description of property. See BIHAR TENANCY ACT, SS. 143 (2) AND 162. A.I.R. 1944 Pat. 214.

-O. 21, R. 13—Decree in administration suit -Rights of creditors and nowers of Court to effect equitable distribution of assets-Power to restrain creditors from trying to secure undue advantage or preference.

Even though an administration suit be filed by a single creditor, the decree passed would be in favour of all the creditors and even after the preliminary decree is passed, every creditor has a right to be joined as a party and to prove his claim. But no creditor will be allowed to steal a march over others by obtaining a separate decree and recovering his dues by executing it. He cannot gain a priority even though he may have got the property attached before the appointment of the receiver in the administration suit. If such a creditor proceeds with the execution of his decree, the Court which passed the preliminary decree (1) may stop the execution proceedings either by a stay order or an injunction served on the decree-holder, or (2) may if the sale of the property has taken place, call for the sale proceeds for being included in the assets for distribution, or (3) may take proper steps to have the sale set aside, or (4) may call for the proceedings from the executing Court and include them in the administration proceedings. (Lokur, 1.) ABDUL RAHIM v. LINGAPPA VALIAPPA 213 I.C 146=17 R.B. 21=45 Bom. L.R. 534=A.I.R. 1943 Bom. 273.

-O. 21, R. 14—Scope—Permissive and net mandatory.

The provisions of R. 14 of O. 21 are permissive and not mandatory unlike those of R. 13 which are mandatory. (Sir Madhavan Nair.) GOVIND PRASAD v. PAWAN KUMAR. 70 I.A. 83=I L.R. (1943) Kar. (P.C.) 109=45 Rom. L.R. 306=I.L.R. (1943) Nag. 669=208 I C. 102=16 R.P.C. 58=1943 A. L.J. 303=56 L.W. 444=1943 A.W.R. (P.C.) 11=1943 O.A. (P.C.) 11=1943 M.W.N. 565=10 B.R. 49=1943 N.L.J. 587=47 C.W.N. 715=A. I.R. 1943 P.C. 98=(1943) 2. M.L.J. 121 (P.C.) tory. (Sir Madhavan Nair.) GOVIND PRASAD v.

-0. 21, R. 14-Scope-Permissive and not story. See Lim. ACT, ART, 182 (5). (1945) 1 mandatory. M.L.J. 270 (F.B.).

-O. 21, R. 15-Applicability-Decree-Assignment jointly to several persons—Application for execution by one assignee only-Competency-If in accordance with law-Limitation Act, Art. 182 (5).

O. 21, R. 15, C.P. Code, can be applied by way of analogy to a case where the right, title and interest of a judgment-crediter under a decree is assigned to more than one person jointly and severally and any one of such assignees can validly present an application for execution of the decree. Such an application presented by any one of the co-assignees is one in accordance with law and will save limitation under Art. 182 (5) of the Limitation Act. (Divatia, J.) SHANKAR HARI v. DAMODAR VYANKOJI (1) I.L.R. (1942) Bom. 1=198 I.C. 238=14 R.B. 278=43 Bom. L.R. 883=A.I. R. 1942 Bom, 29.

—0. 21, Rr. 15 and 16—Applicability —0. 21, R. 15—Joint decree —Decree assigned to 8 several persons—Execution ment to one—When binds others.

C, P, CODE (1908), O. 21, R. 15,

petition by one only of the assignees-Competency-Duty of Court to apply analogous principles-C. P. Code, S. 151.

If a decree is assigned jointly in favour of several persons such assignees may be deemed as joint decreeholders for the purpose of the application of O. 21, R. 15, C.P. Code. Though Rr. 15 and 16 of O. 21, C.P. Code, do not in terms apply to the execution of a decree hy only one out of several assignees of that decree. S. 151, C. P. Code, empowers the executing Court to apply principles analogous to those rules. Where rights are conferred by the Code and no provision is made for a particular set of facts, the Courts ought to apply the provisions which are nearest in point with such modifications as may be necessary, not refusing relief on the ground that the Legislature has not in terms made provision for a particular case. The object of S. 151, C. P. Code, is to give such power to Courts and to prevent a failure of justice. Reading O. 21, Rr. 15 and 16 with Ss. 146 and 151, C.P. Code, there can be no objection to one of the assignees of a decree being allowed to execute it on behalf of himself and the other assignees. The Court may impose under O. 21, R. 15 (2), C.P. Code, such terms for the conduct of the execution as may be necessary for the protection of the interests of the other assignees. The proper course in such a case would, no doubt, be to require the other assignees to be brought on the record of the execution proceedings. (Macklin and Lokur, JJ.) SHANKAR HARI v. DAMODAR VYANKAJI (2). 47 Bom.L.R. 104=A.I.R. 1945 Bom. 380.

-O. 21, R. 15 and Limitation Act. Art. 182 (5)—Joint decree—Execution by one alone but not on behalf of all decree-holders—Certification of satisfaction-If valid as against other decreeholder-If saves limitation for execution by other decree-holder.

It is not open to one of two joint decree-holders to certify satisfaction of the whole decree so as to bind the other decree-holder; he can only certify satisfaction in respect of his own interest in the decree. A decree in favour of two persons jontly cannot be executed by one of them in respect of what he considers his share of the decree, nor can the whole decree be executed by one of the decree holders alone unless he complies with the provisions of O. 21, R. 15, C.P. Code, and applies for execution on behalf of all the decree-holders or for the benefit of them all. But an application for execution made by one of them can be taken into consideration on the question of limitation and will save limitation under Art. 182 (5) of the Limitation Act as regards a subsequent execution application by the other decree-holder. (Fazi Ali, J.) ADIKANDA PANIGRAHI v. NARAVANA-SWAMI 207 I.C. 250=16 R.P. 7=9 B.R. 388= 8 Cut. L.T.86.=A.I.R. 1943 Pat. 188.零化

-0. 21, R. 15-Joint decree-holder-Payment to one-If binds others-Decree-holder entering into compromise as manager-Effect.

A payment made to one decree holder is not binding on the other joint decree-holders. A compromise or an adjustment of a decree entered into hy one of the decree-holders as a manager is also not binding on the others. His authority under the general law is not enough. (Grille. C. J. and Sen, J.). FATMABI v. TUKABAI. I.L.R. (1945) Nag. 242 = 1945 N.L.J. 14 = A.I.B. 1945 Nag. 95.

-O. 21, R. 15-Joint decree-holders - Pay-

O. P. CODE (1908), O. 21, E, 15.

The payment made by a judgment debtor to one of several joint decree-holders is not hinding on others, unless the decree-holder to whom the payment is made represents the other decree-holders in some way or other. But it would be binding on the person to whom it was paid, if he could give a valid discharge of his own share. (Agarwal, J.) INDERDAWAN SINGH a. IAIRAJ SINGH. 193 I.C. 558=1941 O.L.R. 296=1941 A.L.W. 442=13 R.O. 473=1941 C.W.N. 487=1941 O.A. 335=1941 A.W.R. (C.C.) 126=A.I.R. 1941 O.Uch 336.

——O. 21, Rr. 15, 1 and 2—Joint decree-holders

—Power of one to give discharge for decretal
amount

A joint decree-holder cannot give a discharge for the decretal amount to the detriment and without the knowledge of the other decree-holders. (*Mir Ahm id. l.*) KARTAR SINGH v. GURDIAT. SINGH. 202 I.C. 59= 15 R. Pesh. 32=A.I.R. 1942 Pesh. 58.

——O 21, R. 15—Night of one of several joint decree-holders to execute—Nature and extent of—Discretion of Court to grant relief.

The right conferred on one out of several decree-holders to apply for execution of the decree by O. 21. R. 15, C.P. Code, is not an absolute one and as such it is open to the Court to entertain such an application if it is satisfied that it is really for the benefit of all the decree-holders or refuse to entertain it. If it is not so satisfied. (Sathe, J.M.) RAI BAHADUR I.AL. BAIARAG BAHADUR. 1942 P. D. 742 = 1942 A.W.R. (Rev.) 395 (1)=1942 O.W.N. (B.R.) 614=1942 O.A. (Supp.) 421 (1).

——O.21, R. 15—Scope—Joint dicree—Application for execution by one decree-holder—Names of both decree-holders stated in proper column—Other decreeholder appearing in proceedings—If sufficient compliance with rule.

The object of R, 15 of O. 21, C.P. Code, is clearly to enable the Court to protect the interest of a decree-holder who has not applied for execution when such an application has been made by a co-decree-holder. Where one of several decree-holders applies for execution and the others do not object, it is not for the judgment-debtor to plead that sufficient steps have not been taken to safeguard the interest of the other decree-holders. One of two decree-holders applied to execute the decree and in the appropriate column of the application, the names of both were mentioned. The other decree-holder actually appeared in the execution proceedings. The Court also took steps to protect the interest of the latter.

Held, that the execution application was maintainable and it could not be said to be not in compliance with O. 21, R. 15, C.P. Code. (Agarwala, J.) IAGDRO SINGH v. BABU LAL SHAH. 196 I.C. 609=14 R.P. 217=8 B.R. 59=1941 P.W.N. 183=A.I.R. 1941 Pat. 499.

by one decree holder—Satisfaction of whole decree entered—Subsequent application for execution by the other decree-holder ignoring entering up of satisfaction by one joint decree-holder—Maintainability,

Where one of two joint decree-holders executes the decree without acting under O. 21, R. 15, C. P. Code, and certifies satisfaction of the decree the other decree-holder is not bound by the acts of his joint decree-holder and would be entitled to recover the amount due to him for his interest in the decree unless his application for

C. P CODE (1908), C. 21, P. 16.

execution is harred by limitation. But if the other decree-holder subsequency applies for permission to execute the decree under O. 21, R. 15, C.P. Code, on local for himself and the other decree-holder deliberately lenoring the fact that his joint decree-holder has already entered satisfaction, his application cannot be allowed. He can only execute for his share after the other decree-holder has already executed and obtained satisfaction. (Fazt Ali, I.) APIKANDA PANIGRAHIV. NARAYANASWAMI. 207 I.C 250=16 R.P. 7=9 B.R. 388=8 Cut. L.T. 86=A.I.R. 1943 Pat. 188.

O. 21, Br. 15 and 16—Scope—Right to apply for execution—Hindu co-parcener—Right to apply for execution of decree not made in his favour—Procedure.

It is only a decree-holder who can ordinarily apply for execution of his decree. If there are more decreeholders than one, it is competent to one of the several joint decree-holders to apply for execution under R, 15 of O. 21, C.P. Code, under R. 15 a transferee can also apply for execution. A decree-holder entitled to execute the decree as such must appear to be a decree-holder on the face of the decree itself. The executing Court cannot look to anything outside or beyond the decree in order to satisfy itself that the person who is applying for execution is the decree-holder. A co-parcener in a Hindu joint family in whose favour a decree is not passed can never be a decree-holder though he may become a transferce of the elecree by operation of law and then execute it under O. 21, R. 16, C.P. Code. But he must first apply to the Court which passed the decree to recognise him as transferee. (Stone, C.J. and Chagla, J.) KIRTILAL JIVABHAI v. CHUNILAL MANILAL, 47 Bom. L.R. 728.

—0.21, R. 16 — Applicability — Assignment of decree—What amounts to—Arbitration—Award declaring money decree in favour of firm to be properly of fartner—Decree on award—If operates as assignment of decree to partner.

A decree declaring title to the money obtained or due under another decree does not ipso facto constitute an assignment; at best it creates a right to obtain an assignment of the decree for the purpose of realisation of the debt to which the title is conferred. No particular form of words is required to constitute an "assignment" but three must be some written authority proceeding from the transferor of the decree and operating so as to vest the decree in the transferee. A decree based on an award in arbitration declaring that a partner in a firm is entitled to all the outstandings of the firm including a decree for money obtained by the firm against a party, is not an assignment within the meaning of O. 21. R. 16, C. P. Code. A decree is an act of Court, and thoughit may, in the case of a compromise decree, be founded on the previous agreement of the parties, it is itself not a written authority or assignment by the transferor. (0' Sullivan, J.) KAUSHALDAS LEKHRAJ v. JHAMANDAS MAHERCHANDANI. I.L.R. (1944) Kar. 231= 218 I.C. 27=A.T.R. 1944 Sind 230.

-0. 21, R. 16—Applicability—Assignment of future decree—Execution after decree is passed—Application by transferee—Competency. See C. P. CODE, S. 146 AND O. 21, R. 16. (1941) 2 M.L. J. 631."

for execution by transferor and transferee.

O. P. CODE (1908), O. 21, R, 16.

O. 21, R. 16, C. P. Code, applies only where the application for execution is made by the transferre of a decree, and not where it is made iointly by both the transferor and transferee. (Khundkar and Riseas. J.). SATVANARAVAN RANERIEF v. KAIVANI PRASAD SINGH. 49 C.W N. 558 = AIR. 1945 Cal. 387.

——0.21, R. 16—Applicability—Mesne profits by way of restitution—Assignment of right to recover—Transferee's right to apply for restitution. See C.P. CODE, S. 144. (1941) 1 M.L.J 459.

—0.21, R. 16 and 2—40 flication by assistance— Nature of Unrecorded adjustment of decree—If can be set up by indement-differ—Plea that assistance is benamidar of indement deflor or that assistance is fraudulent—If maintainable.

An application under O 21, R. 16, is an application for execution made to the Court which passed the decree for executing the decree. It is therefore not open to the judgment debtor on such application to set up an unrecorded payment or adjustment and maintain that the assignment is invaild because the decree had been discharged by such payment or adjustment, although he is not prevented from showing that the assignment was merely a benamidar for him or that the assignment was made in fraud of him. (Sir George Rawhim.) BHAWANI SHANKAR JOSHI N. GORDHANDAS JAMNADAS. 70 I.A. 50=I LR. (1944) Mad. 1-1044 O.A. (P.C.) 64=46 Rom. I. R. 228=1944 M.W. N. 91=ILR (1943) Kar (P.C.) 77=207 I.C. 131-16 R.P.C. 11=1943 P.W. N. 135=47 C.W. N. 616=56 L.W. 378=9 B.R. 308=1943 A.L.I. 364=A.I.R. 1943 P.C. 66=(1943) 2 M.L.J. 48 (P.C.).

—0.21, R. 16—Application to substitute legal representative of deceased decree-holder—Notice to all judgment-debtors—Necessity for.

Notice of an application for substitution of the name of the legal representative for that of the deceased decree-holder should be served on all the indement-debtors in the case. (Grille and Pollock, II) PRAVAGDAS n. MT. INDIRA BAI. I.L.R. (1943) Nag. 734—212 I.C. 592—16 R.N. 249—1943 N.L.J. 499—A.I.R.1944 Nag. 80.

——0. 21, R.16 — Application under — Scope of inputry—Objections to execution raised by indigment-debtor—If can be considered—Decree to be revived under 0.21, R. 22—Proper stage for hearing objections to execution.

Where an application for execution of a decree is made by a transferee of the decree, he has to establish his title in the first instance under O. 21, R. 16, C.P. Code, he has to apply to the Court which passed the decree and on the notice being issued on this application the Court will decide if the applicant is the person entitled to execute the decree. The exent of his right and the conditions on which he may in fact proceed with the execution are not touched by this decision, because the Court does not at this stage decide how far the decree can be executed, or the objections, if any, to the decree being executed. It only decides that the decree may be executed as if the application were made on behalf of the decree-holder himself. On this notice being made absolute, the only right which the transferee acquires is the right to execute the decree in the same manner and subject to the same conditions as the decree-holder himself had. Any objections raised by the judgment-debtor or his legal representatives to the execution of the decree on the score of limitation or satisfaction of the decree, etc., cannot be considered at that stage. Where the

C. P. CODE (1908), O. 21. R, 16.

decree in question has got to be revived under O. 21, R. 22, C.P. Code, the objections can only be considered and disposed of when the notice under O. 21, R. 22, C.P. Code, comes to be disposed of. (Kania, J.) PANK OF MAPVI LTD 7, R. P. WAGLE & CO. 43, Rom I. R. 266=195 I.C. 727=14 R.B. 75=A I. R. 1941 Bom. 190.

—0. 91, R. 16—Assignment of decree by agent without authority—Ratification by decree holder—Valldity of assignment—Contract Act. Ss. 196-200.

An assignment of a decree executed by an agent who was not authorised at the time of execution can be validated by a ratification of the assignment by the decree-holder. Ratification is in law equivalent to previous authority; it may be express or it may be effected impliedly by conduct. (Sir George Rankin.) BHAVANI SHANKAR IOSHIM. GORDHANDAS IAMNADAS. 70 T.A. 50—IL.R (1944) Mad 1—46 Rom. L.R. 228—1044 O.A.(P.C.) 64—1944 M.W.N. 91—I.L.R. (1043) Kar. (P.C.) 77—207 I.C. 131—16 R.P. C. 11—1943 P.W. N. 135—47 C.W.N. 616—56 L. W. 378—9 R.R. 398—1943 A.L.I. 364—A.I.R. 1943 P.C. 66—(1943) 2 M.L.J. 48 (P.C.).

The transferee of a decree does not as a result of the assignment in his favour become a "decree-holder". It may be that after recognition is accorded by the Court to the transferee of a decree, and the transferee is allowed to execute it under 0.21 R. 16, C.P. Code, the Court will not entertain an application by the original decree-holder for the execution of the same decree. But so long as this is not done, the decree-holder's right to apply for execution of his decree remains unaffected. (Thomas. C. J. and Koul., J.) MOHD. ISHRAT ALJ v. MOHD. SAVED RAZA. 1945 A.W.R. (C.C.) 81=1945 O.W. N. 106=1945 O.A. (C.C.) 81=1945 A.L. W. (C.C.) 99=1945 B.D. 288=A.I.R. 1945 Outh 295.

It cannot be accepted that hecause the assignee of a decree is the son and probably a benamindar for the second defendant the assignment is an adjustment of the decree to as to har execution by the assignee against the first delendant. (Weston. 1.) ISSO w RATTAN CHAND. I.L.R. (1942) Kar. 168=202 I.C. 296=15 R. S. 30=A.I.R. 1942 Sind 83.

-0.21, R. 16—Non-service of notice—Judgmentdehtor appearing and objecting to execution—Proceeding, if vitiated.

The object of O. 21, R. 16, C.P. Code, is to give the indgment-debtor an opportunity to object to execution by the assignee. The rule does not enact a formalistic but essential ritual, and if the judgment debtor appears and objects to such execution, the proceeding is not a nullity merely because he has not been served properly with the piece of paper informing him of his opportunity to object. This is so, particularly having regard to the rule as ameneded by the Calcutta High Court. (Razeureh and Blank, II.) ARIUN I AL AGARWALLA T. RANAEPPARI CHATTERIFE. 77 C.L.J. 434—A.I. R. 1944 Cal. 328 (2).

— 0. 21, R. 16—"Operation of land"—Meaning of

Mortgage decree—Decree-holder adjudged trialized
by foreign Court—Receiver as pointed by foreign Court

Right to execute decree without assignment in writing.

### C. P. CODE (1908), O. 21, R. 16.

The expression "by operation of law" in O. 21, R. 16. C. P. Code, means by operation of the appropriate law, but the law in force in a foreign system is not one which Courts in British India will recognise. No Court will recognise the transfer of immovable property situate within its own jurisdiction by the operation of a foreign system of law. The title to immovable property is always governed by the lex loci. To transfer a decree which operates upon immovable property in British India cannot be transferred by the operation of a system of law other than that of British India where the immovable property is situate. A mortgage decree was passed in favour of H. N. against the respondents on 1st February, 1932, by a Court in Bombay. The decree directed payment to the plaintiff of a sum of Ks. 13,000 by instalments and it was provided that in default of payment of any two instalments, the plaintiff could recover the whole amount by sale of the mortgaged properties. The plaintiff H. N. was in 1936 declared insolvent by a Court in a foreign State, and the appellant was appointed Receiver. The latter in his own name applied to the Bombay Court to execute the decree by sale of the mortgaged properties.

Held, that it would be wrong in principle to allow title to land in British India to depend on the state of some foreign law, and that the title of the receiver appointed by the foreign Court to execute the decree could not be recognised and that he could only enforce the decree by obtaining from the insolvent (H. N.) an assignment of the insolvent's interest in the decree in British India. (Beaumont C.J., and Macklin, J.) HARILAL PANNALAL v. VISHNU RAMCHANDRA. LLR. (1941) Bom. 635=198 I.C. 27=14 R.B. 261=43 Bom. L.B. 724=A.I.B. 1941 Bom. 381.

-0.21, R. 16—Preliminary decree for partition and costs—Assignment of unrealized portion of decree for costs—Validity.

Where the unrealised portion of the costs awarded in a preliminary decree is assigned, there is no bar to the assignee executing the decree for that portion. (Bennett and Misra, J.). MOHABHAT ALI v. SHANKAR DAVAL 1944 A.W.R. (C.C.) 195=1944 O.W.N. 284=1944 O.A. (O.C.) 195=A.I.R. 1944 Oudh 280.

-0. 21, B. 16-Right to execute-Decree for ejectment obtained by a karta-Partition-Allotment of plot conserned to a member who also became lambardar -Decree, if transferred by operation of law.

Where a karta obtained a decree for ejectment under S. 44 of the Agra Tenancy Act and on a subsequent partition the plot in question was allotted to one of the members who also became a lambardar,

Held;—(Per Shirreff, S. M.)—That the decree had been transferred to that member by operation of law, the civil law having operated to make him proprietor of the village and the Revenue law having operated to make him a lambardar and that he could apply for execution of the ejectment decree,

Per Sathe, J.M.—That the partition did not entitle the member to execute the decree obtained by his predecessor without a formal assignment under O. 21, R. 16, C. P. Code. (Shirreff, S. M. and Sathe, J.M.) YASHWANT SINGH v. QUDDUSHI. 1941 R.D. 605=1941 O.A. (Supp.) 576=1941 A.W.R. (Rev.) 619=1941 A.L.J. (Supp.) 111.

— 0. 21, R. 16—Scope—Benami decree-holder— Death of—Right of real owner to apply for execution— Question of title—If can be gone into.

#### C. P. CODE (1908), O. 21. B, 16.

Where a decree is held by one person as a benamidar for another, and the holder dies the true owner can apply for execution, and if his title is disputed, the question can be decided in those proceedings. (Leach, C. J., King and Lakshman Rao, J.). BALASUBRA-MANIAM CHETTY v. KOTHANDARAMA SWAMI NAYANIM VARU. I.L.R. (1943) Mad. 164 = 204 I.C. 96 = 15 B.M. 697 = 55 L.W. 623 = 1942 M.W.N. 657 = A.I. R. 1942 Mad. 688 = (1942) 2 M.L.J. 463 (F.B.).

-Notice issued under 0.21, R. 22 containing particulars required by R. 16—Sufficiency—Omission of ind general debtor to raise objection to assignment on ground of invalidity or non-proof or inadmissibility of assignment deed—Effect—Res judicata.

The purpose of giving a notice to the judgment-debtor under O. 21, R. 16, C. P. Code, is to acquaint him with the fact that the darkhas purports to execute the decree on behalf of the assignee from the judgment-creditor and to ask him to show cause why the assignee should not be allowed to execute the decree. Where on a darkhast filed by the decree-holder and the assignee jointly, a notice was issued to the judgment-debtor, purporting to be one under 0. 21, R. 22, and the notice stated that the assignee had filed a darkhast on the ground that he had purchased the decree in writing from the decree-holder and asked the judgment-debtor to show cause why the transferee should not be allowed to execute the decree along with the 'judgment-debtor, it must be held, that the notice is a good and sufficient notice both under O. 21, R. 16 and O 21, R. 22. If the judgment-debtor does not raise any objection then to execution of the decree on the ground that the assignment should not be recognised, or that the assignment deed has not been produced in Court, or proved or that it is unregistered and hence inadmissible, and allows execution to proceed, he cannot afterwads in a subsequent darkhast raise these objections. The omission on his part to raise the objections would debar the judgment-debtor on the principle of constructive res judicata from raising or urging the same, in a subsequent SUNDARABAI BALAPPAdarkhast. (Divatia, J.) NAIK v. GURUSHIDDAPPA GURUBASAPPA. I.L.R. (1942) Bom. 190 = 200 I.C. 440 = 15 R.B. 4 = 44 Bom.L.B. 164 = A.I.R. 1942 Bom. 134.

—0. 21, R. 16—Scope—Notice—Necessity—Absence of notice to \$\frac{5}{10}\text{digment-debtors not interested in proceedings and against whom decree is not sought to be executed—Effect on validity of order in execution.

Under O. 21, R. 16, which provides for notice to the judgment debtor or judgment-debtors, there is no necessity for the issue of notices on those judgment-debtors against whom the decree is not going to be executed and who are not interested in the execution proceedings. Therefore absence of notice to such judgment-debtors will not affect the validity of the order recognising the assignment of the decree or the proceedings in execution. (Horwill and Kuppuswami Ayyar, 11.) SABAPATHI CHETTIAR v. LARSHMANAN CHETTIAR. 58 L.W. 213=1945 M.W.N. 274=A.I.B. 1945 Mad. 243= (1945) 2 M.I.J. 22.

decree. 0. 21, R. 16-Scope-Relief open to assignee of

R. 16 of O. 21, C. P. Code, does not contemplate an order of substitution being made in favour of an assignee on the basis of a deed of assignment in place of the assignor. It is clear from the wording of O. 21. R. 16 that the transferee has been given a right to apply for execution of the decree directly without the necessity of

#### C. P. CODE (1908), O. 21, R. 16.

obtaining a prior order for substitution in his favour. (Yorke and Ghulam Hasan, JJ.) AJODHIA NATH SETH In re. 198 I.C. 706=14 R.O. 429=1941 O.W.N. 488 = 1941 O.A. 336 = 1941 A.L.W. 443 = 1941 A.W. R. (C.C.) 127 = A.I.R. 1941 Oudh 512.

-O. 21, R. 16—Transfer of decree—Application by transferee for execution-Plea that transferee is benamidar for judgment-debtor-Sustainability-0.21, R. 2 (3).

Although a judgment-debtor failing to certify an adjustment and satisfaction of the decree to the Court cannot be permitted to prove an adjustment of the decree afterwards, let on an application by the transferee of the decree for execution under O. 21, R. 16, C. P. Code, it is open to the judgment-debtor to plead and prove that the transferee is a benamidar for him and cannot, therefore, execute the decree against him. (Lokur and Weston, JJ.) RANCHHOD MATHURDAS v. KANCHANLAL CHUMLAL. 222 I.C. 131 = 47 Bom. L.R. 829 = A.I.R. 1945 Bom. 542.

-0 21, B. 16, Proviso - Applicability - Suit by five plaintiffs—Decree for costs in favour of defendant -Assignment-Assignee benamidar for estate of one of the plaintiffs-Right to execute decree.

Where a judgment-debtor is jointly and severally liable in respect of the decree-debt, and the right of the decree-holder devolves either by operation of law or by transfer inter vivos on that judgment-debtor, there is a merger, and the decree cannot be enforced against the other judgment-debtors. Where the assignee of a decree for costs in favour of the defendant in a suit filed by five plaintiffs is found to be merely a benamidar for the estate of one of the five plaintiffs, the proviso to fore be executed against the other plaintiffs judgmentdebtors. (Kuppuswami Aiyar, J.) AMRITAVALLI THAVARAMMA v. ANNAPOORNAMMA. 212 I.C. 277= 16 R.M. 592=56 L.W. 389=1943 M.W.N. 453= A.I.R. 1943 Mad. 641=(1943) 2 M.L.J. 110.

-O. 21. R. 16 proviso -- Judgment-debtor not pleading satisfaction of decree-Constructive res judicata.

The fact that in an application by the assignee of the decree under O. 21, R. 16, C. P. Code, the judgmentdebtor did not plead satisfaction of that decree by payment to the original decree-holder before assignment does not preclude him on the principle of constructive res fudicata from raising the objection subsequently under S. 47, C. P. Code. (Henderson, 1.) MRIGEN-DRA KUMAR v. ABINASH CHANDRA. 48 C.W.N. 419

-O. 21, R. 16, second proviso-Scote-Decree -Assignment-Agreement between assignce and one of several judgment-debtors that execution should be taken only as against other judgment debtors-If can be pleaded or set up.

An agreement between one of several judgment-debtors and an assignee of the decree that the decree should be executed against the remaining judgmentdebtors is an agreement in contravention of the express provisions of O. 21, R. 16, C. P. Code, second proviso and cannot be enforced or recognised by any Court. (Burn and Mockett, JJ.) NAINA MAHOMED ROW-THER v. PERIAPPA ROWTHER, 200 I.C. 34=14 R.M. 672=54 L.W. 144=1941 M.W.N. 949=A.I.B. 1941 Mad, 745=(1941) 2 M.L.J. 167.

-O. 21, R. 17-Amendment-Powers of Court-Nature of amendment permissible under rule. RAM RAN BIJAIYA PRASAD SINGH v. KESHO PRASAD to enable the decree-holder to ask the Court to

#### C. P. CODE (1908), O. 21, R. 17.

SINGH. [see Q.D. 1936—'40, Vol. I. Col. 1585]. 18 B.P. 326=7 B.R. 206=191 I.C. 492=A.I.R. 1941 Pat. 635.

-O. 21, R. 17 (Patna)-Application mentioning principal amount of decree in Col. (g)
—Defect not noticed by Court—Correction subsequently made by decree-holder—If deemed to have

been made on date of application.
O. 21. R. 17, C.P. Code, enjoins upon the Court the duty of ascertaining whether the require-ments of Rr. 11 to 14 have been complied with and, as amended by the Patna High Court, the rule further requires the Court to allow the defect, if any, to be remedied then and there or within a time to be fixed by it. Where the Court does not carry out the duties imposed upon it by this rule and fails to discover the fact that the principal amount of the decree has not been entered in Col. (g) of the execution petition, the fault of the Court in this respect should not be permitted to penalise the decree-holder. A subsequent application by him to amend the petition should be viewed as an intimation to the Court by him that the Court has inadvertently omitted to notice the defect in the petition and to give the decree-holder an opportunity of remedying it in proper time and, according to the provisions of para. (2) of R. 17, the date on which the correction is made must be deemed to be the date on on which the petition for execution was first presented. (Agarwala, J.) Bednarain Singh v. Bhuneshwari Kuer. 8 B.R. 398=198 I.C. 311 =14 R.P. 452=A.I.R. 1942 Pat. 295.

-O. 21, R. 17-Limitation-Amendment-Limit O. 21, R. 16 would apply, and the decree cannot there-, of time-Application filed within 12 years-Amendment after expiry of period—Legality—C. P. Code, S. 48. See C. P. CODE, S. 48. (1945) 1 M.L.J. 447.

-0.21, R. 17-Scope-Execution application by some of several joint decree-holders not complying with O. 21, R. 15-Amendment adding the other decreeholders - Permissibility.

An amendment which has the effect of changing the whole character of an execution application cannot be allowed under O. 21, R. 17, C. P. Code. Where an application by four out of five decree-holders, not purporting to be an application under O. 21, R. 15 and containing no statement that the decree is sought to be executed for the benefit of all the decree-holders, is sought to be amended by adding the name of the remaining decree-holder, the amendment is not one contemplated by O. 21, R. 17, C. P. Code. Such an application which does not comply with O. 21, R. 15, cannot be amended. (Fazl Ali, C. J. and Reever, J.) NASIBAN v. SURENDRANATH. 24 Pat. 485 = A.I.R. 1945 Pat. 459.

O. 21. R. 17-Scope-Nature of amendment allowable-Substitution of different property for property fully described in execution Petition.

O. 21, R. 17, is intended to deal with only formal amendments but for which the application for execution or attachment will not be regarded as complete. For example when any of the details required under R. 11 are missing or when the description of the property sought to be attached is defective for want of the details required by R. 13 the Court has full power to allow the decreeholder to remedy the defect by supplying such details. But R. 17 of O. 21, was never intended C. P. CODE (1908), O. 21, R. 18,

delete from his application a property which is fully described and to substitute in place thereof another property with a totally different description. (Fazl Ali and Chatterii, JL.) GATANAND THAMED. 21 Pat. 838=205 I.C. 561=15 R.P.; 296=9 B.R. 243=A.I.R. 1943 Pat. 127.

\_\_\_\_O. 21, R. 18—Fxecution of cross-decree staved temporarily—Set-off, if can be allowed.

A set-off cannot be allowed under O. 21. R. 18. C. P. Code, when the execution of one of the cross decrees has been staved temporarily and it is not therefore capable of execution. (Harries, C.J. and Manchar Lal, J.) SIDHESHWAR DRASAD SINGH T. SONU LAL. 197 I C. 440=14 R P. 300 = 22 Pat.L.T. 1031=8 B.R. 207=A.I.R. 1942 Pat. 197.

—O. 21, R. 18—Right to obtain order under —Actual attachment of cross-decree—If necessary. Mahalingam Chettiar v. Ramanathan Chettiar. Isee O.D. 1936—'40 Vol. 1, Col. 3297 I 67 I A. 350—I I.R. (1941) Mad. 1—I.I.R. (1940) Kar (PC) 312—45 CW N. 281—1941 P.W.N. 164—73 C.L.J. 96 (P.C.).

——O. 21, R. 18—Right to set off cross-decrees—If defeated by attachment of cross-decree by third party. Mahalingam Chettian 7. Ramanathan Chettian 15.ee O.D. 1036—'40 Vol. I. Col. 3297.] 67 I.A. 350—II.R. (1941) Mad. 1—II.L.R (1940) Kar (P.C.) 312—45 C.W. N. 281—1941 P.W.N. 164—73 C.L.J. 96 (P.C.)

——O. 21. R. 18— Scope—Cross-decrees—Application by holder of decree for larger amount for recording satisfaction of cross-decree against him for smaller amount and part satisfaction of larger decree—Holder of smaller decree obtaining stay of execution under Madras Act IV of 1938 and athlying under S. 19—Effect—Power of executing Court to proceed under O. 21, R. 18

The adjustment contemplated in O. 21, R. 18, C.P. Code, does not come into being automatically the moment there are two applications for execution of cross-decrees between the same parties. The satisfaction of the smaller decree and the part satisfaction of the larger decree are the result of an act of the Court making orders in the two execution applications and until those orders are made the two decrees do not become adjusted one against the other. When a stay application intervenes, it is not within the competence of the executing court to proceed with what is essentially a process of execution ignoring the stay. Appellant who had taken assignment of a decree against the respondent applied for execution after adjustment of the decree which the respondent held against him which was for a smaller amount, and to record full satisfaction of the. latter decree and part satisfaction of his decree. In the meanwhile the respondent applied under Madras Act IV of 1938, claiming that he was en titled to its benefits as an agriculturist, obtained a stav of execution and applied under S. 19 of the Act for scaling down the decree against him held by the appellant.

Held, that once the proceedings in execution of the decree of the appellant had been stayed, it was not possible to adjust the two decrees or to the decree of the decree.

C. P. CODE (1908), O. 21, R. 19.

for the larger amount and until disposal of the application under S. 19 of Madras Act IV of 103R, all proceedings in execution must cease, Wadsworth. J.) RANGASWAMI AYVANGAR 1, SUBBARAYA GOUNDAN. 210 I.C. 74=1944 M.W.N. 110=57 I.W. 71=A.I.R. 1944 Mad. 255=(1944) 1 M.L.J. 136.

—O. 21, Rr. 18 to 20—Set off of mortgage decree against money decree at the instance of the money decree-holder—Permissibility.

Where one person has obtained a mortgage decree for a certain sum against the property in the hands of another and the latter holds a money decree against the former for a larger sum the money decree-holder can under O. 21, Rr. 18 to 20 of the C. P. Code have the whole of the amount of the mortgage decree set off as against his own decree. (Somayya. I.) Nachmuthu Chetty v. Palani Ammal. 1943 M.W.N. 791=56 L.W. 717—215 I.C. 32=A.I.R. 1944 Mad. 149=17 R.M. 145=(1943) 2 M.L.I. 596.

O 21, R. 19, C. P. Code applies when there is a claim by a defendent against a plaintiff personally and a claim by the plaintiff against the defendant as legal representative of another deceased defendant. The mere fact that there has to be some enquiry under S. 50 C. P. Code as to the extent of the property of the deceased in the hands of his legal representative or that the sum may be limited by the provisions of S. 50 does not make 0.21 R. 19 C.P. Code inapplicable. The plaintiff is entitled to demand a set-off and need not have filed his own execution application. (Davis, C.J. and Lobo, J.) Sobhomal Thaogmal v. Dulahninomal Tilusingh. I.L.R. (1941) Kar. 129=193 I.C. 783=13 R.S. 241=A.I.R. 1941 Sind 49.

——O. 21. R. 19—Res judicata—Cross-decrees for smaller and larger omounts—Court-fee due to Government from holder of larger decree—Execution by Government—Holder of smaller decree not ollowed to set-off his decree—Subsequent execution by holder of larger decree—Claim to set-off by holder of smaller decree—If barrel.

Where a decree provides for the payment of sums by two parties one against the other, if the holder of the larger decree seeks to execute his decree without deducting the amount due to the other party, the latter party can claim a set-off. The fact that in a prior application by the Government for execution in respect of Court-fee due from the holder of the larger decree, the holder of the smaller decree fails to prove a right to adjust his decree against larger decree, will not prevent him from putting forward his claim to adjust his decree against the holder of the larger decree when the latter claims to execute his decree at a later date. (Wadsworth and Patanjah Sastif, J.) MARUTHUVAMATAI MOOPANAR v. AVANACHI. 1941 M.W.N. 482=A.I.R. 1941 Mad. 662-(1941) 1 M.L.J. 641.

O. 21, R. 19-Scope-Claim to set-off amount due jointly to a party and another-If can be allowed.

### G. P. CODE (1908), O. 21, R. 19.

O. 21, R. 19, C.P.Code, does not debar the judgment-debtor liable to pay a larger sum than that to which he is entitled from paying the larger sum and then seeking execution of his sumaller amount. Where in an execution taken out against another the latter claims to set-off costs due to him not individually but jointly with another, O. 21, R. 19, has no application. Nor is such person entitled to relief on the principle of justice, equity and good conscience. (Agarwal J.) MAHOMED ABDULLAH v. KUNJ RHARILAL. 197 I. C. 407=14 R. O. 312=1941 A.W.R. (C.C.) 364=1941 O.A. 954=1941 O.W.N. 1266=A.I.R. 1942 Oudh 177.

—0.21, R. 19—Scope—Decree for specific performance—Plaintiff to deposit certain amount and to get his costs from defendant—Extent to which errditor of defendant can attach amount deposited by plaintiff—Plaintiff's right to priority in respect of his

costs.

O. 21, R. 19, C.P. Code, provides that when two parties to a decree are given a right to recover sums of money under the decree against each other and the sums are unequal, then execution can only be taken out by the party who has to receive the larger amount and only in respect of the balance left after setting off the smaller sum against the larger. It has the effect of extinguishing the smaller debt the moment the decree is passed which in turn has the effect of leaving only the balance available for attachment by any other Where in a decree for specific performance the plaintiff was directed to deposit Rs.825 in Court and the defendant was directed to pay Rs. 473 to plaintiff for his costs and the plaintiff deposited the Rs. 825 a creditor of the defendant could attach that amount only to the extent of Rs. 825 minus Rs. 473 due to plaintiff for his costs for which he has a priority. (Rose, J.) GADIPANT GANUJI KUMBI v. PRATAP: CHOTELAL. 1942 N.L. J. 346.

——O. 21, R. 19—Scope—Execution of lesser decree —Limitation—Starting point—Set-off—Claim by lesser decree-holder in execution by holder of larger decree —Limitation.

Under O. 21, R. 19, C.P. Code, where a decree provides for the recovery of sums by two parties one against the other it is only the party to whom the larger amount is due who is entitled to execute the decree. Hence limitation cannot run against the person who is entitled to the lesser decree at a time when that decree is not executable having regard to O. 21, R. 19, C. P. Code. The fact that more than three years have elapsed cannot prevent the holder of the lesser decree to claim set-off when the holder of the larger decree seeks to execute his decree. (Wadsworth and Patanjali Sastri, JJ.) MARUTHUVAMALAI MOOPANAR v. AVADAIACHI. 1941 M.W.N. 482=A.I.R. 1941 Mad. 662=(1941) 1 M.L.J. 641.

— 0.21 R. 19—Scope—Preliminary redemption decree with order for costs in favour of plaintiff—Right to execute for costs on deposit of the redemption

money.

There is nothing in O. 1, R. 19, C. P. Code, to prevent the plaintiffs in a redemption suit from paying the total amount required for redemption and then executing the decree for cost that is awarded to them. The object of R. 19 of O. 21 is to prevent both parties from taking out execution under the same decree and no purpose would

C.P. CODE (1908), O. 21, R. 20.

be served by applying it to a case where the mortgagee could not take out execution. He has to obtain a final decree before he can proceed in execution. (Bennett and Misra, JJ.) KUNI BEHARI LAL v. SHEIKH A BRULLAH. 218 I.C. 415=18 R. O. 22=1944 O.W N. 148=1944 A.W.R. (C.C.) 106=1944 A.L.W. 193=1944 O.A. (C.C.) 106=A.I.R. 1944 Oudh 247.

——O. 21, R. 19 (b)—Applicability—Decree for possession and mesne profits—Direction for payment by decree-holder of specified amount within fixed time—Decree-holder having right to recover larger amount than amount due to judgment-dettor—Right of set-off—Failure to pay amount within time—Effect on right to execute decree.

The appellant obtained a decree against the defendants for recovery of possession and mesne profits, past and future, at the rate of Rs. 60 per vear on condition that she should pay the defendants the sum of Rs. 350-1-0 within three months. The defendants were ordered to pay the appellant a sum of Rs. 301 within three months. When worked out, the appellant in the result was entitled to recover from the defendants Rs. 571-10-11 against Rs. 551-5-0 which she had herself to pay to them. The appellant who was thus entitled to recover Rs. 24-5-11, after setting off the amount due to herself did not pay the amount directed to be paid by her under the decree within the period of three months but applied to execute the decree. The lower Court dismissed it on the ground that the appellant had forfeited her right to execute the decree by reason of her omission to pay the amount directed to be paid by her within the period of three months limited by the decree.

Held, (1) that though in terms the decree did not direct any set off, in view of the directions contained in the decree, it could never have been the intention of the Court to place the appellant under a liability to pay the amount within the period mentioned, while she herself was entitled to recover a larger sum from the defendants: (2) that O. 21, R, 19 (b) applied to the case, and the defendants were never in a position to take out execution of the decree in so far as it gave them a right to claim money from the appellant; (3) that the appellant was never under any obligation to pay the sum of Rs. 350-1-0 into Court, and her omission to pay the money within the time limited by the decree was entirely without consequence: (4) that the appellant, even apart from O. 21, R. 19 (b), had the right to set-off the amount due to her under the general law, and (5) the appellant was therefore entitled to exe-Cycle the decree. (Mockett and Krishnaswami Ayyanaar, JI.) NARASAMMA V. VENKATESWARA RAO. I.L.R. (1944) Mad. 118=213 I.C. 132=17 R.M. 26=56 L W 452=1943 M.W.N. 519 (2) = A.I.R. 1943 Mad. 667=(1943) 2 M.L.J. 277.

If the plaintiff in a mortgage suit gets a decree for sale by which he can recover money from the judgmentdebtor, and the latter is awarded costs against the plaintiff by the same decree, the costs can certainly be set-off against the mortgage decree under

#### C P. CODE (1908), O. 21, R. 22.

O. 21, R. 19, read with R. 20. The rule is not confined to cases where the judgment-debtor is personally liable for the mortgage money. The right of set-off as embodied in O. 21, R. 19 C. P. Code is one created by law and the Court is bound to give effect to the plea, provided the conditions prescribed by the rule are fulfilled, and no consideration of equity would ordinarily arise. (Mukherjea and Roxburgh, JJ.) RAJANI KANTA DHARA v. 'ANMATHA NATH DAS. 219 I.C. 124=18 R C. 69 = A.I.R. 1945 Cal. 1.

——0. 21, R. 22, (as amended in 1936 in Madras)—Applicability—Application for execution presented before but returned and taken on file after coming into force of amended rules.

O. 21, R. 22, C. P. Code, as amended by the Madras High Court in 1936 would govern an application for execution which though presented before 20th October, 1936, on which date the amended rule came into force was returned for amendment and was re-presented and taken on file after 20th October, 1936. It is not incumbent on the Court to issue notice to the judgment-debtor under the rule if it is within two years from the date on which the prior proceedings in execution came to an end. (Leach, C. J. and Labshmana Rao, J.) CHINA SATTIRAJU v. VIRAYVA. 1943 M.W.N. 420 =56 L.W. 100=(1948) 1 M.L.J. 149.

O. 21, R. 22—Decree for rent—No notice issued to legal representatives of deceased judgment-debtor—Execution sale—If void or voidable. See C. P. CODE, S. 50 AND O 21, R. 22. 46 C. W.N. 631.

——O. 21, R. 22—Hindu widow—Decree against as heir of deceased husband—Execution—Adoption of son by widow—Execution without impleading adopted son Sale—If binds adopted son. See EXECUTION—SALE. 47 Bom. L.R. 277.

## ----O. 21, R. 22-Non-compliance-Effect.

The absence of a notice under O. 21, R. 22 (1), C. P. Code, is a material irregularity committed by the Court and has to be set right in revision. (Sathe. S. M. and Ross, J.M.) SOM RAJ v. HUBLAL. 1944 A.W.R. (Rev.) 49=1944 R.D. 98.

O. 21, R. 22—Non-compliance—Effect on sale.
O. 21, R. 22, C. P. Code, makes it obligatory on a decree-holder to serve notice of an application for execution on the legal representative of a party to the decree, or where the party to the decree has been declared insolvent, on the Official Receiver in insolvency. A sale held without notice required by O. 21, R. 22 is void. (Leach, C. J. and Krishnaswami Aivanear, J.) Official Receiver, Nellore, Venkiah. 198 I.C. 417—14 R.M. 435—53 L.W. 498—1941 M.W.N. 577—A.I.R. 1941 Mad. 606—(1941) 1 M.L.J. 569.

— 0. 21, B. 22—Non-compliance—Effect—Decree against co-mortgagors—Death of one judgment-debtor—Execution—Sale without notice to heirs of deceased and without impleading them—Validity.

There is no warrant for holding that in a darkhast proceeding one judgment-debtor may represent the estate of another judgment-debtor. An auction sale held in execution of a mortgage decree without serving a notice under O. 21, R. 2?, on the legal representative of a deceased judgment-debtor (co-mortgagor) and without impleading him cannot be held binding on such legal representative. (Lokur and Rajadhayksha, 1).) LEELACHAND WALCHAND v. VISHNU GANESH. 47 Bom. L.R. 330=A,IR. 1945 Bom. 409.

C. P. CODE (1908), O. 21, R. 29.

Effect on sale—If void—C. P. Code, O. 21, R, 90.

There is no doubt that where no notice under O. 21, R. 22, C. P. Code, has been issued or served, a sale in execution is wholly without jurisdiction. The mere issuing of a notice is not sufficient. The Court has to be satisfied that notice has been served on the person whom the Court regards as the proper recipient of the notice. If no notice is served at all, the sale is wholly ineffective. The failure to serve the notice is not a mere irregularity in the publication or conduct of the sale. A sale without the notice is in the eye of the law a nullity. (Harries, C. J. and Fazi Ali. J.) DURGA SINGH v. SUGAMBAR SINGH. 194 I.C. 372=13 R P. 708=7 B.R. 753=22 Pat L.T. 520=1941 P.W.N. 529=A.I.R. 1941 Pat, 481.

-0. 21. Rr. 22 and 66-Non-service of notices under-Validity of sale.

The failure to serve the notices under O. 21, Rr. 22 and 66, C. P. Code, serious though it is, is only an irregularity, and does not render the execution sale a nullity. (Henderson. J.) DWARKANATH RAY v. ABDUL LATIF MIAN. 48 C.W.N. 346.

The period of two years under O. 21, R. 22, C. P. Code (as amended in Madras) or one year under the old rule runs from the date of the last order on the previous execution proceedings. Where the sale held in a prior execution case was set aside, the date on which the sale was so set aside must be taken as the starting point. (Leach, C. J. and Lakshmann Rao, J.) China Sattiraly v. Virayyya. 56 L.W. 100=1943 M.W.N. 420=(1943) 1 M.L.J. 149.

O. 21, Rr. 22 and 66—Notice settling terms of proclamation—Judgment-debtor declining on frivolous grounds—Sufficiency of service—Omission of Court to declare and mark him ex parte—Effect. Ser C. P. CODE. S. 11—CONSTRUCTIVE res judicata. (1944) 1 M.L.J. 36.

—0.21, R. 22—Scope—Mortgage-decree—Death of ludgment-debtor after service of all processes including sale proclamation—Sale without notice to legal representative—If, void or noidable.

Per (Full Bench Meredith, J., dissenting)—A sale held in execution of a mortgage decree after the death of the judgment-debtor, but after the service of all necessary processes including the sale proclamation, without any notice to the legal representative is void in the sense that it is not valid and operative against the legal representative. (Chatterji, Meredith and Sinha, J.) AJABLAI. 9. HARICHARAN. 23 Pat. 528—11 B.R. 201—17 R.P. 191—217 I C. 337—1944 P.W.N. 326—A.I.R. 1945 Pat. 1 (F.B.).

—0. 21, R. 24 (2)—Process delivered to Naib Nazar—Latter, if can deliver it to process-server for execution.

The Naib-Nazar is a "proper officer" to whom the process for the execution of a decree may be delivered under O. 21, R. 24 (2), C. P. Code, and it is open to him to deliver it to a process-server for execution. (Hemeon, /.) TIKARAM v. EMPEROR. I.L.R. (1945) Nag. 685 = 1945 N.L.J. 239 = A.I.R. 1945 Nag. 210.

O.21. R. 29—"Until the pending suit has been decided"—Meaning—Suit, if includes appeal also,
The words "until the pending suit has been decided"

The words "until the pending suit has been decided" in O, 21, R. 29, C. P. Code, cannot be construed as

C. P. CODE (1908), O. 21, R. 30.

meaning until the pending suit has been finally decided so as to include appeals as well. "Suit" in the rule only means "the suit" then pending and not the appeal or appeals there from to the appellate Court. (Krishnaor appeals there from to the appearant, JJ.) RAMA-swami Ayyangar and Kunhi Raman, JJ.) RAMA-546=56 L.W. 635=(1943) M.W.N. 642=211 I. C. 518=A.I.R. 1944 Mad. 73=(1943) 2 M.L.J.

-0. 21, R. 30 - Land of judgment-debtor attached-Warrant of arrest-Whether can also be issued. Ordinarily if two remedies are available to a decreeholder and he wishes to avail himself of both the Court should, as far as possible, try and give him both the remedies. The fact that there is an attachment of lands is no bar to the grant of the other remedy of arrest. (Abdul Rahman, J.) MAHOMED HASSAIN SHAH v. CO-OPERATIVE SOCIETY FOR LOANS OF SHAHPUR CITY. 209 I.C. 609=16 R.L. 143=45 P.L.R. 173=A I.R. 1943 Lah. 166.

-0 21, R. 31-Duty of Court-Decree for return of document-Failure of Court to fix amount of compensation as required by O. 20, K. 10—Execution— Executing Court—If can fix compensation straight away.

Where a decree is passed for the return of a letter of authority, but the Court making such decree does not as it should under O. 21, R. 10, C. P. Code, state. the amount of money to be paid as an alternative if delivery cannot be had, the Court under O. 21, R. 31, has to make every reasonable attempt to execute the decree and to obtain for the decree-holder, if that is possible, the letter which he is entitled to get under the decree. It is only when such endeavour is fruitless that the question of compensation as an alternative will arise. The executing Court cannot straightaway fix the amount of compensation at an early stage of the execution. (Horwill, J.) SUNDARARAJULU PILLAI v. DORAI RANI. 211 I.C. 201=16 R.M. 498=56 L.W. 416=1943 M.W.N. 518=A I.R. 1943 Mad. 716= (1943) 2 M.L.J. 154.

-O. 21, R. 32 and S. 58—Conditional order of detention-If can be passed.

There is nothing in O. 21, R. 32, read with S. 58, C.P. Code, which would prevent the Court from passing a conditional order of detention. (Grille, C. J. and Puranik, J.) PANNALAL BOSE v SETH SHREERAM. I.L.R. (1945) Nag. 336 = 1945 N.L.J. 150 = A.I.R. 1945 Nag. 134.

-0. 21, R. 32 and O. 39, R. 2 (3)-Nature of proceedings-Personal service of restraint order on party -If necessary.

Proceedings under O. 21, R. 32, and O. 39, R. 2 (3), C.P. Code, for disobedience of an injunction, are not strictly speaking criminal proceedings or even quasi criminal proceedings for contempt of Court. Therefore, personal service of the restraint order on a party is not necessary. Communication to his agent is sufficient. (Grille, C. J. and Puranik, J.) PANNALAL BOSE v. SETH SHREERAM. I.L.R. (1945) Nag. 336 = 1945 N.L.J. 150 = A.I.R. 1945 Nag. 134.

-0. 21, R. 32-Right to apply under-Declaratory decree also providing for evacuation of a plot by the judgment-debtor-Possession obtained in execution but judgment-debtor still continuing in possession-Decree-holder, if can apply under O. 21, R. 32, -Applicability-R. 15 of the Nayabad Rules.

Where in execution of a decree not only declaring the rights of the plaintiffs over the land but also for provid- R. 37—Court, if bound to proceed under R. 40,

C. P. CODE (1908), O. 21. Rr. 37 and 40.

ing its evacuation by the judgment-debtor, possession is obtained by the decree-holder but the judgment-debtor nevertheless remains in possession it is not open to the decree-holder to again apply under O. 21, R. 32, C. P. Code, in as much as the decree has already been executed. Nor could action be taken under R. 15 of the Nayabad Rules in such a case. (Sathe, S. M. and Dible, J. M.). RUDRA SINGH v. SHYAM SINGH. 1945 R.D. 13=1945 A.W.R. (Rev.) 5.

-O. 21, B. 32 (1)—Prohibitory injunction— Relief against disobedience.

If a person is prohibited from doing something and does it, it is just as much disobedience as if he is ordered to do something and fails to do it. Hence a prohibitory injunction can be enforced in execution under O. 21, R. 32 (1), C. P. Code. (Madeley, J.) PRAG DUTT v. KEDAR NATH. 1944 O.W.N. 335=1944 A.W.R. (C.C.) 223(1) = 1944 O.A. (C.C.) 223(1) =A.I.R. 1945 Oudh 81.

-0. 21, Br. 35 and 97-Failure of decree-holder to avail the remedy under R. 97-If a bar to application under R. 35 for possession.

When the judgment-debtor resists execution of a decree without justification, there is no reason why he should be benefitted by the decree-holder's failure to apply under R. 97 of O. 21, C. P. Code. The decreeholder is not to be debarred by reason of his failure to avail himself of the remedy under R. 97 from making a second application under R. 35 of the same order for possession within the period of limitation. (Dible, S.M. and Acton, A.M.) AKHTAR JAHAN BEGAM v. MAQSOODUN NISSA. 1945 R.D. 388 = 1945 A.W.R. (Rev.) 183.

-O. 21, Rr. 35 and 36-Symbolical possession-If interrupts adverse possession of judgment-debtor-Transferee pending suit-If bound by such possession-Rule of lis pendens.

The delivery of symbolical possession of land in execution of a decree for possession amounts to delivery of actual possession so far as the judgment-debtor and his representatives are concerned. It breaks the continuity of the adverse possession of the judgment-debtor in spite of the technical irregularities, if any, committed in the delivery of possession. A transferee of the land during the pendency of the suit, being a representative of the judgment-debtor, is under the rule of lis pendens as much bound by the the symbolical possession delivered as the judgment-debtor himself. (Din Mahomed, J.) MAHOMED SAADATALI KHAN v. PUNJAB NATIONAL BANK, LTD. I.L.R. (1941) Lah. 428 = 199 I.C. 653 =14 R.L. 408=43 P.L.R. 555=A.I.R. 1941 Lah. 357.

-0. 21, R. 35 (2)-Delivery of possession-Conditions precedent.

The conditions precedent for effecting delivery of possession under O. 21 R. 35 (2) are the affixing of the warrant to the property and the beat of drum. The weight of authority is clearly in favour of the proposition that the omission to take any one of these two steps is fatal to the proceedings and there is no delivery in law. (Almond, J.C. and Mir Ahmad, J.) RAMESHRI υ. VAISHNO DITTI. 193 I.C. 819=13 R. Pesh. 68= A.I.R. 1941 Pesh. 25.

-O. 21, Rr. 37 and 40-Discretion-Judgmentdebtor not appearing—Refusal of arrest—If justified See C. P. CODE, S. 57, PROVISO. (1944) 1 M L.J. 53.

-O. 21, Br. 37 and 40-Notice issued under

C. P. CODE (1908), O. 21, R. 41.

A Court issuing a notice under O. 21, R. 37, C. P. Code, is not compelled to proceed under O. 21, R. 40, especially when the judgment-debtor raises a question of jurisdiction, (Das. J.) ARRATOON AND CO. v. MIMRAJ PURANMULL. 48 U.W.N 706.

——0. 21, B. 41—Procedure for examination— Chamber summons—If essential—Notice to party against whom order is sought—Necessity.

It is not necessary to take out a chamber summons in order to apply to the judge in chamber under O. 21, R. 41, for the oral examination of the judgment-debtor or any other person. But except in very exceptional circumstances the Court should never make an order without in the first instance giving a notice to the party against whom the order is sought. (Chagla, J.) BACHUBAI v. RAGHUNATH. I.L.R. (1942) Bom 128 = 199 I.C. 692 = 14 R.B. 375 = 44 Bom.1.R. 108 = A.I.R. 1942 Bom. 100.

- 021, B. 42-Jurisdiction of Court-Investigation of claims and objections-Proper procedure.

The Court has no jurisdiction on an application under O. 21, R. 42, C. P. Code, to enter into an investigation of claims and objections to the proposed attachment at the stage the application is made. The only question then before the Court is one between the decree-holder and the judgment-debtor tand it the property to be attached is specified by the decree-holder in his application as the property of the judgment-debtor, the Court is bound to make an order for attachment as if the attachment was being asked for in the ordinary course of execution of a decree for the payment of money, leaving it to the parties concerned to prefer such claims or objecttions after the attachment as were open to them under the provisions of O. 21, R. 58 or otherwise. The Court cannot apply to an application under O. 21 R. 42 the considerations which would govern an application for attachment before judgment, (Biswas and Koxburgh, JJ.) JAGAT TARINI DASSI v. SAROJ RANJAN. I.L.R. (1941) 1 Cal. 363=196 I.C. 247=74 C.L.J. 169= 14 R.C. 195=45 C.W.N. 328=A.I.R. 1941 Cal.

——O. 21, R. 42—Nature of application—Order passed after investigation of claims and objections—Appeal. See C. P. CODE, S. 47—APPEAL. I.L.R. (1941) 1 Cal. 363.

-0. 21, R. 43 and Penal Code, Ss. 114 and 353
-Roving commission for seisure of property-Legality
-Resistance-If an offence under S. 353, read with
S. 114, I. P. Code.

A roving commission for seizure of property belonging to the judgment debtors wherever it may be found is not contemplated by the C. P. Code and is entirely illegal. Where such a warrant for attachment of movable property is resisted there is no offence committed under S. 353 read with S. 114, I. P. Code. (Mosely, J.) HARI PRASAD v. BAILIFF SMALL CAUSES COURT, RANGOON. 1941 Rang.L.B. 592=197 I.O. 886=14 R.R. 185=43 Cr.L.J. 292=A.I.R. 1941 Rang. 347.

——0. 21, R. 43—Supardar—Attached goods disappearing from his custody—Decree-holder's right to execute decree against judgment-debtor.

The position of a supardar under C. P. Code, is wholly different from that of a sheriff under the English Law and the English rules relating to sheriffs are not, therefore, applicable to a case of property made over to the possession of a supardar. If movable property of the judgment debtor is attached and made over to a

C. P. CODE (1908), O. 21, B 46,

supurdar and it is subsequently not fothcoming from his custody, the decree-holder's right to execute is not affected thereby. The judgment-debtor is not discharged pro tanto by the mere sexure of the goods, and the decree-holder can execute the decree against him to the full amount. (Tek Chand and Sate, J.). BOOJA MAL GAINDA MAL v. ARISHAN CHAKDRA KALIPADA SHAH. I.L.R. (1944) Lah. 36-206 I.C. 542=15 R, I. 334=45 F.L.R. 66-A.I.R. 1943 Lah. 92.

\_\_\_\_O. 21, .. R. 45-Supardars-Lability-Nature and extent.

Where under a Supardnama the Supardars agree to produce certain goods entrusted to them either to the Nazir (in whose favour the document was executed) or to the Court whenever ordered and in default to pay a fixed, sum they have no business to hand it over to one of the parties on his representation that the attachment in question had come to an end. The Supardars are not at überty to intermeddie in any away with the property entrusted to them without a personal direction to them from the Court and if they do so they have to make good the amount fixed. (Davies.) RAM SWARUP KANI KAM z. RAM SWARUP KAMI NATH. 1942 A.M., L.J. 57.

—0.21, R. 45 (2) and (3)—Attachment of crops—Rights of Judgment-debtor to cut and store—Removal of crops—Offence—Obstruction to attaching officer—Effect of—Penal Code, Ss, 180 and 379.

A judgment-debtor is at liberty notwithstanding the attachment, to cut and gather the produce and store the same in default of any conditions imposed or orders passed by the Civil Court, in view of O. 21. R. 45 (2). C. P. Code. But he is not entitled to take the crops away as is shown by by sub-R. (3) of O. 21, R. 45. If after attachment, and after the crops have passed into the custody of the Court peon, the judgment-debtor and his men not only cut and gather the produce but also take them away, they would be guilty of theft. If in the course of such removal they obstruct the Court peon in the discharge of his duty of holding the crop, they would be also liable under S. 180. I. P. Code. (Dhavle, J.) MAHABIR SAH V. EMPEROR. 192 I.C. 177-7 B.R. 326-42 Cr. L. J. 251-13 B.P. 447-1940 P. W.N. 980-22 Pat. L.T. 662-A.I.R. 1941 Pat. 136.

O. 21, R. 46, C. P. Code, does not apply to decretal debts; it refers only to garnishee debts properly attached and not to the attachment of decrees for payment of money which should be properly made under O. 21, R. 53, C. P. Code. (Davis, C. J. and Weston, J.) SATRAMDAS KISHINCHAND v. MANGHOOMAL HAKUMAL. I.L.E. (1943) Kar. 393 = 211 I.C. 364=16 B.S. 186 = A.I.B. 1944 Sind 68.

—0. 21, Br. 46 and 49 and S. 52—Applicability—Partnership—Death of a partner—Suit on a promissory note by—Decree against, legal representatives against assets of the deceased—Mode of enforcing—Special procedure under R. 49, if available—Interference in revision.

Where after the death of a partner in a partnership, a suit is brought on a promissory note executed by him against his legal representatives and a decree is passed against the assets of the deceased in their hands, the remedy of the decree-holder is to proceed under S. 52 of the Code. The special procedure prescribed by R. 49 of O. 21, C. P. Code, is not applicable to the case because there was no partnership in existence as such at the time of the suit or at the time of the execution. Even

O, P. CODE (1908), O. 21, R. 46.

though the renally by way of suit to set aside an order under R. 49 of O. 21 is available a revision against it is mathitable. (Ya'yy Air, J.) RANGAYYA v. NAGAPOHA ROW. 1915] M.  $N_1N$ . 740=(1945) 2 M. I.J. 531.

—0. 21, Rr. 46, 51—Cheque in favour of judgment-deotor—Astachment — Proper procedure—Prohibitory order on drawee Bank—If effective,

A cheque being a negotiable instrument unless and until the money is paid to the payer the amount of the cheque cannot be considered to be his property. Hence the amount of a cheque in favour of a judgment-debtor not being money belonging to the judgment-debtor does not tall within the category of property declared to be hable to attachment in execution of a decree by S. 60 (1), C. P. Code. The attachment of a negotiable instrument according to R. 51 of O. 21 is by actual seizure of the instrument and bringing it into Court and holding it subject to further orders and not by issuing a prohibitory order on the drawee bank. (Mya Bu, J.) KAJARAM v. RESERVE BANK OF INDIA. 1941 Rang.L.R. 759=A.1.R. 1942 Rang. 59.

—O. 21, R. 46—Debt attached before judgment—Garnishee not objecting—Adverse inference—If justified.

The fact that the garnishee did not object to the attachment before judgment is as much evidence of his good faith as anything else, but that is no reason why thereafter an advantage irregularly obtained should be unduly pressed against him. (Duvies, C. J. and Weston, J.) BEHARILAL TEKCHAND v. RAMGOPAL. I.L.R. (1942) Kar. 173=202 I.C. 329=15 R.S. 31=A.I.R. 1942 Sind. 87.

—O. 21 R. 46—"Debt'—Sale deed—Vendee retaining sale price for discharge of debts due by vendor—Vendor undertaking to pay off other debts but failing to do so—Attachment of unpaid purchase money in vendee's hands—Permissibility. See C. P. CODE, O. 21, RR. 58 TO 63. (1942) 2 M.L.J. 94.

——O. 21, R. 46 and S. 64—Effect of attachment under O. 21, R. 64—Proceedings for liquidation of debt after attachment—Competency—Rights of attaching creditor decree-holder purchaser, if affected.

After attachment and before its purchase in Courtauction by the decree-holder of certain mortgagee rights, the mortgager applied for liquidation of his debts under C. P. Debt Conciliation Act. As the mortgagee did not appear, though noticed, the debt was discharged. In a suit on the mortgage by the auction-purchaser of the mortgagee rights ignoring the discharge of the debt as not binding in as much as it was made during the subsistence of the attachment.

Held, that O. 21, R. 46 did not vest the attaching creditor with any right, title or interest in the debt except the negative right to see that it was not paid (except into Court) without an order of the Court and that the attachment could not prevent a conciliation of the debt between the creditor and the debtor before the Board. It was further held that both S. 64 and O. 21, R. 64 were limited so far as the debt was concerned, to its payment and not to its settlement, and that the statutory extinction of the debt in the interval could not be prevented. (Stone, C. J. and Bose, J.) BHURA v. SADDULAL I.L.R. (1942) Nag. 691=198 I.C. 665=14 R.N. 238=1941 N.L.J. 593=A.I.R. 1942 Nag 36.

-0.21, R. 46—Garnishes—Order by settlement— Payment by garnishes—If discharges him of liability to pay to Receiver appointed to receive the amount, C. P. CODE (1908), O. 21, B. 46,

Where neither party to garnishee proceedings informed the Court that a receiver had been appointed and obtained an order jby settlement, the payment by the garnishee to one of the parties in pursuance of the order will not discharge him of the hability and bind the receiver who was not a party to the proceedings. (Lort Wittens, f.) ANIL CHANDRA MITRA v. INDIAN ECONOMIC INSURANCE CO., LTD. I.L.R. (1941) 2 Cal. 241=197 I.C. 437=14 R.C. 362=A,I.R. 1941 Cal. 579.

O 21, R. 48—Locus standi of disbursing officer to fite objections.

The disbursing officer is in a sense a person affected by the order of the Court; for the direction of the Court is sent to him, and under 0. 21, R. 48 (3), C. P. Code, he can be made personally hable it he pays any sum in contravention of such directions. He has, therefore, a right to apply to the Court and bring to its notice that the order which he is asked to obey is; illegal or prohibited by statute. (Mukherjea and Biswas, J.). Superintendent, R. M. S. (c) Division Calcuita v. R. M. S. C. Division Co-operative Credit Society, LTD., Howrah, I.L.R. (1944) 2 Cal. 187=214 I.C. 108=17 R.C. 24=A.I.R. 1944 Cal. 135.

A usufructuary mortgage is a debt within the meaning of O. 21, R. 46. When such a debt is sold delivery of it is made in the manner prescribed by O. 21, R. 79 by the issue of written order prohibiting the creditor from receiving the debt and the debtor from making payment thereof. Delivery cannot be made by putting the auction-purchaser in possession of immovable property. (Almond, J. C.) DEVI DAS v. NATHU KAM. 204 1, C. 138=15 R. Pesh. 68=A.I.R. 1942 Pesh. 66.

——O. 21, B. 46—Scope—Exact amount of debt—If to be specified,

It is not necessary under O. 21, R. 46 for the purpose of attaching a debt that the exact amount should be ascertained or stated, but before the attached debt can be made the subject of execution, it must be ascertained. Moreover, where there is an attachment before judgment O. 38, R. 5 (2), C. P. Code, requires at least the approximate value of the debt should have been, ascertained and specified. (Davis, C. J. and Wesson J.) BEHARILAL TEKCHAND v. RAMGOPAL. I.L. R. (1942) Kar. 173=202 I.C. 329=15 R.S. 31=A.I.R. 1942 Sind 87.

—O. 21, Rr. 46 and 47—Scope—Judgment-debtor owning share in property in the possession of stranger.

Where the judgment debtor owns a share or incress in some property which is in the posssssion of a stranger R. 46 as well as R. 47 of O. 21 C. P. Code must come into operation so as to necessitate prohibitory orders being issued not only to the judgment-debtor but also to the stranger who is in possession of the property of the judgment-debtor's share which is intended to be attached. (Niyogi, J.) GOVINDRAM v. HARASAYA. 193 I.C. 788=13 R.N. 347=1941 N.L.J. 361=A.I.R. 1941 Nag. 157.

with vendee for payment to vendor's creditors—Attachment by vendor's decree-holder—Locus standi of such creditors to object. See C. P. CODE, S. 60 AND O. 21, R, 46. 44 P.L.R, 415 (F,B).

C. P. CODE (1908), O. 21, R. 46 (2)

Effect on attachment. (2)-Scope-Non-compliance-

Attachment itself is something separate from the mere order and is something to be done and effected before attachment can be declared to have been accomplished. There will be no attachment of a debt if some only of the provisions of Cl. (2) of R, 46 O. 21 C. P. Code are complied with while others are not. (Weston and Tyabii, J.).) DECCAN CO-OPERATIVE BANK, LTD. v. PARSRAM TOLARAM. I.L.R. (1942) Kar. 203=202 I.C. 183=15 R.S. 25=A.I.R. 1942 Sind 96.

—O. 21, R. 46 (3)—Scope—Order for payment— Failure of garnishes to pay money in Court—Remedy of decree-holder.

Under O 21, R. 46 (3), C. P. Code, a garnishee is given the option to pay the amount into Court. There is nothing in the rule which authorises the Court to pass an order by which the garnishee can be compelled to deposit the amount of his debt in Court. If the garnishee does not pay the amount of the debt in accordance with O. 21, R. 46 (3) as ordered by the Court, the decree-holder may adopt the procedure laid down in Rr. 63 A and 63-B, inserted by the Patna High Court, to O. 21, C. P. Code. (Chatterji and Shearer, J.) KAMESHWAR SINGH v. KULESHWAR SINGH. 21 Pat. 287=202 I.C. 533=15 R.P. 124=9 B.R. 14=A.I.R. 1942 Pat. 508.

Garnishee proceedings cannot be taken under O. 21, R. 46-A, C. P. Code, in respect of a debt which cannot be attached under O. 21, R. 46. A debt due to a firm from a customer is the property of the firm within the meaning of O. 21, R. 49 and it cannot be attached in execution of a decree obtained not against the firm or the partners as such but against one or some of them in his or their individual capacities. A garnishee order in respect of that debt made in execution of such a decree is, therefore. illegal. (Mitter and Kundkar, J.). KURSEONG HYDRO ELECTRIC SUPPLY CO. LTD. v. LAKSHMI NARAYAN. I.L.R. (1941) 1 Cal. 389=196 I.C. 513=45 C.W.N. 333=14 R.C. 252=A.I.R. 1941 Cal. 364.

Q. 21, Rr. 46-A and 46-B (Sind)—Scope—Application for notice under R. 46-A—Procedure to be followed.

Per Davies C.J.—When an application is made for a notice under R. 46-A. the Court should require the decree-holder either to specify the debts or apply under O. 21, R. 41 for an examination of the judgment-debtor. It is plain that R. 46-B is complementary to R. 46-A. and the order under R. 46-B must follow, so far as the debt is concerned, the terms of R. 46-A and must be capable of execution. An order to sell an unspecified or unascertained debt is not capable of execution. The debt must, therefore, at some stage of the proceedings be specified or ascertained, and it must be specified or ascertained independently of whether the garnishee should or should not appear and show cause. A debt, the amount of which is not specified or ascertained, may be made the subject of a valid attachment, but it cannot be made the subject of a valid execution in the terms of R. 46-B. Further R. 46-A requires that an application shall be supported by an affidavit verifying the alleged facts and stating the belief that the garnishee is in-

O. P. CODE (1908), O. 21, R. 48.

debted to the judgment debtor. This again gives the decree-ho:der an opportunity of giving the garnishee notice of the value of the debt which is to be the subject of execution. A Court which directs execution to issue against a debt, which are the value of which is not specified, wrongly exercises the power which R. 46-B confers.

Per Weston, J.—The notice under R. 46 A follows attachment under 46. It is open to a decree holder to attach a debt, the amount of which is unknown to him. When he has done so R. 41 of O. 21 affords him facilities for ascertaining the amount and if he wishes the proceedings to have practical result, ordinarily he will be well advised to take steps to ascertain the amount of the debt before seeking the issue of notice under R. 40-A. (Davies, C. J. and Weston, J.) BEHARILAL TEK CHAND v. RAMGOPAL. I.L.R. (1942) Kar. 173=202 I.C. 329=15 R.S. 31=A.I.R. 1942 Sind 87.

O. 21, R. 46-A—Scope—Notice under—Failure to show cause—Effect—Subsequent application under O. 21, R. 58—Maintainability.

A failure to show cause in response to a notice issued to him under O. 21, R. 46-A. C. P. Code, debars a garnishee from filing a subsequent application under O. 21, R. 58, C. P. Code. (Weston, J.) TAHILRAM V. G. VALANI BROS. 1.L.R. (1942) Kar. 153=205 I.C. 199=15 R.S. 117=A.I.R. 1943 Sind 23.

O. 21, R. 46-A (Sind)—Notice—Service of—Requisites of valid service—Garnishee notice on firm—Legal requirements—Procedure See C. P. CODE, O. 30, R. 3. I.L.R. (1943) Kar 255.

—O. 21, R. 46-G (Sind)—If overrides or conflicts with O. 30, R. 3.

There is nothing in rule 40-G of O. 21. which overrides or is in conflict with, the provisions of O. 30. R. 3, C. P. Code. (Lobo, J.) GOKULDAS MARADEV v. DILSUKHKAM. I.L.R. (1943) Kar. 255=209 I.C. 406=16 R.S. 97=A.I.R. 1943 Sind 188.

O. 21, R. 48—Attachment under-When complete and effective-Postponement of remission of salary by disbursing officer—If renders attachment not effective till then.

As soon as the notice of the order issued by the Court under O. 21, R. 48 C.P. Code, is served on the disbursing officer and accepted by him, the attachment becomes complete and effective. His postponement of the remission of the salary to the Court, to a later date, cannot mean that there was no effective attachment till then. (Ghulam Hasan, J.) ELSIE GRIFFIN EDWARD v. HOWARD. 193 I.C. 38=1941 A.W.R. (C.C.) 66=1941 O.L.R. 247=1941 A.L.W. 99=13 R.O. 424=1941 O.W.N. 115=1941 O A. 138=A.I.R. 1941 Oudh. 277.

O. 21. R. 48—Duty of Court—Ascertainment of attachable portion of salary—Necessity for obtaining material from disburing officer and then attaching definite amount BHAGWAN DASS RAMPRASAD v. SECRETARY OF STATE. [Sec Q.D. 1936—'40 Vol. I, Col. 3297.] 193 I.C. 360—7 B.R. 598—13 R.P. 584—A I.R. 1941 Pat. 157,

O. 21, R. 48—Scope—If subject to S. 60 (i)—Attachment of salary exempt from attachment—Legality—Waiver of exemption by ludgment-debtor—Effect—Right of disbursing officer to object—Agreement by judgment-debtor to deduct part of unattachable salary—If opposed to S. 23, Contract Act and S. 6. (f), T.P. Act—Public policy—C. P. Code, O. 21, R. 58.

C. P. CODE (1908), O. 21, R. 48.

A public officer whose salary is exempt from attachment under S. 60 (i), C.P. Code, cannot contract himself out of this statutory provision. This exemption cannot be waived, because there is a question of public interest and policy involved. The privilge being one conferred for reasons of public policy, it cannot be waived. If the public officer whose salary is attached in contravention of S. 60 (i), C.P. Code, submits to the attachment or agrees to a deduction of a part of the salary which is below the minimum prescribed by S. 60 (i), C.P. Code, the disbursing officer can object to the attachment and apply to the Court to vacate the order of attachment, and the Court can give effect to the objection. Every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at root of the subject-matter of controversy between the parties. Where an order is made against Government or a public body, and when the law imposes liability in case the order is not obeyed, it would be unreasonable and unjust to hold that it is not open to Government or to the public body, as the case may be, to move the Court and contend that the order is not justified by the law, and there must be inherent power in the Court to consider such an application. A creditor got a decree for Rs. 236 against a postal peon drawing a salary of Rs. 41 per month, and had him arrested in execution. In order to escape from such arrest he agreed with his creditor that a sum of Rs. 6 per mensem should be deducted from his pay until the debt was paid. The executing Court, acting on this agreement, made an order under O. 21, R. 48, C.P. Code. This was objected to by the Postmaster-General, but the objection was overruled on the ground that the exemption could be waived and that the Postmaster-General had no locus standi to contest the order of attachment.

Held, (1) that O, 21, R. 48, C.P. Code, was expressly subject to S. 60 (1); (2) that the agreement between the creditor and the judgment-debtor (public servant) was obnoxious to the provisions of S, 6 (/) of the T.P. Act, as it was to all intents and purposes a transfer of the judgment-debtors's salary as it fell due in the future; (3) that the agreement must also be regarded as void under S. 23 of the Contract Act; (4) that the objection by the Postmaster-General would fall under O. 21, R. 58, C. P. Code; it could not be said that he had no grievance and it must therefore be held the he had a locus standi to make the objection application; (5) that the legislature having fixed the amount of salary to be exempted in the interests of public policy, it was not for the Courts to say that it was sufficient to reserve a lesser amount; and (6) that the attachment of the salary and the transfer thereof were both illegal and opposed to public policy, (Broomfield and Divatia, J.) POST MASTER-GENERAL. BOMBAY v. CHENMAL MAYA CHAND. I.L.R. (1941) Bom. 415=197 I.C. 462=14 R.B. 222=43 Bom. L.R. 758=A.I.R. 1941 Bom. 389.

-0.21, R, 49 (2)—Rights of judgment-creditor of partner who has overdrawn-Priority of partners to reimbursement—Appointment of receiver—Effect. PAN-MAL v. DHANALAL. [See Q.D. 1936—40 Vol. I Col. 3298.] 192 I.C. 329=13 R.N. 239=I.L.R. (1942) Nag. 248=A.I.R. 1941 Nag. 63.

-O. 21, R. 50 and O. 30, R. 10-Applicability-Joint Hindu family firm.

O. 21, R. 50 and O. 30, R. 10, C.P. Code, are applicable to a joint Hindu family business or trading firm also. (Fast Ali and Varma, JJ.) ALEKH CHANDRA

——O. 21, Rr 50 (2) and 11—Co.

SAHU v. KRISHNA CHANDRA GAJAPATI NARAYAN.

20 Pat. 755=22 Pat. L.T. 682=197 I.C. 730=8 Practice of the Calculta High Court.

C. P. CODE (1908), O. 21, Br. 50 (2).

B.R. 280=14 R.P. 345=7 Cut. L.T. 21=A.I.R 1941 Pat. 596.

-0. 21, R. 50-"As being a partner in the firm' - Meaning-Includes person holding himself ou as partner.

The words "as being a partner in the firm" in O. 21 R. 50(2) C. P. Code are wide enough to include a person who holds himself out as a partner in the firm and is therefore liable as such. (Davis, C.J. and Lobo, J.) MOHANLAL v. PARMANAND HOTCHAND. I.L. R. (1941) Kar. 69=192 I.C. 276=13 R.S. 184= A.I.R. 1941 Sind. 8.

-0. 21, R. 50 (1) (c)—Effect of—Partners served in suit against firm-Right to contest liability subsequently.

O. 21, R. 50 (1) (c) personal liability on partners have been served in a suit against the firm. The served partners are debarred from subsequently contesting their liability as partners. (Davis, C.J., and Weston, J.) RADHAKISHIN NATHURAM v. HARBHAG-WAN & CO. I.L.R. (1942) Kar. 218=203 I.C. 357=15 R.S. 77=A.I.R. 1942 Sind 97.

- O. 21, R. 50 (2)-Application for leave -Nature of - Decree, if may be executed without leave-Application for leave and for execution-If may be combined-Practice of Calcutta High Court.

An application for leave under O. 21, R. 50 (2), C P. Code, is a substantive application specially prescri bed by that rule, and without leave obtained from th Court which passed the decree on such an application the decree-holder cannot execute the decree agains partners who do not fall within Cls. (b) and (c) of O, 21 R. 50 (1). An application for leave under O. 21, R 50 (2) is not the same as an application for execution under O. 21, R. 11, but the two applications are in reality and substance two different and separate applications, and the logical course is to apply for leave first and to apply for execution of the decree afterwards. Though it may be possible in some circumstances to combine the two applications, yet in reality and substance they are and remain two applications and the better practice ordinarily will be to make two applications in the sequence mentioned above. (The need for alteration of the practice relating to applications for leave under O. 21, R. 50 (2) prevailing on the original side of the Calcutta High Court, was emphasised.) (Das, JAGANNATH JUGAL KISHORE v. KANIRAM. 48 C.W.N. 280.

-O. 21, R. 50 (2)—Award against Hindu joint family business-Executability against member of joint family.

An award against a Hindu joint family business carried on under a particular name is incapable of execution as a decree, and even if it is executable, it cannot be executed against a member of the joint family by invoking the aid of O. 21, R. 50, C. P. Code, which applies only to a decree passed against a contractual firm. The question whether the award is against a contractual firm or a joint family business cannot be set down for hearing as an issue in a suit under O. 21, R. 50 (2). (Sen, J.) MOTI LAL CHHAJU LAL v. GIRIDHARI LAL. I.L.R. (1942) 1 Cal. 161=15 R.C. 450=203 I.C. 576=A.I.R. 1942 Cal. 613.

-0. 21, Rr 50 (2) and 11-Combined application for leave and for execution-PermissibilityC. P. CODE (1908), O. 21, R. 50 (2) and (3).

An application under O. 21, R. 50 (2) C. P. Code, for leave to execute a decree against an alleged partner need not be made before an application for execution is taken out under O. 21, R. 11, but the two can well be combined in a singe application, as the one is ancillary to the other. This practice and procedure has been followed in the Calcutta High Court for nearly 20 years and there is no reason why it should not continue. (Mt. Nair and Gentle, J.). JAGANNATH JUGAL KISHORE v. CHIMANLAL. 48 C.W.N. 645.

O. 21 R. 50 (2) and (3)—Construction—Proceedings under—If suit or proceedings in suit—Presidency Small Cause Court—Application for new trial against order in such proceedings—Jurisdiction of full Court to entertain. See Presidency Small Cause Courts Act, S. 38. 44 Bom.L.R. 120.

O. 21, R. 50 (2)—Jurisdiction—Scope of inquiry under—Jurisdiction of executing Court—Limits.

O. 21, R. 50 (2), C. P. Code, contemplates what is in effect the trial of a suit in which the person against whom execution is sought may contest not only his own liability as a partner of the judgment-debtor firm but the plaintiff's claim upon its merits. The adjudication of questions of this kind is limited to the Court which passed the decree and the Court to which the decree has been sent for execution has no jurisdiction to decide them. (King, f.) POTTISWAMI v. SULAIMAN. I.L. R. (1942) Mad. 688=202 I.C. 139=15 R.M. 449=55 L.W. 175=1942 M.W.N. 245=A.I.R. 1942 Mad. 501 (2)=(1942) 1 M.L.J. 377.

Under O. 21, R. 50 (2), C. P. Code, leave to execute a decree against an alleged partner can be granted only by the Court which passed the decree. It is not within the competence of the Court to which the decree is transferred for execution to grant that leave. (Mukherica and Ellis, //.) PULIN BEHARI PAL v. ISWAR CHANDRA PAL. 49 C.W.N. 256 = A.I.R. 1945 Cal. 803.

Proceedings under 0. 21, R. 50 (2) and (3), C. P. Code are proceedings in a suit as contemplated in S. 38 of the Presidency Small Cause Courts Act and S. 38 therefore applies to such proceedings. (Beaumont, C. J.) RATILAL MANILAL v. SAKAR CHAND SHAH & Co. 44 Bom.L.R. 124.

O. 21, R. 50 (2)—Procedure—Application for leave under—Prior application for execution—If condition precedent. COOVERJI VARJAN v. COOVERBAI NACSEY. [see Q.D. 1936-40 Vol. 1. Col. 1609.] 191 I.C. 129.

— 0. 21, B. 50 (2)—Separate application for leave — If necessary.

It is not necessary that leave to execute a decree against an alleged partner under O. 21, R. 50 (2), C.P. Code, should be asked for in a separate petition before filing an application for execution. It is permissible to make one application combining both the prayers, and it is not even required to ask for leave separately as the application for execution against a particular person necessarily implies such a prayer, (Mukherlea and Ellis, J.). PULIN BEHARI PAL v. ISWAR CHANDRA PAL, 49 C.W.N. 256 = A.I.R. 1945 Cal. 303.

C. P. CODE (1908), O. 21, R. 53.

O. 21, R. 52, C. P. Code, is only a mode of attachment of property in the custody of the Court. It does not deal with the leave necessary to be obtained for proceeding under R. 52. The rule is not confined to property other than immovable property, and it cannot be held that when the property is immovable the procedure prescribed by R. 54 of O. 21, may be adopted without proceeding under O. 21, R. 52. (Kania, J.) CENTRAL BANK OF INDIA, LTD. v. PRABHAKAR ANANDRAO. 198 I.C. 285=14 R.B. 288=43 Bom.L.R. 995=A.I.R. 1942 Bom. 53.

The words used in O. 21, R. 52 cannot be read as permissive. They are imperative for the judgment-creditor. He has to apply for attaching the property in the custody of the Court, such as property in the hands of a receiver. While making the application, he may put before the Court sufficient grounds to prevent the Court from making the ordinary order prescribed by the rule or limit the operation of such order to a named property or a named period. The Court has jurisdiction to place such restrictions on limitations, O. 21, R. 52 cannot, however, be read as permitting the judgment-creditor to proceed under O. 21, R. 54, merely after he obtains leave to proceed to execute the decree on the ground that the property is in the possession of a Court officer. (Kania, J) CENTRAL BANK OF INDIA, LTD. v. PRABHAKAR ANANDRAO. 198 I.C. 285=14 R.B. 288=43 Bom.L.R. 995=AI.R. 1942 Bom. 53.

——— 0. 21, B. 53—Adjustment of decree—Compromise presented to appellate Court,

A compromise between parties can be regarded as an adjustment of a decree although it is presented to the Court of appeal instead of being presented to the original Court in the course of execution proceedings. (7th Chand and Beckett, JJ.) SHANTI LAL v.F. HIRA LAL SHEO NARAIN. I.L.R. (1942) Lah. 603=198 I.C. 726=14 R.L. 351=43 P.L.R. 471=A.I. R. 1941 Lah. 402.

——0. 21, R. 53—Attachment of decree in execution of another decree—Attachment subsequently removed and execution case dismissed by executing Court—Order of executing Court set aside on appeal—Satisfaction of attached decree by sale of judgment-debtor's property in the meantime—Attachment, if can be revived—Remedy of attaching decree-holder.

A obtained a decree against B and in execution thereof attached a decree obtained by B against C. He
then obtained an order of attachment of a decree
which C had obtained against D. On objection by C,
the executing Court dismissed the execution case and
removed the attachment. Against this order, A appealed to the High Court. Meanwhile C executed the
decree against D, which was satisfied by the sale of D's property. Thereafter A's appeal to the High Court
was allowed and the execution case started by him
against C was remanded for further hearing to the
executing Court. That Court thereupon purported to
revive the attachment of the decree of C against Dand eventually dismissed the execution case. On appeal,

Held, that as the decree which C obtained against D was rightly or wrongly satisfied and has, therefore ceased to exist, the remedy of A is against C who has

C. P. CODE (1908), O. 21, Rr. 53 and 46.

received the money which really should have been paid to him. (Khundkar and Biswas JJ.) TARAPADA BASU v. MAHENDRA NATH. 49 C.W.N. 285=A.I.R. 1945 Cal. 264.

\_\_\_\_\_O. 21, Rr. 53 and 46—Attachment of decree-

The procedure for attachment of decrees under R. 53 of O. 21 C. P. Code and the mode of its realisation under R. 53 have to be followed and not that prescribed by O. 21 R. 46. (Grille, C./. and Sen, /.) KRISHNABAI v. PARVATI BAI. I.L.R. (1944) Nag. 885=1944 N.L.J. 479=A.I.R. 1944 Nag. 298.

—0.21, R. 53—Preliminary deeree for sate—Attachment for realisation—Procedure.

In the case of a decree for sale the only procedure laid down for its attachment and realisation is that contained in O. 21, R. 53 (1). Such a decree cannot be sold, but the decree itself is to be executed and the assets realised to be made available to the person entitled to attach the decree. The attaching creditor of a preliminary decree for sale is entitled to apply to make the decree final. (Grille, C. f. and Sen, f.) KRISHANA BAI v. PARVATI BAI. I.L.R. (1944) Nag. 885=1944 N.L.J. 479=A.I.R. 1944 Nag. 298.

—0.21. R. 53—Partnership suit—Preliminary decree for accounts—Saleability in execution at instance of attaching decree-holder.

A preliminary decree for accounts in a partnership action is not saleable at the instance of a creditor who has attached it, though it is attachable. (Agarwala and Rowland, /J.) KHIMJI POONJA & CO., v. RATANSHI HIRJI. 19 Pat. 935=192 I.C. 408=13 R.P. 468=1940 P.W.N. 1042=7 B.R. 465=21 Pat. L.T. 728=A.I.R. 1941 Pat. 43.

—O. 21 R. 53 (1) (b)—Scope and object of the request. MAHALINGAM CHETTIAR v. RAMANATHAN CHETTIAR. [see Q.D. 1936-40 Vol. I Col. 3298.] 67 I.A. 350=I.L.R. (1941) Mad. 1=I.L.R. (1940) Kar. (P.C.) 312=45 C.W.N. 281=1941 P.W.N. 164=73 C.L.J. 96 (P.C.).

When the property to be attached is a decree debt, the proper procedure to attach it is under O. 21, R. 53 C. P. Code. which governs the attachment and sale of a money decree. O. 21, R. 46. cannot be applied to a decree-debt. (Davis, C. J. and Weston, J.) SATRAMDAS KISHINCHAND v. MANGHOOMAL HAKUMAL. 1.L.R. (1943) Kar. 393=211 I.C. 364=16 R.S 186=A.I.R. 1944 Sind 68.

—0.21, B. 53 (1) (b) and (6)—Attachment of decree—How made—Presumption of notice to judgment-debtor under attached decree—Recognition of adjustment thereafter—Legality.

Under O. 21, R, 53 (1) (b) attachment of a decree is made by the issue of a notice from the attaching Court to the Court which passed the decree. On proof of the issue of such a notice the presumption would arise that the Court which passed the atached decree would have given notice to the judgment debtor under that decree. Any private adjustment thereafter of such a decree would be in contravention of the order of attachment and cannot be recognised. (Shirreff, S.M. and Sathe, J.M.) MAHABIRYA v. MAHADEI. 1943 R.D. 241=1943 A.W.R. (Rev.) 249.

original suit in favour of fudgment-debtor in a

C. P. CODE (1908), O. 21, R. 53 (1).

small cause suit—Both decrees passed by the same District Munsiff—Application for execution of small cause decree by attachment of decree in original suit—Order allowing—Failure of Munsiff to issue a notice in writing in his capacity as Small Cause Judge to himself exercising original jurisdiction—Effect—Right of attaching decree holder to execute the attached decree in the arramstances.

A obtained a mortgage decree against B and C in the original side of the District Munsiff's Court. In a small cause suit in the same Court D obtained against A a decree which he sought to execute by the attachment of the mortgage decree. On D's application for execution the District Munsiff as Smali Cause Judge issued an order on A prohibiting him from receiving the decree debt until further orders of the Court and an order on B and C prohibiting them from paying the debt. The Munsiff then ordered the mortgage decree to be attached and ultimately after the parties in the mortgage suit had been served with the prohibitory orders he made the attachment absolute. D applied in due course in execution to the District Munsiff as exercising ordinary original jurisdiction for leave to proceed to execute the attached decree. The objections raised by B and C were overruled and an order permitting D to execute A's decree was passed. The order was confirmed on appeal and on second appeal it was again contended that there was no sufficient compliance with the provisions of O. 21, R. 53 of the C. P. Code in that no notice in writing was issued to the Court in which the decree sought to be executed was passed, and that therefore there was no valid attachment which will enable D to proceed with the execution of the mortgage decree.

Held, the object of O. 21, R. 53 of the C. P. Code is to prevent the holder of a decree executing it to the deteriment of the person who has obtained a decree against him. The notice contemplated by O. 21, R. 53 (1) merely prevents the execution being proceeded with until the notice contemplated by this clause is cancelled or the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving the notice to execute the attached decree. The position in the present case was that D applied to the proper Court for an order of attachment of the decree and he applied to the proper Court to be allowed to execute the attached decree. Supposing the Munsiff as the Judge of Small Causes had served upon himself as Munsiff having original jurisdiction, a written notice under R. 53 (i) (b) the notice would have expired as soon as C applied in that suit to be allowed to proceed in execution. To say that there was no valid attachment because there was no written notice issued by the Munsiff as the Judge of Small Causes to himself as the Munsiff having original jurisdiction would be pushing technicality beyond all reasonable limits especially when the mortgage decree-holder was a consenting party to the action of his creditor. Accordingly D is entitled to execute the attached decree. (Leach, C.J. Mockett and Lakshmana Rao, JJ.) GANESHMUL SAIT v. MAHOMED ISMAIL SAHIB. I.L. R. (1944) Mad. 690 = 216 I.C. 322 = 17 R.M. 227 = 57 L W. 342 = 1944 M.W.N. 420 = A.I.R 1944 Mad. 353 = (1944) 1 M.L.J. 446 (F.B.).

——0. 21, R. 53 (1)—Scope -If includes both preliminary and final decree for sale.

O. 21, R. 53 (1) C. P. Code refers to a decree for sale in enforcement of a mortgage. It is not restricted to a preliminary decree for sale. The words used being

C. P. CODE (1908), O. 21 R. 53 (3).

sufficiently comprehensive it will include both the preliminary and final decree for sale. (Grille, C. J. and Sen J.) KRISHNABAI v. PARVATI BAI. I.L.R. (1944) Nag. 885 = 1944 N.L.J. 479 = A.L.R. 1944 Nag. 298.

-O. 21, R. 53 (3) and Bengal Public Demands Recovery Act, S. 19 (3) Attaching decree-holder-Representative character-Limits-Analogous position of certificate-holder under S 19 (3) of the Bengal Public Demands Recovery Act-Right to adjust the decree. RADHAKISSEN v. DURGA PRASAD. [see Q.D. 1936—'40 Vol. 1, Col. 3298.] 67 I.A. 360 = I. L.R. (1940) 2 Cal. 493=L.L.R. (1940) Kar. (P.C.) 321 = 73 C.L.J. 106 (P.C.).

O. 21, R. 53 (3)—Decree attached by several creditors-Right of one to execute without consent of others. Mahalingam Chettian v. Ramanathan CHETTIAR. [see Q.D. 1936—40 Vol. I, Col. 3299.] 67 I.A. 350=I.L.R. (1941) Mad. 1=I L.R. (1940) Kar. (P.O.) 312=45 C.W.N. 281=1941 P.W.N 164 =73 C.L.J. 96 P.C.

-0.21, R. 53 (5)-'Information' - Meaning-Omission to give information either already on record or not required—Effect.

The 'information' referred to in Cl. (5) of R. 53 of O. 21, means information in regard to the attached decree which is being executed by the attaching creditor and not information regarding the decree of the attaching creditor. The omission to give information which is either already on record or which information was not required of the holder of the attached decree, would not render the attachment invalid. (Collister, J.) LAKSH-MAN DAS GOPALDAS v. GAJANAND CHAUDHARI. 1943 A.L.W. 141.

O. 21, R. 53 (6) (All.)—Procedure regarding attachment of a decree in execution of another decree passed by same Court.

Where one decree is sought to be attached in execution of another decree, if both the decrees are passed by the same Court, then an order of attachment by that Court is all that is required in order to effect a valid attachment. Thereafter the decree holder applying for attachment may apply to the Court for the issue of a notice to the judgment debtor bound by the decree attached; and if such notice is issued or if such judgment debtor receives notice otherwise or has knowledge of the order of attachment, then no payment or adjustment in respect of that decree shall be recognized by the Court. (Collister, J.) LAKSHMAN DAS GOPAL DAS GAJANANDCHAUDHARI. 1943 A.L.W. 141.

O. 21, R. 54—Attachment of immovable property-Service of prohibitory order-If necessary to complete the attachment-Procedure required by O. 21, R. 54. KARAN SINGH v. RAM SAHAI. [see Q.D. 1936—40 Vol. I, Col. 3299.] LL.R. (1941) All. 39 = 13 R.A. 389 = 192 I.C. 787 = 1940 A.L.J. 894=A.I. B. 1941 All, 41.

-0. 21, R. 54-Form and duration of order under.

An order of attachment of immoveable property, property drawn, ought to limit the order of prohibition so as to extend only until the disposal of the darkhast or further order; and from the nature of the case it must be assumed that an attachment under R. 54 of O. 21, comes to an end when the darkhast on which it is made is disposed of, if the Court does not order the attachment to continue. (Beaumont, C. J.) LALDAS KAL-YANDAS v. SHANKAR RAMCHANDRA. 209 I.C. 623-16 B B. 156=45 Bom L.R. 501=A.I.R. 1943 Bom. 255.

C. P. CODE (1908), O. 21, R. 57.

-O. 21, R. 54 and O. 38, R. 7—Interim order for attachment before judgment passed by High Court -Notice of motion containing bare endorsement as to grant of interim attachment, served on defendant by attorney's clerk .-- Such service, if effects attachment See C. P. CODE, S. 64. 49 C.W.N. 226.

-0. 21, R. 54 (1) (As Amended in Bombay) -Scope and effect of - If affects R. 54, (2)-Transfer for consideration-Attachment when takes effect.

The addition made by the High Court of Bombay to O. 21, R. 54 (1), C. P. Code, does not affect the provisions of R. 54 (2). The object of adding the new sub-rule is to protect a transferee without notice during the interval between the date of making the order of attachment and the date of its proclamation and not thereafter. Hence, in the case of a transfer of the attached property for considerations, the order of attachment takes effect as against the transferee from the date when such order comes to his knowledge or from the date when the order is proclaimed under R. 54 (2), whichever is earlier. (Divatia and Macklin, JJ.) LAXMICHAND TULJARAM v. PIONEER URBAN CO. OPERATIVE BANK, BELGAUM. 218 I.C. 406=18 R.B. 33=46 Bom.L.R. 522=A.I.R. 1944 Bom. 265.

-0. 21, R. 54 (2)-'Lana'-Does not include buildings thereon.

The word 'land' in O. 21, R. 54 (2), C. P. Code, is used by the Legislature in a restricted sense, and does not include buildings and other constructions thereon. (Harries, C. J. and Mehrchand Mahajan, J.) VIR BHAN v. SHAM SINGH. 218 I.C. 429=18 R.L. 20=46 P.L.R. 303 = A.I.R. 1944 Lah. 455.

-0. 21, R. 54 (2)—Scope—Non-compliance— Effect-Attachment of several properties by one order-Affixing of copy of order on one property only-Sufficiency.

Where several properties are attached by one single order, but a copy of the order is posted only on one of those properties, the mere proclamation of the attachment and the affixing of the order on one of the properties only, cannot be held to be sufficient to effect a valid attachment so far as the other properties are concerned.
The use of the word "property" implies separate attachments where the application for attachment embraces several properties situate in different places. (Luch, C.J. and Shahabuddin, J.) RURMINAMMA v. RAM-AYYA. I.L.B. (1944) Mad. 262=16 R.M. 400=210 I.C. 197=56 L.W. 426 (2)=1943 M.W.N. 479=A.I. R. 1943 Mad. 712=(1943) 2 M.L.J. 189.

-O. 21, R. 55—Attachment of money—How long subsists. HARSHI KESH v. GHULAM HAIDAR KHAN. [see Q.D. 1936-'40 Vol. I, Col. 1619.] 16 Luck. 76.

-O. 21, R. 57 (before amendment)—Applicability—Application dismissed not for decree-holder's default-Order keeping attachment pending-Legality.

O. 21, R. 57, C. P. Code, as it stood before the amendment made cessation of attachment a necessary consequence of a dismissal of an execution application due to the default on the part of the decree-holder. If, therefore, there is no default on his part and the Court dismisses the application suo motu, the rule has no application. In such a case, an order keeping the attachment subsisting, though not regular, is not illegal. (Puranik, J.) GOVIND v. DHONDBA. I.L.R. (1945) Nag. 571 = 1945 N.L.J. 352.

-0. 21, R. 57—Applicability—Conditions of. O. 21, R. 57, C. P. Code. would apply only if there is a default on the part of the decree-holder or nonprosecution resulting in the dismissal of his darkhast, C. P. CODE (1008), O. 21, B. 57.

Where there is nothing on the record to show that the decree-holder failed to do anything which may be regarded as a default on his part and which would justify the inference that the darkhast was dismissed for default, 0. 21, R. 57 will not apply especially when the darkhast is seen to have been disposed of on the merits and to have been partially successful, the decree-holder getting his costs as against the judgment-debtor. (Wadia and Sen. 1) VISHNU BALKRISHNA 5. SHANKARAPPA GURLINGAPPA. 202 I.C. 392 -15 R. B. 156-44 BOM.L.R. 415-A.I.R. 1942 BOM. 227.

---- 0. 21, R. 57-Applicability to attachments before fudgment.

The provisions of R. 57 of O. 21 cannot be extended to cases of attachment before judgment and hence such an attachment would not cease when an application for execution is dismissed for default. (Mulla, J.) BUD-HOO LAL v. SOBHA RAM TEWARI. 1943 A.L.W. 390 = 1943 O.W.N. (H.C.) 233.

——0.21, R. 57—Applicability—Attachment before judgment. PRIBHOMAL v. KISHNOMAL. [see Q.D. 1936—40, Vol. I, Col. 3299.] 192 I.C. 576—13 R.S. 193=A.I.R. 1941 Sind 13.

—0.21, R. 57—Applicability—Attachment before judgment of two sets of properties in different jurisdictions—Decree—Application for execution by sale of one set of property—Dismissal for default of decree-holder—Attachment in respect of other property not covered by application—If terminated—C. P. Code, 0,38, R. 11—Scope.

The attachment which is terminated on dismissal of an application for execution under O. 21, R. 57, C. P. Code is only in respect of the property that came to be attached in pursuance of an application for execution but which could not be proceeded with on account of the default of the decree-holder. The penalty is not to be imposed in regard to properties which were not attached by means of a prayer contained in the application for execution. O. 38, R. 11, has to be read with O. 21, R. 57 and attachment before judgment becomes attachment in execution for purposes of O. 21, R. 57 and if the application for execution in regard to property attached before judgment happens to be dismissed on account of the decree-holder's default, the attachment in regard to that property would cease to exist. But there is no warrant for holding that a decree-holder's default in the conduct of an execution application for the sale of one property situate within the jurisdiction of one Court would entail the consequence of the termination of the attachment of another property situate within the jurisdiction of another Court in regard to which no execution is taken out, simply because both the properties situated within the jurisdiction of two different Courts happened to be attached by one order passed before judgment. There is no reason or justification for extending the scope of the last sentence of R. 57 of O. 21. C. P. Code, which is clearly limited to the property covered by the application for execution which is dismissed. It does not entail the consequence of discharging the attachment in regard to properties to proceed against which there is no application before the Court and which the Court cannot, for want of jurisdiction, enter tain. (Abdur Rahman, J.) NATESA NILANGIRIYAR v. RAJU MUDALIAR. 213 I.C. 41=17 R.M. 6=1943 M.W.N. 101=A.I.R. 1943 Mad 322=(1943) 1 M.L.

C. P. CODE (1908), O. 21, R. 57.

O. 21, R. 57, C. P. Code, does not apply to a case where on the decree-holder accepting instalments, the executing Court strikes off the execution application as infructious but at the same time says that the attachment is "reserved." The rule is limited to cases in which the execution application is dismissed by reason of the decree holder's default. It is impossible to say that there is any default on the part of the Jecree-holder when he accedes to his indemnmediation's request for time or for instalments. (18-2, 1) Rukmani 7, Ramsaroop. ILR (1944 Nag. 739 = 1944 N.L.J. 385=AIR 1944 Nag. 324.

— O. 21, R. 57—Applicability—Rejection of execution application under O. 21, R. 17—If dismissal terminating attachment. SATHAPPA CHETTIAR v. CHOKALINGAM CHETTIAR. [see Q.D. 1936—40, Vol. I, Col. 1621.] 193 I.O. 204=13 R.M. 636.

—0.21, R. 57 and S. 151—Ceasing of attachment

Necessity for fresh attachment and notice to fudgment
debtor.

When owing to the default of a decree-holder an execution application is dismissed for default the existing attachment ceases and a fresh attachment after notice to judgment-debtor would be necessary. Under S. 151, C. P. Code. an execution application of this kind cannot be restored without notice to judgment-debtor. The section is only to be used when the Code does not provide another remedy. (Davies.) CHAND MOHAMMAD v. KISHEN DAS. 1943 A.M.I.J. 26.

—0. 21, R. 57—"Default"—Meaning of Decree holder restrained by infunction from proceeding with execution—Court, if bound to dismiss execution petition—Sale if nullity.

-Sale if nullity.
O. 21, R. 57, does not refer to the inability of the decree-holder to go on with the execution but to the inability of the Court to proceed further with the application for execution by reason of his default. Default in the rule means default not merely in the sense of non-appearance or non-payment of process fee, etc., but includes the case of non-prosecution as well. But the default must be such as would render the executing Court unable to proceed with the execution. Even a decree-holder restrained by an injunction from proceeding with the execution may choose to float the order of injunction; in that case he may be hauled up for contempt of Court or proceeded against under O. 39, R. 2 (3), C. P. Code. But the executing Court is not bound to dismiss the execution petition under O. 21, R. 57 "for default," and the sale held in due course would not be a nullity merely because the decree-holder had been restrained by an injunction from proceeding with the execution, (Lokur, J) ABDUL RAHIM v. LINGAPPA VAIJAPPA. 213 I.C. 146=17 R.B. 21=45 Bom.L.B. 534 = A.I.R. 1943 Bom. 273.

—0. 21, R. 57—Scope—Application for attachment—Order of attachment—Subsequent dismissal for non-payment of process fee and for non-prosecution—Effect on attachment—Order continuing attachment—Validity—Subsequent alienation by judgment-debtor—If void against decree-holder.

An order dismissing an execution application for non-payment of process-fees and for non-prosecution falls under O. 21, R. 57, C. P. Code and the attachment therefore terminates in spite of the fact that the Court orders that the attachment will continue. The order continuing the attachment in such a case is illegal and invalid. There is no legal and valid attachment after that dismissal, and if the judgment-debtor alternates the property the alienation would not be void by

C. P. CODE (1908), O. 21, R. 58.

reason of the attachment, because the attachment has ceased. The fact that the Court passed the order of dismissal under a misapprenension because the execution application only contained a prayer for attachment and not any prayer for sale does not make the order of dismissal any the less binding on the decree-holder. If it is not set aside by appeal or review, it stands as a final order and binds the decree-holder and would operate as res indicata, in subsequent applications for execution. (Divatia, J.) VIJAYADAS HANUMANDAS W. SHEKARAPPA ANANTAPPA I.L.B. (1941) Bom. 652 = 197 I.C. 422 = 14 R.B. 219 = 43 Bom.L.B. 727 = A.I.B. 1941 Bom. 395.

-0. 21, R. 58—Applicability — Attachment of perishable movables—Sale and conversion to cash.

Where movable property subject to speedy and natural decay is attached, it must not be regarded as movable property in the ordinary sense of the term but as cash or notes to which such property must be immediately converted. Viewed in this light an objection application under R. 58 of O. 21, C. P. Code, will lie until the cash is actually made over to the person on whose behalf the sale was completed. (Davies.) KARNA v. SOCIETY OF GANAHERA. (1945) A.M.L. J. 26.

— 0. 21, R. 58—Applicability—Attachment of salary of public servant whose salary is exempt from attachment—Objection by disbursing officer to legality—Maintainability. See C. P. CODF, O. 21, R. 48. 43 Bom.L.R. 758.

Obligation in existence under sale deed—Debtor claiming right to defer payment until the happening of particular event—Altachability of debt—Executing Court raising attachment—Suit by decree-holder—Competency—T. P. Act, S. 55 (5) (b)—Right of vendee under.

O. 21, Rr. 58 to 63, C. P Code, would apply where the "existence of the debt" is admitted by the garnishee, the expression "existence of the debt" being interpreted to mean "existence of facts from a consideration of which it follows in law that the garnishee is indebted." Where the garnishee in essence claims that he was entitled not to refuse payment altogether but only to defer it, his debt is attachable, and if the executing Court raises the attachment on a denial of liability by the garnishee, the decree-holder is entitled to bring a suit under O. 21, R. 63, C. P Code. Defendants 2 to 4 sold certain properties to 1st defendant in December. 1929. Under the terms of the sale deed the consideration of Rs. 2,050 was retained in the hands of the 1st defendant for discharging two debts due to the plaintiff, one on a 1st mortgage and the other on a promissory note. The property sold was also subject to two subsequent mortgages which the vendors themselves undertook to discharge. The 1st defendant did not discharge the debt due to the plaintiff under the promissory note and the plaintiff therefore sued in 1931 on it and got a decree against defendants 2 to 4. In execution he attached the debt which he alleged to be due from the 1st defendant to defendants 2 to 4 as unpaid purchase money. The 1st defendant denied his liability to pay the amount until the vendors had cleared off the subsequent mortgages. The executing Court accepted this plea and raised the attachment on 1-8-1935. The plaintiff thereupon brought a suit under O. 21, R. 63, impleading all the 4 defendants,

Held, (1), that the suit was maintainable, since 1st defendant admitted that he had purchased the property and had not paid for it and in essence only claimed a

C. P. CODE (1908), O. 21, Rr. 58 and 68.

right to defer payment; (2) that a vendee charged with the obligation of paying off an encumbrancer to a certain extent might defer doing so until the vendor was prepared to contribute the remainder of the sum due to pay him off completedly; and the 1st defendant in 1935 was therefore not compelled to pay anything to the subsequent mortgagees unless defendants 2 to 4 joined with him in paying them off and the defendants 2 to 4 had no legal claim in 1935 upon 1st defendant for the amount of the purchase-money; (3) that a debt not immediately payable might nevertheless be attachable if it be an obligation already in existence; (4) that the obligation to pay for the property purchased sprang into being by virtue of the very transaction of sale itself in 1929, and although the vendee had a right under S. 55 (5)(b), T. P. Act, to postpone the discharge of that obligation, the obligation was a debt attachable in 1935. (King, J.) VEERABHADRAYYA v. SUBBARAYUDU. 206 I.C. 309=15 R.M. 952=55 L.W. 403=1942 M.W.N. 507=A.I.R. 1942 Mad. 650=(1942) 2 M.L. J. 94

---- O. 21, R. 58 (Patna Amendment)-Applicability-Mortgagee-Claim by-Competency.

Under O. 21. R. 58, C. P. Code, as amended by the Patna High Court it is open to a person claiming mortgage interests in the property attached to make an application under the rule. (Manohar Lall and Bevor, I.). SUNDER DEBI v. DAMODAR. 23 Pat. 284=1944 P.W.N. 279=11 B.R. 198=217 I.C. 272=17 R.P. 185=A.I.B. 1944 Pat. 331.

----- 0. 21, Rr. 58 and 63—Applicability—Objection to attachment after sale.

Where the objections to an attachment are such as to fall under O. 21, R. 58, the mere fact that on the date of the filing of those objections the sale had already taken place would not alter the nature of the objections with the result that if they are rejected the order would become final unless appealed against within one year as provided by O. 21, R. 63. (Mathur, J.) RAMJI LAL v. MURLI DHAR. 1943 A.L.W. 402.

O. 21, R. 58—Applicability—Objection to attachment—Order on—Appeal—Separate suit—Competency See C. P. CODE, S. 47.

——O. 21, R. 58—Applicability — Objection to attachment and sale on the ground that property is wakf property held by judgment debtor as mutawalli—Order on—Appeal—Maintainability—Separate suit—If lies. See C. P. CODE, S. 47. I.L.R. (1941) Kar. 474.

O. 21, R. 58—Applicability—Objection to attachment by legal representative of judgment debtor—Plea that property is his own property and not assets of deceased—Order rejecting—If appealable—Separate suit—Competency. See C. P. CODE, S. 47. I.L.R. (1941) Kar. 211.

O. 21, R. 58—Applicability—Objection to attachment by transferee of transferee from judgment-debtor.—If falls under S. 47—Order on objections—Appeal. See C. P. CODE, S. 47. 7 B.R. 680.

O. 21. R. 58—Applicability—Objection to sale by judgment-debtor—Plea that property put up for sale is *ghatwali* tenure and hence not saleable—Order on—Appeal. See C. P. CODE, S. 47. 7 B.R. 148.

Subject to the doctrine of res judicata in any particular case, an order on a claim petition filed under O. 21, R. 58, C. P. Code, or a decree in a suit filed

#### C. P. CODE (1908), O. 21, R. 58,

under R. 63, does not extend beyond the execution of the decree which has given rise to these proceedings, R. 58 of O. 21, C. P. Code, only applies to a claim preferred or an objection made to the order of attachment in the particular execution proceedings. R. 63 has to be read in conjunction with R. 58, and an order passed on the claim or objection is not conclusive for all purposes inside and outside the particular execution proceedings. It is conclusive between the parties to the suit or their representatives so far as the execution of the particular decree is concerned; but where the property is sold in execution proceedings arising out of an entirely differ ut decree, the claimant will not be precluded from setting up his title as against a stranger purchaser. If he attachment has not led to the sale of the property, a those concerned, even if there had been a suit under R. +3, will be left in the same position as they were before the attachment, except that the decreeholder will be at liberty to institute fresh proceedings in execution of the same decree without any right remaining in the claimant to re-agitate his claim. (Leach, C. J., Lakshmana Rao and Kunhiraman, JJ.) NARA-SIMHACHARIAR v. RAGHAVA PADAVACHI. 58 L.W. 354=1945 M.W.N. 410=A.I.R. 1945 Mad. 333= (1945) 2 M.L.J. 89 (F.B.).

— 0. 21, R. 58—Applicability—Property in possession of usufructuary mort gagee—Attachment in execution of money deeree against mortgagor—Objection by mortgagee—Competency.

A usufructuary mortgagee is not entitled to object under O. 21, R. 58, C. P. Code to the attachment of the property mortgaged to him, in execution of a money decree against the mortgagor, his rights under the mortgage cannot be affected by the attachment which will be confined to the mortgagor's interest in the attached property. (Agarwala. J.) SHEO NARAIN PRASAD v. JAWAHIR LAL. 199 I.C. 312=14 R.P. 568=8 B.R. 536=23 Pat.L.T. 135=A.I.R. 1942 Pat. 293.

—0. 21, R. 58 (Patna Amendment, 1933)— Applicability—Property sought to be sold in execution of mortgage decree—Claim to—Competency.

O 21, R. 58, C. P. Code, as amended in Patna in 1933, is not confined to property attached in execution, but covers all property which is the subject-matter of the execution proceedings, including property sought to be sold i execution of a mortgage decree. A claim petition u der O. 21, R. 58, to property sought to be sold in execution of a mortgage decree for sale is therefore competent. (Minohar Lall and Reuben, JJ.) SARJUPRASID SINGH v. JAMES. 22 Pat. 709=212 I.C. 56 1=25 P.L. T. 71=10 B.R. 544=16 R.P. 325 = A.I.R. 1944 Pat. 24.

O. 21, Rr. 58 and 63—Applicability—Property subject to mortgage with possession—Attachment in execution of money decree—Claim by mortgagee—Sustainability—Decree-holder contesting validity of mortgage—Order rejecting claim—Suit by mortgagee—Plea by decree holder that attachment was only of equity of redemption and suit is not maintainable—Estoppel.

Where in execution of a decree for money the decree holder attaches property usufructuarily mortgaged by the judgment-debto; and not merely the equity of redemption in such property, the usufructuary mortgagee is entitled to object to the attachment and apply under O. 21, R. 58, C. P. Code, for cancellation of the attachment or for the limiting of the attachment to the equity of redemption only. Where in such an application the decree-holder challenges the mortgage and invites a deci-

## C. P. CODE (1908), O. 21, Rr. 58 and 63.

sion on the merits, it is not afterwards open to him in a suit by the mortgagee under O. 21, R. 63, C. P. Code, to challenge the claim order adverse to him to contend that the attachment was only of the equity of redemption and that therefore the suit is not maintainable. (Meredith and Shearer, J.) MT. ANRAJO KUER v. RAMDFYAL SINGH. 21 Pat. 300 = 200 I C. 557 = 24 Pat. L.T. 5=15 R.P. 2=8 B.R. 713=A.I.R. 1942 Pat. 406.

O. 21 R. 58—Claim—Competency—Failure to show cause on notice under O. 21, R. 46-A—Effect—If bars claim. See C. P. Code, O. 21, R. 46-A. I.L.R. (1942) Kar. 153.

O. 21, R. 58—Claim to properly attached in execution of order against contributory in winding up of company—Scope—Summary nature of investigation—Questions as to fraudulent nature of transfer to person in possession—Cannot be gone into—Proper remedy is to proceed by way of regular suit under O. 21, R. 63, to have the transfer declared fraudulent,

When the liquidators of a company attached certain shares belonging to a contributory it was found that the son of the contributory was registered as the holder of those shares and in actual possession of them. The liquidators sought to prove that the transfer by the contributory to his son was a fraudulent one.

Held: In such proceedings the executing Court is concerned only with the question of the possession of the property and cannot embark upon enquiries involving a decision as to the real as opposed to the apparent title to the property. The proper course for the liquidators to follow is to proceed by way of a regular suit under R. 63 of O. 21 of the Code of Civil Procedure if they have reason to believe that the transfer by the contributory was for any reason ineffective, inoperative and void as against the creditors in the winding up. 39 M.L.J. 350: I.L.R. 43 Mad. 760, dist. (Clark J.) Cyrill Gill v. MAHOMED NAWAZ KHAN. (1945) 2 M.L.J. 573.

—O. 21 Rr. 58 and 63—Effect of order under R. 58—Withdrawal of attachment—Necessity for suit under R. 63. HIDAYAT-UL-NISSA V. JALALUDDIN. [see Q.D. 1936-40 Vol. I, Col. 3300.] 191 I. C. 742=13 R.O. 278=1941 O.L.R. 29=A.I.R. 1941 Oudh 95.

—O. 21, Rr. 58 and 63—Finality of order under R. 58 in the absence of suit under R. 63—Party to whom such plea is available—Claim allowed against decree-holder and judgment-debtor—No suit under R. 63—Claimant relinquishing property in favour of judgment-debtor—Subsequent attachment of same property by decree-holder—Judgment-debtor, if can plead finality of order under R. 58.

Where after a claim is allowed against the decree-holder and judgment-debtor and no suit is filed the claimant relinquishes the property in favour of the judgment-debtor and that property is subsequently attached by the decree-holder, it is not open to the judgment debtor to plead that in the absence of a suit under O. 21, R. 63 to contest the claim order, the latter had become final and that the property could not be attached as his. It is only the original claimant that could rely on the finality of the order in the claim proceedings. (Ghulam Hasan, I.) Swami Dayal v. RAGHUBAR DAYAL 212 I.C. 192=16 R.O. 263=1943 A.W.R. (C.C.) 102=1943 O.W.N. 361=1943 O.A. (C.C.) 234=A.I.R. 1943 Oudh 431.

C.P. CODE (1908), O. 21, Rr. 58 and 63.

-0.21, Rr. 58 and 68—Objection by mortgagee to attachment of property dismissed—Suit not filed within one year—Effect.

An objection by the mortgagee to the attachment of the mortgaged property in execution of a money decree against the mortgagor falls under 0. 21, R. 58, C. P. Code. If the said objection is dismissed as filed too late and the mortgagee does not institute a suit within one year under 0. 21, R. 63, C. P. Code, a subsequent suit by him to enforce the mortgage is barred. The fact that the mortgagee prayed only for the release of the mortgaged property from attachment, and not for its sale subject to the mortgage, makes no difference, (Puranik, J.) GOVIND v. DHONDBA. I.L.R. (1945) Nag. 571-1945 N.L.J. 352.

The executing Court has power in a proceeding under O. 21, R. 58, C. P. Code to go into and decide a question of benami. (Fazl Ali, C. J. and Manohar Lall, J.) CHUNNI DEBI V. ANNAPURNA DAI. 23 Pat. 365=1944 P.W.N. 65=215 I.C. 133=11 B.R. 61=17 R.P. 85=A.I.R. 1944 Pat. 242.

party—Party not dispossessed—Failure to object to execution proceedings—If barred from claiming title, in Land Registration proceedings. See LAND REGISTRATION—TITLE. 8 B.R. 835.

\_\_\_\_O. 21, Rr. 58 and 90—Person objecting to sale of his property for debt of another—Proper remedy.

S. L. being in debt assigned his Immovables to his brother M, by deed reserving only a main-tenance allowance to himself, and M became recorded proprietor of the estate. In 1928 an execution application was made in respect of a money decree passed in 1926 in favour of S.B., against S. L, M was added to the application as a "judgment-debtor" although no judgment had ever been obtained against him. Part of the estate having been attached in execution of S, B's estate naving been attached in execution of 3, 2 and decree, M applied for release of the attached properties under C. P. Code, O. 21. R. 58 on the ground that he was no party to the decree. The Subordinate Judge held M to be a representative of the judgment-debtor S, L and dismissed the application. On the day of the Judge's order a compromise petition was filed in the Court, M undertaking to pay S, B the sum due by way of an immediate cash payment and the balance by fixed annual instalments. The instalments not having been paid as agreed, the decree-holders applied for execution, M again being cited as judgment-debtor. Part of the estate was again attached and then sold. M then applied under O. 21, R. 90 to have the sale set aside on eleven grounds nine of which were allegations of various irregularities in and about the sale, the tenth and eleventh alleging absence of jurisdiction to hold the sale. The Subordinate Judge found against M on the first nine grounds, but held that the sale was without jurisdiction because the compromise deed was unenforceable in execution against in the absence of any decree against him. The High Court allowed an appeal holding that the Subordinate Judge's decision on the first execution application that M was a representative of S, L the judgment-debtor

O. P. CODE (1908), O. 21, B. 63.

concluded the case against M on the principle of res judicata. On appeal to His Majesty,

Held, (without deciding whether M had been rightly or wrongly held to be a representative of the judgment-debtor); that the application under O. 21, R. 90, C. P. Code, was misconceived, since an application lased on the allegation that the properties of M had been wrongfully sold in execution for S L's debt must be made under R. 58 and not R. 90 of the C. P. Code, which was concerned with irregularities in publishing and conducting the sale.

Quaere: whether in any case an application under R. 58 made one month after the sale would have been in time. (Sir George Rankin.) Jagar NARAYAN SINGH v. KHARTAR SINGH. 67 I.A. 97=20 Pat. 791=195 I.C. 73=1941 O.W.N. 949=1941 O.A. 699=1941 P.W.N. 498=1941 O.L.R. 560=1941 A.W.R. (P.C.) 66=45 C.W.N. 1019=7 B.R. 915=14 R.P.C. 5=I.L.R. (1941) Kar. (P.C.) 88=1942 M W.N 328 (P.C.)=22 Pat.L.T. 755=1941 A.L.W. 810=43 Bom.LR. 860=54 L.W. 484=74 C.L.J. 163=43 P.L.R. 676=A.I.R. 1941 P.C. 45=(1941) 2 M.L.J. 227.

Ourt-fee. See Court-fees Act, Sch. I. Art, 1 AND Sch. II, ART. 11. 1943 P.W.N. 33.

\_\_\_\_O. 21, R. 63-Applicability.

If a judgment debtor makes an objection which does not come under O. 21, R. 58 and it is disallowed he is not bound to bring a suit under O. 21, R. 63. He can seek his proper remedy by an objection under S. 47 C. P. Code. O. 21, R. 63, C. P. Code can apply only where an objection which could be made under O. 21, R. 58 is made and disallowed. (Thomas, C. J., Agarwal and Madeley, JJ.) Sheoraj Singh v. Gajodar Prasad. 18 Luck. 366=203 I C. 131=15 R O. 162=1942 A.W.R. (C.C.) 318 (2)=1942 O.W.N. 607=1942 O.A. 404=A.I.R. 1942 Oudh 465 (F.B.).

D. 21, R. 63-Applicability-Application by mortgagee for directing sale subject to mortgage—Court directing issue of sale proclamation mentioning that mortgage was alleged by decree-holder as collusive—If "order against" applicant—Failure to sue on mortgage within one year—Effect—Limitation Act, Art. 11—Applicability. See LIMITATION ACT, ART. 11. (1944) 1 M.L.J. 438.

——O. 21, R. 63—Applicability—Claim to attached property preferred before sale—Order after sale dismissing same as not tenable after sale—If against claimant—Suit within one year—If necessary—Limitation Act, Art. 11.

The dismissal of a claim petition preferred under O. 21, R. 58, C. P. Code, on the ground that it was not tenable after the execution sale had taken place, is not an order falling under O. 21, R. 63, C. P. Code, and the failure to file a suit within one year as provided by Art. 11 of the Limitation Act, would not debar the claimant from setting up his rights afterwards. Where an order is passed either on the merits or on the acquiescence of the applicant or claimant, before the sale takes place, it is an order falling under R. 63 of O. 21. But where in the case of

### C. P. CODE (1908), O. 21, R. 63.

a claim presented before the sale, an order is passed after the sale has been held and proceeds on the ground that the application is not tenable because the attachment has come to an end or that the claim cannot be adjudicated upon after the sale R. 63, of O. 21 can have no application. An order, to fall under R. 63, must relate to the merits of the claim and must not be passed on the preliminary ground that the Court cannot enquire into the merits of the claim. (Divatia, J.) NINGAUDA GIRI MALLAPPA V. NABISAHIB ABALAL. I L.R. (1942) Bom. 636=202 I.C. 416=15 R.B. 163=44 Bom.L.R. 543=A.I.R. 1942 Bom. 263.

O. 21, R. 63, C.P. Code, applies when a claim to a property attached before judgment is either allowed or rejected, and a suit must therefore be instituted under this rule. Art. 13 of the Limitation Act does not apply to such a suit, as that article does not apply where the order sought to be set aside by a suit had been made in a suit. The competition is between Art. 11 and Art. 120 of the Limitation Act. As an attachment before judgment is not an attachment in execution of a decree, Art. 11 will not on a plain reading apply. As there is no other specific article, Art. 120 would apply to such a suit. (Mitter and Sharpe, J.) DHAN BIBI v. MRINALINI GHOSHAL. 79 C.L.J. 181=49 C.W.N. 111.

Where a proceeding for execution is sent to the Collector, the Collector or a Mamlatdar executing the decree is not a Court and hence O. 21, Rr. 58 and 63, C. P. Code, will not apply. and R. 63 of O. 21, C. P. Code, cannot therefore be invoked so as to make the order passed by the Collector or Mamlatdar final. Though the Collector or Mamlatdar may be said to act under the Code when exercising the powers conferred by the Code, he has no power to consider objections to an attachment. Where a person applies to the Collector and Mamlatdar to make a sale subject to a mortgage in his favour and that application is dismissed by the Collector or Mamlatdar without investigation, the order is not one against the applicant under R. 63 of O. 21, C. P. Code, or within the meaning of Art. 11 of the Limitation Act. The applicant is not therefore bound to bring a suit under O. 21. R. 63. C. P. Code, within one year of the order as prescribed by Art. 11, Limitation Act. (Broomfeld and Macklin, JJ.) Ganesh Ram Chandra v Gopal Larshman. I. R. (1943) Bom. 104=204 I. C. 402=15 R. B. 319=44 Bom. L. R. 819=A.I.R. 1943 Bom. 12.

dismissing claim—Subsequent withdrawal of attachment—Suit for declaration of title beyond one year—Maintainability—Limitation Act, Art. 11.

The conclusiveness of an order in a claim case contemplated by O. 21, R. 63, C. P. Code, is conditional on the continuance of the execution proceedings and the attachment issuing therefrom. Consequently,

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where a claim is dismissed, but the execution proceedings terminate and the attachment ceases in any manner to have effect, the parties are put back in the same position as before, and the failure of the defeated claimant to sue within one year does not preclude him from afterwards bringing a suit for a declaration of title in respect of the same property beyond one year. It makes no difference whether the attachment terminates within one year or beyond one year. Art. 11 of the Limitation Act will not apply in such a case. (Sinha and Pande, II.) RAMCHANDRA v. KHODAIJATUL KUBRA. 24 Pat. 462 = 1945 P.W.N. 430 = 26 P.L.T. 245 = A.I.R. 1945 Pat. 369.

-O. 21, R. 63-Burden of proof.

Where a suit is one to set aside the decision of an executing Court under O. 21, R. 63, C. P. Code, it is for the plaintiff to prove his title; and if it is found that there is no conclusive evidence on the question of title the plaintiff's suit must fail. (Tek Chand and Beckett, JJ.) UDHO DAS v. KHAIR MAHOMED. I.L.R. (1943) Lah. 517=201 I.C. 647=15 R.L 62=44 P.L.R. 258=A.I. R. 1942 Lah. 192.

——O. 21, R. 63—Burden of proof—Plaintiff relying on document to prove title.

Per Khundkar, J.—In a suit under O. 21, R. 63, where the plaintiff relies on a document to prove his title and the circumstances surrounding the execution of that document are not free from suspicion, it is clearly for him to establish the genuine nature of the transaction of which that document is evidence. (Mitter and Khundkar, JJ.) Zeissen & Co., Ltn. v. Satva Charan Das. 208 I.C. 411=16 R.C. 204=76 C.L.J. 309=A.I.R. 1943 Cal. 534.

On matter not decided either expressly or by implication—If bar to plea in proceedings under R 100.

O. 21, R. 63, C. P. Code, should not be read in such a way as to make the order in a claim case conclusive on any point which was neither expressly nor by implication decided in such order. The rule raises no bar against the raising of such questions in subsequent proceedings under O. 21, R. 100, C. P. Code. (Manohar Lall and Beevor, JJ) SUNDER DEBI v. DAMODAR. 23 Pat. 284=217 I.C. 272=17 R P. 185=11 B.R. 198=1944 P.W.N. 279=A.I. R. 1944 Pat. 331.

—0. 21, R. 63—Claim petition objecting to attachment "not pressed and dismissed"—Subsequent suit for declaration—Limitation.

Where a claim petition falling within the purview of O. 21, R. 58, objecting to an attachment is dismissed as not pressed, the order is one "against" the claimant even though there has been no investigation of the claim and an adjudication on the merits. It is necessary for such a claimant to file a suit within one year of such order as provided under O. 21. R. 63 if he wishes to reopen the matter. (Leach, C. J., Krishnzswami Aiyangar and Happell, JJ.) Cannangre Bank, Ltd. v. Madhavi. I.L.R. (1942) Mad. 336 = 198 I C. 197=14 R M. 407=1941 M.W.N. 1064=54 L.W. 671=A.I.R. 1942 Mad. 41= (1941) 2 M.L J. 956 (F.B.).

0.21, R. 68-Conclusive character of order on claim-Extent of If limited to question of possession.

#### C.P. CODE (1908), O. 21, R. 63.

There is no warrant for the contention that an order under R. 60 of O. 21, C. P. Code, allowing a claim is conclusive under R. 63 only as regards possession at the date of the attachment It is impossible to separate altogether the question of possession and of title. The order will be conclusive also as to any question of title which has been decided by the order. (Fazl Ali, C.J. and Chatterii, J.) PREMSUKH v. SATYANARAIN. 24 Pat. 408 = A.I.R 1945 Pat. 485.

of such suit"—Meaning of. See LIMITATION Act, ART. 182 (5). (1941) 2 M.L.J. 754.

-O. 21, R. 63—Court-fees—Suit by defeated claimant-Prayer for declaration of title and injunction to restrain delivery of possession to defendant or any illegal act by defendant to suit property-Court-fee-If liable to ad valorem court-fee. See COURT-FEES ACT (AS AMENDED IN BIHAR AND ORISSA), SCH. II ART. 17 (1). 193 I.C. 782.

-0. 21, R. 63-Decision of executing Court-How far conclusive.

The effect of O. 21, R. 63, C. P. Code, is to render a summary decision of an executing Court conclusive only for the purposes of the proceedings in connection with which it is given and not for all purposes. There is no valid reason for holding that this interpretation should be applied only so far as the interests of an outside claiment are concerned and should not be applied to a decree holder. (Tek Chind and Beckett, J.) UDHO DAS v. KHAIR MAHOMED. I.L.R. (1943) Lah. 517 =201 I.C. 647=15 R.L. 62=44 P.L.R. 258=A.I.R. 1942 Lah. 192.

-0. 21, B. 63-Effect of order-If conclusive against judgment-debtor.

Per Nasim Ali, J .- An order in a claim case is conclusive as against the party against whom it is made and is conclusive only as regards the properties which are the subject-matter of the claim case. Where a claim is allowed but the judgment-debtor is not a party in the claim case, it cannof be said that the order in the claim case is against the judgment-debtor. (Sted Nasim Ali and Pal, JJ.) RADHARANI DASSI v. BINODAMOVEE DASSI. I.L.B. (1942) 1 Cal. 169= 200 I.C. 216=14 R.C. 685=46 C.W.N. 245=74 C. L.J. 180 = A.I.R. 1942 Cal. 92.

-0.21, R. 63-Effect of order under O. 21, R. 58 becoming final-If can operate as res judicata in attachment in other suits.

Where as a result of not filing a suit to set aside an order releasing certain property from attachment it has become final under O. 21, R. 63, it can only operate to debar the decree-holder from executing his decree against that property in respect of that decree. But it cannot operate as res iudicata in respect of execution of other decrees obtained by the decree-holder against the same judgment-debtor. (Bajpai and Dar, JJ.)
RAJESHWARI v. DHANI RAM. 1943 A.L.W. 331.

-0 21, R. 63-If bars revision under S. 115. See C. P. CODE, S. 115 AND O. 21, R. 63. 1943 A.M. L.J. 45.

-O. 21, B. 63—Order "against" party-Order dismissing claim for default-If to be made subject of suit within one year-Limitation Act, Art. 11.

An order dismissing a claim for default is an order against the claimant within the meaning of O. 21, Though ordinarily mortgagees could not raise an R. 63, C. P. Code, so as to form a proper foundation issue of title of their mortgagors, in view of the

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dismissed for default and not on contest makes no difference whatever. (Rowland, J) BADRI DAS v. CHOWDHURY MANGARAJ DAS. 8 Cut.L.T. 93.

-0. 21, R. 63-Parties to suit-Suit by attaching decree-holder-Judgment-debtor, if necessary party,

Per Nasim Ali, J .- Where a claim is allowed the attaching decree-holder is the person against whom the order in the claim case is made. He is, therefore, entitled in a suit under O. 21, R. 63, C. P. Code, to establish the right which he claims to the property attached. In such a suit the judgment-debtor may not be a necessary party. But whether he is a proper party in such a suit would depend upon the pleadings. (Syed Nasim Ali and Pal. J..) RADHARANI DASSI v. BINODAMOVEE DASSI. I L.R. (1942) 1 Cal. 169= 200 I.C. 216=14 R.C. 685=46 C.W.N. 245=74 C. L.J. 180=A.I.R 1942 Cal. 92.

-0. 21, R. 63-Parties-Suit by defeated claim. ant - Decree-holder, if necessary party-Nonjoinder-Effect.

In a suit by a defeated claimant under O. 21, R. 63, C. P. Code, the decree-holder is a necessary party, and in his absence the suit cannot proceed. (Chatterii and Shearer, [].) RAMCHANDRA v. RAGHOPATI. 23 Pat. 961 = 219 I.C. 237 = 11 B.R. 387 = A.I.R. 1945 Pat. 189.

O. 21, R. 63—Revision—Erroneous claim order-Remedy-Revision application-Competency. See C. P. Cone, S. 115. I.L.R. (1942) Kar. 160.

O. 21, R. 63-Right of suit-Decree-holder consenting to claim being allowed—Subsequent suit to declare property liable to attachment as belonging to judgment-debtor being held benami by claimant-Maintainability. RAMRUP RAI v. MAHADFO LAL NATHMAL. [see Q.D. 1936-40 Vol. I Col. 1643.] 191 I.C. 542=13 R.P. 333=7 B.R. 226.

O. 21, R. 63-Scope and form of relief comtemplated by Suit by mortgagees on dismissal of claim-Express declaration of mortgagor's title-If can and should be asked.

O. 21, R. 63, C. P. Code, does not lay down any specific form of the relief that a person whose claim or objection is dismissed is entitled to claim. All that it requires is that he should institute a suit to establish the right which he claims to the property in dispute. It does not contemplate that there should be a suit for declaration simpliciter. The words to establish his right to the property' in the rule are wide enough to cover a suit not only for a declaration but a suit for a declaration and consequential relief. Where in a suit by the mortgagees on the dismissal of their claim in respect of the mortgaged property, they maintained that they had a right to enforce the mortgage against the auction purchaser on the distinct averment that the property comprised in the mortgage was owned by the mortgagor and nobody else but failed to ask for an express declaration of their mortgagor's title to the property.

Held, Such an omission was only an error of form and a technical defect which could not and ought not to affect the substance of the claim. for a suit under the rule. The fact of the claim being peculiar nature of the suit they could raise it. C P. CODE (1908), O. 21, R. 63.

(Niyoqi, J) GANPATI KOSHTI V. YADAO. I.L.R (1942) Nag. 166=199 I C. 564=14 R.N. 293= 1942 N.L.J. 76=A.I.R. 1942 Nag. 61.

——O. 21, R. 63—Scope—"Conclusive' character of order—Extent of and limits to—Suit to set aside order disallowing claim — Attachment coming to end pending suit—Effect—Suit proceeded with and decided—Decision—If conclusive—Res judicata.

What is made conclusive by R. 63 of O. 21. C. P. Code, is the order passed under R. 60 or R. 61, which only decides the liability or non-liability of the particular property to the attachment already effected. The order is only of limited effect. The conclusiveness exists only as regards the particular property in dispute. R. 63 does not require the plaintiff in a suit under that rule to establish his ownership of the property attached, but only "the right which he claims to the property in dispute." What he has to establish is the claim to have the property attached if he is the decreeholder, or to have it released from attachment if he is the claimant. Subject to the decision in the suit the order of the executing Court is conclusive. But that order must be subsisting at the date of the decision of the suit. If the order upholds the attachment, but, for some reason or other the attachment comes to an end, the order upholding it becomes defunct, and then there is no purpose in filing a suit to have it set aside or in proceeding with the suit if one has already beenfiled or with an appeal from the decision in the suit. If there be no effective order of the executing Court existing it can in no way be affected by the decree in the suit or appeal one way or the other. Yet, after the order upholding the attachment has become defunct, the parties might choose to fight out the suit or appeal on its merits to its end, not for the purpose of giving finality to the order of the execut-ing Court which had already spent itself but to have their dispute about the right to the property settled once for all; the decision then will debar the parties from agitating the same question again on the ground of res judicata, if the other conditions of S. 11, C. P. Code, are satisfied and not because of the finality of the previous order of the executing Court. (Divatia and Lokur. JJ.) RADHABAI GOPAL v. GOPAL DHANDO. 212 I.C 291=16 R B 345=45 Bom.L.R 980=A.I. R. 1944 Bom. 50.

— O. 21, R. 63-Scope—Decree against father and son—Execution—Attachment of properties—Father's insolvency—Claim by Official Receiver on ground of properties being self-acquisitions—Order rejecting on ground of delay—Son not party to order—Order if conclusive against Official Receiver.

In execution of a decree obtained against a father and his son, certain properties were attached as joint family properties. The father had been adjudicated an insolvent, and the Official Receiver put in a claim petition alleging that the properties were the self acquisitions of the insolvent (father) and that the son had no share in them. This was dismissed on the ground of undue delay. The Official Receiver did not file a suit within one year but sold the property. In a suit by the son claiming partition,

C. P. CODE (1908), O. 21, R. 63.

the Official Receiver pleaded that the properties were self-acquisitions of the insolvent. The son pleaded that the question as to the properties being self-acquisitions was concluded against the Official Receiver by reason of the order on the claim petition, in view of O. 21, R. 63. C. P. Code. It appeared that no notice was served on the son in the claim proceedings, and that the decree-holder alone was served.

Held, that since no notice was served on the son at the time when the order on the claim petition was made, he could not be considered to be a party to that order, and therefore the order on the claim petition did not preclude the Official Receiver or the purchaser from him raising the question of the self-acquisitions against the son in the suit by the latter. (Venkataramana Rao and Somavya, JL.) RAYANJI v. JANAKIRAMAYYA. 55 L.W. 35=1942 M.W.N. 338=206 I.C. 477=15 R.M. 990=A.I.R. 1942 Mad. 330=(1942) 1 M.L.J. 318.

O. 21, R. 63—Scope—If controlled by S. 42 Specific Relief Act, See Specific Relief Act, S. 42 21 Pat. 300.

——O. 21, R. 63 — Scope of enquiry—Decree against firm sought to be executed against joint family property of its members—Claim by third party asserting title to that property in himself on basis of purchase allowed—Suit by decree holder against claimant—Latter if can question executability of decree against joint family.

The words "the right which he claims to the property in dispute" as used in O. 21, R. 63, C. P. Code, refer to the right which the party claims in the execution proceedings. Where a holder of a decree obtained against a firm sought to execute it against a property belonging to the joint family of the members of the firm, and a claim preferred by a third party who asserted a title to the property in himself on the basis of a purchase was allowed, and the decree-holder thereupon filed a suit under O. 21, R. 63. C. P. Code, against the claimant.

Held, that the plaintiff decree holder was entitled to succeed in the suit, on establishing the right which he claimed to the property in dispute in his execution case and that therefore the only relevant point for decision in the suit was whether the property belonged to the joint family or to the defendant claimant, and that the latter should not be allowed to raise the question whether the decree could be executed against that joint family, particularly when the members themselves did not contest the claim of the plaintiff decree-holder, although he was alleged to be the benamidar of the execution-debtors named in the execution case. (Akram and Pai, JJ.) HIRANMOY P. PROBAL KUMAR 205 I.C. 138=15 R.C 582=76 C.L. J. 108 = 46 C.W.N. 289 = A.I.R. 1942 Cal. 338.

O. 21, R. 63—Scope—Mandatory character of —Order on claim becoming final—Later decision in separate proceedings—If prevails over former—Resitudicata—Conflicting decision—Rule, See C. P. CODE, S. 11. (1942) 2 M.L.J. 315.

— 0. 21, R. 63—Scope—Order allowing claim— Failure to sue within one year—Effect—Unsuccessful claimant failing to sue within one year—Attachment raised within one year—Effect—Diperence.

An unsuccessful claimant under O. 21, R. 58, C.P. Code, is not required to bring a suit under O. 21, R. 63, C. P. Code, if, within one year from the date of the order disallowing his claim, the attachment agains

O.P. CODE (1908), O. 21 R. 63.

which he had preferred the claim ceases to exist. O. 21, R. 63, creates no bar against the claimant if the attachment is withdrawn within one year of the dismissal of his claim. This principle, however, does not apply to an unsuccessful decree holder against whom an order allowing a claim is made. If a decree-holder fails to bring a suit under O. 21, R. 63, to set aside an order allowing the claim, then the order becomes conclusive against him and he can no longer assert the right he claims against the property released from attachment by the order on the claim petition. (Fasl Ali, C. J. and Chatterji, J.) PREMSUKH v SATYANARAIN. 24 Pat. 408 = A.I.R. 1945 Pat. 485.

——O. 21, R. 63—Scope—Order on claim—Decree in suit to set aside—Operation and conclusive character—Extent of. See C. P. CODE, O. 21, RR. 58 AND 63. (1945) 2 M.L.J. 89 (F.B.).

holder—If limited to determination of right of particular claimant.

Where a decree-holder files a suit under O. 21, R. 63. C. P. Code, after a claim petition in respect of the property in suit preferred by the judgment debtor as shebait of a deity was allowed, the scope of his suit is not limited to the determination of the question whether that particular claimant has any right or not. The right which the plaintiff asserts is that the property belonged to the judgment-debtor and was consequently saleable in execution of the decree obtained by him. If it is held by the Court that the property is trust property and does not belong to the judgment-debtor personally, then also the plaintiff's suit must fail. The deity in that event would be regarded as one of the beneficiaries under the trust and it is enough that one of the beneficiaries pre-ferred a claim under O. 21, R. 58 of the Code and disputed the alienability of the property which was attached by the decree holder. (Mukherica and Blank JJ.) PURNA CHANDRA CHAKRABARTY v. KALIPADA ROY. 201 I.C. 557 = 15 R.C. 234 = 46 C.W.N. 477= A.I.R. 1942 Cal. 386.

— O. 21, R. 63—Scope of suit under—Claim order in favour of person in adverse possession—Suit by decree-holder to set aside—If arrests adverse possession See ADVERSE POSSESSION—INTERRUPTION. (1943) 1 M.L. J. 212.

\_\_\_\_O. 21, R. 63—Scope of suit—Validity of decree under execution—Claimant, if can question.

Per Mitter, J.—The claimant cannot be allowed in a suit under O. 21, R. 63, C. P. Code, to question the validity of the decree under execution to which he was not a party and by which he is not directly affected. (Mitter and Khundkar, J.) MAHOMED HASHIM ALI KHAN v. IFFAT ARA HAMIDI BEGUM. 200 I. C. 392—15 R. C. 7—46 C. W. N. 561 — 74 C. L. J. 261—A. J. R. 1942 Cal. 180.

O. 21, R. 63—Scope—Suit after sale by defeated claimant—Effect of decree in, on sale—If set aside—Formal order setting aside sale not essential—Right of decree-holder to execute decree afresh—Duty of executing Court.

Where after a claim to attached property under O. 21, R. 58, C. P. Code, is rejected the attached property is put up for sale and purchased by the decree-holder and full satisfaction of the decree is entered, and subsequently a suit brought by the defeated claimant under O. 21, R. 63 is decreed, the decree-holder and the judgment-debtor both being parties to such suit, the effect of the decree obtained by the claimant is to set aside the sale, and no formal order to that effect is required.

C P. CODE (1908), O. 21, B. 68.

The decree-holder auction purchaser should in such cases be allowed to execute his decree afresh, provided there is a total failure of consideration, that is to say, he loses by the suit the entire property purchased by him in auction. The absence of a formal order of the executing Court setting aside the sale is no bar, and it is the duty of the executing Court in the exercise of its inherent powers to grant relief. (Manchar Lall and Charterit, J.). MT. BIBI UMATUL RASUL v. MT. LAKHO KUER. 20 Pat 261=195 I.C 395=7 B R. 921=14 R P. 119=22 Pat. L.T. 955=A.I.R. 1941 Pat. 405.

— O. 21, R. 63—Scope—Usufructuary mortgaged — Objection to attachment—Rejection—Suit to set aside order—Maintainability—Plea by decree-holder that suit is not maintainable—Sustainability. Su. C. P. CODE, O. 21, RR. 58 AND 63. 21 Pat. 300.

o. 21. R. 63—Successive attachments—If give rise to fresh causes of action for claim and suit against adverse order.

A defeated claimant who has instituted a suit under O. 21, R. 63, C. P. Code, is entitled to let his suit be dismissed when the execution petition in which he preferred the claim is dismissed, because the property is no longer in danger of being sold, and he can completely ignore the decision against him under O. 21, R. 63, When a fresh attachment is thereafter made, he can institute a fresh claim and a fresh suit on a new cause of action. (Rowland, J.) BADRI DAS v. CHOWDHURY MANGARAJ DAS. 8 Cut. L.T. 93.

——O.21, R. 63—Suit to set aside order dismissing objection to attachment—Proof required of plaintiff—Decretal amount less than value of pro-

Perty—Valuation for jurisdiction.

In a suit under O. 21, R. 63, C.P. Code, to set aside the summary order dismissing the objection of the plaintiff to the attachment of the property in suit in execution of a decree, the plaintiff must establish his title to the property as against the judgment-debtor. The value of the suit for purposes of jurisdiction is the decretal amount where it is less than the value of the property. (Pollock, J.) RADHABALV. MADHORAO. I.L.R. (1944) Nag. 783=1944 N.L.J. 306=A.I.R. 1944 Nag. 308.

O. 21. R. 63—Suit under—Nature and scope of—If in the nature of appeal from order on claim petition proceeding independent of claim. See C. P. Code, S. 144. (1942) 2 M.L.J. 791.

The plaintiff in a suit under O. 21, R. 63, C. P. Code, has the initial burden upon him to show that the property is not liable to attachment, for the reason that it has in fact been attached by the order of a Court, just as he would have an initial burden upon him to show that he had a right to property which he was seeking to recover from the possession of another, but there is no reason why the burden should be greater in the former case than in the latter. The plaintiff discharges his initial burden by showing that there has been in his favour a transfer which makes him the ostensible owner of the property in suit. If there is nothing else, there is no reason why a Court should make a presumption in favour of fraud. On the other hand, if circumstances are

g. P. CODE (1908), O. 21, R. 63.

made to appear from which a reasonable inference of fraud can be drawn, there would doubtless be a burden upon the plaintiff to rebut the inference. (Allsop and Malık, JI.) AMAR NATH v. DWARKA DAS JAI KISHUN DASS. I.L.R. (1944) A. 737=219 I.C. 27=18 R.A. 26=1944 A.W.R. (H.C.) 253=1944 O.A. (H.C.) 253=1944 A.L.W. 579=1944 A.L.J. 371=A.I.R. 1945 A. 42.

Court is competent to give.

In a suit under O. 21, R. 63, C. P. Code, the plaintiff could obtain only a declaration about the interest which he claimed in the attached property. The Court trying the suit is not to sit in some way in arpeal over the executing Court, but it is only to give a declaration that certain property is not to be attached in execution of certain decree; it is required quite independently to give a declaration about the rights of the parties in the property sought to be attached. It is no part of the business of such a Court to decide what the execution Court ought or ought not to do. A wrong order of the execution Court is to be set right in an appeal against it. (Allsop and Hamilton, JJ.) BANWARI LALRAM BHAROSEY v. MANSAY LAKHAN SAN. I.L.R. (1944) All. 496= 219 I.C. 509=1944 A.L.J. 439=1944 O.A. (H.C.) 241=1944 A.W.R. (H.C.) 241=1944 A.L.W. 438=A.I.R. 1945 All. 22.

——O. 21, Rr. 63-A and 63-B, (Patna)—Scope—Debtor of debtor failing to pay under O. 21, R 46 (3)—Procedure—Failure to apply under O. 21 R. 63 B—Garnishee bank going into liquidation—Subsequent application by decree-holder for order against liquidator of bank—Sufficiency—Right to preferential payment or to levy execution against liquidator. See C.P. Code, O. 21, R. 46 (3). 21 Pat. 287.

—O. 21 R. 63-H (Patna amendment)—Garnishee proceedings in execution of decree of Small Cause Court—Appeal—Maintainability.

O. 21, R. 63-H, C.P. Code (Patna Amendment) does not confer a right of appeal in garnishee matters where no appeal ordinarily lies, e.g., in execution of a decree of a Small Cause Court in that Court itself. The remedy of the garnishee is by way of a motion to the High Court. (Agarwala, I.) JAGADISH CHANDRA DEO v. RAI PADA DHAL, 196 I.C. 66=7 B.R. 993=14 R.P. 175=22 Pat. L.T. 396=A.I.R. 1941 Pat. 458.

—O. 21, R. 63 B, and C. (1) (Rang.)—Scope and object of—Garnishee, if can question his liability after order under O. 21, R. 63 (c) (1).

R, 63 B of O. 21, C. P. Code (Rangoon High Court) is designed to give the garnishee ample opportunity of disputing his liability to pay the amount or disputing his liability to pay anything or of showing that the amount of the debt is less than that mentioned in the notice. When a garnishee fails to appear in answer to the notice under R, 63 B and an order under R, 63 C (1) is made, it is the final determination of the question as to the liability of the garnishee to pay the debt and as to the fact that the debt is not less than the amount mentioned in the notice of attachment and hence the garnishee is not enti-

C. P. CODE (1908), O. 21. R. 66.

tled to raise those questions thereafter. (Mya Bu, J.) SINGER SEWING MACHINE CO. V. SURATH SINGH. 1941 Rang. L.R. 177=195 I.C. 520=14 R.B. 43=AI.R. 1941 Rang. 197.

——O. 21, Rr. 64 and 65—Applicability—Sale by Receiver or Commissioner—If sale by Court— Levy of poundage—Practice—Sind Chief Court Rules.

A sale made by a private person who was appointed Receiver or Commissioner for the purpose by the Court at the request of the parties is not a sale by the Court. Rr. 64 and 65 of O. 21, C. P. Code, are not applicable to such a sale. No poundage can be levied on the sale proceeds in such a sale as in the case of a Court sale under the Rules of the Court. The levy of poundage is not justified by Item V in the Table of Process Fees under the Sind Chief Court Rules. (Weston, J.) BRIJRATTAN JITMAL v. KALLIANJI. I.L.R. (1942) Kar. 196=202 I.C. 631=15 R.S. 52=A.I.R. 1942 Sind 112.

—O. 21, R. 64—Applicability—Sale of tenure under S. 163, Bihar Tenancy Act—Option of decree-holder—Power of Court. See BIHAR TENANCY Act, S. 163 (2) (b). 22 Pat. 628.

—O. 21, R. 64—Discretion—Valuation of property—Executing Court—If bound to value property and order sale of only part—Judgment-debtor not asking for exercise of discretion—If can raise objection in second appeal.

Under O. 21, R. 64, C.P.Code, it is not incumbent upon the executing Court to value the property to be sold, except in cases where the Bihar Money-Lenders Act applies, and to order a sale of part only of the property if the proceeds of such part would in the opinion of the Court, be sufficient to satisfy the decree. The Court has no doubt a discretion to order the sale of part only of the property. Where the Court is not asked to act under O. 21 R, 64, by exercising its discretion to sell part only of the property attached, it is not open to the judgment-debtor to raise that point in second appeal and complain that the executing Court has failed to exercise its discretion and therefore the case should be remanded. The High Court will not in second appeal entertain a new point for the first time, where that involves and further investigation of facts. (Harries, C. J. and Chatterji J.) Baddists. (Harries, C. J. and Chatterji J.) Baddi

—— O. 21, Rr. 66 and 90—Absence of proclamation—Validity of sale.

A sale held in the absence of a proclamation which is obligatory under R. 66 of O. 21, cannot be maintained. (Sathe, S.M.) MANOHARI SARAN v. RAM KISHORE. 1942 R.D. 976 (2)=1942 O. A. M. Supp.) 533 (1)=1942 A.W.R. (Rev.) 507(1)=1942 O.W.N. (B.R.) 794 (2).

Effect.

The failure to issue a notice under O. 21, R. 66 before the issue of the proclamation of sale amounts only to a material irregularity and does not vitiate the whole proceedings. (Binney, F.C.) GANGADHAR V. AMRUT. 1948 N.L.J. 503,

C. P. CODE (1908), O. 21, Rr. 66 and 22.

O. 21, Rr. 66 and 22—Non-service of notices under—Validity of sale. See C. P. Cone, O. 21, Rr. 22 and 66. 48 C.W.N. 346.

—O. 21, Rr. 66 and 9,0—Proclamation containing misleading description of property—Validity of sale.

of sale.

Where a proclamation contained vague, inaccurate and misleading description of the property, a sale in pursuance of it will seriously prejudice the judgment debtor and cannot be allowed to stand. (Tekchand and Beckett, JJ.) BHAGWAN SINGH v. BARKAT RAM. 207 I.C. 561=16 R.L. 11=A.I.R. 1943 Lah. 129.

--- O. 21, R. 66-Sale postponed and held at another place-Absence of new proclamation-Effect.

It is not merely an irregularity when a sale is postponed and held at some other place without any actual new proclamation. (Grille, C.J. and Sen, J.) FAKIRA MAHADJI v. SANGIDAS. I.L.R. (1914) Nag. 594= 218 I.C. 447=18 R.N. 18=1944 N.L.J. 216=A.I.R. 1944 Nag. 199.

The showing of the property wrongly as attached is not a material irregularity vitiating the sale because that fact could not possibly have affected the would-be purchaser one way or the other. (Sathe, S.M. and Acton, A.M.) BEHARI LAL SHUKLA v. KAILASH KUNWAR. 1945 R.D. 31=1945 A.W.R. (Rev.) 36 (2).

Value of property given by party—Daty of Court to include. BARKAT RAM v. BHAGWAN SINGH. [See Q. D. 1936—'40 Vol. I, Col. 1659.] 191 I.C. 612—13 R. L. 307.

——0.21, Rr. 66 and 90, Proviso (Patna Amendment)—Scope—Decree in respect of loan—Executing Court proceeding under O. 21, R. 66—Sale—If invalid—Waiver by judgment-debtor—Effect of. Sce BIHAR MONEY-LENDERS (REGULATION OF TRANSACTIONS) ACT, Ss. 13 and 14. 22 Pat. 631.

——0. 21, R. 66—Scope—Duty of Court and decree-holder in fixing price—Failure to carry out obligations imposed by rule—Effect on sale. See C. P. CODE, O. 21, R. 90. (1945) 1 M.L.J. 229 (P.C.).

- 0.21, R. 66 (1) (e)—Further inquiry to get particulars of property—Whether can be made.

A further enquiry is not precluded by the terms of the amended R. 66 Cl. (e) of R. 66 (1) provides in so many words that the proclamation shall specify as fairly and accurately as possible "everything which the Court considers material for a purchaser to know in order to judge of the nature and value of the property. For this purpose, it may be necessary for the Court to hold some kind of inquiry, the nature and scope of which will of course, depend on the circumstances of each case. (Tekhand and Beckett, 11.) BHAGWAN SINGH v. BARKAT RAM. 207 I.C. 561—16 R.L. 11—A I.B. 1943 Lah. 129.

under—If a material irregularity when party is aware of date of drawing up of the proclamation.

The failure to issue a notice under O. 21, R. 66 (2), C.P.Code, would not amount to a material irregularity when as a matter of fact the parties are aware of the

C. P. CODE (1908), O. 21, Rr. 67 and 90.

date on which the sale proclamation will be drawn up, (Sathe, S.M. and Acton A.M.) BEHARI LAL SHUKLA v. KAILASH KUNWAR. 1945 R.D. 31=1945 A.W.R. (Rev.) 36 (2).

— 0. 21, B. 66 (2), (Patna Amendment)—Scope — If repugnant to or inconsistent with Bihar Tenancy Act, S. 163-A. See BIHAR TENANCY ACT (AS AMENDED IN 1937), S. 163-A. A.I.R. 1944 Pat, 54 (F.B.).

mention in sale proclamation revenue assessed on property—If material irregularity—No separate revenue fixed on portion of estate sold.

The failure to mention in the sale proclamation the revenue assessed on the property as required by 0.21, R. 66 (2) (\$\epsilon\$), C. P. Code, is a material irregularity within the meaning of O.21, R. 90, where it is possible to state the amount accurately or even approximately. But the rule has no application to a case in which the property sold is a portion of an estate upon which no separate revenue has been fixed. (\$\mathcal{Sir}\$ Maganna Naidu v. Venkatrayulu Naidu. 58 L.W. 451=49 C.W.N. 820=1945 P.W. N. 377=1945 M.W. N. 620=A.I.R. 1945 P.C. 178= (1945) 2 M.L.J. 259 (P.C.)

——O. 21, Rr. 66 (2) (e) and 90—Sale proclamation—Annual rent of house in city, not stated—Material irregularity.

In order to arrive at the valuation of house property in a city the test is to ascertain its annual rent or income and to arrive at a valuation of the house according to the market rate prevalent at the time. The omission to state such annual rent in the sale proclamation is a breach of the statutory obligation resting on the Court under the provisions of R. 66 (2) (e) of O. 21, and amounts to a material irregularity in the publication of the sale and vitiates the same. (Thomas, C.). and Ghulam Hasan, J.) S. L. SWING v. BRIJ GOPAL 18 Luck. 647=205 I.C. 58=15 R.O. 383=1943 O.W. N. 15=1942 O.A. 641=A.I.R. 1943 Oudh, 204=1942 A.W.R. (C.C.) 363.

Contents—Inclusion of estimated value according to both parties—Desirability.

It is desirable that the sale proclamation shall include the estimate, if any, given by either or both the parties. It would be a reasonable method to enable the purchaser to judge the value of the property. (Shirreff, S.M., and Sathe, J.M.) SAJJABI BEGUM v. DWARKA DASS. 1942 R.D. 697=1942 O.W.N. 569=1942 A.W.R. (Rev.) 431=1942 O.A. (Supp.) 457.

The omission to file a sale statement as required by R. 66 (3) of O. 21, is no more than a mere irregularity and in the absence of an objection under R. 90 of that order the sale cannot be set aside on that ground steing void ab initio. (Binney, F.C.) RAMNATH v. KANHAIVALAL TULSIRAM. 1943 N.L.J. 120.

O. 21 Rr. 67 and 90—Omission to affix sale proclamation in Collector's office—If material irregularity — Collector's office and court situated in same compound.

Ordinarily, the omission to affix the sale proclamation in the Collector's office as prescribed in C. P. Code, O. 21, R. 54, read with R. 67, would be a material irregularity. But where the Collector's office and the Court are situated in the same compound and

C. P. CODE (1908), O. 21, Rr. 68 and 90.

a copy of the proclamation was duly affixed in the Court, it can hardly amount to a material irregularity. (Sir Madhavan Nair.) NAGANNA NAIDU v. VENKATRAYULU NAIDU. 58 L. W. 451=49 C. W. N. 820=1945 P.W.N. 377=1945 M.W.N. 620=A.I.R. 1945 P.C. 178=(1945) 2 ML.J. 259 (P.C.).

-0.21, Rr. 68 and 90-Sale within 30 days of proclamation-Legality.

A sale within 30 days of the proclamation is contrary to R. 68 of O. 21 and is likely to result in substantial injury to the debtor and is liable to be set aside. (Sathe, S.M. and Ross, A.M.) GHANI HAIDER v. ABDUL BAQAR. 1943 O.W.N. (B.R.) 90=1943 O.A. (Rev.) 41(2)=1943 R.D. 90=1943 A.W.B. (Rev.) 41(2).

——O. 21, R. 69—Acceptance of amins proposal to postpone sale to afternative dates without fixing any time —Material irregularity.

Obiter: Where the Court merely allows a proposal of the amim to postpone a sale to alternative dates without fixing any time, the Court fails to comply with the requirements of R. 69 of O. 21 and it amounts to a material irregularity. (Yorke, J.) MAHABIR PRASAD v. SARJU DEVI. 1943 A.L.W. 323.

—O. 21, Rr. 69 (1) and 90—Adjournment of sale—Non-compliance with statutory obligation to specify date and time of the adjourned sale—Material irregularity.

Under O. 21, R. 69 (1), there is a statutory obligation on the Court when a sale is adjourned to specify not only the day but the hour also of the adjourned sale and any breach of such a requirement would amount to a material irregularity in the conduct of the sale. (Thomas, C. J. and Ghulam Hasan, J.) S. L. SWING v. BRIJ GOPAL. 18 Luck. 547=1942 A.W.R. (C.C.) 363=205 L.C. 58=15 R.O. 383=1943 O.W.N. 15=1942 O.A. 641=A.J.R. 1943 Oudh 204.

An execution sale could not be held on the date specified in the sale proclamation. On that date the Court stayed the sale until further orders and directed the matter to be put up before it on a later date, when the Court vacated the stay order and fixed a date for sale. As the bid was too low on the date so fixed, the sale was held on the following day.

Held, that the sale was not a nullity out and out, but that there was undoubtedly a material irregularity which would entitle the judgment-debtor to get the sale set aside in an appropriate proceeding under O. 21, R. 90, C.P. Code. (Mukherica and Roxburgh, J.). ASALATA BOSE V. MANINDRA NATH, I.L.R. (1941) 2 Cal. 570=201 I.C. 150=15 R.C. 141=45 C.W. N. 987=A.I.R. 1942 Cal. 275.

A breach of the provisions of O, 21, R. 69, C.P. Code, e.g., adjournment of a sale for more than 14 days does not involve any question of jurisdiction of the Court to hold the sale so as to render the sale void and a nullity. (Fast Ali and Meredith, J.). SBEO DAYAL NARAIN v. MOTI KUER. 21 Pat. 281=200 I.C. 782=15 R.P. 9=8 B.R. 720=1942 P.W.N. 202=23 Pat.L.T. 139=A.I.R. 1942 Pat. 238.

O. 21, R. 69 (2) (Madras Amendment)— Scope—Contravention of Material irregularity—Sale adjourned beyond 30 days and held without fresh pro-

C. P. CODE (1908), O. 21, Rr. 71, 86 and 87.

clamation—If illegal or nullity—Setting aside—Grounds.

It is a material irregularity to adjourn a sale for more than 30 days in contravention of 0.21, R. 69 (2), as amended in Madras, and to hold the sale again without a fresh proclamation. If there was a proper proclamation to start with, and if the only ground of attack is that the total period of adjournments exceeded the period of 30 days fixed in 0.21, R. 69 (2), (Madras Amendment), and that the sale was held without a fresh proclamation, it cannot be held that the sale is illegal or a nullity; the sale will be set aside only if substantial loss is proved. (Krishnaswami Ayyangar and Somayya.

//.) SUBBANNA v. SATYANARAYANAMURTI. 213
I.C. 325=17 R.M. 77=56 L.W. 523=1943 M.W. N. 826=A.I.R. 1943 Mad. 739=(1943) 2 M.L.J. 295.

O. 21, B. 71—Applicability—Resale by order of Court on report by plaintiff due to purchaser's default to deposit 25 per cent.

O. 21, R. 71, applies to all cases in which a sale is necessitated by the default of the auction purchaser. (Almond J.C.) DURANI BIBI v. HAJI GHULAM SHAH. 214 I.C. 97=17 R. Pesh. 5=A.I.R. 1944 Pesh. 27.

Neither the absence of a certificate of the officer conducting the sale as to the amount of default nor the furnishing of a certificate in an improper form would prevent the court from recovering the deficiency on a resale from the auction purchaser. (Almond J.C.) DURANI BIBI v. HAJI GHULAM SHAH. 214 I.C. 97 = 17 R. Pesh. 5 = A.I.R. 1944 Pesh. 27

It is true that a decision under O. 21, R. 71 C.P. Code, is ordinarily subject to appeal where the dispute lies between either a judgment debtor or a decree-holder and the defaulting purchaser, and the interest of either the decree-holder or the judgment-debtor has suffered by the default of the previous purchaser. If however, the matter is one between two rival decree-holders, and the judgment-debtor does not enter into the picture at all and the decree-holders themselves are the purchasers one in the earlier sale and the other in the latter, the matter must be treated as one in revision. (Grille, C.J. and Sen, J.) FAKIRA MAHADJI v. SANGIDAS. IL.R. (1944) Nag. 584=218 I.C. 447=18 R.N. 18=1944 N.L.J. 216=A.I.R. 1944 Nag. 199.

— 0.21, R.71—Right to apply—Failure by purchaser to deposit 25 per cent.—Assignee-decree-holder—Application by for realising amount payable by purchaser—Maintainability.

An assignee decree-holder is entitled to apply under O. 21, R. 71, C.P. Code, for realising the amout payable by an execution purchaser who has failed to deposit the initial 25 per cent. of the sale price as required by R. 84 of O. 21 C.P. Code, and who has to make good the deficiency caused by the property being re-sold for a lesser amount. (Kuppuswamy Ayyar, J.) KANNATHAL ACHI V. VADUGANATHAN CHETTIAR. 58 L.W. 40=1945 M.W. N. 120=A.I.R. 1945 Mad. 349=(1945) 1 M.L.J. 322.

— 0. 21, Rr. 71, 86 and 87—Scope—Default of purchaser in paying balance of sale price—Re-sale—Application for—when to be made—Delay caused in re-sale—Deficit sale price—Liability of puchaser—If affected—Right of decree-holder to order against default-

O. P. CODE (1908), O. 21, Rr. 72 and 77.

ting purchaser—Limitation Act, Art. 181. SIVASUBRA-MANIAM CHETTIAR v. MURUGESA MUDALIAR. [See Q D. 1936-'40 Vol. I Col. 1664.] 193 I.C. 225 = 13 R.M. 646.

Even where the property sold in Court auction is movable property if it is bought by the decree-holder, he is not bound to pay the price in cash but can give a receipt in set-off against his decretal amout. (Sathe, S.M.) MAKRAND SINGH v. SHEURAJ SINGH. 1943 R.D. 170=1943 A W.R. (Rev.) 71.

octoor of decree-holder auction purchaser—Proper procedure where other decrees against same judgment-deotor are under simultaneous execution.

The right of a decree-holder auction purchaser to set off the deposit as well as the purchase-money against the debt due to him, under O. 21 R. 72, (2) is subject to the provisions of S. 73. Hence when other decrees against the same judgment-debtor are under simultaneous execution, the auction purchaser should be asked to deposit the purchase-money according to Rr. 84 and 85 of O. 21 and it is only if he tails to so deposit, the Court can order resale. (Sathe, S.M. and Ross, A.M.) DEVIDAYAL v. POHAP SINGH. 1943 A.W.R. (Rev.) 93 = 1943 R.D. 179.

O. 21. Rr. 72 and 92—Sale in favour of decree-holder not confirmed—Decree, if satisfied. The debt due to a decree-holder is not satisfied before a Court sale of the judgment-debtor's property in favour of the decree-holder in execution of his decree for the amount due to him is duly confirmed by the Court. (Harries, C.J. and Abdur Rahman, J.) MEGHA RAM v. MOII RAM 218 I.C. 462=18 R.L. 25=46 P.L.R. 193=A.I.R. 1944 Lah, 325.

vention of If void Remedy of judgment-debtor.

A purchase made by a decree-holder in violation of O. 21, R. 72, C. P. Code, is no doubt a fraud upon the Court, but such purchase is only voidable and not void; in other words it is valid until set aside on an application under Cl. (3) of O. 21. R. 72, C. P. Code. If no such application is filed within the time limited, the purchaser is entitled to realise his rights under the sale, and it is not open to the judgment-debtor to plead O. 21, R. 72 in bar of a suit for possession irrespective of limitation and of the Court which tries that suit. (Somayya, J.) VALLIAPPA CHETTIAR V. MUTHU KOUNDAR. 1941 M.W.N. 988=(1941) 2 M.L.J., 943.

Under O. 21, R. 72 (1), C. P. Code, as amended in January 1936; the decree-holder is entitled to bid for and purchase the property in the absence of an express order to the contrary by the Court. (Chatterji and Meredith, JJ.) DHIRENDRA NATH CHANDRA V. BIMALANANDA TARKATHIRTHA. 196 I.C. 728=8 B.R. 94=14 R.P. 243.

O.21, Rr. 77, 85 and 90-Non-compliance with Rr. 77 and 85-Effect.

Unless there is substantial injury, the mere =17 R.M. 3=1943 M.W.N. 143=56 L.W. 405 on-compliance with Rr. 77 and 85 of O. 21 would =A.I.R. 1943 Mad. 318=(1943) 1 M.L.J. 62.

C. P. CODE (1908), O. 21, Rr. 84 and 85.

not render the sale invalid. (Sathe, S.M. and Ross. A.M.) GHANI HAIDER v. ABDUL BAOAR. 1943 O.W.N. (B.R.) 90=1943 O.A. (Rev.) 41 (2)=1943 R.D. 90=1943 A.W.R. (Rev.) 41 (2).

O. 21, R. 77 and S. 151—Sale of movable property—When becomes absolute—Refusal to confirm sale completed by Kurk Amin, if canbe justified under S. 151, C.P. Code.

Under O. 21, R. 77, the sale of movable property becomes absolute on the granting of a receipt for the purchase-money. Hence when a kurk Amin accepts the highest bid and the sale price and issues a formal receipt to the purchaser the sale becomes complete and absolute and it is not open to the Court when the matter comes betore it on report from the Kurk Amin to refuse to confirm it. Where a Court does so refuse and order resale its action cannot be justified under S. 151, because it could neither be invoked to set at nought the express provisions contained in O. 21, R. 77 (2) nor to validate an order which is clearly against the provisions of law. (Sathe, S.M. and Ross, J.M.) Jairaj Singh v. Ram Sarup. 1943 R.D. 8=1943 O.W.N. (B.R.) 8=1943 O.A. (Rev.) 1 (1)=1943 A.W.R. (Rev.) 1 (1).

— O. 21 R. 84—Bid on behalf of temple—Failure to deposit 25 per cent.—Deficit on resale—Nature of liability. LOKMAN v. MOTRAL. [see Q.D. 1936—Vol. I. Col. 1666.] I.L.R. (1941). Nag. 485.

\_\_\_\_\_O. 21, R. 84—Delay in making deposit—Validity of sale.

Delay in making a deposit under O. 21, R. 84, C. P. Code, is no more than a material irregularity which does not vitiate the sale, unless it has caused substantial injury. (Rau, F.C.) BIHARI LAL v. FAKIR CHAND. 1945 N.L.J. 61.

De 21, Rr. 84 and 71—Sale when complete—Deposit when to be made—'Forthwith', meaning of—Resale if can be held on same day, LOKMAN v. MOTILAL. [see Q.D. 1936—'40 Vol. I. Col. 1667.] I.L.R. (1941) Nag. 485.

——O. 21, Rr. 84 and 85—Scope—Purchase by decree-holder—Deposit of difference between sale price and decree amount—Failure to deposit within 15 days amounts due to other creditors by way of rateable distribution—If ground for setting aside sale.

It is not the duty of the decree-holder-purchaser under O. 21, Rr. 84 and 85, to pay; within 15 days from the date of the sale, that portion of the amount that may be payable rateably to other creditors who may claim rateable distribution under S. 73, C. P. Code, over and above the amount deposited by him into Court, representing the difference between the amount for which he has purchased the property sold and the amount due to him under the decree. The Court has therefore no jurisdiction to set aside a sale on the ground that the decree-holder-purchaser has not deposited within 15 days of the sale the amount payable to the other creditors entitled to rateable distribution. (Kuppuswami Ayyar, J.) VARALAKSHMAMMA v. JANNAYYA. 213 I.C. 35 = 17 R.M. 3=1943 M.W. N. 143=56 L.W. 465

C. P. CODE (1908) O. 21, R. 84 (1).

—O.21 R. 84 (1)—Non-compliance with—Sale if vitiated. See C. P. Code. O. 21. Rr. 90 AND 84 (1). 1942 R.D. 982 (2).

——O. 21, Rr. 85 and 86—Decree-holder purchaser—Right to property sold—Conditions— Non-compliance with—Effect.

A decree-holder purchaser is entitled to the property sold at the auction only if he pays the purchase price or if he gives a receipt in full for the decretal amount. Where he does neither he is not entitled to the property and under R. 86 of O. 21, C. P. Code, the Court itself is bound to order re-sale of the property. (Sathe, J.M.) KHEDU v. KALIKA. 1942 A.W.R. (Rev.) 119=1942 R.D. 274=1942 O.W.N. (B.R.) 208=1942 O.A. (Supp.) 136.

—O.21, R. 86—Default of payment by purchaser—Sale, if nullity. Annapurna Dasi v. Bazley Karim. [see Q.D. 1936—'40 Vol. 1, Col. 3300.] 193 I.C 390=13 R.O. 389=A.I.R. 1941 Cal. 85.

——O. 21, R. 86—Scope and effect of—Position of auction purchaser depositing purchase money after due date—Deposit by judgment-debtor also in the meanwhile—Effect.

Where the auction-purchaser fails to deposit the purchase money within the due date, under O.21 R.86 there is an automatic cancellation of the sale and he ceases to have any interest in property sold and a duty is laid on the Court to resell the property. Where the auction purchaser deposited the money after the due date and the judgment debtor had also in the meanwhile deposited the requisite amount before a resale was held there need be no resale. (Mulla, J.) INAM-UL-LAH v. MAHOMED IDRIS. I.L.R. (1943) All. 580=208 I.C. 3=16 R A. 63=1943 O.W.N. (H.C.) 192=1943 A.W.R. (H.C.) 126=1943 O.A. (H.C.) 126=A.I.R. 1943 All. 282.

\_\_\_\_O.21, R, 86-Scope of-Powers of Court as to forfeiture of deposit and as to resale.

While O. 21, R. 86, C. P. Code, is discretionary in respect of the forfeiture of the ½th deposit made under R. 84 it is not so in the case of a resale. O. 21, R. 86 is mandatory in the latter case. (Sathe, S.M. and Ross, A.M.) RAM SHANKAR v. INAYAT HUSAIN. 1943 A.W.R. (Rev.) 248 (1)=1943 R.D. 240.

——O. 21, R. 88—Object of—Powers of executing Court acting under. Munnalal v. Gopilal. [see Q.D. 1936—'40 Vol. I, Col. 1669.] I.L.R. (1941) Nag. 150=191 I.C. 217=13 R.N. 190.

Original Side—Bombay High Court Rules (O.S.) R. 491.

O. 21, R. 89, would also apply to the High Court in its ordinary original jurisdiction, unless there are rules framed by the High Court on its original side which are in any way inconsistent with or repugnant to O. 21, R. 89. There is nothing in the rules of the Bombay High Court (Original Side) which abrogates O. 21, R. 89. R. 491 of the rules is not inconsistent with and does not abrogate O. 21, R. 89. (Chagla, J.) Official Assignee of Bombay v. Jehangir Sorabji Dalal. 210 I.C. 159=16 R.B. 177=45 Bom.L.R. 683=A.I.R. 1943 Bom. 336.

C. P. CODE (1908), O. 21, R. 89.

O. 21, R. 89—Applicability to sales in execution of mortgage decrees on Original side of Bombay High Court.

R. 89 of O. 21 are not inapplicable to sales held in execution of mortgage decrees on the original side of the Bombay High Court. The duty of the Court is to apply O. 21 R. 89 so far as the rules in Ch. XXVII of the Bombay High Court Original side rules will permit. The liberty to make an application under O. 21 R. 89 is a concession to the judgment-debtor and in the case of a mortgagor it is a still greater concession for the period of redemption is extended. It is not unreasonable therefore to call for strict compliance with the provisions of the rules. If no deposit is made of the decretal amount within thirty days, the application to set aside the sale will not be entertainable even by consent of parties to record an adjustment of the decree so as to deprive the auction purchaser of his bargain. (Mc Nair, J.) Bhabasundari v. Gopeswara Auddy. I.L.R. (1941) 1 Cal. 147—45 C.W.N. 873—196 I.C. 523—14 R.C. 249—A.I.R. 1941 Cal. 159.

— 0. 21, R. 89—Application under—If can be combined with application for selting aside sale on grounds not covered by R. 90.

An application for setting aside a sale in execution on grounds not covered by R. 90 may be combined with an application under R. 89 of O. 21, C. P. Code. (Dar, J.) GOUR CHAND MALLIK v. PRADYUMNA KUMAR MALLIK. I.I.R. (1943) 2 Cal. 485=A.I.R. 1945 Cal. 6.

----O. 21, R. 89—Application under—If may be treated as one under O. 34, R. 5.

An application to set aside a sale held in execution of a mortgage decree on deposit of the requisite amounts under O. 21, R. 89, C. P. Code, may be treated as one substantially under O. 34, R. 5. The applicant is not bound to O. 21, R. 89, merely because his counsel proceeded on that basis or because he has offered to pay 5 per cent, of the whole of the purchase money as required by that rule and not 5 per cent. of the purchase money actually paid into Court as required by O. 34, R. 5, or because he has not specifically asked for return of the title deeds and a reconveyance. (Das, J.) GOUR CHAND MALLIK v. PRADYUMNA KUMAR MALLIK. IL.R. (1943) 2 Cal. 485—A.I.B. 1945 Cal. 6.

—0.21, Rr. 89 and 90—Applications under—Applicant not withdrawing application under R. 90—Dismissal of application under R. 89—Not obligatory.

It is not obligatory on the Court to dismiss an application under O. 21. R. 89, C. P. Code, in limine, if the applicant does not withdraw his application under O. 21, R. 90. The requirements of sub R. (2) of R. 89 are sufficiently complied with and satisfied if the application under R. 89 is not allowed to be "made" or "prosecuted", (i.e.) actually moved or proceeded with and be stayed until the disposal of the application under R. 90. (Das, J.) GOUR CHAND MALLIK v. PRADYUMNA KUMAR MALLIK. I.L.R. (1943) 2 Cal. 485=A.I.B. 1945 Cal. 6.

Rr. 89 and 90—Competency—Subsequent withdrawal of prayer for relief under R. 90—Effect—Application

C. P. CODE (1908), O. 21, R. 89,

under R. 89 - When deemed to be made-Limitation. [see Q.D. 1936-'40 Vol. I. Col. 1678.] RUGHNATH z. HARIRAM. 192 I.C. 10=13 R.S. 180.

——0. 21, R. 89—Construction—Sale of property in several lots—Setting aside—Applicant interested in one lot—Deposit of sale price of that lot and five per cent—Sufficiency—Right of auction-purchaser to insist on full amount.

An applicant under O. 21, R. 89, C. P. Code, must strictly comply with the terms of the rule and deposit the sums of money required by the rule. The fact that he is interested only in one of the several lots in which the properties were sold in execution would not entitle him as of right to apply to set aside the sale on deposit only of the sale price of that particular lot plus the five per cent, thereon. The circumstance that the decreeholder does not object to that course will not help the applicant, because the auction-purchaser becomes entitled to the properties the moment the properties are sold and if the conditions laid down in the rule are not complied with, he gets an indefeasible right to the properties and it is open to him to insist that the amount specified in the sale proclamation should be deposited in full. (Kuppuswami Aiyar, J.) ARUMUGHATHAMMAL v. MANGOOMAL LUNIDA SINGH. 218 I.O 414=18 B.M. 39=1944 M.W.N. 591=A.I.R. 1944 Mad. 565=(1944) 2 M.L.J. 124.

—0. 21, R. 89—Deposit—Unconditional character of—Amount reduced by application under S. 19, Madras Act IV of 1938—Effect—Right of decree-holder to claim full deposit despite reduction.

A deposit under O. 21, R. 89, C. P. Code, is no doubt conditional, but the amount which the judgment-debtor has to pay is always subject to modification by Court before the final order is passed by reason of any error in calculation of the amount due or presumably by reason of any deduction in the amount due under the decree by process of law. Where therefore by a subsequent judicial proceeding, e.g., under Madras Act IV of 1938, the amount of the decree is reduced, the decree-holder cannot claim the right to draw out the deposit which is totally in excess of the amount due to him under the decree on the ground that the deposit is unconditional. (Wadsworth, J.) KARUPPASWAMI v. IBRAHIM. 58 I.W. 459 = 1945 M.W.N. 675 = (1945) 2 M.I.J. 255.

0. 21, R. 89 and S. 115—Dismissal of application under 0. 21, R. 89 after consideration—Jurisdiction if exercised.

If a Court considers on the merits an application under O. 21, R. 89, C. P. Code, there is no failure to exercise jurisdiction even if the prayer is rejected. The exercise of jurisdiction would then be a consideration of the application made and the decision on it whether the relief claimed was granted or not. (Hamilton, J.) BALA PRASAD v. MAKHAN LAL RAM SARUP. 1941 R.D. 555=1941 A.W.R. (H.C.) 227=1941 O.A. (Supp.) 522=1941 A.I.J. 406=1941 A.I.W. 679=1941 O.W.N. 335.

-0.21, B. 89—Deposit by agent of judgment-debtor without power of attorney—Sufficiency.

A judgment-debtor making a deposit under O. 21, R. 89, C. P. Code, for setting aside an execution sale can pay the money through an agent who must pay it as such agent. It is not necessary that the agent must hold a power of attorney in order that the deposit may be a legal or valid deposit. It is sufficient if the judgment-debtor directs the payment to be paid by the agent

C. P. CODE (1908), O 21, R. 89.

(Leach, C.J. and Wadsworth, J.) HANUMAYYA v. BAPANAYYA. I.L.R. (19±5) Mad. 566=58 L.W. 10 (2) = 19±5 M.W.N. 164 (1) = A.I.R. 19±5 Mad. 188 = (19±5) 1 M.L.J. 66.

-0. 21, R. 89—Deposit of 5 per cent commission —If necessary when decree-holder is purchaser.

The commission of 5 per cent. required by R. 89 of O. 21 to be deposited should be deposited even in cases where the auction-purchaser is the decree-holder himself. (Binney, F. C.) RAMNATH v. KANHAIYALAL TULSI-RAM. 1943 N.L.J. 120.

——O. A1, B. 89—Requirements undr-Specific prayer for setting aside sale—Necessity—Deposit if should be made along with the application.

What R. 89 of O. 21, C. P. Code, requires is an application to deposit the money and the penalty of 5 per cent. The prayer that the auction sale should be set aside is implicit in the making of the deposit. The deposit in order to be valid need not be necessarily made along with the application. It would be sufficient if it is made within 30 days from the date of the sale. (Ghulam Hasan and Walford, J.). KISHIN LAL v., HARDEVI KUAR. 20 LIUK. 525=1945 O.W.N. 372=1945 O.A. (C.C.) 337=(1945) A.W.B. (C.C.) 235

——O. 21, R. 89—Right to apply—Person acquiring interest in property under contract of sale by fudgment-debtor pending attachment—Application to set aside sale on deposit—Maintainability.

A third party who has acquired an interest in the property sold by reason of a contract of sale made by the judgment-debtor pending attachment is competent to apply to set aside the sale under O. 21. R. 89 C. P. Code. Such a person is not seeking to enforce any claim against the auction purchaser to his detriment, and S. 44, C. P. Code, should not be invoked to disentitle the applicant to apply. He having acquired an interest in the property by virtue of the contract of sale, should be allowed to deposit the amount required under O. 21, R. 89, C. P. Code, if he applies within 30 days of the sale. (Munohar Lalt, J.) MUNDRIKA SINGH v. NAND LAL SINGH. 191 I.O. 689=7 B.B. 240=13 B.P. 338=A.I.R. 1941 Pat. 204.

— O. 21, R. 89—Deposit under—Withdrawal by decree-holder—Suit by depositor for refund—Maintainability.

A person who makes a deposit under O. 21, R. 89, C. P. Code, after an execution sale, cannot subsequently institute a suit for refund of the amount deposited from the decree-holder who has withdrawn it from Court. (Agarwala, f.) NARSINGH MISSIR v. BABUI SHAMA KUER. 1942 P.W.N. 172.

— 0.21, Rr. 89 and 92—Judgment-debtor adjudicated prior to confirmation of execution sale— Decree-holder failing to prove his debt in insolvency— Effect on sale.

Where prior to the confirmation of an execution sale the judgment-debtor is adjudicated insolvent and the decree-holder fails to prove his debt in insolvency and the judgment-debtor obtains his discharge in due course the failure of tha decree-holder to prove his debts in insolvency could not have the effect of setting aside the sale. (Agarwala, J.) SURAJ BALI v. GANGA PERSHAD. 194 I.O. 605—1941 O.W.N. 833—13 B.O. 15—1941 O.L.B. 510—1941 A.W.B. (O.C.) 234—1941 O.A. 539—A.I.B. 1941 Oudh 505.

O. 21, R. 89 (as amended in Madras)—Right to apply—Purchaser from judgment deitor after

O. P. CODE (1908), O. 21, R. 19.

execution sale—Application to set aside sale—Competency.

A person buying from a judgment-debtor after the execution sale may be allowed to apply under O. 21. R. 89, (Madras amendment) for an order setting aside the sale. (Leach, C. J. and Shrhabuddin, J.) LAKSHMI NARASAMMA v. SATYANARAYANA 210 I.C. 291=16 R.M. 423=1943 M.W.N. 517 (2) = A.I.R. 1943 Mad. 684=(1943) 2 M.L. J. 151.

—O. 21, R. 89—Right to apply—Purchaser from judgment-debtor subsequent to sale—Application by—Competency. RUGHNATH v. HARIRAM. [see Q. D. 1936-40 Vol. I, Col. 1675] 192 I.C. 10=13 R.S. 180.

Fruit trees are immovable property. Hence where they are wrongly sold as movable property the judgment debtor cannot thereby be denied the right to apply under 0. 21, R. 89 to set it aside. (Shirreff, S. M. and Sathe, J. M.) MOHAMMAD HUSAIN v. INAMAT HUSAIN. 1942 A.W.R. (Rev.) 496 (2)=1942 O.A. (Supp.) 522 (2)=1942 O.W.N. (B.R.) 704.

Do 21, R. 89 - Refund of deposit under—If can be ordered on application under S. 144. See C. P. CODE, S. 144 AND O. 21, R. 89. 1941 A.W.R. (H.C.) 278.

——O. 21, R. 89—Scope and intention—Deposit by judgment-debtor—Conditions of validity. RAGHUNATH v. HARIRAM [see Q D. 1936-40 Vol. I. Col. 1679]. 192 I.C. 10=13 R.S. 180.

O. 21, R. 89—Scope—Sale, if can be cancelled on deposit merely of purchase money plus 5 per cent. on it.

O 21, R. 89 requires that the judgment-debtor should pay off the whole of the decretal amount for which the sale was ordered and hence the sale cannot be cancelled under that rule merely on the deposit by the judgment-debtor of the purchase money plus 5 per cent. on it. (Sathe, S. M.) BRIJ LAL v. PURAN MAL. 1943 A.W.R. (Rev.) 148 (1)=1943 R.D. 285 (1).

of satisfaction under 0.21, R. 2—Permissibility.

Once a property is sold in execution the sale cannot be cancelled on a certification of satisfaction by the decree-holder under O. 21, R. 2, C. P. Code, unless the decree holder himself happens to be the auction purchaser. (Sathe, S.M. and Dible, J. M.) SUKHU AHIR v. BARI TOLA. 1944 A.W.R. (Rev.) 307=1944 R.D. 593.

Court after closing of Treasury—Deposit next day, is

Where a tender is made on the last of the thirty days allowed by Art. 166 of the Lim. Act but it is passed by Court after the closing of the treasury and the money is actually deposited in the treasury only the next day, it is a valid deposit because the delay was really due to the act of the Court itself for which the party should not be made to suffer. (Sathe, S. M.) ALI NEWAZ v. ANWARI BIBI. 1944 A.W.R. (Rev.) 271.

——O. 21, R. 89 (1) (as amended in Madras)

—Right to apply under—Person "deriving title"—

"Holding an interest"—Meaning of—Person deriving title in other properties—Application by—Maintainability.

The title derived from the judgment-debtor which would entitle a person to apply for the setting aside of a sale under O. 21, R. 89 (1), (Madras Amendment)

C. P. CODE (1908), O. 21, R. 90.

must be in the properties the sale of which is sought to be set aside. It is impossible to envisage that any person who has at any time derived title in any property from the judgment-debtor should by reason of that fact be qualified to make applications with regard to a totally different property. The interest held by the applicant must be an interest in the property itself under R. 89, and it is not enough that the party should be indirectly affected by the sale when he has no interest in the usual sense such as the interest of a judgment-debtor, mortgagee or even a lessee, in some cases. Certain properties of the judgment-debtor were sold to the appellant and the purchaser was directed to pay the purchase price towards the decree. He paid a part of the amount and this was paid to the decree holder and part satisfaction was entered. But as he did not pay the balance, the decree-holder brought to sale certain other properties of the judgment-debtor and these were sold. The appellant applied under O. 21, R. 89 (1), to have the latter sale set aside on depositing the amount payable under the decree with the necessary charges into Court.

Held, that the appellant had no locus standi to make the application because he was not a person deriving title from the judgment-debtor, or a person holding an interest in the property sold (Mockett and Happell, J/.) KRISHNAMA NAICKEN v. SIVASWAMI CHETTIAR. 211 I.C. 301=16 R.M. 507=56 L.W. 490=1943 M.W.N. 477=A.I.R. 1943 Mad. 709=

(1943) 2 M.L.J. 281.

—O. 21, R. 89 (1)—Scope—Compliance with— Necessity far strict compliance—Amount deposited falling short by small amount due to bona fide mistake in calculation—Deficiency made good after thirty days—Jurisdiction to set aside sale.

A Judgment-debtor seeking to set aside an execution sale under O. 21, R. 89, C. P.Code, is bound to strictly comply with the provisions of O. 21, R. 89 (1), before he can take advantage of the concession. Both the application and the deposit specified in clauses (a) and (b) of O. 21, R. 89(1) must be made within 30 days of the sale. If the amount deposited within the time limited is short even by a small amount by reason of a mistake in calculation, the executing Court has no jurisdiction to entertain the application and to set aside the sale, even though the mistake is bona fide and the applicant makes good the deficiency as soon as the mistake is found out. Equitable conisderations cannot override the imperative provisions of O 21, R. 89, (Lokur, J.) AMRITLAL NARSILAL v. SADASHIV ANNA. 46 Bom.L.R. 432= A.I.R. 1944 Bom. 233 (2).

Where without previous notice to the parties under R. 66 (2) of O. 21, and without any previous enquiry from the parties a sale proclamation is prepared and issued it is a serious irregularity entitling the party affected to apply for setting aside the sale under R. 90 of the same order. (Dible, J.M.) SAIDULLAH v. RAM PRAKASH. 1943 R.D. 348(1)=1943 A.W.R. (Rev.) 149 (2).

—0.21, R. 90—Any person entitled to share tn rateable distribution—Meaning—Interim receiver in insolvency—Right of to apply to set aside sale on behalf of creditors.

"Any person entitled to share in the rateable distribution of assets" in O. 21, R. 90, C. P. Code

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means any of those persons to whom the right to share in the rateable distribution of assets realised in execution is given by S. 73, C. P. Code. Creditors proving in insolvency do not come within the category of such persons, and an interim receiver in insolvency who represents the creditors is not entitled to apply to set aside an execution sale under O. 21, R. 90, C. P. Code. (Krishnaswami Ayyangar and Kunhi Raman, JJ.) Official Receiver Ramnad v. Veerrappa Chettar. I.L.R. (1943) Mad. 577=208 I.C. 163=16 R.M. 186=56 L.W. 353=(1942) M.W.N. 766=A.I.R. 1943 Mad. 199=(1943) 1 M.L.J. 449.

- O. 21, R. 90-Applicability and scope-If exhaustive.

R. 90 of O. 21 which taken with the three subrules of R. 92 gives the general ground on which the executing Court, (and that Court alone is specifically empowered and required to set aside a sale) is confined to "the ground of a material irregularity or traud in publishing or conducting As regards material irregularities or fraud committed otherwise than in publishing or conducting an execution sale, traud would, generally speaking, make the sale voidable only, and if the question should arise in the conditions laid down in S. 47, C. P. Code, it would be under this section, and under this section alone, that the sale would be set aside. (Dhavle and Meredith, J.) BHANKUMAR CHAND v. LACHMIKANTA RAI. R. 507=199 I.C. 169=14 R.P. 557=A.I.R. 1941 Pat. 566.

—0.21, R. 90—Applicability—"Any person whose interests are affected by the sale"—Person claiming by title adverse to and paramouni to that of judgment-debtor—Right to apply.

Persons claiming by title adverse to and paramount to that of the judgment-debtor are not persons whose interests are affected by the sale within the meaning of O. 21, R. 90, C. P. Code, and such persons are not therefore entitled to maintain an application under O. 21. R. 90, to set aside the sale. The undivided share of the judgment-debtor in certain properties was attached in execution of a decree against him. After the attachment in pursuance of an agreement between the judgment-debtor and his co-sharer to refer the matter to arbitration, there was an award by which the properties were divided into three shares and some of the items which formed the subject of the attachment exclusively fell to the shares of the co-sharers of the judgment-debtor. Subsequently the execution sale took place and the co-sharers applied under O. 21, R. 90, C. P. Code, to set aside the sale in regard to the properties which fell exclusively to their shares.

Held, that the co-sharers were not in any way affected by the sale, which was only of the right, title and interest of the judgment-debtor, i.e., his undivided interest in certain items; if the purchaser wanted to realise the fruits of his purchase he would have to file a suit for partition and separate possession of the share purchased by him and it would then be open to the co-sharers to resist his claim and hence they were not in any way hurt by the execution sale. The sale so far as the co-sharers were concerned was a nullity and there was no question of setting it aside under O. 21, R. 90. (Venkataramana Rao, J.)

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14 R.M. 351=54 L.W. 95=1941 M.W.N. 663= A.I.R. 1941 Mad. 680=(1941) 2 M.L.J. 63.

O. 21, R. 90—Applicability—Application to set aside sate on ground of non-compliance with 5. 13, Binar Money-Lenders Act—Limitation. See Limitation Act. Art. 166. 23 Pat.L.T. 139.
O. 21, R. 90—Applicability—Application for resale under O. 21, R. 86—If falls under R. 90.

An application for setting aside a sale and for re-sale under O. 21, R. 86, C. P. Code, on the ground that the decree-holder purchaser has detaulted to pay into Court the surplus sale price after deducting the decree amount due to him, cannot be regarded as an application under O. 21, R. 90, C. P. Code. (Ilarris, C. J. and Fazl Ali, J.) MAHABIR PRASAD v. JUGAL KISHORE PRASAD. 195 I C. 837=14 K.P. 159=7 B.R. 975=22 Pat.L.T. 313=A.I.R. 1941 Pat. 447.

O. 21, R. 90—Applicability—Application to set aside sale on ground of want of jurisdiction—It falls under rule—Order—Second appeal See C.P. Code, S. 47 AND O. 21, R. 90. 22 Pat. L. T. 1018.

—— O. 21, R. 90—Applicability—Material irregularity—Sale without service of notice under O. 21, R. 22—Nullity.

The omission to issue or serve the notice contemplated by O. 21, R. 22, C. P. Code, is not a mere irregularity in publishing and conducting a sale falling under O. 21, R. 90. There can be no sale without such notice, and if a sale is held under such circumstances, it is a nullity being a case of no sale at all in the eye of law. A separate suit therefore lies to declare the sale void and ineffective. (Harries, C.J., and Fazi Ali, J.) DURGA SINGH v. SUGAMBAR SINGH. 194 I.C. 372 = 13 R.P. 708=7 B.R. 753=22 Pat.L.T. 520=1941 P.W.N. 529=A.I.R. 1941 Pat. 481.

O. 21, R. 90—Applicability—Objection as to saleability of property. Maroti v. Kisan Lal [See Q. D. 1930—'40 Vol I, Col. 1679.] I.L.R. (1941) Nag. 381.

— O. 21, R. 90—Applicability—Sale in execution of decree for arrears of rent under Madras Estates Land Act—Setting aside—Power of Revenue Court Suryanarayana v. Sobhanadri Apparao Bahadur. [see Q.D. 1936-'40 Vol. I. Col. 3300.] A.I.R. 1941 Mad. 72.

O.21, R. 90—Applicability—Void sale—If to be set aside. See LIMITATION ACT, ART. 166. A.I.R. 1941 Pat. 566.

Where an application under O. 21, R. 90, C. P. Code, is compromised, and the term is that if a certain sum is paid into Court within a certain time the sale would be set aside, it is proper to infer that time is not of the essence of the contract and that payment is to be made within a reasonable time. (Henderson, J.) RAKHAL CHANDRA v. ABINASH CHANDRA 49 C.W.N. 241.

O. 21, R. 90—Conduct of sale—Sufficiency of publication—Advertised day of sale, a holiday.

—Adjournment to next day—Paucity of bidders.

Where a sale was advertised to be held on a holiday but was adjourned to the next day and

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when it was held on that day there was only one bidder, it could not be considered that there was sufficient publication of the adjourned sale to satisfy the requirements of a properly advertised public auction. (Binney, FC.) GANGARAM v. Zabu Марнојі. 1943 N.L J. 69.

R. 90-Discretion of Court-Amount of deposit or amount for which security can be demanded—Extent of.

Under O. 21, R. 90, C. P. Code, the Court is given the option of taking one of three courses; either it may demand no security at all, or it may demand the deposit of money in Court, or it may call for security in some other form. In either of the two latter alternatives it is clear that the amount of the cash or the amount for which security can be called for must be one of two definite sums, viz., either the amount mentioned in the sale warrant or that realised by the sale. The third sub-section of the rule does not in any way modify or govern what is laid down in the second sub-section and the execution Court has no discretion to call for security for any amount it pleases. (King and Horzvill, II.) G. F. F. F. FOULKES v. SUPPAN CHETTIAR. 57 L.W. 477=1944 M.W.N. 536=A.I.R. 1945 Mad. 13= (1944) 2 M.L.J. 205.

-0. 21, R. 90 -- Duty of Court-Grant of relief to judgment debtor-Requirements of section satisfied.

A judgment-debtor has as much claim on the sym pathy and consideration of the Court as a decree-holder or an auction-purchaser, and if it is proved that his interests have materially suffered and that requirements of O. 21 R. 90, for setting aside sale of his properties in execution are satisfied a Court of law should not hesitate in granting him the relief asked for (setting aside the sale) even if his case as regards the technicalities of law hangs on the border line. Courts exist for doing justice between man and man and a rigid insistence on technicalities should not deter them from redressing the legitimate grievances of the persons aggrieved. (Din Mahomed, J.) LADLI DAS v. WAHID-UD-DIN. A.I.R. 1945 Lah, 196,

O. 21, R. 90—Failure to apply provisions of Madras Act IV of 1938 before sale under mortgage decree-If material irregularity vitiating sale. See Madras Agriculturists' Relief Act, S. 19. (1943) 1 M.L.J. 137.

-O. 21, R. 90—Inadequacy of price—If a ground for setting aside sale.

Mere inadequacy of price is not an adequate ground for setting aside a sale under R. 90 of O. 21, Material irregularity or fraud in publishing or conducting it must be disclosed and even then the Court has to be satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. (Sathe, S.M. and Ross, A.M.) RAM SARUP v. UMMATUL ZOHRA. 1943 A.W.R. (Rev.) 175=1943 R.D. 312.

-O. 21, Rr 90 and 84 (1)—Irregularity-Breach of rule 84 (1).

A breach of rule 84 (1) of O. 21, as to the deposit of a fourth of the sale price is only an irregularity for the purposes of R. 90 of the

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vitiate the sale in the absence of material loss to ary party (Saihe, S.M.) KATORI v. NATHU DEVI. 1943 A W R (Rev.) 5 (1)=1942 O.W.N. (B.R.) 800 (2)=1942 R.D. 982 (2)=1943 O.A. (Rev.) 5 (1).

——O. 21, R. 90—Limitation—Application presented beyond 30 days—Maintainability— Burden of proof-Allegation of knowledge of sale within 30 days of application—Undervaluation of property in sale Proclamation—Inference of fraud-Evidence of proper service of pro-cess-Presumption of fraud-If rebutted. See LIMITATION ACT, S. 18 AND ART. 166. 9 Cut.L T. 84.

-O. 21, R. 90-Material irregularity-Contravention of O. 21, R. 66 (c) - Omission to mention prior encumbrances-Sale, if to be set aside.

Though failure to mention prior mortgages in a sale proclamation constitutes a breach of O. 21 R. 66 (c) and is a material irregularity, it does not follow that substantial injury has resulted therefrom so as to necessitate the setting aside of a sale. Substantial injury has to be proved before the sale can be set aside. (Horwill, J.) Seetharamayya v. Sivaramakrishna Rao. 56 L.W. 605=1943 M.W.N. 650=216 I.C. 316=17 R.M. 221=A.I.R. 1944 Mad. 145=(1943) 2 M.L.J. 536.

-O. 21. Rr. 90 and 66 (2)-Material irregularity-Different items of property in different villages sold in execution-Sale proclamation Essentials-Proper procedure for sale.

It is absolutely essential that all the particulars set forth in R. 66 (2) of O. 21 C. P. Code should be supplied in relation to each property that was to be sold and the sale should be conducted at the spot in each village which is to be sold. (Din Mahmed, J.) LADLI DAS v. WAHID-UD-DIN. A.I.R. 1945 Lah. 196.

O. 21, R. 90 - Material irregularity - Failure to mention in sale proclamation revenue assessed on property-No separate revenue fixed on portion of estate sold. See C. P. CODE. O. 21, RR. 66 (2) (b) AND 90 (1945) 2 M.L.J. 259 (P.C.).

O. 21. R. 90-Material irregularity-Failure to state annual rent in sale proclamation —Failure to state date and time to which sale is adjourned. See C. P. Code, O. 21, Rr. 66 (2) (e) AND 90 AND C. P. CODE, O. 21, Rr. 69 (1) AND 90. 1942 O.A. 641.

O. 21, R. 90-Material irregularity-Non-compliance with O. 21, R. 60-What amount to-Sale not adjourned but continued from day to day by agreement of parties till date of hearing of appeal from order refusing stay of sale—Dis-missal of appeal and sale on date of dismissal— Legality-Fresh proclamation-Necessity.

An execution sale was proclaimed duly and fixed to be held on 8-7-1935. As no bid was forthcoming on that day, the sale was by order of court continued from day to day up to 29-7-1935 and on that day an order was made directing the sale to be continued till 5-8-1935. Meanwhile on 7-7-1935 the judgment debtor applied for stay of sale on the ground of his irregularity for the purposes of R. 90 of the insolvency but the application was dismissed on same order, and such an irregularity cannot 10—7—1935. On 2—8—1935, he filed an appeal

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and prayed for interim stay of sale pending disposal of his appeal. On 3-8-1935, an agreement was entered into between the advocates of the respective parties and it was endorsed on the petition for stay to the effect that the petition was not to be pressed and that the sale was to be continued from day to day till 12-8-1935, which was the date fixed for the hearing of the appeal. On 5-8-1935, the decree-holder's pleader lodged a memo, in the executing court reciting the agreement and paid the necessary fee for continuing the sale for one week from that date. No order was made by the executing court that day but on 8-8-19.5 it made an order that the sale be continued till 12-8-1935. On 12-8-35, the appeal was heard and dismissed, the sale was held and the property was sold at a price which was found to be the full value. The judgment-debtor applied to have the sale set aside on the ground that it was illegal for the sale to have taken place on 12-8-1935, when the latest day for closing the sale had been fixed to be 5-8-1935, and also on the ground that there had been no fresh proclamation of the sale for 12-8-1935.

Held, (1) that in view of the agreement of the parties' advocates and the order of the Court, there was neither material irregularity in the proceedings nor any illegality; (2) that the agreement come to on 3-8-1935 coupled with the order of the Court of 8-8-1935 effectively continued the sale to 12-8-35; (3) that the sale was never adjourned but was all along continued from day to day and therefore no fresh proclamation ever became necessary; (4) that no injury had resulted to the jndgment-debtor as the full value of the property had been realised by the sale. (Lord Goddard.) Venkataramanna Ayyar v. Natesa Pillai. 49 C.W. N. 25-1944 M. W.N. 676-79 C.L. J. 129-47 P.L.R. 156-(1944) 2 M.L.J. 352 (P.C.).

——O. 21, R. 90—Material irregularity—Omission to affix sale proclamation in Collector's office—Collector's office and Court situated in same compound. See C. P. CODE, O. 21, RR. 67 AND 90. (1945) 2 M.L.J 259 (P.C.).

Omission to specify hour of sale.

Under O. 21, R. 69 C. P. Code, it is incumbent upon the Court to specify both the day and the hour of sale. Where the order of Court was that the sale would be held on a certain date after a miscellaneous case started by the judgment-debtor was disposed of, it is a material irregularity. (Mukheriea and Sharpe, JJ.) SHILA PAL v. COMILLA BANKING CORPORATION, LTD. 49 C.W.N. 159=79 C.L.J. 168.

s—0. 21, R. 90—Material irregularity—Property sold at under value—Failure of Court and decree-holder to discharge duty under 0. 21, R. 66—Effect on sale—Setting aside—Dilatory conduct of judgment-debtor—If bar.

O. 21, R. 66, C. P. Code, imposes upon the Court the duty of causing a proclamation of the intended sale to be made and the proclamation must specify, among other things, any encumbrance to which the property is subject. The Court ought, as far as possible, to bring its mind to bear apon the contents of the proclamation and not act blindly on information supplied by the parties. Where material is readily available to check such information the Court ought to avail itself

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of such material, and when it fails to do so, it amounts to carelessness on its part. Apart from the duty cast on the Court, the applicant for sale or somebody on his behalf, has to file a verified statement containing the matters required by R. 66 (2) to be specified in the proclamation which are either known to, or could be ascertained by him. Where a Court sale takes place at a serious under value occasioned by the failure on the part of the Court and the decree-holder to discharge their obligations under O. 21, R. 66, of C. P. Code, in regard to the fixing of the proper value of the property to be sold, after allowing for the correct amount due under a prior charge, the judgment-debtor, sustains substantial injury thereby, and the case falls within the language of O. 21, R. 90, C. P. Code, and the sale has to be set aside, if the judgment-debtor, however dilatory or unsatisfactory his conduct may have been, has not otherwise debarred himself of his right to have it set aside. (Sir John Beaumont.) MARUDANAYAGAM PILLAI v. MANICKAVASAKAM CHETTIAR. 72 I.A. 104 = I L R. (1945) Mad. 601 = 47 Bom. L R. 617 =1945 A.L.J. 276=80 C.L.J. 28=26 P L.T. 194=49 C.W.N. 292=58 L.W. 156=1945 M.W.N. 213= A.I.R. 1945 P.C. 67=(1945) 1 M.L.J. 229 (P.O.)

—O. 21, R. 90 -Material irregularity-Sale in contravention of O 21. R. 69 (2), as amended in Madras—If nullity—Setting aside—Grounds, See C. P. CODF. O 21. R. 69 (2). (MADRAS AMENDMENT). (1943) 2 M.L.J. 295.

of property in hands of Receiver—Leave of Court not obtained—Sale, if void. See C. P. CODE, O. 40, R. 1. (1944) 2 M.L. J. 205.

independent properties grossly undervalued and put up to sale in one lot—Validity of sale.

Where three independent properties were grossly undervalued and put up to sale in one lot there is a material irregularity vitiating the sale (Das. J.) GOUR CHAND MALLIK v. PRADYUMNA KUMAR MALLIK, I.L.R. (1943) 2 Cal. 485=A.I. R. 1945 Cal. 61.

Mere inadequacy of price is not a valid ground for setting aside a sale under R. 90 of O. 21. There must be proof of material irregularity or fraud and even then the Court has to be satisfied that the applicant for setting aside the sale has sustained substantial injury by reason of the irregularity or fraud. (Dible, J.M.) SAIDULLAH V. RAM PRAKASH. 1943 A.W.R. (Rev.) 149 (2)=1943 R.D. 348 (1).

— O. 21, R. 90—Omission to mention Khudkasht land in sale proclamation—Irregularity— Objection regarding this overruled by Collector and appellate Court—Revision.

The omission to state in the sale proclamation the khudkusht land which was mentioned in the C form and which was included in the sale is certainly an irregularity, but it cannot be held that there was misuse of jurisdiction either by the Collector or by the appellate Court in overruling the objection regarding this irregularity to call for interference in revision. (Binney, F.C.) MANIKRAO v. SHAKUNTALABAI. 1943 N.L.J. 185.

g. P. GODE (1908), O. 21, R. 90.

Although an order passed on a compromise in a proceeding under O. 21, R. 90, C. P. Code, is wrong in that it is not exactly in terms thereof, it cannot be set aside except by proper proceeding taken by the parties. (Rowland and Chatterji, J.) SRI NARAYAN SINGH v. POSAN SINGH, 199 I.C. 465=14 R.P. 580=23 Pat.L.T. 602=8 B.R. 567=A.I R. 1942 Pat. 344.

——0.21, R 90—Parties—Application to set aside sale of raiyati jote held in execution of money decree—Landlord, if necessary party—Sylhet Tenancy Act.

There is no provision in the C. P. Code or the Sylhet Tenancy Act requiring the landlord to be made a party to an application under O. 21, R. 90, C. P. Code, to set aside a sale of a raiyati jote held in execution of a money decree. (Raxburgh and Blank, IJ.) BIR BIKRAM KISHORE MANIKYA v. SUKHAMAY GHOSH. I L.R. (1944) 1 Cal. 485=218 I.C. 478=18 R.C. 46=A.I.R. 1945 Cal. 49.

-0. 21, R. 90—"Person whose interests are affected by the sale"—Interim receiver appointed in insolvency after sale but before confirmation thereof—Locus standito apply to set aside sale.

A person applying to set aside a sale under O. 21, R. 90, C.P.Code, must possess an interest which can be said to have been affected at the date of the sale and not by reason of any subsequent event or act. "Sale" in O. 21, R. 90 refers to the auction sale and not to its confirmation by Court. An interim receiver in insolvency appointed after an execution sale but before its confirmation is not a person whose interests are affected by the sale (as representing the creditors) and has therefore no locus standi to apply under O. 21, R. 90 C.P.Code. (Krishnaswami Ayyangar and Kunhi Raman, J.). OFFICIAL RECEIVER, RAMNAD v. VEERAPPA CHETTIAR. I.L.R. (1943) Mad. 577= 208 I.O. 163=16 R.M. 186=56 L.W. 353=(1942) M. W.N. 766=A.I.R. 1943 Mad. 199=(1943) 1 M. L.J. 449.

Before an applicant under O. 21, R. 90, can succeed he must show that (1) there was a material irregularity in publishing or conducting the sale, and (2) this material irregulity resulted in substantial injury to him. In other words the material irregularity must be proved to be the cause and the substantial injury the effect thereof. (Thomas, C. J. and Ghulam. Hasan, J.) S.L. SWING v. BRIJ GOPAL. 18 Luck. 547=1942 A.W. R. (O.C.) 363=205 I.C. 58=15 R.O. 383=1942 O. A. 641=1943 O.W.N. 15=A.I.R. 1943 Oudh 204.

0.21, Rr. 90 and 92—Right of rightful owner to apply under R, 90—Bar of suft on dismissal of such application.

The provisions of O. 21, R. 90 are sufficiently wide to permit of an application being made by the rightful owner of the property sold in execution on the allegation that the publication of the sale was materially irregular. It is a material irregularity in the publishing of a sale and one also causing substantial injury if the name of the person with the true title to the property is wrongly given. When such an application is made and dismissed, no suit will lie according fo R. 92, O. 21. (Davis.) BENI GOPAL v. MADARI RAM. 1942 A N.L.J. 9.

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chaser. 0. 21, B. 90-Right to apply-Auction purchaser.

The auction-purchaser can make an application under O. 21, R. 90, C. P. Code for setting aside a sale on the ground that there has been fraud or material irregularity in publishing or conducting it. (Almond, J.C. and Mir Ahmad, J.) JHANGI RAM v. RAM SARAN. 216 I.C. 346=17 R.Pesh. 15=A.I.B. 1944 Pesh. 42.

Where there is nothing to show that a judgment-debtor had even after transferring his ownership to the vendee any interests which were affected by the sale, he is not entitled to apply under O. 21, R. 90 to set aside an execution sale as his right to so apply has passed to the vendee. (Hamilton, J.) RAM BHAROSE v. TEK CHAND. 1943 A.L.W. 237.

——0. 21, B. 90—Right to apply—Sale of melwaram interest—Application by owner of kudiwaram interest to set aside—Maintainability.

The holder of a Kudivaram interest in land has no locus standi to apply under O. 21, R. 90, C. P. Code, to set aside a sale whether it is of the melwaram interest only. (Abdur Rahman, J.) VEERABHADRA PILLAI V. O.A. NARAVANASWAMI IYER. 196 I C. 98=14 R. M. 251=1941 M.W N. 483=A.I.R. 1941 Mad. 653=(1941) 1 M.L.J. 831.

—0.21, Rr. 90 and 92—Saleability of property

—Objection as to—Judgment-debtor if can raise after
sale.

If property is attached in execution proceedings and if the judgment-debtor has objections to raise on the ground that the property is not liable to attachment or sale he is not entitled to wait until the sale has taken place and then have the sale set aside on the ground that the Court has no jurisdiction to sell the property. (Tek Chand, Bhide and Beckett, J.). GAURI v. UDE. I.L.E. (1942) Lah. 559=203 I.C. 166=15 E.L. 174=44 P.L.E. 302=A.I.B. 1942 Lah. 153 (F.B.)

—0.21, R. 90—Sale notified to be held during monthly sales on certain date—Sale held during monthly sales but on later date—No order of adjournment recorded—Validity of sale.

A sale was notified to be held in the course of the monthly sales on the 8th of a certain month. The sales were not finished on that date. No formal order for adjournment was then made. The property however was put up to sale the next day. As there was not sufficient bid, a formal order for an adjournment of the sale to the next day, (i.e.) 10th was made and the sale was held on that day:

Held, that the failure to record a formal order of adjournment from the 8th to the 9th was nothing more than an irregularity and the sale was not a nullity. (Henderson, J.) ABDUL SAMAD r. ASLAM MUNSH. 48 C.W N 542=A I.R. 1944 Cal. 381.

O. 21, B. 90—Scope—Sale of interest of Hindu co-parcener in joint family property—Want of specification of interest—If invalidates proclamation or sale, See C.P. CODE, S. 60 (m). (1941) 2 M.L.J. 550.

A Court has jurisdiction in an application under 21, R. 90, to consider the question whether the sought to be set aside was without jurisdiction R. 90 makes no reference to objections jurisdiction, but if the Court had, ab initi

C. P. CODE (1908), O. 21, B. 90.

tion to order the sale, it cannot ignore that fact if its attention is drawn to it; and if the Court knows that the sale was without jurisdiction, it cannot order its confirmation. (Horwill, J.) SEETHARAMAYYA v SIVA-RAMAKRISHNA RAO. 216 I.C. 316=17 R.M. 221=56 L W. 605=1943 M W.N. 650=A.I.R. 1944 Mad. 145=(1943) 2 M. L. J. 536.

0. 21, R. 90-Se: nd appeal-Order dismissing application.

The decision of the execution judge dismissing an application under O. 21, R 90 C P.Code amounts to an appealable order and there is only one appeal from such order and there is no provision of law allowing a further appeal from it. (Almond, J.C. and Mir Almond, J.) THANGI RAM 7. RAM SARAM. 216 I.C. 346=17 R. Pesh. 15=A.I.R. 1944 Pesh. 42.

-0.21, B. 90-Security-Order for after issue of notice to respondent-Jurisdiction of Court.

In an application to set aside a sale under O. 21, R. 90, C.P.Code, the Court can demand security only before admitting the application and not afterwards. The issue of notice to the respondent must be held to be an admission of the application, and an order for security after that stage is without jurisdiction. There fore the Court is not justified in dismissing the applica tion for failure to comply with the order for security. (Pandrang Row and King, 11.) CHIDAMBARAM PANDARAM v. LAKSHMINARAYANA CHETTIAR. 53 L.W. 719=1941 M.W N. 624 = A.I.R. 1941 Mad. 652 =(1941) 2 M.L.J. 109.

-O. 21. R. 90 (as amended by Patna High Court) - Setting aside sale-Grounds - Objection under S. 16 of Bihar Money-Lenders Act not taken before sale -Whether can be allowed subsequently.

Where before the conclusion of a sale the Bihar Money-Lenders Act of 1938 had come into force but no application was made to the Court under Ss. 16 and 17 of that Act and no objection was taken to the sale proceeding on the old proclamation of sale, an application under O. 21, R. 90, C.P. Code, cannot be admitted on the ground that the Court did not proceed with the sale as directed by Ss. 16 and 17 of the Bihar Act, as such a ground could have been put forward before the sale. When it is not open to the judgment-debtor to raise the matter in the Court below he cannot raise it in appeal before the High Court. (Harries, C.J. and Manchar Lall, J.) CHANDRA SEKHAR DHAR MISRA v. BHAGWAN DAS 193 I.C. 124-7 B.B. 580 = 13 R.P. 546 = A.I.R. 1941 Pat. 440.

O. 21, R. 90-Setting aside sale-Right of judgment-debtor.

In order to entitle the judgment-debtor to have the sale set aside, it has to be established that there has been some illegality or irregularity in the publication and conduct of the sale which has resulted in the property being sold at an inadequte price to the prejudice of the judgment-debtor. (Harries, C.J. and Manchar Lall. J.) CHANDRA SFKHAR DHAR MISRA " BHAGWAN DAS. 193 I.C. 124=7 B.R. 580=13 R.P. 546=A.J.R. 1941 Pat. 440.

-O. 21, R. 90-Setting aside sale-Sale of properties in separate lots-Irregularity extending to all lots—Sale of only some of them resulting in infury to fudgment-debtor—Entire sale, if may be set aside.

When properties are sold separately in separate lots, the sale of each lot is a separate sale. In such cases,

C. P. CODE (1908), O. 21, R. 90.

and set aside as regards the rest. Even if the irregularity extends to the sale of all the plots, the sale of only those lots which has resulted in injury to the judgment debtor can be set aside. (Mukherjea and Sharpe, JJ.) SHILA PALT COMILLA BANKING CORPORATION, LTD. 49 C.W N. 159 = 79 C.L.J. 168.

O. 21 R. 90-"Whose interests are affected by the sale'-Meaning of-Insolvent judgment debtor-Right of to apply to set aside sale. MANTHIRI GOUN-DAN & ARUNACHALAM GOUNDAN. [See Q.D. 1936 -- '40 Vol. I Col. 1693.] 194 I.C. 795=14 R.M.

-O. 21, R. 90, proviso-Proof of substantial injury by reason of material irregularity-Direct evi. dence-If necessary.

Under the proviso to R. 90 of O. 21, C. P. Code, as it now stands, what is required is that the Court should be satisfied that the applicant has suffered substantial injury by reason of material irregularity or fraud, and if the Court is so satisfied from the facts proved, then the applicant may be said to have discharged his burden. This burden may be discharged not only by direct evidence connecting the material irregularity or fraud with the substantial injury, but also by circumstantial evidence, that is, evidence from which a reasonable inference may be drawn that the substantial injury was the result of the material irregularity or fraud. (Sir Madhavan Nair.) NAGANNA NAIDU v. VENKATA-RAVULU NAIDU. 58 L W. 451 = 1945 P.W.N 377= 1945 M.W N. 620=19 C.W.N. 820=A.I R. 1945 P.C. 178=(1945) 2 M.L.J. 259 (P.C.).

Order for security for costs—"Admitting" of application -Issue of notice to decree-holder.

Under the first proviso to O. 21, R. 90, C. P. Code the Court may call upon the judgment-debtor applicant to furnish security for costs before 'admitting' his application. And it is only when notice of the application is ordered to the decree-holder that the petition can be said to be admitted by the Court. The fact that an application is numbered does not mean that it is admitted at that stage. (Mockett and Kunhi Raman, JJ.) SANKARAM PII I M. ANANTANARAYANA AIYAR. I L R. (1944) Mad. 815=217 T C. 313=18 R.M. 19=57 L.W. 73 (1)=1944 M.W.N. 135=A.I.R. 1944 Mad. 313=(1944) 1 M L.J. 119.

-O. 21, R. 90 (1)-Proviso (added by Nagpur High Court)-If ultra vires.

The proviso inserted by the Nagpur High Court after the proviso to sub-R (1) of R. 90, O. 21, C.P. Code, is within the rule-making powers and is intra vires. It does not take away any substantive right of a party but only regulates the procedure as regards the time when certain objections may be raised. It is not inconsistent with any section of the Code or with any other law. (Grille, C.J. and Sen, J.) TRIMBAK BHIKAJI v. DHONDAPPA. I.L.R. (1944) Nag. 561=1944 N. L.J. 316 = A.I.R. 1945 Nag. 83.

-O. 21, R. 90 (as amended in Madras) Proviso-Power of Court-Order for security to be furnished by specified date-Tender of draft security bond-Sufficient notice to respondent-Objection by latter as to adequacy of security offered-Security tested and found inadequate—Dismissal of application for failure to furnish security—If justified—Issue of notice—If amounts to admission of application.

In an application for setting aside a sale under 0.21, the sale may be upheld with regard to some of the lot . R. 90, C.P. Code, the applicant was ordered to furnish

#### C. P. CODE (1908), O. 21, R. .90 (1).

security under the proviso to R. 90 and he was ordered to furnish the security by a certain date. On that date he applicant tendered a draft security bond and without testing the security or considering its adequacy, the Court ordered notice to the respondent who appeared and took the objection that the property offered as security was not sufficient. The Court thereupon ordered the security to be tested. Since it was found to be wholly inadequate, the Court dismissed the application without condidering it on the merits on the ground that the applicant had failed to furnish security. On appeal from the dismissal the applicant (appellant) contended that by issuing the notice to the respondents the Court had admitted the application and had thereby precluded itself from dismissing it except after consideration on the merits.

Held, that there was no principle of law by which the Court should be deemed to have done what it consciously did not intend to do The security having been called for before issue of notice to the respondent, the subsequent issue of notice before the secueity was tested should be deemed to be provisional and in issuing the notice in the circumstances, the Court did not intend to deprive itself of its power of deciding whether the security to be eventually furnished was adequate on not and when it was found to be inadequate the Court was entitled under O. 21, R. 90 as now amended, to dismiss the application without any consideration of the merits. (King and Happell, J.) VENKATALINGAMA NAVANIM V. VENKATA NARASIMHA NAYANIM 202 IC 294=15 R M 476=55 L.W. 245=1942 M. W N 250=A.I.R. 1942 Mad. 509=(1942) 1 M.L.J. 403.

——0. 21. R. 90 (1) Proviso (Oudh)—Solv of usufractuary mantgages rights in imm weakle property—Nature of rights sold—Objections in regard to sale proclimation—Maintainability after sale

Where it is not shown that certain usufrctuary mortgages rights in immoveable property are such that the debt could not be realised except from the urufruct of the property, such rights are moveable property and when once there has been a sale of such rights by Court, objections in regard to the sale proclamation cannot thereafter be entertained in view of the proviso added by the Oudh Chief Court to R 90(1) of O. 21. (Sathe S.M) DAULAT RAM 7. RAM PVARI. 1943 R.D. 294 (2)=1943 A.W R (Rev.) 235.

—0. 21, R. 90 (Madras Amendment of 1937) Proviso 1—Construction and scope—If ultra vires—Order for security before admission of application—Opportunity to applicant to show cause before order—Necessity, SEETARAM ANJANEVALUTY, RAMMAVVA. [102 O.D. 1936—40 Vol. I Col. 3300] I.L.R. (1941) Mad. 203=192 I.C. 448=13 R.M. 554 (2)=A.I.R. 1941 Mad. 28.

—0.21, R. 91—Scope—Power of Court—Sale— Subsequent loss or deterioration of property before confirmation—If ground for seting aside sale—Inherent powers.

If there is any loss or deterioration to the property sold in Court auction between the date of sale and the date of its confirmation, such loss or deterioration must be borne by the auction purchaser. The Court has no jurisdiction to set aside an execution sale either under O. 21, R. 91, C. P. Code, or in exercise of its inherent powers under S. 151, on the ground of loss or deterioration of the property sold between the dates of sale and confirmation. (Wassoodew. J.) GORDHANDAS RANCH-HODDAS v. ISHVARBAI CHHANULAL. I.L.R. (1942)

C. P. CODE (1908), O. 21, R. 92 (2).

Bom. 704=15 R.B 247=203 I.C. 535=44 Bom. L.R. 638=A.I.R. 1942 Bom. 306.

---- 0 21, R. 92-Order confirming sale-Sale certificate-Relative value.

The order of confirmation of a sale is prima facte evidence of the title to the property of the auction-purchaser and is sufficient to pass such title to him, of which the certificate, if afterwards obtained by him would merely be evidence that the property had so passed. (Ismail, J.) JWALA SUNDAR LAL v. HARNARAIN MISIR. 1944 A.L.W. 301.

O 21, R. 92-Order confirming sale without disposing of application under R. 90-Appeal-Revision. S. e C. P. CODE. O. 43, R. 1 (j). 45 C.W.N. 773.

-0. 21. B. 92—Scope—Judgment-debtor having no interest in part of the property sold—Suit to recover proportionate share of price—Right of purchaser.

There is no warranty of title in a Court sale. If the judgment-debtor has no interest in the property sold the sale can be set aside, but the C. P. Code says that if the judgment-debtor has some interest in the property sold, the sale must stand. No suit will lie for recovery by the purchaser of a part of the sale price on the ground that the judgment-debtor had no interest in a portion of the property. (Leach, C. J. and Lakthmana R10, J.) NARASINGI VANNECHAND v. NARASAYYA. 1945 M W N 191 = 58 L W. 148 = A.I.R. 1945 Mad. 363 = (1945) 1 M.L.J 312.

— O 21, R. 92 - Scope—Mandatory character of—Court—If has discretion or option.

O 21, R. 92 allows no discretion to the Court in the matter of setting aside a sale. If the conditions mentioned in R. 89 are compiled with by the applicant, the Court is bound to set aside the sale. (Chagla, I.) Official Assigner of Bombay v. Jehangir Sorapji Daial. 210 I.C 159=16 R B. 177=45 Bom.L.R. 683=A.I.R. 1943 Bom. 336.

— O 21, R 92—Scope—Sale in execution— Purchase by stranger—Subsequent cancellation of decree in appeal—Power of executing Court to confirm sale.

There is no provision in the C. P. Code for the cancellation of a sale in execution merely because of the cancellation of the decree in execution of which it has been held, and though it he in accordance with justice that a person who has succeeded in appeal should get from the opposite party such restitution as is possible, there is no principle of justice whereby an innocent third party who has purchased in a valid auction held by the Court should be deprived of his property merely because the decree under which the sale was held has been cancelled in appeal. Consequent'y the executing Court has power to confirm the sale notwithstanding that on the date of the confirmation the decree had been set aside on appeal and had ceased to have a judicial existence. (Wadsworth, J) AMBUJAMMAL v. THANGA-VFLU CHETTIAR. 199 I C 895=14 R M 654=53 L W. 167=1941 M W.N. 299=A.I.R. 1941 Mad. 399=(1941) 1 M L.J. 193.

——O 21, R. 92(2)—Delay in depositing due to Courts orders and not to judgment-debtor's laches—Sale, if to be set aside.

Where the delay in depositing the money within the time allowed was not due to any laches of the judgment-debtor but was entirely due to the C. P. CODE (1908), O. 21, R. 92 (2).

orders passed by the Tahsildar, the sale should be set aide. (Sothe, S. M. and Dible, J. M) GOBARDHAN v. S DEPUTY SANKAR. 1944 R.D. 509(1)=1944 A.W.R. (Rev.) 257(2).

—O. 21, R. 92 (2)—Order setting aside sale without notice to person affected thereby—Validity.

An order setting a sale under O. 21, R. 92 (2), without notice to a person affected thereby, is not a nullity but requires to be set aside by an application made for the purpose. A petition of objection containing a prayer that the order may be set aside may be treated as such an application, (Mukherjea and Pal, JI.) Mohesh Chandra Land Reclamation and Agricultural Improvement Co., Ltd. v. Darapali Molla. 47 C.W.N. 539.

—O. 21, R. 92(2), proviso—"Persons affected thereby"—Meaning of—Landlord for whom transfer fees had been deposited under S. 26-E, B. T. Act—If entitled to notice.

In order to be affected by an order setting aside a sale, a person need not take any interest in the properly sold. Any valuable interest arising from the sale and liable to be defeated by the setting aside of that sale will make him a person affected by that order within the meaning of the proviso to R. 92 (2) of O. 21. Consequently, a landlord for whom trasnfer fees had been deposited under S. 26-E. B. T. Act; is a person entitled to a notice under the above proviso, when an application for setting aside a sale under O. 21, R. 90, is made after confirmation of the sale. The fact that the landlord's fees were not paid to him when such application was made, is immaterial. (Mukherjea and Pal, JJ.) Mohesh Chandra Land Reclamation and Agricultural Improvement Co., Ltd. v. Darapali Molla. 47 C.W.N. 539.

The bar of a suit under O. 21, R. 92 (3) does not require that the application on which the order is made should have been heard on the merits and disallowed. The reason for the disallowance of the application is immaterial. Even a dismissal on the ground of limitation would attract the bar under O. 21, R. 92 (3). (Lokur, J.) ABDUL RAHIM v. LINGAPPA VATJAPPA. 213 I.C. 146=17 R.B. 21=45 Bom.L.R. 534=A.I.R. 1943 Bom. 273.

# --- O. 21 R. 92 (3)—Bar of suit.

A suit to set aside 'an execution sale on the ground of material irregularity is plainly excluded by the provisions of O. 21, R. 92 (3), C. P. Code. (Davies.) GHULAM DASTGIR v. VILLAYT HUSSAIN. 1941 A.M.L.J. 81.

#### ——O. 21, R. 93—Discretion to award interest.

The executing Court has full discretion under O. 21, R. 93, C. P. Code, to order interest or refrain from doing so. (King and Happell, JJ.) MALLIKARJANA RAO D. OFFICIAL RECEIVER KISTNA. I.L.R. (1942) Mad. 691=201 I.C. 693=15 R.M. 376=55 L.W. 117=1942 M.W.N. 146=A.I.R. 1942 Mad. 423=(1942) 1 M.L.J. 238.

O. 21, R. 93—Judgment-debtor's absence of

C. P. CODE (1908), O. 21, Rr. 95 and 97.

The rights of the auction purchaser in a sale in execution to get a sale set a side are confined within the limits of O. 21, R. 93. He has no right to maintain a separate suit for failure of consideration on being ousted by paramount title. (Almond. J. C. and Mir Ahmad, J.) MIRZA JAN v. GHULAM RAZA. 194 I.C. 565=14 R. Pesh. 1=A-I.R. 1941 Pesh. 41.

—O. 21, R. 93—Limitation — Starting point—Auction purchaser — Application by, for refund of poundage and interest—Starting point of limitation—Original order setting aside sale or appellate order. See LIMITATION ACT, ARTS. 181 AND 182. (1941) 2 M.L.J 121.

O. 21, R. 94—Mistake in the matter of the number of the house sold—Parties not misled—Agitation after eleven years—Relief cannot be given, Kalvan Das v. Brij Kishore. [see Q.D. 1936-40 Vol. I Col. 3301] 193 I.C. 495—13 R.A. 412=A,I.R. 1941 All. 9.

—O. 21, R. 93—Scope—Exhaustive character— Power of Court to award interest under S. 151—Inherent powers.

R. 93 of O. 21, C. P. Code, deals with the whole question of what is to happen to the money which has been deposited by an auction-purchaser when a sale has been set aside, and the fact that R. 93 permits the Court to make a particular order against a party only if that party has received the money is exhaustive and means that no order can be made against him in any other circumstances. S. 151, C. P. Code, cannot be invoked to award interest as against a decree-holder who has not drawn the amount out of Court. (King. J.) GANGARAJUT. VENKATARAJALU NAIDU. 205 I. C. 557 = 15 R.M. 892 = 1942 M. W. N. 676=55 L.W. 811=A.I.R. 1943 Mad. 235=(1942) 2 M.L. J. 716.

——O. 21, R. 93 (as amended in Madras) Proviso—Applicability—Sale void ab initio—Failure to furnish security in time—Power of Court to dismin application.

If an execution sale is void from its 'very inception, the judgment debtor is entitled to have it set aside under S. 47, C. P. Code, irrespective of whether he furnishes security or not under O. 21, R. 90, C. P. Code. In such a case the failure to furnish security will not entail dismissal of the application to set aside the sale. (King, and Happell, J/) VENKATALIMGAMA NAVANIM v. VENKATA NARASIMHA NAVANIM. 202 I.C. 294=15 R.M. 476=55 L.W. 245=1942 M.W.N. 250=A.I.R. 1942 Mad. 509=(1942) 1 M.L.J. 403.

O. 21, R. 94-Sale certificate - Value of-

A sale certificate is not conclusive but affords only prima facte evidence of title. It can be shown that it relates to property which was not sold. (Rose, J.) DAGDULAL v. RAMESHWAR. I.L.R. (1945) Nag. 296—1944 N.L.J. 380—A.I.R. 1944 Nag. 305.

—O. 21, R. 95 and S. 47—Bar of suit—Suit for possession by landlord decree-holder auction-purchaser—Inclusion of claim for mesne profits—Effect of. Su. C. P. CODE. S. 47 AND O. 21, R. 95. 77 C.L.J. 395.

— O. 21, Rr.. 95 and 97—Right to apply under— Limitation—Failure to apply under R. 97, if can affect period of limitation to apply under R. 95.

R. 97 of O. 21, C. P. Code, merely gives the auctionpurchaser the right to complain to the Court of the resistance offered to him. If he does so, he must do so within 30 days from the time of such resistance under C. P. CODE (1908), O. 21, R. 97.

Art, 167, Limitation Act; but if he fails to so apply, that does not take away his right to apply again under R. 95 for delivery of the property, in which case he must apply within three years of the date of sale becoming absolute, under Art. 181. Art 167 cannot take away the right to apply under R. 95 of O. 21, C. P. Code. (Pollock, J.) GANPAT SINGH v. RAMGOPAL. IL R. (1942) Nag. 633—198 I.C. 284—14 R.N. 209—1941 N.L. J. 494—A.I.R. 1941 Nag. 322.

——O. 21, R. 97—Applicability — Conditions— Prior fulfilment of R. 95—If condition precedent— Private conveyance by judgment-debtor—Obstruction— Application by decree-holder for removal—Competency.

O. 21, R. 97, C. P. Code, only applies when property has been sold by Court in execution proceedings and the requirements of R. 97 of O. 21 have been complied with or fulfilled. In a case where there has been no sale certificate and no order for delivery of possession an application under O. 21, R. 97, is incompetent. Rr. 95 and 97 of O. 21 must be read in conjunction. In the case of a conveyance by private agreement between the decree-holder and judgment-debtor, if there is obstruction, an application under R. 97 will not lie. (Leach, C. J. and Byers, J.) NILADRI RAO v. VENKATARAMA IYER I.L.R. (1942) Mad. 749=202 I.C. 73 = 15 R.M. 431=1942 M W. N. 358=55 L. W. 277 = A.I.R. 1942 Mad 505=(1942) 1 M.L.J. 538.

---- O. 21, Rr. 97 to 99 -- Application under-Court's duty to hold inquiry.

The execution Judge on an application under O. 21, R. 97 C. P. Code should make an inquiry before he comes to the conclusion that action should be taken or otherwise. He should not accept the word of the persons in possession and the suggestion of the revenue authorities that the persons were entered in the Khasra Girdwaris as persons in occupation and dismiss the application. (Mir Ahmad, J.) SHERPIL KHAN v. KHANZAI KHAN. 208 I. C. 454=16 R. Pesh. 25=A.I.R. 1943 Pesh. 59.

Where though there was resistance to possession, the decree-holder did not apply under O. 21, R. 97 but on a second resistance to his second attempt to obtain possession he files an application under O. 21, R. 97, time for such an application does not run from the first resistance but from the resistance made upon the second application for possession. (Yorke, 1.) SATIAWATI v. KANHAIYA LAL. 1943 A.L.W. 282.

——O. 21, Rr. 97 and 103—Dismissal of application under R. 97 of O. 21—Appealability—Scope of R. 103 of O. 21. BAHADUR KHAN v. BARI TALA. [160 Q. D. 1936-40 Vol. I, Col. 3301.] 192 I.C. 709 = 13 R.A. 358.

— O. 21, R. 97—Limitation — Auction purchaser—Application for delivery—Obstruction by judgment debtor—Petition struck off without delivery—Subsequent application—If fresh one or continuation of first—Default—What amounts to.

Where there has been a default on the part of an auction-purchaser in the prosecution of his application for delivery of the property purchased by him at an execution sale on account of some fault on his part, an order dismissing his application is a final order disposing of his application. But if his petition is merely closed or struck off on the ground of non-delivery on account of obstruction by the judgment-debtor, then the application for delivery cannot be regarded as having been disposed of finally, but must be deemed to be still pending and a subsequent application by him for deli-

C. P. CODE (1908), O. 21, Br. 100 and 103.

very will be a continuation of the earlier application only and not a fresh application. Failure to apply for removal of obstruction is not a default of the auction-purchaser, which would necessitate the dismissal of his application for delivery ordinarily. A decree holder is not bound to apply for removal of obstruction under O. 21, R. 97 and it cannot be said that there has been default on the part of the decree-holder because he failed to apply for removal of obstruction under O. 21, R. 97 (Horwi'l. J.) KOTAYVA v. NARAYANA. 214 I.C. 304=17 R.M. 135=1943 M.W.N. 828=A.I.R. 1944 Mad. 60=(1943) 2 M.L.J. 450.

— O. 21, R. 98 (as amended in Peshawar)— Obstruction not at instigation or on behalf of fudgmentdebtor—Remedy of decree-holder.

O. 21, R. 98 C. P. Code, is clear that the persons who resist the delivery of possession should be obstructing either at the instigation of the judgment-debtor or on his behalf, in order that the Court should forcibly put the decree-holder in possession of the property under this rule. It follows, that if the obstruction is not at the instigation or on behalf of the judgment-debtor the decree-holder has to file a suit for possession and cannot be given any relief under O. 21, R. 98 C. P. Code. (Mir Ahmad, J.) MT. PIARI v. ATTA MAHOMED, 210 I.C. 8 = A.I.R. 1943 Pesh. 85.

——O. 21, R. 98—Warrant issued instead of summens—On appearance of obstructor, imprisonment ordered without validing for further obstruction—Legality.

Where instead of issuing a summons as required by R. 97 of O. 21 C. P. Code, the executing Judge issues a warrant of arrest and when the obstructor was before him and the Court had come to the conclusion that the obstruction was unwarranted, he immediately orders his imprisonment without waiting to see if the execution of a further warrant were again resisted, the order can be set aside. (Almond, J. C.) MAHOMED YUSAF v. MASAILI, 207 I.C. 607=16 R. Pesh. 16=A.I.R. 1943 Pesh. 58.

O. 21, R. 100—Applicability to case of delivery of symbolical possession.

R. 100 of O. 21 C. P. Code has no application to a case where symbolic possession is given to decree holder. (Roberts, C.J. and Dunkley, J.) MAAYE TIN v. ELLERMAN'S ARRACAN RICE AND TRADING CO., I.TD. 197 I.C. 777=14 R.R. 150=A.I.R. 1941 Rang. 298.

——O. 21, R. 100—Application under—Maintain-ability—Difference between R. 100 and S. 108 (10) of Oudh Rent Act. See OUDH RENT ACT. S. 108 (10) AND C. P. CODE, O. 21 R. 100. 1941 R.D. 263.

— 0.21, Br. 100 and 103—Who can apply under —Order on application by auction purchaser of judgment-dcb'on's property prior to sale in execution of mortgage decree—Effect.

In order to make an application under R. 100 of O. 21, it is essential that the applicant must be a person other than the judgment-debtor. A person who has bought in Court auction the judgment-debtor's property in execution of a money decree when a suit on foot of a mortgage over that property is pending is not entitled to apply under O. 21, R. 100. When the mortgage decree is executed and the property is bought by the decree-holder himself and possession also is obtained by him, he is only, so far as the mortgage decree-holder-purchaser is concerned the representative of the judgment-debtor and any order passed on such an application would be without jurisdiction and cannot bo pleaded to

C. P. CODE (1908), O. 21, R. 103.

be conclusive under R. 103 of O. 21. (Ighal Ahmad, C.J. and Dar. J.) JWALA PRASAD v. SYED AIN. 1943 A L W. 510.

O. 21, R. 103—Applicability—Sale in execution of charge decree—Stranger purchaser obstructed in taking possession by private vendee from judgment debtor—Application for removal of obstruction—Dismissal—Remedy—Suit or appeal—S. 47—Applicability. See C. P. CODE, S. 47. (1943) 2 M.L. J. 391.

— 0. 21, R. 103—Scepe and effect—Application for removal of obstruction to delivery of possession to decree-holder—Dismissal—Failure to sue within one year—Effect—Suit after several years—Ear of.

The scope of a suit under O. 21, R. 103, C. P. Code, is not the determination of the mere question of possession of the parties concerned, but the establishment of the right or title by which the praintiff claims the present possession of the property. Where an order is made dismissing an application for removal of obstruction to delivery of possession to the holder of a decree for eviction that order must be deemed to have been passed under O. 21, R. 99, C. P. Code, such an order operates as a conclusive adjudication of the right to the property, if one year is allowed to elapse without bringing a suit as provided by O. 21, R. 103, C. P. Code. A suit for declaration of title and possession brought several years later, is therefore barred. (Leach, C.J. and Rajamannar, J) KALESWARAR MILLS, LTD v GOVINDA-SWAMI NA CKER. 58 L.W 552=1945 M.W.N. 743 =A.I.R. 1946 Mad. 76=(1945) 2 M.L.J. 403.

O. 21, R. 103—Scope—Exception in favour of judgment-debtor—If available to his representative. Sec. P. CODE, S. 146 AND O. 21, R. 103. (1943) 2 M.L. J. 539.

- 0. 21, R. 112 (1) and (2) (Outh) - Right of appeal against orders in proceedings against garnishee.

According to sub rules (1) and (2) of R. 112 of O. 21, C. P. Code, where a garnishee disputes his liability, and there has been an adjudication of such liability will amount to a 'decree'; but where the garnishee does not dispute his liability and deposits the money without any objection when called upon to do so, it will be an 'order' and no second appeal is permissible. (Thomas, C. J.) C.D. LINCOLN v. NOOR EIAHI. 204 I.C. 531=15 R.O. 364=1942 A.W.R. (C.C.) 361=1942 O.A. 626=1942 O.W.N. 801=A.I.R. 1943 Oudh 192.

- ——0. 21, R. 131—(All.)—Construction—'Charge', if confined to charge created by act of parties. RAM CHANDRA v. RAM LAL. [rec Q.D. 1936—'40 Vol. I, Col. 1716.] I.L.R. (1940) All. 681=191 I.C. 745=13 R.A. 266.
- O. 22—Applicability Arbitration—Reference by parties of family disputes—Death of one party—If puts an end to arbitration proceedings. VENRATA-CHELLAM v. SURYANARAYNAMURTHY. [160 Q.D. 1936—'40 Vol. I Col. 3301.] A.I.R. 1941 Mad. 129.
- ---- 0.22 Applicability Partition suit Preliminary decree — Subsequent death of defendant— Abatement—If results.

There can be no abatement of a suit for partition by reason of the fact that after the preliminary decree one of the parties dies. The provisions of the Civil Procedure Code, as regards abatement in O. 22 C. P. Code, do not apply in cases of death after a preliminary decree, when the rights of the parties have been deter-deemed to have been extraorised and the right to sue must be deemed to have been extraorised and the right to sue must be

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mined by that decree. (Manshar Lall and Das, 11) RAGHUNANDAN v. BADRI. 24 Pat. 314=A.I.R. 1945 Pat. 380.

— 0 22-Co-parceners of a joint Hindu family— Substitution as legal representatives on death of karta

If it is claimed that the right to sue survives in the case of the death of the karta of a joint Hindu family, it must come to the co-purceners as representatives of the deceased. For the purposes at least of substitution under O. 22, C.P. Code, therefore, the co-parceners must be substituted as legal representatives if they are not already on record. (Misra, J.) RAJENDRA PRASAD GANGA BUX SINGH 1944 A.W.R. (CC.) 291= 1944 O.A (C.C.) 291=A.I.R. 1945 Oudh. 60.

- 0. 22 Rr. 1 and 3—Application for leave to sue as panyor. Death of applicant—Right of legal representative to continue—Abatement—Reway of legal representative—Plaint if can be dated book by payment of court-fee after death of original applicant.

Where, pendinding an application for leave to sue in forma fauteris, the applicant dies before leave is granted, the application abates, the right to sue in forma fauteris being a personal one. The legal representative of the deceased applicant cannot therefore claim to be brought on record in the application and be permitted to continue the same. Nor can the legal representative get the plaint anteclated by paving court-fee on the plaint so as to be effective from the date of the application by the original application. The renedy of the legal representative is either to apply aftesh for leave to sue as a pauper or to file a fresh suit with proper court-fee. (Horwill, 1) ANASUVAMMA n. SUBBA REDDI. 211 I.C. 431=16 R.M. 527=1943 M.W. M42=f6 L.W. 397=A.I.R. 1943 Mad. 646= (1943) 2 M.L.J. 180.

——0.22 R. 1—Death of father during pendency of suit for damages for seduction of daughter—Suit, if abstes—Continuation of suit by other members, it possible—Right of daughter to relief.

Where during the pendency of a suit for damages for the seduction of his daughter, the father dies, the right of action dies with the father and does not survive him and hence the suit abates. It cannot be continued by the other members of the family. Though the daughter may have a right of action, the genesis of the action would not be seduction. (Stone C.J. and Ross, J.) BABOO THAKULDHOBI OF NAGPUR n. MST. SUBANSHI. I.L.R. (1942) Nag. 650=202 I.C. 101=15 R.N. 64=1942 N.L.J. 199=A.I.B. 1942 Nag. 99.

O. 22, R. 1—Suit to de lare plaintiff unoffected by ex-communication—Piecree on appeal—Death of plaintiff pending second appeal by defendant—Appeal it abouts—Applicability of the maxim actio personalis moritur cum persona.

Where a plaintiff's suit to declare a certain panchayatnama ex-communicating him from the biradart was not genuine and that he is unaffected by it was dismissed by the trial Court but was decreed on appeal and pending second appeal by the defendants, the plaintiff died the cause of action did not survive to the heirs of the plaintiff respondent as the right agitated for did not relate to or affect the estate of the deceased plaintiff and did not involve any right to property which might be considered to be a heritable asset. No right to sue in respect of the status of the plaintiff accrued to the legal representatives and the suit being one for vindication of a mere personal right, the maxim actio personalis mortiur cum persona applied and the right to sue must be deemed to have been estimatical activations.

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and the appeal abated. (Ghulam Hasan and Madeley, J/.) KALLOO CHAUDHARI v. RAMZAN. 18 Luck. 578=1942 A.W.R. (O.C.) 345=203 I.C. 253=15 R.O. 184=1942 O.W.N. 681=1942 O.A. 524=A.I. R. 1943 Oudh 14.

—0.22, B. 1—Survival of right to sue—Test—Suit for account in respect of defendant's management of plaintiff's property during his minority—Death of defendant—Suit, if can be continued against the legal representatives—Limits to the application of the maxim 'actio personalis moritur cum persona.'

There are certain types of wrongs which, though a remedy for them is available against the wrongdoer during his lifetime, does not permit of a remedy against his representatives after his death. By English law an executor represents the debts and the property of his testator but not his person. And that in general, is true of the position of a legal representative in India. Generally the only cases, apart from cases of contract in which a remedy for a wrongful act can be pursued against the estate of a deceased person is one in which the wrong consits of the appropriation by the deceased of property, or the value of property belonging to another. To those special types of wrongs which have produced for the wrongdoer either property or money which has accrued to his estate, the English law has refused to apply the maxim of actio personalis moritur cum persona'. These principles are applicable to India as well. Wherever it is found that a deceased person has by his wrong diverted either property or the proceeds of the property belonging to some one else into his own estate, recourse can be had to that estate, through his legal representatives when he is dead, to recover it subject, of course, to the limitation that any decree obtained will be limited to the assets of the deceased wrongdoer's estate. Further wherever a relationship based on contract, quasi contract or fiduciary relationship or some obligation to perform a duty is found to exist that also is alone sufficient to entitle a remedy to be pursued against the legal representatives of the wrongdoer.

Where a plaint charged the defendant with having disposed of various parts of the plaintiff's estate during his minority and of appropriating monies derived from the estate by putting them into his own pocket, and then went on to ask for an account the plaint contained a distinct allegation that the defendant owed a duty to the plaintiff and that in breach of that duty, he appropriated to himself either the property of the minor or else its value and on the death of the defendant the suit did not abate and right to sue survived. (Braund, J.) GHULAM RASHID v. MOHAMMAD ABDUL RAB. I.L.R. (1941) All. 642=195 I.C. 618=14 R.A. 64=1941 A.W.R. (H.C.) 89=1941 O.A. (Supp.) 149=1941 A.L.W. 84=1941 A.L.J. 93=A.I.R. 1941 All. 187.—0. 22, Rr. 2, 4 and 11—Appeal filed by tenant against order settling rent in suit by landlord under S. 105, Bengal Tenancy Act—Landlord granting putnipending appeal—Putnidar added party respondent—

Death of landlord respondent—Appeal if abates.

During the pendency of an appeal filed by a tenant against an order settling rent in respect of his tenure in a suit by the landlord under S. 105 of B.T. Act, the landlord granted to another person a putni which included the suit lands also. The putnidar was then added as Respondent No. 2, the landlord being retained as Respondent No. 1. Thereafter landlord respondent died and no substitution was made in his place. It was contended by the surviving respondent that the appeal became incompetent as against him, it having abated against the deceased respondent.

### C. P. CODE (1908), O. 22, R. 3.

Held, that the right to appeal survived the deceased respondent and survived against the surviving respondent alone within the meaning of O. 22, R. 2, C. P. Code, and that, therefore, the appeal was competent without the legal repesentative of the deceased respondent being brought on the record. (Sen and Pal, J.) HARAD-HONE v. PANCHANAN. I.I. R. (1943) 1 Cal. 144=209 I.C 222=16 R.C. 327=46 C.W.N. 963=A.I.R. 1943 Cal. 570.

—0. 22, Rr. 2 and 3—Applicability—Test—Legal representative already on record—Application for substitution—If necessary.

In order to determine whether R. 2 or R. 3 of O. 22, C. P. Code, applies, it is necessary to see whether or not the right to sue survives to the surviving plaintiff or plaintiffs alone. There is nothing in R. 2 to support the contention that it does not apply where the legal representative is on the record not as such but in his individual capacity. When the legal representative is already on the record and the right to sue survives to the remaining plaintiff, the case comes within R. 2 and not within R. 3 and no application for substitution is necessary. (Harries, C. J. and Chatteri, J.) BHUDEB CHANDRA ROY v. BHIKSHANKAR PAITANIK. 196 I. C. 837 = 8 B.R. 121=14 R.P. 248=A.I.R. 1942 Pat. 120.

— 0.22, Rr. 2 and 3—Legal representative of one of the deceased appellants already on record as respondents—Failure to formally apply for their substitution—If latal.

The object of filing an application for substitution of heirs of a deceased party is to intimate to the Court the fact of death of the party and to place the legal representatives on record in time. If such persons are already parties to the case, the mere non-filing of an application is not fatal to the maintainability of the suit or appeal. Hence where one of the appellants died, but his heirs were on record already as respondents, and no application for substitution was made within time it is not fatal to the maintainability of the appeal. (Grille, C.J. and Pollock, J.) SHEORAM SITARAM v. ATMARAM RAGHOJI. I.L.R. (1943) Nag. 17 = 205 I.G. 17 = 15 E.N. 168=1942 N.L.J. 557 = A.I.R. 1948 Nag. 13.

## --- O. 22, Rr. 3 and 4-Abatement-Effect of.

The effect of abatement is that the plaintiff in the suit abated or those claiming under him are prevented from suing again on the same cause of action. The order of abatement does not extinguish the title of the plaintiff in the suit abated and he is not debarred from defending his possession or rights by relying upon his true title. But if the defendant continues in possession then of course the plaintiff cannot be allowed to set up his possession in a subsequent suit. (Mathur, J.) BIJAI RAGHO NIWASJI v. TEJ NARAIN LAL. 205 I.O. 475 = 15 B.A. 481 = 1943 A.L.J. 4 = 1942 A.W.B. (H.C.) 409 = 1942 A.L.W. 723 = A.I.B. 1943 All. 99.

— 0.22, R. 3—Addition of one of two heirs— If on behalf of the entire inheritance.

Where on the death of plaintiff appellant in a suit for the recovery of mesne profits from a trespasser only one of the two heirs is brought on record as the legal representative, the appeal does not abate as regards the share of the other heir, because, when one of the heirs is added as legal representative, it must be taken to be for the benefit of the entire inheritance which opened on the death of plaintiff appellant. (Allsop and Verma, J.).

RAMCHARAN v. BANSIDHAR. I.L.B. (1942) A. 671

= 203 I.C. 223 = 1942 A. I.J. 411 = 15 B.A. 231 = 1942

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A.W.R. (H.C.) 278=1942 A.L.W. 380=A.I.R. 1942 All. 358,

—0.22, R. 3—Appeal—Death of appellant—All legal representatives not brought on record—Effect—Representation by some only—Sufficiency.

Where an appellant dies pending appeal even a partial representation of the estate of the deceased appellant is sufficient to validate the appeal and to preclude the decree obtained in that appeal from being regarded as a nullity. In other words there will be no abatement of the appeal if at least some representatives are on record. (Lobur and Raiai/hyaksha, Jf.) DHONDO KHANDO V. WAMAN BALWANT. 46 BOM.L.R. 737=A.I.R 1945 BOM. 126.

—O. 22, R. 3—Appeal—Order declaring that suit abates—Appeal—Competency—Legal representative—Right of to challenge dismissal of suit as having abated.

The C. P. Code, does not provide for any appeal against an order declaring that a suit has abated when a suit is dismissed on the ground that it has abated, the person who wanted to come in on the record as the legal representative of a deceased party has a right to challenge the dismissal of the suit, urging that the order of abatement could not be sustained as in truth he is the legal representative. (Chandraskhira Ayyar, J.) KRISHNASWAMI v. SRINIVASAN. 1945 M. W.N. 284—AJR. 1945 Mad. 362=(1945) 1 M.L.J. 220.

——O. 22, Rr. 3 and 4—Applicability—Execution proceedings—Death of decree-holder pending execution application—Power of Court to substitute his legal representatives.

Per-Sen, J.—Execution proceedings do not abate by reason of the death of the decree-holder pending his application for execution or by reason of the failure to substitute his legal representatives. Although O. 22, Rr. 3 and 4, C. P. Code, are not applicable to execution proceedings, the Court may in the exercise of its inherent powers substitute the legal representatives of a deceased decree-holder in such proceedings. They can after substitution continue the old proceedings and a fresh application by them is not necessary. (Mukherjea and Sen, J.). ANANDA PRASAD MITRA v. SUSHIL KUMAR MANDAL. 201 I.O. 479=15 R.O. 207=75 O.I.J. 114=46 O.W.N. 328=A.I.E. 1942 Cal. 390.

——O. 22, R. 3—Application for succession certificate—Death of applicant—His heirs, if can be substituted.

On the death of the applicant for a succession certificate the proceeding lapses, and it will be open to any other party entitled to a certificate to apply. A right to apply for a succession certificate cannot be said to survive to the heir of the applicant. There is therefore no question of substitution of heirs in such cases, (Biswas and Latifur Rahman, JJ.) FATEMANESHA BEGUM v. Sk. MAHIDIN. 48 C.W.N. 673 (1).

——O. 22, R. 3—Benamidar—Suit by—Death pending suit—Application by real owner to come on record as legal representative and to continue suit—Competency.

Where a benamidar sues and dies, the real owner is not entitled to be allowed to continue the suit as his legal representative. (Horwill. J.) ANDALLAMMA v. JANGAMAYYA. 211 I.C. 298=16 R.M. 497=56 L.W. 532=1943 M.W.N. 598=A.I.R. 1944 Mad. 27=(1943) 2 M.L.J. 362.

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Where a Hindu appellant dies leaving heirs having separate interests, if the appeal abates as regards one of the heirs there is no reason why it should cause the appeal to abate even as regards the other heirs. (Madeley, J.) RAM DARSHANV, HARI SHANKAR. 205 I.C. 82=15 R.O. 394=1943 O.A (C.C.) 2 (2)=1943 O.W.N. 20=A.I.R. 1943 Oudh 260.

——O. 22, Rr. 3, 4 and 10—Death of defendant after preliminary and before final mortgage decree—Substitution of legal representatives—Procedure.

If a defendant dies after the passing of a preliminary decree in a mortgage suit and before the final decree, no final decree can be passed without his representative being brought on the record. R. 10, and not Rr. 3 and 4 of O. 22, C.P. Code, are to be regarded as governing the procedure for making the necessary substitution. (Rowland and Chatteri, J.) SANTI DEVI v. KHODAI PRASAD SINGH. 199 I.C. 511=14 R.P. 590=23 P.L.T. 615=8 B.R. 550=1942 P.W.N. 62=A.I. R. 1942 Pat. 340.

—O. 22, Rr. 3, 4 and 11—Death of one of appellants—L. Rs not brought on record—Decision jointly affecting all appellants—Appeal, if abates in toto.

Where during the pendency of an appeal one of the appellants dies and his legal representatives are not brought on the record within the period of limitation, and the decision appealed against jointly affects all the appellants, the appeal does not abate in toto. (Mir Ahmad and Soof, JJ.) MASHAHUR V. SUBHAN DIN. 194 I.C. 365=13 R. Pesh. 79=A.I.R. 1941 Pesh. 36.

— O. 22, R. 3—Death of one of several appellants—Legal representatives not brought on record—Whole appeal—If abates—Power of appellate Court to pass decree in favour of the deceased—O. 41, R. 4.

Where one of two appellants dies pending the appeal, in a case where the decree proceeds on 2 ground common to both O. 41, R. 4, C. P. Code, applies, and it is open to the appellate Court to pass a decree in the suit even in respect of the appellant who is not at the time before the Court. Even after the appeal has abated under O. 22, R. 3, C. P. Code, it is open to the Court, acting under O. 41, R. 4, to pass a decree in favour of all the appellants, including the appel lant whose appeal has abated. If the case is of such a nature that it cannot be disposed of in the absence of the legal representatives of the deceased the whole appeal would abate. But if the lower Court's decree proceeds on a ground common to the deceased as well as to the survivors, then the latter can under O. 41, R. 4, appeal, from the whole decree and the absence of the legal representatives is no bar to the disposal of the appeal. In such a case, therefore, if the legal representatives are not substituted within the period of limitation, the appeal abates only so far as the deceased is concerned, and not as a whole, and if the appeal succeeds, the appellate decree or order enures to the benefit of all the C. P. CODE (1908), O. 22, R. 3.

appellants including the deceased. (Lokur and Rajadhyaksha, //.) DHONDO KHANDO v. WAMAN BALWANT. 46 Bom.L.R. 737=A.I.R. 1945 Bom. 126.

— O. 22, R. 3—Death of party—Number of heirs taking definite share in the inheritance—One of them not added—Abatement if in toto.

Where on the death of an appellant leaving a number of heirs taking definite share in the inheritance, one of them is not added as a party within the time, the whole appeal cannot abate but only as regards the share of the person not added. (Ghulam Hasan and Agarwal, Jf.) TAJAMMUL HASAIN v. AMIRUDDIN. 17 Luck. 297=197 I.C. 471=14 R.O. 314=1941 O.A. 951=1941 A.W.R. (Rev.) 1078=1941 O.W.N. 1239=A.I.R. 1942 Oudh. 189.

o. 22, Rr. 3 and 4—Death of plaintiff in suit for accounts—Money found due from plaintiff to defendant—Plaintiff's Legal Representatives, can be brought on record.

If in a suit for accounts it is found after the preliminary decree that it was the plaintiff who owed money to the defendant, the plaintiff's position will be that of a defendant and the defendant's position that of the plaintiff. If, therefore, the plaintiff dies, his legal representatives can be brought on record, whether the case comes within the purview of R. 3 or R. 4 of O. 22, C. P. Code. (Teta Singk, J.) Sadhu Singh v. Kahan Singh. 218 I.C. 167=18 R.L. 4=46 P. L.R. 292=A.I.R.1944 Lah. 473.

ognorance of death of one of the appellants— Effect—Failure of other appellants aware of the death of that appellant to inform Court—Effect.

Where after the death of one of the appellants a decree is passed in ignorance of his death it is a nullity so far as the deceased and his legal representatives are concerned. Where the other appellants knowing of the death do not inform the Court even though knowing that it is material for the decision of the appeal, their conduct amounts to a fraud on the Court. Being parties to the fraud they cannot take advantage of it with the result that the decree passed is also a nullity so far they are concerned. (Vyas.) Bansi Lal Agarwal v. Moti. (1945) A.M.L.J. 41.

-O. 22, R. 3—Decree in name of dead party though addition of legal representative had been ordered—Appeal against dead person—Correction.

Where the decree is prepared in the name of a dead party even though addition of the legal representative had been ordered by the Court and an appeal is filed against the dead party on the strength of the cause title of the decree, the mistake could not create rights and could be rectified in appeal. (Shirreif, S.M. and Sathe, J.M.) GHASI RAM v. GANGA RAM. 1942 O.W. N. (B.R.) 776=1942 R.D. 958=1943 A.W.R. (Rev). 101.

—O. 22, R. 3—Legal representative already on record as party—Application to bring on record—Omission to make—If fatal.

The object of an application to bring the legal hence is not appealable. Nor can it be interfered representatives of a deceased party on the record is to intimate to the Court the death of a party //.) RAM NARAIAN v. MST. PHULA. 203 I.C.

C. P. CODE (1908), O. 22, Rr. 3 and 10.

and to place the legal representatives on record within time. If such persons are already parties to the case, the mere non-filing of an application ought not to be fatal to the maintainability of the suit or appeal. (Lokur, J.) ISHWARLAL LAXMICHAND v. KUBER MOHAN. I.L.R. (1943) Bom. 575=210 I.C. 335=16 R.B. 201=45 Bom.L.R. 834=A.I.R. 1943 Bom. 457.

Per Chatterji, I,—A legal representative of a deceased party can raise only such objections as could have been taken by the latter. (Fast Ali, I) KAMESHWAR SINGH v, RAJBANSI SINGH. A.I.R. 1943 Pat. 433.

——O. 22, Rr. 3 and 5—Legal representative— Suit by Hindu widow for aeclaration that defendant was not adopted by her and was not her validly adopted son—Death of plaintiff—Claim by husband's cousin to be brought on record as legal representative—Objection by defendant— Competency—Proper legal representative.

R, a Hindu widow, filed a suit against B, who claimed to be her adopted son, for a declaration that she had not taken the defendant B in adoption and that he was not her legally adopted son. R died pending suit, and her husband's cousin W applied to be brought on the record to continue the suit as the legal representative of the deceased plaintiff. The defendant opposed the application on the ground that as adopted son of R, he was her legal representative and the right of suit did not therefore survive.

Held, that since the subject-matter of the suit was the validity of the defendant's adoption itself, the defendant was not R's proper legal representative for continuing the suit and W was the proper legal representative to continue the suit. (Lokur, J.) BAJIRAO MADHAVRAO V. WAMANRAO. 46 BOM.L.R. 421=A.I.R. 1944 Bom. 243 (1).

——O. 22, R. 3—Mortgage suit—Death of mortgagee—Legatee applying to be brought on record—Probate if necessary.

If a mortgagee dies pending his suit to bring the mortgaged property to sale, a person claiming under his will can be brought on the record as a legal representative without taking out probate first. It would, however, be necessary for him either to take out probate or obtain a succession certificate before proceeding to take out a personal decree, if this becomes necessary. (Buckett, J.) DAULAT RAM v. MEERO. 194 I.C. 585=14 R.L. 2=43 P.L.R. 16=A.I.R. 1941 Lah. 142.

---- O. 22, Rr. 3 and 10—Relative scope and applicability—Order for substitution of legal representative on plaintiff's death—Appeal—Revision.

R. 3 of O. 22. C. P. Code, contemplates the substitution of a legal representative upon the death of a plaintiff or plaintiffs while R. 10 of the same Order deals with cases other than those covered by R. 3. Hence when substitution is ordered on the death of a plaintiff or plaintiffs the order is one passed under R. 3 of O. 22 and hence is not appealable. Nor can it be interfered with in revision. (Ghulam Hasan and Agarwal. 17.) RAM NARAIN P. MST. PHULA. 203 I.C.

C. P. CODE (1908), O. 22, R. 3.

125=15 R.O. 159=1942 A.W.R. (C.C.) 344 (2)=1942 O.W.N. 636=1942 O.A. 517=A.I.R. 1943 Oudh 24.

O. 22, R. 3 - Representative suit - Death of one of the representors-Procedure to be followed.

In a representative suit when one of the plaintiffs dies, the duty of the parties is to bring this fact to the notice of the Court and ask for directions. Generally a new name would be suggested and the Court will agree to the substitution of this name in the place of the deceased. Where it is stated that the plaintiffs severally represent the whole community, a decree in favour of one would bind the whole community and in the case of death of one of them, a decree against the remaining representative will not be infructuous, and hence the suit will not abate as a whole on the death of one of the representatives. (Davies.) GANGA DHAR v. MUNICIPAL COMMITTEE, AJMER. 1940 A.M.L.J. 63.

- O. 22, R. 3-Revision—Abatement—Dismissal of suit on—Remedy—Appeal—Competency—Order of dismissal after abatement—If to be passed.

An order of dismissal should be passed after the abatement of a suit under O. 22, R. 3, and an appeal from this order would lie. An application in revision by the aggrieved person is therefore incompetent as he can obtain his remedy by way of appeal. (Happell, J.) GOPALARATNAM v. LAKSHMIKANTAM. 210 I.C. 76=56 L.W. 375=1943 M.W.N. 454=A.I.R. 1943 Mad. 569= (1943) 2 M.L.J. 17.

-O. 22, R. 3-Scope-If qualified by O. 41. R. 4-Appeal-All appellants not alive-Power of Court to vary decree. See C. P. Code, O. 41, R. 4. I.L.R. (1942) Kar. 435.

-O. 22, Rr. 3 and 11-Scope-Partition suit-Several plaintiffs claiming share jointly-Shares of each not specified - Dismissal - Second appeal - Death of one appellant (plaintiff)—Legal representative not impleaded—Effect—Appeal—If abates as a whole.

In a suit by several plaintiffs, one of them being a Hindu claiming to be the purchaser of a half share of the interest of the other plaintiffs who were all Mahomedans for partition, the share of none of the plaintiffs except that of one was specified. It was not clear on the plaint what share any of the other plaintiffs claimed; it appeared from the plaint that the plaintiffs were claiming jointly to have joint shares in ten annas eight pies share of the land in suit. In the prayer clause a share was claimed for plaintiffs 1 to 5, 7 and 8 as also for the purchaser; but it was no-where stated, nor could it be ascertained from the plaint, what the shares of the plaintiffs were. The suit was dismissed by the trial Court and by the first appellate Court as barred by limitation. A second appeal was preferred against the dismissal. One of the appellants, a necessary party, died, and his legal representatives were not brought on the record and suit therefore abated at least as regards him. It was contended that this abatement operated to make the appeal incompetent as a whole.

Held, that the cause of action of all the plaintiffs was joint and the same and that to a proper decision of the dispute all the co-owners were

C. P. CODE (1908), O. 22, Rr. 3 & 11 & O. 41 R. 4.

appeal, and the whole appeal therefore became incompetent. (Davis, C.J. and Weston, incompetent. (Pavis, C.J. and Weston, J.) GHULAM MAHOMED v. SHERDILKHAN. I.L.R. (1942) Kar. 435=205 I.C. 494=15 R.S. 151= A.I.R. 1942 Sind 157.

-O. 22, R. 3-Scope-Suit on behalf of deity -All shebaits parties to suit-Death of one pending suit-Decree without effecting substitution in time limited-Validity-Abatement-If caused.

Where in a suit on behalf of a deity by the shebaits, all the shebaits are on the record at the time the plaint is presented, the suit is properly constituted. If after the suit and before the decree is made one of the shebaits dies, and no substitution is made within the time limited by law, there can be no question of abatement. The deity is sufficiently and substantially represented by the remaining shebaits, who are parties to the decree passed and the decree is a good decree. The suit does not abate. (Agarwala and Meredilli, JJ.) SADHU CHARAN PARIJA V. KRISH-NAMANI DEI. 197 I.C. 674=8 B R. 268=14 R.P. 338=23 P.L.T. 457=7 Cut.L.T. 37=A.I.R. 1942 Pat. 181.

-O. 22, Rr. 3, and 9, and S. 2 (11)—Suit by Hindu widow to recover mortgage debt due to husband—Reversioners, if legal representatives— Death of widow fending suit-Reversioners not applying for substitution-Abatement of suit-Fresh suit by them or by purchaser of their interest-Maintainability.

A Hindu widow suing to recover a mortgage debt due to her husband sues as a representative of her husband's estate. If she dies pending the suit, the right to sue survives and devolves on the reversioners who are her legal repre-sentatives within the meaning of S. 2 (11), C.P. Code, inasmuch as the estate vests in them on her death. If the reversioners do not apply to be substituted in time, the suit abates under O. 22, R. 3 (2) and they are, therefore debarred from instituting a fresh suit on the mortgage under O. 22, R. 9. A purchaser of their interest is under the same disability. (Sen. J.) ABDUL RAHAMAN MIA v. BALAIPADO SETT. I.L.R. (1941) 1 Cal 137 = 195 I.C. 728 = 14 R.C. 131 = 45 C.W.N. 105= A.1.R. 1941 Cal. 347.

-O. 22, Rr. 3 and 11 and O. 41. R. 4-Suit by joint tenants for declaration of rate of rent-Death of one-His heirs not substituted-Entire suit if abates—Appeal by such tenants—Death of one appellant—His heirs not substituted—Entire appeal, if abates.

If in a suit by the plaintiffs as joint tenants of a single tenancy, for a declaration of the rate of rent payable by them, one of them dies and his heirs are not substituted in time, the suit will abate as a whole. But it does not necessarily follow that an appeal by the plaintiffs will also abate as a whole if one of the plaintiff-appellants dies pending the hearing of the appeal and his heirs are not substituted. Under O. 41, R. 4, C. P. Code, the appellate Court has the power to reverse or vary the decree in favour of all the plaintiffs including a plaintiff who has not been made a party to the appeal, if the decree in the Court below has proceeded on a ground common to all the plaintiffs. It can exercise the same power necessary parties both to the suit and to the in favour of the heirs of a plaintiff who was an

### C. P. CODE (1908), O. 22, R. 3 (2).

appellant and who has died pending the appeal, although such heirs have not been made parties to the appeal. The position is essentially the same as if that deceased plaintiff had not appealed at all. (Sen. I.) SARAT CHANDRA NARAYAN v. FEZURAM NATH. 46 C.W N. 281.

——0.22, R.3 (2)—Scope—Deoth of Hindu appellant pending appeal leaving son and widow—Application by son alone to be brought on record as legal representative—Son alone impleaded—Omission to implead widow as heir under Hindu Women's Rights to Property Act—Effect—Appeal—If abates.

O. 22, R. 3 (2), only requires an application to be made by a person claiming to be the legal representative, to prevent the order of abatement being made. When once an application is made by a legal representative to be brought on record and that application is granted and such legal representative is brought on record then the Court shall proceed with the suit or appeal and the appeal will not abate. The rule does not require that all the legal representatives should be on the record and if one of them alone is separately brought on record as legal representative, there would be no abatement. A Hindu who along with his wife and only son constituted a joint Hindu family brought a suit for an injunction against certain persons to secure certain easement rights and other amenities for his house. The suit was dismissed by the trial Court and the plaintiff appealed. The appellant, however, died on 2-10-1940, pending appeal and the only son of the deceased appellant made an application to be brought on the record and his name was placed on the record as legal representative. His mother who was also an heir under the Hindu Women's Rights to Property Act was not brought on the record as his legal representative.

Held, that though it would have been proper if both the son and the widow of the deceased had applied to be brought on record as legal representatives of the deceased appellant, the appeal did not abate merely because the son alone applied and was brought on record as legal representative since the son would sufficiently represent the estate. (Lokur, J.) ISHWARLAL LAXMICHAND V. KUBER MOHAN. I.L.R. (1943) Rom. 575=210 I.C. 335=16 R.B. 201=45 Bom.L.R. 834=A.I.R. 1943 Bom. 457.

---- O. 22, R. 4—Abatement of appeal—Total or partial—Test—Suit for declaration against person attaching property and against persons claiming rateable distribution—Appeal—Death of a respondent—Failure to add legal representative—Appeal if abates in toto.

In case of death of one of the respondents where his legal representative is not added, it cannot be said that in all such cases where the allowing of the appeal would result in conflicting decrees it is necessary for the whole appeal to abate. Mere inconsistency is not sufficient nor is it an absolute test to find out whether an appeal is to abate in toto or partially. Where in a suit to declare certain property not liable to attachment, the person attaching the property and persons claiming rateable distribution were added as defendants and during the pendency of an appeal by the plaintiff from the decision in the suit, one of the respondents died and his legal representa-

### C. P. CODE (1908), O. 22, Br. 4 and 11.

tive was not added as a party, the appeal did not abate in toto but only as against the respondent whose legal representative was not added in time. (Benneit and Madeley, II.) LACHMI NARAIN V. MUSADDI LAL. 17 Luck. 327=197 I.C. 247=14 R.O. 287=1941 O.W.N. 1195=1941 A.W.R. (Rev.) 1010=1941 O.A. 891=A.I.R. 1942 Oudh 155.

out his legal representatives.

Whether an appeal can be heard in the absence of any of the respondents depends on the nature of the suit and where a successful appeal will not create any contradictory decrees between the appellants and deceased formal respondents, the appeal can be heard without the legal representatives. (Harper, S.M. and Sathe, J.M.) RAM ANJORI v. BABUA SAHEB SINGH. 1941 O.W.N. 95=1941 R.D. 63=1941 A.L.J. (Supp.) 29=1941 A.W.R. (Rev.) 265 (1)=1941 O.A. (Supp.) 214 (1).

O. 22, R. 4—Administration suit—Death of one of defendants—Abatement of suit. Maho-Medally Tayleally v. Safiabai. [see Q.D. 1936-'40 Vol. I, Col. 3302.] 67 I.A. 406—I.L.R. (1940) Kar. (P.C.) 410—I.L.R. (1941) Bom 8=191 I.C. 113=13 R.P.C. 113=53 L.W 1=45 C.W.N. 226=7 B.R. 210=1941 A.W.R. (P.C.) 1=43 P. L.R. 63=1941 O.A. 119=43 Bom.L.R. 388=73 C.L.J. 214=1941 O.W.N. 734=1941 P.W.N. 316=1941 M.W.N. 729=1941 A.L.W. 567= (1941) 1 M.L.J. 594 (P.C.).

— O. 22, R. 4—Appeal—Abatement—Decree dismissing application for revocation of grant of probate of will—Appeal—Death of some respondents—Legal representatives not substituted—Appellant giving up certain other respondents owing to difficulty in service of notice—Effect—Abatement of whole appeal.

The question of a will is a single subject-matter and a will must be either good or bad against all the world. It is not possible for a will to be good against some persons and bad against others. Where pending an appeal from a decree dismissing an application for the revocation of the grant of probate of a will, some of the respondents die and the appellant fails to substitute their legal representatives and the appellant also gives up her appeal against certain other respondents owing to difficulties in effecting service, the appeal as a whole abates and not merely as against some of the respondents. The decision of the Court is one and indivisible as the will must be either good or bad against all the world, and, therefore the appeal cannot proceed and is liable to be dismissed. (Manohar Lall and Brough, JJ.) BAHURIA MANIKRAJ KUAR v. AMARBAS KUAR. 22 Pat. 289=211 I.C. 619=16 R.P. 262=10 B.R. 433=A.I.R. 1944 Pat. 38.

O. 22, R. 4—Appeal by applicant under U. P. Encumbered Estates Act—Death of some creditor respondents—Legal representative not added—Appeal, if abates in toto. Unal Pratap Singh v. Dwarka Prasad. [see Q.D. 1936-40 Vol. I. Col. 1727. 15 Luck. 748.

defendants—Co-defendants impleaded as respond-

C. P. CODE (1908), O. 22. R. 4.

ents—Death of a respondent deriving title from appellant and some respondents—Abatement.

Where only one of the defendants in a suit appeals and impleads his co-defendants as respondents and one of them deriving title from the appellant and some of the respondents dies and his legal representatives are not brought on record, the appeal does not thereby abate. (Malik, J.) THAKUR PRASAD KALWAR v. RAM KHELAWAN KALWAR I.L.R. (1944) All. 344=218 I.C. 428=18 R.A. 13=1944 A.L.J. 369=1944 A.W.R. (H.C.) 188 (1)=1944 O.A. (H.C.) 188 (1)=1944 A.L.W. 317 (1)=A.I.R. 1944 All. 240.

O. 22, R. 4—Applicability—Insolvency—Order of adjudication—Right to contest—If personal to insolvent—Death of insolvent pending appeal—Abatement. See PROVINCIAL INSOLVENCY ACT S. 17. 44 Bom. L.R. 132.

— O. 22, R. 4—Applicability — Mortgage suit— Preliminary decree—Subsequent death of mortgagor— Heirs not impleaded—Abatement—Rule—O. 22, R. 6. DAWARALI JAFARALI v. BAI JADI, [162, Q. D. 1936-40] Vol. I, Col. 1728.] 192 I.C. 405=13 R.B. 250.

In the case of an application for rendition of accounts against a person under the Charitable and Religious Trusts Act, the cause of action terminates on his death. The right to demand accounts is a personal right available against him and that right does not survive as against his legal representatives. (Scn. J.) KUBRABI D. SETH SHUBERATI. I.L.R. (1944) Nag. 775 = 220 I.C. 57=1944 N.L.J. 170=A.I.R. 1944 Nag. 190.

— O 22, R. 4 and O. 30, R. 4 — Business administered solely by karta and called firm—Suit by karta and decree—Death of karta pending appeal by defendant—Failure to add legal representatives—Effect—Applicability of O. 30, R. 4.

Where a suit by karta of a joint family who was solely administering a business called a firm is decreed and pending an appeal by the defendant the plaintiff dies and his legal representatives are not added in time the appeal abates. O. 30. R. 4, C. P. Code, has no application to such a case. (Davies.) JEV RAJ v. CHHOTI. 1942 A.M.L.J. 54,

O. 22, R. 4—Contest by some of several defendants—Presumption as to knowledge of rest—If applies to deceased defendant—Mandatory character of O. 22, R. 4. BHARATH DAS v. INDRASAN. [see Q. D. 1936-40 Vol. I, Col. 3302.] 1941 A.L.J. (Supp.) 7.

O. 22, R. 4—Death of one of respondents—Appeal, if abates in toto.

Where the plaintiff files an appeal againt all the original defendants in spite of the fact that one of them had died without bringing on record his legal representatives, the appeal does not abate as against the remaining defendants where it is evident on the plaintiff's claim that he is entitled to sue them even if he never made the deceased defendant a party to the suit at all. (Almond, J. C. and Mir Ahmad, J.) MIRZA JAN v. GHULAM RAZA. 194 I.C. 565=14 R. Pesh. 1=A.I.R. 1941 Pesh 41.

O. 22, Rr. 4 and 11—Death of one of several espendents pending appeal—Failure to add legal re-

C. P. CODE (1908), O. 22, R. 4.

presentative—Abatement, if whole—When interests of respondents are separable—Test.

Where in an appeal one of several respondents dies and his legal representative is not brought on record the test whether an appaal abates as a whole or not should be (1) whether the interests of the respondents are joint and inseparable and (2) whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two conflicting decrees in the same case with respect to the same subject matter. Hence where the interests of certain respondents were separable and there was no danger of them coming into conflict with any recognized principle of law if the appea were allowed against the remaining respondents, the appeal does not abate as a whole. (Bennett and Agar. wal. J.) SARFARZ AHMAD v. ASGHAR ALI. 18. Luck. 567=203 I.C. 71=15 R.O. 156=1942 A.W.R. (C.C.) 342 (4)=1942 O.W.N. 620=1942 O.A. 502=A.I.R. 1943 Oudh. 11.

O. 22, R. 4 and U. P. Encum. Estates Act (1934), S. 4—Death of one of the respondents—Legal representatives not added in time—Appeal, if abutes in toto.

The question whether on the failure to add the legal representatives of one of the respondents within time the appeal abates in toto or not, depends on the facts of each case. The test in such cases should be (1) whether the interests of the defendants in the suit are joint and indivisible so that the interest of the deceased cannot be separated from those of the rest, and (2) whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two inconsistent and contradictory decrees in the same case with respect to the same subject-matter.

Where during the pendency of an appeal by an applicant under the U.P. Encumbered Estates Act, one of the creditors opposing the debtor's application died the interests of the deceased creditor could not be separated from those of the rest and the heirs of the deceased are necessary parties and when they have not been added in time, the appeal abates as a whole. (Thomas, C. J., Bennet and Ghulam Hasan, J.).) GHULAM ABBAS v., SAFDARJAH ZAHID ALI, 16 Luck. 515=193 I. C.1=13 R.O. 446=1941 O.L.R. 272=1941 A.L.W. 313=1941 O.A. 281=1941 R.D. 199=1941 A.W. R. (Rev.) 233=1941 O.W.N 418=A.I.R. 1941 Oudh 219 (F.B.).

—0.22, R. 4—Death of one of three defendants who were brothers—Widow of deceased not impleaded at legal representative—Representation by other defendants that they formed foint family—Plaintiff acting in good faith—Decree, if binds legal representatives.

A suit was instituted against three brothers on the basis of a mortgage effected by them. One of the defendants died pending the suit but he had admitted the mortgage in his written statement. The plaintiff applied for his widow being brought on record as his legal representative but subsequently did not pursue the matter as the other defendants stated that they were members of a Joint Hindu family and had succeeded to the interest of the deceased by survivorship. The suit was eventually decreed. It was found that the defendants had separated in status before the suit.

Held, that the decree was binding on the widow as the legal representative of the deceased inasmuch, as the plaintiff had acted in good faith in not insisting upon impleading her and as the estate was effectively represented by the surviving brothers. (Bhide, /.) Shimber 1941. C. 304=13 R.L. 528=42 P.L.R. 806=A.I.R. 1941 Lah. 49,

G. P. CODE (1908), O. 22, Rr. 4 and 11.

——0.22, Rr. 4 and 11—Death of respondent, manager of Joint Hindu family during the pendency of appeal—Sons alone brought on record—Fature to bring widow also on record, if entails abatement of appeal—Hindu Women's Rights to Property Act (1937)—Effect of.

On the death of the respondent the manager of a joint Hindu tamily during the pendency of an appeal, his sons alone were brought on record as his legal representatives. On a contention that the appeal abated by reason of the failure to implead the deceased widow also as his legal representative. Held, that the appeal did not abate. Although under the Hindu Women's Rights to Property Act, the law now vests in a Hindu widow the limited interest of her husband in the joint property, it does not operate to alter the Hindu Law of joint family so as to make her a member of the co-parcenary. Even if she is a legal representative of her husband the appeal would not abate for the reason that the list of legal representatives mentioned in the application under O. 22, R. 4 read with R. 11 was not exhaustive. (Misra and Koul, Jf.). RADHA RAMAN z. ANANT SINGH, 20 Luck. 305 = 1945 A.W.R. (C.C.) 86=1945 O.W.N. 136=1945 O.A. (C.C.) 86=1945 A.L.W. (C.C.) 129 = A.I.R. 1945 Oudh 196.

-0.22, Rr. 4 and 5—Decree against wreeg legal representative—When binds true representative—Absence of bona fides on part of plaintiff—Effect.

The appellant had settled his land with one J who he alleged, was a tenant-at-will. On J's death, he settled the land with J's sister P and K who was the daughter of G, P's daughter, as joint tenants. The appellant sued to eject J and K on the ground that they were not rendering service as agreed to. Pending the suit P died; the appellant applied to nave K recorded as the legal representative of P. This was done and a decree was passed in the appellant's favour. G brought a suit for declaration that the decree was not binding on her and for an injunction restraining the appellant from interfering with her possession in execution of the decree. It was found that G was in possession of the property and that the appellant made no attempt to give any explanation of his omission to implead G in his suit.

Held, that a decree obtained against a wrong legal representative might bind the true representative who was no party to the decree, it it be shown that the plaintiff had acted bona fule and was ignorant of the true facts, that there was no fraud or collusion and that the person wrongly impleaded was impleaded in a representative capacity, the decree also being passed against him as representing the state. Since the appelant had made no attempt to explain his act in not impleading G, daughter of the defendant P, he could not claim to have acted bona fule. The decree therefore did not bind G. (Agarwala, J.) KRISHNAVATI'S GUNJARI. 193 I. C. 331 = 13 R.P. 575=7 B.R. 592= 22 Pat. L.T. 338=A.I.R. 1941 Pat. 299.

\_\_\_\_O. 22, R. 4—Existence of a legal representative on record—Abatement of appeal if would be saved.

As the bringing in of one legal representative on the record is sufficient to save an appeal from abatement, the existence of one of the legal representatives already on the record would save the appeal from abating even if the other heirs are not brought on record on the death of a defendant respondent. (Bennett and Madeley, JJ.) MOHAMMAD ATA HUBAIN KHAN v. HOSAIN ALI KHAN, 19 Luck, 515—216 I,C. 276—17 R.O.

C. P. CODE (1908), O. 22, R. 4.

75=1944 A.W.R. (C.C.) 11=1944 O.A. (C.C.) 11=1944 O.W.N. 37=A.I.R. 1944 Oudh 139.

O. 22, Rr. 4 and 5—Impleading of only one of the neirs as legal representative of a deceased respondent—Decision against him, if binds others—Appeal if abates against others—Position of Mahomedan hers.

Where a Court appoints one of the heirs of deceased respondent to represent the interests of the deceased during the pendency of the appeal, he represents the estate of the deceased and any decree that may be passed against him would be binding on all those who claim the property in suit through the deceased. Where some of the heirs have been impleaded as the representative of a deceased respondent the appeal does not abate against the heirs who had not been so impleaded. Though Mahomedan heirs succeed to separate shares in an estate and one litigating about his share could not produce any effect on the share of another who was not impleaded where one of the heirs is impleaded not as owner oi a share in his own right but in a representative capacity as the person best suited to represent the estate, any decision against him would bind the others also. (Allsop and Verma, J.) MOHAMMAD HAMMAD v. TEJ NARAIN LAL. I.L.R. (1942) All. 448=202 I.C. 611=15 R.A. 176=1942 A.W.R. (H.C.) 164=1942 A.L.W. 390=1942 A.L.J. 329=A.I.R. 1942 All. 324,

O. 22, Rr. 4 and 11—Rent suit—Death of one of co-tenants pending appeal—Entire appeal if abotes.

While an appeal filed by a landlord in suit for rent against three co-tenants was pending, one of them used. Each tenant was liable jointly and severally to pay the rent.

Held, that the mere tact that the legal representatives of the deceased tenant were not joined as parties to the appeal did not result in the abatement of the entire appeal. (Puranik, I.) NARAYAN V. BADRIDAS. I.L.K. (1945) Nag. 691=1945 N.L.J. 341.

brought on record within 90 days—Subsequent application to bring others on record—Limitation—Limitation Act, Arts. 177 and 181.

If there are several legal representatives, it is sufficient if at least one of them is impleaded whether in the suit or in the appeal. Where some of the legal representatives have been brought on the record on an application made within limitation, a subsequent application for bringing other persons on the record as legal representatives is not governed by the 90 days rule but is governed by the limitation of three years as provided for under Art. 181 of the Limitation Act. (Grille, C. J. and Sen, J.) ABBUL BAKI v. BAMSILAL ABIRCHAND, I.L.R. (1944) Nag. 577=1944 N.L.J. 331=A.I.R. 1945 Nag. 53.

favour of several vendees jointly in specified shares—Death of one of vendees pendente lite—Suit, if abates in toto.

A right of pre-emption is a right of substitution and if a person wishes to get himself substituted for the vendee in exercise of that right, he must claim the whole of the property over which C. P. CODE (1908), O. 22, R. 4 (2).

he has a right (and in cases where the vendee happens to be a pre-emptor as well a superior right) of pre-emption and cannot leave out any portion thereof at the peril of losing his right altogether. If a person cannot sue for a part of the bargain where he is entitled to sue for the whole, it would not be open to him to sue in respect of the shares of certain vendees only when the bargain entered into between the vendor on the one hand and all the vendees on the other is joint and the cause of action indivisible. It would make no difference if the shares of the various vendees, it they happened to be more than one, were specified as long as the sale was for a consolidated price and it was open to the vendor to call upon all the intending purchasers to perform their contract jointly and to recover the whole of the price from any one of them. Specification of shares in such a case could not make such a contract of sale to be divisible or to consist of a number of transactions embodied in a single document. It follows therefore that a suit for pre-emption in respect of sale in favour of several vendees jointly although in specified shares would abate in its entirety and not against one of the vendees only who dies pendente lite but whose legal representatives are not brought on the record within the period of limitation. A.I.R. 1934 Lah. 429, Appr. A.I.R. 1930 Lah. 33 Overruled. (Harries, C. J. Abdul Rashid and Adur Rahman, JJ.) GHULAM QADIR V. DITTA. 220 I.C. 231=47 P.L.R. 224=A.I.R. 1945 Lah. 184 (F.B.).

O. 22, R. 4 (2)—Defences open to legal

representative.

A person brought on record in place of a deceased defendant can only take a defence which was open to the deceased defendant. (*Teja Singh, J.*) SADHU SINGH v. KAHAN SINGH. 218 I.C. 167=18 R.L. 4=46 P.L.R. 292=A.I.R. 1944 Lah. 473.

\_\_\_\_O. 22, R. 4 (2)—Person substituted for deceased party to appeal—Whether can plead

against pleadings of latter.

A person substituted as the legal representative of a deceased party to an ppeal, is bound to adopt the pleadings of the latter. He cannot raise a new case inconsistent with that made therein. (Mitter and Akram, JJ.) SURENDRA NARAIN v. BHOLANATH ROY, I.L.R. (1944) 1 Cal. 139=16 R.C. 410=210 I.C. 219=47 C. W.N. 899=77 C.L.J. 282=AI.R. 1943 Cal. 613.

several trespassers.

It is only when it is not possible to go on with the appeal in the absence of the heirs of a deceased party that the whole appeal must fail. The mere fact that one of the trespassers had died and his heirs had not been made parties does not make it impossible to pass a decree in favour of the other party against the trespassers and hence in such a case the whole appeal does not abate. (Shirreff, S.M.) GOPAL v. DEOKI. 1942 O.A. (Supp.) 161=1942 A.W.R. (Rev.) 141=1942 O.W.N. (B.R.) 391=1942 R.D. 480.

—O. 22, R. 5—Applicability—Dispute between party and representative of another party—Decision on—Res judicata. See C. P. CODE, S. 47 (3). 44 Bom.L.R. 678.

C. P. CODE (1908), O. 22 R. 6.

—O. 22, R. 5—Applicability -Encumbered Estates Act proceedings. See U. P. ENCUMBERED ESTATES ACT RULES R. 6 AND C. P. CODE, O. 22, R. 5. 1943 R.D. 287.

O. 22, R. 5 -Effect of finding that a person

is an heir of the deceased.

A finding under O. 22, R. 5 that a person is the heir of a deceased person is one settled summarily and it cannot determine that person's right to any portion of the holding finally. (Sathe, J.M.) JAISH KEWAL v. SUKHRAJ. 1942 O.A. (Supp.) 372=1942 A.W.R. (Rev.) 346=1942 O.W.N. (B.R.) 573=1942 R.D. 701

----O. 22, R. 5-Inquiry into question as to who is legal representatives of deceased-Whether can be postponed to execution proceeding.

Under O. 22, R. 5, the question whether a particular person is or is not the legal representative of a deceased plaintiff or a deceased defendant should be determined by the Court in the suit itself. There is nothing in that rule to warrant the postponing of the inquiry to execution proceedings after the decision of the suit. (Purnick, J.) GANPATRAO v. BABARAO. I.L.R. (1943) Nag. 352=297 I.C 318=16 R.N. 33=1943 N.L. J. 250=A.I.R. 1943 Nag. 233.

J. 250=A.I.R 1943 Nag. 233.

O. 22, R. 5-Order that particular person is not legal representative-Right to appeal.

An order of a trial judge rejecting an application under O. 22, R. 3, C. P. Code, on the ground of the applicant not having been proved to be the legal representative of the deceased party, is not, open to appeal. It does not make any difference to the decision of the question of the competency of the appeal that the trial Judge also gave another ground for the rejection of the application, namely, that the right to sue did not survive after the death of the deceased party. (Dim Mahomad, Teja Singh and Achieruram, II.) RAMCHARAN DAS v. HIRA NAND. 222 I.C. 177=A.I.R. 1945 Lah. 298 (F.B.).

Orders passed under O. 22, R. 5. C. P. Code regarding the choice of a legal representative do not finally determine the rights of any claimants to the property in suit. Such orders are limited to the purpose of carrying on the suit and do not have the effect of conferring any right to heirship or to property. Even if the claimants choose to put directly in issue any such right, the decision on such an issue does not operate as resjudicata. (Beckett, J.) Daulat Ram v. Merro. 194 I.C. 585=14 R.L. 2=43 P.L.R. 16=A.I.R. 1941 Lah. 142.

O. 22, R. 5—Scope and effect—Death of appellant—Application for substitution by one heir—Notice to other heirs—Latter raising no objection—Order of substitution—Finality. Jyon Prasad Singh Deo Bahadur v. Samuel Henry Seddon [see Q.D. 1936—'40 Vol. 1, Col. 1736.] 192 I.C. 17=13 R.P. 362=7 B.R. 283.

——O. 22, R. 6—Applicability—Application to set aside execution sale—Death of applicant after hearing and before delivery of judgment—Order pronounced after death—If void.

A judgment-debtor who had applied to have an execution sale set aside died after arguments were heard on his application and before judgment was delivered. Subsequently judgment was delivered dismissing the application to set

C.P. CODE (1908), O. 22 R. 8.

aside the sale and confirming the sale.

Held, that O. 22, R. 6, C. P. Code, applied to proceedings in execution by reason of R. 12 of O. 22, C. P. Code, and therefore the order refusing to set aside the sale and confirming the sale was not void. (King, J.) MEER SHAFI SAHIB v. ABDUL KHARIM. 202 I.C. 725=15 R.M. 570=1942 M.W.N. 505=55 L.W. 402=A.I.R. 1942 Mad. 608 = (1942) 2 M.L.J. 89.

-O. 22, R. 8—Construction and scope— Appeal against money-decree—Insolvency of

appellant-Abatement.

A right to appeal against a money-decree is not affected by the insolvency of the appellant debtor. The words "might maintain" in O. 22, R. 8 (1) mean has the power, or is entitled, to maintain. Where pending an appeal against a money-decree the appellant is adjudicated insolvent, the Official Assignee cannot continue the appeal for the benefit of the insolvent's creditors and the appeal cannot abate under O. 22, R. 8, C. P. Code. (Beaumont, C.J. and Macklin, J.) CHANDRAKANT Devji v. Narottam Das Amar Chand. I.L.R. (1941) Bom. 603=196 I.C. 339=14 R.B. 123= 43 Bom.L.R. 644=A.I.R. 1941 Bom. 293.

Grounds-Poverty of appellant.

The general principle on which the Courts act is not to order further security for the costs of the appeal to be given merely on the ground that the appellant is poor. (Beaumont, C.J. and Macklin. J.) CHANDRAKANT DEVJI v. NAROTTAM-DAS AMARCHAND. I.L.R. (1941) Bom. 603=196 I.C. 339=14 R.B. 123=43 Bom.L.R. 644=A.I.R. 1941 Bom. 293.

-O. 22, R. 9-Applicability-Death af mortgagor prior to preliminary decree—Application for substitution only at the time of final decree—

Proper procedure.

Where in a suit on a mortgage the mortgagor dies a day before the preliminary decree and the fact is not known to the plaintiff or to the Court till the time of passing of the final decree the proper course is for the plaintiff to apply under O. 22, R. 9, for excusing the delay in bringing the legal representative on record and not to apply for substitution at the time of the passing of the final decree. (Davies.) UMDA BIBI v.

of the final decree. (Davies.) UMDA BIBI v. BRAHM DUTT. 1943 A.M.L.J. 28.

O. 22, R. 9—Dismissal for default after death of appellant—Heir's application for substitution with prayer to excuse the delay-Nature

of such application.

Where after the dismissal of an appeal for default after the death of the appellant, his heirs apply for substitution and pray for the condonation of the delay in making the application, it should be treated as an application for setting aside the abatement of the appeal and the bringing on record of the heirs and cannot be dismissed as an application for restoration on the ground that the appeal had already abated. (Bajfai, J.) RAM SINGH v. RAGHUNATH PRASAD 1944 A.L.W. 225. abated.

O. 22, Rr. 9 and 4—Remedy of plaintiff. The fact that the Court went outside the considerations which are necessary for disposal of an application seeking an order under O. 22, R. 4, C. P. Code, that the suit had abated would not action. The purchaser at such sale then applied to the bar plaintiff from filing the application to set Court to be brought on record as the plaintiff in the suit

C. P. CODE (1908), O. 22, R. 10.

aside abatement which R. 9 of O. 22 permits him to make. An appeal under O. 43, R. 1 (k) lies from an order passed under O. 22, R. 9 and not from an order passed under R. 4 of that order; and although it may be said that an order under R. 4 may amount to adecree and therefore he appealable, yet R. 9 provides a concurrent remedy of which the party aggrieved may avail himself. (Davis, J.C. and Weston, J.) TIPITHDAS KESHAY DAS v. HARCHANDRAI. 191 I.C. 447=13 R.S. 133=1940 Sind 137.

-O. 22, R. 9 (2)—Right to apply under—Heirs not coming on record—Administrator if can apply to

set aside abatement.

Where a deceased plaintiff or appellant leaves an heir or heirs who can if they choose apply to be brought on record as the legal representative of the deceased plaintiff or appellant but they or any of them neglect to be brought on the record to prosecute the case, the person obtaining the grant of letters of administration to the estate after the abatment of the suit or appeal is entitled to apply for the setting aside of the abatement of the suit or appeal and it would be set aside if sufficient cause is shown. (Mya Ru and Mosely, 11.) KO POHNIT v. KO SIT ON. 1941 Rang. L.R. 371=198 I.C. 791= 14 R.R. 228 = A I.R. 1942 Rang 15.

-O. 22, R. 9-Sufficient cause-Mere ignorance of death. JAGDISH BAHADUR " MAHADEO PRASAD. [see Q.D. 1936-'40, Vol. I, Col. 1741.] A.I.R. 1941 Oudh 16.

O. 22, R. 9 (2)—Sufficient cause—Ignorance of death-Failure to apply not due to any laches.

Where the parties lived in different villages where there is no proper road communication and the death of a party was only vaguely known to the other of having taken place during the vacation and the latter applies for substitution without undue delay, if it is found as a fact that the death occurred earlier the abatement should be set aside. Courts should not taken an unreasonable view in this respect. (Davies.) RAM SWAROOP v. SUGAN CHAND. 1940 A.M.L.J. 79.

-O. 22, B. 10—Aphlicability—Decree under U.P. Encumbered Estates Act sent to Collector for execution-Transfer of part of the decree-Substitution of names if permissible.

Where after the passing of the decree by the Special Judge under the U.P. Encumbered Estates Act, it is sent to the Collector for execution, the proceedings under the Act are still pending. Hence where there has been a transfer of a part of such decree after it is sent to the Collector, an application for substitution of names could be ordedred. To refuse it on the ground that after decree the suit is not pending is putting too limited an interpretation on the words (during the pendency of a suit) in O 22, R. 10 C. P. Code. (Harper. S. M. and Shirreff. I.M.) SUNDAR LAL v. SADA SEWAR. 1941 A.W.R. (Rev.) 598 (1) = 1941 R.D. 518 = 1941 O.A. (Supp ) 552 (1).

-O. 22, R. 10-Applicability-Devolution of property-Suit by decree holder in mortgage suit for declaration of title of mortgagors—Execution sale under mort gage decree-Purchaser-Application for substitution as plaintiff-Competency.

Pending a suit by a mortgage decree-holder, for a declaration that the mortgaged property belonged to the mortgagors (defendants 6 to 9) and not to defendants 1 to 5 who were claiming title, the decree on the mortgage was executed and the property was sold in Court C. P. CODE (1908), O. 22, Rr. 10 and 11.

in place of the existing plaintiff who lost all interest in the property by reason of the sale.

Hold, that the purchaser acquired an interest in the property, though that interest was not identical with that of the plaintiff and was therefore entitled to be brought on record under O 22 R. 10. (Hornvill I.) ETHIRAJAMMA V. KANNAVVA GUPTA. 213 I.C. 10 = 17 R.M. 20 = 1943 M.W.N. 790 = 56 I.W. 716 = A.I.R. 1944 Mad. 165 = (1943) 2 M.L.J. 594.

——C. 22, Rr. 10 and 11—Applicability—Final decree for partition allotting suit property to a person during pendency of suit in respect of such property—Application by such party to come on record during pendency of appeal from decree in suit—Maintainability RATNASABAPATHI PILLAI v. GOPAIA IVER [see Q.D 1936—'40 Vol. I, Col. 1742.] 193 I.C. 637=13 R.M. 705=(1940) 2 M.L.J. 349.

— 0. 22, R. 10—Applicability—Mortgage suit—Preliminary decree— Death of defendants—Non-substitution
— Effect — Limitation for substitution — Procedure
See C. P. Code, O. 22, RR. 3, 4 AND 10. 8 B. R. 550.
— 0. 22, R. 10—Applicability to devolution by reason of death.

In cases where devolution takes place by reason of death, the matter falls under Rr. 3 and 4 of O. 22, C. P. Code and hence R. 10 of that order wil have no application. (Misra. J.) RAJENDRA PRASAD v. GANGA BUX SINGH. 1944 A.W.R. (C.C.) 291=1944 O.A. (C.C.) 291=A.I.B. 1945 Oudh 60.

O. 22, R. 10, C. P. Code applies to execution proceedings. An order made under that rule dismissing an application to add a party to the execution proceeding is appealable under O. 43, R. 1 (1) but is not subject to second appeal in view of S. 104 (2), C. P. Code. (Wadia and Wassoodew, J.). KRISHNAJI RAMCHANDRA v. BHIKCHAND RAMKARAN, I.L.R. (1941) Bom. 629=200 I.C. 160=14 R.B. 395=43 Bom.L. R. 719=A.I.B. 1942 Bom. 82.

O. 22, R. 10—Assignment pending suit in trial Court—Application for substitution by assignee at stage of appeal—If maintainable.

An assignee pendente lite is not bound to file an application during the pendency of the suit if his interest is protected. It is only when he finds that his interest is in jeopardy and not likely to be protected by the assignor that it is necessary for him to apply for leave to continue the suit by or against him. Therefore an assignee during the pendency of a suit in the trial Court who has failed to make an application for his substitution during the suit is not precluded from filing the application at the stage of appeal if he finds only at that stage that his interest will not be protected by the assignor. (Puranik. 1.) WRIGHT NEVILLE v. E.H. FRASER. I.L.R. (1944) Nag. 520 = 1944 N.L.J. 68 = 216 I.C. 65 = 17 R.N. 57 = A.I.R. 1944 Nag. 137.

- 0. 22, R. 10—Application under—Maintainabllity after passing of final decree.

An application under R. 10 of O. 22 can be made only while the suit is pending and not after a final decree is passed. (Dible, J. M.) JOTI PRASAD v. BASDEO SAHAI. 1943 R.D. 318=1943 A.W.R. (Rev.) 150.

perty coming under Court of Wards fending suit— Court refusing to implead Court of Wards and fassing exparte decree- Locus standing fourt of Wards to

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apply to set aside that decree-Punjab Court of wards Act, S. 13.

Under the provisions of S. 13 of the Punjab Court of Wards Act when during the pendency of the suit the property of a defendant comes under the superintendence of the Court of Wards, there is a devolution of his estate by operation of law and the Court of Wards becomes a proper party to the suit and permission should be given to implied it under O. 22, R. 10, C. P. Code, If the Court refuses to implead it as a party and passes an exparte decree against the ward, it can under O. 22, R. 10 read with O. 9, R. 13, C. P. Code, file an application to set aside that decree. (Harries, C. J. and Mehr Chand Mahaian, J.) HARI SINGH v. MOIN Upplin KHAN, 46 P.L.R. 230=A.I.R. 1944 Lah, 397.

— 0.22, R. 10—Factum or validity of assignment —Enquiry into—Jurisdiction of Court,

Under O. 22. R. 10. C. P. Code, the Court has jurisdiction to hold an enquiry into the factum and the validity of an assignment, if challenged. Therefore, the fact that the assignment is challenged is no ground for rejecting an application for substitution made by the assignee. (Puranik, 1) WRIGHT NEVILLEN, F.H. FRASER. I.L.R. (1944) Nag 520=216 I.C. 65=17 R.M. 57=1944 N.L. J. 68=A.I.R. 1944 Nag. 137

- 0. 22, R. 12-Scope and effect of.

Under R. 12 of O. 22 C. P. Code, Rr. 3 and 4 of that order have no application in execution proceedings. Hence a failure to bring the Legal Representatives of a deceased party on record during execution proceedings does not cause those proceedings to abate. (Dible, 1, M. and Ross. A.M.) JOSHI RAM KRISHNA v. BASANT KUAR. 1943 A.W.R. (Rev.) 220 (1)=1943 R.D. 139.

—0.22, R. 10—Scope—Assignment of interest during pendency of litigation—Right to prosecute litigation, if lost—Assignment after decree and before appeal—If can affect right to appeal.

R. 10 is not one of the rules in O. 22, C. P. Code which declare the abatement of a suit but it is merely a provision enabling the assignee to continue the suit if during the pendency of the suit, the interest of the plaintiff has been assigned to him. It is merely a permissive provision for the henefit of an assignee and not a punitive one to the detriment of the assignor. There is no provision in the Code which shows that a plaintiff who has assigned his interest in the property in suit during the pendency of the suit or an appellant who has assigned his interest in the property being the subjectmatter of the litigation during the pendency of the appeal, loses his right of further prosecuting the suit or Where a plaintiff after dismissal of his suit and before filing an appeal against it, assigned his interest in the subject matter of the suit, it is not incompetent for him to prefer an appeal against the dismissal. (Mya Bu, J.) MAUNG BA THAW v. MA SAW MAY. 1941 Rang L R. 366=198 I.C. 785=14 R.R. 223=A.I. R. 1942 Rang. 13.

—0. 22. B. 10—Suit for damages for wrongful entry on land in breach of contract of lease—Assignment by plaintiff of profit and loss of suit—Death of plaintiff—Right of assignee to continue suit—T. P. Act. S. 6 (c). See Transfer Of Property Act, S. 6 (c). (1941) 1 M.L. J. 22.

- 0.22, R. 10-Transfer of interest-Transferors name, if found to be removed.

The previsions of O. 22, R. 10, do not recessarild in 1ly that the name of a transferor should be celetey

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when the transferee is allowed to prosecute a suit. Both may be interested and in such a case both should be impleaded. (Allsop and Malik, JI.) SANTI LAL v. MUKAT J.AL. I L R. (1944) All. 530=1944 O.A. (H.C.) 179 (2)=1944 A.L.J. 351=1944 A W R. (H.C.) 179 (2)=1944 A.L.W. 508=1944 O.W.N. (H.C.) 189.

-0. 22, R. 10-Who can apply under.

It is not competent to a party who has allowed his opportunity to apply under O. 22, R. 4 to go by owing to his negligence, to fall back on O. 22, R. 10. may be cases in which it is legitimate for one party to apply under R. 10 for substitution in the ranks of the opposite parties, but that is not speaking generally the purpose of R. 10. In ordinary cases of devolution by death, R. 4 applies. In case of assignment, creation of interest or devolution of an interest other than by death, it would normally be the party in whose favour the assignment has been made or the interest created or had devolved who would apply under R. 10. Generally speaking it would not ordinarily be open to the opposite party to apply under R. 10. (Yorke, J.) AMAN ULLAH KHAN 7. ABDUL HAKIM KHAN. 195 I.C. 224=14 R.O. 60=1941 O.L R. 553=1941 O.W.N. 872= 1941 A.L.W. 772=1941 A.W.R. (C.C.) 258= 1941 O.A. 583=A I.R. 1941 Oudh. 495.

-0. 22, B. 12—Applicability—Appeal from execution proceedings. JAGADISH BAHADUR v. MAHADEO PRASAD. See O. D. 1936—'40 Vol. I, Col. 1748.] A.I.R. 1941 Oudh 16.

-O 23, R. 1-Appellate Court-Permission to withdraw suit after dismissal of appeal-Power to grant.

An appellate Court has no jurisdiction to allow a suit to be withdrawn under O. 23, R. 1, C. P, Code, with liberty to institute a fresh suit after passing an order dismissing the appeal. (Rhide, J.) LAL DEV v. NATHIJ RAM. 193 I.C. 137=13 R.L. 433=42 P. L.R. 785=A.I.R. 1941 Lah. 18.

-O. 23, R. 1-Applicability-Probate proceed-

O. 23, R. 1, C. P. Code, is not applicable to probate proceedings. Therefore, a second application for prohate of a will is maintainable although the first application was withdrawn without leave. (Mitter and Akram, //.) JAMUNA DASYA v. KAILASH CHANDRA. 49 C.W.N. 636.

-O. 23, R. 1—Applicability—Withdrawal by one of several plaintiffs-Dismissal of suit-Absence of decree-Appealability.

Where one of several plaintiffs withdraws from the suit and the Court dismisses the entire suit on the grounds that the other plaintiffs who only derived title from the one who had withdrawn, had no case to go on with, the order ie not one under O. 23, R. 1 but a dismissal of the suit on merits. Though a decree is not drawn up in such a case, an appeal lies because the decision amounts to a decree. The absence of a decree would not invest the High Court with jurisdiction to interfere in revision. (Bose, J.) VILAVATAII KHAN v. KHAIRUNISSA. 197 I.C. 275=14 R.N. 155=1941 N.LJ. 179=A.I.R. 1941 Nag. 180.

-O. 23, R. 1-Bar of suit-Plaint returned to he presented to the proper Court-Fresh suit.

Where on the request of the plaintiff the plaint is returned for presentation to the proper Court, but there was no application for withdrawal of the suit. a fresh suit is not barred by O. 23, R. 1, C. P. Code. (Chulam leave to file this fresh suit in respect of the same subject-Hasan and Agarwal, JJ.) GUDAN DUBE v. PURBID- matter by the order permitting withdrawal, they were

C. P. CODE (1908), O. 23, R. 1.

IN. 18 Luck. 497=203 I.C. 587=1942 A.W.R. (C.C.) 344 (1)=1942 O.W.N. 590=1942 O.A. 515 = A.I.R 1943 Oudh 36.

-O. 23, R. 1 and S. 11-Bar to fresh suit-Court allowing plaintiff to file fresh suit and dismissing suit-Fresh suit-If barred by res judicata.

Where on an application for withdrawal of a suit under O. 23, R. 1, C. P. Code, the Court passes an order granting permission to the plaintiff to withdraw the suit with liberty to bring a fresh suit and also adds that "the suit stands dismissed," these words are really a surplusage and possess no significance whatever, and a fresh suit is not barred by res judicata. (Tekchand and Abdul Rashid, JJ.) CHANAN SINGH v. COMMITTEE OF MANAGEMENT FOR GURDWABA MAI MALAN. I.L.R. (1941) Lah. 331=196 I.C. 134=14 R.L. 129 =43 P.L.R. 561=A.I.R. 1941 Lah. 192.

-O. 23, R. 1—Bar to fresh suit—Non-payment of costs.

Where a plaintiff who has been allowed to withdraw a suit under O. 23, R. 1, C. P. Code, with permission to bring a fresh suit has been ordered to pay costs to the defendant but no time limit has been fixed for such payment, and such payment has not been made a condition precedent to the institution of a fresh suit, the failure of the plaintiff to pay costs is no bar to the maintainability of a fresh suit. (Tek Chand and Abdul Rashid, JJ.) CHANAN SINGH v. COMMITTEE OF MANAGEMENT FOR GURDWARA MAI MAI AN. IL.R. (1941) Lah. 331-196 I.C. 134=14 R.L. 129-43 P.L.R. 561= A.I.R. 1941 Lah. 192.

O. 23, R. 1—Construction—"Fresh suit"—Suit under S. 92, C. P. C. after consent-Addition of new defendant without consent-Withdrawal of suit against such defendant with liberty to file fresh suit-Subsequent consent of Advocate-General-Addition of same party after consent-Sufficiency-If fresh suit.

It cannot be held that what O. 23, R. 1, C. P. Code, contemplates is a fresh suit in the sense of a freshly instituted suit against all the parties to the suit. It is quite sufficient if the suit is instituted against a particular party after leave has been obtained under O. 23, R. 1. A suit under S. 92, C. P. Code, was filed against defendants 1, 2 and 3 after obtaining the consent of the Advocate-General. On a plea of misjoinder raised by the defendant the 4th defendant was added as a party but consent of the Advocate-General was not taken prior to his being added. On this ground the fourth defendant pleaded that the suit was not maintainable against him. as he was added without the consent of the Advocate-General having been obtained as against him. The plaintiffs therefore applied for leave to withdraw the suit against him under O. 23, R. 1, C. P. Code, with liberty to bring a fresh suit against him on the same cause of action. This was granted and the fourth defendanf's name was struck out. Subsequently the plaintiffs obtained the consent of the Advocate-General to sue the fourth defendant and applied to have him added and he was made a party to the suit again. The fourth defendant now pleaded that this course was illegal and that a new suit should be filed against him because O. 23, R. 1, C. P. Code, would not permit the same party against whom the suit had once been abandoned to be impleaded over again.

Held, that by bringing the fourth defendant on record again after obtaining the consent of the Advocate-General under S. 92, C. P. Code, the plaintiffs had instituted a fresh suit against him, and having obtained

C.P. CODE (1908), O. 25, R. 1.

entitled to maintain the sait as against him. A new suit was in effect instituted against him when he was made a party to the suit after consent of the Advocate-General. (Chagla, J.) CHAMPAKLAL PURSHOTTAM-DAS v. BAI NARBADABAI. 46 Bom.L.R. 749 = A.I.R. 1945 Bom. 74.

-0 23. R. 1-Duty of Court-Grant of permission to withdraw suit

The provisions of O. 23, R. 1 C.P. Code, require that the Court should be satisfied about the conditions justifying withdrawal of the suit under that rule before granting permission. (Bhide, J.) LAL DEVI v. NATHU RAM. 193 I.C. 187=18 R.L. 483=42 P L.B. 785= A.I.R. 1941 Lah. 18.

-O. 23, R. 1—Leave to file fresh suit—If can be

granted on dismissal of suit.

A court cannot give leave to Plaintiff to file a fresh suit upon the dismissal of an earlier suit but only upon its withdrawal. (Roberts, C.J. and Mosely, J.) U SIN v. MA MA LAY. 1941 Rang. L.R. 14=194 I.C. 482 =13 R R. 311=A.I.R. 1941 Rang. 118.

-0.23, R.1-Order allowing withdrawal and also dismissing suit-Effect-Appeal-Revision.

Where on an application by the plaintiff under O. 23, R. 1, C.P. Code, asking for permission to withdraw the suit with liberty to bring a fresh suit, the Court after holding that "the plaintiff was entitled to withdraw from proceeding with the suit" allows him to do so with liberty to bring a fresh suit, and also adds that "the suit of the plaintiff be consequently dismissed", the order is in fact and substance one allowing the suit to be withdrawn under O. 23, R. 1, and its real character cannot be changed by these words. These words are a mere surplusage and have no real meaning. Obviously a suit cannot be allowed to be "withdrawn" and "dismissed" at the same time. Consequently such an order is not appealable, and a revision lies from that order. (Tek Chand and Blacker, JJ.) KHAN SINGH SOMA SINGH v. BALDEV SINGH, I.L.B. (1943) Lah. 151= 199 I.C. 695=14 R.L. 420=44 P.L.R. 41=A.I.R. 1942 Lah. 81.

-O. 23, R. 1 and S. 115-Order granting leave to withdraw suit and file fresh one-Contents-Absence

of details and reasons—Interference—Revision.

An order under O. 23, R. 1, C.P. Code, permitting the withdrawal of a suit with liberty to file a fresh suit must contain the facts, in sufficient detail, to enable a Court to know the case of the parties, the lacuna which is the immediate cause of the application for withdrawal and the reasons of the learned Judge for holding that a case within the meaning of R. 1 of O. 23, C.P. Code, has been made out. In the absence of these details the order is liable to be set aside in revision. (Sinha J.) RIAZUDDIN v. MIR SAJID HUSAIN. I.L.R. (1944) A. 396=215 I.C. 107=1944 O.W.N. (H.C.) 77 (2) =17 R.A. 63=1944 A.W.R. (H.C.) 161 (1)=1944 O.A. (H.C.) 161 (1)=1944 A.L.J. 317=1944 A.L. W. 313 (2) = A.I.R. 1944 All. 224 (1).

-0. 23, B. 1—Order under —Appeal — Withdrawal of suit in appeal-Party being handicapped in production of evidence in trial Court-If a sufficient

No appeal lies from an order allowing a suit to be withdrawn with permission to file a fresh suit under O. 23, R. 1, C. P. Code. The fact that the plaintiffs were handicapped in producing their oral evidence before the trial Court and were unable to file their full documentary evidence is no ground for permitting a suit to be withdrawn in appeal with liberty to file a fresh one and such an order is likely to be set aside in revision. (Shirreff, S.M. and Sathe, J.M.) POORAN MAL.

O. P. CODE (1908), O. 23, R. 1 &O. 7, R. 11.

LAL SINGH. 1942 R.D. 494=1942 O.W.N. (B.R.) 405-1942 A.W.B. (Rev.) 278-1942 O.A (Supp.)

-0. 23, B. 1-Powers of High Court-Application to withdraw suit with liberty to bring fresh suit in Letters Patent Appeal-1f to be allowed.

There is no doubt that the High Court has power in appeal to allow an appellant to withdraw his suit; but where a suit has reached the stage of a Letters Patent Appeal, it would not be right to allow the plaintiff to withdraw the suit in order to bring a fresh suit. (Harries C.J. and Fazl Ali, J.) DOMI RAM v. LIQUI-DATOR, NAWADAH B. CO-OP. SOCIETY. 197 LC. 215 =14 R.P. 286=8 B.E. 172=22 Pat. L.T. 947= A.I.R. 1942 Pat. 148.

-0. 23, R. 1 and S. 115-Revision-If lies against order under O. 23, R. 1-Duty of Court-With. drawal on the ground of formal defects, when defects were material defects-Interference.

In certain circumstances ar application is revision lies against an order passed by a Court under O. 23, R.1. C.P. Code and in such a case it is necessary to see whether the Court has been guilty of material irregularity in passing the order. Where a suit dismissed by the trial Court is allowed by the appellate Court to be withdrawn with liberty to file a fresh suit on the ground that there were certain formal defects, when as a matter of fact they were material defects, the lower appellate Court must be held to have acted with material irregularity in allowing the withdrawal of the suit and its order can be set aside in revision. (Bennett, J.) RAM PADARATH MISIR v. DATA DIN MISIR. 193 I.C. 892=13 R.O. 522 =1941 O.L.B. 371=1941 A.W.R. (Rev.) 310=1941 O.A. 343=1941 O.W.N. 558=A.I.R. 1941 Oudh 417.

-0. 23, R. 1—Scope—Order permitting with drawal of suit with liberty-Subsequent application for revival of suit on ground of non-acceptance of terms or to alter or vary terms-Maintainability.

If a plaintiff simply wishes to withdraw from suit he can do so without asking for any permission from the Court. But if he wishes to withdraw his suit with liberty to institute a fresh suit in respect of the same subject matter, he has to ask for permission from the Court, and it can be given only on such terms as it thinks fit. It is clear that the permission relates not to the withdrawal of the suit but to the filing of another suit when once the suit is withdrawn it is no longer pending. After the order is made permitting the withdrawl of the suit on certain conditions, it is not open to the plaintiff to ask the Court to modify or to annul the conditions, the suit having already ended when the order is made. Once the order for permission to withdraw is made and the suit has ceased to exist it is not open to the plaintiff to revive the suit on the ground of non-acceptance of the terms. This should be before and not after the order of withdrawal is formally made. (Divatia, J.) Jaijibai Modi v. Bhikhibai Chandulal. I.L.B. (1941) Bom. 570=196 I.C. 333=14 R.B. 121 =43 Bom. L.R. 646=A.I.R. 1941 Bom. 290.

O. 23, R. 1 and O. 7, R. 11-Right to abandon part of claim—Application for amendment of plaint— Necessity—Additional court-fee demanded—Part of claim and a defendant given up to avoid payment of the extra court-fee demanded—Dismissal for non-payment of deficit court-fee-Legality.

A plaintiff has always a right to abandon a part of his claim and for abandonment it is not necessary to file an application for an amendment of the plaint. If he abandons part of his claim he has only to intimate

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the fact to the Court and the Court has only to note it on the plaint. Where on a plaintiff on being asked to pay additional court-fee takes time but does not pay the extra fee demanded and only files memorandum giving up an item of property and a particular defendant so as to avoid the extra court-fee the whole suit cannot be dismissed for non-payment of deficit court-fee. An application for amendment of the plaint is not necessary before it can be treated as estricted to the other defendant sand other properties. (Somayya, J.) RAMAKRISHNA REDDI v. VEERA REDDI, 1945 M W.N 716 = (1945) 2.M.L J. 473.

-- 0. 23, Rr. 1 and 2-Scope-Suit under 0. 21, R. 63-Leave refused to amend by insertion of prayer for possession — Order permitting withdrawal with liberty to file fresh suit—Court saying that S. 14, Limitation Act, applied and awarding costs-Fresh suit beyond time-Plea of limitation-Sustainability-Estoppel Acceptance of costs awarded in first suit-Effect.

The respondent whose claim to a property attached in execution of a decree was rejected filed a suit under O. 21 R. 63 to establish his title. When the suicame on for hearing, realising that the suit was not competent without a prayer for possession applied for leave to amend his plaint, but his application was refused. The Court however, gave him leave to withdraw the suit under O. 23 R. 1, C. P. Code, with permission to file a fresh snit within one month and awarded costs to the appellant (defendant). The Court also expressed its opinion that S. 14 of the Limitation Act would apply to the case and that the respondent would not be prejudiced on the question of limitation. The respondent paid the cost to the appellant and filed a fresh suit which was beyond one year of the dismissal of his claim petition. The appellant pleaded limitation but his plea was overruled.

Held. (1) that S. 14 of the Limitation Act did not apply to the case; (2) that any statement made by the Court granting leave to withdraw the suit under O. 23. R. 1, could not operate to repeal O. 23, R. 2, which provided that the fresh suit was barred by the law of limitation; (3) that the Court granting leave to withdraw had no power to impose a condition and the fact that it did, did not relieve the respondent from the responsibility of filing his suit in time; (4) that the appellant was not estopped from raising the plea of limitation by reason of his having accepted costs awarded to him in the first suit. (Leach C.J. and Byers, J.) VIRUPAK-SHAPPA v. VEERABHADRA GOWD. 206 I.C 394=15 R.M. 970=55 L.W 622=1942 M.W.N. 622=A.I.R. 1943 Mad. 80=(1942) 2 M.L.J. 442.

-O. 23, R. 1—Suit for accounts—Withdrawal atter preliminary decree-Permissibility.

A suit for rendition of accounts by the principal against the agent cannot be allowed to be withdrawn under O. 23, R. 1, C. P. Code, if a preliminary decree had been passed in the suit and no appeal had been filed from it. (Tek Chand and Blacker, JJ.) KHAN SINGH SOMA SINGH v. BALDEV SINGH. I.L R. (1943) Lah. 151=199 I.C. 695=14 R.L. 420=44 P.L.R. 41 = A.I.R. 1942 Lah. 81.

-0.23, R. 1-Suit instituted in accordance with permission given under-If can be allowed to be withdrama

There is nothing in the C. P. Code, or any other law, which lays down that under no circumstances can a suit instituted in accordance with the permission given under O. 23, R. 1, C. P. Code, at the time of the withdrawal

### C. P. CODE (1908), O. 23, R. 1 (1) & (4).

the liberty to bring another suit. (Tekchind and Abdul Rashid, JJ.) CHANAN SINGH v. COMMITTEE OF MANAGEMENT FOR CURDWARA MAI MALAN. I.L.R. (1941) Lah, 331 = 196 I.C. 134=14 R.L. 129 =43 P.L R. 561=A.I.R. 1941 Lah. 192.

-O. 23, R. 1 and U. P. Tenancy Act (1939) S. 275.—Withdrawal—Proper stage—If can be allowed in appellate Court-Revision.

An appellate Court is not justified in allowing a withdrawal of a suit when the application is made for it, for the first time in appeal. Its order is liable to be revised under S. 275, U. P. Tenancy Act as amounting to an exercise of jurisdiction with material irregularity. (Hurper S.M. and Sathe, A.M.) SHABBIR v. ZABAR Undin. 1941 R.D. 1115=1941 O.A. (Supp.) 925 (2)=1941 A.W.R. (Rev.) 1156.

-0.23, R. 1 (1) and (4)—Construction and scope—Several plaintiffs—Right of one to withdraw from suit without consent of others-Question of prejudice-Inconvenience to other plaintiffs-Relevancy.

Sub-R. (4) of R. 1 of O. 23. C.P. Code, does not govern an application for the unconditional with-drawal of a suit under sub-R. (1) of R.1. But it does not follow that one of several plaintiffs has an unconditional right to withdraw from a suit though it may be that for such a purpose the consent of the other plaintiffs may not be necessary. The question of prejudice has to be considered by the Court. The 1st and 2nd plaintiffs along with the third plaintiff-a financierbrought a suit for specific performance of an agreement to re-convey property by the defendants. The 3rd plaintiff deposited in Court the necessary amount of money but owing to differences among the plaintiffs the 3rd plaintiff filed a petition for leave to withdraw from the suit so far as he was concerned and also to withdraw from Court the amount which he had deposited.

Held, (1) that since the 3rd plaintiff was not a necessary party to the suit for specific performance of an agreement to which he was not a party, though the grant of leave to him to withdraw from the suit might cause inconvenience to the other plaintiffs, yet such inconvenience was not a legal obstacle to the continuation of the suit and cannot be regarded as a prejudice to the other plaints which should prevent the Court from granting the petition to withdraw; (2) that the withdrawing plaintiff could take back from Court the money deposited by him which was still his, and his right to withdraw the money could scarcely by doubted. (Krishnaswam: Ayyangar, J.) TULSIDAS SAIT v. SETHURAMASWAMI IYER. 204 I.C. 460=15 R.M. 765=55 L.W. 385=1942 M.W.N. 58=A.I.R. 1942 Mad. 373=(1942) 1 M.L.J. 190.

O. 23, R. 1 (1) and (4)—Scope and effect— Several plaintiffs-Unconditional withdrawal of suit by some without consent of rest-Right ofimposition of restrictions-Inherent power of

Per Mukherjea, J.—The operation of Sub-R.(4) of O. 23, R. 1, is confined to cases where permission of the Court is necessary in order to enable the plaintiff to withdraw from a suit; or in other words, it is applicable only when the plaintiff wants to have the liberty of instituting a fresh of the first suit be allowed to be withdrawn with suit in respect of the same subject-matter. In C. P. CODE 1908, O. 23, E. 1 (2).

such a case express leave of the Court is necessary and even if there are circumstances present which would justify the Court in granting leave under Sub-R. (2), Sub-R. (4) imposes a restraint upon its authority and prevents it from granting permission to one of several plaint tiffs to withdraw from a suit if the other plaintiffs do not consent to this course. But if the withdrawing plaintiff does not want to reserve any right to renew the suit on his own account in future and is prepared to take the consequence indicated in Sub-R. (3) it cannot be said that his right of withdrawal is dependent on the consent of the other plaintiffs. The Court has, however, an inherent power quite apart from Sub-R. (4) to impose restrictions upon the right of one of the several plainliffs to withdraw from a suit when such course is detrimental to the interest of the other co-plaintiffs even though the withdrawing plaintiff does not want any liberty to renew his suit.

Per Pal, J.-Suh-R of O. 23, R. 1, C. P. Code. Code, gives a plaintiff the right to withdraw only his suit or abandon his claim. This can be done only by the entire hody of the plaintiffs when they allege that the right to the relief exists in them jointly. The suit and the claim in such a case are the suit and the claim of these plaintiffs collectively. But as persons may join in one suit as plaintiffs even when they claim severally or inalternative, their several or alternative reliefs will be their own respective suits or claim they will be entitled to withdraw or abandon them under Suh R. (1). No leave of the Court will be needed for this purpose. In this view no right of withdrawal is given by this rule to some of the plaintiffs in a case where they allege the right to the relief as existing in them jointly without the leave of the Court. Even the Court's power under the rule is limited to the case of withdrawal with liberty to bring a fresh suit. When such liberty is not sought for, the Court is not authorised by the rule to allow withdrawal. It is only in exercise of its inherent nower that the Court can move in the matter. When therefore such a plaintiff wants to withdraw without such liberty his only remedy is to invoke the in-herent power of the Court. The exercise of the inherent power is not hampered by the provisions of this rule. But certainly all considerations of justice and prejudice will be open to it while called upon to exercise its inherent power. consent of the other plaintiffs in such a case is not at all required. Sub-R. (4) has no application here. The consent is material only so far as the consideration of their prejudice is concerned. If they are sui juris and give their consent, the court need not trouble itself with the question of their prejudice. Still the question of prejudice and harassment of the defendants remains and hefore exercising the inherent power in favour of withdrawal the Court will weigh them properly (Mukherjea, and Pal, Jl.) BAIDYA NATH NANDY v. SYAM SUNDER NANDY. I.L.R. (1943) 1 Cal. 205-208 I.C. 323=16 R.C. 166=76 C.L.J. 211= A.T.R. 1945 Cal. 427.

O. 23, R. 1 (2)-Duty of Court-Notice to defendant-Recording of reasons for grant of permission to withdraw suit with liberty-Necessity for-Failure to comply—Effect—Interference in revision.

C. P. CODE (1908), O. 25, R. 1 (2).

Before permitting a plaintiff to withdraw a suit under O. 23, R. 1 (2), C. P. Code, with liber tv to bring a fresh suit, it is incumbent upon the Court to issue notice to the defendant and to record its reasons for granting permission to withdraw the suit. Where the order granting permission is made without notice to the defendant and is not supported by reasons, it is vitlated by material irregularity, which would justify the High Court in setting aside the order under S 115, C. P. Code. (Lobo and O'Sullivon, II.) SONAKHAN YAR MAHOMED v. MST. BACHT. I.L. R. (1944) Kar 169=216 I.C. 212=17 R.S. 63= A.I.R. 1944 Sind 192.

-O. 23, R. 1 (2)-'Formal defect'-Refusal to allow documentary evidence to be filed in the proceedings. See U. P. Tenancy Acr. S. 275 And C. P. Code, O. 23, R. 1 (2). 1943 R.D. 435.

-0. 23, R. 1 (2) Formal defect - What is-Detect of non-inclusion of certain necessary parties if a 'formal' one.

A 'formal defect' within the meaning of 0.23, R. 1 (2) would seem to connote every kind of defect which does not affect the merits of the It cannot be said that the defect of noninclusion of certain necessary parties is a formal defect. (Rajpai, I.) MUKTANATH TEWARI v. VIDYASHANKER DUBE. I.L.R. (1942) All, 942-205 I.C. 360-15 R.A. 412-1942 A.W.R. (H.C.) 378=1942 A.L.W. 713=1942 A.L.J. 631=A.I.R. 1943 All. 67.

-O. 23, B. 1 (2)—Grant of leave—Discretion of Court.

The grant of leave under (). 23, R. 1 (2), is a matter within the discretion of the Court. Where the plaintiffs are not withdrawing from the suit because of any formal defect or because of any ground analogous to a formal defect, but because they find that they cannot sustain the judgment of the lower appellate Court and cannot succesfully challenge that of the trial Court, it is not a fit case for granting leave to withdraw with permission to bring a fresh suit. (Puranik. I.)
DEOSTHAN MATH ATONYA BARA V. RAMDAYAL,
I.L.R. (1944) Nag. 51=210 I.C. 116=16 R.N.
138-1042 N.T. I. 464-A.T.D. 1042 Nov. 207 138=1943 N.L.J. 481=A.I.R. 1943 Nag. 307.

O, 23, R. 1(2)—Order granting leave to file fresh suit—Legality of order—If can be questioned in such suit.

An order for withdrawal of a suit with leave to institute a fresh suit made in circumstances not within the scope of O. 23, R. 1 (2), C. P. Code, is not an order made without jurisdiction and is not, therefore, null and void. A fresh suit instituted upon leave so granted is maintainable. The Court trying the subsequent suit is not competent to enter into the questions whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had power to make the order and had properly made it. (Sen, J.) NIRBHFFAM V. SUKHDEO. I.L.R. (1944) Nag. 412=1944 N.L.J. 365-A.T. P. 1945 Nag. 407. 366=A.I.R. 1945 Nag. 307.

-O. 23, R. 1 (2)—"Other sufficient grounds"—

Meaning.

The "other sufficient grounds" in O.23, R. 1
(3), C. P. Code, must be ejusdem generis with
"formal defect." (I obo and O'Sullivan, II.) SONORHAN YARMAHOMED V. MST. RACHI. I.L.R. C. P. CODE (1908), O. 23, R. 1 (2) (b).

(1944) Kar. 169=216 I.C. 212=17 R.S. 63= A.I.R. 1944 Sind 192.

—0.23. R. 1 (2) (b)—"Other sufficient grounds" —Meaning—Failure to produce requisite evidence—If ground for grant of leave.

The words "other sufficient grounds" in O. 23, R. 1 (2) (b), C. P. Code, must be read as grounds eiusdem generis with the ground specified in Cl. (2) (a) Leave to withdraw a suit can therefore, only be granted where the suit must fail "by reason of some formal defect" or by reason of something analogous to that. It cannot be granted when a party fails to produce the requisite evidence. (Base. 1.) SUKHAIN MILAI ". IIQUIDATOR' CO-OPERATIVE SOCIETY PONDI SIMARIA. I L.R. (1944) Nag. 458 = 217 I.C. 303 = 17 R.N. 114 = 1944 N.L.J. 160 = A.I.R. 1944 Nag. 183.

—O 23, R. 1 (2) (b)—"Other sufficient grounds"

—Meaning of. JAGADAMBAL v. SUNDARAMMAL.

[5. Q. D. 1936.40 Vol. I, Col. 1754.] A.I.R. 1941

Mad. 46.

owing to abundant caution—It could be granted.

The main object of sub-R. (2) of R. 1 of O. 23, C. P. Code is to prevent the defeat of justice or technical grounds and the words 'sufficient grounds' refer to some defect in the suit, which had the effect of shutting out a fair trial on the merits and arose out of some error made in good faith by plaintiff or by the Court at the instance of either party which could only be effectively set right by a trial de novo 'n a case where there was no defect which shut out a fair trial, but the plaintiff's cause of action disarpeared and he out of abundant caution to meet a possible claim by the other side made a request for permission to bring a fresh suit permission ought not to be reserved to the plaintiff to bring a fresh suit. (Clarke, I) JAMNADAS v. BEHARILAL. 196 I.C. 544=14 R.N. 110=1941 N.L. J. 382=A.I.R. 1941 Nag. 258.

O. 23. R. 1 (3)— Applicability — Application under para. 20. Sch. II—II suit, for purposes of O. 23, R. 1—Withdrawal without liberty—II bars subsequent suit to enforce award or suit on original cause of action apart from award—"Subject-matter."

An application under Sch. II, para. 20, C. P. Code, to file an award, though it is numbered and registered as a suit, is not a suit for all purposes. In respect of a promissory note executed by the defendant to the plaintiff in June 1933, there was a reference to arbitration without the intervention of the Court in 1935, and an award was made. On 14—6—1935, the plaintiff applied to file the award under para. 20, Sch. II, C. P. Code and on 18—9—1936, he applied for permission to withdraw the application on the ground that he had to file a separate suit, but did not specifically ask for liberty to bring a separate suit. The Court made an order permitting the withdrawal. On 28—10—1936, the plaintiff filed a suit to enforce the award and secondly to recover the amount due on the promissory note. It was pleaded that the suit was barred under 0, 23, R. J. (c), as no leave to bring a fresh suit had been granted.

Held, (1) that an application to file an award and a soit to enforce an award were not in part materia, and O. 23, R. I could not be construed to mean that the withdrawal of an application without liberty reserved was a bar to the institution of a suit, as the word "suit" in the rule if it could mean an application to file an award at all, must mean that wherever that word occurred; (2) that even if it be held that the withdrawal of an application to file an award without liberty to apply again barred a suit, it would only bar a suit on the san'

C. P. CODE (1908), O. 23, R. 1 (4).

subject-matter; (3) an application to file an award and a suit afterwards brought to enforce the award were not proceedings in respect of the same subject-matter (4) that a fortiori, the plaintiff's claim for relief on the original cause of action apart from the award was not on the same subject-matter, and hence the suit was not barred, as the plaintiff's failure to obtain leave of the Court to bring the suit was not fatal to his suit.

Ohiter.—O. 23, R. 1 is essentially a rule of procedure, and it would seem that it would under S. 141, C. P. Code, apply to an application to file an award, whether the application is to be regarded as a suit or not. (Brownfeld and Macklin. J.) GANPAT KINUSHFT v. VITHAL BHIKAN. I.L.R. (1942) Bom. 94=14 R.B. 324=198 I.C. 575=43 Bom. L.R. 976=A.I.R. 1942 Bom. 57.

—0. 23, R. 1(3)—Bar of suit—Riectment suits— Lapse of time and fresh opportunity for electment— If makes second suit different from the first.

Where the facts constituting the basis of the plaintiff's rights and the infraction are the same the mere passage of time with the recurrence of a fresh opportunity for ejectment does not constitute any such substantial difference as will make the subject matter of the second suit different from that of the previous suit. (Sathe, 1 M.) RAJ SHATRANJA II v. GUMANI RAM. 1941 O.W.N. 692=1941 A.W.R. (Rev.) 440=1941 O.A. (Supp.) 370=1941 R.D. 374.

—0. 23, R. 1(3)—Order allowing withdrawal with liberty to file fresh suit—Payment of costs made condition precedent to fling suit—Suit filed without payment of costs—Costs deposited on day fixed for orguments—Suit time barred on that day—Effect.

Where the plaintiff was given liberty to withdraw a suit with permission to institute a fresh suit if not otherwise barred by limitation, and costs were directed to be paid to the defendant as a condition precedent to the institution of such suit, but the plaintiff instituted the new suit without paying the costs and deposited them after evidence was taken on the day fixed for hearing arguments on which day the suit was barred by limitation.

Held, that the new suit was time-barred as it must be taken to be instituted only on the day when the condition of the payment of costs was complied with. (Mukherjea and Pal, J.). AMIR HUSAIN v. ABDUL BARIKHAN. I.L.R. (1944) 1 Cal. 286=211 I.C. 24=16 R.C. 486=47 C.W.N. 709=A.I.R. 1943 Cal. 560.

C. P. Code—Suit for redemption of mortgage—With-drawal or abandonment and dismissal—Fresh suit—Bar of.

S. 60, Transfer of Property Act, does not over-ride the provisions of O. 23, R. 1 (3), C. P. Code. When once a suit for redemption of a mortgage has been withdrawn or abandoned and is consequently dismissed, a fresh suit for redemption is not meintainable. (Wadworth and Patanjali Sastri J.) MATTAPALLI RAJU v. VENKATA RAGHAVAYYA. 58 L.W. 126=1945 M.W.N. 298=A.I.R. 1945 Mad.225=(1945) 1 M.L.J. 212.

S. 44—When can O. 23, R. 1 (4) and Agra Tenancy Act, S. 44—When can O. 23, R. 1 (4) apply—Suit against co-sharer under S. 44, Agra Tenancy Act, by lambardar and another co-sharer—Withdrawal by lambardar—Effect.

award at all, must mean that wherever that word occurred; (2) that even if it be held that the withdrawal of an application to file an award without liberty to apply where in a suit under S. 44 of the Agra Tenancy Act a sain barred a suit, it would only bar a suit on the san co-sharer is said by the lambardar and another, the

C. P. CODE (1908), O. 23, R. 1 (4).

lambardar being the only person entitled to sue, can be permitted to withdraw the suit and on such withdrawal the suit has to be dismissed. (Shirzeff, S. M. and Sathe, J. M.) AJOHHYA, TRASAD T. EISHWANTH PRASAD, 1942 O.A. (Supp.) 88 = 1942 A.W.R. (Rev.) 82 = 1942 O.W.N. (B.R.) 270 = 1942 R.D. 359.

— 0. 23, R. 1 (4)—Withdrawal Regularity— Withdrawal by original plaintiff without the consent of the subsequently added a blaintiff.

When a pro forma defendant is transposed as a plaintiff on his application, he is entitled to all the rights of a plaintiff and can object to the with rowal of the soit by the original plaintiff without his consent. (Share, S. M. and Sathe, J. M.) MIGHINHAR P. BANNA. 1942 R.D. 350=1942 O.W.N (P.R.) 261:=1942 A. W.R. (Rev.) 261 (2)=1942 O.A. (Supp.) 287 (2).

The adjustment contemplated by O 23, R. 3, C. P. Code, is an adjustment of the suit by any lawful agreement or compromise. To amount to an adjustment the agreement or the compromise must be capable of being embodied in a decree forthwith. An agreement to have a suit decided according to oath of one of the parties does not amount to an adjustment of the suit. (Achhu Ram, J.) Shah Nawaz n, Ghullam Mahomed. 47 P.L.R. 411 = A.I.R. 1946 Lah. 78.

—0.23, R.3—Adjustment—Arbitration pending appeal—Award not filed in time and not signed by one of arbitrators—Validity.

A petition was filed by both parties to an appeal to the effect that they had agreed that their dispute should be referred to three named arbitrators, who were to submit their award within a certain time. The appealwas then adjourned by the Court to enable the parties to compromise. Long after the time fixed for the submission of the award, a so-called award was put in by two of the arbitrators without the signature of the third who filed an affidavit saying that the arbitrators never met and discussed the matter, and he had had no notice from the other arbitrators;

Held, that in the circumstances the suit could not be treated as having been adjusted under 0. 23, R. 3 C. P. Code, upon the basis of the so called award. Even if the petition originally filed by both parties could be regarded as a valid agreement to refer the case to arbitrators subject to certain conditions, those conditions were never fulfilled and became impossible of performances the agreement, if any, became nugatory. (Fazl Ali. 1) KAMESHWAR SINGH v. RAIBANSI SINGH. 217 I.C. 49=17 R.P. 149=11 B.R. 149=A.I.R. 1943 Pat. 433.

O. 23, R. 3—Adjustment—Award in arbitration out of Court during pendency of suit—Recording of.

An award made during the pendency of a suit, between the parties'and concerning the matters or some of the matters in that suit as a result of an arbitration out of Court may constitute an adjustment by lawful agreement or compromise within the meaning of O. 23, R. 3, C.P. Code and can be recorded as such. (Collister, Bajpai and Braund JJ.) Dular Koert v. Pavag Koert. I.L.R. 1942 A. 357=199 I.C. 607=14 R.A. 392=1942 A.W. R. (H.C.) 67=1942 A.L.W. 142=1942 O.W.N. 102=1942 O.A. (Supp.) 113=1942 A.L.J. 137=A.I.R. 1942 All. 145 (F.B.).

C. P. CODE (1908), O. 23, R. 3.

——O. 23, R. 3and S.115—Adjustment—Award in arbitration with permission of Court—Supersession—Appeal—Revision—If lies.

An award in an arbitration whether with or without the permission of Court cannot be recorded as an adjustment by compromise under 0.23 R. 3 C. P. Code and therefore an order superseding an award is not appealable. Nor is it revisable under S. 115, C. P. Code, because there is no 'case' decided. (Clarke, I.) HANSRAI v. SHANKAR LAL. I.L.R. (1942) Nag. 414—14 R. N. 128—196 I.C. 770—1941 N.L.J. 333—A.I.R. 1941. Nag. 263.

The reference to arbitrators made privately during the pendency of a suit does operate as an adjustment of the suit under R. 3 of O. 23. (Sathe S.M. and Dible, J.M.) JAMNA DASS v. RAM PRASAD. 1943 A.W.R. (Rev.) 64=1943 R.D. 144.

O. 23. R. 3—Agreement between parties in course of mortgage suit—Defendant not receiving full benefit which Bengal Money-lenders Act gives him—Agreement whether can be recorded, See Bengal Money-Lenders Act, S. 36 (1) (b) I.L.R. (1943) 2 Cal. 373.

Ceedings. See PROVINCIAL INSOLVENCY ACT, S. 27
AND C. P. CODE, O. 23, R. 3. 1945 O.W.N. 298.

Application for final decree—Plea of satisfaction and adjustment of mortgage-debt before preliminary decree—If can be raised and gone into. See C. P. CODI, O. 21, R. 2 AND O. 23, R. 3. (1945) 2 M.L.J. 367 (P.C).

O. 28, R. 3—Applicability—Mutation proceedings—Compromise in Land Registration proceedings—Duty of Revenue Officer to give effect to.

There is no reason why a Court including a revenue Court should not encourage settlement by compromise of family disputes. Where, in Land Registration Procedings, it is proved that a compromise has been arrived at adjusting the matter in dispute, it is the duty of the Court to record the compromise under O. 23, R. 3, C. P. Code, and effect mutation in accordance with its terms. (Lee.) DULHIN FATIMA KUER v. DUKHI KUER. 11 B.R. 483.

— O. 23, R. 3—Applicability—Suit under S.92 —Disposal on compromise or on award in arbitration through Court—Jurisdiction of Court to consider whether award or compromise is lawful.

It cannot be held that a suit under S. 92, cannot be disposed of under O. 23, R. 3 as a result of a compromise arrived at between the parties or on the basis of an award passed by arbitrators on a reference made through Court. But the Court is bound to apply the provisions of O. 23, R. 3. and consider whether the compromise or the award is lawful or not within the meaning of O. 23, R. 3. The mere obtaining of an award in a suit under S. 92, C.P. Code, will not take away the jurisdiction of the Court to decide whether the award or compromise is lawful or not. (Manohar Lall and Brough, IJ.) Banabehari Puri v. Ananna Puri. 212 I.C. 35 = 16 R. P. 254=10 B.R. 435=9 Cut.L.T. 85=A.I.R. 1944 Pat. 115.

C. P. CODE (1908), O. 23, R. 3 & O. 34, R. 3.

-O. 23, R. 3 and O. 34, R. 3-Composition between dates of preliminary and final decree-Objection by one party-Provision of law applicable.

Between the passing of the preliminary decree in a mortgage suit and the final decree, a composition should not be accepted where one of parties does not agree. O. 34 refers succincily to mortgage suits and its provisions have to be followed and R. 4 (2) of that order would be of no use if it could be by passed by pleading a composition which the Court was compelled to accept under R. 3 of O. 23. (Davies.) PEM RAJ v. CHAND MAL. (1945) A.M.L.J. 13.

-0. 23, R. 3-Compromise-Agreement in pend. ing suit-Consideration-Absence of fraud-Record of compromise.

Compromises are irrespective of the merits of the claim on either side. When the parties file a petition of compromise, and there is no fraud on the Court, the Court will be free to pass a decree in terms of the compromise. A compromise in a pending suit by a litigant irrespective of his rights and wrongs is a good consideration for the compromise arrived at between the parties. (Sinha, J.) RAMESHWAR MISTRI v. BABULAL. (1945) P.W.N. 387.

-0.23, R. 3-Compromise-Award in private arbitration-If can be acted on as compromise and decree passed thereon. See ARBITRATION ACT, S, 47, PROVISO. (1945) 1 M.L.J. 463.

What amounts to—Decree directing effect to be given to compromise, without setting out the text of it. JAGAT SINGH v. SANGAT SINGH. [see Q.D. 1936-'40 Vol. I, Col. 1759.] 72 C.L.J. 287=22 P.L.T. 407.

for possession of land-Compromise containing term as to terms on which land is to be possessed and cultivated—Effect.

There is nothing in O. 23, R. 3. C.P. Code, which restricts the relief granted in a compromise decree to the relief prayed for in the plaint. The fact that a compromise relates to property not the subject matter of the suit is not in all cases decisive of the question whether the compromise does or does not relate to the suit. Where a suit relates to possession of a specified plot of land, and the compromise effected by the parties relates to terms on which the same land shall be possessed and cultivated, it cannot be said that because the plaintiff is given a relief he did not ask for, that necessarily brings the compromise outside the scope of the suit. The proceedings must be looked at as a whole. The frame of the suit, the plaint, the written statement, the consideration for the compromise, etc.. have to be looked at as a whole (Davis, C.J. and Tyabji, J.) GODHUMAL v. MST. BHAMBHO, I.L.R. (1942) Kar. 326=205 I.C. 256=15 R.S. 118=A.I.R. 1943 Sind 11.

-0. 23, R. 3—Compromise with reference tocertain properties between trustee and beneficiaries-Province of Court to go into propriety of -Form of decree.

A compromise between a trustee and the beneficiaries whereby an item of trust property was agreed to be treated as the property of the trustee is not prima facie

#### C. P. CODE (1908), O. 23, R. 3.

being trust property. When a compromise or agreement has been set up, the Court must satisfy itself that it has been made and once it has been made, it must be recorded, provided it is lawful on the face of it. But this does not mean that it must necessarily be embodied in a decree of the Court. If the Court directs the compromise in writing to be filed with the record it means that it has been recorded. Then it is for the Court to decide what form the decree will take. It is not proper for the Court to include in the decree any matters which are outside the scope of the suit. (Allsop and Malik, //.) KASHI PRASAD v. SATWANTI. I.L.R. (1945) All. 197=1945 A.L.J. 68=1945 A.W.R. (H.C.) 48= 1945 A.L.W. (H.C.) 57=1945 O.W.N. (H.C.) 57= A.I.R. 1945 All. 136.

-0.23, R.3-Decree in terms of compromise-How to be drawn up.

Where a compromise covers both matters relating to the suit and also others extraneous to it, the decree should either recite the whole of the agreement and then conclude with an order relative to that part that was subject of the suit or introduce the agreement in a schedule to the decree. (Clarke, J.) SHANKER BALKRISHNA v. SHREE GOPAL KRISHNA. 196 I.C. 232=14 R.N. 91=1941 N.L.J. 207=A.I.R. 1941 Nag. 197.

-0.23, R. 3-Duty of Court.

When a compromise is alleged to have been entered into by the parties and the compromise agreement is filed in Court it is the primary duty of the Court to get it verified by the parties and then if it is satisfied that the parties have really come to terms it must dispose of the suit in accordance with the terms of that compromise. (Sathe, S.M.) BHAGWAN DIN v. RAMDHAR. 1945 R.D. 91=1945 A.W.R (Rev.) 55.

-O.23, R. 3-Duty of Court-Compromise including term beyond scope of suit-Decree in terms-If nullity or ultra vires-Proper remedy -Objection in execution—Sustainability.

Under O. 23, R. 3, C.P. Code, a Court is bound to record a compromise in accordance with the terms "so far as it relates to the suit". . Whether the compromise relates to the suit or not is a question which the Court which tries the suit has jurisdiction to decide. Even in cases where a part of the compromise does not, strictly speaking, relate to the suit, and nevertheless the Court decides that it does relate to the suit and incorporates it in the operative portion and passes a decree in terms of it, the decree is not a nullity and one passed without jurisdiction, but would be binding upon the parties to the decree; and its validity cannot be questioned in execution, nor can any title derived under it be attacked. It is the duty of the Court under O. 23, R. 3 to see that although the whole of the compromise between the parties is recorded, the operative portion of the decree is confined to that part only which relates to the suit. But it does not necessarily follow that if the Court does not strictly follow this direction, it is acting without jurisdiction. The objection that one of the terms of the compromise decree is outside the scope of the suit is not for the executing Court to consider. If the Court is not right in including that term in the operative part of the decree illegal. Hence it is not for the Court to go into the it should be challenged either by way of review question of fact as to the nature of the property involved or by way of appeal, but the executing Court and to refuse to record it on the ground of the property cannot go behind the decree. (Lokur, J.) AmbaC. P. CODE (1908), O. 23, B. 3.

LAL CHUNTHABHAI v. SOMABHAI BAKORBHAI. 213 1.C. 181=17 R.B. 26=45 Bom.L.R. 1045=A.I.R. 1944 Bom. 46.

O. 23, R. 3—Duty of Court—Procedure—Suit under S. 92 for removal of trustee, for breach of trust, incompetence, matfeasance, etc., and for framing of scheme—Proper procedure—Reference to arbitration—Award without inquiry and finding on charges against trustee—If can be made a decree of Court.

Where in a suit under S. 92, C. P. Code, for a declaration that detendant (mahant) was guilty of breach of trust, malfeasance, misfeasance, misappropriation and illegal alienation of math properties, was incompetent to manage the affairs of the math and that he should be removed from the trusteeship, for settling a scheme for the duc administration of the trust and for appointment of new trustees, an award is passed in arbitration on a reference through Court, the Court should not as a matter of course pass a decree in terms of the award without inquiry. If the suit is in respect of a public endowment, it is to the interest of the public to have it determined whether the defendant has been guilty of the charges alleged against him and whether he is at all competent to manage the affairs of the math and whether he should be removed from the mahantship. The Court is bound to decide that question; and if it decides that the detendant has not been guilty of breach of trust, etc., as alleged the suit should be dismissed. But if on the other hand, it decides that the defendant has been guilty, then the Court with the agreement of the parties, may take the help of arbitrators to settle a scheme and to appoint another trustee or a committee of trustees. If the scheme for the management of the trust property thus proposed then is sound and trustworthy, the Court can accept it and dispose of that part of the suit under O. 23, R. 3. But when the question as to the competency or fitness of the defendant to continue as a trustee is not at all decided, and the agreement arrived at as the result of the award avoids an inquiry into that matter and the interests of the institution 15 wholly ignored and neglected by the parties, the arbitrators and the Court in that a decree is passed in terms of such an award the decree so passed cannot be allowed to stand and must be set aside. (Manohar Lall and Brough, II.) BANA-BEHARI PURI v. ANANDA PURI. 212 I.C. 35=16 R.P. 254=10 B.R. 435=9 Cut.L.T. 85=A.I.R. 1944 Pat. 115.

Q. 28, B. 3—Mortgage suit—Stage between preliminary and final decree—Adjustment or payment out of Court—Whether can be recorded—Pendency of smit after preliminary decree—Limits of rule.

An adjustment or payment out of Court between the preliminary and final decrees in a mortgage suit cannot be gone into by the Court when a petition is filed under U. 23, R. 3, C. P. Code, for recording the adjustment between the parties. (1935) 69 M. L. J. 785: (F. B.), distinguished. After the passing of the preliminary decree the suit is pending only for a particular purpose namely, for the purpose of enforcing the right declared by the preliminary decree in the manner set out in the decree and not for any other purpose. And after the passing of the final decree the suit is pending for ascertaining, if personal remedy is available, whether any money remains due after paying the sale proceeds to the

O. P. CODE (1908), O. 25, B. 1.

plaintiff or after giving credit to any payment or adjustment made subsequent to the passing of the final decree, (Kuppuswans Ayyar, J.) VEERABAHU PILLAI v. CHITTIRAM PILLAI. 208 1.C. 9=16 B.M. 143=55 L. W. 670=A.I.B. 1943 Mad. 81=(1942) 2 M.L.J. 685.

O. 23, R. 3—Plea of adjustment by payment out of Court in application for passing of final decree—If can be gone into. See C. P. CODE, O. 34, R. 5 AND O. 23, R. 3. 1942 O.W.N. 276.

O. 23, B. 3—Procedure under—Agreement recorded—Decree, if can be passed any time.

The procedure under O. 23, R. 3 consists of two steps: first the agreement or compromise has to be recorded, and secondly a decree must then be passed in accordance therewith so far as it relates to the suit. The decree which follows upon the agreement can be passed at any time. (Roberts, C. J. and Dunkley, J.) V. M. R. P. CHETIYAR FIRM v. HAJEE MAHOMED SULTAN. 1941 Rang. I. R. 774=198 I.C. 404=14 R.R. 198=A.I.R. 1941 Rang. S16.

A mortgage suit does not come to an end until the mortgage property has been duly sold and the sale proceeds dealt with, or if there is a right to a personal decree under O. 34, R. b, C.P. Code, until that personal decree has been passed, and therefore any agreement or compromise relating to the whole of the subject matter of the suit which is entered into by the parties before the conclusion of the proceedings in a mortgage suit is an adjustment of the suit which falls to be dealt with under O. 23, R. 3 and not under O. 21, R. 2, C.P. CODE. (Roberts, C.J. and Dunkley, J.) V.M.K.P. CHETYAR FIRM v. HAJEE MAHOMED SULTAN. 1941 Rang. L. R. 774=198 I.C. 404=14 R.R. 198=AI.R. 1941 Kang. 316.

——O. 23, R. 3—Terms of decree under-Matters not forming subject-matter of suit-1f can be included in decree.

Under O. 23, R. 3 C. P. Code, all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree. (Roberts, C. J. and Dunkley, J.) V. M. R. P. CHETTYAR FIRM v. HAJEE MAHOMED SULTAN. 1941 Rang. L.R. 771=198 I.C. 404=14 R.R. 198=A.I.R. 1941 Rang. 316.

Grounds of Divorce suit—Plaintiff deliberately seeking jurisdiction of particular Court knowing that all evidence has to some from another prevince—If ground for order.

An order for security for costs can only be made in accordance with some established principle. If a petitioner for divorce is entitled to file his petition in a particular High Court, the fact that he might have filed it in another High Court is no ground for requiring him to turnish security for the costs of the co-respondent, when the petitioner resides in British India. Where the petitioner resides in British India. plaintiff files a suit for divorce in Madras on the ground that he and his wife last resided together in Madras, the fact that he deliberately seeks the jurisdiction of the Madras High Court knowing that all the evidence would have to come from elsewhere, such as Bombay or Calcutta, and thereby deliberately increasing the costs of the parties involved, cannot be made a ground for ordering him to furnish security for costs of the

Q. P. OODE (1908) O. 25, R. 1 (3).

co-respondent. (Leach, C. J. and Shahabuddin, J.) JASHO PROKASH MITTER v. BOTAWALA DE RANDER. 211 I.C. 209=16 R.M. 500=56 L.W. 412=1943 M.W.N. 435=A.I.R. 1943 Mad. 657 (1)=(1943) 2 M.L.J. 132.

---O. 25, R. 1 (3)—Female plaintiff—Security when can and when cannot be demanded.

As regards a plaintiff who is a woman, the legislature has specifically laid down that security may be taken from her in certain circumstances in a suit for payment of money. Inclusio umus exclusio alteriis, and therefore security cannot be taken from a female plaintiff in a suit for property. There is no discretion left in the Court for taking security in any case or in any set of circumstances other than those specifically provided for. (Collister, J.) Surajkuar v. Sant Singh, I.L.R. (1941) Ail, 418=196 I.C. 102=14 R.A. 123=1941 A.L.J. 249=1941 O.A. (Supp.) 248=1941 O.W.N. 628=1941 A.L.W. 432=1941 A.W.R. (H.C.) 138=A.I.R. 1941 All, 219.

----O. 26, R. 1—Pardanashin lady—Right to be examined on commission.

A pardanashin lady should not be compelled either to appear in Court personally or attend Court even although she may have tailed to observe the restraints of the parda system on previous occasions. She should, therefore be examined on commission. (Eagley, J.) KISSEN LAL KANKORIA v. PURSHOTTAM DAS. I.L.R. (1941) 2 Cai. 155=199 I.C. 150=14 R.C. 521=A.I.R. 1942 Cai. 143.

O. 26, R. 4—Refusal to issue commission— If revisable. See C. P. Code, S. 115 and O. 26, R. 4. 1942 O.A. 215=1942 O.W.N. 307.

Under R. 7 of O. 26 the evidence taken on commission only forms part of the record in the same way as pleadings, affidavits, and other documents of a suit form part of the record of that suit. Both on the proper construction of Rr. 7 and 8 of O. 26, and according to the long and well-established practice on the Original Side of the High Court, the depositions of witnesses taken on commission have got to be tendered as evidence and admitted by the Court as evidence before they become evidence in the case. A party who examines a witness on commission is not bound to and cannot be compelled to tender the evidence of the witness examined on commission. No Court can compel a party or his counsel to lead any particular kind of evidence or tender any evidence if he does not wish to do so. If such party does not wish to tender the evidence taken on commission, the other party is entitled to tender that evidence and make that part of his own case. (Chagla, J.) VITHALDAS DAMODAR v. LAKMIDAS HARJIWAN. I.L.R. (1942) Bom. 680=202 I.C. 430=15 R.B. 167=44 Bom. L.R. 609=A.I.R. 1942 Bom. 266.

O. 26. R. 8 (a)—Sick witness—Evidence taken on commission—If inadmissible. Snehalata Devi v. Janardan Prasad Singh. [see Q. D. 1936-40 Vol. I, Col. 1767.] 191 I.C. 288—13 R.P. 292—7 B.R. 168.

C.P. CODE (1908), O. 29, R. 1.

O. 26, R. 10—Commissioner's report—Value. It is the facts contained in a local Commissioner's report which count as evidence and not his opinion. (Sathe, S. M. and Ross, J.M.) SARDA FRASAD v. RAM BHAROS. 1944 A.W.R. (Rev.) 18=1944 R.D. 69.

----O. 26, R. 10-Commissioner's report-Use as evidence-Limits.

A Commissioner's report would, under O.26, R. 10, only form part of the evidence in the case in which he was appointed a Commissioner and it cannot form the evidence in any other case. But the Commissioner can be examined in any case with reference to what he saw at the time of his inspection. (Sathe, S.M.) ITAR SINGH v. SUKHEY. 1943 A.W.R. (Rev.) 193 (2)=1943 R.D. 392.

——0. 26, Rr. 13 and 14—Preliminary decree in partition suit—Matters requiring determination— Reference to Commissioner—Permissibility.

The Court passing a preliminary decree in a partition suit should not leave all matters requiring determination to the local Commissioner. Some of these matters (e.g.) the extent of the property or if any of the parties is liable to render accounts and it so who, and for what period should be decided by the Court itself. (Tek Chand and Sule, /J.) GHANSHAM LAL v. BAIJ NATH SYAL. 46 P.L.B. 372.

——O. 27, R. 3—Suit by Crown—Necessity to consult Governor General—Suit "by Governor General in Council through the Post Master-General"—If properly instituted.

Under O. 27, R. 3 C. P. Code, in suits by the Crown it is sufficient to insert as plaintiff the words "Governor-General in Council." The Governor-General need not be consulted as to whether such a suit should be brought. A suit brought by the Governor-General in Council through the rost Master-General is brought in the name of the correct plaintiff, and the words 'through the Post-Master General' are merely surplsuage. (Almond J.C. and Mir Ahmad, J.) Gujjar Mal v. Governor General of India. 200 I.C. 429=15 R. Pesh. 1=A.I.R. 1942 Pesh. 33.

---O. 29, R. 1-Nature of provisions

The provision under O. 29, R. 1, C. P. Code, is only an enabling one, and does not prohibit a suit in the form of O. 1. R. 8, C. P. Code, when such form is appropriate. (Davis, C. J. and Weston, J.) MOTIRAM NATHOMAL v. MANGHARAM TRATHDAS. I.L.R. (1942) Kar. 56=201 I.C. 711=15 R.S. 16=A.I.R. 1942 Sind 130.

— O. 29, R. 1—Suit against Municipality— Power of Secretary to engage counsel—Special authorisation by Municipality—If necessary.

Under O. 29, R. 1, C. P. Code, a Municipal Secretary can sign and verify the written statement, and the fact that he has been generally empowered to institute and defend suits is enough to authorize him to engage a counsel to defend actions against the Municipality. Defending an action. The latter step requires initiative which should certainly come from the Municipality itself and not from its agent. Therefore although a special authorization by the Municipality is necessary for instituting suits, such authorization is not necessary for defending suits. (Mir Almas, J.) Tha Mahomed v. Municipal.

C. P. CODE (1908), O. 30, R. 1.

COMMITTEE PESHAWAR. 196 I.C. 648=14 R. Pesh. 36=A.I.R. 1941 Pesh. 76.

—O. 30, R. 1—Applicability—Joint Hindu family firm—Punjab. Nandgopal Om Prakash v. Mehnga Mal Kishori Lal. [see Q.D. 1936—'40 Vol. 1, Col. 1774.] 192 I.C. 383—13 R.L. 371.

——O. 30, R. 1—Applicability—Joint Hindu family trading firm—Punjab. ATMA RAM v. UMAR ALI. [see Q.D. 1930—40 Vol. 1, Col. 1774.] I.L.R. (1941) Lab. 39.

I.L.R. (1941) Lah. 39.
O. 30, R. 1-Applicability-Joint Hindu

family trading firm.

O. 30, R. 1, C. P. Code, applies to a joint Hindu family trading firm in the Punjab by reason of the Explanation added to the Rule by the Lahore High Court. (Gentle, I.) MADAN THEATRES, LTD. v. RAM KISSEN KAPOOR. i.L.R. (1942) 1 Cal. 562=207 I.C. 581=16 R. C. 119=1943 Comp. C. 192=A.I.R. 1943 Cal. 172.

—0.50, R. 1—Applicability—Partnership between family firm and another firm—Deaths, withdrawals and additions of family members during course of partnership—Suit for dissolution of partnership by the family firm as plaintiff when of the family members there was left only a single effective member of the tirm—Maintainability—Proper representation of firm—Date of dissolution of partnership—Practice—Counsel—Assent to addition of partners—Withdrawal after conclusion of arguments—Permissibility.

A firm consisting of several members of a family entered into a partnership with another firm in 1900. During the course of the partnership some members died or retired and the firm was carried on by the remaining members of it. In 1931 the family firm sued as plaintiff for the dissolution of the partnership with the other firm. At the time of the institution of the suit, of the four members of the family who had any interest in the partnership, two had been declared insolvent and one being a minor who was only admitted to the benefits of the partnership, there was only a single effective member of the fim. On a contention that the suit in the form in which it was brought was not maintainable.

Held, that the objection was not technical as it touched the very foundations of the case and affected the validity of the suit itself and that in the circumstances, the suit as brought was not maintainable. The firm would be properly represented for carrying on the suit is the minor, who had now become a major, was joined as a party to the suit as the legal representative of his father and also in his personal capacity as a co-plaintiff.

Held, further, that as the partnership went on as a living concern continuously since the time it was started, the separation or death of some members of the family firm could not amount to a dissolution of the partnership as, in the circumstances, the remaining members of the firm or such members as were added to it from time to time must be taken to have been treated as partners. [Counsel who assented to the addition of parties when he wanted to withdraw his assent after the the conclusion of the arguments was not allowed to do s..] (Sir Madhavan Nair.) DEVJI GOA z. TRICUMJI JIWANDAS. 49 C.W.N. 299 = 1945 M.W.N. 221 = A. I.R. 1945 P.C. 71 = (1945) 1 M.L.J. 305 (P.C.).

firm—Personal decree against partner—When to be passed.

In a suit against a firm, the Court cannot pass any personal decree against a partner unless he is sued personally along with the firm. In such a

C. P. CODE (1908), O. 30, R. 3,

suit it would be open to the plaintiff to withdraw the suit against the firm and to proceed with his alternate or additional remedy against the partner. (Davies, C.J. and il eston, J.) AHMED Moosa Bros. v. LILARAM TIKAMDAS. I.L.R.(1942) Kar. 210=207 I.C. 23=16 R. S. 4=A.I.R. 1942 Sind 93.

out naming firm-Competency.

O. 30, R. I, C. P. Code, is permissive and not mandatory. It provides one mode of procedure but it does not take away any existing right of suit. Since the partners in a firm are jointly and severally hable for the debts of the firm, they can be sued individually even without naming the firm as one of the defendants. The Code, while it merely provided a new procedure, did not affect in the slightest degree the right of a plaintiff to bring on record the different members of the firm. (Meredith and Shearer, II.) Musammat Jagpati Kuar v. Damki Sahu Haikhori Ram. 20 Pat. 811=198 I.C. 521=14 R.P. 460=8 B.R. 421=23 P.L.T. 588=A.I.R. 1942 Pat. 204.

— O. 30, R. 1—Suit against firm and suit against its individual members—Difference.

A suit filed under O. 30, C. P. Code, against a firm has substantial points of difference in its consequences from a suit filed against the individuals composing that firm, for in a suit against a firm, where one partner has been served under O. 30, R. 3 C. P. Code, a decree may be made against the firm and such a decree under O. 21, R. 50, C. P. Code, may be executed immediately against any property of the firm. In a suit against the individuals, on the other hand, before execution could be taken against their joint property, it would be necessary that the decree should have been made against all those individuals after proper service in the suit. (Davis, C. J. and Weston, J.) AHMED MOOSA BROS. V. LILAMAM TIKAMDAS. I.L.R. (1942) Kar. 210=207 I.C. 23=16 R.S. 4=A.1.R. 1942 Sind 93.

Proper frame of. See 1940 Dig., Col. 318 Lucknow Automobiles v. Replacement Parts Co. [see Q.D. 1936—'40 Vol. 1, Col. 3302.] 16 Luck. 357.

O. 30, R. 3—Scope—If overridden by 0. 21, R. 46-G (Sind). See C. P. Code, O. 21, R. 46-G (Sind). I.L.R. (1943) Kar. 255.

Necessity for Application under 0.21, R. 46-A Service of notice on firm—Requisites of valid and good service.

Under O. 30, R. 3, read with O. 48, R. 2, in order to effect proper notice on a firm of garnishee application made under O. 21, R. 46.A, the directions of the Court should be obtained in the first instance and service should be effected in the manner provided in O. 30, R. 3, that is to say, the applicant has to seek the Court's directions as to the method of service; then the notice should specify that it is being served upon the person having, at the time of service, the control or management of the partnership business. If these two things are not done, there is no compliance with the law, and there cannot be said to be

# C. P. CODE (1908), O. 30, R. 3 and O. 5, R. 17.

a proper or good service under O. 30, C. P. Code. The matter of service under 0.30, is not a mere formality, and O. 30, should be strictly complied with perore a service can be held good. (Lobo, J.) GOCULDAS MAHADEV v. DILKUSHRAM. 1.L.R. (1943) Kar. 255=209 I.C. 406=16 R.S. 97=A.I.R. 1943 Sind 188.

-0.30, R. 3 and O.5, R. 17-Service of summons as partner-Whether may be effected at place of business.

O. 30, R. 3, C. P. Code, does not contemplate that a person, who is served as a partner, must be served at his residence. It enables service to be effected at the principal place at which the partnership business is carried on and enables it to be effected upon any person having control or management of the partnership business. The words "any person" include partners. Accordingly where a plaintiff obtains leave to serve the writ of summons on a partner of the defendant firm the summons may be properly served on the partner by affixing a copy thereof on the outer door of the premises where the defendant firm is carrying on business. (McNair, J.) SOORAJ-MULL NAGARMULL v. HARIBUX SHEWNATHRAL. I.L.R. (1944) 2 Cal. 57 = A.I.R. 1945 Cal. 454.

-0.30, R.4-Applicability-If confined to suits-Appeal from decree in suit against firm-Death of one respondent-Failure to implead

neurs-If causes abatement of appeal.

There is no authority for holding that O. 30, R. 4, C. P. Code, applies only to suits and cannot apply to appeals. U. 30, R. 4 applies in principle to appeals though in terms it applies only to suits. Where pending an appeal from a decree in a suit against a registered firm and its partners, one of the respondents dies, it is not necessary to bring on record the legal representatives of the deceased respondents as parties to the appeal; and the appeal does not abate by reason of the failure of the appellant to bring on record the legal representatives of the deceased respondent. (Mackin, J.) SAVALARAM GIRDHARILAL V. HIMATLAL PRA-TAPMAL & Co. 219 I.C. 383=46 Bom. L.R. 640 =A.I.R. 1944 Bom. 350.

-O. 30, R. 8-Scope-Defendant served as partner-Appearance in protest and denial of being partner-Right to ask for issue of partnership being tried first. Nandlal Tribhovandas v. Baker Jafer & Co. [see Q.D. 1936—'40 Vol. 1, Col. 3303.] 191 I.C. 633—13 R.B. 189.

-O. 30, R. 10-Applicability-Hindu Joint family trading firm. See C. P. Code, O. 21, R. 50 AND O. 30, R. 10. 7 Cut. L. T. 21.

-O. 30, R. 10-Applicability-Joint Hindu trading family-Decree against it in its trade

name—If nullity.

O. 30, R. 10, C. P. Code, applies not only to a single individual carrying on business under a firm name or an assumed name but also to a number of individuals carrying on business either under a firm name or an assumed name when those individuals do not in law constitute a partnership resting on contract as for example a joint Hindu trading family. A suit can, therefore be instituted against such a family in the assumed name in which they are carrying on business, and a decree obtained in that form will not be a nullity but will be binding on all the persons interested in the business carried on under that name and style. (Mitter and Blank, II.) JAMUNADHAR PODDAR v. JAMNA RAM BHAKAT, majority during suit—Right to continue suit.

C. P. CODE (1908), O. 32, R. 2.

I.L.R. (1944) 2 Cal. 131=214 I.C. 262=17 R.C. 40=78 C.L.J. 270=48 C.W.N. 203=A.I.R. 1944 Cal. 138.

---O. 30, R. 10-Scope-Person sued in name adopted by him for purpose of dealings-Another using that name by transfer of business before suit—If liable for debts incurred by former. Jaisinghani, In re. [see Q.D. 1936—'40, Vol. I, Col. 3303.] 191 I.C. 635—13 R.S. 160.

-O. 31, R. 2-Suit against trust estate-Trustees made parties in their own names but not as such-Objection to validity of decree-If can be taken in execution.

No objection can be taken in execution to the validity of a decree against a trust estate on the ground that the estate has not been properly represented, when no such objection was taken in the suit, and the estate appeared on the record by name represented by a pleader appointed by the senior of the two trustees and both the trustees were parties in their own names though not as such. (Roxburgh and Blank, JJ.) ARJUN LAL Agarwalla v. Banabehari ChatterJee. 77 C.L. J. 434=A.I.R. 1944 Cal. 328 (2).

-0. 32-Applicability-Application for revision under S. 23, Bombay Mamlatdars Courts Act-Death of applicant—Abatement—Legal representative—Impleading of-Limitation. See BOMBAY MAMLATDARS Courts Act, S. 18 (3). 47 Bom. L.B. 845.

O. 32—Applicability—Minor or lunatic not

competent to sue.

O. 32, C. P. Code, merely contains procedural rules which are applicable to a minor or a lunatic when he is competent to sue, but they have no application where he is not so competent. (Collister and Allsop, JJ.) BHAGWATI SARAN SINGH v. PARMESHWARI NANDAN SINGH. I.L.R. (1942) All. 518=202 I.C. 227=15 R.A. 104=1942 A.L.J. 197=1942 A.L.W. 245=A.I.R. 1942 All. 267 (2).

-O. 32, R. 1—Next friend—Competency to sue where in a prior suit a different quardian ad litem has been appointed for same minor.

It is competent for a person to sue as the next friend of a minor even though in a prior suit a different person has been appointed as a guardian ad litem for the same minor and has not been removed when the latter suit is not a proceeding in continuation of the earlier one and the action of the guardian ad litem itself is being questioned. (Mathur. J.) RAMJI LAL v. MURLIDHAR. 1943 A.L.W. 402.

-O. 32, R. 2-Minority of plaintiff disclosed on enquiry—Proper procedure—Failure of next

friend to sign and verify plaint-Effect.

Where the question of the minority of the plaintiff is put in issue and it is found that the plaintiff was a minor, the Court should not dismiss the suit at once but should allow a reasonable time for a next friend to come on record and go on with the suit and it is only if no one comes forward that it should reject the plaint. Where a next friend so brought on record fails to sign and verify the plaint it is a mere irregularity which could not, in any case, justify the dismissal of the suit. (Yorke, J.) RAM SEWAK v. RAM SAHAI. 1942 A.L.W. 225=1942 O.W.N. 281.

O. 32, R. 2-Minor suing without next

C. P. CODE (1908), C. 32, R. 2.

If a Court finds that a plaintiff is a minor and has sued without a next triend, the correct procedure is not to dismiss his suit forthwith but to give min a reason the opportunity of remedying the defect. It during the course of the suit he attains majority he can elect to ratify the proceedings taken during his minority and continue the suit. (Almont, J. C. and Mir Ahmid, J.) ABDUL HAKIM KHAN v. MAHOMED ALI JAN. 202 I.C. 668=15 R. Pesh. 50=A I.R. 1942 Pesh. 73. -0.32, R. 2 and Majority Act (1875), S. 2

-Suit by minor Mahomed in girl for dissolution of marriage-Maintain willity without next friend 'Act' in S. 2. Majority Act - Meaning.

'Act' in the matter of dower, divorce, etc., mentioned in S. 2 of the Majority Act means something done personally and not by the Court. Hence in the case of a divorce by a woman it would be the right of divorce outside a Court such as the woman has by an agreement with her husband. However that may be, as the C.P. Code being of later date clearly lays down in O. 32, R. 2 that when the plaintiff is a minor the suit must be instituted through a next friend and as there is no exception made for a Mahomedan female or anyone else, a suit by a Mahomedan minor girl for dissolution of her marriage without a next friend would not be maintainable. (Hamilton, J.) SAKINA BEGAM v. NATHI. 1944 À.L.W. 41.

-O. 32, R. 2—Suit by minor—No objection by defendant-Plea of proceedings being a nullity if open to such a detendant. SULEMAN v. ABDUL SHAKOOR. [see Q.D. 1930-'40 Vol. I, Col. 1781.] I.L.R. (1941) Nag. 735.

-O. 32, R. 3 and U.P. Tenancy Act (1939), S. 163-Absence of affidavit by plaintiff and formal order appointing guardian—Irregularity, if cured by service of notice of suit on guardian-

Effect of such irregularity.

Where in proceedings for ejectment of certain minor tenants under S. 163 of the U. P. Tenancy Act, the plaintiff failed to file the affidavit as required by R. 3 (3) of O. 32, C. P. Code, and there was no formal order of the Court appointing a guardian ad litem, the irregularity is not cured by the fact of the service of notice of suit on the guardian at the request of the plaintiff. If the minor's interests have suffered, the defect in the appointment of the guardian should be taken into account and the proceedings set aside. (Sothe, S. M.) THE SPECIAL MANAGER, COURT OF WARDS, LUCKNOW V. RAM SEWAK. 1944 A.W. R. (Rev.) 265=1944 R.D. 474.

-O. 32, R. 3-Appointment of guardian-Father refusing to act and suggesting mother-Mother if should notify willingness. RAM CHARAN DAS v. BHAGWAT SARAN. [see Q.D. 1936—'40 Vol. I Col. 3303.] 191 I.C. 620=13 R.A. 242.

-O. 32, R. 3-Appointment of guardian-Minor's name wrongly given-None misled in fact -Objection in execution-Sustainability. RAM CHARAN DAS v. BHAGWAT SARAN. | See Q.D. 1936-40, Vol. I, Col. 3303. | 191 I.C. 620=13 R.A. 242.

-O. 32, Rr. 3, 5 and 7—Compromise on behalf of minor defendant-Right to enter into-

C. P. CODE (1908), O. 32, B. 3.

WIDOW OF TRIBENI PRASAD. [see Q. D. 1936—'40 Vol. I, Col. 1782.] 192 I.C. 170=13 R.P. 411 =7 B.R. 322=22 Pat.L.T. 223.

-O. 32, Rr. 3 and 4 - Guardian - Absence of valid appointment-Binding nature of decree.

In cases where in fact a guardian was appointed in fact the guardian had acted for the minor the appointment may not be capable of being called in question, on the ground of any irregularity. But where no one has appeared for the minor at all and there has been no valid appointment and the notices sent to the nominated guardian have been refused, any decree that may be passed against the minor in such circumstances cannot be regarded as a mere irregularity. It is a wholly illegal procedure and no minor can be bound by such a decree. (Dar, J.) SHAH UDEY RAM v. KANCHAN SINGH. 1941 R.D. 658=1941 A L.W. 740=1942 O.W.N. 118=1942 A.L.W.

-O. 32, R. 3 -Minor defendants-Guardian taking all possible pleas on behalf of minors-Decree against-If without jurisdiction and a

nullity.

Where the record of the case shows that the minor defendants were represented and that all the pleas which could be taken on their behalf were taken and were before the Court, it cannot be said that the Court which tried the suit had no jurisdiction to pass any decree against the minors or that the decree is a nullity as against them. (Fazl Ali, and Meredith, JJ.) SATINDRA PRASAD SUKUL v. PADUMNABH PRASAD. (1944) P.W.N. 108.

-O. 32, R. 3 and O. 9, R. 13-No order appointing guardian-Ex parte decree-Guardian, if can be appointed to file application under R. 13

of O.9.

Though no order appointing a guardian for a minor defendant, has been passed under R. 3 of O. 32, C. P. Code, if an ex parte decree is passed, a guardian can be appoitned to maintain an application under R. 13 of O. 9, C. P. Code. (Saihe, S. M. and Dible, J. M.) RAM SUNDAR RAM v. MANSA RAM. 1944 R.D. 469=1944 A.W.R. (Rev.) 250.

-O. 32, R. 3 - Scope Failure to comply-Absence of formal order appointing guardian-Effect-

Decree, if void.

The omission to follow the appropriate procedure for the appointment of a guardian ad litem under O, 32, C. P. Code, and the absence of a formal order appointing the guardian ad litem can only amount to an irregularity, and would not render the decree passed a nullity, when it is found that the minor was represented on the record by a person who was not disqualified from acting as guardian and when the minor was also described as minor represented by that guardian, and when the minor's interest has not suffered by reason of the irregularity. (Faul Ali, C. J. and Manchar Lall, J.) Madhusudan Roy v. Jogendra Kar. 23 Pat. 640 =10 Cut. L.T. 73=1944 P.W.N. 527=220 I.C. 31= 11 B.R. 453=25 P.L.T. 194 = A.I.R. 1945 Pat. 138.

-O. 32, R. 3 (Nagpur)-Suit against minor at mator-Subsequent amendment and appointment of

guardian-If affects limitation.

Where a person was sued as a major and subsequently on an objection that he was a minor, he was treated as a Natural guardian of minor—Compromise by—
Minor—If bound, AWADESH PRASAD MISSIR v,

minor and a guardian was appointed, on a contention that the suit against him was barred as it should be taken to have been instituted only on the day the guar-

#### O. P. CODE (1908), O. 32, B. 3 (4).

dian was appointed. Held, O. 32, R. 3 did not mean that the suit was a nullity until a guardian was appointed or that no suit could be taken to have been instituted till such date and for purposes of the Limitation Act it did not matter whether the person was a major or a minor and further that the suit, so far as Limitation Act was concerned was against the proper person, whether he was described as a major or a minor and it would be within time, if it was within time on the date on which the suit was instituted by the filing of the plaint. The question of guardianship was a separate matter and related not to the institution of the suit but to the right of the plaintiff to carry it on against the minor. (Bose, J.) ABDUL AZIZ v. SK. AMIR. I.L.R. (1942) Nag. 322=193 I.O. 805=13 R.N. 348=1941 N.J. I.I.5=A I.R. 1941 Nag. 130

=1941 N.L.J. 115=A.I.R. 1941 Nag. 130.

O. 32, R. 3 (4) and Agra Tenancy Act, S. 86—Failure to serve notice on minor tenant in a suit under S. 86, Agra Tenancy Act—Absence of pre-isadice—Proceedings, if affected.

The mere absence or failure to serve notices on minor tenants in a suit under S.86 of the Agra Tenancy Act against the heirs of a statutory tenant will not affect or render the proceedings null and void if as a matter of fact there has been no prejudice to the interests of the minors. (Sathe, J. M.) KARAMDAR v. RAM KISHORE. 1942 A.W.R. (Rev.) 355=1942 O.A. (Supp.) 381=1942 O.W.N. (B.R.) 599=1942 R.D. 727.

——O. 32, R. 3 (4)—Omission of notice under— Proceedings if and when nullified.

It is wrong to say that the omission of the notice under O. 32, R. 3 (4), C. P. Code, necessarily nullifies the proceedings against the minor. It is only when the irregularity has in fact prejudiced the minor that it can have such an effect. (Sathe, S. M. and Dible, J. M.) JAGTAMBIKA PRATAP NARAIN SINGH v. BASDEO. 1944 R.D. 338=1944 A.W.R. (Rev.) 173 (2).

— O. 32, R. 3 (5)—Appeal—Notice served on guardian ad litem appointed in lower Court—Power of Court to appoint fresh guardian ad litem without discharging existing guardian.

Where in an appeal to the High Court from a decree of a lower Court, it is found that a guardian ad litem had been appointed in the lower Court for certain minor respondents and that such guardian has been served with this notice of appeal, it is not proper for the Registrar of the High Court to appoint a fresh guardian for such minors until the existing guardian has been dicharged. (Agarwala and Rowland, J.). Lalji MANDAL v. PARBAL MANDAL. 13 R.P. 347=191 I.O. 794=7 B.R. 260=22 P.L.T. 362=A.I.R. 1941 Pat. 224.

—O. 32, R. 3 (5)—Applicability—Minor appellant—Appeal presented by person other than guardian ad litem—Validity.

O. 32. R. 3 (5), applies also to the case of a minor appellant, and is not restricted to the case where a minor is a respondent. Consequently the only person who is competent to prefer an appeal on behalt of a minor is the person who has been appointed by Court as a guardian ad litem. The presentation of an appeal by any other person is void ab initio and it cannot be validated by the guardian ad litem merely empowering the pleader of that person to represent the minor after the appeal has become barred by time. (Nivogi, J.) GANESH SINGH v. GOVIND. I.L.R. (1944) Nag. 270 = 211 I.C. 71 = 16 R.N. 175 = 1943 N.L.J. 594 = A.I.R. 1944 Nag. 78.

— O. 32, R. 3(5) — Court-guardian — Appoint- guardian ad litem of m. ment-Effect and duration of Mortgage suit — Court minor's interest—If nullity.

C. P. CODE (1908), O. 32, B. 4.

guardian appointed for three minor defendants—Preliminary decree—Two minors becoming majors—Final decree with Court guardian on record showing all three as minors—If null and void,

A decree cannot be regarded as a nullity merely because certain defendants who were minors continued to be shown as minors represented by their guardian ad litem though they had attained majority at the time of the decree. The appointment of a guardian ad litem, unless terminated earlier by some order of Court would continue to be in force for appellate and execution proceedings under O. 32, R. 3 (5), C. P. Code. Three of the defendants in a mortgage suit were minors represented by a Court guardian at the time of the preliminary decree. In an appeal on behalf of the defendants the minors were represented by one of them who was the father of two of the minors and a relation of the third. He also represented the minors in a second appeal. Subsequently in the final decree proceedings the minors (two of whom had then become majors) were again represented by the Court guardian an final decree was passed with the Court guardian on record as representing the three defendants. The two who had become majors did not apply to be declared minors or to discharge the Court guardian. In execution proceedings it was contended that the final decree passed in such circumstances was a nullity.

Held, that the decree could not be regarded as a nullity merely because the parties who had become majors continued to be shown as minors. (Harries, C. J. and Dhavle, J.) GULAB CHAND v. KISHORI KUER. 199 I.C. 625=14 R.P. 591=8 B.R. 584=23 Pat. L.T. 162=A.I.R. 1942 Pat. 348.

——O. 32, R. 3 (5)—Execution of payment order of Registrar—Guardian for minor appointed by Registrar—Execution Court—If must appoint guardian—See Co-operative Societies Act, S. 43, Rules under, R. 18. (Almond, J.C. and Mir Ahmed, J.) MAHOMED ASHRAF KHAN v. NOOP-UNNISSA A.I.R. 1945 Pesh. 39.

—O. 32, R. 3 (5)—Existence of Court guardian

Appeal by minor through different guardian—Competency.

Where a guardian appointed by Court for a minor is still due to function, not having been removed and being alive, an appeal filed by the minor under the guardianship of another person is illegal and of no effect. (Harper, S.M.) GANGA DIN v. CHHADAMI. 1941 A.W.R. (Rev.) 927=1941 O.A. (Supp.) 801=1941 R.D. 788 (2)

——O. 32, R. 3 (5)—'Proceedings arising out of the suit'—If includes application to set aside ex parts

An application for setting aside an exparte decree does not come within the scope of 'proceedings arising out of the suit' as contemplated by sub-rule (5) of rule (3) of O. 32, but it is an independent proceeding altogether for the purposes for which the appointment of the guardian for the suit does not continue automatically. Hence such an application when it is made by one other than the guardian appointed in the suit cannot be said to be made by one not competent to make it. (Vorke, 1.) MAHADEO v. SUBEDAR SINGH. 1943 A.L.W. 544.

Suit on debt incurred by father—Father appointed guardian ad litem of minor son—Decree against minor's interest—If nullity.

C. P. CODE (1908), O. 32, R. 4.

It cannot be laid down as an absolute rule that that the father in a joint is indu family, although a natural guardian of his minor son, should not be appointed as his guardian ad litem in a suit brought on a dept incurred by the rather as manager of the family, and it so appointed the decree in such a suit is a nullity as against the minor's snare. There is no doubt that a person whose interests appear to be adverse to mose of a minor should not be appointed his guardian ad utem, and if there is an adverse interest in fact, a decree would not be binding on the innor at his option. But where a person, especially a natural guardian, is appointed as guardian ad litem in the absence of anything to show that his interest conducted with that of the minors, and a decree is then passed against the minor's share, the question as to the binding nature of the decree against the minor cannot be decided without determining whether on the facts proved there is a conflict or interest between the guardian and the minor, and that cannot be done without going into the merits of the case. The appointment of a father as guardian ad litem of his minor son is not itself sufficient to set aside the decree on the ground of conflict of interest apart from any prejudice caused to the minor. In the case of a joint Hindu family where the manager has the power to bind the minor members of the co-parcenary by an alienation for legal necessity, it is open to the son to challenge it in a suit brought to enforce the alienation on the ground that although it may be binding on the manager, it is not binding on the minor. His interest may, therefore, conflict with that of the manager as the defences of both may be separate and even antagonistic, if the manager wants to throw the burden of his private debt on the family. In such a case it would be undesirable to appoint the manager as the guardian ad litem of the minor in the suit, but if he is so appointed and a decree is passed against the minor's interest in the property it cannot be said, in the absence of fraud or collusion on the part of manager, that the decree is a nullity merely because the manager ought not to have been appointed as his guardian. If the minor subsequently sues to set aside the decree, he must show that the alienation was not, in fact, binding on him. This would be especially so where the manager is the father who is the natural guardian of the minor and whose personal debts are also binding on the son if they are antecedent to the alienation and are not illegal or immoral. Where there is no real defence to the suit, it is not the father's duty to create and manufacture evidence in order to support the case of the minor. (Divatia and Lokur, JJ.) MAHADEV SHANKAR V. SHANKAR SWAMIRAO. 213 I.C. 112=16 R.B. 11=45 Bom.L.R. 782=A.I.R. 1943 Bom. 387.

Q. 32, R. 4 (Patna)—Suit or mortgage executed by Hindu father having minor sons—Appointment of pleader as guardian for the minors on the father's refusal to receive notices to act as such, though mother was alive—Validity—Suit decreed in spite of strenous contest by pleader guardian—Subsequent suit by mother on behalf of the minors to set aside the decree—Attempt to avoid liability by pleading that the debts was incurred for immoral purpose—Permissibility.

C. P. CODE (1908), O. 32, R. 4-A.

A ilindu father executed a mortgage on benalt of nimself and his minor sons. In a suit on the mortgage, the rather, who was suggested by the mortgagee as the guardian for his minor sons refused to receive notices to act as such and hence a pleader was appointed guardian for the minors. The mother of the minors was alive. The suit was decreed in spite of a strenuous contest by the pleaser guardian. There after the mother or the minors filed a suit on their behalf to set aside the decree as against them and contended that the appointment of the pleader as guardian ignoring the existence of the mother was improper and that the debts in question were incurred by the father for immoral purposes—a contention not put forward by the guardian in the suit,

Held, that as there was no evidence that the mortgegee concealed the fact of the existence of the mother from the Court in the mortgage suit or practised any species of traud or concealment and as the pleader guardian had done all that he properly could, no case of fraud or negli-gence could be maintained. The mother was not the natural guardian of the ininors and the Court might very properly regard her as being like her husband a person with an interest adverse to the minors, unlikely as a pardanashin to be capable of handling troublesome litigation. In the circumstances the appointment of a pleader guardian was the most sensible and proper course to take in the interest of the minors. The charge of immorality against the tather would not have been of any use to the minors in the mortgage suit and in any event the absence of this line of defence is not to be attributed to the irregularity in the appointment of the guardian. No good reason had been shown for setting aside the decree. (Sir George Rankin.) Krishna Kant Prasad v. Dhanu Lal. 212 I.C. 226=57 L.W. 217=1944 A.L.J. 151=1944 O.A. (P.C.) 26=1944 A.W.R. (P.C.) 26=1944 M.W. N. 344=25 P.L.T. 47=10 B.R. 511=16 R.P.C. 194=1944 P.W.N. 502=I.L.R. (1944) Kar. (P. C.) 164=48 C.W.N. 301=A I.R. 1944 P.C. 14= (1944) 1 M.L.J. 250 (P.C.).

A non-contentious proceeding for probate is not a suit. Consequently O. 32, R. 4 (3), C. P. Code, does not in terms apply to a non-contentious probate proceeding. (Nasim Ali and Akram, 11.) PASUPATHI SADHUKHAN v. JANAK NATH MUKHERJEE. 200 I.C. 588=15 R.C. 60=74 C.L. J. 383=A.I.R. 1942 Cal. 236.

guardian—Procedure for obtaining.

Where an advocate if appointed guardian of a minor and the matter comes up to the High Court in which the minor is a respondent it is the duty of the advocate to make a formal application to the High Court at the earliest stage, for funds and not wait till the appeal comes on for hearing and then communicate or ally to the Court through an advocate appearing for another respondent, his request for tunds. The Court cannot take notice of it. (Ismail, J.) RAM LAL v. RAM DIN KILEDAR, 195 I.C. 695=14R.A. 75=1941O.A. (Supp.) 519=1941 A.L.W.R. (H.C.)224=A.I.R. 1941 All, 318—0. 32, R. 4A (Allahabad)—Nen-observance of Provisions of—If a mere irregularity.

# C. P. CODE (1908), O. 32, Br. 6 and 7.

The failure to observe the provisions of R. 4-A of O. 32, C.P.Code, by a Court in appointing a person other than the guardian appointed by competent authority to represent a minor in the course of a suit or other proceedings is a mere irregularity and does not vitiate the whole proceedings. It is one thing to say that a minor is not represented at all if represented by a person who is absolutely disqualified from representing him and quite another to say that he is not represented at all if represented hy a person whom the Court in its discretion could appoint to represent him but might not have appointed, if it had been aware of all the relevant facts. It would throw an impossible burden upon the parties to proceedings in which a minor was involved if those proceedings were to be regarded in certain circumstances as void if the person appointed to represent the minor was not the person appointed by competent authority to be the guardian of the minor under the Guardian and Wards Act. (Allsop and Verma, II.) DHARAMPAL SINCH v. MOOL CHAND. I.L.R. (1942) All. 509=202 I.C. 143=15 R.A. 96=1942 A.W.R.(F.C.) 190=1942 A.L. W. 310=1942 A.L.J. 276=A.I.R. 1942 All. 248.

-O. 32, Br. 6 and 7—Applicability—Next friend or guardian acting as manager of joint family.

A next friend or guardian who enters into a compromise or an adjustment of the decree acting as a manager on behalf of the joint family, is subject to O. 32, Rr. 6 and 7, C. P Code. (Grille, C. J. and Sen. J.)
FATMABI v. TUKABAI. I.L.R. (1945) Nag. 242= 1945 N.L.J. 14 = A.I.R. 1945 Nag. 95.

- 0. 32, Rr. 6 and 7—Execution proceedings-Next friend or guardian entering into compromise or adjustment of decree-Sanction of Court-If necessary.

The execution proceedings are a continuance of a suit and a next friend or guardian, after a decree, cannot enter into a compromise or an adjustment of the decree without sanction of the Court. (Grille C. J. and Sen. J.) FATMABI v. TUKABAI. J.L.R. (1945) Nag. 242=1945 N.L.J. 14=A.T.R. 1945 Nag. 95.

O. 32, R. 6—Hindu joint family—Decree obtained by manager in suit brought in name of joint family firm on behalf of himself and as next friend of minor-Power of manager to give discharge—Execution application by him dismissed as time harred—Subsequent application by minor on attaining majority—If harred—Rule of res judicata. See. LIMITATION ACR. S. 7. 44 P.L.R. 368.

O. 32, R. 6 and O. 21, R. 2-Payment accepted by next friend of minor without leave of Court-Certification, if can be made.

Certification cannot be made of a payment accepted by a next friend of a minor on his hethalf without obtaining the leave of the Court under O. 32, R. 6, C. P. Code. (Diaby, J.)
TULSIRAM v. KEWALRAM. J.LR (1944) Nag. 131
=208 I.C. 175=16 R.N. 63=1943 N.L. J. 273= A.I.R. 1943 Nag. 231

— O. 32. R. 6—Scope and applicability—Karta's fosition in joint Hindu family, how

affected.

The provisions of R. 6 of C. 32, C. P. Code. are mandatory and the Court is directed to take certain precautions for the protection of the interest of a minor litigant. It is true that in a joint Hindu family a karta is vested with very wide powers over the property of the joint

#### C. P. CODE (1908), O. 32, R1 7 and 15.

family. He may bring a suit for money due to the joint family without even impleading the other co-parceners but once a minor member of the family is joined as a party and a guardian ad litem is appointed to represent him the directions laid down in R. 6 of O. 32 have to be followed. The ordinary rule of Hindu I aw which empowers the manager of the family to deal with the property of the entire joint family is subject to the restrictions laid down in R. 6 of O. 32, C. P. Code. (Ismail and Mulla, J.). JAWAHAR LAL v. BENIRAM UTTAMCHAND. 1942 A.L.W. 535.

O 32, R. 6-Scope-"Receive"-Meaning-Receipt by guardian from third party of money forming consideration for assignment of decree in favour of minors-If prohibited.

R. 6 of O. 33, does not prohibit the receipt by the guardian from a third party the considera-tion for the assignment to the third party of a decree in favour of the minor. "Receive" in the rule cannot be construed as meaning receive either directly or indirectly. (Lord Athin.) either directly or indirectly. TITENDRA NATH ROY V. SAMARENDRA NATH MITTER. 70 I.A. 68=I I.R. (1943) Kar. (P.C.) 97= 46 Bom.L.R. 232=208 I.C. 1=16 R.P.C. 65= 1943 M.W.N. 496=1943 A.L. I. 367=47 C.W.N. 885=10 B.P. 39=56 L.W. 359=A.I.R. 1943 P. C. 96=(1943) 2 M.L. I. 78 (P.C.).

-O.32, R. 7—"Agreement or compromise with reference to the suit'- Meaning of-Transfer of decree to third party-Leave of Court-Neces-

The phrase "agreement or compromise with reference to the suit" in O. 32, R. 7, means agreement with a party to the suit; it does not cover a transfer of a decree to some one unconnected with the suit ever assuming that such transfer can properly be described as an agreement. It cannot have been intended to require the leave of the Court to an agreement, for example made with a non-party to finance a suit, whether with a stipulation to receive part of the proceeds or not. (Lord Aikin.) JITENDEA NATH ROY V. SAMARENDEA NATH MITTER. 70 I.A. 68=I.L.R. (1943) Kar. (P.C.) 97=46 Bom.L.R. 232=208 I.C. 1=16 P.P.C. 65=1943 M.W.N. 496=1943 A.L.I. 367=47 C.W.N. 885=10 P.R. 39=56 L. W. 359=A.I.R. 1943 P.C. 96=(1943) 2 M.L.J. 78 (P C.).

-O. 32. Rr. 7 and 15-Applicability-Agreement to refer to arbitration where minor or lunatic is concerned-Leave of Court-Materials to be furnished.

An agreement to refer to arbitration in a case where a minor or lunatic is concerned is an 'agreement' within the meaning of O. 32, R. 7 C. P. Code, and hence before the matter could he referred to arbitration, the leave of the Court must be expressly got recorded in the proceedings. Before granting the leave, the Court should exercise a judicial discretion as to propriety of the reference to arbitration in the interests of the minor or lunatic. All available materials should be placed before the Court and the materials must satisfy the mind of the Court that the action proposed is for the renefit of the mirer or lenatic. Though it is not possible to lay down any hard and fast rule as to what s' ould be done in such matters, this much can be said, that all facts necessary for the exercise of O. P. CODE (1908), O. \$2, R. 7.

a judicial discretion by the Court should be placed hefore it and nothing should be concealed, for where the matter is being referred to arbitration and one of the parties is a lunatic, there should and one of the particles and mark, there should be abundant good faith. (Collister and Baipai, J.). RAMGOPAL v. SHANTI LAL. I.L.R. (1941). All. 807=199 I.C. 346=14 R.A. 383=1941 A. W.R (H.C.) 302=1941 A.L.W 977=1941 O.A. (Supp.) 844 (1)=1941 A.L.J. 596=A.I.R. 1942 All. 85.

-O. 32, R. 7—Applicability—Execution proceedings.

O. 32, R. 7, applies to execution proceedings, (Diaby, I.) TULSIRAM v. KEWALRAM, I.L.R. (1944) Nag. 131=208 I.C. 175=16 R.N. 63= 1943 N.L. J. 273=A.I.R. 1943 Nag. 231.

-O. 32. R. 7—Applicability—Execution proceedings-Absence of sanction-Effect-Minor

challenging compromise-Effect.

Execution proceedings are a continuation of the suit and hence O. 32, R. 7 is applicable to an agreement or compromise made in course of execution proceedings. Where there is no sanction as required by sub-R. (1) of R. 7 of that order, under sub-R. (2) of the same order the compromise is voidable against all parties other than minors. It is only the minor who can sue to avoid it and the adults have no such right to avoid it on the ground of want of leave. But when a minor sues to avoid it, it is voidable against all parties. (Dunkley, I.) MA KALEMA v. MA KYAING. 1940 Rang, L.R. 772=193 I.C. 619=13 R.R. 262=A.I.R. 1941 Rang, 103.

—0.32, R.7—Applicability and scope—Hindu

Law-Joint family-Minor or person of unsound mind represented in suit by person other than manager-Power of manager to dispose of interests of co-parcener without leave of Court.

O. 32, R. 7, C. P. Code, applies to the guardian or next friend in the suit, and when the father or manager of a Hindu joint family is not the guardian ad litem or next friend his powers are unaffected by O. 32, R. 7. It is the bounden duty of the manager of a joint family to pay the dehts of the family out of the family assets, and he can therefore dispose of the interests of coparceners who happen to be minors or persons of unsound mind, when he is not the next friend or guardian of such co-parcener. (Leach, C.J. UMAYAL ACHI. I.L.R. (1944) Mad. 850=218 I.C. 311=18 R.M. 27=57 L.W. 134=1944 M. W.N. 149=A.I.R. 1944 Mad. 289=(1944)1 M. L.J. 182.

Manual, Para, 94—Applicability of O. 32, R. 7

to partition proceedings.

Under Para. 94 of the Revenue Court Manual, the provisions of O. 32, C. P. Code have been applied only to proceedings under S. 111 (3) of the U. P. Land Revenue Act. Consequently no sanction of Court is required in the case of a compromise in partition proceedings. (Harper, S.M. and Sathe, J.M.) IAISHI SINGH v. RAM BHAROSEY. 1941 R.D. 196=1941 A.W.R. (Rev.) 343=1941 O.A. (Supp.) 257.

O. 32, R. 7—Applicability to agreements for reference to arbitration in pending suits. LOUNG TAHIR v. RAMSING TAKHATRAM. See Q.D. 1936—40 Vol. I, Col. 1791. 191 I.C. 291=13 R.S.

29.

C. P. CODE (1908), O. 32, R. 7.

O. 32, R. 7—Applicability to proceedings under S. 36 of the U. P. Land Revenue Act.

By virtue of para 93 of the Revenue Court Manual, O. 32, R. 7, C. P. Code, applies to proceedings under S. 36 of the U. P. Land Revenue Act and hence a compromise in such proceedings on behalf of minors entered into by the guardian without the consent of the Court is altogether null and void. Shirreff, S.M. and Sathe, /.M.) NAWAB ALL v. BAJL 1942 A.W.R. (Rev.) 183=1942 O.W.N. (B.R) 310=1942 (Supp.) 203=1942 R.D. 399.

O. 32, R. 7-Application for leave under-Duty of Court-Materials to be placed before Court.

The Court, when considering an application for leave to compromise on behalf of a minor, has a very serious function to perform, namely to guard the interest of the minor and this duty is not one which ought to be performed in a perfunctory way. It is obviously difficult for the Court itself to go into every matter meticulously and to assess the value and so forth. In simple cases there are however at least two things which the Court ought to have before it-the first is an affidavit from the guardian himself that he, at any rate, has considered the matter carefully from the minor's point of view and has formed a considered opinion that the proposed transaction is for the minor's benefit. That should be indispensable in every case. The second item of assistance to which the Court is always entitled is a statement at the bar from the advocate or professional gentleman who represents the minor that he in his professional capacity has examined the matter and has formed an opinion that that it is one from which the infant will benefit. (Braund, J.) AKBAR HUSAIN KHAN v. RUDHU. I.L.R. (1941) All. 677=197 I. C. 814=14 R.A. 245=1941 A.W.R. (H.C.) 308= 1941 A.L.W. 997=1941 A.L.J. 605=A.I.R. 1941 All. 431.

O. 32, R. 7—Compromise by guardian—Previous sanction of Court not obtained-Court, if can give effect to it.

The Court cannot give effect to a compromise which has been entered into by a guardian of a minor without its previous sanction. (Rowland and Chatterii, 11.)
SRI NARAYAN SINGH v. POSAN SINGH. 199 I.C.
465=14 R P. 580=8 R.R. 567=23 P.L.T. 602= A.I.R. 1942 Pat. 344.

-O. 32, R. 7-Construction-Duty of Court-Leave of Court-Grant of before entering into compromise-If essential-Approval of terms of compromise already entered into-Sufficiency. AWADESH PRASAD MISSIK v. WIDOW OF TRIBENI PRASAD. [See Q.D. 1936—140 Vol. 1, Col. 1796.] 192 I.C. 170=13 R.P. 411=7 B.R. 322=22 Pat.L.T. 223.

-O. 32, R. 7—Duty of Court—Record that compromise is for minor's benefit-If obligatory.

Under O. 32, R. 7, the Court must not grant leave to a guardian to compromise a suit on behalf of the minor unless it is satisfied that the compromise is for the benefit of the minor. The rule makes it obligatory upon the Court only to record the fact that it has granted leave. It does not require that the Court must in every instance expressly record that it is of opinion that the compromise is for the benefit of the minor. J.) GANESH CHANDRA DAS v. JOGENDRA NATH NAYABAN. 47 C.W.N.1258.

-O. 32, R.7—Duty of parties submitting compromise on behalf of minor-Omission to disclose material information—Effect—Fraud.

#### C. P. CODE (1908), O. 32, R. 7.

When a proposed compromise on behalf of a minor is submitted to Court for its sanction, a high degree of good faith is required on the part of those who submit the same, and a duty lies upon them to take care that the Court should have unimpeachable material before it on which to form its judgment. If in fact the material placed before the Court is not unimpeachable or parties having further important information in their possession withhold it improperly or without justification that in itself would amount to constructive fraud, even though the Court may not have called for the information. (Lobo and Tyabii, 17) MOULEDINO 7, PARCHOMAI. I.L.R. (1944) Kar. 223=219 I.C. 139=18 R.S. 34=A.I.R. 1944 Sind 209.

——O. 32, R. 7—Grant of leave—Interference by High Court.

Whether or not a compromise is for the minor's benefit, is a matter which the Court granting leave should decide, and if it has decided the matter it is not open to the High Court to revise that decision. (Sen, J.) GANESH CHANDRA DAS v. JOGENDRANATH NAYABAN. 47 C.W.N. 258.

——O. 32, R. 7—Guardian of minor appointed next friend—Power to compromise suit.

A mother of a minor who occupies the dual capacity of guardian and next friend in a suit to which the minor is a party, cannot rely on her position as guardian for power to compromise the suit. When she is appointed as next friend, her powers as guardian are controlled by the provisions of law which come into operation on her appointment. (Diebr. 1) TULSIRAM P. KEWAL-RAM. I.L.R. (1944) Nag. 131=208 I.C. 175=16 R.N. 63=1943 N.L.J. 273=A.I.R. 1943 Nag. 231.

- O. 32, R. 7 - Leave of Court not expressly recorded—Suit for declaration by minor - Duty of Court.

If a minor brings a suit for a declaration that a decree passed on the basis of a compromise in a previous suit is not binding upon him as the leave of the Court for the compromise had not been obtained and expressly recorded in the proreedings as required by O. 32, R. 7. the Court is not bound to automatically decree the suit without determining whether the minor has or has not in fact been prejudiced by the compromise. The Court is entitled-indeed it is bound-to determine whether in the circumstances of the case before it the declaration asked for should or should not be granted and for this purpose the benefit of the minor is of paramount importance. If the Court trying the suit finds that the compromise was for the benefit of the minor it must dismiss the suit. If, however, it is established that the compromise was prejudicial to him the suit must be decreed, the effect of the decree being to restore the original suit or proceedings in which the compromise had been arrived at. (Tek. Chand and Beckett, II.)
SAT NARAIN v. KANTI LAL. I.L.R. (1943) Lah.
583-212 I.C. 595-16 R.L. 309-A.I.R. 1943 Lah. 313.

—0.32, R. 7—Leave to refer to arbitration on hehalf of minor—Form of order granting—Failure to give reasons—Effect—Suit to avoid agreement offending against 0.32, R. 7—Maintainability.

No particular formula is required for the express recording of the leave of Court to refer a matter to arbitration when a minor is involved. Where the Court is informed about the proposal and about a minor being involved and grants time to get the express consent of the guardian concerned and after satisfying itself about this it makes the reference, it satisfies the conditions of 0. 32, R. 7 and it amounts to an 'express recording' of the leave of Court within the meaning of that provision

#### C. P. CODE (1908), O. 32, R. 7.

It is a salutory rule that the Judge must on the face of his order show that he has considered the question of the minor's benefit and give reasons for his thinking that it is. But the omission to record reasons will not make the order a nullity. O. 32, R. 7 does not give the minor an unqualified right to have the matter avoided but vests the Court with the discretion to avoid or not to avoid it. An agreement which offends O. 22, R. 7 in that the Court had not given reasons for its granting leave, cannot be avoided by a separate suit in the absence of fraud upon the Court for there is only an irregularity and not an illegality. (Stone, C. J. and Bose, J.) MADANLAL v. RAMCHANDER SWAMI, I.L.R. (1942) Nag. 642=192 I.C. 749=14 R.N. 240=1941 N.L.J. 601=A.I.R. 1942 Nag. 26.

O. 32, R. 7—Leave under--Effect of-Leave granted to Mahomedan mother acting as guardian ad litem of minor daughter—Sale deed of immovable property as guardian of minor-Validity—Title of purchaser. See MAHOMEDAN LAW -- ALIFNATION. 47 Bom.L.R. 803.

——O. 32, R. 7—Next friend and guardian ad litem—Distinction—Application by mother for substitution of minor transferce under O. 21. R. 16—Subsequent compromise—Leave of Court—Necessity.

There is a distinction drawn throughout O. 32, C. P. Code, between a 'next friend' and 'the guardian for the suit'. While the latter is constituted by an order of the Court, the former automatically constitutes himself by taking steps in the suit. It is too narrow a view to take that the expression 'next friend' in O. 32, R. 7, is confined to a person who is acting on behalf of a minor who has already assumed the position of a plaintiff. It applies to any person who makes an application to the Court on a minor's behalf in relation to a suit. Where on the transfer of a decree to a minor, the mother applies to the Court under O. 21, R. 16 for his substitution, she becomes his 'next friend' by that very act and hence any compromise of the matter after that date if it should bind the minor must be with the sanction of the Court. (Braund, J.) AMARCHAND v. NEMCHAND, I.L.R. (1942) All. 144=200 I.C. 434=14 R.A. 435=1942 O.A. (Supp.) 99 (1)=1942 A.L.J. 89=1942 A.L.W. 44=1942 A.W.R. (H.C.) 37= A.I.R. 1942 All. 150.

—O. 32, R. 7—Reference to arbitration recalled under a misapprehension of facts—Recall order vacated next day—Fresh certificate under O. 32, R. 7, if necessary.

Where on a misapprehension of the facts a reference to arbitration is recalled but on the next day when the true state of facts was understood the order of recall is vacated and the arbitrators are directed to proceed with the reference there is no occasion to give a fresh certificate under R. 7 of O. 32, C. P. Code. (Ismail and Malik, J.). RAW KUNWAR v. RENI BAI. I. R. (1944) All. 356=1944 O.A. (H.C.) 177(2)=1944 A.L.W. 378=1944 A.L.J. 314=1944 O.W.N. (H.C.) 133=1944 A.W.R. (H.C.) 177 (2).

——O. 32 R. 7—Scope—Arbitration—Agreement of reference by guardian ad litem without leave of Court—Validity—Option to resile—If available to parties other than minor—Guardian agreeing to reference—Right to impeach validity on behalf of minor. RAMANATHAN CHETTIAR v. KUMARAPPA CHETTIAR. [See Q.D. 1936—'40 Vol. I, Col. 1797.] 194 I.C. 826—14 R.M. 94.

O. 32, R. 7—Scope—Compremise—I eave of Court—When to be applied for and granted—If necessary before negotiating terms of compremise—I eave

C. P. CODE (1908), O. 32, R. 7.

granted before actual recording of compromise—Suffic

The prohibition contained in R. 7 of O. 32, C. P. Code, against a next friend or guardian ad litem of a minor entering into a compromise or agreement without the leave of the Court being expressly recorded, does not go to the length of saving that a compromise entered into by the adult members may not be sanctioned by the Court even if the application for recording the compromise is accompanied by an application on behalf of the guardian ad litem for leave of the Court. The rule does not require or insist that the guardian ad litem must first obtain the leave of the Court to negotiate the terms of the compromise itself. If leave is applied for and granted before the compromise is actually recorded, the terms of O. 32, R. 7 are substantially complied with. (Chatterji and Sinha, 11.) DHARNIDHAR o. PHUL-KUMARI. 24 Pat. 529 = A.I.R. 1945 Pat. 391.

— O. 32, R. 7—Scope—Non-compliance—Effect on compromise decree—Leave of Court sanctioning compromise—If to be expressly recorded.

The fact that the Court does not expressly record an order to the effect that the compromise has been sanctioned in respect of the minor parties would not render the decree passed on the compromise a nullity. No particular formula is required to be used by the Court in granting leave to a guardian ad litem to compromise a suit on behalf of a minor. Where it is shown that an application for such leave was made by the guardian and noted by the Court, a decree passed on such a compromise is binding on the minor. It is well-settled also that mere non-compliance with O. 32, R. 7, C. P. Code. will not make the compromise decree a nullity. The decree would merely be voidable, and the executing Court cannot disregard the decree. (Fazl Ali and Meredith, JJ.) SATINDRA PRASAD SUKUL PADUMNABH PRASAD. (1944) P.W.N. 108.

— O. 32, R. 8—Cost—Suit by next friend—Dismissal—Order for recovery of costs of defendant from plaintiff—Liability of next friend. See C. P. CODE, S. 35. 45 Bom.L.R. 1029.

——O. 32, R. 15—Applicability—Agreement to refer to arbitration where minor or lunatic is concerned—Leave of Court—Materials to be furnished. See C. P. Code, O. 32, Rr. 7 AND 15. 1941 A.L.J. 596.

——O. 32, R. 15—Duty of Court—Application for appointment of guardian ad litem for judgment-deltor alleged to be insune and mentally infirm for purpose of applying for scaling down decree under Madras Act of 1938—Dismissal without indicial inquiry and without opportunity to produce medical certificate.

Where an application is made to a Court after the final decree in a suit has been passed by the mother of the judgment-debtor for appointing a guardian ad litem for the judgment-debtor who is alleged to be mentally infirm and unable to manage his affairs for the purpose of enabling the guardian to ask the Court to apply the provisions of Madras Act IV of 1938 to the decree passed in the Court, the Court should hold a judicial inquiry as contemplated by O. 32, R. 15. C. P. Code. It is not proper for the Court to dismiss the application by merely relying on the previous history of the litigation and on its opinion after looking at the judgmentdebtor and questioning him. When the applicant is desirous of adducing evidence such as a doctor's certificate, an opportunity must be given to adduce such evidence. Since the consequence of the dismissal of the application would be to prevent the application of the provisions of the Madras Act IV of 1938, to a case to which they may apply it is incumbent on the Court to

C. P. CODE (1908), O. 33, Rr. 1 and 2.

hold a regular inquiry and to invite the parties to adduce proper evidence even if the parties are somewhat indifferent, as otherwise justice could not be done. (Pandrang Rao, J) RAMANATHAN' CHETTIAR v. SOMASINDARAM CHETTIAR. 200 J.C. 648=15 R.M. 97=53 L.W. 193=1941 M.W.N. 165= A.I.R. 1941 Mad. 505=(1941) 1 M.L.J. 234.

——O 82. R. 15—Procedure—Suit on behalf of person of unsound mind—Enquiry into competency of next friend—When to be held.

In cases coming under O. 32, R. 15, C. P. Code, it is desirable that the Court should, before admitting the plaint, insist upon an independent application and an affidavit disclos no the facts relating to the unsoundness of mind of the person on whose behalf the plaint is presented; it is also open to the Court to direct the next friend to produce witnesses before it in order that it may satisfy itself as to the mental capacity of the person on whose behalf the plaint is presented. All that is needed is that there should be some prima facie proof to satisfy the Court that the person was, by reason of unsoundness of mind or mental infirmity, incapable of protecting his interests, because an order permitting the next friend to represent such a person is not final. It is always open to the defendant to take out an independent application to have the said order revoked, when the Court can go fully into the matter. But when once the Court permits the next friend to sue on behalf of such person, it is not open to the Court to raise an independent issue in the trial as to the competency of the next friend to represent the plaintiff in the suit. (Venkataramana Rao and Hormill, 11) GOVINDAVVA v RAMAMURTHI, 200 I.C. 77=14 R.M. 698=53 L.W. 258=1941 M.W.N. 198 = A.I.R. 1941 Mad. 524 = (1941) 1 M.L.J. 354.

—0. 33—Pauber suit—High Court—Application for leave to sue in forma pauperis in respect of claim for damages for slander—Summary dismissal on ground that claim could not exceed amount within furir diction of Court of lower grade—If justified."

In an application in the High Court for leave to sue in forma pauberis for damages for slander in respect of certain defamatory statements, the plaintiff claiming Rs. 12,500 by way of damages, the Master held that the damages claimed could not in any event exceed Rs. 5,000 and that therefore the plaintiff should be referred to a Court of lower jurisdiction to agitate his claim.

Held, that the claim for damages for slander being one in which the damages were at large, the damages could not be ascertained until there had been an examination of all the evidence; nor could it be said that they could not in any event exceed any particular sum, and therefore the summary dismissal of the application for leave to sue as pauper was wrons. (Gentle, J.) VENKATASUBBA ROW. TAYLOR STANLEY PHILIP. 1941 M.W.N. 921 = 201 I.C. 122 = 15 R.M. 226 = A.I. B. 1942 Mad. 16 = (1941) 2 M.L.J. 505.

-0.33, R. 1—Application by minor—Means of father—If relevant.

A suit by a minor in forma pauperis is maintainable. In an application for leave to sue in forma pauperis filed on behalf of a minor, the Court is only concerned with the decision of the question whether the minor is a pauper or not. The fact that the minor's father is rich enough to be able to pay the amount of the courtee on the suit is irrelevant. (Abdul Rahman. J.) MAHOMED ASHRAF v. MAHOMED BIBI. 47 P.L.B. 402.

- C. 33, Br. 1 and 2—Application for leave to sue
-Claim for dan ages for slander—Summary dismissal

#### C. P. CODE (1908), O. 33, R. 1.

on the ground that damages cannot exceed a certain amount and referring party to Court of lower jurisdiction—Propriety. See PRACTICE—PAUPER SUIT. (1941) 2 M L.J. 505.

--- O. 33, R. 1-'Means'-Claim for dower.

A claim which a Mahomedan lady might have against her husband to realise her dower cannot be deemed to be means' within the meaning of O. 33, R. 1, C. P. Code for this reason that it depends entirely upon the option of the lady to prefer a claim for it or surrender it and she cannot by any means be forced to exercise that option. (Ismail and Mulla, J.). CHANDA REGUM v. MAQSOOD HUSAIN KHAN. I L.R. (1942) All. 859 = 202 I C. 620 = 15 R.A. 175 = 1942 A W.R. (H.C.) 256 = 1942 A.L.W. 416 = 1942 A.L.J. 340 = A. I.R. 1942 All. 319.

——O. 33, R. 1 and O. 9, R. 9—Pauper application—Dismissal for default—Restoration—Propriety— Revision. if lies. See C. P. CODE, S. 115 AND O. 9, R. 9. 1941 O.A. 427.

— 0.33, R. 1—Right to sue as a pouper—Not confined to natural persons as distinguished from juridical persons.

The word 'person' hos not been defined by the C. P. Code, but it cannot be deried that the right to sue and the liability to be sued inheres equally in natural as well as juridical persons. There is obviously nothing inherent in the nature of a juridical person to lead to an inference that the Legislature intended to deprive all plaintiffs other than natural persons from the benefit of the privilege by O. 33. All persons who can sue as plaintiffs can also sue as paupers, provided the other conditions imposed by O. 33 are satisfied. (Thomas, C. J. and Misra, 1.) SRIPAL SINGH v. THE U. P. CINETONE, LTD. 216 I.C. 42=17 R.O. 56=1944 O.A. (C.C.) 88=1944 O.W.N. 125=A.I.R. 1944 Oudh 248.

——0.33, R. 1—Scope—Appeal—Review of judgment—Application by respondent—Power of Court to admit in forma pauperis—Court Fees Act. S. 4.

A Court has no power to admit an application by a respondent in an appeal for review of judgment in forma pauperis, having regard to S. 4 of the Court-Fees Act. There is no procedure which will entitle the Court to make an inquiry in regard to a respondent's pauperism after the appeal in regard to which he is to make the application has been brought to a close. The words of O. 33, R. 1. C. P. Code, are unambiguous and cannot be construed so as to cover a defendant (or respondent) or a defence. There is nothing in O. 33, which car help a defendant (or a respondent) in asking for the indulgence granted to persons who wish to file suits in forms pauperis, except perhaps in cases where the defendant or respondent may, for the purposes of the suit or appeal, be regarded as a plaintiff (or an appellant). The Court has no powers to exempt a defendant or a respondent from paying the necessary Court-fee. even temporarily. when they are required to pay the same at the time when proceedings are initiated by them except perhaps when they really stand in the position of plaintiffs or appellants. A petition for review by a respondent in an appeal cannot be regarded to be in the nature of a continuation of the suit at least up to the time that it is not granted, (Abdur Rahman, J.) ANANTHAKRISHNA BALIGA, In re. 207 I.C. 307=14 B.M. 87=1942 M.W.N. 742 = A.I.R. 1943 Mad. 177 ==(1942) 2 M.LJ. 707.

O. 33. R. 1, O. 44, R. 1 and S. 149— Sufficient meant—Possibility of raising loan on security of subject matter of litigation—Mala fides—Payment, on pau-

C. P. CODE (1908), O. 33, R. 1, Expl.

per obtaining sufficient means before disposal of enquiry as to pauperism—Date of filing of appeal—Limits to the right of the other party to challenge the admission.

In determining the question whether an applicant for leave to appeal in forma pauperis is possessed of sufficient means to pay the court-fee, the Court can take into consideration the possibility of the applicant raising money on the security of his interest in the subject matter of the proposed appeal and his other joint properties such possibility does not establish the mala fides of the applicant. Nor is the search by him for a financier to conduct the appeal on terms of sharing the subject matter of litigation in case of success any evidence of bad faith or fraudulent intention on his part. Where on his obtaining sufficient means to pay the courtfee during the pendency of an enquiry into his pauperism, the applicant is allowed time under S. 149, C. P. Code to pay the court-fee and it is paid within the time allowed, the appeal must be considered to have been filed when it was preferred without court-fee with the application for leave to appeal in forma pauperis. The admission of the appeal, if it had been made exparte may be challenged by the other side at the hearing of the appeal, if not before. But it can be successfully done only on the ground that the original pauper application was malafile or fraudulent. (Bennett and Ghulam Hasan. II.)
PARBHU NARAIN SINGH n. IITENDRA MOHAN SINGH.
19 Luck. 234—213 I.C. 127—16 R.O. 307—1943 O.W.N. 252=1943=O.A. (C.C.) 141=A.I.R. 1943 Oudh 458.

——O. 33 R. 1 and O. 39 R. 7—"Suit"—Pauper plaintiff—Suit by—When commences—Presentation of plaint and application for leave to sue in forma pauperis—Effect of—Application on same day under O. 39 R. 7—Competency.

The filing in Court by an applicant for leave to sue in forma pauperis of a plaint with a petition for leave to sue in forma hauperis amounts to the institution of the suit by him and the plaint takes effect from the date when the plaint and the petition are filed. A pauper plaintiff who files an application in the form of a plaint which is taken on file as a plaint is entitled to apply on the same date for an order under O. 39, R. 7, C.P. Code and it cannot be said that no order under the rule can be made because there is no suit in existence. (Beaumont, C. J. and Wassonder, J.) Totaram [Behlaram r Dattu Mangu. I L.R. (1943) Bom. 138=207 I.C. 59=16 R.B. 5=45 Bom.L.R. 231=A.I.R. 1943 Bom. 143.

— O. 33. R. 1 Expl.—Construction and scope— "Means"—Subject-matter of suit—Mortgage bond —Application for leave to sue on mortgage in forma pauperis—Value of claim—If can be taken

into account as assets of applicant.

The word "means" in the Explanation to O. 33, R. I., C. P. Code, means income, estate or wealth. In estimating the means of an applicant for leave to sue in forma pauperis the subject-matter of the suit can be taken into consideration in so far as the applicant is found to be in possession of it or any portion of it. But a man cannot be said to be able to prosecute his suit if he can only secure the where withal to do so by parting with his claim. The value of the claim itself, which it is sought to prosecute in forma pauperis cannot be taken into account. A person cannot be held disentitled to sue in forma bauperis merely because he has a claim, possibly a valuable claim, which he wants to prosecute as such. Where a person seeks to enforce a simple mortgage in a

C. P. CODE (1908), O. 33, R. 1 Expl.

suit it cannot be said that he is in possession of any nortion of the subject-matter of the suit. He is only in possession of the mortgage document which, though the basis of his claim, is not the subject matter of the suit. The claim under the mortgage cannot be taken into account as part of the assets of the applicant for permission to sue on the mortgage in forma bauberis, and his application cannot be rejected on the ground that he is not a pauper merely because his claim is a valuable claim. (Meredith, I.) MST. RAMMANNI KURR v. RUPMARAIN SINGH 201 I.C. 13=15 R. P. 24=8 B.R. 762=23 Pat.L.T. 97=A.I.R. 1942 Pat. 290.

——O. 33, R. 1, Expl—"Possessed of sufficient means"—Meaning—Applicant having share in inheritance though not in possession thereof—Grant of leave to sue without considering whether money cannot be raised with it—Revision—Mate-

rial irregularity.

An applicant for leave to sue in forma pauperis who has a share in an inheritance cannot succeed unless he or she shows that he or she is not possessed of sufficient means in the sense that the applicant, having a share in an inheritance, cannot raise enough money to pay the Court-fee. The words "possessed of sufficient means to enable him to pay the fee." in O. 33 R. 1 C.P.Code. mean having sufficient realizable property to be able to pay the Court-fee stamp on the plaint and cannot be construed as meaning "having sufficient hard cash for the purpose." To ignore the applicant's share in an inheritance because he is not in possession of it, and allow him to sue as a pauper without considering whether he has shown that with the share he could not raise enough money to pay the Court-fee, would amount to material irregularity in the exercise of the jurisdiction conferred upon the Court under O. 33, C.P. Code, affording ground for interference by the High affording ground for interference of the fight Court under S. 115, C. P. Code. (Dhavle, L) LAINATUN NISSA BIRY V. IDRAKUNNISSA. 197 I.C. 631=8 B.R. 258=14 R.P. 324=7 Cut.L.T. 28 =22 P.L.T. 760=A.I R. 1941 Pat. 638.

——O. 33. R. 1 Expln-'Possess means'— Meaning-Right to claim money which may or may not be realised.

A person cannot be said to 'possess means' when he is merely entitled to claim a sum of money which may or may not be realised from the debtor. It cannot be assumed that a person so entitled to make a claim is necessarily possessed of means to the extent of the claim. (Thomas, C.J., and Misra, J.) Sripal Singh v. The U. P. CINETONE, I.TD. 216 I.C. 42=17 R.O. 56=1944 O.A. (C.C.) 88=1944 A.L.W. 162=1944 A.W. R. (C.C.) 88=1944 O.W.N. 125=A.I.R. 1944 Oudh. 248.

——O. 33, R. 1, Explanation—Possessed of sufficient means'—Property in suit not in possession of applicant—If can be taken into consideration.

An applicant for leave to sue as a pauper claimed a share in a joint family estate on the ground that he was adopted by the widow of one of the deceased coparceners. The adoption was denied by the defendant and the applicant was not in possession of any part of the family property.

Held, that the applicant's alleged share in the joint family estate could not be taken into consideration under O. 33 R. 1. Fuplanation in deciding whether he was possessed of sufficient means to enable him to

C. P. CODE (1908), O. 33, Rr. 2 and 5 (a).

pay the court-fee on his plaint. (*Gruer*, 1.) AMRIT-RAO ATMARAM E. NARSINGRAO, I.L.R. (1942) Nag 625=199 I.C. 702 = 14 R.N. 295=1942 N.L.J. 106=A.I.R. 1942 Nag. 47.

O. 33, R, 2-Mere right to enforce a claim-If property.

A mere right to enforce a claim is nothing more than a title to recover future property and cannot be regarded as "property" within the meaning of O. 33, R. 2, C. P. Code. (Thomas, C. J. and Misra, J.) SRIPAL, SIGNH 7. THE H. P. CINETONE, LTD. 216 I.C. 42=17 R.O. 56=1944 O.A. (C.C.) 88=1944 O.L. W. 162=1944 A.W.R. (C.C.) 88=1944 O.W.N. 125=A.I.R. 1944 Oudh 248.

—O. 33, R. 2 and O. 44, R. 1—Mortgage decree —Mortgagor applying for Jeave to appeal in forma pauperis—Duty to state in affidavit valuation of equity of redemption. Sect. P. CODE. O.44, R. 1 AND O. 33, R. 2. 45 C.W.N. 426.

——0.33, Rr. 2 and 7 and S. 149—Refusal of leave to sue in forma pauperis—Filing of revision and extension of time to hav court-fee till after disposal of revision—Death of hetitioner during pendency of revision—Right of heirs to continue suit.

Leave to sue in forma pauteris was refused. The petitioner preferred a revision against the order. He also obtained time for pavment of court-fee till after the disposal of the revision. But he died during the pendency of the revision, On his legal representatives being brought on record, held, that in the circumstances the proceedings relating to pauperism not being defunct it was open to the legal representatives to refuse to go on with those proceedings and to ask the Court to convert the application into a plaint on navment of proper court-fee. (Thomas, C. I. and Ghulam Hasan, I.)
TARIF BEGAM v. RAZUIDDIN. 20 Luck, \$27=1945 O. A. (C. C.) 114=1945 A.W.R. (C.C.) 114=1945 O.W.N. 200=A.J.R. 1945 Oudh 219.

O. 33, Rr. 2 and 5 (a)—Scope and effect of— Applicant for leave to appeal as pauper—Duty to disclose assets fully—Failure to make bona fide disclosure —Fifect.

An applicant for leave to appeal as a pauper is bound to disclose his or her assets fully and the utmost good faith is required in the matter of such disclosure under-O. 33, R. 2, read with O. 33, R. 5 (a), C. P. Code. Id is the petitioner's bounden duty to make a full any accurate verified statement of his or her properties. Any intentional departure from good faith, whatever the motive may be, must result in the refusal of leave; and if leave has been obtained by fraudulent non-disclosure, such leave will be cancelled. (Leach, C. J. and CHELLAMMAL MUTHULAKSHMI Clarke, J. J.) CHELLAMMAL v. MUTHULAKSHMI J.L.B. (1945) Man. 628=1945 M.W.N. AMMAL. 97=58 L.W. 21=A.I.R. 1945 Mad. 296=(1945) 1 M.L.J. 53,

\_\_\_\_O. 33 Rr. 2 and 5 (a) \_Scope\_Duty of applicant—Fraudulent disclosure—Fifect—If fatal.

It is the bounden duty of an applicant in forma parperis under O. 33, R. 2. read with P. (a) C. P. Code, to make a full and accurate verified statement about his properties. Where there is a freudulent suppression, the fact that, if the particular asset which had come to light had been disclosed it would not have affected the question of the alleged payperism of the applicant, has no relevance inasmuch as any intentional departure from good failt, whatever the motive might he, must lead to a dismissal of the application for leave to sue in C. P. CODE (1908), O. 33, Rr. 2 and 5.

forma pauperis. (Chandrasekhara Ayyar, J.) KUP-PUSWAMI NAIDU v. VARA DAPPA NAIDU. 205 I C. 81=15 R M. 814=1942 M.W.N. 553=55 L.W. 561 (1)=A.I.R. 1943 Mad. 11=(1942) 2 M.L J. 345.

——O. 33, Rr. 2 and 5—Scope—Suit for partition—Objection to court-fee—Order calling on plaintiff to pay additional court-fee—Application for amendment and for leave to continue suit as pauper—Power-of Court to allow—Application if defective and liable to be rejected—Rules of procedure—Object of. CHAITAN RAY v. PADMA CHARAN ROV. [seeQ D. 1936-40 Vol. I Col. 1807.] 192 I.C. 223=13 R.P. 443=7 B.R. 360.

——O. 33, R. 2—Scope—Suit in ordinary form— Leave to continue as pauper—Power of Court to grant— Conditions to be satisfied.

The Court has power to allow a plaintiff to continue in forma pauperis a suit which has been instituted in the ordinary way but before he can do so, there must be an application for permission which must comply with O. 33, R. 2, C. P. Code. (Rowland, J.) PORHAN GORAIN ". BENGALI GORAIN. 196 I.C. 40 = 14 R.P. 171=7 B.R. 987=A.I.R. 1941 Pat. 621.

O. 33. R. 2—Substartial compliance with— Sufficiency. See C. P. CODE, S. 115 AND O. 33, R. 2, 1942 O W N. 95.

Court to examine applicant as to cause of action subsisting—Decision as to existence of cause of action—Revision.

Under R. 4 of O. 33, C. P. Code, a Court is entitled to examine the applicant for leave to sue as a pauper not only as regards the property of the applicant with a view to determining whether he is or is not a pauper but also to examine him as regards the merits of claim. This examination must necessarily be directed to ascertain whether the allegations in the plaint do or do not show a cause of action for the suit. The Court is hence justified in taking into consideration the applicant's statement in addition to the plaint allegations for determining whether the applicant had a subsisting cause of action. An order rejecting the application on the ground that there is no subsisting cause of action is not revisable under S. 115. (Thomas, C. I. and Ghulam Hasam, 7.) MST. HIRA DEI v. GOKUL CHAND, 199 T.C. 364=14 R.O. 480=1942 O.A. 129=1942 O.W.N. 195=1942 A.W.R. (C.C.) 150=A.I.R. 1942 Oudh 361.

O. 33. R. 5—Rejection of pauper application—Revision, if lies. See C. P. CODE, S. 115 AND O. 33, R. 5. 1942 A.L.J. 340.

- O. 33, R. 5 (Oudh)-Scope.

The additional words added to R. 5 of O. 33 by the Oudh Chief Court imply that if there is any defect in the application, the applicant should be given time to amend it and his application should be rejected only if he fails to amend it within the time allowed. (Bennett, 7.) RAM DULARI v. AIIAN RIB. 17 Luck 628=199 I.C. 614=14 R.O. 503=1942 A.W.R. (C.C.) 79=1942 R.D. 181=1942 O.A. 57=1942 O.W.N. 106=A.I.R. 1942 Oudh 240.

-----O. 33, R. 5 (a) -- Scope-Schedule of property Omissions-If fatal.

Omissions of some items of property from the schedule of property submitted by a pauper applicant are not fatal unless they ar mala fide. (Dhavle, J.) JAINATUN NISSA BIRI v. IDRAKUNNISSA. 197 I.C. 631=8 B.R. 258=14 R.P. 324=7 Cut. L.T. 28=22 P.L.T. 760=A.I.R. 1941 Pat. 638.

C. P. CODE (1908), O. 33, Rr. 5 (d) and 6.

—O. 33, R.5 (c)—Objection to pauperism—Stage
—Decision in such proceedings affecting rights of third
parties—Propriety.

There is nothing in the provisions of O. 33 C. P. Code, to warrant the view that an objection as to pauperism could be entertained only prior but not subsequent to the notice. In an inquiry under R. 5 (c) of O. 33 as to the pauperism of the applicant transactions to which the pauper was one of the parties cannot be held or delclared to be fictitious in the absence of the other parties thereto. Every transaction must be held to be real until the contrary is proved and nothing should be done to the detriment of a party behind his back. (Plowden and Sinha, J.). MOHAMMAD BUX v. KHAIR-UN-NISSA. I.L.R. (1944) All. 502=1944 A.W.R. (H.C.) 196=1944 O.A. (H.C.) 196=1944 A.L.J. 366=1944 A.L.W. 376;

——O. 33, R. 5 (d) and S. 115—Dismissal on ground of cause of action being barred—Propriety—Revision—Competency.

O. 33, R. 5 (d) contemplates a subsisting cause of action which is not barred by limitation. Where a Court confines itself to the application for leave to sue as pauper and to the arguments and considers the question of limitation to be simple and decides it against the applicant, it cannot be said that it has exercised its jurisdicition illegally or with material irregularity. It is certainly within its powers to decide what it considered to be not a complicated question of limitation and hold that the application should be rejected as the claim is barred by limitation. Such an order could not be revised, (Clarke, J.) DARGAH OF SAINT MISKEENSHAH BARENA PIR v. HARDAYAL PRASAD. I L.R. (1942) Nag. 459 = 197 I.C. 746=14 R.N. 190 = 1941 N.L.J 473=A.I.R. 1941 Nag. 330.

—0.33, R. 5 (d)—Powers of Court—Allegation in plaint inconsistent with Full Bench decision of High Court—Reflection of application as disclosing no cause of action—Legality.

It is impossible to say that a plaint discloses no cause of action merely because it is inconsistent with a High Court Full Bench decision which is not necessarily final. It is not therefore open to a Court hearing an application for leave to sue in forma pauperis to reject it under 0. 33, R. 5, C. P. Code, on the ground that the allegations do not show a cause of action merely because they are inconsistent with a Full Bench decision of the High Court. (Beaumont. C. J.) ACHYAT GOPAL v. GOPALRAO RAMCHANDRA. I.L.R. (1944) Bom. 138 = 219 I.C. 8 = 18 R.B. 61 = 46 Bom. L.R. 415 = A.I.R. 1944 Bom. 232.

——O. 33, Rr. 5 (d) and 6—Relative scope—Scope of inquiry—Power of Court to travel beyond plaint and documents referred to therein.

Before a Court can dismiss an application for leave to sue in forma fauteris on the ground that there is no subisting cause of action, it must be able to draw that conclusion from the allegations in the plaint itself. It may be permissible to read with the plaint itself. It may be permissible to read with the Plaint the documents referred to in the plaint, but the Court should not travel beyond the plaint and perhaps those documents. The Court is not at liberty to consider any evidence which might be addreed bearing on the question at issue between the parties. R. 6 of O. 33, cannot have the effect of altering the meaning of R. 5 (a). (Horwill, J.) Subramaniam Piliai v. Kavundappa GCUNDAN. 211 I.C. 17=16 R.M. 475=56 L.W. 426 (1)=1943 M.W.N. 545=A.I.R. 1943 Mad. 663=(1943) 2 M.L.J. 177.

O. P. CODE (1908), O. 38, Rr. 5 (d) and 7.

- O. 33, Rr. 5 (d) and 7-Scope—Duty of Court - Jurisdiction is go into evidence and to dismiss application on ground of suit being barred by Res judicata—Dismissal—Interference in rivision.

Where an application for leave to sue in forma tanteris, itself does not disclose any want of cause of action the Court should grant leave to the applicant, if other conditions are satisfied. The Court is not entitled to look into other evidence, such as documents, at that stage and to dismiss the application under O. 33. R. 5. (d), C. P. Code, on the ground that the suit would be barred by res indicata. The dismissal of the application being on a ground not contained in O. 33, R. 5. C. P. Code, the Court acts without jurisdiction and the order is therefore liable to be set aside by the High Court in revision. (Horwill, 1) PPRIMAL AIVAR V. SRINIVASA AIVANGAR, 200 I C. 10=15 R.M. 5 = 1941 M W N. 64(2)=53 L.W. 201 = A.I.R. 1941 Mad. 398=(1941) 1 M.L. J. 31.

O. 33. Rr. 6 and 7-Evidence which could be admitted under.

Under O. 33, R. 6, C. P. Code, the only evidence that the Court could admit on record is on the question of pauperism. As regards the other grounds upon which a pauper application is liable to be dismissed under R. 7, the allegations in the application and the statement of the applicant can alone be gone into for the purposes of O. 33. The Court is not entitled to allow the opposite parties to produce evidence in order to controvert some of the applicant's allegations on merits (Thomas, C. J. and Missa. J.) MAOBIU. BAHADUR P. PRATAP BHAN PRAKASH SINGH. 1944 O.W.N. 440=1944 A.W.R. (C.C.) 277=1944 O.A. (C.C.) 277=A.I.R. 1945 Oudh. 79.

—O. 33, R. 6—Scope—If alters or affects R. 5

O. 33, R. 6—Scope—If alters or affects R. 5 (d) See C.P. CODE, O. 33, RR. 5 (d) AND 6. (1943) 2 M.L. J. 177.

\_\_\_\_O. 33, R. 7—Applicant paying court fee— Institution of suit—Date of.

Unless it is proved that the application to sue in forma pauperis was fraudulent the payment of court-fee makes the institution of the suit date back to the day on which the application to sue in forma pauperis was presented. Where all that the court has found is that the applicant is possessed of some property this would not make the presentation of the application to sue in forma pauperis fraudulent. (Mir Ahmad, I) HAIDER AMIR KHAN v. HARNAM SINGH. 200 I.C. 704=15 R. Pesh. 11=A.I.R. 1942 Pesh. 27 (1).

O. 33, R. 7—Granting of leave to sue as pauper—If revisable, See C. P. Cone (1908), S. 115 AND O. 33, R. 7. 1942 A.L.J. 419.

O. 33, Rr. 7 and 9—Grant of leave to sue as pauper—Facts instifying dishaupering coming into existence since application—Court refusing to consider them—Revision—C. P. Code. S. 115.

If facts come into existence since the date of the application for leave to sue as a pauper, on which the plaintiff can be dispaupered under 0.33 R. 9, C. P. Code there is no reason why the Court cannot make such an order in anticipation by straightaway refusing the leave asked for. But if the Court allows the plaintiff to sue as a pauper refusing to take into account those facts, it cannot be said to act so clearly without jurisdiction that the High Court should be bound to interfere in revision. (Piswas and Roxburgh, Jl.) AGENT, B. N. Ry. Co. v. Veneateswafi, 45 C.W.

C. P. CODE (1908), O. 33, R. 8.

A Court refusing to allow the applicant to sue as a pauper under O. 33, R. 7, C. P. Code, may at the time of passing the order allow the applicant under S. 149, C.P. Code, time to pay the requisite court-fee and upon such payment within the time of lowed, the suit will be deemed to have been instituted on the day on which the application for leave to sue as a pauper is made. (Pobde. I) Chinaman Shamanov Raban. J.L. R. (1944) Nag 523—1944 N. I. 429—A. I. R. 1944 Nag 357.

—0. 33, R. 7 and S. 149—Refusal of leave to sue in forma pauperis—Payment of court-fee subsequently, if can be allowed.

After refusing to allow an applicant to sue in forma bauperis the Court cannot by a separate and subsequent order allow him to pay the requisite court-fee under S. 140, C. P. Code and treat the application as a plaint. (Collister and Rairai, II.) Tel Singh v. Jagat Singh. 1942 A.L.W. 602.

— O. 33 Rr. 7 and 15—Scope and applicability of—Dismissal of application as withdrawn after notice and prior to hearing—Second application—Maintainability.

R. 7 of O. 33 C.P. Code, contemplates an enquiry into the fact of pauperism upon the evidence that may be produced by the parties and after hearing their arguments. Until the stage contemplated by R. 7 is reached and an order is passed by the Court under that rule, the provisions of R. 15 of that order do not come into operation. The crucial test for determining the applicability of R. 15 of O. 33, is whether the previous order dismissing the application for pauperism was passed under R. 7 (3) of O. 33 after satisfying the conditions laid down in that rule. Where it is prayed that a nauper application may be permitted to be withdrawn for the removal of certain formal defects and it is dismissed as withdrawn after issue of notice to the opposite party but before the actual date fixed for the hearing of the application, it cannot operate as an order refusing to allow the applicant to sue as a pauper within the meaning of R. 15 of O. 33, so as to constitute res indicata. There is no enquiry into the merits of the application and much less any adjudication of the matter by the Court and hence a second application is maintainable. (Thomas, C. J. and Ghulam Hasan. J.) UMRAO JAHAN BEGAM v. HAKI-MUNNISSA. 17 Luck. 462—198 J. C. 467—14 R.O. 399=1941 O.W.N. 1335=1941 A.W.R. (CC.) 414=1941 O.A. 1015=A.I.R. 1942 Oudh 169. O. 32, R. 7 (2)—Absence of leave—Parties

to compromise other than minor how affected. Where a compromise involving a minor is entered into without leave of the Court, it is void as against the minor only according to sub-R.(2) to R. 7 of O. 32. It is not a nullity as against the others. (Mathur, I.) SIDH NATH v. SUKHRAM DUBE. 1943 A.L.W. 156.

O.33, R.8—Application for leave to sue as hauper allowed and plaint numbered as suit-finding that suit was beyond jurisdiction of Court-Plaint returned—Deletion of claim and re-presentation in some Court—I egality—Fresh application for leave—Necessity.

Where, after an application for leave to sue in forma hauperis is allowed and it is run teredand

O. P. ODDE (1998), O. 33, R. 8, and S. 3, Expl.

filed as a suit, it is discovered that the suit is be, youd the pecuniary jurisdiction of the Court and the plaint is returned for presentation to the proper Court, it is not open to the paper plaintiff to re-present the plaint again to the same Court after deleting one or his claims so as to bring it within the Court's jurisdiction. The amended but unstamped plaint cannot be entertained without an application for leave to sue in forma paupers being made and allowed. (Horwill, 1.) Govindaraju Mudaliar v. Hanumantha Rao. 57 L.W. 538=1945 M.W.N. 16=A.I.R. 1945 Mad. 7=(1944) 2 M.L.J. 258.

——0.33, K. 8 and Limitation Act, S. 3 Expl.

—Scope—Application for leave to sue as pauper—
Order refusing leave—Subsequent grant of time
for payment of court-fee for regular suit—Effect

—Date of institution of suit.

If an application to sue as a pauper is granted, then under 0.33, R. 8, the application itself is deemed to be the plaint in the suit, and under the explanation to S. 3, Limitation Act, the suit is deemed to have been nled on the day on which the application for leave to sue as a pauper is made. Even before deciding whether to grant the application or not, the Court may, at any time during the pendency of the proceedings, treat the application as a plaint and allow the applicant to pay the requisite court-tees and give up his request to be allowed to sue as pauper. Even if the Court decides to reject the application under 0.33, K. 5, or to refuse to allow the applicant to sue as a pauper under O. 33, R. 7, it may treat the application as an unstamped plaint, and either before or at the time of passing the order under R. 5 or R.7, the Court may in its discretion under S. 149 C.P.Code, allow the applicant time to pay the requisite Court-fees and upon such payment within the time allowed number and register the plaint. But in doing so, the Court should have regard to R. 15 of O. 33 and make the payment of costs a condition precedent. In all these cases for purposes of limitation the suit will be deemed to have been instituted on the day on which the application for leave to sue as a pauper is made. But if once the Court passes an order rejecting the application under R. 5 or refusing to allow the applicant to sue as a pauper under R. 7, without keeping the application alive as an unstamped plaint and granting the applicant time to pay the requisite Court-fees, the proceedings came to an end and the Court has no power to grant time by a separate and subsequent order. In that case the only remedy of the applicant is to file a suit regularly under O. 33, R. 15, and, for purposes of limitation, the suit must be taken to be instituted only on the day on which it is actually filed; and the applicant cannot avail himself of the time spent in the pauper proceedings to save the bar of limitation. The grant of time to pay court-fee after the termination of the pauper proceedings cannot revive the application which had already been disposed of.

Quaere: Whether S. 15, Limitation Act applies to such a case. (Broomfield and Lokur, JJ.) MAHADEV GOPAL V. BHIKAJI VISHRAM. 208 I.C. 543=16 R.B. 88=45 Bom.L.R. 544=A.I.R. 1943 Bom. 292.

—O, 33 R. 9—Procedure—Application to dispauper plaintiff—Time for disposal—Order

C. P. CODE (1908), O. 33, Br. 10, 11 and 12,

dispaupering plaintiff after judgment in suit and along with disposal of suit—Propriety. ADINA-RAYANA CHETTY v. SKIRANGACHARIAR. [see Q. D. 1930-40 Vol. I, Col. 1816.] A I.R. 1941 Mad. 217.

——O.33, R. 10—Applicability—Pauper suit for partition—Preliminary decree declaring share and directing payment of court-fee to Government—Plaintiff giving up share in favour of defendants as debts exceeded assets—Final decree—Recovery of court fee—Right of Government to proceed against share of plaintiff in hands of defendants.

A pauper suit was filed for partition of family properties and a preliminary decree was made declaring that the plaintiff was entitled to a one-tourth share in the suit properties. There was a direction that the plaintiff should pay the courtiese amount due to the Government. Subsequently a final decree was passed, but before that the plaintiff, finding that he had to pay a greater amount for his share of the family debts than the value of the properties which he would get in partition, gave up his claim for his entire share in the tamily properties in favour of some defendants.

Held, that the plaintiff had succeeded in the suit and the fact that he voluntarily gave up his share after the preliminary decree was no ground for holding that he had not succeeded in the suit. The Government would therefore be entitled to a first charge on the share given up by him and to proceed against that share in the hands of the detendants for recovery of the amount of the court-fee payable by the plaintiff. (Divatia and Weston, JJ.) Government of Bombay v. Mohanlal Vajechand. 220 I.C. 364—46 Bom. L.R. 439—A.I.R. 1944 Bom. 239 (1).

-0.33, R. 10-Construction and scope-First charge for court-fee-If limited to subject matter of

The first charge referred to in O. 33, R. 10, C. P Code, is not limited to the subject-matters of the suit which the party ordered to pay costs has recovered. The provision that there shall be a first charge on the subject-matter of the suit is a distinct provision. Where by consent, a suit in forma pauperis is decreed with a direction that the second plaintiff therein should receive a certain portion of the properties in the suit and that the first plaintiff should pay the costs of suit and the courtfee payable to Government, it is open to the Government to realise the court-fee on the plaint from the properties awarded to the second plaintiff, as O. 33, R. 10 is wide enough to allow a charge in favour of the Government on the properties received by the second plaintiff under the consent decree. (Leach, C. J. and Lakshmana Rao, 1.) GOPALASWAMI NAICK v. PROVINCE OF MADRAS. 58 L.W. 353=1945 M.W.N. 473=(1945) 2 M.L.J.

——O. 33, Rr. 10, 11 and 12—Court-fee payable—Computation—Basis—Amendment of valuation—Subsequent compromise—Court-fee payable.

The payment of the Court-fee under Rr. 10 and 11 of O. 33 ought to be calculated on the basis of the valuation at the date of the filing of the suit which is the valuation upon which the plaintiff would have had to pay if he had not been permitted to sue as pauper. Hence where a pauper plaintiff gets his valuation amended to a figure less than that given originally in his plaint, and the suit is compromised subsequently the Court-fee payable to the Government is to be calculated

# C. P. CODE (1908), O. 33, Br. 10 and 11.

not on the amended valuation but on the original valuation given by the pauper plaintiff. (Braund, J.) SECRETARY OF STATE v. GOMTI KUNWARI. 195 I. C. 246-14 R.A. 23-1941 O.A. (Supp.) 327-1941 A.W.R. (H.C.) 162-1941 A.L.W. 404-1941 A.L.J. 253-A.L.R. 1941 All. 221.

——O. 33, Rr. 10 and 11—Plaintiff succeeding only in part—Order for payment of whole court-fee by defendant—Propriety. MUJWIR HUSAIN v. KISHWAR JEHAN BEGAM. [See Q. D. 1936—'40 Vol. 1, Col. 3304.] 16 Luck. 252=191 I.C. 185=A.I.B. 1941 Oudh 66.

Rr. 10 and 11 of O. 33, C. P. Code, are mandatory. According to those rules the Court has to pass an order, for the payment of Court-fees in a pauper's suit suo motu. (Wassoodew, J.) GOVERNMENT OF BOMBAY v. BAI BAIBA KANDHABHAI. I.I.R. (1942) Bom. 456=202 I.C. 781=15 R.B. 191=44 Bom. I.R. 518=A.I.R. 1942 Bom. 274.

—0. 33, R. 11 and S. 35—Award of costs personally against friend of minor plaintiff—Power of Court.

O. 33, R. 11, must be construed in the light of S. 35 and on the principle underlying O. 32, R. 14. S. 35 gives wide discretion to the Court and full power to determine by whom or out of what property and to what extent costs are to be paid. The Court would, therefore, be justified in making the next friend of a minor plaintiff personally liable to pay the court-tees and costs of a suit instituted in forma pauperis, if it thinks that the suit is false and it is unreasonable and improper to have launched it. (Niyogi, I) KESHEO HANMANT v. MAINABAI. I.L.E. (1943) Nag. 775=210 LC. 237=16 R.N. 145=1943 N.I.J. 478=A.I. B. 1943 Nag. 329.

as plaintiff-Court's power to make.

Under O. 33, R. 11, (as amended in Madras), it is not open to the Court when dismissing a pauper suit, to order a defendant to pay the court-fee because his interest is the same as that of the plaintiff. (Leach, C, J. and Lakshmana Rao, J.) RUKMANI ACHI v. SAMPOORNAMMAL. 209 I.C. 9=16 R.M. 290=56 L.W. 185 (1)=1943 M.W.N, 196 (2)=A.I.R. 1943 Mad. 585=(1943) 1 M.L.J. 286.

——0. 33, R. 12—Applicability—Court passing decree making order for payment of Court-fees—Application by Government for fresh order—Competency.

R. 12 of O. 33, C. P. Code, is intended to enable the Government to ask the Court to make an order for the payment of Court fees where no such order has been made. But it does not enable the Government to dictate to the Court in what terms the order should be passed or to apply for such an order again when the Court has already made an order. R. 12 is confined in its application to cases in which there is a distinct omission to pass orders under Rr. 10 and 11 suo motu by the Court which passed the decree. (Wassodew, J.) GOVERNMENT OF BOMEAY v. BAI BAIBA KHAMDABHAI. I.L.R. (1942) Bom. 456=202 I.O. 781=15 R.B. 191=44 Bom.L.B. 518=A.I.B. 1942 Bom. 274.

O. 38, R. 15—Applicability—Notice served only on some of the respondents—Dismissal of application for default—If order refusing to allow applicant to sue as pauger—Fresh application—If barred.

An order refusing to allow an applicant to sue as a pauper falling within O. 33, R. 15, C. P. Code, must be

#### O. P. CODE (1908), O. 33, R. 15,

an order passed under R. 7 (3) of O. 33, and R. 7 has to be read with R. 6. It is clear that, having regard to Rr. 6 and 7. the stage of R. 7, is not reached unless notice is given to the opposite party and the Government pleader as provided in R. 6. When there are several res. pondents, all the respondents must be served with notice. The Court cannot hear evidence as to pauperism and decide the question as against some only of the whole body of opposite party or respondents. When the application is rejected for default without notice being served on all the respondents (only some of them being served) it does not amount to an order refusing to allow the applicant to sue as pauper so as to attract the operation of R. 15 of O. 33, C. P. Code A fresh application is therefore not barred. (Dhavle and Chatterii, II.) PROVINCE OF URISSA v. DEBYA SINGH, 20 Pat. 765 =197 I C. 726=14 R.P. 348=8 B.R. 283=22 Pat. L.T. 814=7 Cut.L.T. 34=A.I.R. 1941 Pat. 594.

—0. 33, B. 15—Construction and scope—If mandatory—Payment of costs of pauper application—If condition precedent to institution of sust with courtiee.

Where an application for leave to sue as a pauper has been refused and subsequently a suit is filed on payment of court-fees under O. 33, R. 15, the payment of the costs of the pauper application directed to be paid is not made a condition precedent to the jurisdiction of the Court to entertain such ordinary suit. The costs, however must be paid, and if they are not paid and the matter is brought to the notice of the Court, and the payment is not waived the Court should reject the plaint on presentation, or subsequenly stay the suit pending payment, but the Court is not bound to dismiss the suit. (Beaumont, C. J. and Sen, J.) ABDUL RAHMAN v. AMINABI. I.I.B. (1943) Bom. 525=210 I.C. 495=16 R.B. 224=45 Bom.I.R. 768=A.I.R. 1943 Bom. 409.

O. 33, R. 15, C. P. Code, applies only to cases in which permission has been refused after the issue of notice under R. 7 of the same order, and does not apply to cases in which the application has been summarily rejected under R. 5. An order of rejection under R. 5. although passed on the merits, does not operate as a bar to the presentation of a fresh application. (Tek Chand and Beckett, J.) ARYA SAMAJ, CHAORI BAZAAR DELHI v. RAM GOPAL I.I.R. (1941) Lah. 709=195 I.C. 717=14 R.L. 85=43 P.I.R. 257=A.I.B. 1941 Lah. 253.

The refusal which is contemplated by R. 15 of O. 33, C.P. Code, is a refusal to allow the applicant to sue as a pauper under sub-R. (3) of R. 7 of that order which must be the result of an inquiry into the merits of the application as directed by sub-Rules (1) and (2) of R. 7. Dismissal for default of appearance of applicant cannot amount to such a refusal. R. 15 of O. 33 only authorises the application of the principle of res judicata to an application to sue in forma pauperis and prohibits the entertainment of a fresh application when the first has been dismissed on the merits. It does not contemplate that a summary order passed without inquiry or contest should be given the force of res judicata. (Mullah, /.) NIMAR PANDEY v. JAGDISH PANDEY. I.L.B. (1941) All. 313=196 I.O. 109=14 R.A. 121=1941 A.L.W. 73=1941 A.W.R. (H.C.) 56=1941 A.L.J. 103 = A.I.R. 1941 All. 166.

O. P. OOD 21(1908), O. 33 R. 15.

——0. 33 R. 15—Scope and applicability. See O. 33, RR. 7 AND 15—SCOPE AND APPLICABILITY. 1941 O.A. 1015.

O. 33, R. 15—Scope—If exhaustive—Rejection of application for leave to sie in torma praperis—Power of Court to treat same as plaint and grant time for payment of court-fees—Remety of applicant—C.P. Coae, S. 149.

An application for leave to sue in froma pauperis can only be treated as a plaint if it is granted; but it it is rejected, the only remedy open to the applicant is that provided by O. 33. R. 15 C. P. Code, i.e., the ning of a tresh suit after first paying the costs incurred by the Provincial Government and the opposite party in opposing his application for leave to sue. The date of the institution of such suit will, for purposes of limitation, be the actual date there of, and the provisions of S. 149, C. P. Code, cannot be availed of or invoked. It is not open to the Court to allow the applicant the benefit of S. 149, C. P. Code, and simultaneously refuse his application to sue as a pauper, or to treat the application, after it has been refused, as a plaint or a potential plaint which can be allowed to be converted in to a regular plaint by the payment of court-tees. When the Court refuses to allow the applicant to sue as a pauper, the matter would be governed solely by O- 33 R, 15, C. P- Code, and it would no longer be open to the applicant to say that the plaint is still on the record as the suit is still pending so that he is entitled to pay the court-fee under 5. 149. Explanation to S. 3, Limitation Act, cannot be relied on to enable the applicant to treat the application as the plaint. The explanation is intended to show when limitation begins to run on a suit being instituted, and not to affirm that an application for leave to sue as pauper is tantamount to the filing of a suit, (Sen, 1.) VAMANRAO LALLUBHAI v. PRANLAL BHAGWANDAS. I.L.B. (1943) Bom. 721 = 212 I.C. 608 = 16 R.B. 390=45 Bom.L.R. 1002=A.I.R. 1944 Bom. 63.

—0.33, R. 15—Scope—Non-compliance—Effect— Suit filed on insufficient court-fee—Costs paid subsequently—Deficiency in court-fee made good later—Date of suit—Suit barred on date of payment of costs—Lability to dismissal.

Under O. 33, R. 15, it is obligatory on the plaintiff that he should first pay the costs in the pauper petition incurred by the Provincial Government and by the opposite party the right of suit recognised by the rule is made expressly subject to the condition that he should pay the said costs before the institution of the suit. Where the costs are paid long after the presentation of the plaint on insufficient stamp paper but before the deficiency is made up it must be held that the provisions of O. 33, R. 15 have not been complied with. The suit cannot be deemed to be instituted on the date on which the deficiency in stamp is made good, but can only be treated as instituted on the date on which the costs are paid, and if on such date the suit is barred, it is liable to be dismissed. (Krishnaswami Ayyangar Horwill, JJ.) SIVA RAO 2, RAMAJOGA RAO. 209 I.C. 111=16 B.M. 273=1943 M.W.N. 443=56 L.W. 280 = A.I.R. 1943 Mad. 547 = (1943) 1 M.L.J. 427.

——O. 34—Applicability to charges created by decrees. RAYCHAND JIVAJI v. BASAPPA- [see Q.D. 1936—40 Vol. I. Col. 3304.] I.L.R. (1941) Bom. 136—193 I.G. 740—13 R.B. 337—A I.R. 1941 Bom. 71.

- 0. 84—If exhaustive—Form of decree if can be settled by compromise—Effect of such compromise.

C. P. CODE (1908), O. 34, B. 1,

O. 34, is not exhaustive and it is open to the parties, even in a suit for sale brought on the foot of a simple mortgage to settle by compromise the form of the decree (provided that there is nothing in it which is opposed to public policy.) Payments can be agreed to be received in instalments extending over the period allowed by O. 34. Parties can agree to have a single decree which is strightway executable and do away with the necessity for a preliminary and a final decree, But it it is agreed that the decree holder shall have a right to apply for a final decree on the happening of certain events, the deeree holder would have to apply for it within the prescribed period of limitation. (Verma and Yorke / J.) GHULAM AMIR v. MASUDA KHATUN L.L.R.(1943) All. 684=210 L.C. 573=16 B.A. 198= 1943 A.L.J. 349=1943 O.W.N. (H.C.) 227=1943 A.W.R. (H.C.) 167=1943 O.A. (HC.) 167=1943 A. L.W. 375=A.I.R. 1943 All. 321.

—0.84, B. 1—Attaching creditor in execution of simple money decree—If a necessary party to a mortgage sust—Position of auction purchaser, if different—Court auction in execution of mortgage decree—Binding nature.

An attaching creditor in execution of a simple money decree is not a necessary party to a mortgage suit with reference to that property and is bound by the purchase in execution of the mortgage decree even though he was not made a party to the mortgage suit. The position of a purchaser in execution of the simple money decree is not in any way different. (Ghulam Hasan and Madeley, ff.) GAVA PRASAD v. MST. BHAGAN BIBI. 20. Luck. 53=1944 O.W.N. 349=1944 A.L.W. 456=1944 A.W.R. (C.C.) 234=1944 O.A. (C.C.) 234=A. I.R. 1945 Oudh 87.

----O. 34, R. 1-Claim of paramount title-What amounts to,

It a person asserts that the mortgaged property belongs to another person and not to mortgagor, it is a clear assertion of title of the other person and denial of title of the mortgagor. This amounts to a claim of paramount title. (Gritle, C. J. and Sin, J.) ABDUL BAKI v. BANSILAL ABIRCHAND, I.L.R. (1944) Nag. 577=1944 N.L.J. 331=A.I.R. 1945 Nag. 53.

----- 0. 34, R. 1-Failure to implead puisne mortgagee-- If would entail dismissal of suit.

A mortgage suit is not liable to be dismissed if a puisne mortgagee is not impleaded as a party. (Thomas C. J. and Agarval, J.) SHEO PRASAD v. MST. PARKASH KANI. 18 Luck. 601=1942 O.A. 567=1942 A.W.R. (C.C.) 355=1942 O.W.N. 766=204 I.C. 444=15 K.O. 350=A.I.R. 1943 Oudh 164.

——0.34, B. 1 — Mortgage executed by Receiver — Suit on—Receiver made party—Owners of mortgaged property—If uccessary parties.

In a suit to enforce a mortgage executed with the sanction of Court by a receiver appointed under O. 40, R. I., C. P. Code, the receiver may be a proper party, but the owners of the property who have interest in the right of redemption are also necessary parties. in view of the provisions of O. 34, R. 1, C. P. Code, it is doubtful whether it would be within the competence of the Court appointing the receiver to make an order directing him to represent fully the right of redemption.

# C.P. CODE (1908), O. 34, R. 1.

Even assuming that the receiver would normally represent the owners in a suit of this character, he cannot do so it contiston is proved between him and the mortgagee. A decree obtained in such circumstances against the receiver, in the absence of the owners of the property will not affect their right of redemption. (Akram and Pil, J.) Annapurna Dasi v. Sarat Chandra. 207 I.C. 461—16 R.C. 68—16 C.W.N. 355—A.I.R. 1942 Cal. 394.

In a mortgage suit no question of title arises. The only question with which parties are concerned is the question of retemption. It is only those who are interested in paying in order to save the property who are necessary parties to the suit. A person who claims a paramount title is not a necessary party in as much as he disclaims all interest in the equity of redemption. (Bose, f.) SHAKUNFALABAI v. ROSHANLAL. 1941 C. 19=13 R.N. 354=1941 N.L.J. 81=A.I.R. 1941 Nag. 133.

—0.34, R. 1—Necessary and proper party —Distinction—Suit on mortgage against one of several heirs of mortgagor—Other heirs impleaded after limitation—Effect.

There is a distinction between 'necessary party' and 'proper party'. A proper party is not necessarily a necessary party and he may be impleaded even after limitation had expired but a person who is a necessary party must be impleaded within the period of limitation and if he is not the entire suit tails. If a suit is brought against one of the several heirs of a mortgagor and the other heirs are impleaded after the expiry of the period of limitation, the suit against the heirs subsequently impleaded would be parred by time unless it can be shown that those heirs were represented by the person against whom the suit was originally instituted within time. It is wrong to say that in every case one of the several heirs of a mortgagor represents the others. (Agarwal, J,) GUR CHARAN v. RAM CHANDRA SINGH. 17 Luck 482=197 I.C. 411=14 R.O. 310=1941 A.W.R. (C.C.) 373=1941 A.L.W. 1088=1941 O.A. 961 =1941 O. W. N. 1279=A. I. R. 1942 Oudh

O.34, R. 1—Non-joinder of all interested parties—Effect. Girdhar v. Motilal Champalal. [see Q.D. 1936—'40 Vol. I, Col. 1826.] I.LR. (1941) Nag. 615=13 R.N. 267=192 I.C. 556=A.I.R. 1941 Nag. 5.

Estates Act. R. 6—0.34, R. 1 if applies to proceedings under Encumbered Estates Act—Persons interested in mortgage, subject-matter of proceedings under the Encumbered Estates Act—If can be made parties. DWARKA NATH SINGH v. RAJ RANI [see Q. D. 1936—'40 Vol. 1, Col. 1831] 16 Luck, 110.

It is an established rule that a party claiming title paramount in a mortgage suit is not a necessary party. (R. C. Mitter, and Akram, IJ.) BARODA PROSAD SUKUL v. NAOGAON LOAN OFFICE, LTD. 72 C.L.J. 493.

O. P. CODE (1908), O. 34, R. 1,

——0.34, R. 1—Parties to mortgage suits—Rule as to discharge or non-joinder of person claiming title paramount, if absolute.

Though it is a general rule that a person setting up a paramount title should be discharged from or not joined in a mortgage suit, it is not an absolute one. Questions of title may be investigated in a mortgage suit where it is necessary to give complete relief to the plaintiff or secure to him as a result of the decree in the mortgage suit, a quiet and unobstructed possession. In a suit on mortgage, a lambardar who had subsequently obtained a decree for arrears of land revenue against the property mortgaged and in execution of which he had purchased the field himself and obtained possession can be joined as a party and questions of priority in respect of land revenue and redemption of charge by mortgagee on payment could be decided in the mortgage suit. (Gruer, /.) LAXMANRAO v. MADHO PRASAD. I.L.B. (1942) Nag. 701=200 I.C. 35=14 B.N. 314= 1942 N.L.J. 156 = A.I.R. 1942 Nag. 60.

Where in a suit on a prior mortgage against the mortgagor and puisne mortgage it is declared that the mortgage sued on was not genuine, the prior mortgage ceases to be interested other in the mortgaged security or in the right of redemption and hence is not a necessary party in a subsequent suit by the puisne mortgagee on his mortgage and need not be joined, (Thomas, C.J. and Agarwat, J.) SHEO PRASAD 1, MST.PARKASH RANI. 18 Luck. 601=204 I.O. 444-15 R.O. 350=1942 O.A. 567=1942 A.W.R. (C.O.) 355=1942 O.W.N. 766=A.I.R 1943 Outh 164.

——O. 34, R. 1 and Form 9, Appx. D-Puisse mortgagee-defendant classing decree in form No. 9 of Appx. D-Jurisdiction of Court, if affected by the total amount being beyond its pecumary jurisdiction—Court-fee if payable on defendant's prayer for such decree.

Where in a mortgage suit the puisne mortgagees impleaded as defendants ask for a decree in form No. 9 of Appx. D, the suit for purposes of jurisdiction has to be valued ad valorem on the amount due on the plaintiff's prior mortgage and jurisdiction is not lost if the amounts claimed on the prior and subsequent mortgages taken together exceed the pecuniary jurisdiction of that Court. The relief which the puisne mortgagees ask for does not require to be stamped at all. (Polluck and Gruer, J.) GANPATRAO v. SHAMRAO. I.I.B. (1941) Nag. 194 = 194 I.C. 390 = 13 R.N. 367 = 1941 N.L.J. 105 = A.I.R. 1941 Nag. 138.

The opening words of O. 34. R. 1, indicate that its provisions are subject to the provisions of O. 1. R. 9. which lays down that the suit is not liable to be defeated by reason of the non-joinder of parties. Noncompliance with the provision of O. 34, R. 1 is not necessarily fatal to a suit to enforce a mortgage. O. 1. R. 9, applies to mortgage suits as well. (Ghulam Hasan and Madeley J.) GUR CHARAN v. RAM BHAROSE SINGH. 19 Luck. 183=207 I.C 72=18 R.O. 9=1943 O.W.N. 105=1943 O.A. (C.O.) 55=A.I.B. 1943 Outh 218.

O. 34, R. 1—Seope—Mortgage suit—Neest gagy parties—Person interested in Mortgage C. P. CODE (1908), O. 34, R. 1.

security—Application to be impleaded as party to suit and claiming adversely to plaintiff—Duty of Court to implead.

Although it is ordinarily undesirable to implicate in a mortgage suit persons claiming adversly to either the mortgagor or the mortgagee, this does not apply to the case of a person who has an interest in the mortgage security and whose claim is not in any way in derogation of the rights of the mortgagee or the mortgagor, notwithstanding that his claim is adverse to the plaintiff in the mortgage suit. If the person applying to be impleaded as a party in a mortgage is interested in the mortgage suit, he should be added as a party before a decree is given in the suit. O. 34, R. I requires that all persons having an interest in the mortgage security shall be joined as parties to any suit relating to the security. CHETTIAR v. (Wadsworth. J.) MUTHUSWAMI NARAYANASWAMI CHETTIAR. 196 L.C. 389=14 R.M. 292=1941 M.W.N. 517=54 L.W. 65=A.I.R. 1941 Mad. 710=(1941) 1 M.L.J. 626.

——O. 34, R. 1—Scope—Non-complinace—Effect—Suit by first Mortgagee without impleading second Mortgagee-Decree and sale-Purchase by first mortgagee and possession—Suit by second mortgagee after prior suit—Decree and sale—Purchase by second Mortgagee—Effect—Rights inter se—Prierity of title.

R was the mittadar, i.e., the owner of the melwaram right in a village. He mortgaged his rights in the village and other villages to the plaintiff under three mortgage deeds of 1921, 1922 and 1923. The defendants were maindars of the village and were entitled to receive from R one-third of the sum payable by R to Government as peshoush and had in respect of that right a first charge on R's interests in the village. On 30-6-1933, they sued R for arrears of their dues and for enforcement of their charge and got a decree on 10-4-1934; and in execution brought the village to sale on 24-10-1934 and having themselves purchased the property, obtained delivery on 4-12-1934. The plaintiff, who was in the position of a puisne mortgagee, was not made a party to this suit. On 12-10-1933, the plaintiff sued on their mortgages, got a decree on 25-7-1934, sold the property on 3-10-1935, and purchased the property at the execution sale. The sale was confirmed on 6-3-1936. He did not implead the plaintiff in the suit or in the execution proceedings. When he sought delivery of the property, ne was obstructed by the defendants and thereupon the plaintiff applied for removal of obstruction; his application was, however, dismissed on 18-8-1938. In August, 1939 he filed the present suit to set aside the adverse order. The suit was dismissed by the trial Court, out on appeal the appellate Court passed an order of remand which provided that (1) the plaintiff should pay the defendants the amount due on their decree with interest, and that the detendants should give credit for income received by them from the village for the period of their possession of it; (2) the defendants should pay the plaintiff the proportionate amount due to him on his decree in respect of the suit village, and that these sums were to be set off against each other and the exact amount found due by the detendant should be paid by them to the plaintiff; (3) that if the defendants paid that amount they were not to be disturbed in their possession, their ownership being resognised; but if they did not pay, the property was to be sold and the sale proceeds were to be distributed in a particular manner. Both sides appealed against this order to the High Court.

C. P. CODE (1908), O. 34, Rr. 2 and S.

Held, (1) that the plaintiff could not assail the purchase by the defendants on the ground of lis pendens and though the failure on the part of the defendants to implead the plaintiff as a party to their suit under O. 34 R. 1 C. P. Code, rendered the decree not binding on the plaintiff, the latter had no right to claim priority over the title of the defendants; (2) that the case was one in which each party relied upon a title which was imperfect in that it did not bind the other, and so far as priority of time in the acquisition of the title was concerned the defendants and not the plaintiff were entitled to claim the advantage (4) that the refusal on the part of the plaintiff, who must have become aware of the sale of the defendants, to implead the defendants in the execution proceedings must be held to be deliberate and the plaintiff could therefore claim no equitable relief; (5) that the defendants could not claim immunity from liability to account for income received by them from the village. (King and Bill, //.) NAIESA CHETTIAR v. SUBBUNARAYANA AYYAR, I.L.R (1945) Mad. 578=1945 M.W.N. 5 =A.I.R. 1945 Mad. 91=(1944) 2 M.L.J. 374.

——O. 34. B. 1—Socpe—Non-joinder—Effect, JASRAJ FACOJI v. SUGRABAI. [see Q. D. 1936—'40 Vol. I, Col. 3304.] 191 I.C. 483.

——O. 34, R. 1—Scope—Sale of property of mortgagor—Suu on mortgage without impleading purchases—Decree and execution sale—Purchase by Mortgagee—Subsequent suit by him against private purchase for possession subject to latters right to redeem—Maintanability.

A mortgaged his property to B and afterwards sold it to C who took possession. B, then sued on his mortgage not making C a party, got a decree, borught the property to sale and purchased it himself. He failed to get possession from C, and therefore brought a suit to evict C, subject to C's right to redeem him. At the date of B's suit against C, a suit to recover the mortgage suit by sale of the mortgaged property was barred by limita-

Held, that the suit was not maintainable and the auction purchaser, B, had no right to recover the property from C, unless C was willing to redeem him. (Broomfield and Macklin, J.) GANAPA KAMA HEDGE v. TIMMAYA NARAYAN. 201 LC. 123-15 R.B. 56-44 Bom.L.R. 111-A.I.R. 1942 Rom. 146.

\_\_\_\_O. 34, Rr. 2 and 3—Power to contract out of operation of.

There is nothing to debar the parties to a mortgage from contracting themselves out of the provisions of kr. 2 and 3 of 0.34, and to agree to have a decree passed in such terms as to make it operate as a final decree automatically or to agree that in default of payment of the money by a stipulated date the decree shall operate as a final decree for foreclosure at once. It depends upon the facts of each case as to whether the intention of the parties was that or not. (Bennett, 1.) BANSIDHAR v. SITLA. 217 I.C. 208=17 B.O. 91=1943 O.W.N. 457 (2)=1943 O.A. (C.C.) 283=1943 A.W.R. (C.C.) 151=A.I.R. 1944 Oudh 111.

There is nothing to debar the parties to a mortgage from contracting themselves out of the provisions of Rr. 2 and 3 of O. 34, and to agree to have a decree passed in such terms as to make it appear as a final decree automatically, or to agree that in default of payment of the money by a stipulated date the decree shall operate as a final decree for foreclosure at once. It is a ques-

# G. P. CODE (1908), O. 34, R. 3.

tion to be decided on the facts of each case whether an agreement netween the parties did or did not really have such effect. (Thomas, C. J. and Ghulam (Iasan, J.) AUTOR SINGH v. MOHAMMAD EJAZ RASOOL KHAN. 214 f.C. 5=17 k.O. 10=1943 A.W.R. (C.O.) 131=1943 O.W.R. 401=1943 O.A. (C.O.) 203 -A.I.R. 1944 Oudh 106.

A final decree Cannot be passed behind the defendants' back. It is necessary to near nim as shown by the form of final decree given in Appendix D. Notice to the detendant is therefore clearly necessary. (Bose, J.) MAHAJAN KAGHUBIR PRASAD v. PYARELAL AMARCHAND. I.L.E. (1944) Nag. 420 = 218 I.O. 200 = 18 E.N. 5 = 1944 N.L.J. 119 = A.L.E. 1944 Nag. 181.

Where no amount is specified and no date is fixed for payment in the preliminary decree, it is not possible for the decree-noider to say that there has been a detailt by the judgment-deptor in payment as directed by the decree which alone would entitle him to apply for a final decree. In such a case time never begins to run against the decree-holder under Art. 181, Limitation Act, (Verma and Yorke, J.). GHULAM AMIR 7. MASUDA KHATUN. 210 I.U. 573=16 E.A. 198=11.L.B. (1943) Ali. 684=1943 A.L.J. 349=1943 O.W.N. (d.O.) 227=1943 A.W.B. (d.C.) 167=1943 O.A. (d.O.) 167=1943 A.L.W. 375=A.L.B. 1943 Ali. 321.

Where a compromise decree is passed, no final decree is necessary to enable the decree-nolder to take out execution of his compromise decree (Sale, J.) KARNAIL SINGH v. VIRUMAL. 210 1.0. 10=46 F.L.E. 171=10 E.L. 147=A.I.R. 1943 Lan. 189.

Co. 34, B. 4—Interest from suit till redemption—Rate of—Right of mortgagee. GHULAM MAHOMED v. RAJESHWAK. [see Q. D. 1930-40' Vol. 1, Col. 1833] LL.B. (1940) Lan. 650=192 L.C. 505=13 R.L. 385.

onal decree for costs—If can be granted.

Under S. 35 read with O. 34, R. 4, any defendant, whether he is a mortgager or a subsequent mortgages or a purchaser of the equity of redemption, can be made personally liable for costs in a mortgage suit if the nature of his defence or his conduct demands that he should be made personally liable. But the mere fact that the mortgager set up a plea of limitation which was a time fide one, or that the subsequent purchaser of the mortgaged property purchased it for a very small amount, is no justification for ordering costs to be recovered personally from them. (Grille, C, J. and Puranik, J.) PRABHAKAR NILKANTH v. CHANDRA KANT NARAYANRAO I.L.B. (1943) Nag. 422=207 LO. 214=16 B.N. 24=1943 N.L.J. 159=A.L.B. 1943 Nag. 178.

-0.34, B. 4 Preliminary mortgage decree for sale-If executable.

A preliminary mortgage decree for sale passed under O. 34, R. 4 C. P. Code, is not executable. Before execution can be levied, an order under O. 34, R. 5 C. P. Code, making the preliminary decree final has to be obtained, (Clough, J.) JIVANDAS KHIMJI v. DINDOYAL SHAH, 50 C.W.N. 4.

C. P. CODE (1908), O. 34, R. 5,

The power to extend the time under O. 34, R. 4 (2) C. P. Code, is intended to be for the benefit of the mortgagor. (Clough, /.) JIVANIAS KHIMJI v. DINDOYAL SHAH. 50 C.W.N. 4.

O. 34, B. 4 (3) and T. P. Act, S. 58 (g)—'Lahangahan' mortgage—Decree that could be passed—Scope and grounds for the exercise of discretion of Court. SITARAM v. KRISHNARAO. [see Q.D. 1936/40 Vol. 1. Col. 1835.] I.L.B. (1941) Nag. 607.

——O. 34, R. 4 (3)—Scope of—Discretion of Court under. See MORTGAGE—ANOMALOUS MORTGAGE, 1941 A.L.J. 111.

— 0.34, R. 4 (4)—Construction—Duty of Court
—Suit by first mortgagee against mortgager and second
mortgagee—Duty to ascertain rights and tiabilities of
all parties—Application for final decree by second mort
gagee—Limitation—Limitation Act, Art. 181.

Reading O. 34, R. 4 (4), C. P. Code, with Forms Nos. 9, 10 and 11 in Appendix D to the Code, it is clear that in a suit filed by the first mortgagee against the mortgagor and the second mortgagee, it is the Court's duty, when passing the preliminary and final decree, to adjudicate upon the respective rights and liabilities of all the parties to the suit in the manner set forth in the forms. It is not necessary for the second or puisne mortgagee to file a substantive suit or counter-claim to get his rights ascertained. The question of ascertaining the amount personally payable to the mortgagees who have not received satisfaction is deferred till the property is sold and the deficit ascertained. On that being done, the rights of the mortgagees, who have not received satisfaction, for a personal decree have to be considered by the Court and if the claim is found to be valid and not barred the Court would pass a personal decree. The relevant time for consideration whether an application for a personal decree under O. 34, R. 6, C. P. Code, is barred or not is not the date on which the application is made to the Court, but the date of institution of the suit by the plaintiff. In the case of a puisne mortgagee the latest date would be the date when he files his written statement in the suit. (Kania, A. C. J. and Chagla, J.) AMRATLAL AMARCHAND v. MULJI SAVCHAND. 219 I.C. 281=46 Bom. L.B. 851=A.I.R. 1945 Bom. 169.

When a decree is passed in terms of a compromise acre. When a decree is passed in terms of a compromise and not in terms of R. 2 or R. 4 of O. 34, C. P. Code. R. 5 has no application. It may be that a final decree may be necessary if the compromise decree itself provides for it. Unless it is so drawn up as to require a final decree, a compromise decree which differs in its terms from R. 2 or 4 of O. 34, C. P. Code, must be treated as an executable decree. (Grille, C. J. and Niyogi, J.) RATANLAL v. SAGARBAL I.L.R. (1945) Nag. 643 = 1945 N.L.J. 409 = A.I.R. 1945 Nag. 289.

Debt Conciliation Board—Mortgage—Agreement providing for payment within specified time and for sale in default of payment—Sale—Deposit before confirmation of sale—Power of Court to treat deposit as payment. See MADRAS DEBT CONCILIATION ACT, 6: 14. (1945) 2 M.L.J. 117.

C. P. CODE (1908), O. 34, B. 5.

——0.34, R. 5—Applicability—Sale by Registrar under Chap. 27, Calcutta High Court, Original Side Rules and Orders—Application by mortgagor—Deposit of costs Procedure.

The provisions of O. 34, R. 5, C. P. Code, are applicable to a sale by the Registrar under Chapter 27 of the original side Rules and orders of the Calcutta High Court. A mortgagor applying for relief under O. 34, R. 5, need not deposit costs along with the application. In most cases the mortgagee can furnish an estimate of his costs and that estimate can be accepted or modified by the court and the court may direct that a sufficient sumshould be deposited when the application is made, or before the order is made on the application, provided the attorney for the mortgagee gives the usual undertaking to refund any balance that may ultimately be found due. But this course is unnecessary in a case where the mortgagor and the mortgagee have agreed that the mortgagee should retain the title deeds of the mortgaged property until the costs have been taxed and the amount of the taxed costs have been paid to him. (Mc Nair, J.) SHAMANGINI ROY " MAHATAKSHI RAKSHIT. 201 T.C. 464 = 15 R.C. 203 = A T.R. 1942 Cal. 44.

An order on an application under O. 34, R. 5, C. P. Code, by a creditor who has attached the preliminary decree to make the decree final, is an interlocutory order and it does not amount to a decree. An appeal against the order is, therefore, incompetent. But a revision application is maintainable where it involves a question of iurisdiction. (Grille, C. I. and Sen. I.) KRISHNA-BAI & PARVATI BAI. I.T.B. (1944) Nag. 885=1944 N.L.J., 479=A.I.B. 1944 Nag 298.

The Legislature has not considered it necessary to provide for a notice to the defendant on an application by the plaintiff under O. 34, R. 5 (3) C. P. Code, for the passing of the final decree. The fact that as a matter of practice courts do issue a notice, does not entitle the defendant to claim a notice. As a notice is not necessary, the defendant can not of right claim that an exparte decree should be set a side. (Mir Ahmad, J.) SADHU SINGH v. LACHHMAN SINGH. 206 I.C. 315 = 15 R. Pesh. 109 = A.I.R. 1943 Pesh. 31.

An attaching creditor of a preliminary decree for sale is entitled to apply to make the decree final. The attachment creates an interest in favour of the attaching creditor within the meaning of O. 22, R. 10 and he can file an application under O. 34, R. 5(3) read with S. 146 C. P. Code, (Grille, C. J. and Sen. J.) KRISHNA BAI T. PARVATI BAI. I.L.R. (1944) Nag. 885 = 1944 N.I., J. 479 = A.I.R. 1944 Nag. 298.

—0.34, R. 5—Decree for sale—Application of sale proceeds—Subsequent interest and costs—If can have priority.

In the absence of a direction to the contrary in the decree, the sale proceeds of the properties sold in execution of a mortgage decree must be applied first in payment of subsequent interest and costs, and thereafter the balance to discharge the principal sum declared as payable in the decree. 19 Lah. 403, Overr. (*Tck Chand*, *Monrae and Beckett. Jr.*) IIA RAM v. SUIAKHAN MAL. I.I.B. (1941) Lah. 740=43 P.L.R. 521=14 R.I. 169=196 I.C. 625=A.I.R. 1941 I ab. 286 (P.B.).

C. P. CODE (1908), O. 34, R. 5.

-0. 34, R. 5-"Defendant"—Right to apply under—Suit on mortgage against manager of Hindu inint family—Decree for sale—Execution—Right of funior member to apply under R. 5 for stoppage of sale.

R. 5 of O. 34, when it speaks of a defendant, means a 'defendant' and does not mean anyboby who has an interest in the equity of redemption. But R. 5 must be read in conjunction with R. 1 and the practice which exists under R. 1. It is well settled that where the manager of a joint Hindu family is made a defendant in a mortgage suit, he sufficiently represents the other members of joint familiy, so that the other memhers are regarded, for purposes of R. 1 as being joined as parties through the manager and as being sufficiently before the Court to enable them to be bound by an order for sale. Hence they must also be regarded as sufficiently before the Court to enable them to exercise the privilege of stopping the sale, conferred on \*defendants' in the manner provided in O. 34, R.5, If an applicant shows that he is a member of the joint family which is represented by the manager who is sued as defendant, he is sufficiently a defendant under R. I and can exercise the privilege conferred on a defendant under R. 5 (Reaumont C J. and Rajadhyaksha, J.) THAK-ORFBAI SHRINIVAS " CENTRAL BANK OF INDIA, T.TD. 211 T.C. 287=16.R.B. 288=45 Bom.L.R 976=A.I.R. 1944 Bom. 35.

-0.34, B. 5—Final decree—If must invariably he in accordance with preliminary decree—Power to order sale of property not available for sale, though included in preliminary decree.

A final decree should, no doubt, be made in accordance with the preliminary decree; but where there is an obvious mistake in the preliminary decree, the Court is not bound to repeat that mistake, when passing the final decree. Particularly in the case of a final decree for sale in a mortgage suit, the Court must not direct the sale of any mortgaged property which is no longer available for sale under the mortgage, though it is wrongly included in the preliminary decree. (Chatterii 1.) KINIA REHAPI MISSRA 7. BENJUMAR PANDA. 7 Cut. L.T. 49-107 I.C. 739-14 P.P. 350-8 B.R. 291-23 P.L.T. 412-A.I.R. 1942 Pat. 185 (2).

— 0. 34. B. 5—Mortgage suit—Application for final decree—Dissmissal of, decree having heen satsified under S. 19, Madras Act IV of 1938—If terminates suit—Right to apply for final decree for balance due,

A mortgage suit must be considered to be pending till a final decree under 0. 34, R. 5 (1) or (3) is passed, and it is open to the plaintiff to ask for a final decree to be made for the balance due to him under the preliminary decree. The fact that a final decree has been once refused on the ground that decree has been discharged under S. 19 of the Madras Act IV of 1938, and that the order of refusal has not been appealed against within the period prescribed for appeal, does not preclude an application for a final decree for the balance, if any, found to be due to plaintiff. The refusal to pass a final decree is not and cannot be a dismissal of the suit. (Wadsworth and Pataniali Sastri. II.) Subbayya v. Vynkata Hanumantha Bhushana Rao. I.L.R. (1942) Mad. 60=200 I.C. 520=15 R.M. 69=54 L.W. 107=1941 M.W.N. 741=4 F.L.J. (H.C.) 280=A.I.R. 1941 Mad. 817=(1941) 2 M.L.J. 125.

— 0. 34, R. 5—Preliminary decree — Appeal— Pecree on appeal—If final or preliminary decree— Final decree fassed by trial Court pending appeal from preliminary decree—Effect, C. P. CODE (1908), O. 34, R. 5 and O. 23, R. 2.

Where an appeal has been preferred from the preliminary decree in a mortgage suit, the decree passed by the appellate Court should be deemed to be the preliminary decree which has to be made final under O. 34, R. 5, before it can be regarded as executable. The fact that pending appeal, a final decree is passed by the trial Court, would not make the appellate decree from the preliminary decree a final decree. (Krishnaswamy Ayvanger and Kunhi Raman, II) BALAKRISHNAVVA. LINGA RAO. I.L.R. (1943) Mad. 804—212 I.C. 633—16 R.M. 655—A.I.R. 1943 Mad. 449—(1943) 1 M.L.J. 198.

-0, 84, R. 5 and O. 23, R. 3-Scote and effect of O. 34, R. 5-If will override O. 23, R. 3-Plea of payment out of Court, if can be gone into when an application for passing a final decree is made.

Sub.R. (3) of R. 5 of O. 34, C.P. Code, prvoides that where payment is not made in accordance with sub-R. (1), the Court shall on an application made by the plaintiff in this behalf pass a final decree. Sub-R. (1) provides for a payment being made into Court. As provision for an application for preparation of a final decree is made under O. 34, R. 5. it being a specific provision on that particular subject it would override the general provisions of O. 23, R. 3. Hence when an application for final decree is made on failure to denosit the decree amount in Court as provided in the preliminary decree and a payment out of Court is pleaded which is not admitted by the other side, it cannot be recognized and no inquiry as to such payment need be made. (Rennett and Agarmal, 1/1) MADAN THEATERS, I.TD n. DINSHAW AND COMPANY. 18 Luck, 71=200 I.C. 465=15 R.O. 6=1942 O.A. 211=1942 A.W.R. (C.C.) 199=1942 A.J.W. 237=1942 O.W.N. 276=A.I.R. 1942 Oudh 358.

O. 34, R. 5—Sub-mortgagee made defendant in suit by original mortgagee for sale—Preliminary decree—Right of sub-mortgagee to apply for final decree—C. P. Cole, S. 146.

Having regard to the derivative character of a submortgage as an assignment of the mortgage right by the original mortgagee by way of charge, there is no obvious reason why the sub-mortgagee, as a person claiming under the original mortgagee, hould not, on the general principle recognised in S. 146, C. P. Code, be entitled to apply for a final decree for sale of the mortgaged property where the original mortgagee plaintiff fails to make such application. A sub-mortgagee made a defendant in a suit for sale brought by the original mortgagee is entitled to apply for a final decree, where the preliminary decree for sale has ascertained the amount due to him but contains no provision authorising him to make such an application on default of payment by the mortgagor, of the amount due to the original mortgagee. (Pataniali Sastri, 1.) RAJA-MAYYER To. VENKATASUBBA IVER. 1945 M.W.N. 450=58 L.W. 441=A.I.B. 1945 Mad. 465=(1945):2 M.L.J. 122.

——O. 34, R. 5 (2)—Solatium of auction-purchaser —Right of stranger purchaser and decree-holder-purchaser setting off decretal amount.

The words "purchase-money paid into Court by the urchaser" which occur in 0.34 R.5 (2), mean money actually so paid and not the entire purchase-money whether paid into Court or not. The words do not also include purchase-money set off against the amount of the decree, in cases where the decree holder is the pur-

O. P. CODE (1908), O. 34, R. 6.

chaser. It follows, therefore, that under this provision a stranger purchaser can get five per cent only on the amount he has actually paid into Court and not on the amount of the accepted final bid, and that a decree-holder purchaser who sets off his decree against the price can get nothing on the amount set off. (Khund. kar. J.) NATIONAL TOBACOO CO. OF INDIA, LTD. 7. MAHMODINNISSA BEGAM. I.L.R. (1943) 1 Cal. 324—47 C.W.N. 147.

——O. 34, R. 5 (3)—Execution of mortgage decree -- Decree-holder's right to troceed against separate items of property at different times.

The intention of the legislature in enacting O. 34, R. 5 (3). C. P. Code, is to confer a right upon the mortgagee ordinarily to realise his security by bringing only a part of the mortgaged property to sale provided that he is satisfied that the sale of a portion of such property will be sufficient for the purpose of enabling him to realise his dues. If in execution proceedings against a portion of the mortgaged property only, the mortgagee fails to realise his full dues, there is no reason why he should not proceed against some other items of the mortgaged property; and it certainly cannot be said that by failure to proceed against the entire property he waives his right to do so in a subsequent execution case. (Fd gley, 7.) ABDUR ROUF v. ABDUR RAHIM. I.L.R. (1940) 2 Cal. 520—195 I.C. 134=14 R.O. 48—A.I R, 1941 Cal. 205.

—— O. 34, R. 5 (3)—Scope-Power of Court—Mortgaged property already sold for prior claim—Surplus sale proceeds—Final decree declaring mortgage's right to surplus proceeds—Power of Court to pass—C. P. Code, S. 151.

Where mortgaged property has already been sold in execution of a prior claim and the surplus sale proceeds are lawfully payable to the plaintiff mortgagee, there is no reason why the Court should not pass a final decree declaring the right of the plaintiff to recover the surplus sale proceeds. O. 34, R. 5, would be enough to empower the Court to do so, but if that rule be considered not wide enough to cover such a case, the Court may act in the exercise of its inherent powers under S. 151, C.P. Code. (Chatterii, J.) KUNJA REHARI MISRA v. BENUDHAR PANDA. 7 CULLIT. 49=197 I.C. 739=14 R.P. 350=8 B.R. 291=23 Pat. L.T. 412=A.I.R. 1942 Pat. 185 (2).

——0.34, R.6—Applicability—Consent decree providing for instalments—Charge created on shares of defendants—Default clause entitling plaintiff to recover whole amount on failure to pay two instalments—Right given to plaintiff to realise amount by Sale of shares—If personal decree—Right to proceed against other property without fresh personal decree—Construction.

A decree which directs payment of the amount is prima facie a personal decree. O. 34, C. P. Code, regulates the enforcement by suit of mortgages. The Court must read the decree as a whole, and if a preliminary mortgage decree provides in the first instance that the mortgagor should pay the amount, not into Court but to the mortgagee, the Court would not be justified in construing the decree as an executable decree for payments because, taking the decree as a whole, it provides that there is not to be a personal decree for payment until the mortgaged property has been sold and a deficit has resulted. But there is no reason why one should apply the analogy of a mortgage decree to a consent decree which must be construed according to the language used. In the case of a consent decree, there is no justification.

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for holding that by taking a charge upon specific property, the primary object of which is to secure the creditor against other creditors, the creditor abandons his right to proceed against other property of the debtor. Such an abandonment should not be presumed in the absence of language making clear the intention to abandon. To hold that the creditor can only attach other property after obtaining a fresh order for payment is to ignore the fact that the decree already contains an order for payment. A consent decree directed the defendant to pay to the plaintiff a lump sum of Rs. 9,000 by yearly instalments of Rs. 2,000. There was a default clause making the whole amount payable on default of payment of two instalments. Then it provided that a charge in favour of the plaintiff for the decretal amount of Rs. 9000 was given on certain shares belonging to the defendant; it then went on: "If the defendant fails to pay the monies in time, the same should be recovered by sale of the said shares. The defendant committed default, and the shares were sold and realised Rs. 4,350. Subsequently the plaintiff took out a drakhast to recover the balance of the debt by attachment and sale of a house of the defendant. The latter contended that the plaintiff having taken a charge on specific shares, had adandoned his right to recover the money by any other means. He also pleaded alternatively that if the plaintiff desired to proceed against other properties and had a right to do so, he must first of all proceed to get a personal decree for payment.

Held, that the decree amounted to an order for payment and could be enforced by attachment and sale of anv of the defendant's property; and merely because the plaintiff protected himself against other creditors by taking a charge on part of the defendant's property, he could not be held to have impliedly deprived himself of his right to proceed against any property or delayed its enforcement. The plaintiff, having failed to realize the whole amount of his debt by sale of the charged shares, could proceed under the decree to attach any other property of the defendant which might be available. That the decree did not in terms restrict the right of the plaintiff to proceed against any other property and it did contain a decree for personal payment and could therefore be executed against the house of the judgmentdebtor. (Reaumont, C. J., Macklin and Wassoodew, J.J.) GUPAPPA GURUSHIDDAPPA v. AMARANGJI VANICHAND. I.L.B. (1941) Fom. 299=198 I.C. 217=13 R.B. 319=43 Fom. L.R. 26=A.I.R. 1941 Bom. 90 (F.B).

O. 34, R. 6—Applicability—Mortgage decree for sale and providing for personal remedy in case of insufficiency of sale proceeds to satisfy decree—Mortgaged property ceasing to be available for sale under decree—Right to apply for personal decree without sale. GANESWAR PARIDA v. HARISH CHANDRADUTTA. [See O. D. 1936—'40 Vol. I, Col. 1843.] 191 I.C. 599 = 13 R.P. 331-7 B.R. 231.

——O. 34, R. 6—Liability—Hypothecation by lessee of minerals—Suit by lessor to enforce hypothecation against lessee and sub-lessee—Necree—Sale proceeds insufficient—Application for personal decree against sub-lessees—Competency.

The lessees of minerals hypothecated certain property to secure sums due by way of royalty; in a suit by the lessor for royalty against the lessees and sub-lessees praying for a decree for sale of the hypothecated property, a preliminary decree was passed and then a final decree also was made. The hypothecated property was brought to sale but the amount fetched at the sale was

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not enough to satisfy the whole decree. The lessor applied under O. 34, R. 6, C.P. Code, for a personal decree against both the lessees and the sub-lessees,

Held, that no personal decree could be passed against the sub-lessees merely because they were interested in the property. They were in no way personally liable to the lessor and therefore there could be no personal droree against them. (Harries C. J. and Manohar Lall, J.) JOYRAM NARAYAN V. SHIVA PRASAD SINGH. 193. I.C. 32 = 7 B.R. 503 = 13 R.P. 534 = A.J.R. 1941 Pat. 416

D. 34, R. 6—Limitation—Mortgage—Suit by first mortgagee against mortgagor and second mortgagee—Application by second mortgagee for personal decree—Relevant date to decide limitation. See C. P. Code, C. 34, R. 4 (4). 46 Bom.L.R. 851.

——0. 34, R. 6—Mortgagee purchasing property in execution of mortgage decree—Title to property—Right to apply for personal decree.

It is a well-recognised rule that when mortgaged property is sold in execution of the mortgage decree, the interests of both the mortgagee and mortgagor pass to the purchaser. The same result is brought about by the sale of the mortgaged property free of encumbrance in accordance with S. 138 of the C. P. Land Revenue Act. A mortgagee decree-holder who purchases the property obtains an absolute and unqualified title free from all encumbrances. But he is not debarred from applying for a personal decree for the balance of the decretal amount. (Grille, C. J. and Niyoi, J.) RATANLAL v. SAGARBAI. I.L.R. (1945) Nag. 643 = 1945 N.L.J. 409 = A.I.R. 1945 Nag. 239.

—— O. 34, R. 6—Personal decree hofore mortgaged property is exhausted—Validity.

It is true that normally a personal decree should not be passed at all until the mortgaged property has been exhausted, but if such a decree is passed it is not invalid. (Almond, J.C. and Mahomed Ibrahim. J.) HAJI NATHU v. NIKKI DFVI. 204 I.C. 509=15 R. Pesh. 79=A.I.R. 1942 Pesh, 85.

O. 34, R. 6—Preliminary decree in suit on mortgage against mortgagor and tansferee of the equity—Liberty to apply for personal decree clause—Transferee of equity, if can plead that he is not a person from whom the bolance is recoverable.

Where a preliminary decree in a suit on a mortgage against the mortgager and a transferee of the equity provided that the 'plaintiffs shall be at liberty to apply for a personal decree for the amount' if the sale proceeds are insufficient, it was held that the liberty to apply clause did not prejudge or decide what will happen when application was made, at any rate, where the application could be against either of two (B, or C.) and must in law fail as against C, but would succeed, prima facie against B, and that it was open to the transferee of the equity to contend that he is not a person from whom the balance is recoverable. (Stone, C.J. and Bose, J.) BAIJNATH v. ANANDRAO. 1942 N.L.J. 144.

— O. 34, R. 6—Personal decree—Right to—When arises—Plaint in mortgage suit not proving for personal decree—Preliminary decree not reserving right to apply—If bars right to apply on proceeds of sale proving insufficient.

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An application for a personal decree in a suit on a mortgage is an application in the suit and only arises when it is found that the mortgaged properties have not realised sufficient to pay off the mortgage. The mortgagee has a right to apply for a personal decree in such circumstances and his application can only be made in the suit. The Court has no power to pass a personal decree until that eventuality has happened. Merely because the plaint in the suit does not contain prayer for a personal decree, and the preliminary decree, does not reserve a right to apply for a personal decree, the plaintiff is not precluded from applying for and obtaining a personal decree when the contingency happens, (Teach, C.I. and Lakshmana Rao, I.) GOPALA-SWAMI RATAPIRIYAR W MARAYANASWAMI TIDAYAD I.L.R. (1944) Mad. 572=211 I.C. 630=16 R.M. 559=1943 M.W.N. 698=55 L.W. 649=A.I.R. 1944 Mad. 65-(1943) 2 M.I..J. 501.

——O. 34, R. 6—Right to a personal decree Basis—Reservation of part of consideration with rendee for payment to mortgagee of property sold—Failure of vendee to pay mortgagee—If furnishes a cause of action to mortgagee for a personal decree—Other reguisites.

Where in a sale of mortgaged property, in the consideration the mortgage money due to the mortgagee is made dehanced to him and the vendee fails to pav it, the latter does not by virtue of the sale-deed become a trustee for the payment of the dehanced money to the mortgagee so as to clothe him with the rights to obtain a personal decree against the vendee. But, if there is a subsequent agreement between the vendee and the mortgagee for the navment of the mortgage money, then it could be made the basis to fasten the personal liability on the vendee. (Misra. I) KAII v. RAM AUTAD 20 Luck. 179=1944 O.A. (C.C.) 198=1944 A.W.R. (C.C.) 198=1944 O.W.N. 278=A.I.R. 1945 Oudh. 65.

gagee can apply.

It is only the mortgagee and not the mortgagor who is entitled to apply for a decree for sale. (Almond, J.C.) ZUHFA BEGAM V. SALIM KHAN 204 I.C. 242=15 R.Pesh. 73=A.I.R. 1942 Pesh. 96.

——(as amended in 1930), O. 34, Pr. 7(2) and 8(1)—Applicability and construction—Usufructuary mortsage—Redemption—Preliminary decree—Deposit of amount by mortgagor and proper for delivery of property—Time limit—Limitation Act, Art, 181.

So long as the suit is pending, the mortgagor has the right expressly given to him under O. 34. Rr. 7 (2) and 8 (1), C. P. Code. The rights under these provisions are available to a mortgagor in the case of redemption of a usufructuary mortgage also. Courts should, if it is possible to do so, construe both these rules as applicable to suits for redemption of usufructuary mortgages as well. The mortgagor is not hound to take out an application within three years of the time fixed for payment under the preliminary decree, and he can deposit the amount at any time so long as a final decree has not been passed, Art. 181, Limitation Act, has no application. (Somayya, J.) ANGAMMAL v. MAHOMED SULAIMAN LEBRAI. 1945 M.W.N. 578 = 58 I. W. 492 = (1945) 2 M.L.J. 239,

C. P. CODE (1908), O. 34, R. 11.

O. 34, R. 10—Costs—Rule—Deposit under S. 83, T. P. Act. by subsequent mortgagee—Deposit not of full amount—Mortgageo not mode party—Prior mortgagee refusing to accept deposit in full settlement—Costs in later redemption suit—Right to.

In a redemption action the Court is hound to give the mortgagee his costs of the suit unless the Court is of opinion that his conduct has been vexatious or unreasonable so as to disentitle him thereto. Nor can he, when his conduct was neither vexations nor unreasonable, be made to nay the costs of the person suing for redemption. The fact that a prior mortgagee refused to accent a deposit made by a subsequent mortgagee under S. 83, T. P. Act, when it is found that the deposit under S. 83 were not full and correct and that the mortgagors were not made parties to the application under 5- 83 cannot amount to vexatious or unreasonable conduct on the part of the prior mortgagee so as to disentitle him to costs in a later suit for redemption by the subsequent mortgagee, (Abdur Rohman and Somavya, II) MIMAKSHI AYYAR 2' JANAKI R ACHAITER, T.L.R. (1948) Mad. 205-205 T.C. 457-15 R.M. 873-55 L.W. 413-A.I.R. 1942 Mad. 592-(1942) 2 M.L.J. 124.

O. 34. R. 11 C. P. Code which must be read with Rr. 2 and 4, gives a discretion to the Court to allow interest up to the date for redemption on the amount found or declared due by the preliminary decree. The interest must be calculated at the contract rate unless the Court finds that such a rate is penal or excessive. The Court has no option to disallow interest at that rate, even if it be compound interest unless of course the rate is found to be penal. For the period subsequent to the date of the preliminary decree, however, the Court has under the rule the option to allow or refuse interest. (Chatterii and Meredith, IJ) MAPHO PRASAD SINGH v. MAKUTDHARI SINGH, 193 I.C. 661=15R. P. 637=7 B.R. 641=22 P.L.T. 317=A.I.R. 1941 Pat. 378.

——0.34, R, 11—Discretion of Court—Mortgage's inaction—Delay in suing—If ground for disallowing interest before suit.

O. 34, R. 11, C. P. Code, does not deprive the Court of its discretion to refuse interest in appropriate circumstances. Where a mortgagee has been inactive for a long time and has not satisfactorily explained such inaction for several years, the Court in a suit for sale can properly refuse interest prior to suit. (Weston and Trahii, II) HUNDALDAS 2. RAITIKHAN I.L.P. (1942) Kar. 459=204 I.C. 574=15 R.S. 101=A.I.R. (1943) Sind 59.

O. 34, R. 11, C.P.Code, makes a clear distinction between two stages or periods, namely, the period between the date of the decree and the date fixed for redemption and the period between the date fixed for redemption and the date of realisation. During both these periods the mortgagee is not as of right entitled to interest. During the first period the agreement between the parties as to paymant of interest has no inviolable sanctity of its own. If the interest is legally recoverable and the Court in its discretion thinks fit to allow it, then it has to be calculated at the agreed rate. In the second period (i.e.) after the date of redemption, the

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agreement of parties has no force at all and the matter is left entirely to the discretion of Court. (Das, J.) NEMAI CHAND SEN v. KAM KEWAL SHA. 48 C.W.N. 736.

O. 34, R. 11—Interest pendente litte—Discretion of Court to reduce contract rate. JAIGOBIND SINGH v. LACHMI NARAIN RAM. [see Q. D. 1950-'40 Vol. 1 Col. 1800.] 21 Pat. L.T. 1109 (F.C.).

O. 34, E. 11—Pendente lue interet—Power of Court to retuse. See BIHAR MONEY-LENDERS ACT (1939), S. 7. 196 I.O. 677.

It is only at the contractual rate that the pendente lite and future interest should be allowed under O. 34, Kr. 4 and 11. The interest may altogether, for good reasons, be disallowed, but if interest is allowed it must be at the contractual rate. (Allsop and Verma, JJ.) BRIJ JIWAN DAS v. SRIMATI KAWAL BIBI. 1.L.E. (1942) All. 908=205 I.C. 207=15 K.A. 370=1942 A.W.K. (H.C.) 330=1942 A.L.J. 616=1942 A.L.W. 596 =A.L.E. 1942 All. 444.

—0.34, B. 12—Construction and scope—Suit by puisne mortgagee—Frior mortgagee impleaded—Decree for sale free of first mortgage with consent of first mortgagee—If can be passed.

In a suit for sale brought by a puisne mortgagee to which the prior mortgagee is made a party, when the prior mortgagee consents to have the property sold free from his incumbiance on condition that he should be paid first out of the sale proceeds, the Court under 0. 34 K. 12, can pass a preliminary decree for sale free of the first mortgage. It is not necessary that a decree for sale should have been passed before the date of the consent of prior mortgages. The consent may precede the sale, (Abdur Kahman, 1.) KRISHNASWAMI PILLAI v. CHOCKALINGAM CHETTIAR. 210 LO. 194—16 K.M. 397—1943 M.W.N. 111—56 L.W. 170—A.I.R. 1943 Mad. 455—(1943) 1 M. L.J. 169.

Under O. 34, R. 12. C. P. Code, the Court can direct a sale of the mortgaged property at the instance of a subsequent mortgagee, free from any prior mortgage, only when the prior mortgagee gives his consent, and in that case he is bound to give the prior mortgagee the same interest in the proceeds of the sale as he had in the properties sold. (Mukhertea and Biswas, //.) ROWSHAN KHAN v. ABDUL KHALEQ. 202 L.C. 308=15 E.C. 318=45 C.W.N. 705=74 C.L.J. 1=A.I.E. 1942 Cal. 138.

——0.34, R. 13—Applicability—Realisation under mortgage decree—Method of appropriation.

O. 34, R. 13 of the C. P. Code which tays down the method of appropriation of realisations under a mortgage decree applies not merely to a case where a property is sold with the consent of the prior mortgagee but also to other cases where there is no prior mortgage to consider and provide for, for instance, where there is more than one mortgagor and the moneys realised are from properties comprised in the mortgage and belonging to one or a few only among them. When moneys are realised in execution of a mortgage decree, in the absence of something in the decree itself to indicate that a contrary appropriation or application of the sale proceeds was intended or directed, the amount realised should first be appropriated towards interest and costs of the suit and the appeal and the balance alone should be applied to the payment of the principal amount. The provision in the decree for the payment

#### C. P. CODE (1908), O. 33, R. 14.

of the costs by the other defendants also does not alter the situation. (Chandrasekhara Aiyar, J.) SANYASAPPA RAO v. PAPINAIDU. A.I.R. 1945 Mad. 392=(1945) 1 M.L.J. 430.

-0.34, R. 13 and S. 151-Order under O. 34 R. 13-Remedy.

No appeal lies against an order passed under the provisions of R, 13 of O, 34. A revision also will not lie as in majority of the cases no question of law would probably be involved. An order under this provision might be gravely prejudicial to the parties concerned and in such a case it might be possible for the aggrieved parties to take action under the provisions of S, 151, C. P, Code. (Davies.) KANWAL NAIN HAMIR SINGH v. PAN MAL LODHA. 1942 A.M.L.J. 51.

-0.34, R. 13 (1) -Person "interested in property"-Calcutta Corporation having statutory charge for unpaid taxes-Liability to pay such taxes.

The fact that the Calcutta Corporation has a statutory charge upon the property sold for the unpaid taxes does not give them an interest in that property within the meaning of sub-S. (1) of R. 13 of O. 34, C. P. Code. The liability to pay the taxes does not rest on the mortgagee but lies on the mortgagor who is in possession of the property, and the auction purchaser after his purchase will take the property subject to this statutory charge. The Court has, therefore, no jurisdiction to order the retention in Court of a portion of the sale proceeds in a mortgage sale for payment to the Calcutta Corporation. (Ghose and Mukherjea, J.). SATISH CHANDRA DAS z. KAMALA BALA DEVI. 75 C.L.J. 363.

Revenue Code, Ss. 86 and 87—Sale of mortgaged property at instance of mortgages to recover arrears of rent under rent note by mortgagor—Validity. See BOMBAY LAND REVENUE CODE Ss. 86 AND 87. 44 Bom. L. B. 597.

— 0. 34, R. 14—Applicability—Conditions—Mortgage suit for sale—Decree for sale refused—Attachment and sale of mortgaged property in execution of money decree—If carred.

The plain language of O. 34, R. 14, C, P. Code, implies obviously that the claim arising under the mortgage must be a claim for which the mortgage is still enforceable and upon which a suit could be brought. Where a suit for sale on the basis of the mortgage has already been brought and a decree for sale has been refused, it is impossible to hold that in such a case the provisions of O. 34 R. 14, can have any application, (Chatterti and Meredith, J.). SITARAM v. LACHMAN LAL GOSWAMI. 20 Pat. 751=199 f.C. 22=14 R.P. 519=8 B.R. 481=23 Pat. L.T. 267=A.I.R. 1942 Pat. 50.

-0. 34, R. 14—Applicability—Mortgage and lease back forming parts of the same transaction—Obtaining of decree for rent.

Where there is a mortgage and a lease back forming parts of the same transaction and a decree for rent is obtained by the mortgagee against the mortgager it is a decree for an amount arising under the mortgage and hence according to O. 34. K. 14, it the mortgaged property is to be sold a separate suit must be instituted for that purpose, (Davis.) MOHAMMAD SAYEED v. IMAM ALI. 1943 A.M.I.J. 1.

O. 34, R. 14—Applicability and scope—Mortgages purchasing one item of mortgaged property directed to be sold first under decree as sale for Government
revenue—If trustes for purchaser of other items—Furchase if invalid under O. 34, R. 14—Trusts Act, S. 90.

C. P. CODE (1908), U. 31, E. 14,

The only limitations which fetter the power of a mortgagor to purchase the mortgaged property are those contained in O. 34, R. 14, C. P. Code and S. 90 of the Trusts Act. The former aims at affording to the mortgagor a measure of protection against the mortgaged property being sold at a disadvantage, while the latter is much wider in scope preventing, as it does, persons standing in a special relationship to certain others, from taking advantage of their position to secure a benefit to themselves in derogation of the rights of those others. Where a mortgagee who has obtained a decree for sale of two items of mortgaged properties, the decree directing that the first property should be sold first and then only if it is necessary the second property should be sold, purchases the first property at a sale for arrears of revenue for a very low price it cannot be said that the purchase by him at such sale can be ignored either on the ground of its being prohibited by O. 34, R. 14, C. P. Code, or on the ground that the mortgagee in purchasing it is only a trustee for owner the purchaser of the second item from the mortgagor. It cannot be said that the mortgagee owes a legal duty to the purchaser of the second item which would stand in the way of his acquiring the property for himself at the revenue sale with the object of getting round the restrictions placed on him by the decree. The mortgagee decree holder is in no sense in a fiduciary position in so far as the purchaser of the second item is concerned, and in purchasing the first property he cannot be deemed to have availed himself of any special position he held. When these two conditions are not satisfied, the fact, that he gains an advantage to the prejudice of the purchaser of the second item cannot afford any ground of relief to the purchaser of the second item. So long as the revenue sale is not due to any wrongful conduct on his part, there is no reason why the mortgagee should be held to be in a worse position than a stranger purchasing at the revenue sale and obtaining a clear title incapable of being assailed by anybody. When he is under no duty to pay the revenue due on the first property and when he does not scheme to bring about a default in its payment, his position is not different from that of a second mortgagee, who purchases the mortgaged property at a sale by the first mortgagee in exercise of a power of sale. The law does not, subject to certain well-known exceptions, prevent the wary and the diligent from taking advantage of their less fortunate tellowmen, if the latter do not exhibit that degree of alertness which is necessary for the protection of (Krishnaswamy Ayyangar, and their interests. Kunhi Raman, J.) GOVINDARAJAM PILLAI D. ALA-GAPPA CHETTIAR. I.L.B. (1943) Mad. 418=207 I.C. 526=16 R.M. 121=55 L.W. 735=1942 M.W.N. 828 = A.I.B. 1943 Mad, 202 = (1943) 1 M.L.J. 477.

——0. 34. B. 14—Applicability — Usufructuary mortgage—Lease back to mortgagor—Default in payment of rent under lease—Decree for rent in suit by mortgagee—Attachment and sale of mortgaged property in execution—Permissibility.

Where a mortgagor after mortgaging his house with possession takes the property back on lease for rent undertaking to pay rent every month and agrees that on default in payment of rent the mortgagee would be competent to realise the rent by suit, a decree obtained by the mortgagee in a suit for rent cannot be executed by attachement and sale of mortgaged property. O. 34, R. 14 applies so as to bar the sale of the mortgaged property in execution of the decree on the lease, (Fasl Ali and Varma, J.). NANEKESHWAR PRASAD v. NANEKESHWAR PRASAD v.

U.P. UODE (1908), O. 34, B. 14,

&.P. 69=24 P.L.T. 296=10 B.R. 54=1943 P.W.N. 25=A.I.B. 1943 Pat. 282.

— O. 3±, R. 1±—Applicability—Usufructury mortgage—Lease back to mortgager—Kent due under tease—Decree for sale of equity of redemption in mortgaged property—If barred—Mortgage and lease—If one transaction—Question of law.

It is true that O. 34, R. 14, has been enacted for the benefit of mortgagors. But it does not mean that a mortgagor should be entitled to pray in aid the provisions of the rule in all cases in which the mortgagee has entered into some sort of arrangement with his mortgagor with respect to the properties mortgaged. There is no warrant for the contention that simply because a claim has arisen between two parties who happen to be mortgagor and mortgagee in respect of certain dues arising from the possession of the mortgaged property such a claim can be said to have arisen under the mortgage. The rule will apply and the mortgagor can secure the benefit of the rule only in those cases where it can be reasonably interred that a decree for payment of money has been passed against the mortgagor in satisfaction of "a claim arising under the mortgagor," in other words, only in those cases in which the Court is satisfied that the transaction in question was a part and parcel of the mortgage, transaction itself. Where a mortgagor executes a usufructuary mortgage and then takes the mortgaged property on lease under a patta agreeing to pay rent to the mortgagee annually if it appears on a reasonable construction of the documents that the properties are given in security not only for the principal amount secured but also for the interest accruing thereon and that the second document, lease, is in reality only a device to ensure regular payment of interest which also is secured on the same mortgaged properties, it may generally be said that the two documents are parts of the same transaction. In such a case if the mortgagee obtains a money decree against the mortgagor as lessee for rent in arrears under the lease patta, such a decree cannot be executed by attachment and sale of the equity of redemption in the mortgaged property. O.34, R.14 applies to such a case and is a bar to the mortgagee executing his money decree by attaching and selling the equity of redemption of the mortgagor in the mortgaged property. The mortgagee has to bring a suit for sale for payment of the principal sum as also all the interest que after the lapse of the period axed for the payment of the mortgage dues. The question whether the two transactions are part and parcel of the same transaction is not a question of fact, but one of law which can be raised in second appeal, (Fast At: C. J, and Sinha, J.) UMESHWAR PRASAD SINGHA v. DWARIKA PRASAD. 22 Pat. 320=213 I.C. 17=10 B.R. 553=16 R.P. 331=A.I.R. 1944 Pat. 5.

—0. 34, B 14—Applicability — Usufructuary mortgagor withholding possession of khudkasht plots from mortgages—Decree for possession and damages—Equity of redemption, if can be sold in execution.

Where after the execution of a usufructuary mortgage the mortgagor does not deliver possession of the khudkhaut, though he had not acquired any exproprietary rights in them and the mortgagee thereupon obtains a decree for his ejectment and also damages, the damages merely represents compensation for the usufruct to which the mortgagee was entitled and hence he cannot bring the equity of redemption to sale in execution of the decree for damages by virtue of O. 34, R. 14, C. P. Code. (Shirreff, J.M. and Sathe, A.M.) ATAL SINGH P. ANAND SWARUP. 1941 B.D. 1134 = 1941 O.A. (Supp.) 942 = 1941 A.W.R. (Rev.) 1173.

# C. P. CODE (1908), O. 34, R. 15.

Money decree with declaration of charge. 6—Applicability—

If in a suit instituted to enforce a charge a preliminary decree for sale is passed, the sale of the property must no doubt precede any personal decree under O. 34, R. 6, C. P. Code. But when there has been no decree for sale, and the decree is really a money decree with a declaration of a charge for the amount decreed, there is no room for the operation of O. 34, R. 15 for the decree is not in a form contemplated by the earlier rules of O. 34. (*Weston*, *J*.) Isso v. RATTAN CHAND. I.L.R. (1942) Kar. 168=202 I.C. 296=15 R.S. 30=A.I.R. 1942 Sind 83.

O. 35, R. 5—Scope—Landlord and tenant—Interpleader suit by tenant against landlord and stranger—Maintainability. YESHWANT Вніка јі v. Sadashiv Govind. [see Q.D. 1936-'40, Vol. I, Col. 1856.] I.L.R. (1940) Вот. 842=191 I.C. 655=13 R.B. 191. — О. 37, R. 7 (1) (c) (1)—Scope and ef-

fect of-Mortgagor's right to redcem-When lost -Failure to pay amount within time fixed—Effect.

When a preliminary decree in a suit for redemption of a zaripeshgi mortgage fixes a time for payment of the amount declared due under the mortgage, under O. 34, R. 7 (1) (c) (1), C. P. Code, default in payment of the amount so declared due within the time fixed does not operate to debar the plaintiff mortgagor from all right to redeem the mortgaged property. (Fasl Ali, C. J. and Pande, J.) AZIM v. SULTAN. 24 Pat. 575.

-O. 38, Rr. 2 and 3-Arrest before judgment-Debtor finding surety under O. 38, R. 2-Surety obtaining discharge after passing of decree under R. 3-Necessity to call upon defendant to

find fresh surety—Proper procedure.

A plaintiff obtained an order under O. 38, C. P. Code for the arrest of the defendant before judgment. The defendant found surety under O. 38, R. 2. This surety, after decree, applied for his discharge under O. 38, R. 3 and the conditions being fulfilled he was discharged. The Court thought that the decree having been passed, O. 38 was no longer applicable, but that something in the nature of proceedings under S. 51 of C. P. Code was. On revision,

Held, as the arrest of the debtor was made

under O. 38, the proceedings must continue under The Court must therefore call upon the defendant to find 'fresh security under R. 3 and if he fails to comply with that or any order under R. 2 or 3, the Court has a discretion to Commit him to prison. (Bell, J.) MAHOMED USMAN & Co. v. KUNHAMU. 210 I.C. 564=16 R.M. 455=56 L.W. 33=1943 M.W.N. 124= A.I.R. 1943 Mad. 366=(1943) 1 M.L.J. 87. O. 38, Rr. 5 and 6—Applicability—Conditions—Disposal of property subsequent to suit —If condition precedent—Disposal made before suit—If may be relied on in support of applica-

tion for attachment. There is no justification for the view that in order that Rr. 5 and 6 of O. 38, C. P. Code, should apply there must be a transaction subsequent to the institution of the suit. There is nothing in the plain words of the rules which

## C. P. CODE (1908), O. 38, R. 5.

would make a transaction subsequent to the institution of the suit a condition precedent to the application of Rr. 5 and 6. R. 5 refers not to the past but to the future. It refers to a defendant who with a particular intent is about to dispose of the whole or part of his property. The fact that he has done so after the institution of the suit may be strong evidence of the future intention provided he has any property left. But transfers before the institution of the suit may,

as evidence of conduct, be evidence of intention after the institution of the suit.

Weston, J.—Action under R. 5 of O. 38, C. P. Code, is preventive to provide against future attempts of the defendant to place his assets beyond the reach of the potential decree-holder, and is not punitive in order to punish such acts of the defendant committed either before the suit was filed or before presentation of the application under the rule. An application under R. 5 may be made at any stage in the suit; if a defendant, having knowledge that a suit will be filed against him begins disposal of his property with the intention of obstructing or delaying the execution of a decree likely to be passed against him, there is nothing in R. 5 which debars the plaintiff from applying under that rule at the time he files his suit, and from relying in support of his application not on disposals made subsequent to the filing of the suit or subsequent subsequent to the filing of the suit or subsequent to service of suit on the defendant, but on disposals made before the suit has been filed. (Davis, C. J. and Weston, J.) BISHAMBARDAS & Co. v. SACHOOMAL KOTOOMAL. I. L. R. (1941) Kar. 362=197 I.C. 291=14 R.S. 99 = A.I. R. 1941 Sind 178.

——O. 38, R. 5—Applicability—Suit on mortgage governed by Dekkhan Agriculturists' Relief Act—Decree—Subsequent application for

Relief Act-Decree-Subsequent application for attachment before judgment-Maintainability.

Once the Court passes a decree in a mortgage suit governed by S. 15-B of the Dekkhan Agriculturists' Relief Act, the suit is terminated, and is no longer pending as in the case of an ordinary mortgage suit after the preliminary decree. An application for attachment before judgment after the decree is therefore not maintainable because such an application is one made in the stage of the execution and cannot be regarded within the meaning of O. 38, R. 5. (Divatia and Sen, JJ.) Gopaldas Hirialal v. Mahadu Dagou. 205 I.C. 100=15 R.B. 344=44 Bom.

L.R. 855=A.I.R. 1943 Bom. 24.

O. 38, R. 5—Attachment before judgment—Raising of an allowance of claim—Suit by creditor under O. 21, R. 63—Suit decreed on appeal—Effect—Attachment—If revives on success

of creditor on appeal.

The raising of an attachment on the success of a claim proceeding is only provisional and the attachment revives and is restored on the success of the suit by the attaching creditor. It makes no difference that the attachment was before judgment and that the suit under O. 21, R. 63, to set aside the claim order is decreed only in the appellate Court. When the claim suit of the creditor succeeds, the order allowing the claim stands cancelled and the order of dis-

# C. P. CODE, (1908), O. 38, R. 5.

missal passed on the application for attachment is also vacated and the previous state of things 

ment-Duty of court to call upon defendant

to furnish security.
Under O. 38, R. 5, C. P. C., the Court has to call upon the defendant to furnish security first, before ordering attachment before judgment. (Mir Ahmad, J.) Bhag Chand v. Sujan Singh. 199 I.C. 209=14 R. Pesh. 79=A.I.R. 1942 Pesh. 17.

O. 38, R. 5 and O. 34, R. 6—Mortgage suit—Personal decree not passed—Jurisdiction to a suite a standard and suite as the suite

to order attachment.

The Court has jurisdiction in a mortgage suit to order an attachment before judgment under the last clause of O. 38, R. 5, C.P.C., although a personal decree has not been passed under 0. 34, R. 6, C.P.C. The words "any decree that may be passed" in O. 38, R. 5 (1) are wide enough to cover a possible decree. (Mir Ahmad, J.) BHAG CHAND v. SUJAN SINGH. 199 I.C. 209=14 R. Pesh. 79=A.I.R. 1942 Pesh. 17.

-O. 38, R. 5-Non-compliance with the rule as to issue of notice-If affects validity of

**a**ttachment.

The omission to issue a notice as required by R. 5 of O. 38 is nothing more than a mere irregularity and cannot affect either the jurisdiction of the Court or the validity of the attachment. (Mulla, I.) Budhoo Lal v. Sobharam Tewari. 1943 A.L.W. 390=1943 O.W. N. (H.C.) 233.

Abbert 1943 A.D. Order refusing attachment—

Appeal.

An order refusing attachment before judgment passed after issuing notice to the opposite ment passed after issuing notice to the opposite party to show cause under O. 38, R. 5, is not appealable. (Niyogi and Digby, II.) ROBELLO v. LADHASINGH. I.L.R. (1943) Nag. 794=211 I.C. 479=16 R.N. 208=1943 N.L.J. 504= A.I.R. 1944 Nag. 30.

O. 38, R. 5—Procedure under, not followed—Order of attachment before judgment—If yadid

If valid.

O. 38, R. 5, C. P. Code, is merely directory. It does not lay down any condition precedent to the accrual or exercise of the Court's jurisdiction but only prescribes the mode in which the Court's admitted jurisdiction is to be exercised. An order of attachment before judgment is, An order of attachment before judgment is therefore, not null and void on account of the omission to follow the procedure laid down therein, but is only an irregularity which is cured by acquiescence of the parties adversely affected. (Niyogi and Digby, JJ.) DHIAN SINGH v. SECRETARY OF STATE. I.L.R. (1945) Nag. 121—1945 N.L.J. 62=A.I.R. 1945 Nag. 97.

attachment before fudgment—Inference from

C. P. CODE (1908), O. 38, R. 11,

judgment can issue. The Court must be satist fied that a defendant is about to transfer his property in order to defeat or delay the interests of the creditor, who seeks to obtain a decree against the debtor concerned. Where a debtor had transferred more than 80 per cent. of his property including his residential house and had also changed the name of his firm, the circumstances justified an order under O. 38, R. 5. (Davics.) RAM SARUP v. CHIRANJI LAL. 1941

A. M. L. J. 30.

O. 38, R. 6 (2)—Applicability—Interim

attachment-Subsequent dismissal of application for attachment after hearing parties—If order under R. 6 (2)—Appeal. Scc C. P. Code; O. 43, R. 1 (q). 44 Bom. L. R. 855.

O. 38, Rr. 9 and 11—Dismissal of suit

-Subsequent review and decree for plaintiff in suit-Effect on attachment before judgment-If restored to benefit of plaintiff-Alienation after decree on rehearing-If void. See C. P. Cope, S. 64 AND O. 38, Rr. 9 AND 11. (1943) 1 M.

L.J. 394.
O. 38, R. 10—Applicability and scope—
Subsequent sale in Attachment in execution—Subsequent sale in fursuance of contract of sale entered into before attachment—If void—Decree for specific performance of contract and conveyance through Court—If prevails over attachment effected after agreement of sale—C. P. Code, S. 64.

The principle laid down in O. 38, R. 10, is not

limited to attachments before judgment, but applies to all attachments whether before judgment or in course of execution. Where in pursuance of an agreement to sell entered into before the attachment the attached property is purchased by the vendee after the attachment, such purchase would prevail against the attachment. Where after the attachment the vendee files a suit for the specific performance of the contract of sale entered into before and the Court enforces the execution of a conveyance, such a conveyance is not a private transfer under S. 64, and cannot be held to be void against the attachment. (Divatia, J.) YESHWANT SHANKAR v. PYARAJI NURJI. 206 I.C. 567=15 R.B. 418=45 Bom. L.R. 208=A.I. R. 1943 Bom. 145.

O. 38, R. 10—Scope—If controls S. 64.

See C. P. Code, S. 64. 44 Bom.L.R. 874.

O. 38, R. 10—Scope—If controls S. 64.

Attachment before judgment—Contract of sale entered into before attachment-Effect-Decreeholder's rights—Right to bring property to sale. See C. P. Code, S. 64 and O. 38, R. 10. 43 Bom.L.R. 206.

-O. 38, R. 11—Scope and effect of-Attachment before judgment of two properties in two jurisdictions-Decree-Execution application for sale of one property-Dismissal for default of decree-holder under O. 21, R. 57-Attachment of other property not covered by application—If ceases to exist. See C. P. Code, O. 21, R. 57. (1943) 1 M.L.J. 225.

O. 38, R. 11—Scope—Attachment before

judgment-Subsequent decree-Execution-Limicircumstances.
O. 38, R. 5, sets out the conditions necessary to be fulfilled before an attachment before tan attachment before (1944) 2 M.L.J. 192 (F.B.).

#### C. P. CODE (1908), O. 39.

39—Scope—If exhaustive—Inherent power to grant temporary injunction. See C. P. CODE, S. 151. 24 Pat. 496.

O. 39, Rr. 1 and 2—Applicability—

Injunction to restrain execution for possession.

An injunction to restrain the execution of decree for possession cannot be granted either under O. 39, R. 1 or R. 2 pending suit for declaration of title. (Davies.) RAM PAL v. Chhagan Mal. 1941 A.M.L.J. 23.

O. 39, Rr. 1 and 2 and Ss. 24, 36—Applicability of O. 39, R. 2 (3)—Injunction under R. 1—Enforcement—Procedure—Such transfers.

proceedings, if transferable—Effect of transfer

on interim orders.

Sub-R. (3) of R. 2 of O. 39, C. P. Code does not apply to injunctions issued under R. 1 of oc. 39, but applies only to injunctions issued under R. 2 of that order. The enforcement of injunctions issued under O. 39, R. 1 is to be under the provisions of S. 36 and O. 21, R. 32, C. P. Code. The proceedings for the enforcement of an injunction under O. 39, R. 1, are transferable under S. 24, C. P. Code. On the analogy of S. 37, C. P. Code, a Court which has necessary an interior order which requires exercised. passed an interim order which requires execution, ceases to have jurisdiction in the matter of enforcing the order, when it ceases to have jurisdiction to deal with the suit and consequently the power of enforcing the order lies in the Court which would deal with the interim proceedings, if it began at that time. (Allsop and Braund, JJ.) DULHIN JANAK NANDINI KUNWARI v. KEDAR NARAIN SINGH. I.L.R. (1941) All. 295=194 I.C. 166=13 R.A. 474=1941 A.W.R. (H.C.) 51=1941 O.A. (Supp.) 65=1941 A.L.W. 53=1941 A.L.J. 46=1941 O.W.N. 48=A.I.R. 1941 All. 140. -O. 39, Rr. 1 and 2 (3) and O. 21,

R. 32—Disobedience of injunction—Punishment. R. 32—Disobedience of injunction—Punishment.
Disobedience of an injunction issued under
O. 39, R. 1, C. P. Code, is not punishable under
O. 39, R. 2 (3), but can be dealt with under
O. 21, R. 32 read with Ss. 36 and 58, C. P. Code.
O. 39, R. 2 (3), C. P. Code, applies only to
injunctions issued under R. 2 of the order.
(Grille, C.J. and Puranik, J.) PANNALAL BOSE
v. Seth Shreeram. I.L.R. (1945) Nag. 336
=1945 N.L.J. 150=A.I.R. 1945 Nag. 134.

-O. 39, R. 1-Grant of temporary injunction-Powers of Court.

The powers of a Court to grant a temporary injunction are not limited to the cases where a perpetual injunction can be granted. (Das, J.) BALDEO DAS BAJORIA v. GOVERNOR OF THE U. P. I.L.R. (1944) 1 Cal. 181=A.I.R. 1945 Cal. 44.

O. 39, R. 1—Interim injunction—Granting of conditions—Discretion—Applicant failing to make out even prima facie case. MADHORAO NARAYANARAO v. YADAORAO. [See Q.D., 1936-40, Vol. I, Col. 1867.] I.L.R. (1941) Nag. 578.

O. 39, R. 1—Interlocutory injunction based on cause of action arising after suit—If can be granted.

A Court cannot grant an interlocutory injunction based upon a cause of action arising after the suit is filed and which cannot, therefore, possibly form part of the cause of action in the order granting a temporary injunction would be

C. P. CODE (1908), O. 39, R. 2.

suit as framed. (Das, J.) BALDEO DAS BAJORIA v. GOVERNOR OF THE U. P. I.L.R. (1944) 1 Cal. 181=A.I.R. 1945 Cal. 44.

-O. 39, R. 1—Interlocutory mandatory injunction-Grant of-Effect of delay-Infructu-

ous order-If can be made.

It is essential that a party applying for an interlocutory mandatory injunction should come to Court as early as possible. Any delay on his part which is not sufficiently explained, is fatal to his application. The Court should not make any interlocutory order which will be infructuous for all practical purposes. (Das, J.)
Baldeo Das Bajoria v. Governor of the U. P.
I.L.R. (1944) 1 Cal. 181=A.I.R. 1945 Cal. 44.

-O. 39, Rr. 1 and 2 (3)—Scope and construction—Disobedience of injunction order— Remedy—Power of court to punish—Contempt of court—Interpretation of statutes.

Disobedience of an order of injunction issued

under O. 39, R. 1, C.P.C., is punishable under O. 39, R. 2 (3). The two rules must be read together. All parts of statute should be so construed that they do not run counter to each other and the very object of the enactment is not frustrated.

Das, J.—Disobedience of an order of injunction passed under O. 39, R. 1, C.P.C., can be punished by the High Court as a contempt of Court, apart from the power of the Court whose order has been disobeyed to punish under R. 2 (3). (Manohar Lall and Das, JJ.)
SITARAM v. LACHMINARAIN. 24 Pat. 606=A.
I.R. 1946 Pat. 47.

-O. 39, Rr. 1 and 2-Temporary injunc-

tion against person outside jurisdiction—Inherent power of High Court to grant. See Injunction—Jurisdiction. 49 C.W.N. 172.

Grant of Principles—Questions to be considered by Court.

It is well-established that in granting or refusing a temporary injunction under O. 39, R. 2, C. P. Code, the Court would primarily consider two questions: (1) whether the plaintiff has made out a prima facie case, and (2) on which side would lie the balance of convenience or inconvenience. (Lobo, J.) UTTAM CHAND v. ALUMAL. I.L.R. (1943) Kar. 504=212 I.C. 545=16 R.S. 266=A.I.R. 1944 Sind 107.

-O. 39, R. 2—Temporary injunction—Person in possession in pursuance of contract of sale —Suits by for specific performance and injunction—Application for temporary injunction— Competency.

The considerations in respect of an application for a temporary injunction are rather different from those for a permanent injunction. suit by a plaintiff who was in possession in pursuance of an agreement of sale in his favour for enforcement of his contract of sale and for injunction restraining the defendants from interfering with his possession, the plaintiff also applied for a temporary injunction.

Held, that as the plaintiff was in possession and as it was not certain that he would not succeed in obtaining a permanent injunction,

C. P. CODE (1908), O. 39, R. 2.

justified. (Horwill, J.) GOPALA RAO V. VEN-KATRAMAYYA. 220 I.C. 174=1944 M.W.N. 71=57 L.W. 150 (1)=A.I.R. 1944 Mad. 254=(1944) 1 M.L.J. 51. O. 39, R. 2 (1)—Principles on which

Courts would exercise their power to grant in-

The power of the Court to issue an injunction under this rule is not circumscribed by any limitations but the power is not arbitrary and must be exercised according to sound judicial principles. The rule that is generally followed is to grant an injunction according as to on which side the balance of convenience lies. (Thomas, C.J. and Ghulam Hasan, J.) MAHESHWAR DAYAL SETH v. YUVRAJ DUTTA SINGH. 1945 O.A. (C.C.) 237=1945 A.W.R. (C.C.) 237=1945 A.L.W. (C.C.) 315=1945 O.W.N. 350.

–O. 39, R. 2 (3)–Application under– Grant of-Applicant actuated by personal mo-

tives.

An application under O. 39, R. 2 (3), C. P. Code, for disobedience of an injunction, should not be granted where the applicant has not at heart the honour of the Court whose authority he says has been condemned but is actuated by personal motives. (Blacker, J.) SHIV RAM Ватта v. D. D. DESAI. 196 I.C. 776=14 R. L. 180=43 P.L.R. 447=A.I.R. 1941 Lah. 334.

O. 39, R. 2 (2) and O. 21, R. 32-Nature of proceedings-Personal service of restraint order on party—If necessary, See C. P. Code, O. 21, R. 32 and O. 39, R. 2 (3). 1945

N.L. J. 150.

O. 39, R. 4—Order on application

A pocalability set aside ex parte injunction-Appealability-Test. Madhorao Narayan Rao v. Yadaorao. [See Q.D., 1936-'40, Vol. I, Col. 1872.] I.L. R. (1941) Nag. 578.

ment of Commissioner with power to dig up ornaments buried in land-Power to order.

A Court has power under O. 39, R. 7 (b), to make an order directing a Commissioner to dig up property such as ornaments, alleged to be buried in land; and the Court before proceeding under O. 39, R. 7, can, in cases in which it is necessary to take action promptly in order to prevent property from being made away with by the defendant, always appoint a receiver or a by the defendant, always appoint a receiver of a Commissioner or grant an injunction ex parte. (Beaumont, C.J. and Wassoodew, J.) Totaram Ichharam v. Dattu Mangu. I.L.R. (1943) Bom. 138=207 I.C. 59=16 R.B. 5=45 Bom. L.R. 231=A.I.R. 1943 Bom. 143.

O. 39, R. 7—"Suit"—Pauper plaintiff—Acalization for legent of the control of superconduction.

Application for leave to sue as pauper and plaint presented—Application at same time for order under O. 39, R. 7—Competency. See C. P. CODE, O. 33, R. 1 AND O. 39, R. 7. 45 Bom.L. R. 231.

-O. 39, R. 9—Mortgage suit—Order in favour of mortgagee—If can be made after final decree and sale.

An order under O. 39, R. 9, C. P. Code, can be made in favour of a mortgagee after a final decree is passed in the mortgage suit, and even

C. P. CODE (1908), O. 40, R. 1.

Ali and Blank, II.) PASHUPATI NATH PAL v. DURJODHAN ROY. I.L.R. (1942) 2 Cal. 546 =204 I.C. 349=15 R.C. 514=46 C.W.N. 893 =A.I.R. 1943\_Cal. 160.

-O. 40, R. 1-Appeal-Interference with discretion—Order appointing receiver. Pahlad Dass Bhagwan Dass v. Shanti Sagar. [Sée Q.D. 1936-'40, Vol. I, Col. 1873.] I. L. R. (1941) Lah. 590.

O. 40, R. 1—Appointment of receiver—

Execution Proceedings to be transferred to Collector. Narain Das Gulab Singh v. Pattala Durbar. [Sec Q.D. 1936-'40, Vol. I, Col. 1876.] 191 I.C. 704=13 R.L. 325.

-O. 40, R. 1—Appointment of receiver in execution-Prior attachment of property-If condition precedent to validity of appointment. See C. P. Code, S. 51 and O. 40. (1942) 1 M.L. J. 217 (2).

-O. 40, R. 1-Appointment of receiver in execution-When may be made. See C. P. CODE, S. 51. 45 C.W.N. 1104.

O. 40, R. 1—Appointment of receiver in

execution of money decree—When justified. PAHLAD DASS BHAGWAN DASS v. SHANTI SAGAR. [See Q.D. 1936-'40, Vol. I, Col. 1879.] I.L. R. (1941) Lah. 590.

-O. 40, R. 1-Appointment of Receiver

in final judgment-Permissibility.

The appointment of a receiver of landed property is confined to the pendency of a suit or an appeal. Such direction in a final judgment is permissible only in exceptional cases. (Grille, C.J. and Puranik, J.) HIRALAL v. SARJOOPRA-SAD. I.L.R. (1944) Nag. 166=212 I.C. 289 =16 R.N. 223=1943 N.L.J. 571=A. I. R. 1944 Nag. 82.
O. 40, R. 1—Bank appointed receiver—

Moneys realised as receiver put into its current account under Court's order-If become assets of Bank. Sec Banker and Customer. 46 C. W.N. 910.

-O. 40, R. 1—Continuance of receiver in appeal-Necessity-Considerations.

There is no doubt that when a matter is in dispute in a trial Court and the property concerned is in the possession of a third party it is necessary for the preservation of the property pending the determination of the rights of parties to appoint a receiver in the common interest of both parties. But when the trial Court has determined the rights of parties and the matter is pending in an appeal, it cannot be said that it would be still just and convenient to keep the property in the custody of the Court by either appointing a fresh receiver or continuing the old receiver. The property should be handed over to the party found by the Court to be entitled, no doubt, with sufficient safeguards. (Thomas, C.J. and Misra, J.) PARTAB BIKRAM SINGH v. DILLIPAT SHAH. 216 I.C. 244-17 R.O. 68 = 1944 O.W.N. 52=1944 A.L.W. 98=A.I. R. 1944 Oudh 225.

Order of Court—Necessity—Termination of suit or proceeding—If ipso facto discharges Receiver. Except in cases where a Receiver is appointed for a limited time, the appointment continues after the sale before its confirmation. (Nasim until the Court passes a formal order discharg-

#### C. P. CODE (1908), O. 40, R. 1.

ing him. The termination of the suit or proceeding in which he was appointed does not ipso facto operate to discharge the Receiver or terminate his appointment. The Receiver continues in his possession until he is finally discharged by an order of Court which appointed him. (O'Sullivan, J.) Ramzan Moosa Khan v. Abubucker Sakhi. I.L.R. (1944) Kar. 396=A. I. R. 1945 Sind 75.

——O. 40, R. 1—Execution—Decree against agriculturists—Land not saleable—Receiver, if

can be appointed.

Although there is nothing in the Code to prohibit the appointment of a receiver in execution of a decree held against an agriculturist in a case in which his land cannot be brought to sale, it is for the execution Judge to decide whether the appointment of a receiver is "just and convenient." (Almond, J.C. and Mir Ahmad, J.) RAMJI DASS v. ASGHAR KHAN. 209 I.C. 424 =16 R. Pesh. 37=A.I.R. 1943 Pesh 52.

-O. 40, R. 1—Execution—Receiver appointed in-Judgment-debtor subsequently judicated insolvent—Costs, charges and expenses incurred by receiver—If can be recovered from insolvents' estate-Presidency-Towns Insolvency

Act, S. 54.

Where subsequent to the appointment of a receiver of the property of the judgment-debtor at the instance of the decree-holder, the judgment-debtor is adjudicated insolvent and the possession of the property is made over to the Official Assignee, the receiver is only entitled to the costs and expenses incurred in the execu-tion proceedings till the date of the order of adjudication to be paid out of the estate of the insolvent. The receiver's remedy for the other charges and expenses he has incurred, viz., rent due for premises of which he was in occupation and charges in respect of durwan and estate clerk will be against the person at whose instance he was appointed. (McNair, J.) Deva Dutta Sarowgee v. P. C. Mitter and Sons. I.L.R. (1941) 2 Cal. 37.

-O. 40, R. 1—"Just and convenient"—

Appointment of Receiver.

The Court will decline to appoint a receiver although it may be just, where it is not convenient but highly impracticable and undesirable to interfere with the status quo. (Lobo, J.)
AISHABAI v. MAHOMAED ISMAIL. 195 I.C. 503 =14 R.S. 28=A.I.R. 1941 Sind 112.

O. 40, R. 1—Leave of Court—Property in hands of receiver—Sale in execution of mort-gage decree—Leave of Court—Necessity—Sale without leave if void—Subsequent grant of leave

-Effect.

Where property in the possession of a receiver is sold in execution of a decree without obtaining leave of the Court appointing the receiver, the sale is not void but is only voidable at the discretion of the Court. Where leave of the Court is obtained subsequently the illegality is effectively cured and the sale is not liable to be set aside. The principle that leave of the Court should be obtained before property in the hands of a receiver is proceeded against in execution is equally applicable to a case where the

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execution is levied by a mortgagee-decree-holder. The mere fact that the executing Court and the Court appointing the receiver are the same will not necessarily lead to the inference that leave may be taken to have been granted by the Court. (Mockett and Kunhi Raman, JJ.) VENKATA-NARASIMHA RAYANIMGAR v. VENKATALINGAMA NARASIMHA RAYANIMGAR V. VENKATALINGAMA NAYANIM. I.L.R. (1944) Mad. 717=1944 M. W.N. 76=57 L.W. 121=A.I.R. 1944 Mad. 372=(1944) 1 M.L.J. 129.

O. 40, R. 1—Leave of Court—Property in possession of Receiver—Execution sale—Absence of leave of Court—If makes sale void—Leave obtained before confirmation—If validates

sale-O. 21, R. 90.

Where property in the possession of a receiver is sold in execution without leave of the Court which appointed the receiver, the sale is not void but only voidable at the discretion of the Court; and where leave of the Court is obtained subsequently before confirmation of the sale, the defect is cured and the sale is valid and is not liable to be set aside. (King and Horwill, JJ.)
G. F. F. FOULKES v. SUPPAN CHETTIAR. 57 L.
W. 477=1944 M.W.N. 536=A.I.R. 1945
Mad. 13=(1944) 2 M.L.J. 205.

O. 40, R. 1—Leave of Court—Receiver appointed under-Suit against-Leave of Court-

Necessity.

In the case of receiver appointed under O. 40, R. 1, C. P. Code, permission of the Court appointing him is absolutely necessary for institution of proceedings against him as receiver. (Allsop and Sinha, JJ.) SHYAM LAL GOMATWALLA V. NAND LAL I.L.R. (1944) All. 255=1944 A.L.J. 248=1944 A.W.R. (H.C.) 118 (2) =1944 A.L.W. 320=1944 O.A. (H.C.) 118 (2)=A.I.R. 1944 All. 220.

-O. 40, R. 1—Leave of Court—Receiver of private market-Failure to take out licence under S. 171, Madras Local Boards Act—Prosecution—Leave of Court—Necessity. See MADRAS LOCAL BOARDS ACT, S. 207. (1944) 1 M.L.J. 121.

O. 40, R. 1-Mortgage executed by receiver under Court's order—Order sanctioning loan on first charge—Precedence of mortgage over earlier encumbrances created by parties.

In those case where the order of the Court simply sanctions a loan by the receiver on a first charge of the properties, but does not indicate the purpose for which the loan is sanctioned, the creditor who advances the money is entitled to assume that everything was in order and so he ought to get what the Court had promised to give him, precedence over earlier encumbrances created by the parties. In such cases the Court cannot break faith with him. In cases, however, where the order itself recites the purpose of the loan, different considerations should apply. the purpose of the loan as set out in the order is for preservation or protection of the property committed to the care of the receiver, or if the order is made in an administration suit or in a partition suit for working out the rights, liabilities and obligations of the co-sharers of joint properties in the course of partition, the mortgagee from the receiver would have first

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charge in accordance with the order. The principle seems to be this. By the appointment of the receiver the Court takes upon itself the duty of protecting and preserving the subject-matter of the suit, which it discharges through its own officer, namely, the receiver. It must therefore have all powers which are incidental and necessary for the discharge of that duty. It will have therefore the power to sanction loan to be raised by the receiver, and if ncessary, to direct the mortgage to be executed by him for securing it to have precedence over earlier mortgages executed by the parties. He may be unaware of such prior mortgages or even if aware, may not give notice to those mortgagees. This power of the Court being thus incidental to and necessary for the performance of its duty to protect and preserve the subject-matter of the suit, which it has taken upon itself by appointing a receiver, must be measured and limited by its duty, where its exercise comes into conflict with the rights of third parties which are not before it and to whom no notice had been given, or who had not consented. In such a case the principle breach of faith cannot be the decisive factor. It is a question of power or jurisdiction of the Court. If the Court arrogates to itself a power which it does not possess and does an act affecting persons not parties to the suit, its acts cannot prejudice the rights of such persons. In such a case the mortgagee from the receiver cannot protect himself on the presumption that the Court had acted within its powers, for the order on the basis of which he acted ex facie would indicate want of power in the Court. (Mitter and Akram, JJ.) BHADRABATI DEVI v. JIBANMAI, BABU. I.L.R. (1941) 1 Cal. 155 = 194 I.C. 650=14 R.C. 5=45 C.W.N. 68 = 72 C.L.J. 427=A.I.R. 1941 Cal. 163.

---O. 40, Rr. 1 and 2 and O. 43, R. 1 (s)-Order fixing remuneration of receiver

-Applicability.

Though the Court has the power to make the order fixing the remuneration of a receiver appointed by it at any time, nevertheless it must be regarded as part of the order of appointment. When it is made subsequent to the order of appointment it is really a continuation of the original order of appointment, at any rate it is so closely connected with the original order that it must be regarded as part and parcel of that order and hence such an order as to remuneration would be appealable under O. 43, R. 1 (s). (Stone, C.J. and Bose, J.) BUDHULAL JACANNATH v. THE HIRDAGARH COLLIERIES, LTD. I.L.R. (1942) Nag. 671=199 I.C. 874=14 R.N. 305=1942 N.L.J. 191=A.I.R. 1942 Nag. 64.

O. 40, R. 1—Partition suit—Appointment of receiver—Power of parties to deal with their

shares thereafter.

A mortgage executed by the parties to a partition suit is valid notwithstanding the fact that they executed it after the appointment of a receiver without any reference to the Court. The title to the properties does not vest in the receiver appointed under O. 40, C. P. Code, for the management and preservation of the the pro-

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perties in suit. The parties have, therefore, the power to deal with their shares without reference to Court, provided that their acts do not interfere with possession of the receiver. The receiver could exercise the powers of the owners in the matter of execution of documents and if the Court sanctions a loan on mortgage, he could validly execute the mortgage instrument so as to bind the shares of the parties. (Mitter and Akram, JJ.) BHADRABATI DEVI V. JIBANMAL BABU. I.L.R. (1941) 1 Cal. 155=194 I.C. 650=14 R.C. 5=72 C.L.J. 427=45 C.W.N. 68=A.I.R. 1941 Cal. 163.

—O. 40, R. 1—Partition suit—Proceedings under O. 20, R. 12—Plaintiff declared entitled to specific share but property not divided—Appointment of receiver—Right of plaintiff to apply for. It is open to the Court in proceedings under O. 20, R. 12, C. P. Code, in a partition suit to appoint a receiver of the whole property pending division, at the instance of the plaintiff who is entitled to a specified, though undivided share in the suit property and who is entitled to a considerable sum of money as mesne profits. He is entitled to ask that his share should be safeguarded. (Davis, C.J. and Weston, J.) Santifram Rupchand v. Alu Tundu. I.L.R. (1941) Kar. 563=200 I.C. 74=14 R.S. 205=

——O. 40, R. 1—Partnership—Suit for dissolution—Receiver appointed — Judgment-creditor's remedy—Charging order—Application for—Proper forum—Effect of such order.

A.I.R. 1942 Sind 60.

Where in a suit by a partner for dissolution of partnership a receiver is appointed of the assets of the partnership, the remedy of the creditor who had obtained a decree against the partnership firm is either to apply to the Court which appointed the receiver for leave to attach some specific property or for an order charging the assets in the hands of the receiver on giving an undertaking to deal with the charge according to the orders of the Court. There is no doubt that the appplication for a charging order must be made to the Court by which the receiver was appointed. But where the Court which appointed the receiver in the partnership suit and passed the decree in the creditor's suit is the same, and all the parties in both suits are present, including the receiver, there can be no objection to a charging order being made on an application made in the creditor's suit, instead of in the partnership suit, and the cause title can be formally amended. The effect of a charging order will be to give the judgment creditor's priority over creditors who have not proceeded to judgment. (McNair, J.) SURESH CHANDRA ROY v. PRAKASH KRISHNA. 45 C.W.N. 1104.

simple mortgage—Appointment of Receiver— Jurisdiction of Court—Principles governing.

Though ordinarily a receiver may not be appointed in an action on a simple mortgage or in an execution proceeding taken to enforce a mortgage decree for sale, it cannot be said that the Court has no jurisdiction to appoint a receiver in a suit on a simple mortgage. A

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receiver can, however, only be appointed when a special case is made out for putting the property in charge of an officer of the Court. Where, e.g., the Court is satisfied that the value of the security has diminished by act of the mortgagor or otherwise, or where the entire dues of the mortgagee cannot be liquidated by the mortgage security, the Court would be in-clined to appoint a receiver so as to place the rents, issues and profits of the property in the hands of the Court to be dealt with in accordance with the justice and the equity of that particular case. (Fasl Ali, C.J., and Sinha, J.) HARGOPAL v. DEONITE. 24 Pat. 282=A.I.R. 1945 Pat. 404.

----O. 40, R. 1—Powers of receiver—Right to sue for debt due to deceased person—Succes-

sion certificate, if necessary.

A receiver who is an officer of the Court, although he represents the estate of the deceased, does not claim by right of succession. Therefore he can maintain a suit for a debt due to a deceased person to whose estate he has been appointed a receiver without a succession certificate. (Lord Williams, J.) ANIL CHANDRA MITRA v. INDIAN ECONOMIC INSURANCE Co., LTD.
I.L.R. (1941) 2 Cal. 221=197 I.C. 437=14
R.C. 362=A.I.R. 1941 Cal. 579.

-O. 40, Rr. (1) and (4) and O. 43, R. 1 (s)—Receiver, appointment of—Appealagainst person not a party to suit-Order

In considering the right of appeal under O. 43, R. 1 (s), the distinction between an order appointing a receiver and an order removing a person from the possession or custody of the property should not be lost sight of because an order merely appointing a receiver does not affect the person in possession of the property directly whereas an order for the removal of any person from possession or custody of the property affects him directly. If the order appointing a receiver is made against a party to the suit, then he would have a right to appeal under O. 40, R. 1 (a) read with O. 43, R. 1 (s); if the Court orders the removal of a person from possession he would have a right of appealing against that order under O. 40, R. 1 (b) read with O. 43, R. 1 (s). But where an order is made against a person not a party to the suit, refusing to direct the receiver to release the property there is no appeal against it by the third party. His remedy is by suit. (Mya Bu, J.) BANK OF CHETTINAD, LTD. v. U CHAN HMWE. 1941 Rang. L. R. 300=196 300=196 I.C. 768=14 R.R. 100=A.I.R. 1941 Rang. 236.

Effect—If creates charge—Charge created by decree of competent Court—Receiver not made

party to suit-Validity of charge.

Where a person is granted a charge in a decree passed by a Court of competent jurisdiction, and that decree stands, he is in a better position than a person who has no title to the property in question. The fact that the official trustee as representing him is appointed receiver would offend against the provisions of O. 40, in a suit by him on behalf of the latter for partition does not give the latter a charge. Would offend against the provisions of O. 40, R. 1 (2), C. P. Code, inasmuch as the effect of the order is to remove the mutawalli from the

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The receiver is an officer of the Court appointed to hold the property in suit for the benefit of the person who could show a title to it. When the officer gets a decree in the suit on behalf of the person whom he represents, the latter would have no greater rights than are conferred by the decree. The fact that the party who got a charge over the property did not make the official trustee a party to his suit would not affect the validity of the charge creatwould not affect the variaties of the charge created by a decree of a competent Court. (Leach, C.J. and Byers, J.) Subramania Iyer v. Thandavamurthi Chetty. I.L.R. (1942) Mad. 933=206 I.C. 490=15 R.M. 994=55 L.W. 433=1942 M.W.N. 453=A.I.R. 1942 Mad. 670=(1942) 2 M.L.J. 115.

—O. 40, R. 1—Receiver—Appointment—Effect. Possessing that taken by receiving Creaties

Effect-Possession not taken by receiver-Credi-

tor's right to proceed to execution.

It is a well-established rule that until a receiver's appointment has been perfected and the receiver is actually in possession a creditor is not debarred from proceeding to execution. (Mc Nair, J.) Suresh Chandra Roy v. Prakash Krishna. 45 C.W.N. 1104. —O. 40, R. 1—Receiver—Grounds for

appointment.

Where it is found as a fact that the party seeking the appointment of a receiver is an adopted son and as such has an adequate locus standi, and it is also further found that his allegations of waste have not been contraverted, it is just and convenient that a receiver should be appointed. (Davies.) Mt. Ruckma v. Bishesh-WAR LAL. 1944 A.M.L.J. 46.

—O. 40, R. 1—Receiver—Grounds—Sufficiency—Rival claims—Likelihood of waste—Clai-

mants not in possession.

Where there are rival claimants to the property in dispute and the property has never been in the possession of any of the parties to the suit since the death of the deceased owner and the situation is fraught with the possibility of waste and mismanagement, it would eminently be a case for the appointment of receiver. (Thomas, v. MoHAN BAN. 1941 O.A. 197=1941 O.W. N. 272=1941 A.W.R. (Rev.) 145=194 I.C. 8=1941 A.L.W. 293=1941 O.L.R. 400=13 R.O. 544=A.I.R. 1941 Oudh 328.

-O. 40, R. 1-Receiver in respect of right to future maintenance—If can be appointed. See C. P. CODE, Ss. 51, 60 (1) AND O. 40, R. 1. 1942 O.W.N. 359. ——O. 40, R. 1—Receiver in respect of

waaf property—Execution of personal decree against mutuwalli—Propriety—Powers.

Where a certain property is dedicated as waqf property and under the terms of the deed of waqf it is not liable to attachment and sale and has to be managed by a trustee who is enjoined to perform certain religious duties, it would not be just and convenient to appoint a receiver of such property in execution of a decree against the trustee as the property does not belong to him and further such an order of appointment

possession or custody of the property which the possession of classical of the property which the Court at the instance of the decree-holder has no right to do. (Thomas, C.J. and Ghulam Hasan, J.) TAQI HUSAIN v. SHYAM BEHARI. 197 I.C. 467=14 R.O. 319=1941 O.A. 967=1941 A.W.R. (C.C.) 370=1941 O.W.N. 1274=A.I.R. 1942 Oudh 205.

----O. 40, R. 1-Receiver-Lease-hold-Receiver of-Duty of to discharge head-rent out

of sub-rents.

The primary duty of a receiver over a leasehold is, no doubt, to discharge the head-rent out of the sub-rents, but the parties concerned may, by consent order obtained from the Court, modify by consent order obtained from the Court, modify the legal responsibility thus thrown upon the receiver. (Sir Madhavan Nair.) Kedarnath Himarsingka v. Prabhabati Sahera. 209 I.C. 553=56 L.W. 741=1944 A.L.W. 17=1944 O.W.N. 11=48 C.W.N. 275=16 R.P. C. 121=10 B.R. 235=I.L.R. (1944) Kar. (P.C.) 157=A.I.R. 1943 P.C. 185=(1943) 2 M.L.J. 463 (P.C.).

-O. 40, R. 1-Receiver-Party appointed receiver in suit-Rights and liabilities of-

Remuncration-Extent of.

The rights of a Receiver who is a party to the suit do not stand on any higher footing than those of one who is a complete stranger to the litigation. His liability to account for the receipts from the property in his charge is much greater than that of a third party Receiver, because an additional duty is cast on him to safeguard the rights of his adversary—a duty which very often is more readily accepted than discharged. It is manifest that beyond his legitimate remuneration as a Receiver, and incurring such expenses in the management and preservation of the property in his charge as may be deemed fit and proper in the circumstances, the Receiver would not be entitled to make any profit out of the property in his charge. (Manohar Lall and Sinha, JJ.) DANDY SWAMI JAGANNATH v. KASHINATH MISSIR. 1944 P.W.N. 63.

-O. 40, Rr. 1 and 2-Receiver-Party proposing himself as receiver—Remuneration.
The English rule is that when a party inte-

rested proposes himself as receiver, he is usually required to act without salary unless by consent. There is nothing to show that the rule is different in India. But the Court may at some later stage if necessary make an order allowing remuneration to such a receiver. (Stone, C.J. and Bose, J.) BUDHULAL JAGANNATH v. THE remuneration to such a receiver. (Stone, C.J. and Bose, J.) BUDHULAL JAGANNATH v. THE HIRDAGARH COLLIERIES, LTD. I.L.R. (1942) Nag. 671=199 I.C. 874=14 R.N. 305=1942 N.L.J. 191=A.I.R. 1942 Nag. 64.

—O. 40, R. 1—Receiver—Position of—Mortgage suit—Appointment of Receiver at instance of mortgagor—Effect—Receiver—If represents mortgage alone—Payment of property

presents mortgagee alone—Payment of property tax by receiver—If payment on behalf of mort-gagor. See Madras Agriculturists' Relief Acr. S. 3 (ii), Proviso (c). (1942) 1 M.L.

-O. 40, R. 1-Removal of Receiver-Failure to file accounts. SARBA SUNDART DASI V. NANDA RANI DASI. [See Q.D., 1936'40, Vol. I, Col. 1888.] 194 I.C. 13=13 R.C. 484 =A.I.R. 1941 Cal. 144.

C. P. CODE (1908), O. 40, R. 1. -O. 40, R. 1-Scope-Appointment of

Receiver-Right of third party to attach and sell property in execution of decree—If affected. It is true that when a receiver is appointed the actual appointment operates as an injunction restraining the parties to the suit from interfering with the property, but it does not affect outsiders. So far as third persons are concerned, the appointment of a receiver does not affect them until the receiver has actually taken possession. The appointment of a receiver does not affect the right of a creditor to proceed to execute a decree by attachment of the property intended to be received until and unless the appointment of the receiver has been perfected and he is actually in possession. Therefore no notice of such execution proceeding is required to be sent to the Receiver if he has not taken possession of the property. (Harries, C.J. and Chatterji, J.) Nilkantha Narayan Singh v. M. S. Zoha. 22 Pat. 256=208 I.C. 275=16 R.P. 62=10 В.R. 46=24 Р.L.Т. 411=A.I.R. 1943 Pat. 297.

O. 40, R. 1—Scope—If controls S. 51 (d)—"Just and convenient"—Discretion of Court in appointing receiver in execution. See C. P. Code, S. 51 (d). 23 Pat.L.T. 191.

O. 40, R. 1—Title of receiver—Contin-

gent debt-Receiver giving notice to debtor and

debtor admitting claim.

Where property is a contingent debt which at the time when the Receiver is appointed has not accrued due, the only way in which the Receiver can take possession is by giving notice to the debtor. If the debtor admits the claim, the admission plus the notice given perfects the title of the receiver. (Lort Williams, J.) Anil CHANDRA MITRA 7: INDIAN ECONOMIC INSURANCE Co., Ltd. I.L.R. (1941) 2 Cal. 221=197 I. C. 437=14 R.C. 362=A.I.R. 1941 Cal. 579.

-O. 40, R. 1 (d)—Receiver authorised to defend suits-Suit by third party to plaintiff-Owners of property-If necessary parties.

A Receiver as such does not acquire a title to the property in respect to which he has been appointed Receiver. The ownership remains in the parties to the suit, and the Receiver takes charge of and holds the property as an officer of the Court during the litigation. The mere fact that the Receiver is authorised to defend suits under O. 40, R. 1 (d), C. P. Code, does not entitle a third party plaintiff to bring a suit against the Receiver alone ignoring the persons who are the owners of the property and who are in law necessary parties to such suit. The only difference that the appointment of a Receiver makes is that if the property in the hands of the Property in the hands of the Receiver is intended to be affected by the result of such a suit, the Receiver has got to be made a party after obtaining leave from the Court and this is to be by way of addition to and not in substitution for the parties who are primarily responsible. (Mukherjea and Blank, JJ.) MAHOMED KADIR ALI FAKIR v. GOBINDA-BANDHU DUTTA. 49 C.W.N. 808.

O. 40, R. 1 (1) and (2)—Relative scope and effect of—Former, if curtailed or controlled by latter—Raiyati land in Chota Nagpur—Power of Court to about the interview.

of Court to appoint receiver.

In the face of the clear language of O. 40, R. 1 (2), it must be held that a Court has no power to appoint a receiver of the raiyati holdings held by a judgment-debtor in Chota Nag-pur, a sale of which is prohibited by the Chota Nagpur Tenancy Act. The general power given to the Courts under O. 40, R. 1 (1) is curtailed by sub-R. (2). Both the sub-rules have to be read together as forming part and parcel of one rule. (Agarwala, J.) Permeshwar Ram v. Charu Ram. 198 I.C. 818=14 R.P. 504=8 B.R. 464=1941 P.W.N. 580=22 Pat.L.T. 798=A.I.R. 1942 Pat. 52 (2).

-O. 40, R. 1 (2)-"Any person"-If restricted to non-parties.

O. 40, R. 1 (2), C. P. Code, covers only the case of removal of a person from possession who is not a party to the suit. Sub-R. 1 (b) gives the court the power to remove "any person" from possession. Sub-R. (2) is a limitation of the power of the court thus defined in Sub-R. 1 (b). 58 A. 949 (F.B.), dissented from. (Mitter and Ahram, II.) UDAY CHAND MAHTAB v. BIBHUTI BHUSAN DAS. I. L. R. (1944) 2 Cal. 194=A.I.R. 1945 Cal. 298.

O. 40, R. 1 (2)—'Any—person'—Party to suit, if included.

A party to a suit is not included in the words "any person" used in sub-Cl. (2) of R. 1 of O.

40, C. P. Code. (Bennett and Madeley, JJ.)
SATGUR PRASAD v. HAR KISHAN DAS. 1944 O.
W.N. 303=1944 A.W.R. (C.C.) 211=1944
O.A. (C.C.) 211=A.I.R. 1945 Oudh 25.

O. 40, R. 1 (2)—Applicability—Property in possession of party to litigation.

Quare:—Whether O. 40, R. 1 (2), C. P. Code, has application only to properties in the possession of third parties or is also applicable to properties in the possession of one of the to properties in the possession of one of parties to the litigation. The rule should be so parties to the lifigation. The rule should be so amended as not to leave any doubt as to the true interpretation. (Iqbal Ahmad, C.I., Bajpai, Dar, Yorke and Mathur, II.) TULSHA DEVI V. SHAH CHIRONJU LAL. 204 I.C. 210=15 R.A. 322=1942 A.W. R. (H.C.) 337 (2)=1942 A.L. W. 646=A.I.R. 1943 A. 1 (F.B.).

O. 40, R. 1 (2)—Scope and effect of—Receiver in respect of property in possession of parties to litigation—Power of Court to appoint.
O. 40, R. 1 (2), C. P. Code, is intended only for the protection of persons who are not parties to the litigation; the sub-rule does not debar the Court from removing one of the parties

bar the Court from removing one of the parties to the litigation from the possession of property of which he is in possession, by the appointment of receiver. Where the dispute is between par-ties to the suit or litigation, if it is just and convenient for the purpose of enforcing or carrying out the directions in a decree, a receiver may be appointed even where the party in pos-J.) Banwari Lal Sahu v. Baldeo Sah. 200
I.C. 649=14 R.P. 670=8 B.R. 710=23 Pat.
L.T. 91=A.I.R. 1942 Pat. 240.
O. 40, R. 3.—Security—If mandatory.
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respect of security. (Shirreff, S.M. and Sathe, J.M.) Suraj Bux Singh v. Gaya Prasad. 1942 O.A. (Supp.) 257 (1)=1942 A.W.R. (Rev.)

C. P. CODE (1908), O. 40, R. 4.

231 (1)=1942 O.W.N. (B.R.) 372=1942 R. D. 461.

-O. 40, R. 4—Order refusing to re-open accounts already passed—If falls under—Appealability.

An order refusing to re-open a receiver's accounts of the previous years which were already passed, does not come under O. 40, R. 4, and is not, therefore, appealable. (Mukherjea and Blank, JJ.) SAFARADDI GAZI v. RAHIM BAKSH. I.L.R. (1943) 2 Cal. 204=207 I.C. 609=16 R.C. 125=47 C.W.N. 400=A. I. R. 1943 Cal. 244.

-O. 40, R. 4—Question of wilful default and gross negligence of Receiver—Enquiry into—Jurisdiction of Court—Such enquiry, if confined to accounts not yet passed—Death of Receiver pending inquiry—Proceeding, if can be continued against his legal representatives.

The Court which appointed a Receiver has jurisdiction to make an enquiry into allegations of wilful default and gross negligence with regard to the administration of the property placed in his charge in a summary proceeding under O. 40, R. 4, and the filing of a separate suit is not essential. Such an inquiry need not be confined to the accounts of those years only which have not yet been passed by the Court but may extend to matters covered by the accounts of the previous years which had already been passed by it. The question of wilful default and gross negligence is not a matter directly of accounts. It is a liability which attaches to the receiver outside the accounts and consequently the question as to whether or not the accounts of particular years were formally passed by the Court, is immaterial for the purpose of determining whether the charges of default or negligence could be brought home against the receiver. If the receiver dies during the pendency of the enquiry, the proceedings can be continued against his legal representatives, as an order of attachment, if made, can be directed against the property of the receiver in their possession. (Mukherjea and Blank, JJ.) SAFARADDI GAZI v. RAHIM BAKSH. I.L.R. (1943) 2 Cal. 204=207 I.C. 609=16 R.C. 125=47 C.W.N. 400=A.I.R. 1943 Cal. 244.

40, R. 4 (2)—Scope—Application against receiver—Allegation of fraud and mis-appropriation—Procedure—Reference to commissioner-Propriety.

O. 40, C. P. Code, contemplates an inquiry in cases of ordinary questions of accounts and also cases of wilful default or gross negligence; but it is not designed to cover what in substance is a case of conversion. Where the allegation in an application filed against a receiver under O. 40, R. 4 (2), C. P. Code, is that he had been guilty of fraudulent conduct and misappropriation, the Court should not refer so serious a matter to a commissioner, but should refer the parties to a regular suit. No other procedure is suitable in such a case. (Mockett and Bell, J.) SOMASUNDARAM CHETTLAR v. KANNAMAL. ACHI. I.L.R. (1945) Mad. 47=57 L. W. 256=1944 M.W.N. 257=A.I.R. 1944 Mad. 392=(1944) 1 M.L.J. 368.

Q. D. I-83

Court appeals—Power to dispense with produc-

tion of copy of judgment.

O. 41, R. 1 is applicable to appeals under the Land Revenue Act and hence the production of the copy of the judgment appealed against can be dispensed with by the appellate Court. (Sathe, A.M.) KANCHAN SINGH v. ISHWAR KIRPAL SINGH. 1941 A.W.R. (Rev.) 993=1941 O.A. (Supp.) 837.

O. 41, R. 1 and O. 43, R. 2—Combined effect of—Failure to file copy of formal order in appeal from an order—Effect.

The combined effect of O. 41, R. 1 and O. 43,

R. 2, C. P. Code, is that the procedure laid down in R. 1 of O. 41 to the effect that the memorandum shall be accompanied by a copy of the decree appealed from, must be held to apply in the case of appeals from orders as distinguished from decrees. Hence in an appeal from an order it is obligatory upon the appellant to file along with the memorandum of appeal a copy of the formal order also without which the appeal is clearly not competent. (Thomas, C.J. and Ghulam Hasan, J.) Durga Prasad v. Rampal. 200 I.C. 479=14 R.O. 607=1942 A.L. W. 221=1942 O.A. 158=1942 A.W.R. (C. C.) 161=1942 O.W.N. 213=A.I.R. 1942 Oudh 349.

-O. 41, R. 1—Competency of appeal without filing copy of prior order disposing of

all but one issue.

Where all the issues in a case excepting one are disposed of on a particular day while the one remaining issue is decided and judgment pronounced on a later date and an appeal is preferred against the decree it cannot be said that it does not satisfy the requirements of O. 41, R. 1, because the copy of the earlier order disposing of the several issues is not filed. Even if it were a defect it would be a read a if it were a defect it would be cured by its subsequent production. (Ghulam Hasan, J.)
GIRWAR SINGH v. CHANDIKA SINGH. 1945 O.
W.N. 40=1945 A.L.W. (C.C.) 40=1945 A.
W.R. (C.C.) 22=1945 O.A. (C.C.) 22=
A.I.R. 1945 Oudh 194.

of decree under S. 19, Madras Act (IV of 1938)-Appeal accompanied by copy of order directing amendment alone-Neither original decree nor amended decree produced-Appeal-If can be treated as one against amended decree. See MAD. AGRI. RELIEF ACT, S. 19-Appeal-Order directing amendment of decree. (1942) 2 M.L.J. 568

-O. 41, R. 1—Order under S. 47—Appeal filed without copy of formal order-If com-

petent. Mangray v. Sundar. [See Q.D. 1936-'40, Vol. I, Col. 1894] 15 Luck. 669.

O. 41, R. 1—Powers and duties of Court—Appeal filed without printed copies of of prior application for printed copies of the industrial Rules of Angelication for printed copies on ground of prior application having been dismissed for default—Dismissal of appeal for failure to produce copies—Propriety—Madras Civil Rules of Practice, R. 135.

An application for printed copies of the industrial application fo

An application for printed copies of the judgment in a suit having been dismissed by the C. P. CODE (1908), O. 41, R. 1.

trial Court on the ground of the printing charges not having been paid within 7 days after they were called for, the appellant preferred an appeal with a certified copy of the decretal order, and a manuscript certified copy of the judgment was also filed. Along with the appeal, the appellant filed an application for dispensing with the production of printed copies, undertaking to file them later. This was granted and the ap-peal was taken on file and numbered and notice went to the respondent. The appellant then applied to the trial Court for printed copies for being filed in the appeal, but his application was dismissed by the trial Court on the respondent's opposition on the ground that a second applica-tion for printed copies did not lie under the Civil Rules of practice. When the appeal was taken up for hearing, the appellant, represented his difficulty, but the appellate Court, instead of having the judgment printed in that Court, dismissed the appeal on the ground that the appellant had failed to fulfil his undertaking to file printed copies.

Held, (1) that there was nothing in the Civil Rules of practice prohibiting a second copy application, and that in any case the trial Court had power to restore the first copy application to file and grant copies; (2) that the appellate Court had power to order printing to be done in that Court and that O. 41, R. 1, clearly gave power to that Court to dispense with the production of a copy of the judgment, and in dismissing the appeal had shown utter disregard of its duty; (3) that the denial by the first Court of copies and the dismissal of the appeal by the appellate Court, amounted to a travesty of justice and a gross abuse of the Rules of Court. (Somayya, J.) Sheir Meera Saheb v. Mahomed Kyathi Saheb. 215 I.C. 43=I.L. R. (1944) Mad. 681=17 R.M. 147=56 L.W. 668=1943 M.W.N. 750=A.I.R. 1944 Mad. 90=(1943) 2 M.L.J. 517.

-O. 41, R. 1 and O. 3, Rr. 1 and 4-Presentation of appeal without vakalatnama owing to a bona fide mistake—Subsequent filing of vakalatnama after limitation-Appeal if rendered incompetent.

Where there has been a presentation of an appeal by an Advocate without a vakalatnama owing to some wrong impression that it has been already filed in the lower Court and the vakalatnama is filed immediately on the mistake being discovered but after the period of limitation for filing the appeal, it amounts only to a defect of procedure due to a bona fide mistake and is not procedure due to a vona hae mistake and is not so vital a defect as to render the appeal incompetent. The rectification could be permitted to be made under the discretionary power of the Court. (Koul and Misra, JJ.) Kodi Lal v. Ahmad Hasan. 20 Luck. 356=1945 O. A. (C.C.) 121=1945 A.L.W. (C.C.) 116=1945 O.W.N. 123=1945 A.W.R. (C.C.) 121=A.I.R. 1945 Oudh 200.

O. 41, R. 1 and O. 3, R. 1—Presentation of plaint or appeal by person other than plaintiff or appellant or their recognised pleader or agent-Validity.

A plaint or a memorandum of appeal duly signed by the plaintiff or appellant or their duly

appointed pleader or agent, can be validly presented by any person without a written authority from any one of them. O. 3, R. 1, C. P. Code, in terms refers only to appearances, applications and acts in or to any Court, as that term is used or understood in the Code, but the persons deputed by the Court to receive plaints or the boxes provided for that purpose cannot be held to be Crurts. (Harries, C.J. and Abdur Rahman, J.) BARKATE v. FEROZ KHAN. 216 I.C. 5=46 P.L.R. 96=A.I.R. 1944 Lah. 131.

O. 41, R. 1—Scope of. See C. P. Code, O. 3, R. 1 and O. 41, R. 1. 1940 O.W. N. 1253.

— O. 41, R. 2—Appeal—New ground— Leave to raise—Conditions. Under O. 41, R. 2, C. P. Code, the appellate

Court has no doubt authority to grant leave to urge a fresh ground. But such a ground must have been foreshadowed in the discussions in the lower Courts. There is no justification for an appellate Court to subject a party, after he has obtained a decree, to the brunt of a new attack on which he had never had notice during the hearing of the suit. Hence it is wrong to grant leave where the party concerned never raised the question in the pleadings nor made it any part of his case in the lower Court. (Dible, J.M. and Ross, A.M.) MAGSUDAN SINGH v. DATA RAI. 1944 A.W.R. (Rev.) 97=1944 R. D. 164=1944 A.L.J. (Supp.) 22.

O. 41, R. 4—Appeal by two co-owners of one—If causes abatement—Right of continue abased.

survivor to continue appeal.

The death of one of two joint owners during the pendency of an appeal by both of them does not prevent the appeal being prosecuted by the other. There is no rule that all joint owners must be parties to an appeal though they must be made parties to suits. (Broomfield and Macklin, JJ.) Shripad Balvant v. Nagukushaba. I.L.R. (1943) Bom. 143=210 I.C. 474=16 R.B. 215=45 Bom.L.R. 109=A.I.R. 1943 Bom. 301.

-O. 41, Rr. 4 and 33—Applicability and scope—Powers of appellate Court under.

The provisions of O. 41, Rr. 4 and 33 are wide and give the appellate Court ample powers to pass such orders, as it may deem just and proper and necessary, to do full justice having regard to all the circumstances of the case. But these powers must not be so applied as to disregard other provisions of law, such as the Court-Fees Act and the Limitation Act. Where there is a distinct and separate decree against some defendant or persons who have not chosen to appeal, neither R. 4 nor R. 33 should be applied. In the absence of good and sufficient reasons, a right of appeal should not, after it has lapsed, be handed out gratuitously to persons who have themselves neglected to avail of it, especially when they have not asked for it, and the interests of the case do not require it for the purpose of doing justice to the persons who have appealed. (Meredith and Shearer, 71.) MUSSAMAT JAGPATI KUER V. DAMRI SAHU HALKHORI RAM. 20 Pat. 811=198 I.C. 521 =14 R.P. 460=8 B.R. 421=23 P.L.T. 588 =A.I.R. 1942 Pat. 204.

C. P. CODE (1908), O. 41, R. 5.

-O. 41, R. 4—Applicability—Powers Court—O. 22, R. 3—If qualified by O. 41, R. 4—Power to vary decree in favour of dead person whose legal representative is not brought on re-

The provisions of O. 22, R. 3, C. P. Code, are not qualified by O. 41, R. 4, C. P. Code. O. 41, R. 4 does not apply to a case where all the plaintiffs and all the defendants are not alive, and it gives no power to a Court to vary or reverse a decree in favour of a person who is dead and whose legal representative has not been brought on the record. (Davis, C.J. and Weston, J.) GHULAM MAHOMED v. SHERDIL KHAN.
I.L.R. (1942) Kar. 435=205 I.C. 494=15
R.S. 151=A.I.R. 1942 Sind 157.

O. 41, Rr. 4 and 33—Combined effect of—Suit by co-sharers—Appeal—Death of some

-Legal representatives not brought on record —Appeal, if can be continued by others. Sheo Govind v. Zahur Mahomed. [See Q.D., 1936-'40, Vol. I, Col. 3305.] 16 Luck. 382=191 I. C. 234=13 R.O. 232=A.I.R. 1941 Oudh 155.

-O. 41, R. 4-If control or affect O. 22, R. 3—Appeal—Death of one appellant—Abatement-Decree in appeal-If can be made for benefit of deceased appellant. See C. P. CODE, O. 22, R. 3. 46 Bom.L.R. 737.

O. 41, Rr. 4 and 33—Powers of appellate Court—Claim for smaller amount than due—Decree—Appeal by defendant similarly entitled claiming larger amount—Absence of appeal or cross objections by plaintiff—Appeal allowed— Power to vary decree in favour of plaintiff.
Where a plaintiff claims a certain fixed amount

which is really less than what he is really entitled to, and pays court-fee only on that amount, and does not amend the plaint even when a defendant similarly entitled puts forward a claim for a larger amount, and accepts the decree without preferring an appeal or a memorandum of cross-objections in an appeal filed by such defendant, it is not open to the appellate Court while allowing the appeal in favour of the appealing defendant, to vary the decree in favour of the plaintiff also, or in favour of the other defendants who have not preferred appeals or cross-objections against the decree. (Somayya, J.) Arulayi v. Anthonimuthu Nadan. (1944) M.W.N. 539=A.I.R. 1945 Mad. 47=(1944) 2 M.L.J. 220.

-O. 41, R. 5—Applicability—Appeal from order refusing to set aside ex parte decree— Power to order stay of execution of decree— Order for stay—Execution sale held in spite of order-If illegal or without jurisdiction.

An appellate Court hearing an appeal from an order refusing to set aside an ex parte decree under O. 9, R. 3, C. P. Code, cannot order stay of execution of the decree itself. O. 41, R. 5, C. P. Code, does not apply and it is not therefore competent to the appellate Court to stay proceedings in execution of a decree merely by reason of an appeal having been preferred from the order of the trial Court refusing to set aside the decree passed ex parte. If the appellate Court in such a case orders stay of execution of the decree, it is wholly without

jurisdiction and is null and void. If execution is proceeded with and a sale takes place in spite of the illegal order of stay, the sale cannot be sale is valid and will stand. (Harries, C.J. and Dhavle, J.) Mohan Lal Mahto v. Shibdhari Chaube. 197 I.C. 651=14 R.P. 327=8 B. R. 273=22 Pat.L.T. 1018=A. I. R. 1942 Pat. 146.

-O. 41, R. 5-Order for stay-Effect of -Act done in contravention of such order-If

mullity.

When the Appellate Court passes an order for stay, the proceedings are not withdrawn from the lower Court. They still remain pending in that Court, only the matter which is covered by the stay order is kept in abeyance during the period of its operation. The lower Court does not lose jurisdiction over those proceedings. An order passed by a Court, or an act done by it, in contravention of the stay order would be an irregular one, may even be regarded as illegal, but it would only be an order passed or an act done in the illegal exercise of its jurisdiction, and so would not be a nullity. It will have to be set aside by appropriate proceedings. The Court aside by appropriate proceedings. which passed the order or did the act may itself recall it, or the Appellate Court may set it aside, but till recalled or set aside it cannot be totally ignored in another or other independent proceeding. (Mitter and Biswas, J.) Jatis Chandra Pal v. Kshirode Kumar, I.L.R. (1943) 1 Cal. 274=208 I.C. 309=16 R.C. 155=76 C.L.J. 83=47 C.W.N. 186=A.I.R. 1943 Cal. 319.

-O. 41, R. 5—Scope—Appeal from order refusing to set aside ex parte preliminary decree —Stay of passing final decree pending disposal—Power of Court—Inherent powers under S. 151—Exercise of See C. P. Cope, S. 151. (1943) 2 M.L.J. 557.
——O. 41, R. 5 and S. 47—Stay of execu-

tion in transferec Court pending appeal-Dismissal of appeal-Fresh execution application, necessary—Effect of decree being affirmed appeal—Merger—Limits to doctrine of.

Where an appeal is preferred against a decree during the pendency of its execution in the transferee Court and the execution is stayed and the appeal is subsequently dismissed and the order is discharged, it cannot be said that fresh applications for the transfer and execution are The execution in the transferee necessary. Court may be revived by a mere application to that Court. Where a decree is affirmed in appeal, the result is not to wipe out the decree of the trial Court for all purposes. Where the terms of the decree of the trial Court are not in any way affected by the appellate decree, the fiction of merger should not be carried so far as to lead to such a palpably absurd and inequitable result that the decree-holder should be put to the inconvenience of filing a fresh application in the Court which originally passed the decree, getting a fresh transfer certificate to another Court and pursuing the proceedings for execution in that Court. (Ghulam Hasan and Agarwal, JJ.) Saroop Narain v. Suraj Mohan Paral, 197 J C. 94=1941 O.L.R. 811=1941

C. P. CODE (1908), O. 41, R. 6.

O.W.N. 1186=1941 O.A. 909=1941 A.W. R. (Rev.) 1031=14 R.O. 261=A.I.R. 1942 Oudh 84.

-O. 41, R. 5-Stay order-When becomes effective-Attachment effected after order for stay but before communication to lower court-Validity.

An attachment effected by a court after an order staying execution is passed by the appellate court but before it is communicated to the executing court is valid. An order staying execution, in the nature of a prohibitory order to the lower court becomes effective only on com-munication. Till it is communicated by the superior court, steps in execution taken by the lower court must be treated as legally valid. The mere passing of a stay order, without communication, would not make the lower court functus officio (Sonayya, J.) Subbayya v. NAGARATHNAMMA, (1945) M.W.N. 256=A. I.R. 1945 Mad. 391=(1945) 2 M.L.J. 19.

-O. 41, R. 5-Stay-When takes effect-Sale after slay order but before communication-Validity.

A stay order passed by a higher Court takes effect from the date on which it is pronounced and not on the date on which it is communicated. A sale held despite the passing of such a stay order even though the same is not communicated is ultra vires. (Ghulam Hasan, J.) BAHADUR SINGH v. PIRTHIPAL SINGH. 17 Luck. 189=202 I.C. 273=15 R.O. 119=1941 A.W. R. (Rev.) 774=1941 O.W.N. 1044=A.I.R. 1942 Oudh 24.

O. 41, R. 5 (2) and (3) and S. 151— Dismissal of stay under R. 5 (2), O. 41—Subsequent stay under same rule without complying with sub-rule (3) of R. 5—Legality—Stay if could be justified under S. 151.

After an application for stay is dismissed on the merits under R. 5 (2) of O. 41, C. P. Code. It is not thereafter open to the same Court to pass an order for stay under the same provision of law if the provisions of sub-rule (3) of R. 5, are not complied with. Nor could any such order be justified as passed under S. 151, C. P. Code, because inherent powers could not be exercised in matters in which the statute has made express provision, namely, O. 41, R. 5 (3). (Bennett and Madelay, JI.) JITENDRA MOHAM
SINGH v. BINDBASNI KUNWAR. 1944 A.W.R.
(C.C.) 282=1944 O.W.N. 472=1944 O.A.
(C.C.) 282=A.I.R. 1945 Oudh 96.

O. 41, R. 6—Stay of sale—Duty of Court—Rule for stay discharged under R. 5—
Effect. Dhirendra Nath Roy v. Sallaj Kumar
Bose. [See Q.D., 1936-'40, Vol. I, Col. 3305.]
193 I.C. 109=13 R.C. 362.

O. 41, R. 6—Surety bond—Construction
Appeal to High Court from decree for more.

-Appeal to High Court from decree for money -Execution of decree allowed on plaintiff furnishing sureties—Bond undertaking to pay amounts payable to defendant in case of appeal going against plaintiff—If covers appeal to Privy Council.

A surety bond has to be strictly construed in favour of the surety; if therefore there is any ambiguity in the bond, it is to be construed in

favour of the surety as the benefit should be given to the surety. Pending an appeal to the High Court by the defendants from a decree for money, the plaintiff applied for execution of the trial Court's decree and furnished sureties under O. 41, R. 6, to the satisfaction of the trial Court for being allowed to execute the decree. The sureties executed a bond which, after referring to the appeal pending in the High Court (which was described by the number), inter alia, provided that if in the said appeal the decision went against the plaintiff, then he would pay into Court the entire amount payable to the defendant, but that if he failed to do so, the sureties and their legal representatives would be personally liable to pay the amount or balance due up to Rs. 40,000. The appeal was dismissed by the High Court which confirmed the trial Court's decree. But on appeal to the Privy Council, the decree was reversed and suit was dismissed. The defendant sought restitution under the decree of the Privy Council, and sought to make the sureties liable under the bond executed by them pending the appeal in the High Court.

Held, that the bond referred only to a particular appeal pending in the High Court and the sureties' liability could not be extended to a decision given by the Privy Council reversing the decree in that appeal.

Held further, that the words "by the appellate Court," in Form 3 of Appendix G, C. P. Code, would not necessarily cannote "by all further appellate Courts." (Divatia and Lokur, I.L.R. (1943) Bom. 636=208 I.C. 161=16 R.B. 108=45 Bom.L.R. 510=A.I.R. 1943 Bom. 243.

O. 41, R. 6 (2)—Appellate Court re-O. 41, K. 6 (2)—Appellate Court refusing to stay execution under R. 5 (1)—Power of trial Court to stay sale. JITENDRA NATH v. BHOLANATH. [See Q.D., 1936-'40, Vol. I, Col. 1903.] 73 C.L.J. 297.

O. 41, R. 6 (2)—Limited stay order—If can be granted. MURARI MOHAN v. KRISHNAPPA. [See Q.D., 1936-'40, Vol. I, Col. 3306.] 191 I.C. 144-45 C.W.N. 382 (1).

O. 41, R. 6 (2) and S. 115—Order under—Revision. JITENDRA NATH v. BHOLAMATH. [See Q.D., 1936-40, Vol. I, Col. 1903.] 73 C. L.J. 297.

Mortgage decree—Order for sale—Appeal against part of decree—Court taking security for further interest and staying sale—If justified—Court if

bound to stay only sale of part of property.

A mortgage decree for sale is not separable or divisible, and when the Court which has ordered the sale has taken security for further interest pending appeal from the decree, it is bound to stay the sale under O. 41, R. 6 (2), C. P. Code. The fact that the appeal is directed only against a part of the decree and not against the whole decree, is no ground for holding that the Court cannot stay the sale of the entire mortgaged property. (Chatterji and Meredith, JJ.) JUGAL PRASAD MISSIR v. JADUBANS NARAYAN MISSIR 193 I.C. 592=13 R. P. 610=22 Pat.L.T. 236=7 B.R. 568=A.I. R. 1941 Pat. 483.

## C. P. CODE (1908), O. 41, R. 14.

-O. 41, R. 16-Appeal-Order directing security to be furnished within a specified time-Security tendered in time-Rejection of appeal before testing-Propriety.

Where security for costs of appeal is ordered to be furnished within a particular time, it is a compliance with the order if it is tendered within the time; and the appeal cannot be rejected unless the security is tested and found insufficient, even though the testing is after the time fixed for furnishing it. The testing of the secu-Interest for furnishing 11. The testing of the security itself need not be within the time. (Happel, J.) RANGASWAMI NADAR v. PITCHAIMANI NADAR. 1941 M.W.N. 748=54 L.W. 234=A.I.R. 1942 Mad. 29=(1941) 2 M.L.J. 291.

O. 45, R. 7—Security for costs—Application for payment by successful respondent— Forum.

It is the convention of the Peshawar Court that the money lying in that Court as security for the costs of the respondent should be paid to the respondent on dismissal of the appeal with costs by the Privy Council, by the original Judge when the order in council is transmitted. (Mir Ahmad, J.C.) PARTAP SINGH v. HARKISHAN SINGH. 199 I.C. 46=14 R. Pesh. 78 =A.I.R. 1942 Pesh. 14.

-O. 41, R. 10 (2)-Order rejecting an appeal for failure to furnish security within the time ordered by Court-Not a decree. See time ordered by Court—Not a decree. See COURT-FEES ACT (AS AMENDED IN MADRAS), SCH. II, ART. 1. (1941) 2 M.L. J. 500 (F.B.).

—O. 41, R. 11 and Ss. 151, 152—Dismissal of appeal under O. 41, R. 11—Effect—Amendment of decree appealed against—Application for—Proper forum.

When the Chief Court dismisses an appeal under O. 41, R. 11, C. P. Code, it neither confirms nor varies the decree of the lower appeal.

firms nor varies the decree of the lower appellate Court but allows it to remain as it was. Hence when the decree in question is sought to be amended, it is the lower appellate Court which could amend the decree and hence an application for amendment of the decree should be made to that Court and not to the Chief Court. (Zia-ul Hasan and Yorke, JJ.) Tribeni Prasad Tewari v. Rukmin Devi. 16 Luck. 697=192 I.C. 269=13 R.O. 335=1941 A.W.R. (C. C.) 44=1941 O.L.R. 100=1941 A.L.W. 192 =1941 O.W.N. 1=1941 O.A. 8=A.I.R. 1941 Oudh 251.

O. 41, R. 14 (as amended in Peshawar)—Effect of—Appellant, if must implead as respondents all persons who were parties to original suit.

O. 41, R. 14, C. P. C., lays down the procedure as to the service of notice on the respondents and the proviso added by the Peshawar Court makes it possible for the appellate Court to dispense with the service of notice on those respondents who were not interested in the result of the appeal. Beyond this the rule does not go. It does not necessarily lead to the conclusion that all the persons who were parties to the suit should de rigueur be made parties to the appeal. No other provision of law denies to the appellant the right to implead only those persons whom he considers necessary and proper for the appeal. The appellant certainly runs a risk, but then he is to suffer if he commits a

C. P. CODE (1908), O. 41.

mistake. (Mir Ahmad, J.)Маномер Ац v. Аврик Gнагик. 203 I.C. 91=15 R. Pesh. 53=A.I.R. 1942 Pesh. 79.

-O. 41, R. 14, proviso-Only respondents to appeal ex parte in lower Court-Undesirable

to apply proviso.

When an appeal is filed and the only respondents to that appeal are persons who have allowed the proceedings in the trial Court to go ex parte, it is undesirable to apply the proviso to R. 14 of O. 41, C. P. Code, without an attempt to serve at least one of those respondents. (Wadsworth and Patanjali Sastri, JJ.)

Moidin Batcha Rowther v. Chidambaram
Pillat. 57 L.W. 582=1945 M.W.N. 20= A.I.R. 1945 Mad. 86=(1944) 2 M.L.J. 338. -O. 41, Rr. 18 and 19-Dismissal for failure to deposit process fees—When justified —Procedure to be followed—Opportunity to be hcard—Necessity.

An appeal can only be dismissed under R. 18 of O. 41, C. P. Code, for failure to deposit process fee, and it cannot be so dismissed unless a day has been fixed under R. 12 for hearing the appeal. Further the appeal cannot be dismissed without giving the appellant a hearing. It could be restored under R. 19. (Sathe, S.M. and Dible, J.M.) BHAGAWAT PRASAD SHUKUL v. MIDHAPAT. 1944 A.W.R. (Rev.) 168 (1)= 1944 R.D. 329.

-O. 41, Rr. 19 and 22 (4)—Restoration of appeal-Effect on order passed in crossobjections-Decision in cross-objections not set

aside—Rule of res judicata.

A restoration of an appeal which was dismissed for default, will not by itself have the effect of vacating the order passed in cross-objections adversely to the appellant in his absence. Unless steps are taken to set aside the order passed on cross-objections, that order continues to be binding on the parties and if in disposing of the cross-objections it was necessary for the Court to come to a decision on facts which would affect the merits of the appeal itself, the principle of res judicata would debar the appellant from reagitating the matter in appeal. (Harries, C.J. and Abdur Rahman, J.) HIRA NAND v. MAHBUB ILAHI. 213 I.C. 217=17 R.L. 27=46 P.L.R. 80=A.I.R. 1944 Lah. 174. -O. 41, R. 19—Scope and applicability

An application under O. 41, R. 19 is the only way in which an order under O. 41, R. 18 can be questioned, except possibly in revision. Under O. 41, R. 19 the Court is given no discretion. Where the necessary proof is forthcoming, the Court is bound to readmit the appeal. It is a condition of the Court production of the court is a condition of the Court production. condition of the Court readmitting the appeal that, the appellant's 'excuse' has to be 'proved and the Court has to be satisfied' that his excuse, constituted a 'sufficient cause' why he did not do what he ought to have done. ABraund, J.) RATAN LAL v. ZAHOOR-UL HASAN. 1942 A.L. **W**. 56.

Appeal—Dismissal for non-payment of costs of paper book-Jurisdiction to restore-Inherent powers.

C. P. CODE (1908), O. 41, R. 20

O. 41, R. 19, C. P. Code, does not exhaust the powers of the Court in a proper case to re admit an appeal or an application dismissed for default or want of prosecution. The Court has inherent powers under S. 151, C. P. Code, to make an order restoring an appeal or application for the ends of justice or to prevent an abuse of the process of the Court, without any reference to the period of limitation fixed for applications to re-admit appeals or to restore any other proceeding dismissed for default. Where an appeal is dismissed for non-prosecution, for failure of the appellant to deposit within time of the appeal the Court can under its inherent powers under S. 151, C. P. Code, restore the appeal. (Divatia, I.) NINGAPPA NARASINGAPPA V. CHANDRA JAKAPPA. 201 I.C. 653=15 R.B. 103=44 Bom.L.R. 367=A.I.R. 1942 Bom.

O. 41, R. 19—Scope—If exhaustive— Application for re-admission of appeal made beyond time limited-Inherent power of Court to

allow—S. 151 and O. 47.

The provisions of O. 41, R. 19, read with Art. 168, Limitation Act, are exhaustive; there is no inherent power remaining in the Court ex debito justitiae to allow appeals which are timebarred or to set aside an order of dismissal of an appeal under O. 41, R. 18. Neither S. 151, nor O. 47, can be invoked to set at nought the provisions of the code or any provision of the Limitation Act. An appeal dismissed for default under O. 41, R. 18, cannot therefore be re-admitted under R. 19, if the application for such restoration is not made within the time limited. The Court has no inherent power. (Davis, C.J. and O'Sullivan, J.) MAHO-MED SHAH 2. ABDUL JABAR MAHOMED YAKUB. I.L.R. (1943) Kar. 409=209 I.C. 326=A. I.R. 1943 Sind 132.

—O. 41, R. 20—Addition of necessary parties—Powers of Board—When to be exercised—Procedure to be followed where defect occurred in the lower Court. JHAGRU v. SHEODATTA. [See Q.D., 1936-'40, Vol. I, Col. 3306.] (1941) A.L.J. (Supp.) 15.

O. 41, R. 20—Addition of new party in appeal—De novo trial—Necessity.

Where though an apportunity was given to

Where though an opportunity was given to the plaintiff to add a person as defendant he did not avail himself of it, but later on in appeal made that person, a respondent, the new party should have an opportunity of putting forward his case before it could be decreed against him and hence there should be a remand for a de novo trial. (Harper, S.M. and Sathe, J.M.). RANDHIR SINGH v. MOOL CHAND. 1941 R.D. 422=1941 O.A. (Supp.) 486=1941 A.W.R. (Rev.) 555.

-O. 41, R. 20—Addition of party—Limits

on the power.

An additional respondent can no doubt be added under O. 41, R. 20, by the Court, but this should not be done merely in order to suit the convenience of a party or to enable it to get round limitation. (Sathe, S.M.) RAMDAS SHUKUL v. BALRAM SHUKUL. 1943 R.D. 484=1943 A.W.R. (Rev.) 315 (1).

-O. 41, R. 20—Addition of parties—Parties against whom right of appeal is barred by limitation.

Parties who have not been impleaded in appeal and against whom the right of appeal has become barred by limitation, cannot under O. 41, R. 20, C. P. Code, be made respondents to an appeal against the others. (Ghulam Hasan and Madeley, JJ.) RAMESHWAR v. AJODHIA PRASAD. 17 Luck. 175=195 I.C. 761=14 R. O. 117=1941 O.L.R. 620=1941 R.D. 752= 1941 O.A. 714=1941 A.W.R. (Rev.) 694= 1941 O.W.N. 998=A.I.R. 1941 Oudh 580. -O. 41, R. 20, O. 1, R. 10, Ss. 107 (2) and 151—Addition of respondent after limita-tion—Power of appellate Court—Limitation Act,

S. 5.
When once time for an appeal has run out, it is not possible for an appellant subsequently to implead those defendants who were not originally impleaded as respondents in the appeal. Meither O. 41, R. 20, nor O. 1, R. 10 read with S. 107, C. P. C., nor S. 151, C. P. C., nor S. 5 of the Limitation Act could be invoked by the appellant for the purpose. The power conferred on a Court of appeal by O. 41, R. 20, C. P. C., can be used in favour of that person alone who is interested in the result of the conferred on the conferred alone who is interested in the result of the appeal, and a defendant against whom the right of appeal has become barred is not a person so interested. What the appellate Court is not empowered to do under O. 41, R. 20, it cannot do under O. 1, R. 10, read with S. 107. The power to add parties to an appeal in certain circumstances is specially provided for in O. 41, R. 20, and this being so, this special provision alone can be invoked in this matter and not the general provision. Similarly S. 151, C. P. C. too cannot be invoked in such cases. This is a residuary section, and not an overriding provision of law. In other words, it comes into play only where no specific provision is made to meet an exigency that arises and cannot be relied upon to enable a court to disregard a clear provision of law and to perform an act which may otherwise be illegal. (Din Mahomed, Sale and Abdur Rahman, J.). Labhu Ram v. Ram Partap. I.L.R. (1945) Lah. 18=213 I.C. 278=17 R.L. 39=46 P.L.R. 148=A.I.R. 1944 Lah. 76 (F.B.).

-O. 41, Rr. 20 and 22—Cross-objection against person not party to appeal-Procedure -Limitation.

Where a respondent in an appeal proposes to file a memorandum of cross-objections against a person who is not a party to the appeal two distinct operations are necessary; he must first implead the person in question as a party under O. 41, R. 20, and then, he must put in his memorandum of cross-objections under R. 22 of O. 41. In order that he may succeed under R. 20, he must bring his application within the time allowed for filing an appeal against the person sought to be impleaded. Having succeeded in getting him impleaded, he must file his memorandum of objections within the period of

C. P. CODE (1908), O. 41, R. 20. 423=A.I.R. 1943 Mad. 609=(1943) 1 M.L. J. 429

-O. 41, R. 20—Interested in the result of the appeal-One of the holders of the decree not impleaded as respondent before limitation. Where one of the holders of a decree has not been impleaded as a respondent to an appeal and the time limited for appealing has expired, he is not 'interested in the result of the appeal' within the meaning of R. 20 of O. 41, and as such he cannot be added as a party later on. (Bennett and Ghulam Hasan, JJ.) TAJAMMUL HUSAIN KHAN v. Dy. Commissioner, Bara Banki. 211 I.C. 103 (2)=16 R.O. 208=1943 O.W.N. 385=19 Luck. 438=1943 A.W.R. (C.C.) 108=1943 O.A. (C.C.) 240=A.I.R. 1944 Oudh

-O. 41, R. 20—Parties in appeal—Addition-Conditions.

It is clear that under O. 41, R. 20, it is not necessary that every individual party should be impleaded in the appeal unless their impleadment would lead to the likelihood of their losing by the success of the appeal. (Sathe, S.M.) DHONE BARHAI v. GURU BUX SINGH. 1943 A.W.R. (Rev.) 313 (2)=1943 R. D. 475.

——O. 41, R. 20 and S. 151—Person against whom appeal has become time-barred—Addition of as respondent—Inherent power of Court.

It cannot be laid down as an inflexible rule that no person against whom the right of appeal has become time-barred can ever be added as a respondent under O. 41, R. 20. The question whether the interest of the respondent proposed to be added still survives in the appeal depends on the nature of the litigation, the decree passed, the subject-matter of the appeal, and the effect of the decision in appeal in his absence. Apart from this, the language of O. 41, R. 20, does not show that it is exclusive or exhaustive so as to deprive a Court of any inherent power which it may possess and can exercise in special circumstances and which has been saved by S. 151. The Courts have therefore inherent powers to add a party to an appeal even after the expiry of the period of limitation if they think fit to do so. (*Teja Singh, J.*) Munshi Ram v. Abdul Asiz. 212 I.C. 575=16 R.L. 306=45 P.L.R. 248=A.I.R. 1943 Lah. 252.

-O. 41, R. 20-Power of Court-Omission to implead necessary party to appealApplication after objection by respondent to implead—Power of Court to allow—Omission found
to be deliberate and wilful.

Two Hindu daughters brought a suit for a

declaration that two alienations made by their mother, the third defendant in favour of the second defendant who was the husband of the fourth defendant (the plaintiffs' sister) were not binding on the plaintiffs and the fourth defendant ant. The suit was dismissed. In appeal by the plaintiffs, the second and third defendants were not impleaded as respondents. The first defendant contended that the appeal was liable to be dismissed in limine in view of the omission to implead the second defendant. It was found limitation contemplated by R. 22. (Byers, J.) that the omission was deliberate and wilful, and Venkatapathi v. Veerayya. 210 I.C. 500= not due to any mistake. On an application by 16 R.M. 449=56 L.W. 277=1943 M.W.N.

after the objection was raised,

Held, that there was no jurisdiction to pass an order directing the impleading of the second derendant as a party respondent to the appeal.

(Pandrang Row, J.) RAMAMOHANA RAO v.
RAGHAVAMMA. 1941 M.W.N. 311=53 L.W.
392=(1941) 1 M.L.J. 471.

O. 41, R. 20—Scope and applicability.

O. 41, R. 20, is discretionary and not mandatory. The discretion must also be used subject to any rights which the party may have acquired owing to its non-impleadment. (Sathe, J.M.)
RAM DAYAL v. SHRIMATI DEVI. 1942 A.W.R. (Rev.) 26=1942 O.A. (Supp.) 26=1942 O. W.N. (B.R.) 15=1942 R.D. 15.

-O. 41, R. 21-Applicability-If limited to case of decree in appeal ex parte against restondent-Appeal dismissed—Observations judgment against respondent on some point-If

ground for application for restoration of appeal.
O. 41, R. 21, C. P. Code, which corresponds to O. 9, R. 13, C. P. Code, cannot be limited to cases in which a decree against the respond-ent has been passed in appeal, because the appeal may have other results than the passing of a decree against the respondent. But the rule is not wide enough to cover the case of an appeal which has been wholly dismissed, merely reason of some remarks which may be in the nature of obiter dicta and thus incapable of constituting a final decision of the matter discussed so as to be res judicata. (Rowland, J.) So as to be 75 martine. (Noted at 1) Sofi Lohar v. Maheshwar Prasad Narain Singh. 192 I.C. 211=13 R.P. 436=7 B.R. 329=21 Pat.L.T. 1082=A.I.R. 1941 Pat. 141.

41, R. 22—Applicability—Appeals Under Provincial Insolvency Act. JAIKRISHNA v. SAWATRAM. [See Q.D., 1936-'40, Vol. I, Col. 1919.] I.L.R. (1942) Nag. 156=201 I.C. 439=15 R.N. 47.

——O. 41, R. 22—Applicability—Case in

which only revision can be filed.

O. 41, R. 22, C.P.C., does not apply to cases in which only revision proceedings can be taken by either side. There is nothing in the code to entitle a respondent to present cross-objections to a petition for revision made by his opponent. v. Dryal Singh. A.I.R. 1945 Pesh. 34.

—O. 41, R. 22—Applicability—Revision

petition—Memorandum of cross-objections—Competency. LATCHANNA DORAVARU v. MALLU DORAVARU, [See Q.D., 1936-'40, Vol. I, Col. 3306.] 193 I.C. 175=13 R.M. 634=A.I.R. 1941 Mad. 55.

-0. R. 22—Construction—Partial 41. decree—Appeal by plaintiff—Respondent not filing cross-objection—Right to urge in support

of decree ground disallowed by trial Court.
Under O. 41, R. 22, it is open to a defendant-respondent who has not taken any crossobjection to the partial decree passed against him, to urge in opposition to the appeal of the plaintiff appellant a contention which, if accepted by the trial Court, would have necessitated the total dismissal of the suit. There is nothing in O. 41, R. 22 to prohibit the defendant from doing so. The appellate Court cannot, of course, set the decree aside because it has become final;

## C. P. CODE (1908), O. 41, R. 22.

but it is open to the defendant to repel the plaintiff's case for an increased decree by showing that he was not really entitled to a decree at all that he was not really entitled to a decree at all (Leach, C.J., Lakshmana Rao and Krishnaswami Ayyangar, JJ.): VENKATA RAO v. SATYANARAYYANA MURTHI. I.L.R. (1944) Mad. 147=209 I.C. 479=16 R.M. 322=56 L.W. 527=1943 M.W.N. 557=A.I.R. 1943 Mad. 698=(1943) 2 M.L.J. 336 (F.B.).

O. 41, R. 22—Cross-objections against correspondent—When admissible

co-respondent-When admissible.

Cross-objections would be admissible if the points raised in them directly or indirectly concern the appellant. In case they do, the fact that a co-respondent is also affected would not matter. But, on the other hand, if the cross-objections agitate questions which have nothing to do with the appellant and affect only a co-respondent or co-respondents they should not be admitted. (Mir Ahmad, J.C. and Mahomed Ibrahim, J.) KRISHAN LAL v. RAM CHAND. 206 I.C. 35=15 R. Pesh. 101=A.I.R. 1943 Pesh. 3.

-O. 41, R. 22-Cross-objection against corespondent—Permissibility.

In a partition suit every defendant is in the position of a plaintiff so far as his particular share is concerned. In an appeal from the decree in such a suit, it is therefore open to one co-respondent to make a cross-objection against another co-respondent. (Manohar Lall and Beever, JI.) KANIZ FATIMA v. JAI NARAIN.
23 Pat. 216=218 I.C. 443=18 R.P. 50=11
B.R. 329=1944 P.W.N. 556=A.I.R. 1944 Pat. 334.

-O. 41, R. 22—Cross-objections against correspondents-Permissibility.

In a memorandum of objections a respondent may raise a question that arises only between Min and a co-respondent. (Burn, J.) Gopala Menon v. Meenakshi Amma. 53 L.W. 57= 1941 M.W.N. 89=A.I.R. 1941 Mad. 402= (1941) 1 M.L.J. 106.

-O. 41, R. 22—Cross-objections against

co-respondent-Permissibility.

A respondent has no right to file cross-objections against a co-respondent when he has not appealed from the decree. (Harries, C.J. and Mehr Chand Mahajan, J.) JAN MAHOMED v. RAZDON. 218 I.C. 193=18 R.L. 14=46 P.L. R. 281=A.I.R. 1944 Lah. 433.

-O. 41, R. 22—Cross-objections against

co-respondent-Permissibility.

Although a cross-objection can usually be taken only against an appellant, such an objection may in certain cases be taken against a corespondent. One of the exceptions is when the appeal raises a question which cannot be properly disposed of in the absence of the corespondents. (Henderson, J.) Sris Chandra Nandi v. Md. Ibrahim Meah. 48 C.W.N. 484=79 C.L.J. 45=A.I.R. 1944 Cal. 383.

O. 41, R. 22—Cross-objections against correspondents—Permissibility.

Where a person filing a cross-objections hav-

Where a person filing a cross-objections having not chosen to file an appeal against some of the respondents seeks in the cross-appeal to agitate his rights against them only and his cross-objection has nothing to do with the appeal filed by the appellant, such a cross-objection

is not maintainable under R. 22 of O. 41, C.P. Code. (Bennett and Ghulam Hasan, JJ.) SARAN DAS v. RUDRA PRATAP NARAIN SINGH 20 Luck. 45=215 I.C. 295=17 R.O. 55= 1944 O.W.N. 50=1944 A.W.R. (C.C.) 22 =1944 O.A. (C.C.) 22=1944 A.L.W. 96= A.I.R. 1944 Oudh 130.

-O. 41, R. 22—Cross-objections—Filing before service of notice on respondent-Permissibility.

Although cross-objections cannot be presented after the expiry of one month from the date of the service of the notice on the respondent or his pleader, it is not necessary for the respondent to wait until the service is actually effected on him, as the right to submit his cross-objections accrues to him as soon as an order is made issuing notice of the date of hearing of the appeal to him. It is even open to him to appear in a Court of appeal on the date of hearing and present his objections there and then though not Rahman, JJ.) Labhu Ram v. Ram Partap.

I.L.R. (1945) Lah. 18=213 I.C. 278=17 R.

L. 39=46 P.L.R. 148=A.I.R. 1944 Lah.

76 (F.B.).
O. 41, R. 22—Cross-objections—Filing of—Omission of some respondents in list of parties—Defect, if fatal.

The fact that the list of parties attached to

the cross-objections does not contain the names of some of the respondents, is not fatal to the cross-objections. The cross-objections are always preferred to an appeal that is pending and the title of the cross-objections remains the same as that of the appeal. (Din Mahomed, Sale and Abdur Rahman, II.) LABHU RAM v. RAM PARTAP. I.L.R. (1945) Lah. 18=213 I.C. 278=17 R.L. 39=46 P.L.R. 148=A.I.R. 1944 Lah. 76 (F.B.).

-O. 41, R. 22—Cross-objections—Neces-

sity-Adverse finding favourable decree.

Where a suit for arrears of rent is dismissed but a finding is given as to amount of rent, there is no need to file a written cross-objection under O. 41, R. 22, C. P. Code, as cross-objections are filed only against decrees and not against individual findings. (Harper, S.M. and Sathe, J.M.) Mahadeo v. Ghurpattar. 1941 R.D. 299=1941 A.W.R. (Rev.) 401=1941 O.A.

(Supp.) 350.

O. 41, R. 22—Letters Patent Appeal from first appeal—Cross-objections—If can be filed. Khazanchi Shah v. Niaz Ali. [Sec Q.D., 1936-'40, Vol. I, Col. 1922.] 191 I.C. 417

=13 R.L. 291.

—0. 41, R. 22—Limitation—Appeal to High Court from original decree of Subordinate Court-Date of service of notice on respondent or pleader—Affixing to office of respondent's advocate—If due service. See C. P. Code, O. 3, R. 5. (1942) 1 M.L.J. 245.

attack lower Court's decision.

O. 41, R. 22—Right of respondent to occurr's decision.

O. 41, R. 22, C. P. Code, gives a respondent power only to support the decision of the lower Court and not to attack it, when he has not appealed against it or even put in cross-objections. | (Tek Chand and Blacker, JJ.) RAJA RAM

C. P. CODE (1908), O. 41, R. 22.

v. Lehna. 199 I.C. 700=14 R.L. 412=44 P.

L.R. 80=A.I.R. 1942 Lah. 87.

O. 41, R. 22 and Court-Fees Act,
S. 6-A (1) (as amended by U. P. Act XIX of 1938)—Right to file cross-objection, when there is no right to appeal—Appeal under S. 6-A (1), Court-Fees Act-Cross Objections if can be filed in.

Where the law confers no right on a party to file an appeal, it follows that he is precluded from filing cross-objections to the appeal. A defendant is not entitled to file any appeal under S. 6-A (1), Court-Fees Act as he is not a person who had been called upon to make good a deficiency in Court-fee. It follows that he is not entitled to file cross-objections in an appeal filed by the plaintiff under that section. (Bennett and Ghulam Hasan, JJ.) ABHLAKH BAKHSHI SINGH v. THAKUR PRASAD. 18 Luck. 256=200 I.C. 860=15 R.O. 46=1942 A.W.R. (C. C.) 258=1942 O.A. 286=1942 O.W.N. 382 =A.I.R. 1942 Oudh 391 (1).

-O. 41, R. 22-Scope-Cross-objections as against party to suit not made party to appeal—Permissibility.

O. 41, R. 22, C. P. Code, cannot be read as precluding a respondent from filing cross-objections directed not against the appellant but against a party to the suit who has not been made a party to the appeal. (Venkataramana Rao and Abdur Rahman, JJ.) KRISHNASWAMI NAIDU v. SECRETARY OF STATE. 208 I.C. 38=16 R.M. 148=55 L.W. 578=A.I.R. 1943 Mad. 15=(1942) 2 M.L.J. 431.

-O. 41, R. 22-Scope-Right of respondent to claim relief not granted by lower Court

without filing cross-objections.

Under O. 41, R. 22, C. P. Code, a respondent can support the decree granted to him on any ground decided against him in the Court below, but if he wants a decree for a higher right which he prayed in the plaint but which has not been granted to him, it is incumbent on him to file cross-objections. (Divatia and Macklin, II.) Secretary of State v. Chimanlal Jamna Das. I.L.R. (1942) Bom. 357=201 I.C. 420=15 R.B. 76=44 Bom.L.R. 295=A.I.R. 1942 Bom. 161.

-O. 41, R. 22 (4)—Applicability—Appeal -Rejection for non-payment of Court-fee-Effect-Cross-objections-If also fail.

It is quite clear that if an appeal is rejected for non-payment of Court-fee, the cross-objections preferred by the respondent must fail with the appeal; if the appeal is rejected there can be no respondent and no cross-objections. Such rejection for non-payment of Court-fee does not amount to withdrawal or dismissal for default under O. 41, R. 22 (4), C. P. Code. (Beaumont, C.J. and Sen, J.) KASHIRAM SENU. RANGLAL MOTILALSHET. I.L.R. (1941) Bom. 477=195 I.C. 894=14 R.B. 84=43 Bom.L.R. 475=A.I.R. 1941 Bom. 242.

-O. 41, R. 22 (4)—Maintainability of cross-objections on rejection of appeal for nonpayment of court-fee.

It is clear from the language of sub-rule (4) of R. 22 of O. 41, that the rejection of the appeal for failure to pay proper court-fee is not

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tantamount to the dismissal of the appeal for default as contemplated in the sub-rule and as such the cross-objections filed in such an apppeal such the cross-objections med in such an applicate are thereafter not maintainable. (Bennett and Ghulam Hasan, JJ.) Avadii Narain Singh 215 I.C. 37=17 R.O. 45=1943 O.A. (C.C.) 291=1943 A.W.R. (C.C.) 159=1943 O.W.N. 470=1943 A.L. W. 561=A.I.R. 1944 Oudh 57.

mand substantially one under R. 23.

Although the Court ordering the remand may have had no jurisdiction under R. 23 to pass the order under that rule, nevertheless if the order of remand as made purports to be an order under O. 41, R. 23 and appears to be in form and substance an order under that rule it is to be regarded as an order of remand passed under R. 23 and therefore subject to appeal. (Sen, J.)
PULIN CHANDRA v. SARAT CHANDRA. 72 C.L. J. 383.

-O. 41, R. 23 and S. 151-Appeal-Order of remand under inherent power.

An order of remand made not under O. 41, R. 23, C. P. C., but in the inherent jurisdiction of the Court is not appealable unless the order amounts to a decree in accordance with the definition in S. 2, C. P. Code. (Henderson, J.) GOPAL CHANDRA v. DWARIKA NATH. 195 I.C. 864=14 R.C. 144=74 C.L.J. 535=A.I.R. 1941 Cal. 446.

-O. 41, R. 23—Applicability—All ques-

tions decided.

R. 23 of O. 41, C. P. Code, applies where an appellate Court has reversed a decree and all the questions arising in the case have not been the questions arising in the case have not been decided by the Court of first instance. Where all the questions are decided by the Court of first instance R. 23 would have no application. (Ghulam Hasan and Agarwal, JI.) Noor Mohammad v. Suleman Khan. 203 I.C. 236 = 15 R.O. 166=1942 O.A. 430=1942 O.W. N. 520=1942 A.W.R. (C.C.) 322 (2)=A.I. R. 1943 Outh 35 O. 41, R. 23—Applicability—Preliminary point—Rejection of plaint under O. 7, R. 11.

A preliminary point is one which when determined in favour of the plaintiff permits the progress of the suit but when determined against him concludes the suit. The preliminary points may arise before or after admission of the plaint, In either case if the decision on the preliminary point is against the plaintiff that would stop the further progress of the suit so as to compel the Court to dispose of the suit finally without deciding the merits of the controversy. An order rejecting a plaint under O. 7, R. 11, C. P. Code, has the force of a decree under S. 2 (2) and the rejection of the plaint brings about the disposal of the suit. When an appeal is preferred against such an order, and the appellate Court sets it aside, it has to remand the case for the trial of the other issues arising in the case and such an order of remand could not be made under any provision of law except under O. 41, R. 23, C. P. Code and such an order is appelable under O. 43, R. 1 (u). (Niyogi, J.) MADHAORAO GANESH v. KESHAO GAJANAN. I.

C. P. CODE (1908), O. 41, R. 23.

L.R. (1941) Nag. 629=197 I.C. 43=14 R. N. 136=1941 N.L.J. 410=A.I.R. 1941 Nag. 304.

-O. 41, R. 23 (as amended in Oudh) -Construction-'Have not been decided'. LACH-MIN v. BHAIRON BAKHSH SINGH. [See Q.D., 1936-'40, Vol. I, Col. 1925.] 16 Luck. 65.

-O. 41, R. 23 (Allahabad)-Construction-'Have not been decided by it', meaning of Remand for retrial after reframing of issue— If falls under R. 23—Appeal—Inference of re-mand under R. 23 in preference to remand under

inherent jurisdiction.

The words have not been decided by it in O. 41, R. 23, C. P. Code, as amended by the Allahabad High Court must be taken to mean 'have not been properly decided by it'. Where an appellate Court sets aside a decree dismissing a suit on the ground that an issue had not been properly tried by the trial Court and remands that issue for retrial after reframing it, it is a remand under the Code and not under the Courts inherent jurisdiction and is hence appealable, Ordinarily a remand under O. 41, R. 23 will be readily inferred in preference to an assumption being made that the remand was under the inherent jurisdiction. (Braund, J.) RAM PRASAD SINGH v. SABZ ALI SHAH. 1942 A.L.W. 48. -O. 41, R. 23-Decision on merits-Order of remand—Appeal. Sec C. P. Code, S. 151 AND O. 41, R. 23. 197 I.C. 13.

-O. 41, Rr. 23, 25 and 28-Duty of appellate Court to indicate provision of law under

which the remand is made.

It is not proper 'for an appellate Court to pass a vague order that the decree is set aside and the suit remanded for fiesh decision after allowing both parties to lead evidence. The Courts of first appeal should not remand suits to trial Courts without giving any indication as to the provision of law under the Civil Procedure Code, under which they are passing their order or without going any clear direction to the trial Court as to what it has to do. (Dible, S. M. and Acton, A.M.) AJODHIA PRASAD V. NAWAL SINGH. 1945 R.D. 558=1945 A.W.R. Singh. 1945 (Rev.) 263.

-O. 41, R. 23 (Allahabad) and Court-Fees Act, S. 13-Ex parte decree after striking off defence—No finding recorded on issues— Reversal in appeal—Remand, if one under O. 41,

R. 23—Refund of Court-fee.

Where the trial Court after striking off the defence for non-compliance with an order awarding costs to plaintiff, passes an ex parte decree without recording any finding on the questions arising in the case and the decree is set aside in appeal and the suit is remanded to trial Court for rehearing, the remand is one under O. 41, R. 23 (Allahabad)—and the appellate is O. 41, K. 23 (Allahabad)—and the appellate is entitled to refund of Court-fees paid in appeal by him, under S. 13 of the Court-Fees Act. (Ganga Nath, I.) SHIAM SUNDER V. VENNEY PRAKASH. I.L.R. (1942) All. 84=1941 A. W.R. (H.C.) 301=1941 A.L.W. 976=1941 O.A. (Supp.) 843=1941 A.L.J. 604.

—O. 41, R. 23 (Oudh)—If confined to questions raised by parties in the pleading in the trial Court

trial Court.

R. 23 of O. 41, C. P. Code, as framed by the Oudh Chief Court refers only to questions which were raised by the parties on their pleadings in the trial Court and not to questions which may be raised subsequently at the stage of the appeal from any cause whatsoever. The intention of from any cause whatsoever. The intention of the rule is to confine its scope only to such questions. (Ghulam Hasan and Madeley, JJ.)

MAHABIR SINGH v. PITAMBAR DAS. 19 Luck.
411=211 I.C. 396=16 R.O. 231=1944 A.W.
R. (C.C.) 1=1944 O.A. (C.C.) 1=1943
O.W.N. 537=A.I.R. 1944 Oudh 117.

O. 41, R. 23 and S. 151—Inherent power of remand—If exists—When could be re-

sorted to. Sheolal v. Jugal Kishore. [See Q.D., 1936-'40, Vol. I, Col. 1926.] 191 I.C. 566=13 R.N. 203.

**-O. 41, R. 23 and O. 7, R. 11**—Order dismissing suit after deciding preliminary issue as to its maintainability-Nature of-Remand by appellate Court for further proceedings—Appeal. Sec C. P. Code, O. 7, R. 11 AND O. 41, R. 23. 44 P.L.R. 236.

-O. 41, R. 23—Order of remand—When not justified.

An order of remand is not justified when the net result of the order is to allow an unsuccessful litigant to fish out evidence in order to prove his case and make up the lacuna which exists. (Almond, J.C. and Mir Ahmad, J.) Mt. Motal v. Mohd. Akbar Khan. 193 I.C. 871=13 R. Pesh. 70=A.I.R. 1941 Pesh. 28.

-O. 41, R. 23—Order under—If revisable. See C. P. Code, S. 115 and O. 41, R. 23. 1942 O.W.N. 236.

-O. 41, Rr. 23 and 25-Order under R. 23—Conversion into one under R. 25.

An order which is really passed under R. 23 of O. 41, C. P. Code, whether it is proper or not, cannot after it had become final be treated as one under R. 25 of that order. (Shirreff, S.M. and Sathe, J.M.) MAITHYLI SHARAN CHURTA IRAN GUPTA V. RAM GUPTA. 1942 O.A. (Supp.) 71 =1942 O.W.N. (B.R.) 112=1942 A.W.R. (Rev.) 65=1942 R.D. 144.

O. 41, R. 23—Preliminary point—Meaning.

A preliminary point does not necessarily mean a point collateral to the merits of the case but would include any point whether of fact or law, the decision on which renders the decision of other issues arising in the case unnecessary.
(Bhide, J.) Khuda Bakhsh v. Ata Mohammad. 201 I.C. 159=15 R.L. 33=44 P.L.R. 133=A.I.R. 1942 Lah. 135.

O. 41, R. 23—Remand—Clear findings on remitted issues-Course open to appellate

Court.

Where an appellate Court remitted two issues to the lower Court for trial and that Court had given clear findings on those issues, it is open to the appellate Court to differ from those findings and to set aside the order of the trial Court, but a remand of the case back is not justified.

(Harper, S.M. and Sathe, J.M.) TULSI RAM v.

DHUPAN RAI. 1941 O.A. (Supp.) 208=1941

A.W.R. (Rev.) 259=1941 R.D. 315.

O. 41, R. 23 and O. 43, R. 1 (u)

## C. P. CODE (1908), O. 41, R. 23.

Remand contemplated by O. 41, R. 23—Remand under inherent powers—Appeal—Competency.
R. 23 of O. 41, C. P. Code, contemplates the case

of a remand where the lower appellate Court has reversed the decree of the trial Court and all questions arising in the case have not been decided by the trial Court. Where, however, although the lower appellate Court reverses the decree all questions arising in the case have been decided by the trial Court and no question is left undecided, then the remand is not under R. 23 of O. 41, but under the inherent powers of the Court. In such a case no appeal would lie against the order of remand. (Thomas, C.J. and Ghulam Hasan, J.) JAGADISH SINGH V. KATESHAR SINGH. 1944 A.W.R. (C.C.) 272=1944 O.A. (C.C.) 272=A.I.R. 1945 Oudh

-O. 41, Rr. 23 and 25 and S. 105 (1)-Remand on appeal from preliminary decree-If can be treated as one under R. 25 of O. 41-Agitation in appeal against final decree.

Where an appellate Court varies the shares fixed by the trial Court in a preliminary decree for partition of a holding and remands the case to the trial Court, the order is one under rule 23 of O. 41 and cannot be converted into one under R. 25 of that order. Where under the Agra Tenancy Act under which the suit was filed no appeal was allowed against the order of remand. Held, that it could be agitated in an appeal against the final decree of the appellate Court under the provisions of S. 105 (1), C. P. Code. (Sathe, S.M.) CHABU v. MAHIPAT. 1944 A.W. R. (Rev.) 12=1944 R.D. 39.

-O. 41, R. 25-Remand order directing fresh findings on same evidence-Legality.

An order of remand directing a Court which has given its finding on merits on a particular issue to reconsider that finding on the same evidence offends against principles of law. (Sathe, S.M. and Ross, J.M.) Janki v. Mst. Bilaso. 1944 R.D. 106=1944 A.W.R. (Rev.) 36.

O. 41, R. 23—Remand order—Failure to appeal—Effect of—If bars objection to jurisdiction of trial Court.

Where the appellant was not aggrieved by and therefore had not appealed against an order of remand by the lower appellate Court it will be unjust to hold that he is precluded from raising later on when the matter comes up in second appeal, after remand, the question of the juris-(Leach, C.J., Wadsdiction of the trial Court. vorth and Somaya, JJ.) Secretary of State v. Jagannadham. I.L.R. (1941) Mad. 850 = 196 I.C. 353=14 R.M. 289=1941 M.W.N. 644=54 L.W. 7=A.I.R. 1941 Mad. 530= (1941) 2 M I. I.A. (P. P.) (1941) 2 M.L.J. 47 (F.B.).

-O. 41, R. 23 and S. 151-Remand, power of Opportunity to produce evidence to party failing to discharge burden on him—Duty,

if any on Court to call for documents.

There is no law which can justify an appellate Court in remanding the case to the trial Court in order that a party who, in the opinion of the appellate Court—right or wrong—has failed to discharge the burden that lay on him, may be enabled to have another opportunity of producing evidence. There is also no law which casts

on the trial Court the duty to call for certain documents in order that a party's title may be established. (Verma, J.) HIRA LAL V. RATAN LAL. I.L.R. (1944) A. 594=218 I.C. 130 =18 R.A. 1=1944 A.L.W. 367=1944 A.W. R. (H.C.) 192=1944 O.A. (H.C.) 192=A. I.R. 1944 All. 293.

O. 41, R. 23—Remand under—Construction of order. Mathura Prasad v. Sita Ram. [See Q.D., 1936-'40, Vol. I, Col. 1927.] 15 Luck. 686.

-O. 41, R. 23-Scope-If exhaustive-

Inherent powers of remand.

The powers of the appellate Court as regards remand are not restricted to the cases specified in O. 41, R. 23. It has inherent power to remand in case of error, omission or irregularity. But whether justice does require a Court to invoke its inherent jurisdiction has to be determined by that Court with reference to the particular facts of the case and the rule of law that a Court cannot invoke an inherent jurisdiction where there is a provision in the Code which, if applied, will meet the justice of the case. (Lobo and O'Sullivan, JJ.) TIKARAM KASHIRAM v. GANESHMAL JOGUMAL I.L.R. (1943) Kar. 429=214 I.C. 256=17 R.S. 23=A.I.R. 1944 Sind 73.

O. 41, R. 23-A and O. 43, R. 1 (u) (as amended by Lahore High Court)—Intra

vires.

R. 23-A of O. 41, made by the Lahore High Court under S. 122, C. P. Code, as well as the amendment made in R. 1 (u) of O. 43, providing an appeal from an order passed under R. 23-A of O. 41, are intra vires the High Court. R. 23-A of O. 41, as amended, does not offend against S. 128, C. P. Code; it is not in any way inconsistent with S. 151 or any other provision in the body of the Code. S. 104 permits appeals not only from orders mentioned in R. (1) of O. 43 as originally enacted but also from rules as might thereafter be added by the High Court under S. 122, after following the procedure laid down in Part X. Accordingly, if the High Court adds a rule to O. 43, making an order appealable, which was not appealable formerly, such rules is automatically covered by S. 104. (Tek Chand and Beckett, JJ.) KISHAN Singh v. Bachan Singh I.L.R. (1943) Lah. 569=201 I.C. 667=15 R.L. 68=44 P. L.R. 253=A.I.R. 1942 Lah. 201.

O. 41, R. 23-A, 25 and 27-Trial Judge not framing proper issues and wrongly excluding evidence—Order of remand under R. 23-A

Propriety.

If the appellate Court finds that the trial Judge has not framed proper issues and has wrongly excluded certain documentary evidence, it should frame additional issues and remand the case under R. 25 and at the same time direct the trial Judge under R. 27 to admit the exthe trial judge under R. 21 to admit the excluded evidence. It should not remand the case under R. 23-A for rehearing and re-decision. (Tek Chand and Beckett, II.) KISHAN SINGH V. BACHAN SINGH. I.L.R. (1943) Lah. 569 = 201 I.C. 667=15 R.L. 68=44 P.L.R. 253 =A.I.R. 1942 Lah. 201.

## C. P. CODE (1908), O. 41, R. 27.

the High Court when remitting certain other issues to lower Court—If binding on the Bench hearing the matter on receipt of the findings.

Where a Bench of the High Court hears an

appeal and arrives at certain findings on some issues and remits certain other issues to the lower Court for recording its findings, when the matter comes up either before the same Bench or a different Bench after the receipt of the findings from the lower Court, the Bench which hears the matter is not bound by the findings arrived at by the former Bench; but it is entitled in its discretion if it so desires, not to reconsider those findings. (Allsop, Ismail and Verma, JJ.) CITAULI v. MST. MEGHOO. 1945 A.L.J. 316=1945 O.W.N. (H.C.) 251=1945 A.W.R. (H.C.) 244=1945 A.L. W. 272=A.I.R. 1945 All. 268 (F.B.).

-O. 41, R. 25-Remand under-Appeal Where there is a remand by the appellate Court for a decision on certain issues which had not been decided, no appeal lies from such an order of remand. (Davies.) Hamira v. Kishan Chandra. 1941 A.M.L.J. 24.

-0. 41, R. 27-Additional evidence-Admissibility - Conditions - Document being

above suspicion, if a sufficient ground by itself.

Before additional evidence can be admitted in an appellate Court it must be shown that it falls within the purview of O. 41, R. 27, C. P. Code. The mere fact that a document is above suspicion is not enough to justify its admission in an appellate Court. (Shirreff, S.M. and Sathe, I.M.) CHOKAT SINGH v. DAYA KHATIK. 1942 O.A. (Supp.) 199=1942 R.D. 405= 1942 O.W.N. (B.R.) 316=1942 A.W.R. (Rev.) 179.

Additional evidence—Admissibility in appeal— Evidence not tendered in lower Court and not required by appellate Court to enable it to pronounce judgment.

Where the evidence sought to be adduced in appeal was never tendered to the lower Court, and there is no reason why such evidence should not have been adduced in the Court below, though the parties must have been aware of its existence and could, with the exercise of dili-gence, have produced and proved it before the lower Court, the appellate Court will not admit the additional evidence in appeal especially when it cannot possibly be said that it is necessary to enable it to pronounce judgment and when it can decide the point on the materials before it. (Harries, C.J. and Manohar Lall, J.) SHIVA
PRASAD SINGH v. SRISCHANDRA NANDI. 22 Pat.
220=210 I.C. 426=16 R.P. 147=10 B.R.
259=A.I.R. 1943 Pat. 327.

Admissibility in second appeal.

Additional evidence will not be admitted in in second appeal when no reasons are shown why that evidence was not, or could not be produced at the trial. (Tek Chand, I.) Subh RAM v. RAMKISHAN. 210 I.C. 262=16 R.L. 161=45 P.L.R. 284=A.I.R. 1943 Lab 265.

-O. 41, R. 27—Additional evidence— Admission in appeal—Party purposely obstaining from examining witness in trial Court—If can be permitted to examine witnesses in appeal

-Power of appellate Court.
O. 41, R. 27, was not intended to permit a plaintiff to examine witnesses whom he could and should have examined in the trial Court. The words of O. 41, R. 27, are, no doubt, wide, but they are extremely limited in their scope. The mere desire on the part of the Judge of the appellate Court to ease his conscience does not entitle him to put a party in a privileged position and to allow him to call witnesses and to have evidence recorded when he should have called those witnesses and could have had that eviderce recorded in the lower Court if he had not been remiss or carless. Far less should he be privileged when such party has purposely abstained from bringing upon the record evidence which, in his opinion or in the opinion of his legal advisers, would not, at that stage of the case have helped his suit. (Davis, C.J. and O'Sullivan, J.) AZIM WADHO v. ALINAWAZ GHULAM HYDER, I.L.R. (1943) Kar. 415=217 I.C. 4=16 R.S. 213=A.I.R. 1944 Sind 57.

-O. 41, R. 27—Additional evidence in —Admission—Recording of reasons appeal—Admission—Recording

Necessity.

Under O. 41, R. 27, C. P. Code, additional evidence can no doubt be admitted by an appellate Court but this can be done only under certain restrictions and whenever additional evidence is admitted the Court has to record the reasons for its admission. A failure to so record would render the evidence admitted liable to be excluded. (Sathe, J.M.) CHOKAT SINGH v. CHULHI. 1942 O.A. (Supp.) 376 (2)=1942 A.W.R. (Rev.) 350 (2)=1942 O.W. N. (B.R.) 564=1942 R.D. 692.

-O. 41, R. 27—Additional evidence—Ad-

missibility—Refusal—Grounds.

Where certain documents were neither produced in the trial Court nor were they refused admission, and were not necessary to enable the Court to decide the case, a refusal to admit them by the appellate Court is justified. (Sathe, J. M.) CHHATTARDHARI AHIR v. GANESH AHIR. 1942 O.W.N. (B.R.) 287=1942 O. A. (Supp.) 195=1942 R.D. 376=1942 A.W.R. (Rev.) 175. -O. 41, R. 27—Additional evidence—Dis-

entitling circumstances.

Where the plaintiff knew clearly what he had to prove and chose to prove it in a particular manner and took the chance of a judgment in his favour on that evidence, he will not be allowed by the appellate Court to produce the evidence which he could have produced at the trial. (Ba U and Shaw, JI.) FATIMA BEE BEE v. OFFICIAL TRUSTEE. 198 I.C. 564=14 R. R. 207=A.I.R. 1941 Rang. 344.

Filling up lacuna.

Where the non-production of the documents in the lower Courts was due either to the negligence of the party or his counsel, it is neither desirable nor proper to allow the appellant to

## C. P. CODE (1908), O. 41, R. 27.

fill up the lacuna in the evidence produced and to patch up the weak points of the case, by permitting him to produce additional evidence in appeal. (Yorke and Ghulam Hasan, II.) Munia v. Manohar Lal. 194 I.C. 161=1941 A.W.R. (Rev.) 395=1941 R.D. 359=13 R. O. 558=1941 O.L.R. 428=1941 O.A. 422= 1941 A.L.W. 492=1941 O.W.N. 648=A.I. R. 1941 Oudh 429.

O. 41, R. 27—Additional evidence second appeal—When may not be allowed.

Where the additional evidence was within the knowledge of the appellant all along and he has not explained why he did not produce it at the trial, he cannot be allowed in second appeal to fill up gaps in his case by calling such evidence. Obviously O. 41, R. 27, C. P. Code, does not apply to such a case. (Tek Chand and Din Mahomed, JJ.) JAWALA SINGH v. JAGDISH SINGH. 195 I.C. 244=14 R.L. 49=43 P.L., R. 41=A.I.R. 1941 Lah. 144.

O. 41, R. 27—Admission of additional evidence in second appeal—Document purposely withheld to avoid penalty under Stamp Act—Subsequent validation of document—Document if admitted likely to make applicant succeed in the case—Considerations if sufficient for its being

admitted.

Where the reasons given by a party for failing to produce the document in question in trial Court were false, and deliberately false, the fact that the document, if admitted, would go far to prove that party's case and the fact that since the decision of the lower appellate Court the document had been validated by the payment of stamp duty and penalty cannot prevail against the consideration that the document was deliberately withheld in order to avoid penalties and possible prosecution, and that false evidence was submitted in respect of the nonproduction of the document at an earlier stage and also false evidence in the suit regarding the dates on which the debts were incurred-false evidence which would have been unnecessary had the document been produced. Under those circumstances the document sought to be admitted in the lower appellate Court and refused by it was also refused to be admitted in second appeal. (Grille, J.) GANESHPRASAD v. MST. RAMBAT BAI, I.L.R. (1942) Nag. 369=201 I.C. 550=15 R.N. 52=1942 N.L.J. 248= A.I.R. 1942 Nag. 92.

o. 41, R. 27—Application for admission of additional evidence—Proper disposal.

When an application for the admission of additional evidence in appeal is made, it is incumbent on the appellate Court to pass definite orders either admitting or rejecting the addi-tional evidence tendered. An order of a routine nature by the clerk that the papers will remain with the file is altogether insufficient to dispose of the application. (Shirreff S.M. and Sathe, J.M.) CHONHAR KALWAR v. MADHO PRASAD. 1942 A.W.R. (Rev.) 353=1942 O. A. (Supp.) 379=1942 O.W.N. (B.R.) 577=1942 R.D. 705.

-O. 41, R. 27—Construction—Strict construction.

The words of O. 41, R. 27, are wide; but they should be strictly interpreted, i.e., in accordance with the spirit and intention of the rule. (Davis, C.J. and O'Sullivan, J.) ASIM WADHO V. ALINAWAZ GHULAM HYDER. I.L.R. (1943) Kar. 415=217 I.C. 4=16 R.S. 213=A.I.R.

1944 Sind 57.
O. 41, R. 27—Documents not received evidence-Formal order giving reasons-If ne-

cessarv.

The appellate Court need not record a formal order giving reasons for not taking in documents. The law requires such an order only when documents rejected by the trial Court are received in evidence by the appellate Court. (R.C. Mitter, Khundhar and Pal, JJ.) BIBHABATI DEVI V. RAMENDRA NARAYAN ROY. 202 I. C. 551=15 R.C. 355=47 C.W.N. 9=A.I.R. 1942 Cal. 498 (S.B.).

-O. 41, R. 27-Document for which there was no occasion to produce—Admissibility

in second appeal.

A document for the production of which no occasion arose in the trial Court can be admitted in second appeal under O. 41, R. 27, C. P. Code, when it is considered that its production and admission is necessary to enable the second appellate Court to pronounce judgment. (Shirreff S.M. and Sathe, J.M.) MST. KHUSHALO V. CHUNNILAL. 1942 R. D. 723=1942 O. A. (Supp.) 404=1942 O.W.N. (B.R.) 595=1942 A.W.R. (Rev.) 378.

-O. 41, R. 27—Grounds for admission—

Sufficiency.

The fact that the documents in question were above suspicion and that the opposite side could not adduce any valid reasons for their not being admitted, are not sufficient grounds to justify their admission under O. 41, R. 27, C. P. Code. (Sathe, J.M.) RAM BADH TEWARI V. RAM PRASAD SINGH. 1942 O.W.N. (B.R.) 126=1942 O.A. (Supp.) 86 (2)=1942 A.W.R. (Rev.) 80 (2)=1942 R.D. 170 (2).

O. 41, R. 27—Order permitting appellant to adduce additional evidence on bayment

lant to adduce additional evidence on payment of costs—Respondent's counsel accepting costs behind his back—Respondent, if precluded from

contesting order in revision.

Where an appellant is permitted to adduce additional evidence on payment of costs to respondent who instructs the filing of a revision application against the order, the acceptance of costs by a counsel for the respondent behind his back does not preclude the respondent from contesting the order in revision. The respondent is not, however, entitled to retain the costs paid to his counsel. (Puranik, J.) Seth KunJILAL v. SHANKAR NANURAM. I.L.R. (1943)
Nag. 492=211 I.C. 37=16 R.N. 171=1943
N.L.J. 418=A.I.R. 1943 Nag. 289.

O. 41, R. 27—Powers of appellate
Court—Admission of additional evidence—Principles

ciples.

The provisions of O. 41, R. 27, are clearly not intended to allow a litigant who has been unsuccessful in the trial Court to patch up the weak points of his case and to fill up omission in the Court of appeal. The powers given by O. 41, R. 27, are to be used sparingly and

## C. P. CODE (1908), O. 41, R. 27.

caution has to be exercised in admitting new evidence. The rules cannot obviously reasonably be invoked in a case in which a party has kept back his evidence which he should have produced at the proper time, when the conduct of such party, in this respect, has been found to be reprehensible. (Lobo and O'Sullivan, IJ.) TIKARAM KASHIRAM v. GANESHMAL JOGUMAL. I.L.R. (1943) Kar. 429=214 I. C. 256=17 R.S. 23=A.I.R. 1944 Sind 73.

-O. 41, R. 27-Power of Court-Additional evidence-When to be admitted-Party failing to produce necessary evidence in trial Court-Additional evidence in appeal to fill up gaps—Admissibility. Assya UMMA v. Moossa. [See Q.D., 1936-40, Vol. I, Col. 1937.] 194
I.C. 816=14 R.M. 91.

——O. 41, R. 27—Scope—Additional evidence—Procedure—Setting aside of judgment of trial Court before taking additional evidence—International evidence in appear to in up appear to in up

If justified.
O. 41, R. 27, while it permits the admission of additional evidence in appeal, does not contemplate the setting aside of the judgment of the trial Court before that additional evidence has been recorded. It contemplates the decision of the appeal after that additional evidence has been recorded and in the light of that additional evidence. (Davis, C.J. and O'Sullivan, J.) Azim Wadho v. Alinawaz Ghulam Hyder. I.L.R. (1943) Kar. 415=217 I.C. 4=16 R.S. 213=A.I.R. 1944 Sind 57. ALINAWAZ GHULAM

Additional evidence in appeal—When to be

admitted.

It is only where an appellate Court requires additional evidence to enable it to pronounce judgment or for any other sufficient cause that O. 41, R. 27 (1) (b), C. P. Code, applies so as to justify the admission of additional evidence in appeal. When the fresh document admitted was one which the party could have put in evidence in the trial Court and there is nothing to suggest that the appellate Court found it necessary to admit the document in order to enable it to decide the case properly, the admission of such a document cannot be justified, as no case would arise in such a case for admitting it in appeal. (Sir John\_Beaumont.) CHATURBHUJ SINGH v. GOBIND PRASAD SINGH. 50 C.W.N. 2=1945 P.W.N. 466=1945 M.W.N. 592=(1945) 2 M.L.J. 519 (P.C.),

-0. 41, R. 27 (1) (b) (All.)—Applicability-Conditions.

According to sub-clause (b) of R. 27 (1) of O. 41, C. P. Code, it is obligatory on the party seeking, to produce additional evidence in appeal to show that the evidence sought to be produced after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made (Bennett and Ghulam Hasan, JJ.) Gokhul Prasad v. Mahader. 1941 O.W.N. 643=1941 O.A. 412=194 I.C. 195=13 R.O. 563=1941 O.L.R. 425=1941 A.L.W. 520=1941 A.W.R. (C.C.) 166=A.I.R. 1941 Oudh 341.

——O. 41, R. 27 (1) (b) (Madras)—Discretion—Exercise of—Additional evidence admitted for reason of the nature contemplated by rule-Propriety.

Where an appellate Court admits additional evidence in appeal and sets out reasons which are of the nature described in R. 27 (1) (b) of O. 41, C. P. Code, (Madras), it cannot be said that the discretion has not been exercised judicially. (Horwill, J.) SATYARAO v. VENKATARATNAM. 1945 M.W.N. 633=(1945) 2 M.L.J. 349.

admission—Additional evidence.
Under O. 41, R. 27 (1) (b)—Grounds for Under O. 41, R. 27 (1) (b), C. P. Code,

the appellate Court cannot admit additional evidence when it neither finds an inherent lacuna on examining the record nor requires the proposed evidence to enable it to pronounce judgment. (Harries, C.J. and Manohar Lall, J.)
BALMUKUND RAM v. JANARDAN PRASAD NARAIN
SINGH. 193 I.C. 129-7 B.R. 583-13 R.P. 551.

O. 41, R. 27 (1) (b)—Ground for admission—Negligence of party or his pleader.
Under O. 41, R. 27 (1) (b), it is only when

the appellate Court requires, in other words, finds it needful, that additional evidence can be admitted. Negligence on the part of a party or admitted. Negligence on the part or a party or his pleader is no ground for allowing fresh evidence. The phrase "for any other substantial cause" does not mean any cause stated by a party; it must be read with the words preceding it. (Puranik, J.) Seth Kunjil v. Shankar Nanuram. I.L.R. (1943) Nag. 492=211 I.C. 37=16 R.N. 171=1943 N.L.J. 418= A.I.R. 1943 Nag. 289.

O. 41, R. 27 (1) (b)—New evidence— Discovery after decision of trial Court—Un-successful review application—Admissibility of new evidence in appeal against decision of trial Court.

Where in a suit for ejectment the defendant pleaded that he held under a written lease which he had lost but the suit was decreed and the lease was subsequently discovered and a review against the decision on the ground of discovery of new important evidence was also dismissed, on a question as to whether that evidence could be admitted in an appeal against the order of ejectment of the trial Court preferred after the application for review and before its dismissal. Held, that the document should be admitted and that there was no absolute prohibition against the admission of evidence after the fai-S.M. and Sathe, A.M.) BILAS KUAR v. BALISTER. 1941 R.D. 825=1941 O.A. (Supp.) 752=1941 A.W.R. (Rev.) 843.

O. 41, R. 27 (1) (b)—Powers of Court

-Admission of further evidence.
From the wording of O. 41, R. 27 (1) (b), C. P. Code, it is quite clear that it comes into operation only when the Court requires fresh evidence. The requirement must be of the Court and not of the party to the litigation. When the Court is of opinion that without fresh evi-

## C. P. CODE (1908), O. 41, R. 27.

form its functions, then and then only will the Court admit fresh evidence. The rule is not intended to assist a party who through negligence or over-confidence fails to produce suffi-cient evidence to prove his case in the Court below. If the Court upon the evidence on the record is able to pronounce judgment or perrecord is able to pronounce judgment or perform its functions it has no jurisdiction to admit further evidence. (Sen, J.) JAMADAR SINCH v. NAIYAB ALI. I.L.R. (1941) 1 Cal. 536=196 I.C. 193=74 C.L.J. 121=14 R.C. 190=45 C.W.N. 498=A.I.R. 1941 Cal. 378.

—O. 41, R. 27 (1) (b)—"Requires"— Meaning of—Aaditional evidence—Admission of -Grounds for.

O. 41, R. 27, permits the admission of additional evidence when the trial Court has refused to admit evidence which ought to have been admitted. It also permits additional evidence to be adduced when the appellate Court "requires" any document to be produced or any witnesses to be examined to enable it to pronounce judgment. Cl. (b) of sub-S. (1) clearly contemplates the requirements of the Court rather than the desires or wishes or even requirements of a party. It is only when the appellate Court is unable, on the record as it stands, to pronounce judgment that the exceptional powers under the rule may be used. Cl. (b) contemplates a case where, upon the record, as it stands, the Court perceives such lacuna or such defect as will disable it from giving a proper judgment upon the merits. (Davis, C.J. and O'Sulivan, J.) AZIM WADHO v. ALINAWAZ GHULAM HYDER I.L.R. (1943) Kar. 415=212 I.C. 4=16 R. S. 213=A.I.R. 1944 Sind 57.

——O. 41, R. 27 (1) (b)—Second appeal—Admission of additional evidence—When justified.

The production of additional evidence in second appeal is open to strong objection. But an exception can be made in a case where it is necessary to prove what the entries in the revenue papers throughout the years prior to the suit have been. (Harper, S.M. and Sathe, J.M.) BEHARI v. PARMAL. 1941 R.D. 19=1941 A.W.R. (Rev.) 174=1941 O.A.

(Supp.) 118.
O. 41, R. 27 (1) (c)—Power of appellate Court-Remand to trial Court with instructions to examine person as Court witness-Propriety-Proper procedure.

There is no provision for the examining of Court witnesses by trial Courts; but under O. 41, R. 27 (1) (c) the appellate Court can itself record the evidence of a witness or direct the trial Court to take evidence of a witness and send it to the appellate Court, before disposing of the appeal. To allow the appeal and remand the case to the trial Court with instructions to examine a person as a Court witness is not the Correct procedure. (Horwill, J.) SWAM V. VENKATRAYUDU. 212=I.C. 551=16 R.M. 661 = 56 L.W. 498=1943 M.W.N. 554 (1)= A.I.R. 1943 Mad. 726=(1943) 2 M.L.J. 312.

-O. 41, R. 27 (2)—Additional evidence dence it cannot pronounce judgment or that Admissibility in appeal—Grounds of—Admission without fresh evidence it finds it difficult to per-life of fresh evidence for corroborating oral evi-

dence disbelieved by trial Court-If justified. NARASIMHAMURTHI v. HAYAT KHAN. [See Q.D., 1936-240, Vol. I, Col. 1940.] 192 I.C. 355=13 R.M. 543.

O. 41, R. 27 (2)—Failure to comply

with-Effect.

Unless there is compliance with the mandatory direction of O. 41, R. 27 (2), there would be no proper admission of evidence. (Sathe, S.M. and Dible, J.M.) RAM SWARUP v. KHAIRATI LAL. 1944 A.W.R. (Rev.) 168 (2)= 1944 R.D. 349.

-O. 41, R. 27 (2)—Omission to record reasons for admission of additional evidence-When ground for reversal—Absence of objection to admission of evidence—Effect. Assya Umma v. Moossa. [Scc Q.D., 1936-'40, Vol. I, Col. 1941.] 194 I.C. 816=14 R.M. 91.

-O. 41, R. 28—Question of issuing commission arising only in appellate stage-Proper

procedure for appellate Court.

Where no question of issuing a commission in a suit arose in the trial Court at all and it is only at the appellate stage that the question arises, the appellate Court should adopt the procedure prescribed by O. 41, R. 28, C. P. Code. It should either issue a commission itself or direct the trial Court to issue the commission and, after the return of the commission, it should take into consideration the commissioner's report. The Appellate Court should not set aside the decree of the trial Court and remand the case for a fresh consideration by that Court after giving the plaintiff an opportunity of applying for a commission. (Agarwala, J.) RAMDAHIN LOHAR v. RAMDHANI MAHTO. 199 I.C. 91=14 R.P. 528=8 B.R. 495=A.I.R. 1942 Pat. 379.

-O. 41, R. 31-Appellate Court-Duty to come to independent decision-Contents of judgment.

The appellate Court is under a duty to come to an independent decision on a consideration of the evidence on the record. Where the finding of the appellate Court really amounts to a statement of concurrence with the reasons given by the lower Court and no justification for such concurrence is given and there is nothing whatever to show that the appellate Court has given independent scrutiny of the evidence in the case, there is no judgment according to law. (Dible, S.M. and Ross, I.M.) SHANKER DAYAL BHAGAT
v. RAMDEHIN PANDE. 1945 A.W.R. (Rev.)
111=1945 R.D. 211.

O. 41, R. 31—Appellate Court's judg-

ment-Requirements.

An appellate Court's judgment must show that it had applied its mind to the examination of the evidence on record independently from the examination of the evidence conducted by the trial Court. Findings of the appellate Court on questions of fact are conclusive and final and thus settle the rights of parties in respect of them once and for all. Hence the necessity for independent examination of the evidence by the appellate Court. (Sathe, S.M. and Ross, A.M.) SUKHI v. COLLECTOR OF MORADABAD. 1943 R.D. 384=1943 A.W.R. (Rev.) 208.

C. P. CODE (1908), O. 41, R. 33.

---O. 41, R. 31-Judgment setting forth arguments of both sides-Decision in favour of one party-Relief not stated-Judgment if one in law.

Where an appellate Court merely sets forth the arguments of both sides in its judgment and then decides that the arguments of one side must prevail simply because the counsel for that side promised to put his client in the Box to make a particular statement and the relief which that party is given is not even stated, there is no judgment in law. (Shirreff, S.M. and Sathe, J.M.) Kuer Pradhan v. Maula Julaha. 1942 R.D. 584=1942 A.W.R. (Rev.) 302=1942 O.A. (Supp.) 328=1942 O.W.N. (B. R.) 467.

-O. 41, R. 31-Non-compliance with-How affects judgment-Irregularity, if and when

can be ignored.

Non-compliance with the strict provisions of R. 31 of O. 41 may not vitiate the judgment and make it wholly void. The irregularity may be ignored if there has been a substantial compliance with it and the second appellate Court is in a position to ascertain the findings of the lower appellate Court. (Madeley, J.) Mohd. Azim v. Maharaja Pateshwari Prasad Singii. 203 I.C. 361=1942 O.A. 442=1942 A.W.R. (C.C.) 325 (1)=1942 O.W.N. 613=15 R.O. 203=A.I.R. 1943 Oudh 105.

-O. 41, R. 31 (d)—Duly of Court under-Appeal in abatement of rent suit-Specification of rent.

When a Court of appeal allows an appeal in an abatement of rent suit, it is obligatory on the Court to specify the new rent. (Harper, S.M. and Sathe, J.M.) LAKSHMI SAHAI v. BASDED DUBEY. 1941 A.W.R. (Rev.) 504=1941 O. A. (Supp.) 463=1941 R.D. 581.

O. 41, R. 31 (d)—Requirements of—Compliance with—Necessity.

Appellate Courts should comply with the mandatory provisions of O. 41, R. 31 (d), C. P. Code and should state clearly the relief to which an appellant is entitled when a decree is reversed or varied. (Sathe, J.M.) DULAR AHIR v. RAM CHARAN. 1941 A.W.R. (Rev.) 101=1941 O.A. (Supp.) 89=1941 R.D. 30.

O. 41, R. 33—Applicability and scope— Powers of appellate Court. See C. P. Cone, O. 41, Rr. 4 and 33. 20 Pat. 811.

-O. 41, R. 33-Applicability to second appeals.

It cannot be said that the provisions O. 41, R. 33, can in no circumstance be applied in second appeal. Those provisions are applicable to second appeals under the provisions of O. 42. It is open to the High Court to do in second appeal what the lower appellate Court ought to have done. (Collister, J.) DALCHAND LOKIMAN DAS v. Surajmal Sankal Chand. I.L.R. (1943)
All. 830=209 I.C. 538=16 R.A. 144=1943
A.W.R. (H.C.) 211=1943 A.L.J. 440=
1943 A.L.W. 497=1943 O.W.N. (H. C.)
296=1943 O.A. (H.C.) 211=A.I.R. 19 All. 342.

—O. 41, R. 33—'Parties'—Meaning of— Award of decree in favour of persons not parties to appeal—Power of appellate Court. The word "parties" in O. 41, R. 33, C. P. Code,

is wide enough to include persons who were parties to the suit in the trial Court, but were not parties to the appeal. Where the trial Court had dismissed a suit against some of the defendants without costs and decreed it against the rest, in an appeal by the latter the appellate Court has power to decree costs incurred by the former in the trial Court, although they have not filed any appeal or cross-objection and are not parties to PRASANNA DEB GUPTA v. NIAZ MAHOMED KHAN.
I.L.R. (1941) 2 Cal. 556=204 I.C. 618=15
R.C. 546=46 C.W.N. 227=A.I.R. 1942 Cal. **257**.

O. 41, R. 33 and Letters Patent (Rangoon), C1. 13—Powers of appellate Court— Scope of jurisdiction—If confined to point mentioned in certificate granting leave-Order

costs-Interference.

It is an error to assume that when leave granted, the appeal and the terms of the certificate are to be regarded as a reference only. The jurisdiction of the appellate Court is not limited to the consideration of only the point mentioned in the certificate granting leave to appeal. In view of the wide provisions of R. 33 of O. 41, C. P. Code, the appellate Court has the right and duty to pass whatever decree should have been passed by the Subordinate Court in all the circumstances of the case, and that means, in all the circumstances which gave rise to the litigation originally and to all the disputes between all the relevant parties in the matter.

Per Blagden, I.—A Letters Patent appeal is an appeal in a 'case' certified to be fit for appeal. The word 'case' is a very wide word and includes an order for costs made or refused in that case, which is obviously ancillary to the substantive order made in that case. Neither the precise form of the certificate nor any failure of the appellant to file a document which he should have filed under O. 41, R. 1 could deprive the Court of its power under O. 41, R. 33 to pass or makesuch further or other decree as the case may require. (Roberts, C.J. and Blagden, J.) Sein Dass v. Lakhajee. 1940 Rang. L.R. 693=194 I.C. 306=13 B.R. 301=A.I.R. 1941 Rang.

O. 41, R. 33—Powers of appellate Court -Suit dismissed against two co-defendants-Appeal by plaintiff impleading only one defendant-Power of Court to decree suit against defendant not impleaded. VIRUPARSHAYYA v. SUBBARAYUDU. [See Q.D., 1936-'40, Vol. I, Col. 1947.]

191 I.C. 891=13 R.M. 532.

O. 41, R. 33 and S. 151—Powers of applications of the court of t

pellate Court-Wholly irregular procedure in trial

Court-Proper order to be passed.

Where the procedure adopted in the Court was wholly irregular and the judgment is pronounced by a Judge who neither heard the evidence nor arguments the proper thing is to remand the case to the trial Judge, with a directional state of the state of tion to hear the parties and then record his findings. (Davies.) ABDUL RAHIM KHAN v. BHAG CHAND. 1940 A.M.L.J. 67.

## C. P. CODE (1908), O. 41, R. 33.

O. 41, R. 33—Powers of Court—Cross-objections filed by some respondents only—Respondents not filing-Power of Court to permit them to take advantage of such objections-Rule.

Where only some of the respondents to an appeal have preferred memoranda of cross-objections, while others have not, the Court has power under O. 41, R. 33, C. P. Code, to permit the respondents who have not preferred cross-objections to take advantage of the cross-objections preferred by the others when such objections go to the very root of the matter and the result of not doing so would result in two contradictory decrees. (Fazl Ali and Meredith, IJ.) BENARES Bank, Ltd. v. George Macdonald Falkner. 21 Pat. 397=204 I.C. 48=15 R.P. 191=9 B.R. 111=A.I.R. 1942 Pat. 493.

O. 41, R. 33—Scope of powers under—Whole decree, if can be reversed in an appeal against a part of it.

Under O. 41, R. 33, C. P. Code, an appellate Court has authority to pass an order setting aside the whole decree even though the appeal related only to a part of it. In an appeal against the amount of damages payable disallowance of the claim for damages itself will be within the powers of the appellate Court. (Sathe, S.M.) JUGNI BEGAM v. NIAZ BAHADUR KHAN. 1943 A.W.R. (Rev.) 331=1943 R.D. 561.

-O. 41, R. 33—Subsequent events—Powers

of appellate Court to take notice of.

Events which happened subsequent to the decree passed by the first court cannot be taken into consideration by an appellate Court for the purpose of depriving the successful party, or the party who should have succeeded, of the decision which was or ought to have been in his favour. There is no doubt that the powers conferred on an appellate Court by O. 41, R. 33, C. P. C., are very wide; but they cannot be exercised so as to affect a vested right, say, for instance, by virtue of the law of limitation and, similarly a right which had been declared to be vested in a pre-emptor by a decree passed in his favour. (Harries, C.J., Abdul Rashid and Abdur Rahman, IJ.) ZAHUR DIN v. JALAL DIN. 215 I.C. 305=17 R.L. 136=A.I.R. 1944 Lah. 319 (F.B.).

-O. 41, R. 33-Suit by worshipper for declaration that property is debutter property of idol decreed-Appeal filed by transferees-Neither shebait nor idol made party—Omission, if defect of form.

A suit by a worshipper of a Hindu deity for a declaration that certain immovable propertieswere debutter properties was decreed. On appeal by the defindants transferees to which nei-ther the shebait nor the idol was made a party although they were parties to the suit, the decreewas reversed. On second appeal it was contended that in as much as the decree in the ori-ginal court was in favour of the idol, the appellate court had no jurisdiction to set aside that decree in an appeal to which, neither the shebait nor the idol was a party.

Held, that the interests of the idol were in

fact represented before the lower appellate court by the plaintiff-respondent and the omission to make either the shebait or the idol a party to

the appeal was at most an error in form and not in substance. If the objection had been taken, the party could have been added under O. 41, R. 20, C. P. C., and the defect removed. Since both the idol and the shebait were parties to the second appeal which had been heard in their presence, the decree of the lower appellate court should not be set aside merely for the alleged defect of parties. (Khundkar and DRA KISHORE. I.L.R. (1941) 1 Cal. 309=196 I.C. 241=14 R.C. 199=45 C.W.N. 699=A. I.R. 1941 Cal. 248.

-O. 41, R. 35-Silence of appellate Court as to costs-Inference.

Where the order of an appellate Court is silent as to costs the order of the trial Court must stand. (Sathe, J.M.) WAOF IMDADIA v. ASA RAM. 1942 O.A. (Supp.) 66=1942 O.W.N. (B.R.) 100=1942 A.W.R. (Rev.) 60=1942 R.D. 132.

-O. 41-A, Rr. 1 and 2-Provision for production of printed copies of judgment-If mandatory-Power of Court to dispense with their

production.

The Court has power to dispense with the production of the twelve printed copies of the judgment appealed against so long as a certified copy of the judgment is filed. O. 41-A (Mad.) R. 1 is only a modification of the rules outlined in O. 41 R. 1, of the C. P. Code. The power to dispense with the production of copies of judgment contained in O. 41, R. 1 of the C. P. Code, is not taken away but continues. (Chandarasekhara Aiyar, J.) RAMAPPA, In re. 58 L.W. 670=1946 M.W.N. 39=(1945) 2 M.L.J. 563.

datory nature of—Power to dispense with production of requisite number of copies.

The provisions of O. 41-A, R. 2, C. P. Code (Madras) are mandatory, and the appellant must produce the requisite number of printed copies of the judgment and order appealed against; a typed copy of the lower Court's order is insuffityped copy of the lower Court's order is insufficient. Such production cannot be dispensed with under O. 41, R. 1, as R. 2 of O. 41-A, is mandatory. (Byers, I.) KURMANNA, In re. A.

I.R. 1945 Mad. 353=(1945) 1 M.L.J. 268.

O. 41-A, R. 6—Scope—If overrides pleader—Sufficiency. See C. P. Code, O. 3, R. 5.

(1942) 1 M.L.J. 245.

O. 43, R. 1 (a)—Scope—Order returning plaint for presentation to proper Court—Order made before numbering of plaint and without

made before numbering of plaint and without notice to defendant-Right of appeal to defendant -Objection by defendant in Court of re-presenta-Court-Fees Act (as amended in Marras). S. 7 (IV-A) And (IV) (c). (1943) 1 M.L.J. 316.

O. 43, R. 1 (c)—Applicability—Suit dismissed for default—Application to set aside dismissal—Dismissal for default—Appeal—Maintain-ability.

ability. O. 43, R. 1 (c) applies in terms to an order of dismissal for default of an application under O. 9, R. 9, to set aside an order dismissing a suit for default. An order dismissing such an

C. P. CODE, (1908), O. 43, R. 1 (d).

application for default is certainly an order reject. ing the application for an order to set aside the dismissal of a suit and is therefore appealable under O. 43, R. 1 (c), C. P. Code. It is immaterial that the application is dismissed not on the merits but for default. (Somayya, J.)
NARASAYYA v. THIMMAPPA. 212 I.C. 209=16
R.M. 575=56 L.W. 191=1943 M.W.N. 202 =A.I.R. 1943 Mad. 584=(1943) 1 M.L.J.

O. 43, R. 1 (c) and O. 9, R. 9-Dismissal for default-Setting aside ordered conditionally on payment of costs—Default in payment on due date—Application for extension of

time-Dismissal-Appealability.

Where an application to set aside the dismissal of a suit for default is ordered conditionally on payment of costs to the other side within a time fixed but the costs are not paid on the due date and an application is later on made for extension of time which is rejected and the restoration application is also dismissed, the order is apealable under O. 43, R. 1 (c), C. P. Code. Even otherwise the appeal could be treated as a revision under S. 115, C. P. Code. (Ghulam Hasan and Koul, JI.) Sukdeo Prasad v. Jagannate N. 132=1945 A.L.W. (C.C.) 106=1945 O.W. W.R. (C.C.) 106=A.I.R. 1945 Outh 273.

O. 43, R. 1 (d) (k)—Appeal under Cl. (d)—Refusal to set aside abatement of—If

appealable under Cl. (k).

There is no provision in O. 43, laying down that the word 'suit' in Cl. (k) of R. 1 of that order should be taken to include an appeal. Hence an order refusing to set aside the abatement of an appeal under Cl. (d) of R. 1 of O. 43, is not appealable under Cl. (k) of R. 1 of that order. (Verma, J.) UMMATUR RABAB V. MAHA-DEO PRASAD. 196 I.C. 574=1941 A.L.J. 516= 1941 O.W.N. 1010 (2)=1941 A.L.W. 826= 1941 O.A. (Supp.) 681=1941 A.W.R. (H. C.) 251=A.I.R. 1941 All. 338.

O. 43, R. 1 (d)—Applicability—Application to set aside ex parte decree-Order directing restoration of suit on condition of deposit of amount and providing that in default decree will stand-Default Appeal against first order-

Company.

The appellants applied for setting aside certain ex parte decrees passed against them and the Court by its order directed the appellants to pay Rs. 100 for costs of the respondents, irrespective of the result of the suits within 15 days and also to deposit costs of the suit as a condition precedent to the trial of the suit restored to file; the Court also posted the suit peremptorily for hearing to 26-7-1943. In default, the applications were to stand dismissed with costs. The costs were not deposited and on the date fixed, the Court passed an order to the effect that as the direction was not obeyed the prior order operated and that the decrees already passed would stand. An appeal was preferred under O. 43, R. 1 (d). C. P. Code, against the original order. .....

Held that the first order was the only and final order in the case and was appealable. (Mockett and Bell, JJ.) RAMAYYA v. LAKSHMAYYA. I.L. R. (1945) Mad. 203=1944 M.W.N. 296=57 C. P. CODE (1908), O. 43, R. 1 (d). L.W. 292=A.I.R. 1944 Mad. 383=(1944) 1 M.L.J. 381.

Revenue Court—Order on application under O. 9, R. 13—Appeal—Competency—Madras Estates Land Act, Ss. 189 (2) and 192.
Under S. 192 of the Madras Estates Land Act

as amended, the provisions of O. 43, are applicable to proceedings under the Estates Land Act before a revenue Court. Hence an order passed by a revenue Court on an application filed under O. 9, R. 13, is appealable under O. 43, S. 189 (2) of the Estates Land Act does not bar the right of appeal in such a case. S. 189 (2) is concerned only with decrees and orders, passed in suits referred to in S. 189 (1) but not with orders passed In interlocutory applications. Kuppuswami Ayyar, J.) Ambalagaran v. Venkatarama Naicker. 56 L.W. 418=210 I.C. 87=1943 M.W.N. 474=16 R.M. 373=A.I.R. 1943 Mad. 656= (1943) 2 M.L.J. 193.

-O. 43, R. 1 (d)—Scope—Execution—Exparte order directing execution to proceed—Application to set aside—Order rejecting—Appeal Maintainability. See C. P. Code, O. 9, R. 13.

I.L.R. (1944) Kar. 39.

O. 43, R. 1 (f)—Order refusing to dis-

miss suit—Appeal, if lies.

An appeal is competent from an order refusing to dismiss a suit or to strike out the defence under O. 11, R. 21, C. P. Code. (Mitter and Sharpe, JJ.) JAGAURAM SAHU v. CHANDULAL AGARWALA. 49 C.W.N. 132.

o. 43, R. 1 (j)—Order confirming sale without disposing of application under O. 21,

R. 90—Appeal—Revision.

An order confirming a sale without disposing of an application under O. 21, R. 90, C. P. Code, does not fall within the purview of O. 43, R. 1 (j) and is, therefore, not appealable. is the refusal to set aside the sale that is made appealable and not a mere order confirming the sale. The High Court can therefore, deal with shore, C.J. and Sen, J.) Nirendra Nath Banerji v. Birendra Nath. 202 I.C. 163=15 R.C. 299=46 C.W.N. 773=A.I.R. 1942 Cal. 480.

-O. 43, R. 1 (k)-Suit-If includes appeal-Order refusing to set aside abatement of appeal—Appealability. RAJU MUDALI v. CHIN-NARAJU NAIDU. [See Q.D., 1936-'40, Vol. I, Col. 3306.] 193 I.C. 832=13 R.M. 724=A. I.R. 1941 Mad. 51.

O. 43, R. 1 (1)—Order refusing to add party under O. 22, R. 10—Appeal and second appeal. See C. P. Code, O. 22, R. 10. 43
Bom.L.R. 719.

o. 43, R. 1 (m)—Applicability—Compromise recorded under O. 23, R. 3—Order that fresh decree could not be passed—Appeal.
Under O. 43, R. 1 (m), C. P. C., the order

that is appealable is the order recording or refusing to record an agreement, compromise or satisfaction. Where the Deputy Registrar of the original side of the High Court records the agreement of compromise but holds that a fresh decree cannot be drawn up, his order is not appealable. (Roberts, C.J. and Dunkley, J.) V. C. P. CODE (1908), O. 43, R. 1 (q).

M. R. P. CHETTYAR FIRM v. HAJEE MAHOMED Sultan. 1941 Rang.L.R. 774=198 I.C. 404 =14 R.R. 198=A.I.R. 1941 Rang. 316.

cording compromise under O. 23, R. 3, followed immediately by decree in accordance therewith-Appeal against order—Competency—Decree—If consent decree—C. P. Code, S. 96 (3).

Under O. 23, R. 3, C. P. Code, where the Court finds it proved that there has been adjust-

ment of the suit by a lawful agreement or compromise the Court should (1) order the agreement to be recorded and (2) pass a decree in accordance therewith so far as it relates to the suit. The decree follows the order. An appeal lies against the order passed under O. 23, R. 3, under the provisions of O. 43, R. 1 (m), C. P. Code, and the right of appeal is not lost by reason of a decree being passed immediately in ac-cordance with the order. The decree following the order must be treated as a decree under S. 96 (3), i.e., a consent decree. (Divatia and Sen, JJ.) UMIASHANKAR NARANJI v. SHIVSHANKAR PRABASHANKAR I.L.R. (1944) Bom. 405=46 Bom.L.R. 424=A. I. R. 1944 Bom. 239 (2).

-O. 43, R. 1 (m)-Suit under S. 92-Award on arbitration-Decree on-Appeal-

Maintainability—O. 23, R. 3.
Where in a suit under S. 92, C. P. Code, the matter is referred to arbitration and an award is made, the Court is bound to apply the provisions of O. 23, R. 3 and consider whether the award is lawful or not. The mere obtaining of an award in a case falling under S. 92, will not take away the jurisdiction of the Court to decide whether the award is lawful or not within the meaning of O. 23, R. 3. An appeal will lie from an order recording or refusing to record the award or compromise, under O. 43, R. 1 (m). (Manohar Lall and Brough, JJ.)
BANABEHARI PURI v. ANANDA PURI. 9 Cut.L.
T. 85=212 I.C. 35=16 R.P. 254=10 B. R. 435=A.I.R. 1944 Pat. 115.

-O. 43, R. 1 (q)—Scope—Application for attachment before judgment-Interim order of attachment-Subsequent rejection of application after hearing both sides—Order—If falls under R. 6 (2) of O. 38—Appealability. . .

Where on an application by a plaintiff for attachment before judgment, an interim order of attachment is made and after hearing the parties when the defendant shows cause, the plaintiff's application is rejected such rejection amounts to an order withdrawing the attachment falling under R. 6 (2) of O. 38 and an appeal therefore lies under O. 43, R. 1 (q). Chivatia and Sen, II.) GOPALDAS HIRALAL v. MAHADU DAGDU. 205 I.C. 100=15 R.B. 344=44 Bom. L.R. 855=A.I.R. 1943 Bom. 24.

O. 43, R. 1 (q)—Scope—Order of interim attachment and notice—Defendant bringing into Court money equal to value of property attached—Order confirming interim order and directing money to remain in Court as security—Appealability—If falls under O. 38, R. 6 or R. 5.

On an application for attachment before judgment under O. 38, R. 5, C. P. Code, the Court made an interim order in the following terms:

"Interim attachment as prayed and notice." The defendant brought into Court money equal to the value of the property attached and the Court confirmed the order of attachment. The terms of the order were: "The rule issued is made absolute. The money deposited by the defendant in Court will remain as security against any decree that may be passed against the defendant in this suit." In appeal against the order, the plaintiff contended that no appeal lay on the ground that the order was one under O. 38, R. 5 and not under O. 38, R. 6, as there was no attachment but only a security.

Held, that the defendant did not show cause why security should not be furnished and did not furnish security. What he did in effect was to bring the property (its equivalent in money) into Court, in effect to submit to its attachment if the Court so ordered; the final order passed by the Court was an order under R. 6 of O. 38 and not under R. 5 and the order was therefore appealable under O. 43, R. 1 (q), C. P. Code. (Davies, C.J. and Weston, J.) BISHAM-BARDAS & Co. v. SACHOOMAL KATOOMAL I.L. R. (1941) Kar. 362=197 I.C. 291=14 R.S. 99=A.I.R. 1941 Sind 178.

–O. 43, R. (1) (s)—Appeal under– When lies—Order against person not a party to suit—Remedy. Sce C. P. Code, O. 40, Rr. 1 AND 4 AND O. 43, R. 1 (s). 1941 Rang.L.R.

-O. 43, R. 1 (s)—Order fixing remunereceiver-Appealability. See C. P. CODE, O. 40, Rr. 1 AND 2 AND O. 43, R. 1 (s). 1942 N.L.J. 191.

-O. 43, R. 1 (s)—Order under O. 40, R.

1 (c)—Direction to receiver to pay money to third person—Appealability—S. 47.

An order passed by a Court under O. 40, R. 1 (c), C. P. Code, directing a receiver to pay any amount due from him and payable to a third person (not a party to the suit) is not appealable either under O. 43, R. 1 (s) or under S. 47, C. P. Code. (Davis, C.J. and Weston, J.) JASODABAI v. GOPALDAS. I.L.R. (1942) Kar. 343=204 I.C. 158=15 R.S. 86 A.I.R. 1942 Sind 144.

O. 43, R. 1 (s)—Scope—Order appointing receiver in place of one who had gone out -Appealability.

The wording of O. 40, R. 1 (a), C. P. Code, is wide enough to cover the case of appointment of a Receiver in the place of one who had been removed or gone out, and hence such an order is appealable under O. 43, R. 1 (s). (Chatterji and Sinha, JJ.) BHIMNATH v. KUMAR SHYAMANAND. 24 Pat. 457=A.I.R. 1945 Pat. 467.

-O. 43, R. 1 (u)—Appeal against order of remand-Interference with findings of fact. In an appeal against an order of remand find-In an appeal against an order of remand findings of fact cannot be gone into uless there is either a misapprehension or the finding is too vague. (Bennett and Madeley, JJ.) ARDUL QAVI KHAN v. BHOLAN KHAN. 207 I.C. 532 = 16 R.O. 41=1943 O.A. (C.C.) 103=1943 O.W.N. 165=A.I.R. 1943 Oudh 274.

O. 43, R. 1 (u)—Appeal against order of remand—When lies. SHEOLAL v. JUGAL KI-

C. P. CODE (1908), O. 43, R. 1 (u).

SHORE. [See Q.D., 1936-'40, Vol. I, Col. 1957.] 191 I.C. 566=13 R.N. 203. Appeal against order of remand—When lies.
An appeal under O. 43, R. 1 (u), C. P.
Code, can only lie if the order complained of is one falling under O. 41, R. 23. The latter rule applies where an appellate Court has reversed a decree and all questions arising in the case have not been decided by the Court of first instance. Where all the issues are as a matter of fact decided by the Court of first instance R. 23 of O. 41 has no application and a remand in such a case is not appealable under O. 43, R. 1 (u). (Thomas, C.J. and Misra, J.) BARKAT BEG v. ASIM. 209 I.C. 357=16 R.O. 121=1943 O.A. (C.C.) 195=1943 O.W.N. 310.

O. 43, R. 1 (u)—Appealability—Appellate order remanding suit after setting aside trial Court's order setting aside an award trial Court's order setting aside an award.

Where a trial Court sets aside an award on the ground that one of the parties to the reference was not competent to refer on behalf of another but the appellate Court disagrees with that finding and remands the suit for trial, the order of the appellate Court is appealable under O. 43, R. 1 (u), C. P. Code. (Agarwal and Madeley, JJ.) HARKARAN SINGH v. ACYA RAM. 204 I.C. 257=15 R.O. 310=1942 O.W.N. 685=1942 O.A. 543=1942 A.W.R. (C.C.) 350=A.I.R. 1943 Oudh 128.

-O. 43, R. 1 (u)—Applicability—Remand under inherent powers.

Where an order of remand is not under R. 23, O. 41, C. P. Code, but under the inherent powers of the Court, an appeal against it under O. 43, R. 1 (u) is not maintainable. (Bennett and Ghulam Hasan, JJ.) HARI SARAN DAS v. RUDRA PRATAB NARAIN SINGH. 20 Luck. 45= 215 I.C. 295=17 R.O. 55=1944 O.W.N. 50 =1944 A.W.R. (C.C.) 22=1944 O.A. (C.C.) 22=1944 A.L.W. 96=A. I. R. 1944 Oudh 130.

——O. 43, R. 1 (u)—Applicability—Suit to have decree against karnavan declared void. Allegation that karnavan did not represent jumor members of tarwad and that even if he did, they were not bound—Rejection of plaint for want of sufficient Court-fee—Appeal—Remand -Appeal against remand—Competency—Revision.

The junior members of the tarwad brought a suit 'for avoiding a decree passed against the karnavan on the ground that the karnavan did not represent the junior members and that even if he did they were not bound by the decree. The trial Court held that as no Court fee had been paid on the prayer for avoiding the decree, the Court fee paid, as if for a declaration, was insufficient and rejected the plaint. In appeal, the lower appellate Court held that as the plaintiffs had alleged in the plaint that the karnavan did not represent the plaintiffs, they need pay Court-fee only on that basis. The lower appel-late Court therefore allowed the appeal and remanded the suit for trial on the merits. There was an appeal to the High Court against the order or remand by Government.

Held, that the order of remand did not fall under O. 41, R. 23, C. P. Code, and therefore

no appeal lay from the order of remand to the High Court; (2) that the High Court could however, treat the appeal as a revision and interfere, since the plaintiffs had not confined their pleadings to the allegation that the decree was void for want of representation by the karnavan, but had also sought to have the decree set aside on the ground that they were not bound by it even if the karnavan did not represent them in the suit in which that decree was made, which relief could only be granted on payment of the proper Court-fee. (Horvvill, J.) PROVINCE OF MADRAS v. LAXMI AMMA. 1945 M.W.N. 291 =A.I.R. 1945 Mad. 430=(1945) 1 M.L.J. 259.

O. 43, R. 1 (u), O. 7, R. 11 (d) and Ajmer Municipal Regulation (1925), S. 233

—Failure to give notice under S. 233, Ajmer Municipal Regulation—Effect—Dismissal of suit—Setting aside on appeal—Further appeal.

Where the statutory notice under S. 233, Ajmer Municipal Regulation—Effect—Dismissal of suit—Setting aside on appeal—Further appeal.

Where the statutory notice under S. 233, Ajmer Municipal Regulation is not given, it will result in a rejection of plaint and not the dismissal of the suit. Where, there is a so-called 'first dismissal' in such case it is in reality a rejection of the plaint and hence when it is set aside in appeal with a direction to the trial Court, no appeal will lie under O. 43, R. 1 (u), C. P. Code. (Davies.) MUNICIPAL COMMITTEE, AJMER v. HARIDAS. 1942 A.M.L.J. 13.

—O. 43, R. 1 (u) (as amended by Lahore High Court)—If ultra vires. See C. P. Code, O. 41, R. 23-A and O. 43, R. 1 (u). 44 P.L.R. 253.

O. 43, R. 1 (w)—Appeal filed also

against decree on merits—Grounds open to appellant.

Where on a review being granted an appeal is filed not only under O. 43, R. 1 (w), C. P. Code, but also on the merits against the decree, it is open to the appellant to challenge the decree on every ground on which a decree can be challenged in a first appeal. He is not limited to the three grounds enumerated in O. 47, R. 7, C. P. Code. (Harris, C.J. and Abdul Rashid, J.). Zubaida Begum v. Sardar Shah. 210 I. C. 587=16 R.L. 168=45 P.L.R. 836=A.I. R. 1943 Lah. 310.

——O. 43, R. 1 (w) and O. 47, R. 7-Right of appeal—Restrictions.

An order granting review on the ground that there is an error apparent on the face of the record is not appealable. The right of appeal under O. 43, R. 1 (w), C. P. C., is subject to the restrictions set forth in O. 47, R. 7, C. P. C. (Ghulam Hassan and Madeley, JJ.) KAILASH NARAIN BAKHSHI v. RAJ KUMAR BAKHSHI. 20 Luck. 380=1945 O.A. (C.C.) 76 (1)=1945 O.W.N. 108=1945 A.W.R. (C. C.) 76 (1)=1945 O.W.N. 2004 A.L.W. (C.C.) 101=A.I.R. 1945 Oudh 183.

——O. 43, R. 1 (w)—Scope—Order of remand—Suit disposed of on merits—Appellate Court sending case back for disposal according to law—Appeal from order of remand—Competency.

Where the trial Court goes into the merits of a case and does not dispose of the suit on a preliminary point only and the appellate Court

#### C. P. CODE (1908), O. 44, R. 1.

sends back the case for disposal in accordance with law, after making certain observations no appeal lies against the order of remand under O. 43, R. 1 (w) read with O. 41, R. 23. (Varma, J.) RAGHUBIR SARAN SINGH v. MAHOMED JAHIR ALI KHAN. 8 B.R. 35=14 R.P. 209=196 I.C. 562.

O. 44, R. 1—Applicability—Memo. of

lity.

There is no provision in the C. P. Code relating to the filing of cross-objections in forma pauperis, but when a respondent files cross-objections, he is in fact filing a cross-appeal, and the same principle as in O. 44, r. 1, C. P. Code, must be applied. The conditions prescribed by that rule must be satisfied before leave, to file an appeal or cross objections in forma pauperis can be granted. (Leach, C.J. and Happell, J.) RAMACHANDRA AIVAR, In re. 199 I.C. 542=14 R.M. 597=54 L.W. 171=1941 M.W.N. 794=A.I.R. 1941 Mad. 833 (1)=(1941) 2 M.L.J. 187.

M.L.J. 187.

O. 44, R. 1—Decree against several defendants—Appeal by some only in forma pauperis—Defendant having assets not joining in appeal in order to enable others to appeal as paupers—Propriety of.

The Court will not approve of a practice whereby one of the defendants who is clearly possessed of assets abstains from joining in an appeal in order that the other defendants may prosecute the appeal as paupers. (Wadsworth and Patanjali Sastri, JI.) VIJAYARATNAM NAIDU v. SITAPATIRAO. 207 I.C. 89=16 R.M. 31=1943 M.W.N. 9=56 L.W. 15=A.I.R. 1943 Mad. 263=(1943) 1 M.L.J. 90.

O. 44, R. 1 and O. 33, R. 2—Mortgage decree—Mortgagor applying for leave to appeal in forma pauperis—Duty to state in affidavit valuation of equity of redemption.

In a suit for enforcement of a mortgage at the instance of a mortgagee, the equity of redemption which is in the mortgagor or defendant is not the subject-matter of the suit and for the purpose of deciding the question as to whether the mortgagor is a pauper or not, the value of the equity of redemption cannot be excluded by the Court from its consideration. The mortgagor is, therefore, bound to state the valuation of the equity of redemption on oath in his affidavit in support of his application under O. 44, R. 1, C. P. Code, for leave to file an appeal in forma pauperis against the mortgage decree. If he does not do so, his application is defective and is liable to be dismissed. (Mitter and Khundkar, JJ.) Subode Chandra v. K. L. Bank, Ltd. I.L.R. (1941) 1 Cal. 428=197 I. C. 489=14 R.C. 364=45 C.W.N. 426=A.I.R. 1941 Cal. 659.

—Property decreed in trial Court, if can be taken into account. NASIR AHMAD KHAN v. SAIDAN. [See Q.D., 1936-40, Vol. I, Col. 3306.] 191 I. C. 722=13 R. O. 275=1941 O.L.R. 16=A.I. R. 1941 Oudh 113.

O. 44, R. 1—Procedure—Rejection of application without hearing applicant or giving him opportunity of being heard—If justified.

Subbayya Nadar v. Anjaneyalu. [Sce Q.D., 1936-'40, Vol. I, Col. 3307.] I.L.R. (1941) Mad. 389=195 I.C. 867=14 R.M. 239=A.I. R. 1941 Mad. 49.

-O. 44, R. 1, proviso-Applicant for leave to appeal as pauper-Right to be heard in

support of application.

A person who files an application for an order permitting him to file an appeal in forma pau-peris under O. 44, R. 1, C. P. Code, is not entitled as of right to be heard in support of the application; but while there is no necessity in law to hear the applicant, it would tend to maintain confidence if judges do give such applicants an opportunity of being heard, being careful, of course, not to allow him to travel beyond the documents referred to in O. 44, R. 1. (Leach, C. J. and Byers, J.) Subba Rao v. Tata Reddit. I.L.R. (1942) Mad. 746=201 I.C. 773=15 R.M. 409=1942 M.W.N. 282=55 L. W. 211=A.I.R. 1942 Mad. 478 (1)=(1942) 1 M. L.J. 435.

\_\_\_\_O. 44, R. 1, Proviso and S. 115—Rejection of application on wrong assumption of

law-Revision.

If a Court summarily rejects an application to be allowed to appeal as a pauper under O. 44, R. I, proviso, C. P. Code, on a wrong assumption of what the law is, the High Court has power to interfere in revision. The proviso to O. 44, R. 1, does not require that an actual decision on any particular point of law arising in the case should be taken by the Court. (Bobbe, J.) · CHUDAMAN v. BABAJI. I.L.R. (1944) Nag. 623=1944 N.L.J. 429=A.I.R. 1944 Nag. 357.

-O. 44, R. 2 and S. 109 (c)—Enquiry into pauperism—Procedure—Enquiry by Sub-ordinate Court—Report, if binding on appellate Court—Question, if a substantial question of

When an application for leave to appeal in forma pauperis is made it is the appellate Court which alone has power to grant leave, and the fact that it directs an enquiry by the Subordinate Court into the applicant's pauperism does not mean that it divests itself of jurisdiction to decide whether leave should be given. O. 44, R. 2, C. P. Code, merely provides for an enquiry by the Subordinate Court; it does not in any way indicate that the report of that Court must be accepted. It is entirely within the competence of that appellate Court to accept or reject it. The question whether the appellate Court can refuse to accept such a report is not such a substantial question of law as would justify the granting of certificate under S. 109 (c), C. P. Code. (Bennett and Ghulam Hasan, JJ.) JIVAN NATH v. RAM CHANDRA. 200 I. C. 426 =14 R.O. 599=1942 O.A. 222=1942 A.W. R. (C.C.) 209=1942 O.W.N. 305=A.I.R. 1942 Oudh 422.

-O. 45, R. 4—Applicability—Two suits and appeals disposed of by common judgment-Substantially same questions raised—Consolidation for valuation.

Where two suits have been disposed of by a judgment and the appeals arising common therefrom have also been disposed of by a com-

#### C. P. CODE (1908), O. 45, R. 7.

mon judgment, and they raise substantially the same questions, namely, the mental capacity of a person and the way in which the defendants conspired together to obtain various alienations in their favour, it would be a fit case in which consolidation should be ordered under O. 45, R. 4, C. P. Code; and if the value of the combined appeals is over Rs. 10,000, a certificate of leave to appeal to His Majesty-in-Council should be granted. But separate printing charges should be paid and separate securities should be furnished. (Somayya and Chandrasekhara Ayyar, JI.) PONNAMMAL V. RAJAMBU AMMAL I. L. R. (1945) Mad. 672=1945 M.W.N. 200=(1945) 1 M.L.J. 73.

O. 45, R. 4—Order for consolidation of

two appeals-Security for costs-Separate sets -If necessary-Single set of security for all ap-

peals consolidated—Sufficiency.
O. 45, R. 4, C. P. Code, simply empowers the High Court to make an order for consolidation for pecuniary jurisdiction, but it does not say anything about taking security for costs in such a case. There is nothing in the Privy Council Rules or in C. P. Code to warrant the view that when two or more appeals are ordered to be consolidated, only one security for costs will be enough. On the other hand separate securities for different appeals which have been ordered to be consolidated must be furnished. (Divatia and Macklin, JJ.) VENKATRAO SHRINIWASRAO V. BASAVA PRABHU. 217 I.C. 123=17 R. B. 157=46 Bom.L.R. 724=A.I.R. 1944 Bom. 352.

O. 45, R. 4—Scope—Consolidation in respect of deposit of printing charges and fur-

nishing security—Permissibility.
O. 45, R. 4, C. P. Code, deals only with the question of consolidation as regards valuation for Majesty-in-Council purposes of appeal to His and not for purposes of deposit of printing charges or furnishing security. There is no provision of law under which consolidation may be ordered in respect of deposit of printing charges or furnishing security. (Somayya and Chandra-schhara Ayyar, JJ.) PONNAMMAL v. RAJAMBU AMMAL. I.L.R. (1945) Mad. 672=1945 M, W.N. 200=(1945) 1 M.L.J. 73.

——O. 45, R. 4—Suits decided by separate judgments—Consolidation—Permissibility.

Where two suits are decided by separate judgments they cannot be consolidated under O. 45, R. 4, C. P. Code, though they involve substantially the same questions for determination. (Lobo and Tyabji, JI.) GOVINDJI AND CO. v. PREMI DAMODAR. I.L.R. (1944) Kar. 163=220 I.C. 314=A.I.R. 1944 Sind 190.

Dismissal of appeal—Order for costs of respondent-Decree satisfied by adjustment and appropriation under-S. 19, Madras Act IV of 1938-Right of respondent to payment under order for

costs out of deposit.

A deposit made by an appellant to the Privy Council under O. 45, R. 7, C. P. Code, is merely by way of security for any liability for costs of the respondent which might arise in case the appeal failed. When such liability arises and is discharged by appropriation of amounts already

received in respect of the decree as provided for in S. 19 of the Madras Act IV of 1938, the decreeholder or respondent can no longer claim any payment under his decree for costs, and the deposit has to be returned to the appellant judgmentdebtor. (Wadsworth and Patanjali Sastri, JJ.) SUBBAYYA v. VENKATA HANUMANTHA BHUSHA-NARAO. I.L.R. (1942) Mad. 60=200 I.C. 520=15 R.M. 69=54 L.W. 107=1941 M.W. N. 741=4 F.L.J. (H.C.) 280=A.I.R. 1941 Mad. 817=(1941) 2 M.L.J. 125.

O. 45, R. 7—Extension of time for furnishing security—Jurisdiction of High Court. AKIMUDDIN v. FATEH CHAND. [See Q.D., 1936-'40, Vol. I, Col. 1964] I.L.R. (1941) 1 Cal. **2**99.

O. 45, R. 7—Extension of time—Power of High Court—Privy Council Rules, R. 9.
Under O. 45, R. 7, C. P. Code, as amended by Act XXVI of 1920, the period of six weeks from the date of the certificate cannot be extended by the High Court, but R. 9 of the Privy Council Rules gives the High Court a discretion to extend time. There being a conflict between the two, the latter must prevail under the clear provisions of S. 112 (c), C. P. Code. (Tek Chand and Beckett, JJ.) DINA NATH v. SANT RAM. I.L.R. (1942) Lah. 548=200 I.C. 273=15 R.L. 187=45 P.L.R. 43=A.I.R. 1942 Lah. 279.

O. 45, R. 8 (as applied to Federal Court)—Scope of—Declaration of admission of appeal—If condition precedent to jurisdiction of Federal Court.

(Obiter.) Sulaiman, J.—Under O. 45, R. 8, C. P. Code as applied to 41 . P. Code, as applied to the Federal Court the High Court after the deposit has been made to its satisfaction, has to declare the appeal admitted, and then give notice to the respondent, and to transmit the record to the Federal Court. After the certificate required by S. 205 of the Govenment of India Act has been granted, the admission of the appeal by the High Court under O. 45, R. 8, C. P. Code, is its final judicial act. The declaration that the appeal is admitted is not a mere ministerial or administrative act, but a judicial act. An appellant cannot come to the Federal Court without his appeal having been admitted by the High Court.

Varadachariar, J.—Though the scheme of O.

45, C. P. Code, implies that till the High Court makes the order under R. 8, it still retains a measure of control over the proceedings, it cannot be said that such an order is a condition precedent to the exercise of jurisdiction by the Federal Court. When the Federal Court has power to dispense with or give special directions as to printing and production of the records before it, it would be illogical to insist that the High Court must pass an order under O. 45, R. 8 (a), C. P. Code, which can be passed only on compliance with the directions originally given by the High Court, which ex hypothesi have become inoperative because of the Federal Court's discretion in the matter. (Gwyer, C.J., Sulaiman and Varadachariar, JJ.) Lach-MESHWAR PRASAD SHUKUL v. KESHWAR LAL CHAUDHURI. 1940 F.C.R. 84=I.L.R. (1941) Kar. (F.C.) 1=20 Pat. 429=13 R.F.C. 4

C. P. CODE (1908), O. 45, R. 17.

=45 C.W.N. (F.R.) 66=1941 O.W.N. 372 =1941 P.W.N. 133=7 B.R. 362=3 F.L.J. 73=73 C.L.J. 51=53 L.W. 373=1941 A.L. W. 255=191 I.C. 659=1941 O.L.R. 82= 1941 A.W.R. (F.C.) 39=1941 M. W. N. 136=1941 O.A. 224=22 Pat.L.T. 119=A.I. R. 1941 F.C. 5=(1941) 1 M.L.J. (Supp.) 49.

-O. 45, R. 8 (b)-Process fee-Notice of admission appeal—If liable to process fee. See C. P. C., O. 45, R. 8 (b). 47 Bom. L. R. 861.

-O. 45, R. 13 (2) (d) and S. 151-Power of High Court-Income of property in suit accruing after decree, lying in deposit in High Court pending appeal—Order for its preservation—If may be passed after and before application for leave to appeal to Privy Council is filed.

Under O. 45, R. 13 (2) (d), C. P. Code, the High Court can, after an application for leave to appeal to His Majesty in Council has been filed, make an order for the preservation of the subject-matter of the appeal. A sum of money representing the fruits and profits of the decretal property accruing after the decree was passed, which was deposited in the High Court under its orders pending the disposal of the appeal to it, forms part of the subject-matter of the appeal to the Privy Council, as an adjudication of title in respect of the property one way or the other would directly affect its ownership. Prima facie, therefore, the High Court will have the power under that clause to make an order for the preservation of this sum of money, if in its discretion it thinks fit to do so. Even if Cl. (d) does not cover this case, the High Court will have the inherent power make an order concerning this sum of money. Pending the filing of an application for leave to appeal to His Majesty in Council, the High Court has the auxiliary power, the inherent power to make an interim order touching this sum of money maintaining the status quo till such time within which the application for leave to appeal may be made and for such further period as within which an order may be obtained from (Mitter, and Khundkar, JJ.) RAMENDRA NARAYAN ROY V. BIBHABATI DEBI. I.L.R. (1942) 1 Cal. 67=202 I.C. 442=15 R.C. 337=45 C. W.N. 1023=A.I.R. 1942 Cal. 488.

peal to Federal Court—Order declaring appeal admitted under R. 8-If necessary.

An appeal lies to the Federal Court from a final order of a sigle Judge of a High Court when a certificate has been granted under S. 205 (1) of the Government of India Act of 1935. The provisions of S. 111-A and O. 45, R. 17, C. P. Code, do not preclude the admission of the appeal. When matters have proceeded as far as R. 8 of O. 45, a formal order of admission by the High Court is not necessary, but if all the requirements of the law, up to that stage have been complied with, it would be improper for the High Court not to declare the appeal admitted. When the certificate under S. 205 (1) of the Government of India Act has been given,

no further certificate, is necessary, and the person aggrieved, is entitled to go to the Federal Court provided he complies with so much of R. 7 of O. 45 as is incumbent upon him. (Leach, C.J. and Mockett, J.) RAMANATHA SASTRIGAL v. KRISHNA MENON. 200 I.C. 886=15 R.M. 174=1941 F.L.J. (H.C.) 326=54 L.W. 295 = A.I.R. 1942 Mad. 70=(1941) 2 M.L.J.

O. 46, R. 1-"Any such decree"-Meun-

ing of.

The words "any such decree" in O. 46, R. 1, C. P. Code, must mean either (a) a decree in a suit where no appeal is provided against the decree, or (b) a decree in an appeal where no Further appeal is provided. (Broomfield and Divatia, JI.) CHHOTUBHIAI BHIMBHAI v. BAI KASHI. 197 I. C. 895=14 R. B. 260=43 Bom.L.R. 733=A.I.R. 1941 Bom. 365.

——O. 46, R. 1—Applicability—Reference—When competent. BABU BITAL VAMALCHAND v. HIRALAL VAMALCHAND. [See Q.D., 1936.'40, Vol. I, Col. 3307.] I.L.R. (1941) Bom. 131 = 193 I.C. 242=13 R.B. 305=A.I.R. 1941 Bom. 69.

ject to appeal"—Meaning—Reference—Compe-

tency.

The words not subject to appeal in O. 46, R. 1, C. P. Code, must mean that the law provides no appeal in any circumstances. They do not mean that no appeal has in fact been made. If in the case of a decree of a High Court, there might have been an appeal, it cannot be said that the decree is not subject to appeal, although it is very unlikely that such an appeal would have been made or that the High Court would have granted leave to appeal to the Privy Council. If there might have been an appeal, the decree in subject to appeal, and no reference can be made under O. 46, R. 1 in such a case. Внімвнаї v. Ваї Казні. 197 І.С. 895=14 R. В. 260=43 Вот. L.R. 733=A.I.R 1041 Вот. 365 Bom. 365.

-O. 46, R. 1—Question of law arising during execution-Jurisdiction of Court to make reference—Conditions. Manindra Nath Ghose v. Mandar Biswas. [See Q.D., 1936-'40, Vol. I, Col. 1970.] 72 C.L.J. 522.

O. 47—Compliance with—Necessity—Re-

view application to the Board under S. 250, Agra Tenancy Act. See AGRA TENANCY ACT, S. 250 AND C. P. CODE, O. 47. 1940 R.D. 624. —O. 47—Scope—Power of Court—Re-admission of appeal dismissed for default—Ap-

plication for restoration beyond time—Power of Court to allow by way of review. See C. P. Code, O. 41, R. 19. I.L.R. (1943) Kar. 409.

——O. 47, R. 1—Applicability—Application for review after filing of appeal—Competency—Appeal subsequently dismissed as barred by time and Court refusing to excuse delay in presentation of appeal-Effect.

Where an appeal has been preferred, there should be no review. One of the essential conditions of O. 47, R. 1, C. P. Code, is that no appeal shall have been preferred. Where

## C. P. CODE (1908), O. 47, R. 1.

for review is preferred, such application is not maintainable, even though the appeal is afterwards dismissed as barred by limitation, the Court of appeal refusing to excuse the delay in presenting the appeal. O. 47, C. P. Code, gives must be strictly construed. (Sen, I.) Jankinam Co. v. Chunilal Shriram I. L. R. (1944) Bom. 675=220 I.C. 327=46 Bom.L. R. 671=A.I.R. 1945 Bom. 40.

-O. 47, R. 1—Applicability—Compromise decree-Application for review on ground that it was fraudulently procured-Competency-Pro-

per remedy.

An application for review will not lie to vacate a compromise decree on the ground that it was fraudulently procured. O. 47, R. 1, C. P. Code, does not apply to such a case. The proper remedy and indeed the only course is to proceed by a separate suit for the purpose. (Harries, C.J. and Fazl Ali, J.) GIRIDHARAN PRASAD v. BHOLI RAM. 194 I.C. 551=14 R.P. 6=1941 P.W.N. 385=7 B.R. 795=A.I.R. 1941 Pat. 574.

-O. 47, R. 1—Applicability—Principles go-

verning relief—Facts be proved by applicant.
Applications under O. 47, R. 1, C. P. Code must be treated with a considerable measure of caution. That is a matter of public policy as it is obviously necessary that, save in exceptional circumstances, finality in litigation should be achieved at some point. It is a proper principle in applications for review that the person who wants it should at least prove strictly the diligence he claims to have exercised and also that the matter or evidence which he wishes to have access to is, if not absolutely conclusive, at any rate, nearly conclusive of the matter. It is not the proper function of a review application merely to supplement evidence. It is not a proper use of O. 47, R. 1, to make it serve the purpose of merely introducing evidence which might possibly have had some effect on the result. It has to go a good deal further than that. (Braund, J.) PYARE LAL v. CHHOTEV LAL. 198 I.C. 863=14 R.A. 318=1942 A.L. J. 29=1941 A.L.W. 1106=1941 A. W. R. (H.C.) 385=A.I.R. 1942 All. 82.

which would justify a review—Discovery of new evidence, if entitles party to lead other supple-

mentary evidence.

Before an application for review can granted on the discovery of new evidence it must be shown that the new evidence is so conclusive in its character that if admitted it must result in the setting aside of the previous order. result in the setting aside of the previous order. Further O. 47, R. 1, does not contemplate that the discovery of a certain piece of evidence should entitle the party reopen the case and to lead other supplementary evidence in addition to the new evidence freshly discovered. (Sathe, S. M.) GHURPATI SINGH v. UMA NAND MISRA. 1943 R.D. 464=1943 A.W.R. (Rev.) 309 (2).—O. 47, R. 1—Discovery of new matter—Decree under S. 14 of Encumbered Estates Act—Pendente hite and future interest not granted -Pendente lite and future interest not granted

therefore after filing an appeal, an application under S. 35 of that Act—If a "discovery of new

matter." BAIJNATH MARWARI Ganesh v.

SINGH. [See Q.D., 1936-'40, Vol. I, Col. 3307.] 192 I.C. 212=13 R.A. 299.

O. 47, R. 1 and Agra Tenancy Act (1926), S. 80—'Discovery of new and important matter'—Want of notice as required by S. 80, Agra Tenancy Act.

The non-service of the notice required under S. 80 of the Agra Tenancy Act is not a ground for reviewing an order of ejectment because it cannot come within the words 'discovery of new and important matter.' (Shirreff, S.M.) CHANDRA DATTA v. LACHHI RAM. 1942 A. W. R. (Rev.) 432=1942 O.A. (Supp.) 458=1942 O.W.N. (B.R.) 641.

O. 47, R. 1—"Error apparent on the face of the record"—Meaning of—Failure to take note of decision establishing clear position

of law—If ground for review.
"An error apparent on the face of the record" may be an error of law. It cannot of course be held that whenever a Judge has overlooked a ruling he has a power to review his decision; nor can it be held that whenever, after a judgment has been pronounced, a subsequent ruling changes the accepted view of the law, that subsequent ruling can be a ground for review. But when there is a legal position clearly established by a well-known authority and by some unfortunate oversight the Judge has gone palpably wrong by the omission to draw his attention to the authority, it may in a proper case be a ground for review, coming within the category of an error apparent on the face of the record under O. 47, R. 1, C. P. Code. (Wadsworth, J.) NATESA NAICKER v. SAMBANDA CHETTIAR. 54 L.W. 263=1941 M.W.N. 1047=A.I.R. 1941 Mad. 918=(1941) 2 M.L.J. 390.

O. 47, R. 1—Ground for review—Absence due to illness on date of the order.

Absence owing to illness on the date of the

order is not a sufficient ground for asking for review of the order passed on that day without contest by him. (Harper, S. M. and Sathe, A. M.) MATA DIN v. KALI PRASAD. 1941 O.A. (Supp.) 868=1941 A.W.R. (Rev.) 1070.

——O. 47, R. 1 and U. P. Tenancy Act— Grounds for review—Absence of knowledge of debtor and inadequacy of price fetched in sale of interest of tenant's holding—If grounds.

Absence of knowledge of sale proceedings on the part of the judgment-debtor his being blind and deaf and the price fetched in sale of his interest in the holding being very inadequate are not valid grounds for asking for a review of the order confirming sale of such holding. (Sathe, S.M. and Dible, J.M.) CHETA v. RAJENDRANATH. 1943 R. D. 363=1943 A. W. R.

(Rev.) 269 (1).
O. 47, R. 1 and U. P. Tenancy Act— Ground for review—Additional evidence—Na-

The nature of additional evidence which would justify a review, should be such that it could not have been discovered before the previous order even after due diligence. When the question before the Court is as to the rate of rent payable by a tenant, certified copies of extracts from a prior Khatauni cannot be considered to

## C. P. CODE (1908), O. 47, R. 1.

be such evidence as would justify a review because those extracts could have been obtained on the earlier occasion. (Sathe, S.M.) Kunwar Bahadur v. Jiwan Singh. 1943 A. W. R. (Rev.) 186=1943 R.D. 419. O. 47, R. 1—Grounds for review—De-Kunwar

fect in law or procedure.

It is incompetent for a Court to review its previous order on account of any defect in law or procedure. (Saihe, S.M. and Ross, A.M.) KANHAIYA LAL v. ABBUL WAHID. 1943 A.W. R. (Rev.) 60=1943 O.W.N. (B.R.) 107=1943 O.A. (Rev.) 60=1943 R.D. 124.

——O. 47, R. 1—Grounds for review—Deliberate mistake of procedure by Court.

A deliberate mistake of procedure by the Court is not a mistake of the type which can be rectified under O. 47, R. 1, C. P. Code. (Sathe, S.M. and Ross, A.M.) SHIVABALAK RAM v. BANSUA. 1943 A.W.R. (Rev.) 145 (1)=1943 R.D. 311.

-O. 47, R. 1—Grounds for review—Error apparent on the face of the record—Decision taking different view of law in later case— Sufficiency.

The fact that the Court takes a different view of the law is no ground for review of judgment in a prior suit. There is no error apparent on the face of the record in such a case. (Mochett, J.) VISWANATHAM v. VARADACHARYULU. 209 I.C. 160=16 R.M. 284=56 L.W. 82 (1) = 1943 M.W.N. 116=A.I.R. 1943 Mad. 377 (1)=(1943) 1 M.L.J. 168.

O. 47, R. 1—Ground for review—Important provision of law overlooked by Court.

Where in deciding against the competency of a second appeal the Court overlooks an important provision of an amending Act, there is a mistake or error on the face of the record, or in any event there is sufficient reason for granting review. (Harries, C.J. and Din Mohammad, J.) Kehar Singh v. Attar Singh. 219 I.C. 130=18 R.L. 42=46 P.L.R. 287=A. I.R. 1944 Lah. 442.

-O. 47, R. 1—Grounds for review—Mistaken view regarding interpretation of law.

A mistaken view regarding interpretation any provisions of law is not a good ground for review. (Sathe, S.M. and Ross, A.M.) RAGHU-NATHJI SHRI v. RAFIO MOHAMMAD KHAN. 1943 A.W.R. (Rev.) 130=1943 R.D. 267=1943 A.L.J. (Supp.) 23.

-O. 47, R. 1—Grounds for review—Mistake of law.

Mistake on a point of law or procedure is not an adequate ground for review. (Sathe, S.M. and Ross, A.M.) LACHMAN PRASAD v. SHEO RAJ SINGH. 1943 R.D. 331=1943 A.W.R. (Rev.) 155.

O. 47, R. 1—Ground for review—Mistake of law—Decision involving question of pub-

lic importance.

Under O. 47, R. 1, C. P. Code, a mistake of law is no ground for review. Nor is the fact that the question involved in the decision is not one merely between the two parties but is one of great public importance. (Grille, C.J. and Sen, J.) MADANSINGH v. DEPUTY COMMISSIO-

'NER, BILASPUR. 1944 N.L.J. 438=A. I. R. 1944 Nag. 371.

-O. 47, R. 1-Ground for review-Mis-

take of law or procedure.

Mistakes of law or procedure cannot be considered to be an adequate ground for review under O. 47, R. 1, C. P. Code. (Shirreff, S.M. and Sathe, J.M.) YADUNATH SINGH v. NANHU MAL. 1943 R.D. 220=1943 A.W.R. (Rev.) 183.

-O. 47, R. 1-Grounds for review-'Mistake or error apparent on the face of the record'—What would constitute—Error of law -When would and when would not be a ground

for review.

In order that a mistake or error may constitute a ground under O. 47, R. 1, C. P. Code, for review it must be one apparent on the face of the record and not one which may require extraneous matters to prove the underlying fallacy. Such an error may be one of law, but in order that it may be a valid ground, the law must have been indisputable at the date of the decision which is characterised as erroneous. A view of law taken by a Judge on a debatable point and subsequently found by an authoritative pronouncement to be incorrect is not a mistake apparent on the face of the record so as to entitle the aggrieved party to apply under O. 47, R. 1. (Ghulam Hasan and Misra, JJ.) LIA-OUT HUSAIN V. MOHAMMAD RAZI. 217 I. C. 132=17 R.O. 88=1944 O. A. (C.C.) 81= 1944 A.W.R. (C.C.) 81=1944 A.L.W. 138 =1944 O.W.N. 76=A.I.R. 1944 Oudh 198. O. 47, R. 1—Grounds for review—Obvious mistake of law arising out of failure to notice a section of the Act.

Though a Court cannot admit an application for review merely upon the ground that it has made a mistake in law, it cannot be said that if the mistake is an obvious one due to failure to notice a particular section of an Act or part of such a section, the obvious error could not be corrected by the Court. (Allsop, J.) KAM-TA CHAUDHARY v. LAL CHANDRA. I. L. R. (1945) A. 680=1945 A.W.R. (H.C.) 138 (1)=1945 A.L.J. 223=1945 A.L.W. 220= 1945 O.W.N. (H.C.) 205=1945 R.D. 359 =A.I.R. 1945 A. 284.

-O. 47, R. 1-Ground for review-Want of service of notice or absence of knowledge.
Want of service of notice or absence of know-

ledge of the proceedings is not an adequate ground for a review application. (Sathe, S.M.)
MANIYAN v. BABU RAM. 1943 R.D. 351 (1)
=1943 A.W.R. (Rev.) 209.

-O. 47, R. 1-Ground for review-Wrong

decision on a point of law.

A wrong decision on a point of law is not a .'mistake or error on the face of the record' within the meaning of O. 47, R. 1, C. P. Code, and hence cannot be a ground for review. (Ghu-Tam Hasan and Agarwal, JJ.) Sheo Dulant v. Sri Ram & Co. 19 Luck. 242=208 I. C. 85=16 R.C. 59=1943 O.W.N. 189=1943 A. L.W. 339=1943 O.A. (C.C.) 114.

o. 47, Rr. 1 and 7—Interference with granting of review—Final order, proper order.

C. P. CODE (1908), O. 47, R. 1.

Where the final order passed by a Court on a review of its own prior order is the proper order to be passed in the case, the Court, whatever view it may take of the lower Court's competency to pass the order in review. should not interfere. (Bennett and Agarwal, JJ.) BIRENDRA BIKRAM SINGH v. RAJRANG BAHADUR SINGH. 205 I.C. 269=15 R.O. 402 =1942 A.W.R. (C.C.) 338=1942 O.A. 495 =1942 O.W.N. 648=A.I.R. 1943 Oudh 136, -O. 47, R. 1-Power of Court-Review suo motu.

A Court can correct arithmetical or clerical errors under S. 152, C. P. Code. But it has no power to review and modify its judgment when neither party has applied for review under 0. 

after its affirmance by superior Court-Power of superior Court to direct review by inferior

Court by sending circular letter.

No superior Court can direct an inferior Court to review its previous decision by sending a circular letter or any other order to it. No Court has any jurisdiction to review its order when that order has been affirmed by a superior Court. (Harries, C.J. and Manohar Lall, J.) DHUPLAL SINGH v. RAMDHANI DUSADH. 24 Pat. L. T.

125=A.I.R. 1943 Pat. 353.

O. 47, R. 1—Review application—Main-

tainability—Grounds.

Where there is no suggestion in a review application of any mistake or error apparent on the face of the record having been committed by the Court, it would not be maintainable. (Bennett and Madeley, JJ.) GAURI SHANKAR v. HARI SARAN DASS. 1944 O.W.N. 340=1944 O.A. (C.C.) 229=1944 A.W.R. (C.C.) 229.

quent to filing of appeal.

Where an appeal is filed against an order, there is no right to file a subsequent application for review of that same order. (Sathe, S. M. and Ross, A.M.) KANHAIYA LAL v. ABDUL WAHID. 1943 A.W.R. (Rev.) 60=1943 O. W.N. (B.R.) 107=1943 O.A. (Rev.) 60=1943 R.D. 124.

**–O. 47,** R. **1**—Review—Entertainability— Subsequent appeal against same order.

An application for review is entertainable, notwithstanding the fact that an appeal has subsequently been preferred against the same order (Shirreff, J.M.) BABU LAL v. SULTAN BEGAM. 1941 R.D. 428=1941 O.W.N. 813=1941 A.

W.R. (Rev.) 571=1941 O.A. (Supp.) 539.
O. 47, R. 1—Review—Rent reduction case—Order by Collector ex parte—Power of

successor to review.

Where the Collector's order in a rent reduction case is passed ex parte and not on the merits, the successor of the Collector who has passed the order is justified in reconsidering the matter. (Swanzy.) DWARKA PANDEY v. SHAH

HAMIDUDDIN. 9 B.R. 25.
O. 47, R. 1—Review—Grounds—Inability to pay decree amount in a decree for eject-

ment for arrears of rent.

A review application can be granted by a Tahsildar only on any one of the grounds mentioned in O. 47, R. 1, C. P. Code. The 'some other good reason' referred to in the rule must be of a nature cognate to the reasons given before. Hence a decree for ejectment for arrears of rent cannot be reviewed on the ground that the judgment debtor was unable to pay the decree amount because of floods when such reason had not even been suggested when application for extension of time for payment of decree amount was made. (Shirreff, S.M. and Sathe, J.M.) BHUNESH-WARI PRASAD NARAIN SINGH v. JAMUNA RAI. 1942 R.D. 438=1942 A.L.J. (Supp.) 37=1942 A. W. R. (Rev.) 203=1942 O. A. (Supp.) 229=1942 O.W.N. (B.R.) 349. -O. 47, R. 1—Review—Grounds—Mistake of law or on a point of judgment-Proper remedy.

Any mistake committed by a Court in respect of either law or judgment cannot give occasion for a review application and the only remedy open to the aggrieved party is to appeal against the order. (Sathe, A.M.) JANGJIT SINGH v. PITAMBAR SINGH. 1941 R.D. 880=1941 O.A. (Supp.) 840=1941 A.W.R. (Rev.) 996.

-O. 47, R. 1-Review-Grounds-Wrong decision on a point of law.

The only right which subsists once an appeal has been heard and determined is a right of review, and that right must be exercised in strict confirmity with O. 47. A review could not be obtained on the ground that some wrong decision on a point of law has found its way in the judgment. What is intended is something like an arithmetical error or the use of wrong words, or, say, a finding of fact inconsistent with the pleadings. (Roberts, C.J. and Blagden, J.)
P. V. SUNDARAM v. M. G. BAGLA. 1941 Rang.
L.R. 382=197 I.C. 216=14 R.R. 115=A.I.

R. 1941 Rang. 233. -O. 47, R. 1—Review—Jurisdiction hear application—Partition suit—Appeal against final decree only—Dismissal—Second appeal also dismissed—Application to 1st appellate Court to review preliminary decree and order in appeal from final decree—Maintainability.

Where the preliminary decree in a partition suit is not appealed against, but an appeal is preferred against the final decree and rejected, and a second appeal is also rejected, an application for review of the judgment in respect of the preliminary decree and of the order of the first appellate Court in the appeal from the final decree will not lie in the appellate Court. The review application in respect of the preliminary decree has to be made in the Court which passed it, as there was no appeal against that decree. So far as the appellate decree in the appeal against the final decree is concerned, there having been a second appeal which was dismissed, the first appellate Court has no jurisdiction to entertain the application for review. (Harries, C.J. and Chatterji, J.) JUGESHWAR MISRA v. KIRIT SINCH. 198 I.C. 743=14 R.P. 500=8 B.R. 463=1941 P.W.N. 557=A.I.R. 1942

-O. 47, R. 1-Review-Not to be made

behind the back of parties.

## C. P. CODE (1908), O. 47, R. 1.

It is irregular to review a previous order for. inadequate reasons behind the back of parties. and without giving the party concerned an opportunity to contest the statements in the application for review. (Sathe, S. M. and Ross, A. M.)
IRSHAD HUSAIN v. MUBARAK HUSAIN. 1943 A.W.R. (Rev.) 174 (2)=1943 R.D. 290.

-O. 47, R. 1-Scope of-"For any other

sufficient reason"-Effect of.

The provisions of O. 47, are very limited indeed and cannot be applied to give a right of appeal, where such a right is even by implication necessarily barred by the provisions of the Limitation Act. The words "or for any other sufficient reason" in O. 47, R. 1, may be wide, but they are not wide enough to give a right of appeal where in fact no such right of appeal isgiven by other provisions of the Code, but which right has been exhausted by reason of the provisions of the Limitation Act. (Davis, C. J. and O'Sullivan, J.) SAYED MAHOMED SHAH v. ABDUL JABAR. I.L.R. (1943) Kar. 409=209 I. C. 326=16 R.S. 95=A. I. R. 1943 Sind 132 1943 Sind 132.

-O. 47, R. 1—'Sufficient ground"—Absence of knowledge of execution proceedings— Review of order for ejectment under S. 80,

Agra Tenancy Act.
Want of knowledge of the execution proceedings is not a sufficient ground for asking for re-Tenancy Act. (Shirreff, J.M. and Sathe, A.M.)
MARYAM BIBI v. SARUPA. 1942 O.W.N. (B.
R.) 13=1942 O.A. (Supp.) 9=1942 A.W.R.
(Rev.) 9=1942 R.D. 13.

-O. 47, R. 1-Sufficient ground-Execution petition—Dismissal for default—Review—Competency—Inherent powers.

Absence of counsel is not a ground for review of an order dismissing an application for execution for default, and the same principle would apply when the party is also absent. A review in such a case is incompetent in view of the limited scope of O. 47, R. 1. Nor can the inherent powers of the Court be invoked on the ground of hardship, namely, that another application would be out of time. Necessity for amendwould be out of time. Necessity for amendment of O. 9, R. 15, pointed out so that in suitable cases a Court may set aside an order of dismissal of an execution petition passed for default of appearance. (Leach, C.J. and Kunhi Raman, J.) SIVA SUBRAMANIA CHETTIAR v. ADAIKALAM CHETTIAR I.L.R. (1944) Mad. 857=218 I.C. 292=18 R.M. 25=57 L. W. 192=1944 M.W.N. 205=A.I.R. 1944 Mad. 203=(1044) 1 M.I. I. 259 293=(1944) 1 M.L.J. 259.

O. 47, R. 1—"Sufficient reason"—Amending Act changing law with retrospective effect—-Not a ground for review.

The passing of an Amending Act, even though it: changes the law with retrospective effect is not. a sufficient reason for review and for re-opening matters which have already been decided on the basis of the law as it stood before the Amendment. (Wadsworth and Patanjali Sastri, II.)
VASUDEVAN In re. 57 L.W. 20 (1)=1944 M.
W.N. 56=A.I.R. 1944 Mad. 238=(1944)
1 M.L.J. 15.

O. 47. R. 1-"Sufficient reason"-Decision of Privy Council reversing prior decision of Court on which judgment is based-Decision not

brought to notice of Court and not reported officially at the time—If sufficient ground for review.

It is not open to a Court in exercise of the powers conferred by O. 47, R. 1, C. P. Code, to review a judgment on the ground that an authority binding on the Court had not been brought to the notice of the Court at the hearing of the matter, the decision of which is sought to be reviewed.

Chatterji, J.—The fact that a decision of the Court which formed the basis of the judgment sought to be reviewed was overruled by the Privy Council by a decision already given but not reported at the time, constitutes a sufficient ground for review. (Agarwala and Chatterjee, JJ.) Selha Dei v. Keshab Charan. (1945) P.W.N. 188.

-O. 47, R. 1—'Sufficient reason'-Mistaken view of law or fact.

The 'other sufficient reason' which would justify a review under O. 47, R. 1, must be of a cognate nature. A mistaken view of the law or of the facts is not a matter which can be covered by the expression 'some other reason'. (Shirreff, S.M. and Sathe, J.M.) SHYAM LAL SAHU v. LAL NIRINDRA BAHADUR CHAND. 1941 A.W.R. (Rev.) 683=1941 O.A. 623=1941 R.D. 745 (2)=1941 (Supp.) (Supp.) 117.

-O. 47, R. 1 (1)—Ground for review -Subsequent contrary decision by superior Court

on question of law decided.

The fact that subsequent to the decision by a Court there has been a contrary decision by a superior Court on the question of law decided is no good ground for reviewing the original decision. (Bennett and Agarwal, JJ.) BIRENDRA BIKRAM SINGH v. BAJRANG BAHADUR SINGH. 205 I.C. 269=15 R.O. 402=1942 A.W.R. (C.C.) 338=1942 O.A. 495=1942 O.W.N. 648=A.I.R. 1943 Oudh 136. Singh.

-O. 47, R. 1 (1)—Mistake—If ground for review-Decree based on compromise-Jurisdic-

tion of Court to set aside in review.

A mistake affecting the judgment of the party, there being no mistake affecting the decision of the Court is not a ground for review under O. 47, R. 1 (1). A Court has no jurisdiction in review to set aside a decree passed on a comreview to set aside a decree passed on a compromise, which compromise would, by the ordinary law of contract, be binding on the party. (Wadsworth, J.) Shahool Ameeth Ali v. Dayaram Singh. 219 I.C. 160=18 R.M. 62=1944 M.W.N. 523 (2)=A.I.R. 1944 Mad. 570=(1944) 2 M.L.J. 107.

O. 47, R. 4 (1)—Order granting review application—If a judgment—Letters Patent Appeal, if lies. See Letters Patent (Nagpur) AND C. P. Code, O. 47, R. 4 (1). 1941 N.L.J. 617.

617.

-O. 47, R. 4 (2)—Finding as to absence of knowledge-Discretion-Granting of review-Interference in revision.

Where the Court in its discretion holds that after due diligence, the applicant did not have knowledge of the new fact alleged by him and

## C. P. CODE (1908), O. 47, R. 7.

that it came to his knowledge only after the decree had been given and grants the review application, it could not be said that in arriving at this view the Court committed any illegality or material irregularity. (Harper, S.M.) DAULAT RAM v. POORAN MAL. 1941 R. D. 454=1941 A.W.R. (Rev.) 573 (2)=1941 O.A. (Supp.) 531 (2).

O. 47, R. 4 (2) (b)—Construction—"Strict proof"—Meaning of.

The words "strict proof" in O. 47, R. 4 (2) (b) cannot be construed as meaning no more than evidence formally admissible or evidence strictly admissible. Having regard to the use of the words "strict proof" in the rule, there is no reason why the appellate Court in deciding whether the conditions of R. 4 of O. 47, C. P. Code, have been complied with or not, should be precluded from seeing whether the evidence adduced before the lower Court amounted to proof Or not. (Burn, J.) AHMED KHAN v. VENKATA-CHALAMAYYA. 202 I.C. 86=15 R.M. 439=55 L.W. 93=1942 M.W.N. 132=A.I.R. 1942 Mad. 511=(1942) 1 M.L.J. 278.

O. 47, R. 5—Jurisdiction—High Court— Appeal disposed of by two Judges-Application for review after one Judge has left the Court-

Jurisdiction to hear.

Where after the disposal of an appeal by a bench of two Judges an application for review of judgment is made when only one of the Judges who heard the appeal remains attached to the Court, the application can be heard and disposed of by that remaining Judge alone. In accordance with the invariable practice of the Madras High Court even in first appeals, the application for review is heard and decided only by the Judges who heard the appeal or, where one of them is absent, by the other Judge sitting alone. (Somayya, J.) PEERAMCHENNA REDDI, In re. 201 I.C. 453=15 R.M. 340=1941 M. W.N. 898=54 L.W. 444=A.I.R. 1942 Mad. 23=(1941) 2 M.L.J. 644.

-O. 47, R. 7-Appeal against order granting review—Parties—Ejectment order against several set aside on review application by one-Appeal-All ejected persons, if to be made par-

Where an order for ejectment obtained against several persons is set aside on review on the application of one of them and the decree-holder appeals against the granting of the review he must make all the persons ejected parties and not implead only the applicant for review. (Sathe, J.M.) Kunwar Dhuji Pratap Singh v. Shiv Din. 1942 O.W.N. (B.R.) 524=1942 A.W. R. (B.R.) 364 (2)=1942 O.A. (Supp.) 390 (2).

O. 47, R. 7—Appeal—Grounds.

The provisions of R. 7 of O. 47, C. P. Code are exhaustive and an appeal will lie only on the grounds mentioned in it, or not at all. (Davies.) KANWAL NAIN HAMIR SINGH v. PAN
MAL LODHA. 1942 A.M.L.J. 51.

O. 47, R. 7—Appeal—Order granting review for sufficient cause under R. 1 (1) (c).

An order granting

An order granting a review on the ground of there being "sufficient reason" under O. 47, R. 1 (1) (c), C. P. Code, is not open to appeal, (Davis,

C.J. and Weston, J.) SATRAMDAS KISHINCHAND v. MANGHOOMAL HAKUMAL. I. L. R. (1943) Kar. 393=211 I.C. 364=16 R.S. 186=A.I. R. 1944 Sind 68.

-O. 47, R. 7 and U. P. Encumbered Estates Act (1934), S. 35—Appeal under S. 35 of the U. P. Encumbered Estates Act based on an order of review-O. 47, R. 7, if applies to

Where though an appeal is under S. 35 of the U. P. Encumbered Estates Act and is based on an order of review, the special provisions of the C. P. Code, contained in O. 47, R. 7 applies to it and hence a wrong conclusion on a question of fraud would not be a sufficient ground for appeal. (Shirreff, J.M.) BABU LAL v. SULTAN.
BEGAM. 1941 R.D. 428=1941 O.W.N. 813
=1941 A. W. R. (Rev.) 571=1941 O. A. (Supp.) 539.

against amended decree.
O. 47, R. 7—Applicability—Appeal
O. 47, R. 7, C. P. Code, does not apply to
the case of an appeal against the decree amended on review. Hence such an appeal is not confined to those grounds mentioned in R. 7 of O. 47. (Shirreff, S.M. and Sathe, J.M.) Khurshed Husain v. Mohan Kewat. 1941 A.W. R. (Rev.) 800=1941 O.A. (Supp.) 711=1941 R.D. 729.

-O. 47, R. 7—Scope—If over-ridden by S. 75 of the Provincial Insolvency Act. See Pro-VINCIAL INSOLVENCY ACT, S. 75. (1941) 1 M. L.J. 537.

hear the case"—Meaning of—Whole case, if open.
The words "re-hear the case" in O. 47, R. 8, C. P. Code, mean re-hear the case in full and deal with every point which it is necessary to consider before passing a fresh order. The Court is not confined to the point raised by the party seeking review. (King, J.) GANGARAJU v. VENKATARAYALE NAIDU. 205 I.C. 557=15 R.M. 892 = 1942 M.W.N. 676=55 L.W. 811=A.I.R. 1943 Mad. 235=(1942) 2 M.L.J. 716.

-O. 47, R. 9—Competency of review of an order passed on review.

The review of an order on a review application is forbidden by O. 47, R. 9, C. P. Code and hence no Court is competent to do that (Sathe, S.M. and Ross, A.M.) SHAMSUDDIN V. GUNNA MALL. 1943 A.W.R. (Rev.) 308= 1943 R.D. 306.

under O. 48, R. 1 (1)—Applicability—Notice under O. 45, R. 8 (b)—Liability to process fee.

No process fee is to be levied in the notice of

the admission of an appeal to the Privy Council to be given to the respondent under O. 45, R. 8, C. P. Code. Such a notice is not a process within the meaning of O. 48, R. 1 (1), but is a mere intimation which does not call upon the respondent either to appear or to oppose any prayer made by the appellant. (Lokur and Bavdekar, JJ.) Pirojsha Bhicaji v. Dadabhai. 47 Bom.L.R. 861.

O. 49, R. 4 (Cal.)—Intra vires.
O. 49, R. 4 (Calcutta) is intra vires. (R.C. Mitter, Khundkar and Pal, JJ.) BIBHABATI DEVI v. RAMENDRA NARAYAN ROY. 202 I. C.

C. P. CODE (1908), Sch. II, Para 1. 551=15 R.C. 355=47 C.W.N. 9=A. I. R. 1942 Cal. 498 (S.B.).
——Sch. II—Applicability—Company—Arbi-

tration proceedings before Arbitration Act of 1940 -Procedure-Arbitration Act of 1899 or C. P.

Code, Sch. II. See Companies Act, S. 152. (1944) 1 M.L.J. 290 (F.B.).

Sch. II—Applicability—Restitution proceedings. See C. P. Code, S. 144 and Sch. II. 1941 A.L.J. 596.

-Sch. II-Award-Suit to declare it ille-

gal and ineffective-Maintainability.

A suit for a declaration that an arbitration award was illegal and ineffective, is entirely misconceived and is not maintainable. It is open to a party to challenge the award before the judgment was pronounced by the Court according to it under the provisions of Sch. II of the C. P. Code, and it is not open to him to chalc. r. Code, and it is not open to him to challenge it in any other way. (Bennett and Ghulam Hasan, JJ.) PANNA LAL v. MST. RUPO. 1944 O.W.N. 345=1944 A.L.W. 452=1944 A.W.R. (C.C.) 238=1944 O.A. (C. C.) 238=A.I.R. 1945 Oudh 92.

Sch. II, para. 1—Applicability—Appeal from preliminary decree in partition suit—Application by parties to abbellate Court for reference.

plication by parties to appellate Court for reference to arbitration pending appeal-Competency-

Jurisdiction to make reference.

The procedure laid down in Sch. II, C. P. Code, is not inapplicable to an appellate Court and an application for reference to arbitration under Sch. II, C. P. Code, may therefore be made to an appellate Court as well as to a Court of original jurisdiction. An application for reference to arbitration made to a Court before which an appeal from a preliminary decree in a partition suit is pending is therefore competent, and the appellate Court has jurisdiction to refer and the appellate Court has jurisdiction to refer the matters in dispute to arbitration. (Davis, C. J. and Weston, J.) ALLAKHDINOMAL v. TEKUMAL. I.L.R. (1942) Kar. 177=204 I.C. 473=15 R.S. 100=A.I.R. 1943 Sind 22.—Sch. II, Para. 1—Reference—Competency of pleader to make. See LEGAL PRACTITIONER. 1942 O.A. 543.—Sch. II, Para. 1—Scope—Suit for restitution of congular rights—If can be referred.

titution of conjugal rights-If can be referred to arbitration.

The question whether a person should be given a decree for restitution of conjugal rights against his wife is a matter in difference between the husband and wife in suits for restitution of conjugal rights and there is no legal bar in Sch. II, C. P. Code, to a reference of the whole suit for restitution of conjugal rights to arbitration and to a decree being passed in accordance with the award. (Almond, J.C. and Mir Ahmad, J.) the award. (Almona, J.C. and war Almmu, J.)
Mt. Kunti Devi v. Bhola Nath. 194 I. C.
466=13 R. Pesh. 81=A.I.R. 1941 Pesh. 43.
——Sch. II, Para. 1 (1)—Judgment contemplated by—Pendency of review application—If a bar to reference to arbitration without interventions.

The 'judgment' contemplated by para. 1 (1) of the second Schedule, C. P. Code, is a judgment in a suit. Review proceedings are not a suit. Para. 1 (1) predicates the pendency of a suit. Hence a reference to arbitration without the intervention of Court is not bad in a case

tion of Court.

## C. P. CODE (1908), Sch. II, Para. 3.

after the judgment in a suit but during the pendency of a review application thereafter. (Col-Hister and Bajpai, JJ.) SAGAR MAL v. PARSHOTTAM DAS. 198 I.C. 385=14 R.A. 279=1941 A.W.R. (H.C.) 371=1941 A.L.W. 1095=1941 A.L.J. 770=A.I.R. 1942 All. 36.

-Sch. II, Para. 3—Scope—Power Court to compel party to go to arbitration on

matter not agreed to be referred.

There is no provision in the schedule which enables a Court directly or indirectly, to force a party to refer a matter in dispute. Para. 3 does not give the Court power to compel one of the parties to go to arbitration on a matter which he has not agreed shall be referred. The Court has therefore no power to nullify a reference lawfully made by an addition, to the matter referred, of some other matter by an amendment of the pleadings. (Davis, C.J. and IVeston, J.) SITALDAS POHUMAL v. NIHALCHAND Issardas. 198 I.C. 847=14 R.S. 158=A.I. R. 1942 Sind 7.

Sch. II, Para. 5—Applicability— Agreement to refer—Refusal by some arbitrators named to act—Effect—Application to file agreement—Power of Court to appoint new arbitrators and make reference-Absence of provision in agreement in case of refusal of arbitrators to act-Effect-Para. 17 (4).

It cannot be seriously disputed that there is some difference between the procedure to followed where the arbitration is made in a pending suit and where there is a mere agreement to refer to arbitration which is sought to be filed in Court. In the latter case the Court obviously cannot go beyond the terms of the agreement, and if the agreement specifies the persons who are to be appointed arbitrators and makes no provision for the case where the arbitrators refuse to act, the Court cannot substitute in the place of the named arbitrators other persons, in the face of the clear provision in para. 17 (4) of Sch. II, C. P. Code. Para. 5 of Sch. II, C. P. Code, will not apply to such a case, as it can come into play only after there has been an order of reference by the Court. If the one or more of the arbitrators named in agreement refuse to act and thus make agreement incapable of performance, the agreement becomes void, and the Court has no jurisdiction under para. 17 (4) to make a reference to the arbitrators who are willing to act. (Harries, C.J. and Chatterji, J.) TARA PRASAD BALIASEY v. BAIJNATH PRASAD BALIASEY. 19 Pat. 927=193 I.C. 756=13 R.P. 628=1941 P.W.N. 49=7 B.R. 615=A.I.R. 1941 Pat. 155.

-Sch. II, Para. 8-Extension of time for filing award—Discretion—Improper

Interference in appeal.

Where proceedings before an arbitrator gone on for some time, the evidence has been closed and the case is ready for arguments and giving of the decision, and the arbitrator who had only obtained two former extensions of time for filing the award applies only for one more fortnight's time, it is an arbitrary exercise of ders an award liable to be set aside. Chand v. Mool Chand. [See Q.D., tration and thereby cause grave miscarriage of Vol. I, Col. 1993.] 16 Luck. 79.

## C. P. CODE (1908), Sch. II, Para. 14.

justice. It is liable to be set aside in appeal. (Ghulam Hasan and Madeley, JJ.) CHINMAN v. Brij Mohan Das. 18 Luck. 425=204 I.C. 144=15 R.O. 273=1942 O.A. 298=1942 O. W.N. 407=1942 A.W.R. (C.C.) 270=A.I. R. 1943 Oudh 117.

-Sch. II, para. 10-Filing of

What amounts to.

The mere handing over of an award with the reader, in the absence of the Judge on leave, is not filing it in Court. An award cannot be said to be "filed in Court" within the meaning of Sch. II, para. 10, C. P. Code, by simply showing it on the record. It is necessary that it must be placed on the record by order of the presiding officer of the Court, or by an official specially authorised in this behalf. (Tek Chand and Beckett, II.) IMAM DIN v. ALLAH RAKHA, 201 I.C. 462=15 R.L. 49=44 P.L.R. 249 =A.I.R. 1942 Lah. 190.

-Sch. II, Para. 10-Reference of suit to arbitration-Parties joining together with arbitrators and third persons, and executing document agreeing to compromise suit on certain terms—Document, if award.

The parties to a partition suit referred the matter to the arbitration of certain Amins. When the Amins had decided what they were going to do, the parties joined together with the Amins and certain local gentlemen and executed a document by which they agreed that the parties shall be bound to compromise the suit upon certain terms which were annexed to the document which was signed by the parties.

Held, that the document was not an award but an agreement to compromise. (Derbyshire, C.J. and Mukherjea, J.) Purna Chandra Chowdhury v. Jagat Bandhu Choudhury. 45 C. W.N. 381=76 C.L.J. 33.

-Sch. II, Para. 11-Statement of award without leave of Court-Subsequent grant of

leave-Effect of.

The omission to take the leave of the Court before stating an award for its opinion as required by para. 11 of Sch. II, C. P. Code, can be rectified by the subsequent grant of leave. (Sen, J.) Surji Sethani v. Ratanlal. 47 C. W.N. 266.

amend award—Revision—North-West Frontier

Provinces Courts Regulation, S. 34.

If the trial Judge comes to the conclusion that there is no obvious error in the award which can be corrected under para. 12, Sch. II, C. P. Code, his decision is final even if he reaches a wrong conclusion. But if, on the other hand, he declines to consider the matter being of opinion that he has no power in any event to amend the award, he fails to exercise a jurisdiction vested in him, and a revision will lie. (Sir John Beaumont.) MAHOMED AKBAR KHAN v. ATTAR SINGH. 49 C.W.N. 802=A.I.R. 1945 P.C. 170 (P.C.).

----Sch. II, Para. 14 (c)—Taking of an erroneous view of law by arbitrator—When ren-PHOOL 1936-'40,

C. P. CODE (1908), Sch. II, Para. 15.

Sch. II, Para. 15—Construction—Cancellation of reference to arbitration under R. 8—Subsequent award—If void—If can be filed.

Even where an award has been made by arbitrators whose powers have been revoked cancellation of order of reference under R. 8 of Sch. II, C. P. Code, the award is not void ab initio but has to be set aside under R. 15 of Sch. II. If no application is made to set aside the award, it remains in force and may be filed. (Mockett, J.) Subbayya v. Venkatadri. 200 I.C. 55=14 R.M. 687=1941 M.W.N. 780=54 L.W. 604=A.I.R. 1941 Mad. 921=(1941) 2 M.L.J. 395.

Sch. II, Para. 15—Delay in pronouncing award—Rights of parties. Kesholal v. Laxman Rao. [See Q.D., 1936-'40, Vol. I, Col. 1995.] 192 I.C. 371=13 R.N. 244.

-Sch. II, Para. 15-Setting aside award -Grounds-Complaint as to vagueness of award

—Sufficiency.

An objection that an award is vague and illegal, is itself a vague objection and does not deserve any consideration. (Harper, S.M. and Sathe, J.M.) DINA v. KALIKA PRASAD. 1941 R.D. 284=1941 A.W.R. (Rev.) 404=1941 O.A. (Supp.) 353.

Sch. II, Para. 16—Applicability—Refer-

ence to arbitration before 1-7-1940-Award after Arbitration Act (1940) came into force —Order refusing to set aside—Appeal—Competency. See Arbitration Act, S. 39. 1943 P. W.N. 65.

–Sch. II, Para. 16—Decree on award-Reference to arbitration without jurisdiction— Appeal or second appeal—If lies—Revision.

No appeal lies from a decree made in accord-

ance with an award by a Munsif on the ground that the reference to arbitration was jurisdiction; nor does a second appeal lie to the High Court in such a case. Parties are entitled to ask the High Court to interfere under S. 115, C. P. Code, and set aside an order made by an appellate Court without jurisdiction. But High Court will not be prepared to help in revision a party who joined in the reference to arbitration and took part in it, but having lost it, is trying to back out of it. (Henderson, J.) ACHIRAN BIBI v. BABUR ALI SAPUI. I. L. R. (1944) 1 Cal. 619=79 C.L.J. 123=A.I.R. 1945 Cal. 156.

Sch. II, Paras. 16 and 21—Trial Court accepting objections to award and giving decision on merits—Appellate Court holding award valid and passing decree thereon—Second appeal -If competent.

A second appeal is competent in a case in which the trial Court, after accepting objections to an award, gives a decision on the merits, and the first appellate Court, holding the award to be valid passes a decree in accordance with award. The language of paras. 16 and 21, Sch. II, C. P. Code, refers in all cases to decrees of the trial Court and finality is given only to such decrees. S. 100, C. P. Code, which deals with second appeals, gives a right of appeal from all decrees of appellate Courts subordinate to the High Court. S. 41 of the Punjab Courts Act, in conceding the right of appeal, is more empha-

C. P. CODE (1908), Sch. II, Para. 18.

tic than S. 100, C. P. Code. A right so given can not be taken away by implication or by analogies drawn from other provisions or by any alleged illogical reasoning of the Legislature. (Abdul Rashid, Ram Lall and Beckett, JJ.) MA-HOMED JAMIL v. SAUDAGAR SINGH. 47 P.L.R. 114=220 I.C. 107=A.I.R. 1945 Lah. 127 (F.B.).

——Sch. II, Para. 16 (1)—Powers of Court -Award—Objections—No orders—Competency

of Court to dispose suit on merits.

Where an award has been given on a reference and objections are filed but no orders are passed either accepting or rejecting them, it is not competent for the Court under Sch. II, R. 16 (1) of the C. P. Code to dismiss the suit on the merits. (Harper, S.M. and Sathe, J.M.) DINA v. KALIKA PRASAD. 1941 R.D. 284=1941 A.W.R. (Rev.) 404=1941 O.A.

——Sch. II, Para. 16 (2)—Appeal—Decree in excess of award—Sustainability.

Where a decree is passed on an award and it is found that part of the decree was in excess of the award, that portion of the decree which has exceeded the award, cannot be supported in appeal and is liable to be set aside. (Harper, S.M. and Sathe, J.M.) DINA v. KALIKA PRASAD. 1941 R.D. 284=1941 A.W.R. (Rev.) 404=1941 O.A. (Supp.) 353.

-Sch. II, Para. 17 (4)—Power of Court -Agreement to refer to named arbitrators-Refusal by some to act-Absence of provision in agreement to meet situation—Application to Court to file—Power of Court to appoint arbitrators in place of those specified in agreement. See C. P. Code, Sch. II, Para. 5. 19 Pat. 927.

-Sch. II, Para. 18-Stay under-Effect of

subsequent award-Further procedure.

Where a suit filed during pendency of arbitration proceedings is stayed under para. 18 of the second schedule, C. P. Code and an award is subsequently delivered, no question of the continuance of the suit can arise thereafter and the further proceedings must commence de novo, whether under the provisions of the second schedule or otherwise upon the award. Hence there is no necessity to revoke the stay order and formally dismiss the suit. (Bennett and Madeley, JJ.) Gopal Das v. Jugal Kishore. 212 I.C. 366=16 R.O. 282=1943 O.W.N. 256=1943 O.A. (C.C.) 132=A.I.R. 1943 Oudh 378.

-Sch. II, Para. 18-Stay order-Review-Permissibility—Arbitration subsequently becoming infructuous by death of some arbitrators—Power of Court to revoke reference.

An order for stay made under Para. 18 of Sch. II, C. P. Code, can be reviewed at a later stage, if new facts come into existence which render such a review necessary or desirable. Where after a stay order is made the arbitration becomes infructuous by reason the death of some of the arbitrators, the Court can make an order cancelling the stay, but is not competent to pass an order revoking the reference to arbitration made without its intervention. (Khundkar and Biswas, II.) GANGA C. P. CODE (1908), Sch. II, Para. 20. PROSAD GAIN v. UPENDRA NATH. 49 C.W.N. 316.

——Sch. II, Para. 20—Award on private reference made rule of Court—Minor party reference made rule of Court—Minor party avoid award for want of registration—Maintainability.

Where an award on a private reference has been by consent of all parties made a rule of Court and a decree passed in terms thereof and a minor party has been throughout represented by his guardian, he is not entitled to file a suit for a declaration that the decree is void and of no effect as it was based upon an un-registered award. (Collister and Bajpai, JI.) SAGAR MALL v. PARSHOTTAM DASS. 198 I.C. 385=14 R.A. 279=1941 A.W.R. (H. C.) 371=1941 A.L.J. 770=1941 A.L.W. 1095= A.I.R. 1942 All. 36.

-Sch. II, Para. 20—Award—Validity— Partition suit—Reference to arbitration—Procedure—Piece-meal inquiry—If invalidates award. If in a partition suit a reference is made of the whole matter to an arbitrator with directions to make an award, the arbitrator would not be empowered to make a series of awards each dealing with one branch of the dispute as on the making of an award he would be func-tus officio, and would have no power to do any-thing further. But an arbitrator dealing with a complicated partition dispute would not be debarred from taking up an inquiry piece-meal, classifying the evidence according to the subjectmatter more or less under issues just as a Court would do and arriving at tentative conclusions on each section of the case, always provided that he does not make anything in the nature of an award in writing until the whole matter is decided. The arbitrator in a parti-tion inquiry must decide firstly what are the properties available for decision before he can proceed to decide how those properties should be divided. The apportionment of the would often depend upon the apportionment of the lands and it is therefore almost inevitable that the arbitration in such a case should proceed piece-meal. There is consequently nothing wrong in the procedure of the arbitrator in that manner, unless he can be deemed to have made a final and formal award at any of the stages before he makes the final award. The procedure in deciding the various sections of the inquiry piece-meal and summing them up in one final award cannot therefore be regarded as amounting to the giving of several awards so as to render his decision invalid. (Wadsworth and Patanjali Sastri, JJ.) RAMANUJACHARIAR v. VATAPATHRA SAYEE THATHACHARIAR, I.L.R. (1943) Mad. 443=206 I.C. 207=15 R. M. 936=1942 M.W.N. 811=55 L.W. 814=A. I.R. 1943 Mad. 172=(1942) 2 M.L.J. 698.

——Sch. II, Paras. 20 and 21—Filing of award and passing of decree directed by same order—Impropriety—Proper procedure.

When an application is made for the filing of an award it is not proper to direct by a single award cannot therefore be regarded as amount-

an award it is not proper to direct by a single order that the award be filed and that a decree be passed upon the basis of the award. There should be two separate orders and this is imC. P. CODE (1908), Sch. III, Para. 11. portant because the C. P. Code provides for an appeal against an order filing an award but does not provide for an appeal against a decree passed on the basis of the award. When a single order is passed and an appeal is filed it is treated as an appeal from an order directing the award to be filed. (Bajpai, I.) PARSHOTTAM RAIL 2. RAGHUNATH RAM. 1943 A. L.W. 24.
——Sch. II, Para. 20 (2)—Jurisdiction—

Application relating to property within jurisdic-

tion of two Courts-Forum.

Where an application under para. 20 (2) of Sch. II, C. P Code, relates to property within the jurisdiction of two Courts in British India the Court within whose jurisdiction part of the property is situate is competent to entertain the application. (Davis, C.J. and Weston, J.) JETHANAND PITAMBERDAS V. MIRABAI. I. L. R. (1942) Kar. 36=202 I.C. 152=15 R.S. 24= A.I.R. 1942 Sind 79.

-Sch. II, Paras. 20 and 21-Jurisdiction of Court under-Award allotting business to one partner and directing others to pay dues and execute release deeds to the former in fixed time—Provision for payment of fixed amount of damages on default—Legality—Enforceability of award-Power of Court to modify. Thirumalai Chettiar v. Nanjayya Gowder. [See Q.D., 1936-'40, Vol. I, Col. 2009.] A.I.R. 1941 Mad. 266.

-Sch. II, Para. 21 (1)—Object and scope-Power of Court to inquire into genuine-

ness of reference. See Arbitration Acr, Ss. 17
AND 30. I.L.R. (1943) Kar. 390.
——Sch. III, Para. 1—Decree obtained by co-operative society transferred to Collector— Society subsequently going into liquidation-Jurisdiction of Collector to sell property.

The fact that after a decree obtained by a co-operative society is transferred to the Collector for execution the society goes into liquidation and is replaced by a liquidator, does not deprive the Collector of jurisdiction to sell the

deprive the Collector of jurisdiction to sell the property of the judgment-debtor. (Binney, F. C.). AMOLAKCHAND v. LIQUIDATOR TALEGAUN CO-OPERATIVE SOCIETY. 1943 N.L.J. 249.
——Sch. III, Para. 2—Property under management of Collector—Alienation by judgment-debtor—If void or voidable—Sale and subsequent acceptance by Collector—Effect. SHALAGRAM v. MANNU. [See Q.D., 1936-'40, Vol. I, Col. 3308.] I.L.R. (1941) Nag. 214 = 192 I.C. 312=13 R.N. 236=A.I.R. 1940 Nag. 12. Nag. 12.

Sch. III, Para. 6—Forum of appeal contemplated by.

The 'Court' against whose decision on dispute arising under para. 4 or para, 5 of the third schedule, C. P. Code, a right of appeal is given by para. 6 of the same schedule is the Civil Court and hence the appeal is to the Civil Court only. (Sathe, S. M. and Dible, J.M.)

Sumat Das v. Allahabad Bank Ltd. 1943 A.

W R (Rev.) 140 (2)—1043 R. D. 316

W.R. (Rev.) 140 (2)=1943 R. D. 316.

Sch. III, para. 11—Application for execution against other properties of judgment-debtor not under Collector's control—Time during the state of the st ing which sale proceedings were pending before Collector-If can be excluded.

#### C. P. CODE (1908), Sch. III.

Under cls. (1) and (2) of para 11 of Sch. III, C. P. Code, the jurisdiction of the Civil Court to execute the decree against property of the judgment-debtor, which has not been attached and not included in the C Form and in respect of which the Collector has not made any provision under para. 7, is not ousted for the reason that the incapacity imposed on the judgment-debtor is confined to the property of which the Collector has assumed management and does not extend to property which is not under his control. It follows, therefore, that the decree-holder filing a fresh application for execution of the decree against other properties of the judgment-debtor which have not been mentiond in any of his previous applications, is not entitled to invoke cl. (3) of para. 11 to overcome the bar of limitation by seeking to exclude the time during which the sale proceedings were pending before the Collector. (Grille, C.I. and Niyogi, J.) BHASKAR GULABRAO v. CHANDRABHAN. I.L.R. (1945) Nag. 555=1945 N. L.J. 261=A.I.R. 1945 Nag. 239.

-Sch. III, Para. 11—Execution of mortgage decree-Collector selling some of properties and discharging rest from sale-Mortgage thereafter by judgment-debtor of property not sold—Sale subsequently set aside on deposit by judgment-debtor-Validity of mortgage-Collector's permission for such mortgage—Whether can be deduced from his order discharging remaining properties from sale—U. P. Government Rules, Rr. 996-1000.

A mortgage decree for sale was transferred for execution to the Collector under S. 68, C. P. Code, and the Collector ordered that a certain property should be sold as the first lot and another property as the second lot and that the other properties should only be sold if these two did not produce sufficient to discharge the debt, and that the auction should be closed as soon as the full amount of the demand was secured. When the sale was actually held, the property ordered to be sold second was not put up for sale but only the property ordered to be sold The first and another property were sold. The order of the Collector recording the sale stated that as the amount due to the decree-holder was satisfied, the remaining properties were discharged from sale. The sale of the two properties was subsequently set aside on deposit purporting to have been made by some of the judgment-debtors under O. 21, R. 89, C. P. Code, which is in the same terms as R. 996 of the U. P. Government Rules framed under S. 70, C. P. Code. One of the other judgmentdebtors mortgaged the property which was ordered to be sold second but was not sold, after the date of the execution sale and before the date on which it was set aside.

Held, (i) that that mortgage was invalid having been made in circumstances which brought into operation para. 11 of Sch. III, C. P. Code, and that the powers and duties of the Collector under paras. I to 10 of Sch. III did not expire on the date of the mortgage but lasted at least

## C. P. CODE (1908), Sch. III.

of the U. P. Government Rules; (ii) that a written permission of the Collector for the mortgage could not be deduced from his statement in the order recording the sale that the remaining properties were discharged from sale. (Sir George Rankin.) RAJA MOHAN MANU-CHA V. MANZOOR AHMAD KHAN. I. L. R. (1943) Kar. (P. C.) 19=70 I. A. 1=18 Luck. 130=206 I.C. 457=1943 O. W. N. 214=1943 A.L.W. 381=9 B.R. 353=15 R. P.C. 94=1943 A.L.J. 421=47 C.W.N. 509 =46 Bom.L.R. 170=1943 O.A. (P.C.) 52 =A.I.R. 1943 P.C. 29=(1943) 1 M.L.J. 508 (P.C.).

-Sch. III, Para. 11-Mortgage granted in violation of-Personal covenant-If also void.

The incapacity imposed on a judgment-debtor by para. 11 of Sch. III, C. P. Code, is an incapacity to affect his property and not a genecapacity to affect his property and not a general incapacity to contract. Although a mortgage granted in violation of this paragraph is void, the personal covenant to repay is not made void by the mere operation of this paragraph. (Sir George Rankin.) RAJA MOHAN MANUCHA V. MANZOOR AHMAD KHAN. I.L.R. (1943) Kar. (P.C.) 19=70 I.A. 1=18 Luck. 130=206 I.C. 457=1943 O.W.N. 214=1943 A. L.W. 381=9 B.R. 353=15 R. P. C. 94=1943 A.L.J. 421=47 C.W.N. 509=46 Bom. L.R. 170=1943 O.A. (P.C.) 52=A.I.R. 1943 P.C. 29=(1943) 1 M.L.J. 508 (P.C.). C.).

-Sch. III, Para. 11 and U. P. Revenue Manual, Para. 1010—Power of sale—If can be delegated by Collector—Presumption of such delegation-Justifying circumstances.

There is no prohibition imposed upon the Collector to delegate the power of sale to the Assistant Collector and the latter can under his written permission allow the judgment-debtor to execute a private sale of his property. Where there is no dispute that a sale officer was appointed by the Collector and there is further evidence that an application for permission to sell having been made before him the sale deeds were executed with his permission then a presumption arises that there was a delegation of the power of the Collector to the sale officer. (Ghulam Hasan and Madeley, JJ.) Kamta Prasad v. Sipahi Lal. 19 Luck. 463=17 R. O. 17=214 I.C. 39=1943 A.W.R. (C.C.) 180=1943 O.W.N. 488=1943 O.A. (C.C.) 312=A.I.R. 1944 Oudh 60

Jurisdiction of Collector—Attachment by Court-Validity-Sale in pursuance of-If can affect sale under powers conferred by paras. 1 to 10 of Sch. III.

Where the Collector is exercising the powers conferred on him by paras. 1 to 10 of Sch. III, C. P. Code in respect of a property, the Civil Court cannot issue any process against such property by virtue of the prohibition contained in para. 11 of Sch. III. Hence a sale held in pursuance of an attachment contrary to the prountil the date on which the sale was set aside, regard being had to Rr. 996 to 1000 (which correspond to O. 21, Rr. 89 to 94, C. P Code) DAWARI BAL. I. L. R. (1943) Nag. 199=206 C. P. CODE (1908), Sch. III.

I.C. 470=15 R.N. 263=1943 N.L.J. 104=

A.I.R. 1943 Nag. 166.

-Sch. III, para. 11—Scope and effect of. Para. 11 of Sch. III, C. P. Code, cannot affect anything done by the proprietor for the effective cultivation of the ryoti land of the village in the ordinary course of village management, even though it may involve transfer of cultivating rights. This provision of law only takes away the judgment-debtor's capacity alienate the property under the control of the Collector, but does not take away his right to manage his village as would be the case if the Court of Wards Act had applied. (Niyogi, J.)
FATTECHAND v. BUDHU. 1942 N.L.J. 299.
——Sch. III, Para. 11 (3)—Scope.
Cl. 3 of para. 11 of the third schedule is wide enough to include the case of an applica-

tion to which S. 48, C. P. Code, applies and is not confined to periods of limitation prescribed not confined to periods of limitation prescribed by the Limitation Act. (Ghulam Hasan and Madeley, JJ.) Deputy Commissioner, Bara-Banki v. Anand Behari Lal. 220 I.C. 137 = 1944 O.W.N. 169=1944 A.L.W. 239= 1944 A.W.R. (C.C.) 120=1944 O.A. (C.C.) 120=A.I.R. 1945 Oudh 110.

Appendix G, Form 3—Construction—"By the appellate Court"—If covers all further appellate Courts. See C. P. Code, O. 41, R. 6. 45 Bom.L.R. 510.

45 Bom.L.R. 510.

**CLUB**—Race club—Decision of domestic tribunal—Natural justice—What is—Malice—Considerations for deciding

-Subsequent events-Relevancy.

In considering whether natural justice has been observed or not by a domestic tribunal in arriving at a decision, one of the factors to be considered is whether the body which decided the question were actuated by malice or some improper motive. In considering such a question the subsequent conduct of those concerned may be most material. When there is a question of malice, everything relative to the matters in question even down to the very conduct of the defendant (the domestic tribunal) at the trial, may be material. Evidence of events subsequent to the decision of the domestic tribunal may be considered. (Blagden, J.) GEORGE BELL v. ROYAL WESTERN INDIA TURF CLUB, LTD. 47 Bom.L.R. 916=A.I.R. 1946 Bom. 88.

-Race club-Decision of stewards-Proceedings held in accardance with rules of racing—Notice of hearing and notice of charge—Adequacy of—Natural justice—Shortness of notice—If fatal—Absence of notice of charge before hearing—Effect of.

Where the rules of racing framed by a club do not prescribe any particular length of notice in regard to the investigation into a charge of misconduct on the part of a trainer, mere shortness of notice is not by itself fatal and would not vitiate the proceedings or make them contrary to natural justice. Nor would the mere absence of notice of the charge before the hearing in itself, be incompatible with natural justice in a domestic tribunal. Where there is no rule expressly requiring any particular notice to be given to the party affected or to the tribunal, the party cannot be allowed to conduct his case, before a tribunal properly constituted, to its conclusion, and then, when he has been unsuccessful, to say that he ought to have had notice of the charge before the hearing began and particulars of the charge. (Blagden, J.) George Bell v. Royal Western India

COLONIAL (INDIAN AND) DIVORCE JURISDICTION ACT (1962).

TURF CLUB, LTD. 47 Bom.L.R. 916=A.I.R. 1946 Bom. 88.

Race club—Expulsion of member—Tribunal o stewards deciding question—"Bias"—What constitutes

-Interest of members of tribunal in result-Effect of.
To constitute "bias" in an arbitrator or a domestic tribunal, such as a committee of stewards of a race club, there must be something tending to make the mind to go one way rather than another, and improperly tending to do so. In every club, and even in every profession, the tribunal which decides the question of expulsion of a member, is to a certain extent interested in the result of the proceedings. That is not, however, in itself, bias for the purpose of invalidating their decision. (Blagden, J.) George Bell v. Royal Western India Turf Club, Ltd. 47 Bom.L.R. 916=A.I. R. 1946 Bom. 88.

Race club—Rules of—Tribunals provided by to decide disputes—Powers of—Jurisdiction of Civil Court to interfere—Cause of action for suit -Principles. See Jurisdiction-Civil Court. I. L.R. (1944) Kar. 364.

-Race club-Suit against for damages in respect

of wrong ful act of stewards-Maintainability.

Where a club or society is incorporated a suit for damages will lie against such club or society in respect of the alleged wrong doing of its committee e.g., stewards of a racing club, who, for this purpose, must be regarded as their agents. (Blagden, J.) GEORGE BELL D. ROYAL WESTERN INDIA TURF CLUB, Ltd. 47 Bom.L.R. 916=A.I.R. 1946 Bom. 88.

Royal Western India Turf Club—Rules of Racing, rule 103—"Misconduct"—Meaning of—Withdrawal of

trainer's licence—Power of stewards.
"Misconduct" in rule 103 of the Royal Western India Turf Club Rules is very general, and is not restricted to any specific offence. The stewards of a racing club would be within their right in withdrawing the licence of a trainer, provided they honestly entertain the opinion and arrive at it in a proper way, that he was guilty of that conduct and that it is misconduct in connection with racing. (Blagden, J.) GEORGE BELL v. ROYAL WESTERN INDIA TURF CLUB. LTD. 47 Bom.L.R. 916=A.I. R. 1946 Bom. 88.

COFFEE STEALING PREVENTION ACT (MADRAS ACT VIII OF 1878). See MADRAS ACTS.

COLLECTOR PROCEEDINGS—Sale—Stayby reason of application to Debt Conciliation Board— Dismissal of application—Sale without notice to judgmentdebtor-Propriety.

After the issue of a proclamation of sale by the Collector the proceedings were stayed by reason of an application to the Debt Conciliation Board. After the latter's dismissal, the sale was held without notice to judgment-debtor. It was set aside by the appellate Court. Held, in revision that the appellate order was so obviously just and equitable that it could not in any event be interfered with in revision. (Binney, F.C.) SHEONARAYAN BALIRAM v. SARDARKHAN

ABDULLAH. 1942 N.L.J. 29.
COLONIAL (INDIAN AND) DIVORCE
JURISDICTION ACT (16 and 17 Geo, V Ch. 40) (1926)—Cruelty—What may not amount to.

Where during the honeymoon the wife was struck on the face which necessitated a doctor's attendance but did no bodily harm to her and where the husband persisted in writing letters to his wife expressing his doubts as to paternity of the child of his wife

# COLONIAL (INDIAN AND) DIVORCE JURIS DICTION ACT (1926), S. 1.

it was held that these did not amount to legal cruelty which would enable her to obtain a divorce under Jurisdiction Act. the Indian Colonial Divorce (Sharpe, J.) H. USSHER v. T. USSHER. 1941 Rang.L. R. 290=196 I.C. 270=14 R.R. 73=A.I.R. 1941 Rang. 221.

-S. 1-Declaration of nullity of marriage-Grant

of—Jurisdiction of High Court.

The Divorce Act recognises the distinction between decrees for dissolution and decrees for nullity and the words "decrees for dissolution" in the Indian and Colonial Divorce Jurisdiction Act must be confined to "decrees for dissolution" as defined by the Divorce Act. The High Court has, therefore, no jurisdiction under the Indian and Colonial Divorce Jurisdiction Act to grant a declaration of nullity of marriage on the ground of impotence. (Monroe, J.)
H.F.M. HUNTER v. M.B. HUNTER. 203 I.C. 496=
15 R.L. 220=44 P.L.R. 468=A.I.R. 1942 Lah. 302.

-S. 1—Jurisdiction under—Parties to marriage last residing in Lahore-Wife living in Bombay before and at time of petition for divorce-Husband living in Lahore-Petition by wife in Bombay High Court—Maintainability—R. 24 under S. 1 (4)— Construction. P.C. CARROLL v. C. J. CARROLL. [See Q. D. 1936-'40, Vol. II, Col. 1941.] I.L.R. (1941) Bon. 183=192 I.C. 767=13 R.B. 289= A.I.R. 1941 Bom. 61,

COMPANIES—Agreement by promoters prior to incorporation-Ratification by company after incorporation-

Agreement, if enforcible by company.

An agreement made by the promoters of a company prior to its incorporation, cannot be enforced by the company even though it has adopted and ratified it after its incorporation. (Gentle, J.) BARASAT BASIRHAT LIGHT RAILWAY CO., LTD. v. DISTRICT BOARD, 24 PARGANAS. I.L.R. (1944) 2 Cal. 101.

-Application for shares—Revocation—Grounds-Material change in prospectus after application and before allotment-Sufficiency-Proof of misrepresentation or fraud-

Necessity.

Where after an application is made for shares in a company and before the date of the allotment, the prospectus of the company is changed in material particulars for instance, by a reduction of the minimum subscription required before allotment from Rs. 40,000 to Rs. 10,000, an applicant for shares is entitled to revoke his application. Mere material change in the prospectus is sufficient to entitle an applicant to revoke his application and it is not necessary to prove misrepresentation or fraud. (Byers, J.) RAJAGOPALA IYER v. SOUTH INDIAN Mad. 133=15 R.M. 612=203 I.C. 243=1942 M.W. N. 475=55 L.W. 521=1942 Comp. C. 203=A.I.R. 1942 Mad. 656=(1942) 2 M.L.J. 228.

-Articles of Association—Construction—Banking company-Provision in Article for vacating office by director on resignation or incapacity to act as director—Default in repayment of loan to company-If ground for vacating

office of director.

Where one of the Articles of Association of a banking company provides that the office of a director shall be vacated "if he resigns or for any other reason becomes incapable of acting as a director," it cannot be held that default by him in repaying a loan to the bank and indebtedness to the bank incapacitates him from acting as a director. Loans to directors

## COMPANIES—Articles of Association.

of a bank are contemplated as part of its business and therefore default in repayment of a loan cannot be a disqualification. There must be some disqualification. incapacity such as illness, long absence, imprisonment or insanity, etc. (Byers, 7.) Albuquerque v. Catho-Lic Bank, Ltd., Mangalore. I.L.R. (1943) Mad. 291=204 I.C. 557=15 R.M. 784=1943 Comp. C. 213=55 L. W. 532 (1)=A.I.R. 1942 Mad. 737 (1)=(1942) 2 M.L.J. 307.

of–Articles Association—Construction—Binding character of-Allotment of shares to applicants by directors after meeting—Subsequent cancellation of alloiment and removal of names from register—Legality—Companies

Act, S. 30.

One of the articles of association of a company provided that "the shares shall be under the control of the directors who may allot or otherwise dispose of the same only among existing members but shall not, without the consent of the company in general meeting allot or otherwise dispose of them to outsiders" Two persons applied for shares in the company which then consisted of only six members all of whom where directors. Each of them was allotted two shares at a meeting of five out of the six directors of the company. Their names were duly entered in the register of members. About 8 months later, the directors resolved to cancel the allotments on the ground that the allotments were invalid for want of consent of the company in general meeting as required by the Articles of Association, and removed the names of the two newly added members from the register of members.

Held, in an application by those members to rectify the register by re-inserting their names, that the allotments must, under the circumstances, be regarded as valid and binding on the company. The applicants for shares, though deemed to have contracted on the footing of the Articles of Association, could not be held bound to inquire into the regularity of the internal management or the "indoor management", and they were entitled to assume that the sanction of the company in general meeting as required by the Articles of Association had, in fact, been obtained. As they were persons who had agreed to become members of the company under S. 30 of the Companies Act, the addition of their names to the register of members constituted them members and their names could not be removed except by rectification of the register as required by law. (Clark, J.)
DAMODARA REDDI v. INDIAN NATIONAL AGENCIES.
I. L. R. (1945) Mad. 728=58 L. W. 578=
1945 Comp. C 148=A.I.R. 1946 Mad. 35= (1945) 2 M.L.J. 432.

Articles of Association—Construction—Shipping company—Company having as its object, among others, acquisition of and dealing with "personal estate and effects" and of the investment of money in such manner as the directors think fit—Purchase of bullion—If ultra vires.

The respondent company, which was a shipping company incorporated under the Indian Companies Act, had as its objects, as stated in the memorandum of association, "to acquire and deal with the following property, the business property and liabilities of any company, firm, etc., lands, buildings, etc., plant, machinery, personal estate and effects, and to perform or do all or any of the following operations, acts or things . . . . to lend money with or without security and to invest money of the company in such manner (other than in the shares of the company) as the directors think fit. The company out of its funds laid out 25 lacs of rupees in the purchase of bullion and deposited it

## COMPANIES-Articles of Association.

at a bank for safe custody. The appellant who was a shareholder in the company brought a suit against the company and the directors for a declaration that the transaction was ultra vires and illegal and void in law and for other reliefs.

Held, that the transaction was not ultra vires, but within the powers of the company and covered by the memorandum of association, as it amounted to acquisition of "personal estate and effects,"

which were comprehensive words.

Per Kania, J. (Stone, C.J. contra).—That the word "invest" in the memorandum of association was wide enough to cover the transaction in question. (Stone, C.J. and Kania, J.) WAMANLAL CHHOTALAL v. SCINDIA STEAM NAVIGATION Co., LTD. I.L.R. (1944) Bom. 247=214 I.C. 205=17 R.B. 79= 1944 Comp. C. 69=46 Bom.L.R. 145=A.I.R. 1944 Bom. 131.

--- Articles of Association-Power to refuse transfer of shares-Construction-Refusal of transfer for unsound and untenable reasons-Validity-Power of Court to

interfere.

The right of transfer of shares in a company is absolute as it is inherent in the ownership of the shares, but it can be restricted by contract which has to be found in the Articles of Association. Even in a case where power to refuse transfer is conferred in absolute terms, the refusal must not be arbitrary. Provided they act bona fide, the directors are not bound to give reasons for their refusal. But if they give reasons the Court can examine them, though it will not overrule the decision of the directors merely on the ground that it would have reached a different conclusion. If the directors refuse transfer on any wrong principle their act can be rectified. Where consent to the transfer is withheld for reasons which cannot stand scrutiny and no objection is raised of a personal kind against the person seeking transfer on whom the shares have devolved by operation of law, to recognise a power in the directors to refuse the transfer is to countenance an abuse of powers vested in them for the due and efficient management of the company. (Chandrasekhara Ayyar, Ank, Ltd. 213 I.C. 334=17 R.M. 79=1943 Comp. C. 202=A. I.R. 1943 Mad. 743=(1943) 2 M.L. J. 201.

-Debenture-holders-Rights of. MITHAN LAL v. Official Liquidators, Agra Spinning and Weaving Mills Co., Ltd. [See Q. D. 1936-40 Vol. I, Col. 3308.] 191 I.C. 458=13 R.A. 234.

Debentures—Trust deed creating charge (first mortgage) on property of company—Receiver appointed in suit by trustees of debenture trust—Loan raised with sanction of Court for payment of wages of staft and millhands-Charge on property-Agreement to hypothecate-

Effect of-Priority over debenture-holders.

A company formed in 1920, issued 200 first mortgage debentures of Rs. 25,000 each, bearing interest at 8 per cent. per annum; the debentures which were in common form were secured by a trust deed dated 8-8-1923, which contained (1) a specific charge on certain immovable and other assets of the company and (2) a floating charge on the rest of the property and undertaking. Later, in and after 1929, the company obtained financial assistance from the appellants' father, under an agreement dated 9—11—1925, which provided inter alia, for a lien in favour of the lender for moneys advanced by him on raw materials in the company's godowns and other materials, products and property of the company. In 1927, in the course of a suit by the

#### COMPANIES—Directors.

trustees of the debenture trust, a receiver was appointed of the property and undertaking of the company and as the receiver was urgently in need of funds to pay off the wages of the staff and mill-hands of the company, who had not been paid for over three months, he was authorised by the Court to raise money and he raised money from the appellant by a charge of the company's property. The agreement recited, "as regards these goods it has been agreed upon that as there is no opportunity for sufficient inquiry at this time, hence in future if these goods will be proved to be the property and to have been purchased or under lien of X (appellant) then within 10 days of the said decision, I shall hypothecate to you (appellant) to your satisfaction sufficient property worth at least . . " The goods were found to be under lien to the appellant.

Held, that the receiver could validly raise money by a charge on the company's property ranking in front of the debentures, that the appellant was entitled to a charge in priority to the debentureholders, and that as against the debenture holders, an agreement to hypothecate was as effectual as an actual hypothecation. (Lord Simonds.) LARSHMAN PRASAD v. JOHN. 72 I.A. 133=I.L.R. (1945) All. 597=58 L. W. 394=1945 P. W. N. 367= 1945 M.W.N. 594=A. I. R. 1945 P.C. 121= (1945) 2 M.L.J. 141 (P.C.).

---Deposits by employees in Bank as security-Nature of. Dinshaw & Co. v. Krishna Piari. [See Q.D. 1936-40, Vol. I, Col. 3308.] 16 Luck. 241=191 I. C. 178=1941 Comp. C. 138= A.I.R. 1941 Oudh 126.

of Directors present—If valid.

Unless a construction of the articles of a company leads to the conclusion that there was an intention to supersede the ordinary rule, it must be held that, where no quorum has in fact been fixed, the acts of a major part of the Directors for the time being are valid. (Tek Chand and Blacker, JJ.) GANSH FLOUR MILLS CO., LTD. v. JAG MOHAN SARAN. I.L. R. (1943) Lah. 123=199 I.C. 397=14 R.L. 386 =1942 Comp. C. 10=45 P.L.R. 15=A.I.R. 1942 Lah. 68.

Director or managing director—Position of.

A director or a managing director is in no way a servant of the company; he is the agent of the company for carrying on its business. (*Young, C.J. and Sal, J.*) Gulab Singh r. The Punjab Zamindara Bank, Ltd., Lyallpur. 199 I.C. 667=14 R.L. 423=43 P.L.R. 619=1941 Comp. C. 301=AI. R. 1942 Lah. 47.

-Directors-Power to refuse to recognise transfer of shares-Failure to rive reasons-Presumption of mala

fides—Opinion of shareholders—Relevancy.

Where a discretion is given to the Directors of a company by its Articles of Association, to refuse to register the transfer of shares to any person whom they think it undesirable to be admitted to membership of the company it is certainly open to the directors to refuse to register a transfer on that ground without giving any further reasons. But if a shareholder challenges this undoubted right of the Directors to use their discretion in such a matter, the burden lies heavily on him to allege with particularity and to prove such mala fides on the part of the Directors as amounts to arbitrary and wanton conduct. Directors are not to be exposed to suspicion of mala fides by reason merely of the fact that they have chosen to withhold their reasons and which they are not bound to give. In such a matter the opinion of

#### COMPANIES-Dividend.

the shareholders is quite irrelevant. So long as a Board of Directors exists and particular powers are vested in them by the articles, then they are entitled to exercise those powers without interference by other shareholders. If they are dissatisfied they can always remove the Directors. (Braund, J.) JAGDISH PRASAD v. PARAS RAM. I.L.R. (1942) All. 671=197 I.C. 860=14 R.A. 253=1942 Comp. C. 21=1941 A.L.J. 483=1941 O.A. (Supp.) 690=1941 A.W.R. (H.C.) 260=1941 A.L.W. 864=A.I.R. 1941 All. 360.

——Dividend—Party to whom company bound to pay
—Notice of agreement between vendor and vendee of shares
as to apportionment of dividend, if could be taken.

A company is bound to pay dividend to its members whose names are registered in its books. It could not take notice of any private arrangement between the vendor and vendee of certain shares in regard to the apportionment as between them of the dividend thereon. (Malik, J.) The Scientific Apparatus AND CHEMICAL WORKS, LTD. v. SUKHDEO PRASAD. I.L.R. (1945) All. 15=218 I.C. 495=18 R.A. 16=1944 A.L.W. 612=1944 O.W.N. (H.C.) 293=1945 A.W.R. (H.C.) 13=1945 O.A. (H.C.) 13=1945 Comp. C. 45=1944 A.L.J. 489=A.I. R. 1945 All. 47.

———Dividend—Right to—Shareholder not registered a! time of its declaration.

When declared, a dividend is a debt arising out of a contract payable by the company to a shareholder. The persons entitled to receive the dividend are only the duly registered shareholders when the dividend is declared. This is the usual position in the absence of any provisions to the contrary in the Articles of Association. (Derbyshire, C.J. and Iodge, J.) SRI SRI HARISESWAR IDOLS v. KHOROORIAH MAJOJILL ZEMINDARY SYNDICATE, LTD. 48 C.W. N. 693.

—Effect of statute of its country terminating its existence. A company which has ceased to exist by an act of the country by whose Acts and under whose laws it was made a juristic entity, must be treated as non-existent by all Courts administering English law. (Lord Romer.) DAIREN KISEN KABUSHIKI KAISHA V. SHIANG KEE. 196 I.C. 414=14 R.P. C. 28=1941 O.L.R. 712=54 L.W. 610=8 B.R. 61=1941 A.W.R. (P.C.) 69=1941 O.A. 707=1942 Comp. C. 1=A.I.R. 1941 P.C. 88 (P.C.).

——Forfeiture of shares—Conditions precedent—Strict compliance of—Necessity—Notice to shareholder not stating place where and dates on which calls were to be met—Forfeiture—Validity.

It is an established rule of law and equity that no forfeiture of property can be made unless every condition precedent has been strictly and literally complied with. A very little inaccuracy is as fatal as the greatest. A limited company forfeited the shares of a shareholder on the ground that he did not pay for the shares subscribed by him. A clause in the Articles of Association stated that the notice to a shareholder shall name a day (not being less than 14 days from the date of the notice) and a place or places on and at which the call or instalment and interest and expenses were to be paid. The notice issued to the shareholder in the case did not state where the payment should be made and did not correctly state the dates on which the calls were to be met.

Held, that the notice was bad and therefore the forfeiture was invalid. (Leach, C.J. and Lakshmana Rao, J.) LAKSHMIAH CHETTY v. ADONI ELECTRIC SUPPLY CO., LTD. I.L.R. (1944) Mad. 796=

COMPANIES-Forfeiture of shares.

the shareholders is quite irrelevant. So long as a Board of Directors exists and particular powers are vested in them by the articles then they are 107

Forfeiture of shares—If limited to non-payment of calls. See Companies Act, S. 32 (2) (g) and Sch. III, Form E. 49 C.W.N. 502.

——Forfeiture of shares—Non-payment of call money—Directors not appointing person or place to whom or at which it is to be paid, as provided by articles—Notice calling for payment of both call and allotment money—Forfeiture for their non-payment—Validity.

It was provided by the Articles of Association of a company that the Directors "may, from time to time, make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them respectively, and not by the conditions of allotment thereof "made payable at fixed times" and that each member shall pay the amount of every call so made on him to the persons and at the times and places appointed by the Directors'. It was stated that if any member failed to pay any such call, the Directors might serve a notice on such member requiring him to pay the same together with interest and expenses, and that if the requisitions of any such notice were not complied with, the shares might be forfeited by the Directors. These provisions as to forfeiture were made applicable "in the case of non-payment of any sum which by the terms of the issue of a share becomes payable at a fixed time". The Directors of the company passed a resolution for a call fixing the sum per share to be called up and the date for payment. Nothing was said in the resolution about the persons or places to be appointed in accordance with the Articles of Association. A notice was subsequently sent to the petitioner signed by the Secretary "by order of the Board" requesting him to remit the call money to the "Company's Head Office" on or before the date fixed in the resolution. As no payment was made, a notice was served on the petitioner informing him that the Directors required him on or before a certain date to pay a certain sum which included the allotment money as well as the money due for call on his shares and that in the event of non-payment the shares would be liable to be forfeited. The petitioner did not pay his amount and the Directors thereupon forfeited the shares standing in his name.

Held, (i) that no forfeiture of shares could be made unless every condition precedent had been strictly and literally complied with; (ii) that as the Directors had not, as provided by the Articles, appointed the persons and places to whom and at which the call money was to be paid either in their resolution making the call or in any subsequent resolution, the call and the notice given in respect thereof were invalid and that consequently the forfeiture of shares founded on them was ultra vires; (iii) that the forfeiture of shares based upon failure to pay the allotment money was also invalid and ultra vires, as the notice requiring its payment was defective in that it asked for payment of the call money as well, which was invalid. (Lort Williams, J.) Bengal Electric Lampworks, Ltd., In re. I.L.R. (1941) 1 Cal. 132=45 C.W.N. 1075=15 R.C. 431=203 I.C. 469=1942 Comp. C. 238=A.I.R. 1942 Cal. 516.

Forfeiture of shares otherwise than for non-payment of calls—Legality. See Companies Act, Ss. 54-A and 55. 49 C.W.N. 502.

----Forfeiture of shares-Position of attaching creditor and charge-holder.

## COMPANIES -- Liquidation.

The shares of a company are subject to its Articles of Association and all the incidents thereof. If under the Articles they are liable to foreiture, it is an inherent vice or defect to which the right of a member is subject. Creditors of the member can have no higher right. The company can, therefore, exercise its power of forfeiture of the shares for its own benefit and to the prejudice of the rights which a creditor has, prior to the exercise of the power, acquired by obtaining a charge on such shares or by attaching them. (Das,  $\mathcal{J}$ .) NARESH CHANDRA 49 C.W.N. 502. SANYAL v. RAMANI KANTO ROY.

Liquidation-Preferential Creditor- Trust- Payment of arrears of premia to insurance company by assignee of policy for revival of lapsed policy—Conditions as to production of medical certificate not fulfiled—Company ordered to be wound up before production—Right of assignee to rank as preferential creditor—Trust—If created.

Whenever money is paid by one person to another it can be said that is it remitted for a specific purpose, e.g., when a buyer pays to a seller of goods or a hirer for the hire of an article; but because money is paid that does not ipso facto make the recipient a trustee. A trust would exist when a banker is to collect and remit, but not when he is to use and repay. The applicant, as assignee of a policy of insurance, issued by an assurance company which had lapsed on default by the assured to pay the permia for two years, applied for revival of the policy, to which the company agreed on condition that the applicant paid the arrears of premia amounting to Rs. 140 and produced a medical certificate in respect of the assured. The applicant sent the amount to the company which acknowledged receipt of the same, stating that it would consider revival of the policy upon receipt of the medical certificate and that meanwhile the amount would be placed in the suspense account. In fact, however, the company placed the money not in any account named "suspense" but in an account called "advance premium receipt account". Within a few days of this, the company went into liquidation and no further step was taken in the matter of the policy or its revival. The applicant claimed to be treated as a preferential creditor on the ground that the amount was paid by him to the company in circumstances which created a trust, the company being the trustee and the applicant the cestui que trust.

Held, that the payment to the company of the sum of Rs. 140 was for a specific purpose which did not involve any payment by the company to a third person nor was it agreed that the money should be returned to the applicant on the happening of any specified event. The object for which the payment was made and which was the consideration for the payment had failed, but the company could not be said to have received this money in any fiduciary be said to have received this minkly in any fiduciary capacity, and therefore no question of trust arose. (Gentle, J.) RAMAKRISHNA AIYAR v. OFFICIAL LIQUIDATOR. 201 I.C. 204=15 R.M. 271=1941 M.W.N. 1067=A.I.R. 1942 Mad. 210=(1941) 2 M.L.J. 910.

-Managing agency agreement—Construction—Enforceability by person not party to agreement—Firm employed as secretaries and agents—Change in constitution—Failure to enter into fresh agereement—Right of company to terminate.

The respondent company was incorporated as a joint stock company on 30-7-1907. One of the clauses of the memorandum of association made mention of a draft agreement with a firm K.A. and Co., in these terms. "The members who at to enforce the obligation to employ, it was never

# COMPANIES - Managing agency agreement,

the firm of Messrs. K.A. & Co., are hereby appointed secretaries, treasurers and agents of the company upon the terms contained in the agreement annexed .... and it is hereby expressly provided that in consideration of the services rendered by them in promoting the company . . . the appointment of the said firm as secretaries, treasures and agents of the company shall not be liable at any time here. after to be revoked or cancelled on any ground or for any reason whatever, save and except their being found guilty of fraud in the managment and discharge of their duties as such secretaries treasurers and agents," The partners in the firm of K. A. & Co. were four; (1) K, (2) A, (3) G and (4) B. All these four under the fair agreement dated 7—12—1907 promised to perform "faithfully and to the best of their ability the officers of secretaries, treasurers and agents... as long as the said company and the said firm shall continue to carry on their business at the remuneration, upon the terms and subject to the conditions"
. . . . The company also covenanted that it "shall from time to time when the constitution of the firm changes by death, retirement, admission of any new partner or otherwise, enter into a fresh agreement, if necessary, with the said firm and the partner or partners therein on the terms in these present contained." By another clause in the agreement the firm was given power, subject to the approval of the board of directors, to transfer to any fit and proper person or persons all the interest of the said firm under that agreement. K. died in 1910 and by an assignment deed of 9-6-1920 the shares of G. and B. were assigned to one N.P. so that A. alone was the only original member of the firm who was still a partner and carrying on business as K.A. & Co. On 31-3-1922, N.P. assigned his two shares to the plaintiff, and from that time A and the plaintiff carried on the business as partners, A. being the active partner who managed the business. On 5-10-1939, A retired and assigned his share in the partnership to his son. On 20-11-1939, the respondent company wrote to the plaintiff that all the original partners had left the firm of K.A. & Co. the latter had ceased to exist and to function as the secretaries, treasurers and agents of the company. In fact from 5—10—1939 to 20—11—1939, no one as a representative of K.A. & Co. had managed or taken part in the company's affairs and the company had made its own arrangements, though this was unknown to the plaintiff. At the time of each assignement, the company was notified by letter and the company recorded the fact of the receipt of the letter in the minute book of the meetings of the directors. No new or further agreement was entered into between the company and a new partner or the firm as reconstituted. The plaintiff sued the company for damages for breach of the agreement dated 7-12-1907.

Held, that neither the plaintiff nor any of his predecessors had compelled the company to enter into a fresh agreement with them and except on the doctrine of perpetual succession, the respondent company was not bound to employ the plaintiff with whom it had never entered into any contract; and without setting up a novation or an estoppel, the plaintiff could not sue for damages for breach of the agreement to which he was no party.

Obiter:-No question of perpetuity arose, because though the necessary machinery existed in the case to create a continuity in the right to serve and present constitute or who may hereafter constitute made use of. Properly framed there was no reason

## COMPANIES—Managing Agents.

why a managing agency agreement should be void for uncertainty. (Stone, C.J. and Coyaiee, J.) Bhagwanji Morakji Gocullas v. Alembic Chemical Works Co., Ltd. 46 Bom.L.R. 265=A.I.R. 1944 Bom. 205.

Managing agents—Termination of employment— Misconduct—Principle applicable—Quarrels between partners

of firm of managing agents.

The principle which applies to a case of master and servant applies also to a case of a company and its managing agents in considering the question of misconduct sufficient to justify the termination of their employment. In each case the question must be whether the misconduct proved, or reasonably apprehended, has such a direct bearing on the employer's business, or on the discharge by the employee of that part of the employer's business in which he is employed, as to seriously affect or to threaten to seriously affect the employer's business or the employee's efficient discharge of his duty to his employer. The nature of the particular business, and the nature of the duties of the employee, will require to be considered in each case in order to arrive at a just conclusion on the question. If the quarrels between the partners of the firm of managing agents are such as to be detrimental to the interests of agents are such as to be detrimental to the interests of the company, the termination of their employment is justified. (Lord Thankerton.) Morarji Gokuldas & Co. v. Sholapur Spinning and Weaving Co., Ltd. 211 I.C. 434=1944 A.L. J. 93=46 Bom. L.R. 324=1944 Comp. C. 59=1944 M.W.N. 337=16 R.P.C. 185=10 B.R. 462=78 C.L.J. 113=1944 A.W.R. (P.C.) 28=1944 O.A. (P.C.) 28=I.L.R. (1944) Kar. (P.C.) 57=57 L.W. 98 =48 C.W.N. 181=A.I.R. 1944 P.C. 17=(1944) I.M. I. I. 227 (P.C.) 1 M.L.J. 227 (P.C.).

-Management-Board of management-rower to frame by-laws delegated to Board-Gratuity to ex-employee in cases not covered by by-laws—Power of General Body to sanction award of. Venkatesa Rao v. Trichinopoly District Co-operative Central Bank. Ltd. [See Q.D. 1936-40, Vol. I, Col. 2084.] 193 I.C. 89=13 R.M. 615=(1940) 2 M.L.J. 488.

if invalid-Procedure.

Where an amendment to a resolution, moved at an ordinary meeting of a company, is wrongly ruled out of order by the chairman of the meeting, and the original resolution without amendment is lost, the proper course is to treat all the proceedings subsequent to the moving of the resolution as invalid and to direct a general meeting to be convened for the purpose of considering the resolution afresh. The refusal by the chairman to put the amendment to the meeting invalidates the proceedings. (Blagden, J.) T. H. VAKIL v. BOMBAY PRESIDENCY RADIO CLUB, LTD. 47 Bom.L.R. 428=A.I.R. 1945 Bom. 475.

-Meeting-Resolutions and amendments-Rule as to

-Amendments, when out of order.

Amendments to a resolution moved at a meeting must, as a general rule, be germane to the subjectmatter of the proposition, and secondly, they must not, in substance, be a direct negative of the proposition moved. Where, at an ordinary meeting of a company, a motion is submitted that the report of the committee and the accounts be received and adopted, an amendment to the effect that the report and accounts be received but not adopted and that a committee be appointed to look into them and report cannot

### COMPANIES-Secretary.

be said to be a direct negative of the resolution moved. and must be held to be in order. (Blagden, J.) T. H. VAKIL v. BOMBAY PRESIDENCY RADIO CLUB, LTD. 47 Bom.L.R. 428=A.I.R. 1945 Bom. 475,

-Purchase of own shares-Legality-Vendor-Right of to have name removed from register of shares— Companies Act, S. 184—Company—If estopped from pleading invalidity of purchase by reason of representation of officers that purchase was for constituents-Rule.

A limited company by its very constitution is prohibited from purchasing its own shares; whether such purchase is authorised by the memorandum of its association or not, the purchase is void and illegal. The legal incapacity of a company to purchase its own shares is not dependant upon the fact of the purchase being made either within or outside the territorial limits of the place where the company is incorporated, but it is beyond the scope of its constitution. If a company therefore purchases its own shares, no matter where, a member who has sold his shares to the company cannot claim to be removed from the register of shareholders under S. 184 of the Companies Act because the purchase by the company must be deemed to have been not validly made as it is ultra vires of the company. On the strength of such a transaction the vendor is not entitled to have his name removed from the register and to have the vendee's name put instead. If a company purchases its own shares, the effect is that in law the vendor does not cease to be the legal owner of the shares, and his liability as a member contributory in respect of unpaid calls is not thereby extinguished, even if the sale and purchase be effected outside the state or territory where the company is incorporated. Nor is the company estopped from pleading the invalidity of the purchase or that the purchase was for itself and not for a constituent by reason of representations made by its officers to the vendor, even if it be a foreign company. company cannot be bound by estoppel to do something beyond its powers. In such a case the remedy, if at all, can only be against the officers who made the representation on the faith of which the contracts were entered into. (Venkataramana Rao, J.) Saba-RATNAM CHETTIAR v. OFFICIAL LIQUIDATORS. 208 I.C. 270=1943 Comp. C. 61=16 R.M. 206=55 L. W. 653=A.I.R. 1943 Mad. 111.

— Secretary—Position of—Appointment of secretary for term—Subsequent appointment of general manager
—Secretary absenting himself from duty—Suit for damages for wrongful dismissal—Maintainability.

The respondent agreed to serve the appellant, an Insurance Company, as the secretary of its business in Madras for 5 years from 17—11—1939. He had to devote his whole time as such secretary and to do all in his power as such secretary to extend and increase the business of the company. He was subject to the control of the directors and of the managing agents and was to obey all directions or orders from time to time given to him. The managing agents were in charge of the managment of the company and under the Articles of Association, they had power to appoint in their discretion, remove or suspend managers, secretaries, etc. On 23—7—1941, the company appointed a general manager. The respondent resented this and on 29-7-1941 he absented himself grom office and subequently applied for leave which was refused. He did not return to his duties, but on 20-11-1941 he filed a suit for damages for wrongful dismissal.

Held, (1) that the respondent was appointed merely as secretary and was a mere servant, his position

#### COMPANIES—Shares.

being that he had to do what he was told, having no authority to represent anything at all; (2) that the agreement between him and the company cid not preclude the company from appointing a general manager; (3) that the respondent having left his employment without reason had no right to bring the suit. (Leach C.J. and Laksimana Rao, J.) Krishna v. Indo Union Assurance Co., Ltd. (1944) Comp. C. 10.

——Shares—Suit for share money—Defence of fraud and misrepresentation—Prompt repudiation of contract—

If necessary.

Apart from an agreement by which a person becomes a shareholder in a company, when there has been fraud or misrepresentation inducing the contract, the injured party can resist a claim upon the contract made against him by the guilty party. A contract induced by fraud or misrepresentation is voidable and not void, and the injured party upon discovery of the facts must promptly repudiate the transaction, and unless he does so, he cannot successfully take proceedings to obtain rescission. The position must be the same when a person is sued upon a contract and sets up the defence that he was induced to enter into it by fraud and misrepresentation entitling him to resist the claim made against him. Repudiation must be on the ground of the fraud and misrepresentation upon which he relies, to obtain rescission or as a defence to a claim against him upon the contract. If he repudiates the contract on other grounds he avail himself of such repudiation when setting up fraud or misrepresentation. (Gentle, J.) CALCUTTA CELLULOID WORKS, LTD. v. LABANYA 47 C.W.N. 421. Mohan Ghatak.

——Shares—Transfer in blank—Transferee's rights to fill in particulars after transferor's death.

The transfree, in cases of transfers in blank of shares in a company, has the right to fill in the necessary particulars, including his own name as transferee and the date of the transfer, after the death of the original transferor. (Lord Willimas, J.) Bengal. Silk Mills Co., Ltd. In re. I.L.R. (1942) 1 Cal. 122=201 I.C. 778=15 R.C. 275=1942 Comp. C. 206=45 C.W.N. 1109=A.I.R. 1942 Cal. 461.

Suit against—Right of shareholders—"Fraud on the minority"—Frame of suit—Directors, when necessary parties—Increase of capital—Directors, if may be assailed.

There can of course be suits by shareholders against the company for individual wrong done to them. Apart from individual wrong there may be suits to restrain acts ultra vires. Suits to restrain acts ultra vires and suits to restrain acts notwithstanding that they have the support of the majority of shareholders, are both exceptions to the rule that the Court will not interfere in the affairs of the company or with the decision of the majority. The Court interferes in cases of ultra vires acts, because it is not an act within the constitution. In the other class of cases the Court interferes upon a different basis. They have been referred to generally as cases of "fraud upon the minority". These cases, however, are only special examples of an action by the company for what is in theory regarded as a wrong done to the company; a special form of the suit being adopted as a matter of machinery to obtain relief under special and peculiar circumstances. the wrongdoer has the balance of power, and thereforc the company does not take action, there are two courses open. The minority may take the risk and boldly use the company's name. The other course, and the better course, where the wrongful act is supported by the majority, is for the minority

## COMPANIES-Traasfer of Shares.

shareholders to sue in their own name or, as a matter of convenience, for a shareholder to sue on behalf of himself and all the other shareholders. If, however, the wrongdoers are also shareholders, these shareholders as a matter of course must be excluded from the category of the plaintiffs. In a suit so brought. it is not sufficient to plead simply the dominance of the majority of the shareholders or what may be called the secondary fraud. The primary fraud must be clearly indicated. It is the gist of the action, although no doubt the pleading or the particulars may be so framed as to stress the dominance of the majority and the effectuation of the fraud through that domin. nance. It is not sufficient to allege fraud against the company generally. The wrongdoers must be specified and made party defendants to the action. It may be sufficient to make them parties qua shareholders, although if the primary wrong is that of the directors, it is right and proper they should be sued qua directors. Where a decision of the directors is attacked on the ground that it is injurious to the company, the directors should be parties. Where that act of the directors so impeached has been confirmed and is still impeached on the basis that the directors have got that confirmation by controlling the majority, still those directors should be parties. The directors may be assailed if it is established first that the increase of capital is for the purpose of power and secondly that the passing of the company resolution confirming the increase was procured by their own power, by the power of their dependants or by any kind of device. (Ameer Ali, J.) JHAJHARIA BROS. v. SHOLAPUR SPINNING AND WEAVING.
CO., LTD. I.L.R. (1941) 1 Cal. 30=195 I.C.
36=14 R.C. 29=72 C.L.J. 458=A.I.R. 1941 Cal, 174.

Transfer of shares—Grantee under will—Righ to apply for and obtain transfer in his name—Applicant in enemy occupied territory—If loses right of suit to enforce transfer—C. P. Code, S. 83—Applicability—Succession Certificate—Grant of—Effect—Succession Act, S. 381—

Defence of India Rules, Part 15-Scope.

L, who held some shares in the defendant Bank (a limited Company) died on 1-12-1940 leaving a registered will dated 28-11-1940, by which it was provided that his son the plaintiff should get the Bank shares transferred in his own name. On 30-12-1940, the plaintiff applied to the defendant Bank for transfer of the shares in his name relying on the will enclosing with his application a registration copy of the will. This copy was later returned to the palaintiff by the Bank after recording it in their books. The transfer was not effected and the plaintiff who had gone to Burma and the Federated Malay States wrote to the Bank on 12-4-1941 asking for the transfer and return of the share certificates. Subsequently the plaintiff paid up to the Bank certain amounts demanded by the Bank as further call of Rs. 30 per share and also obtained a succession certificate on 19-12-1941. The defendant bank raised further contentions and stated, that the plaintiff, who was then in the Federated Malay States which had been overrun by Japan should send a letter expressly recognising the Bank's lien for amounts due by the deceased L, and consenting to be treated as a member of the Bank and to be entered in the register of its members as such, that the plaintiff was an alien enemy and that the succession certificate was not sufficient and that the plaintiff should produce a probate or letters of administration. The plaintiff's title to get a transfer of the share under the will was also repudiated.

### COMPANIES-Winding up.

Held, (1) that under S. 381 of the Succession Act the plaintiff got a good title by the grant of the succession certificate, which also afforded full indemnity to all persons dealing with the grantee; (2) that the Bank was not justified in insisting on a letter from the plaintiff who was then in enemy occupied territory a letter expressly recognising a lien as the lien if any, would under the law attached to the shares in the hands of the plaintiff who become entitled to have them transferred in his name; (3) that the conduct of the Bank throughout was evasive and dilatory and raised suspicions about its bona fides; (4) that the plaintiff could not be treated as an alien enemy, and S. 83, C.P. Code, did not apply so as to render a suit by him incompetent as the Federated Malay States could not be described as a foreign country the Government of which was at war with the United Kingdom of Great Britain and Ireland; (5) that the Defence of India Act and Rules did not also apply; part 15 of the Rules made it clear that what was prohibited and rendered penal was any commercial, financial or other intercourse or dealings with, or for the benefit of, the enemy and the suit therefore was not barred; (6) that the plaintiff was therefore entitled to have the shares transferred in his name and also to damages against the bank for the breach by it of its legal obligation to the plaintiff in the matter of the shares. (Chandrasekhara Ayyar, J.) Thenappa Chettiar v. Indian Overseas Bank, Ltd. 213 I.C. 334—17 R.M. 79—1943 Comp. C. 202 =A.I.R. 1943 Mad. 743=(1943) 2 M.L.J. 201.

-Winding up-Agreement to advance money and get cotton spun —Adjustment of charges against advances—Winding up—Rights, how to be worked out. Mithan Lal v. Official Liquidators, Agra Spinning and Weaving Mills Co., Ltd. [See Q. D., 1936-40, Vol. I, Col. 3309.] 191 I. C. 458=13 R.A. 234.

-Winding up-Application by shareholder-What applicant has to prove—Discretion of Court—Exercise of—Principles governing—Interference with internal manage-

ment of company-Rule.

A shareholder applying for an order winding up a company is under no disability as compared with a contributory and he is under no obligation to satisfy the Court that on a winding up there would be surplus assets. But in exercising its discretion in winding up a company on the petition of a shareholder, the Court constantly bears in mind that the internal management of the Company is its own concern, and it is a much better judge of business prospects of trading venture than the Court can ever hope to be. If, therefore, the majority of the shareholders show confidence in the management of the company and have faith in its future prospects, the Court will rarely interfere. It is not right for the Court to intervene because one shareholder is dissatisfied. An applicant for winding up has got to make out a case for winding up on his petition, and he cannot be allowed to fish out a case by cross examination of the deponents who have made affidavits on behalf of the company or by inspecting the accounts. (Chagla, J.) In re The Cine Industries & Recording Co., Ltd. 203 I.C. 116=1942 Comp. C. 215= 44 Bom L.R. 387=A.I.R. 1942 Bom. 231.

-Winding up-Assets or capital-Uncalled share money on ordinary issued shares—If available for payment to preference shareholders—Rights to payment of dividend out of capital when there are no profits.

Uncalled share money upon issued shares at the date of the winding up of a company forms part of the assets or capital of the company. The preference

### COMPANIES-Winding up.

shareholders being entitled in widing up to return of capital in priority to other shares, unpaid ordinary share capital can be called up to meet the amount required to pay the preference share capital, and the preference share capital can be repaid to the preference shareholders out of calls made upon the ordinary shareholders to the extent of the unpaid capital on the issued shares. Such payment of course is subject to the discharge of all debts owing by the company and payment of charges ranking prior to the preference shares. Where the memorandum of association of a company provides that "No dividend shall be payable except out of the net profits arising from the business of the company, there can be no dividend payable to the preference shareholders from the amount of the share capital when there have been no profits, although under the articles of association preference shares confer the rights to a fixed cumulative preferential dividend. (Gentle, J.) D'CRUZ r. VISWANATHAN. 199 I.C. 602. =14 R.M. 612=54 L.W. 745=1941 M.W.N. 972=1941 Comp. C. 277=A.I.R. 1941 Mad. 806=(1941) 2 M.L.J. 94.

-----Winding up -- Attachment in execu-tion of order against contributory---Claim-------Scope in execuof enquiry. See C.P. Code, O. 21, R. 58. (1945) 2 M.L.J. 573.

-Winding up-Loans borrowed by managing director for company under authority but misappropriated by him-Liability of company—Head of lending firm also co-managing director of debtor firm—If deprives creditor

company of right to rank as creditor.

A company formed for the purpose of carrying on business as an investment trust authorised R, one of its managing directors to invest the firm's moneys in shares and securities and sell them when deemed necessary and for that purpose to borrow moneys from another firm of which V, a co-managing director, was the head and R, its Madras agent. R borrowed large sums from that firm and utilised them for gambling in differences on behalf of the company and also embezzled large sums of the company. The company having been compulsorily ordered to be wound up, the lending firm claimed to rank as a creditor for the amounts lent and interest. The official liquidator opposed the claim in respect of the major portion of the debt.

Held, that R having been duly authorised to borrow though R had misappropriated the moneys the lending company not being put upon inquiry as to the application of the moneys lent and as R's knowledge of the fraud he was committing was not the knowledge of the firm or of the company, the company was liable and the fact that V was a managing director of the debtor company made no difference, as he knew nothing of the defalcations of R until all the moneys had been lent. (Leach, C.J. and Lakshnmana Rao, J.) V.K.R.S.T. FIRM V. ORIENTAL INVESTMENT TRUST, LTD. I.L.R. (1945) Mad. 96=1944 M. W.N. 548=1944 Comp. C. 231=A.I.R. 1944 Mad. 532=(1944) 2 M.L.J. 77.

— Winding up—Company borrowing money on onerous terms—Creditor seizing its machinery under power conferred by agreement with company-Company unable to carry on its business and pay its debts.

Where the creditor from whom the company has borrowed money on onerous terms becomes de factothe company, and has power to bring it to an end whenever it suits him, and the creditor under a so called power to distrain conferred on him by his agreement with the company seizes its machinery and plant in consequence of which the company

## COMPANIES-Winding up.

is unable to carry on its business or to pay its debts, an order winding up the company is just and equitable. (Lord Justice Luxmoore.) Ernest Hugh Canning v. Soobran Partap. 1941 A.W.R. (P.C.) 51=8 B.R. 187=14 R.P.C. 80=197 I.C. 118=1942 Comp. C 5=1941 O.A. 603=A.I.R. 1941 P.C. 106 (P.C.)

Pursuant to an order of Court for sale by tender of a business which was a limited concern and which had been ordered to be wound up the Official Receiver caused an advertisement to be published in the newspapers inviting tenders for the purchase of the business. The advertisement directed that the tenders, should reach the official receiver before a specified date but it was not stated that the highest tender would be accepted and there was no reserve price fixed. The appellant was found to have submitted the highest tender. Subsequently in an application made by the Official Receiver to Court the Court was informed that other persons were willing to raise their offers to amounts higher than that offered by the appellant and the Court thereupon directed that a week's further time might be given for receipt of fresh offers or for increase of offers already made. It was also directed that the offers should be made in sealed covers to be opened in Court. The appellant feeling aggrieved by this order appealed.

Held, that as the advertisement did not state that the highest tender would be accepted and as the sale had not taken place at the time when the official Receiver took out the application for directions, it was competent for the court to pass the order in question calling for fresh tenders. [Proper procedure for sale by official Receiver under orders of Court indicated.] (Leach, C.J. and Lakshmana Rao, J.) Chidamearam Chettiar v. Official Receiver, High Court, Madras. I.L.R. (1943) Mad. 790 = 212 I.C. 541=16 R.M. 642=1943 Comp. C. 133=56 L.W. 41=1943 M.W.N. 58=A.I.R. 1943 Mad. 365=(1943) 1 M.L.J. 123.

Winding up—Priority of debts—Costs of successful litigant against company—If entitled to priority.

A successful litigant against a company in liquidation is entitled to be paid his costs in full in priority over other ordinary creditors except where there are other creditors in the same position as himself when they and he will rank Pari passu as regards the fund available for the discharge of their debts. (Young, C.J. and Sale, J.) THE KAILASH PICTURE PALACE, LITD. v. KIDAR NATH. I.L.R. (1942) Lah. 742=197 I.C. 858=14 R.L. 293=43 P.L.R. 648=1941 Comp. C. 294=A.I.R. 1942 Lah. 10.

Winding up proceedings—Costs—Company

—Winding up proceedings—Costs—Company and shareholders appearing by same solicitor but separate counsel—Right to separate sets of costs—Creditors—costs of See Cost—Discretion, 44 Bom. L.R. 387.

Winding up—Security deposit of employee—Employee's right to claim priority—Such deposit, if impressed with trust—Considerations.

If a security depoist made by an employee or by a selling agent of a company can be regarded as impressed with a trust, or the deposit can be regarded as being held, by the depositee in a fiduciary capacity, the depositor would, on the liquidation of the company, be entitled to get it back from the assets before any

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creditor, secured or unsecured, of the company can participate in the assets. If, however, the security deposit money cannot be so regarded, the relation between the depositor and the depositee would be that of creditor and debtor, and the former would have no preference over the creditors of the company but must share the assets pro rata with them. Whether the security deposit will be considered as trust money in the hands of the company or as a loan to it would depend upon the facts and circumstances of each case, and where there is a written contract, the question would have to be decided on a construction of that instrument. The money would be regarded as trust money in the hands of the company, unless there are other terms and conditions which would make the relation between them to be that of creditor and debtor. The mere fact that there is a stipulation for payment of interest on the deposit money, or the fact that in certain contingencies the company would be entitled to liquidate its claim from out of it against the employee or the selling agent would not establish the relationship of creditor and debtor. The money deposited as security would still be regarded as trust money in the hands of the company. If it is trust money or is so held, the right of the depositor would not be affected simply because it has not been kept by the company as an ear-marked fund but has been mixed up with other funds of the company. (Mitter and Sen, Jf.) KSHETRA MOHAN DASS v. D. BASU, I.L.R. (1943) 1 Cal. 313=207 I.C. 239=16 R. C. 40=1943 Comp. C. 54=76 C.L.J. 74=47 C.W.N. 245=A.I.R. 1943 Cal. 105.

Winding up—Set-off—Deposit of money in name of husband and wife—Loan by husband alone—Right of set-off—Presumption as to ownership of money—Rule.

Under the law of set-off which is applicable in the winding up of a company, where there are two amounts one in the account of A and the other in the account of A, and B, if it is shown that the latter account though standing in the name of A and B was really in trust for A, the amount due under one account can be set-off against the amount due under another account. Under the law prevailing in India a deposit by a husband in the name of himself and his wife payable to either or survivor, in the absence of evidence to the contrary must be presumed to belong to the husband. Where a husband deposits his salary in a bank in current and savings bank accounts in the name of himself and his wife payable to either or survivor, and takes a loan from the bank in his own name only, the amount standing to his credit in the joint account can be set off against the money due under the loan account in the winding up of the Bank, as the money is really his. (Venkataramana Rao, J.) PANIKAR v. TRAVANCORE NATIONAL AND QUILON BANK, I.TD. 203 I.C. 588=55 L.W. 252=1942 M.W.N. 211=1942 Comp. C. 72=A.I.R. 1942 Mad. 358=(1942) 1 M.L.J. 161.

Winding up—Set-off—Principle underlying—Effect of S. 3, Limitation Act—Barred debts, if could be set off—Difference between set off in liquidation proceedings and set off under C. P. Code.

The effect of S. 3, of the Limitation Act is to bring about the automatic dismissal of suits, appeals and applications founded upon debts or causes of action which according to their various periods of limitation are time barred. It is only the remedy that is destroyed, but the debt remains. Such a debt can be set-off by a liquidator in winding up proceedings against debts by its company to the debtor. The right of set-off exerciseable in winding up proceedings is distinguishable from the set-off provided for under

## COMPANIES ACT (1913).

the C.P. Code, O. 8, R. 6. In the latter case it is required as a condition precedent that the money should be legally recoverable by the defendant from the plaintiff, but no such condition attaches to the exercise of a right of set-off by the official liquidator in winding up proceedings acting under the Companies Act. (Braund, J.) THAKUR PRASAD v. OFFICAIL LIQUIDATOR OF THE BENARES BANK, LTD. I.L.R. (1941) All. 415=194 I.C. 839=14 R.A. 10=1941 Comp. C. 298=1941 A.W.R. (H.C.) 133=1941 O.A. (Supp.) 243=1941 A.L.W. 399 =1941 O.W.N. 548=A.I.R. 1941 All. 278.

COMPANIES ACT (VII OF 1913)—Interpretation-Reference to English law-Permissibility.

It is common knowledge that the company legislation in India has been based on English statutes. The courts in India are, therefore, bound to follow the priciples the English courts have laid down on the subject. (Das, J.) NARESH CHANDRA SANYAL v. RAMANI KANTO ROY. 49 C.W.N. 502.

——Madras High Court Rules, under R. 5—Scope and effect of—High Court Fees Rules—Applicability. See Madras High Court Rules (O.S.), O. 5, R. 20. (1944) 1 M.L.J. 199.

-Ss. 2 (1), (13)(c) and 134 (4)—Applicability —Private company—Issue of prize bonds with seal of company and bearing consecutive numbers—If debentures.

Failure to file balance sheet and profit and loss account—

Offence.
Where it is found that certain prize bonds, issued by a private company and bearing the company's seal, contain an acknowledgement of a debt and a promise to return it, and form a series bearing consecutive numbers, and it is also clear that all the holders get an equal chance to partake in the annual distribution of prizes out of the net interest realised by the company, it must be held that such bonds are debentures within the meaning of S. 2 (1), (13) (c) of the Companies Act. The fact that the bonds are not styled debentures would not make them anything other than debentures. It is not necessary that the debentures should create a charge. A charge though usual, is not an essential requisite of a debenture. There may be a mortgage debenture or a simple debenture which does not create any charge on the assets of the company. If such debentures are issued by a private company, the company ceases to be a private company, and is therefore bound to file its balance-sheet and the profit and loss account with the Registrar of companies under S. 134 of the Companies Act. Default in filing the same renders the company and its directors liable to the penalty under S. 134 (4) (Lokur and Weston, 37.) EMPEROR v. LAXMAN BHARMAJI. 47 Bom.L.R. 660.

-(as amended by Act XXII of 1936), S. 4 (2) and (5)—Company of more than 20 persons formed in 1922-1923 not registered as required by S. 4 (5) enacted 18 1936—Members whether guilty of contravening S. 4
(5)—Complaint by private persons—Cognisability.

Where a company consisting of more than 20

persons formed in 1922-1923 is unregistered, the members thereof can be punished for continuing to be members of such company, under S. 4 (5) of the Companies Act which was introduced by the Amending Act XXII of 1936, although they cannot be punished for originally forming themselves into such a company in contravention of S. 4 (2) of the Act of 1913. (Horwill J.) MUTHUVEERAN CHETTIAR 1. MOTTAYAN CHETTIAR 202 I.C. 28=15 R.M. 470=1942 Comp. C. 86=43 Cr. L.J. 785=1942

COMPANIES ACT (1913), S. 32.

M.W.N. 121=A.I.R. 1942 Mad. 283=(1942) 1

M.L.J. 230.

Ss. 10 and 12—Applicability—Appointment of Court—Necessity.

The appointment of a managing agent for a company is merely a detail of management for the purpose of carrying on the business of the company, and a company is entitled to regulate that detail in such manner as it likes without going to a Court for its sanction. (Chagla, J.) RAMACHANDRA LALBHAI v. CHINUBHAI LALBHAI. 214 I.C. 42=17 R.B. 55=45 Bom. L.R. 1075=A.I.R. 1944 Bom. 76.

—S. 20—Alteration of Articles of Association— Power of registered Association—Changes necessitated by passing of Insurance Act of 1938.

An Association which is registered as a company under the Companies Act as under S. 20 of that Act power to alter Articles of Association in good faith for the benefit of the Association as a whole. Where the passing of the Insurance Act of 1938 necessitated the amendment of the Articles of such an Association, and the Association at the meetings of their members passed resolutions making the necessary amendments, such amendments are binding upon their members who had notice of the meetings and who have nothing to say against the regularity of the resolution passed. (Niyogi, J.) All INDIA RAILWAYSMEN'S BENEFITS FUND v. BAHESHWARNATH. I.L.R. (1945) Nag. 599=1945 Comp. C. 142=1945 N.L.J. 249=A.I.R. 1945 Nag. 187.

-S. 21—Articles of association—If constitute contract

-Implied contract —If may be proved.

Though the memorandum and articles of association of a company do not constitute a contract, an implied contract may be proved by the acts of the parties on the terms set out in the articles of association. (Young, C.J. and Sale, J.) Gulab Singh v. The Punjab Zamindara Bank, Ltd., Lyallpur. I.L.R. Punjab Zamindara Bank, Ltd., Lyallpur. I.L.R. (1943) Lah. 28=43 P.L.R. 619=1941 Comp. C. 301=199 I.C. 667=14 R.L. 423=A.I.R. 1942 Lah. 47.

——S. 30—Agreement to become members—Application for allotment of shares—Effect—Allotment of shares and entry of name in register of members—Power of directors to cancel allotment and remove names from register. See Company—Articles of Associations. (1942) 2 M.L. J. 432. OF ASSOCIATIONS.

\_\_\_\_\_S. 32—Construction—Failure to send return—Liability of company and of officers.

While a company is always liable where a return is not sent as required by S. 32 of the Companies Act, the officers of the company are liable only if the knowingly or will fully authorise or permit the default. (Horwill, 7.) Public Prosecutor v. Lury Co. 197 I.C. 265=14 R.M. 355=43 Cr.L.J. 138=54 L.W. 726=1941 Comp. C. 331=1941 M.W. N. 845=A.I.R. 1942 Mad. 75=(1941) 2 M.L. J. 487.

S. 32—Prosecution of Managing Director for non-compliance with section—Several meetings not held during year—Finding by Court that this is due to his default
—If necessary—His previous conviction under S. 76 for

such default-If sufficient.

Where in a case in which a general meeting of the company was not held during the year, the Managing Director is prosecuted under S. 32 of the Companies Act for wilful default in submitting the information required by that section, it is necessary for the Magisrate to come to a finding that he was responsible for the default in connection with the failure to hold the meeting, assuming that he cannot put forward as a defence the impossibility of complying

## COMPANIES ACT (1913), S. 32 (2).

with the section if the failure to hold the meeting was due to his own default. It is doubtful if the accused could be convicted without the Magistrate coming to an independent finding that he was responsible for such default even if he had been previcusly convicted under S. 76 of the Act for such default. (Henderson, 7.) SURENDRA NATH SARKAR v. EMPEROR. 199 I.C. 94=14 R.C. 533=43 Cr.L. J. 466=1942 Comp. C. 252=45 C.W.N. 1130= 74 C.L.J. 367=A.I.R. 1942 Cal. 225.

-Ss. 32 (2) (g) & Sch. III, Form E-Forfeiture of shares-If limited to non-payment of calls.

The Companies Act sanctions forfeiture of shares generally, that is to say, forfeiture as a means to get rid of a member who is in default either in payment of calls or in observing or performing other rules and regulations of the company. S. 32 (2) (g) and Form E of Schedule III recognise forfeiture generally and not for non-payment of calls only. Regulations in table "A" in Sch. I to the Act are model regulations which may or may not be adopted by a company at its option, and they do not control the section or the form. (Das, J.) NARESH CHANDRA SANYAL v. RAMANI KANTO ROY. 49 C.W.N. 502.

-S. 33-Scope-Trust of shares in private limited company—Validity—Trusts Act, S. 94—Applicability
—Transfer of shares—Delivery of share certificates and transfer forms to purchaser—Director of company refusing to accept transfer—Effect—Position of vendor—Right to vote-Right of purchaser to control exercise of with a view

to get alteration of articles of association.

Shares in a private limited company are capable of equitable assignment and can therefore be the subject of a trust. The right to vote which a shareholder has is a right of property annexed to the shares and transferable or assignable with the shares. Where a person purchases shares in a company and after receiving his vendor's share certificates and transfer forms applies for transfer of the shares in the share register of the company to the names of his nominees, but the directors of the company refuse to accept the transfer, the transferce is in the position of a trustee of the shares for the purchaser. The legal title to the shares is in the vendor but the beneficial interest is transferred to the purchaser; the transferor whose name remains on the register is a trustee for the transferee and the transferor, under S. 94 of the Trusts Act, must comply with all reasonaable directions that the transferee may give. Equity treats the purchaser as if he was the real owner and compels the registered holder to act as the agent of the beneficiary and the latter has a right to control the exercise by the trustee of the right to vote. As trustee of the shares the holder is also trustee of all property rights annexed to the shares, he is trustee not only of the corpus but also of the income; he is trustee of the dividends that he may receive and he must pay them to the beneficiary. As such trustee of the dividends he is also a trustee of the right to vote which is a right of property annexed to the shares and not a right personal to the shareholder. The purchaser is entitled to control the exercise of the right of vote by the vendor in such a way and to take such steps as to secure an alteration of the articles of association with a view to limit the discretion of the directors with the object of eventually becoming a registered shareholder. The purchaser is therefore entitled as against the vendor to a restrictive injunction restraining him from attending meetings of the company and to a mandatory injunction enjoining him to sign a proxy with regard to Ss. 54-A and 55—Forfeiture of the shares to the transferce. (Prait, J.) E.D. Sas- than for non-payment of calls—Legality.

COMPANIES ACT (1913), S. 54-A.

SOON AND CO., LTD. v. K. A. PATCH. 45 Bom, L. R. 46.

-S. 33—Unpaid call money on share—Liability of person other than registered shareholder.

Under the Companies Act, it is only the registered holder of a share who can be made liable in respect of anything unpaid on the share and it makes no difference whether he is the real owner of the share or a mere benamidar of another person. The whole scheme of the Act is that the company has got to proceed on the basis of its own register of members and it is neither obliged nor competent to enquire into the rights of other persons whose names are not entered in it. (Mukherjea and Blank, JJ.) Murshida-BAD LOAN Office, Ltd. v. Satish Chandra Charra-Varthi. 209 I.C. 317=16 R.C. 355=47 C.W.N. 486=A.I.R. 1943 Cal. 440.

S. 34 (3)—Scope—Company—Expulsion of member by resolution—Name struck out from register of members—Subsequent amendment of articles to enable company to transfer such member's shares without proper instrument of transfer-Ultra vires—Sale of shares by Company—Legality— Right of members as shareholder-If affected. MADHAVA RAMAGHANDRA KAMATH v. CANARA NAMENTAL COMPORATION. LTD. See [Q.D. 1936'40, Vol. I, Col. 3309.] 195 I.C. 265=14 R.M. 165 =1941 Comp. C. 78=A.I.R. 1941 Mad. 354.

-S. 34 (3)—Scope—Mandatory character of— Transfer of shares-Right to demand-Delivery of duly stamped instrument of transfer—If condition precedent.

An applicant for transfer of shares in a company

registered under the Indian Companies Act must deliver to the company a proper instrument of transfer duly stamped as required by S. 34 (3) of the Act. The presentation of a duly stamped transfer form is a condition precedent under the mandatory terms of S. 34 (3). (Stone, C.J. and Kania, J.) New CITIZEN BANK OF INDIA v. ASIAN ASSURANCE CO., LTD. I.L.R. (1945) Bom. 334=219 I.C. 204=1945 Comp. C. 53=46 Bom.L.R. 782=A.I.R. 1945 Bom. 149.

-Ss. 38-Registration of the name of a firm as holder of shares-If can be made.

The Indian Companies Act does not contemplate the registration of the name of a firm as the holder of its shares, but only individuals or other legal entities. An application for such a purpose is not maintainable. (Bennett, J.) Ganesh Dass Ram Gopal. v. R.G. Cotton Mills Co., Ltd. 1945 Comp. C. 32=(1944) O.A. (C.C.) 261=1944 A.W.R. (C.C.) 261=1944 O.W.N. 436=A.I.R. 1944 Oudh

-S. 38—Scope—Register of members—Rectification— Procedure—Power of company to alter register, apart from

S. 38.

The register of the members of a company is a public document, and there is no provision in the Company's Act which permits the directors or officers of a company to make any alteration to the register except in accordance with law. If members' names have been improperly added to the register the remedy of the company is to apply to the Court under S. 38 of the Company's Act for the rectification of the register and the company cannot take upon itself to alter the register. (Clark, J.) DAMODARA REDDI v. Indian National Agencies. I.L.R. (1945)
Mad. 728=58 L.W. 578=1945 Comp. C. 148= A.I.R. 1946 Mad. 35=(1945) 2 M.L.J. 432.

Ss. 54-A and 55-Forfeiture of shares otherwisk

### COMPANIES ACT (1913), S. 72.

The exercise of the power of forfeiture of shares otherwise than for non-payment of calls, does not bring about any illegal reduction of capital in contravention of S. 55 of the Companies Act, especially when all the shares are fully paid up. Nor does it amount to a buying by the company of its own share so as to offend against S. 54-A of the Act. (Dass, J.) NARESH CHANDRA SANYAL v. RAMANI KANTO ROY. 49 C.W.N. 502.

-S. 72-Permissive or imperative.

S. 72 is merely permissive and not imperative. It only provides one of several methods whereby a communication or notice may be served on a company. (Roberts, C.J., Dunkley and Shaw, JJ.) Dawsons Bank, Ltd. v. Municipal Committee, Kyaiklat. 198 I.C. 180=14 R.R. 187=A.I.R. 1941 Rang. 339 (S.B.).

-S. 73 (a)—Construction "outside the office"-Meaning—Company having office in building with compound
—Name—If to be painted or affixed outside the compound

as well as outside office.

S. 73 (a) of the Companies Act is a penal provision and has to be construed strictly. The section has nothing to do with advertising the whereabouts of a company or affording facilities to members of the public in finding its place of business. The words "outside the office" cannot be construed as outside the premises or outside the compound, where the office is in a building with a compound. The requirements of the section would be satisfied by a board of the necessary conspicuousness and legibility outside the office room inside the building. The fact that the company owns the whole premises makes no difference. Where an office is situated within a compound the law does not require the name of the company to be painted or affixed outside the compound as well as outside the office. (Broomfield and Wassoodev, JJ.) EMPEROR v. BATLIWALA Sons & Co., Ltd. I.L.R. (1941) Bom. 186=193 I.C. 620=1941 Comp. C. 154=42 Cr. L. J. 452 = 13 R.B. 335=43 Bom.L.R. 105=A.I.R. 1941 Bom. 97.
——S. 76 (2)—Applicability—Absence of evidence of

knowing and wilful default-Conviction-Sustainability.

A managing director of a company can be convicted under S. 76 (2) of the Companies Act only if he was "knowingly and wilfully" a party to the default under Chettiar v. Emperor. 1941 Comp. C. 341=42 Cr.L.J. 854=53 L.W. 680=(1941) M.W.N. 381=(1941) 1 M.L.J. 702.

-Ss. 76 (2) and 131—Delay in holding general body meeting and laying balance sheet-Condonation by

Registrar—Effect—Power to condone delay.

Where the Registrar of Joint Stock Companies condones the delay on the part of the directors of a company in holding a general body meeting, and thereby condones the delay in filing a balance sheet before the general body at its meeting, the directors cannot be convicted under Ss. 76 (2) and 131 of the Companies Act. Quaere, whether the Registrar can condone the delay in holding a general meeting. (Horwill, 7.) Appalaswami v. Emperor. 1941 M. W.N. 225=195 I.C. 140=14 R.M. 139=53 L. W. 660=42 Cr. L.J. 683=A.I.R. 1941 Mad. 504=(1941) 1 M.L.J. 419.

-S. 76 (2)—Ordinary director of company—Conviction under—Evidence to show that director was knowingly and wilfully a party to the default-Necessity for.

Before an ordinary director of a company can be convicted of an offence under S. 76 (2) of the

## COMPANIES ACT (1913), S. 91-B.

Companies Act, there must be evidence to show that he was knowingly and wilfully a party to the default under S. 76 (2). (Lakshmana Rao, 7.)
PERIYANNAN CHETTIAR v. EMPEROR. 197 I. C.
729=14 R.M. 398=54 L.W. 18 (2)=43 Cr.L. J. 295=1941 M.W.N. 959.

-S. 82-Amendment of articles of association

altering nature of company—Registrar if bound to file.

There is nothing in the Companies Act which prohibits the Registrar from filing a special resolution amending the articles of association with a view to alter the nature of the company from a public to a private company. On the contrary by reason of S. 82 of the Act he is bound to file them. (Harries, C.J., and Brough, J.) RADIANT CHEMICAL CO., LTD., MONGHYR, In re. 22 Pat. 202=207 I.C. 630=16 R.P. 47=10 B.R. 4=1943 Comp. C. 186=24 P.L.T. 226=A.I.R. 1943 Pat. 278.

\_\_\_\_\_S. 86 (d)—Scope —Loan sanctioned to director in contravention of S. 86 (d)—Duty of director to rectify

illegality when their attention is drawn to it.

There is a contravention of S. 86-D of the Companies Act when the Board of Directors of a company sanction a loan to a director; and if the attention of the directors is drawn to this it is their duty to see that the illegality is terminated. Failure to rectify the same is an offence under S. 86-D. (Horwill, J) SUBBIAR v. LAKSHMANA IYER. 201 I.C. 701=15 R. M. 426=43 Cr. L.J. 770=1942 Comp. C. 136=55 L.W. 232=1942 M.W. 296=A.I.R. 1942 Mad 452(1)=(1942) 1 M.L.J. 520.

-S. 87 (4)—Failure to comply with S. 87 (2)— Liability of company—Proof of knowldege of change in particulars by persons connected with company—Not

Where a company makes default in complying with S. 87 (2) of the Companies Act by failing to report to the Registrar of Joint Stock Companies a change in the directorships held by a director, it becomes liable under S. 87 (4). It is unnecessary for the prosecution in such a case to prove that anybody connected with the company had knowledge of the connected with the company and an interest with the change, etc. The words knowingly and wilfully in S. 87 (4) can only refer to a person and not to a company. (Horwill, J.) Public Prosecutor v. Comparore National Bank, Ltd. 205 I.C. 324= 15 R.M. 862=56 L.W. 80=1943 Comp. C. 50 =44 Cr.L.J. 380=1942 M.W.N. 761=A.I.R. 1943 Mad. 214=(1943) 1 M.L. J. 119.

-S. 87-B (d)—Scope — Compulsory sale at creditor's instance-If barred.

The restriction by S. 87-B (d) of the Companies Act is against a managing agent making a voluntary charge or assignment of his remuneration and the object is undoubtedly to prevent him from doing so to the detriment of the company. It is an entirely different matter when a creditor of a firm of managing agents seeks to recover his debt by attaching the remuneration to which the managing agent is entitled. A restraint on voluntary alienation does not bar a compulsory sale at the instance of a creditor. (Me Nair, 7.) Pursattamdas v. Baijnath. 195 I.C. 69=14 R.C. 41=A.I.R. 1941 Cal. 240.

-S. 91-B (1) (before amendment)—Scope and effect-Shareholder creditor, who is a director-Right to vote for resolution authorising set off of future calls against debt due.

It is open to a company to agree with a shareholder to whom it owes money that the debt shall be set-off against future calls. But where such shareholder creditor is himself a director and the managing agent,

## COMPANIES ACT (1913), S. 101 (3).

he cannot validly vote for a resolution authorising such set-off. The resolution would be invalid when the necessary quorum is lacking without such directors' vote. Such a shareholder can, therefore on liquidation, be placed in the list of contributories in respect of the unpaid share money. (Leach, C.J. and Chandrasekhara Aiyar, 7.) PANDALAI v. SOUTH INDIAN GENERAL ASSURANCE Co., LTD. I.L.R. (1942) Mad. 230=201 I.C. 374=15 R.M. 320= AI.R. 1942 Mad. 95=1941 M.W.N. 1022= 1941 Com. C. 327=54 L.W. 440=(1941) 2 M. L.J. 595.

pliance with requirement of S. 101 (3)—Legality Company, if can demand share money. RAMLALSAO v. K. B. M. E. R. MALAK. [See Q.D., 1936-40, Vol. I, Col. 2035.] I L.R. (1941) Nag. 567.

-S. 109 (1) (e)—Construction and scope—"Not being a pledge"-Bailment of promissory notes as security for debt by bailer to bailee—Registration—Necessity— Mortgage or pledge—Distinction.

S. 109 (e) of the Companies Act clearly contemplates that there can be a mortgage which is also a pledge; the words "not being a pledge" must be held to have been inserted in S. 109 (e) with the object of providing that registration should not be necessary where the person entitled to the security has obtained possession of the goods. Though a transaction may amount to a mortgage, when there are all the requirements of a valid pledge, it is a pledge as well and hence does not require registration under S. 109 (e). difference between a mortgage and a pledge is that in the case of a mortgage the ownership of goods passes, whereas in the case of a pledge the pledgee gets possession, but no right to the goods beyond what is necessary to secure the debt. On 5-2-1938, the appellant placed with the respondent company a bank, a sum of Rs. 3,000 on fixed deposit. bank was not able to repay the amount on the due date as it was in financial difficulties and offered to endorse to the appellant five promissory notes as security for its indebtedness to him. The appellant agreed to this course and the arrangment was embodied in a document dated 29—6—1939, which was not, however, registered with the Registrar of Joint Stock Companies under S. 199 of the Companies Act. Under the documents the bank, which was referred to as the borrower, was to transfer by endorsement to the appellant, who was referred to as the lender, the promissory notes by way of security for the principal and interest due to him by the bank. It was provided that the appellant should be at liberty to collect the amounts due on the promissory notes and to credit the net realisations towards the amount due by the bank; it was further provided that on payment to the appellant of any balance due to him he should re-transfer to the bank such of the promissory notes as may be outstanding. The appellant thus became entitled to realise the securities as and how he pleased. The promissory notes which were executed to the bank by its debtors of the face value of Rs. 4,476-13-3 were endorsed to the appellant and delivered to him. Suits were instituted by the appellant against the makers of the promissory notes and the net realisations amounted to Rs. 1,173-3-9. On 2-11-1939, there was an order by the High Court for the compulsory winding up of the bank, and on 20-2-1941, the Official Liquidator applied to have the agreement between the bank and the appellant declared void for nonregistration and to call on the appellant to pay over to him the moneys collected by the appellant and

## COMPANIES ACT (1913), S. 151 (2).

to endorse the instruments to the Official Liquidator. Hold, that the transaction amounted to a bailment of the promissory notes as security for the payment of the debt due to the appellant by the bank, that all the requirements for a valid pledge were fulfilled, and being a pledge, it did not require registration, and being a picage, it did not require registration, though it might amount to a mortgage. (Leach, C. J. and Bell, J.) RADHAKRISHNA CHETTIAR v. OFFICIAL LIQUIDATOR, MADRAS PEOPLE'S BANK, LTD. 207 I.C. 304=16 R.M. 84=1943 Comp. C. 21=1942 M. N. 692=55 L.W. 709=A.I.R. 1943 Mad. 72=(1042) 1 M J. J. 142 73=(1943) 1 M.L.J. 142.

-S. 131-Delay condoned by Registrar-Effect on liability to conviction. See Companies Act, Ss. 76 (2) And 131. (1941) 1 M.L.J. 419.

S.136 (4)—Procedure—Issue of summons against

Company—Cr.P. Code, S. 69 (3).
S. 136 (4) of the Companies Act, provides for a penalty against the company. The Company is a legal entity. There is nothing to prevent the issue of a summons against the company itself, Subsection (3) of S. 69, Cr. P. Code, provides for the service of such a summons. (Reuben, 7.) Sudhir Ranjan Roy J. N.K. Mazumdar. 216 J.C. 312=46 Cr.L. J 168=11 B.R. 136=17 R.P. 164=1944 P.W.N. 275=A.I.R. 1944 Pat. 210.

Ss. 137, 138 and 141-A-Scope-Prosecution for offence under S. 282-Private complaint-Bar of.

S. 137 of the Companies Act has no relation to a prosecution for an offence under S. 282 of the Act. Nor does it appear that S. 138 or S. 141-A of the Act bars a prosecution upon a private complaint of an offence under S. 282. (Davis, C.7.) EMPEROR v. VISWANATH. 198 I.C. 95=14 R.S. 134=43 Cr.L.J. 304=1942 Comp C. 51=A.I.R. 1942 Sind 9.

S. 141-A (1)— Of any offence in relation to the company for which he is criminally liable—Meaning of.

In S. 141-A (1) of the Companies Act, the words "of any offence in relation to the company for which he is criminally liable" mean not only criminally liable under the Act but criminally liable under the Penal Code as well. (Davis, C.J.) EMPEROR v. VISWANATH. 198 I.C. 95=14 R.S. 134=43 Cr. L.J. 304-1942 Comp. C. 51=A.I.R. 1942 Sind 9.

-S. 142-Intspectors appointed by special resolution -Powers of -Appointment by ordinary resolution - Dis-

Under S. 142, Companies Act, inspectors appointed by special resolution have the same powers and duties as inspectors appointed by the Central Government. But inspectors appointed by ordinary resolution would not have those drastic powers. (Blagden, J.) T. H. VAKIL v. BOMBAY PRESIDENCY RADIO CLUB, LTD. 47 Bom. L.R. 428—A.I.R. 1945 Bom. 475.

S. 151 (2) (as amended by Act XII of 1936)—Powers of Governor-General—Alteration of Form F—Notification of 16—1—1937—Volidity.

The Notification of the Governor-General issued on 16th January, 1937, under S. 151 of the Companies Act, amending Form F of the third schedule to the Act, differentiating between one class of companies and another (i.e., relieving banking companies from the obligation to disclose bad debts in the balancesheet) is ultra vires and invalid. The Central Government has no power under S. 151 to alter Form F in such a way as to distinguish between companies, as that involves in substance an alteration of S. 132 of the Act. (Beaumont, C. J., Lokur and Rajadhyaksha, JJ.) Shamdasani v. Centrai Bank of India, LTD. (No. 1). I.L.R. (1944) Bom. 302=212 I.C. 396=16 R.B. 358=45 Cr. L.J. 612=46 Bom. COMPANIES ACT (1913), S. 151 (3).

L.R. 70=1944 Comp. C. 38=A.I.R. 1944 Bom. 107 (F.B.).

S. 151 (3) (as amended in 1936)—Scope-Compliance with—Requirements of—Publication of alterations alone without publication of Form as altered-Sufficiency.

Per Lokur and Rajadhyaksho, 37.—Where a Form is altered under S. 151 (2) of the Companies Act, and the entire Form as altered is not published, what is published in the Official Gazette being only the atterations, there is sufficient compliance with the requirements of S. 151 (3) of the Companies Act. Per Beaumant, C. J.—What has to be published is

the altered form and it is only upon such publication that the altered form takes effect as part of the Act. Publication of the alteration alone is not a sufficient rubication of the alteration aione is not a sufficient compliance with the provisions of S. 151 (3). (Beaumont, C. J., Lokur and Rajadhyaksha, JJ.) SHAMDASANI v. CENTRAL BANK OF INDIA LTD. (No. 1.). I. L.R. (1944) Bom. 302=212 I.C. 396=16 R.B. 358=45 Cr.L.J. 612=46 Bom.L.R. 70=1944 Comp. C. 38=A.I.R. 1944 Boin. 107 (F.B.).

— S. 152—Scope—A bitration—Company—Procedure
—C.P. Code, Sch. II—Applicability.

After the enactment of the Indian Companies Act

(1913) and before the Indian Arbitration Act (1940) came into force, a company could only enter into an arbitration under the provisions of the Arbitration Act (1889) and consequently companies were outside the scope of Schedule II to the C.P. Code (Leach, C.J., Lakshmana Rao and Krishnaswami Ayyangar, JJ.) CATHOLIC BANK, LTD., MANGALORE v. ALBUQUERQUE, I.L., R. (1944) Mad. 385=217 I.C. 399=17 R. M. 305=1944 Comp. C. 95=1944 M.W.N. 203=57 L.W. 221=A.I.R. 1944 Mad. 308= (1944) 1 M.L.J. 290 (F.B.).

-S. 152—Scope—Arbitration with intervention of Court-Arbitration Act-If applies. East Ben-GAL BANK, LTD. v. IOGESH CHANDRA BANERJEE. [See Q. D., 1936-'40, Vol. I., Col. 2039.] 193 I. C. 553=13 R.C. 419=A.I.R. 1941 Cal. 127.

-S. 152 (1)—Scope—Arbitration under Sch. II, C.P. Code-If excluded.

S. 152 (1) of the Companies Act enables a Company to refer to arbitration disputes between it and another person in accordance with the provisions of Indian Arbitration Act; and if it does not wish to avail itself of the provisions of the Arbitration Act, reference to arbitration in accordance with Sch. II, C.P. Code, is open to the Company. S. 152 (1) does not exclude arbitration under the C.P. Code. An award passed in arbitration under the C. P. Code, is consequently valid and can be enforced by a Court though such Court has not been conferred jurisdiction under the Arbitration Act. The words "may by written agreement refer to arbitration in accordance with the Arbitration Act, 1940 " in S. 152 (1) mean that if a Company wishes to refer to arbitration under the Arbitration Act, it can do so by written agreement; this carries with it the implication that reference to arbitration under the C.P. Code, is still open to it, if it does not wish to avail itself of the provisions of the Arbitration Act. (Somayya and Happell, JJ.), KARNATAKA BANK, LTD., MANGALORE v. SINGARAYA. 1944 Comp. C. 1=216 I.C. 22=17 R.M. 178=56 L.W. 637=1943 M. W.N. 672=A.I.R. 1944 Mad. 95=(1943) 2 M. L.J. 489.

-S. 153-Duty of Court-Scheme approved by 

COMPANIES ACT (1913), S. 153-B.

1936-'40, Vol. 1, Col. 2045.] 192 I.C. 853=13 R.M. 599.

Tors and policy holders—If can be summoned.

It is not right to summon a joint meeting of the creditors and all policy holders of an insurance comcreations and an policy noiders of an insurance company as they have different interests. (Derbyshire, C.J., and Nasim Ali, J.) LIGHT OF ASYA INSURANCE Co., LTD. In the matter of I.L.R. (1942) 2 Cal. 85=46 C.W.N. 441=204 I.C. 175=15 R.C. 472=A.I.R. 1942 Cal. 578.

-S. 153—Scheme of compromise—Insurance Company -Value of policies for ascertaining majorities at meetings. In view of the fact that it is impracticable to try and ascertain the true or real value of the policies of an Insurance Company, the nominal value of the policies must be accepted for the purpose of ascertaining majorities at meetings held to approve or disapprove of a scheme of compromise under S. 153 of the Companies Act. (Lort Willaims, J.) LIGHT OF ASIA INSURANCE. Co., Ltd., In re. 45 C.W.N. 979.

S. 153 (6)—Retrospective operation.

The Legislature cannot be said to have altered the existing law by the addition of sub-S. (6) to S. 153 of the Companies Act by Act XXII of 1936. The object of the added clause is merely to explain the meaning of the expression "creditors of the same class" which occurred also in the Act as it stood before amendment. Consequently even depositors who obtained decrees against a Bank before the addition of the sub-S. in 1936 do not constitute a separate class from ordinary depositors and it is not necessary that there should be a separate meeting of such creditors before a scheme settled by the ordinary depositors can be sanctioned by the Court. (Mukherjec and Blank, JJ.) HARI CHARAN v. ULIPUR BANK, LTD. 201 I.C. 674=15 R.C. 272=75 C.L.J. 203=1942 Comp. C. 110=46 C.W.N. 634=A.I.R. 1942 Cal. 442.

———S. 153 (7)—Insurance company—Order sanctioning scheme of re-construction—Appealability—Governor-General' in Council and Superintendent of Insurance-If can file

appeal-Insurance Act, Ss. 9 and 61.

Where the Court sanctions a scheme of re-construction of an Insurance Company by its dissolution and creation of a new Insurance Company involving the transfer of the money deposited by the dissolved company under S. 7 of the Insurance Act (a property within the meaning of S. 153 A (1) (a) of the Companies Act) and the reduction of contracts of insurance it does so under S. 153 of the Companies Act as the jurisdiction of the Court under that section to sanction such scheme has not been in any way affected by any provision of the Insurance Act though in the exercise of this jurisdiction the Court is to keep in view the provisions of S. 8, S. 36 and S. 61 of the Insurance Act. Consequently the order sanctioning the scheme is an order under S. 153 read with S. 153-A of the Companies Act and is, therefore, appealable under S. 153 (7) of the Act. The Governor-General in Council, although he was not a party to the proceedings in the trial Court, is entitled to appeal against the order. So also the Superintendent of Insurance. (Derbyshire, C. J. ana Nasim Ali, J.) LIGHT OF ASIA INSURANCE CO., LTD., In the matter of I.L.R. (1942) 2 Cal. 85=204 I.C. 175=15 R. C. 472=46 C W.N. 441=A.I.R. 1942 Cal. 578.

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All that S. 153-B of the Companies Act (as amended in 1936) does is to provide that where there is a contract or scheme for the acquisition by one company of shares in another company which has been accepted by the statutory majority of share-holders in the latter company the transferee company can acquire compulsorily the shares of the minority unless the Court otherwise orders. The section does not confer any right on the Court to consider the merits of the contract so far as concerns the majority of shareholders who have accepted it. In their case the matter is complete; the matter has gone through. The only question is whether the minority share-holders are to be left in possession of their shares or whether they can be compelled to sell their shares on the same terms as those which the other share-holders have accepted. The Court must consider whether the attitude of the minority was reasonable. The section is based on the view that prima facie the minority are acting unreasonably in refusing to come into line with the majority, and ought to be forced into line, unless the Court orders otherwise. The burden is on the dissentients to adduce reasons for thinking that the majority of shareholders were wrong. (Beaumont, C.J. and Kania, J.) Government Telepthones Board, Ltd. v. Hormusji Manerji Serval. I.L.R. (1943) Bom. 581=209 I. C. 382=16 R.B. 126=1943 Comp. C. 249=45 Bom. L.R. 633=A.I.R. 1943 Bom. 325.

-S. 154—Scope—Public company—Conversion private company-Procedure-Amendment of articles.

There is nothing in S. 154 of the Companies Act, which prevents the conversion of a public company into a private one by means of amendments in the articles of association. Such a conversion can take place if suitable amendments are made to the articles of association. (Harries, C. J. and Brough, J.)
RADIANT CHEMICAL Co. LTD. In re. 22 Pat. 204=
207 I.C. 630=16 R.P. 47=1943 Comp. C. 186=
10 B.R. 4=24 P.L.T. 226=A.I.R. 1943 Pat.278

——Ss. 156, 212 and 216—Company in voluntary liquidation—Contributories settled by liquidator— Application to Court for order to enforce call—Discretion and

power of Court-Necessity for suit.

Where a shareholder has failed to pay for shares allotted to him as a signatory to the memorandum of association or on application, he can, in the event of the company going into liquidation, be placed upon the list of contributories and the liquidator can make a call upon him for what is due, in which case a Court can enforce the call without requiring the liquidator to institute a suit, and the amount of the call becomes payable irrespective of any question of limitation. There is no real difference between a company which is being compulsory wound up and a company which is in voluntary liquidation. Where the contesting respondent raises several defences, the Court may direct the liquidator to file a suit. (Leach, C. J. and Happell, J.) RAMABHADRAN v. MANICKKAM. I. L.R. (1941) Mad. 538=1941 M.W.N. 275=199 I.C. 848=14 R.M. 641-53 L.W. 321=1941 Comp. C. 70=A.I.R. 1941 Mad. 565=(1941) 1 M.L.J. 369. (Leach, C. J.

—S. 156—Liability of shareholders to contribute -Unpaid calls barred by limitation. EAST BENGAL Sugar Mills Ltd., In re. [See Q. D., 1936-40, Vol., T, Col. 2052]. 194 I.C. 59=13 R.C. 474=45 C. W N. 879=A.I.R. 1941 Cal. 143.

S. 156—Member becoming member under instrument transfer improperly stamped—Winding up proceedings— Such member, if must be treated as contributory.

## COMPANIES ACT (1913), S. 162.

After the commencement of the winding up proceedings when Ss. 156 of the Companies Act comes into play, the court cannot take into account the fact that a member whose name was registered more than a year back became a member under an instrument of transfer which being improperly stamped cannot be admitted in evidence or acted upon. It is too late to fall back upon the illegality of the transfer and to urge that the person whose name stands in the register is not to be treated as a contributory. (Fact Alli, C.J. and Chatterji, J.)YAMUNA DAS F. BEHAR ENGINEERS AND CONTRACTORS, LTD. 23 Pat. 18—218 I.C. 202—11 B.R. 245—18 R.P. 13=1944 Comp. C. 163=A.I.R. 1944 Pat. 226

-S. 160-Payment order made against deceased contributory-Remeay of liquidator.

Where a deceased person has been placed on the list of contributories and a payment order has been made against him, the remedy of the liquidator lies against the estate of the deceased in due course of administration as cuacted in S. 160 of the Companies Act. (Young, C.J. and Sale, J.) T.N. Bose n. Pandir Yogeshiwar. 199 I.C. 773=14 R.L. 437 =43 P.L.R. 650=1941 Comp. Cas. 296=A.I.R. 1941 Lah. 480.

———S. 162—Scope of inquiry—Investigation into conduct of directors—Propriety.

In an application for winding up a company, the Court will not investigate into conduct of the directors or consider whether they have exceeded their borrowing powers given to them under the articles of association. The question of exceeding the borrowing powers, is essentially a question of internal managment of the company, and when the company has taken the view that the directors acted in the best interests of the company the Court will not go behind that. (Chagla, J.) The Cine Industries and Recording Co., Ltd. In re. 203 I.C. 116—1942 Comp C. 215—14 Bom.L.R. 387—A.I.R. 1942 Bom. 231.

-S. 162—Solvency of Insurance company—Unpaid capital-If must be taken into consideration.

In judging the financial position of an insurance company at a given moment, while it is possible to regard the entire unpaid capital as available to the creditors at its face value, it is equally wrong to leave it out of consideration altogether, regardless of the position and solvency of the shareholders. On the one hand, allowance must be made for the fact that some of the share-holders may not be able to meet the call when made, and those who have the means may not be willing to pay too readily; on the other hand, it cannot be assumed that not a single pie out of this large sum can be taken to be available for meeting the contingent liability of the policy-holders. (Tekchand and Sale, JJ.) New State of India Insurance Co., Ltd. v. Superintendent of Insurance, New Delhi. I.L.R. (1944) Lah. 47=208 I.C. 170=16 R.L. 2=45 P.L.R. 49=A.I.R. 1943 Lah. 109.

S. 162—Winding up—Application by shareholder holding small number of shares if incompetent—Considerations for Court—Matters to be considered.

In an application for winding up of a company, the mere fact that the petitioner or applicant holds only a small number of shares, e.g., five shares out of 2500 shares issued. should not by itself prevent the Court from making the order asked for. The main consideration which the Court has to keep before it is the interest of both the shareholders and the creditors, and the fact that the overwhelming

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majority of the shareholders are opposing the application and a large number of creditors are also doing the same and the rest are taking no part is a fact | which must bear with the Court in coming to its decision. (Chagla, J.) THE CINE INDUSTRIES & RECORDING CO., LTD. In re. 203 I.C. 116=1942 Comp C. 215=44 Bom.L.R. 387=A.I.R. 1942 Bom. 231.

—S. 162 (v)—Unable to pay its debts—Company when commercially insolvent—Test to determine—Burden

of proof.

A company is said to be commercially insolvent when its assets and existing liabilities are such, as to make it reasonably certain—as to make the Court feel satisfied—that the existing and probable assets would be insufficient to meet the existing liabilities. The decisive test is whether at the date of the presentation of the winding up petition there was any reasonable hope that the object of tracing at a profit, with a view to which the company was formed, could be attained. It is for the applicant to prove and to satisfy the Court that there is no such reasonable hope. (Chagla, J.) The Cine Industries & Recording Co., Lit., In rs. 203 I.C. 116=1942 Comp. C. 215=44 Bom.L.R. 387=A.I.R. 1942 Bom. 231.

S. 162 (v)—"Unable to pay its debts"—Meaning of—Application for winding up—Question for consideration—Share money due and not called up—If to be taken into

When the Court is called upon to wind up a company under S. 162 (v) of the Companies Act on the ground that it is unable to pay its debts, what has to be ascertained is not whether the company, if it converted all its assets into cash, would be able to discharge its debts, but whether, in a commercial sense, the Company is solvent. In deciding whether a company is able to pay its debts, the subscribed capital of the company which is due and which has not yet been called up can be taken into account as money available for the discharge of the debts. A company is entitled to regard money which it is entitled to call up on account of shares from the contributories as money available for the discharge of its debts. (Agarwalla, J.) Sudhiya Nath Bhaduri v. Bihar National Insurance Co., Lid. 20 Pat. 538=198 I.C. 667=14 R.P. 483=8 B.R. 443=23 Pat. L. T. 23=1942 Comp. C. 66= A.I.R. 1941 Pat. 603.

S. 162 (v) and (vi)—Winding up—Grounds— Misconduct or mismanagement of directors—Company working at a loss—If per se grounds for winding up— Substratum of company—When deemed to be gone.

The mere fact that the Court is of opinion that the business of a company cannot be carried on, or probably will not be carried on, in a successful manner is not sufficient ground for winding up. mere misconduct or mismanagement on the part of the directors, even though it might be such as to justify a suit against them in respect of such misconduct or mismanagement is not of itself sufficient to justify a winding up order. The substratum of the company is deemed to be gone when (a) the subject matter of the company is gone, or (b) the object for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company except at a loss, in other words there is no reasonable hope that the object of trading at a profit can be attained, or (d) the existing and probable assets are insufficient to meet the existing liabilities. Itis impossible to say that the assets are insufficient

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pressing for payment of his debt. It would not be just and equitable for the Court to make a winding up order on the grounds merely that the directors were guilty of misconduct and that the business has been carried on at a heavy loss. These are per se not grounds on which a winding up could be ordered. (Chagla, J.) THE CINE INDUSTRIES AND RECORDING Co., LID., In re. 203 I.C. 116=1942 Comp. C. 215=44 Bom.L.R. 387=A.I.R. 1942 Bom. 231.

S. 162 (vi)—" Just and equitable"—Test to determine—Function and duty of Court—Matters to be

considered.

In deciding whether it is just and equitable to wind up a company under S. 162 (vi) of the Companies Act, the decisive question is whether at the date of the presentation of the petition there is any reasonable hope that the object of trading at a profit is attainable-The onus of proof is on the petitioning creditor or contributory. It is not the function of the Court to determine the question of the prospects of the company in future on its own views as to probable success or failure, but to form the best opinion it can upon the evidence of persons given with a practical knowledge of the trade in question and the local conditions where these affect the matter, If at the relevant time, there is a reasonable hope of tiding over a period of difficulty and emerging into a region in which the company might reasonably expect to carry on at a profit, there is no sufficient reason why the Court should wind up the company under class (vi) of S. 162. Where there is no evidence of persons with practical knowledge of the business in question, the fact that a public officer, whose duty it is to intervene in cases where a company's affairs are not conducted in a sound manner, has not taken action to wind up the company is, of course, not a deciding factor in determining whether a petition for winding up by a contributory should be granted or not, but it is a fact which is deserving of consideration under the just and equitable clause. (Agarwala, J.) SUDHIYA NATH BHADURI V. BIHAR NATIONAL INSURANCE Co., Ltd. 20 Pat. 538=198 I.C. 667=14 R.P. 483=8 B.R. 443=23 P.L.T. 23=1942 Comp. C. 66=A.I.R. 1941 Pat. 603.

S.163 (1)—Applicability—Neglect to pay—Meaning of—Bona fide dispute as to liability and as to nature of liability—Refusal by Company to pay—Petition for

winding up-Maintainability.

Where it is by no means clear that there are debts due by a Company to persons applying for winding up, and the question as to whether there are debts or not depends upon many factors which are not admitted or undisputed, such matters cannot be gone into on a winding up petition based on the neglect of the Company to pay its debts under S. 163 (1) of the Companies Act. When there is a bona fide dispute as to liability and a hona fide dispute as to the nature of liability, if such liability be ever found to exist the refusal on the part of the Company to pay in such circumstances cannot be regarded as a mere neglect to pay its debts, and it cannot be held that the Company is insolvent by reason of its neglect to pay under S. 163. A petition for winding up in such a case will not lie and must be dismissed. (Harries, C.J. and Din Mahomed, J.) DITTOO MAL.
AIDAN & SONS v. Om Press Co., LTD. (1944)
Comp. C. 224.

S. 171—Appeal against company—Pendency on date of winding up order—Leave to prosecute—Necessity.

Where at the date of the winding up order, a proceeding, namely, an appeal is pending against to meet the existing liabilities when no creditor is the company, it could not, according to S. 171 of the

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Companies Act, go on without the leave of the Court. Companies Act, 50 of Wallott the Act of the Count (Braund, J.) Rawat Raj Kumar Singhv. Benares Bank, Ltd. I.L.R. (1941) All. 175=194 I.C. 57=13 R.A. 467=1941 O.W.N. 200=1941 Comp. C. 59=1941 O.A. (Supp.) 276=1941 A.L.W. 103=1941 A.L.J. 23=1941 A.W.R. (H.C.) 1= A.I.R. 1941 All. 154.

S. 171—Applicability—Execution proceedings-Decree on mortgage—Company party to suit as puisne mortgagee—Execution proceedings impleading Bank—Subsequent order winding up Bank-Sanction of winding up

Court—Necessity for continuing execution proceedings.

"Proceedings" in S. 171, Companies Act is not confined to an original proceeding but covers execution proceedings also.

Execution proceedings were started under a mortgage decree by the decree-holders. A Bank, which was a limited company was impleaded as a party to the suit as well as the execution, as it was a puisne mortgagee, and went into liquidation subsequent to the filing of the execution proceedings.

Held, that the Bank, though a puisne mortgagee was not a mere pro forma party, but was a party, liable to pay the amount of the mortgage-debt, and sanction of the Court which passed the order of winding up was necessary under S. 171, for the purpose Mining the execution proceedings. (Kuppuswami Ayyar, J.) Calicut Bank Ltd. v. Mekkat. 1943 M.W.N. 702=56 L.W. 644=1944 Comp. C. 7=215 I.C. 271=17 R.M. 155=A.I.R. 1944 Mad. 84=(1943) 2 M.L.J. 448.

Ss. 171 and 229—Application for leave assignee of decree from Bank prior to liquidation-Official liquidator, if can challenge transfer.

The official liquidator represents all the unsecured creditors and it is their right to challenge through him a transfer of property belonging to the Bank, if the transfer is believed to be fraudulent, and either voidable under S. 53 or void under S. 54, Provincial Insolvency Act. Where an assignee of a mortgage decree from a bank who was an unsecured creditor applied for leave to continue proceedings under S. 171 of the Companies Act on the bank going into liquidaor the Companies Act on the bank going into liquidation, it was open to the liquidator to challenge the transfer in such an application. (Bennett, and Agarwala 77.) Anand Behari Lal v. Dinshaw and Co. 18 Luck, 110=200 I.C. 485=14 R.O. 600=1942 Comp. C. 137=1942 O.W.N. 319=1942 O.A. 227=A.I.R. 1942 Oudh 417.

——Ss. 171 and 230-A (5)—Company—Liquidation
—Claim by Managing Director—Permission given to
file suit within specified time—Failure to file suit in time— Effect -Right to prove claim in liquidation proceedings.

Where the Managing Director of a limited company which is being wound up by Court under a compulsory winding up order, presents a claim against the company and asks that his application should be treated as an application to file a suit against the Official Liquidator under S. 171 of the Companies Act to prove his claim, and he is allowed time for the purpose of filing a suit, if he fails to file the suit within the time granted to him, for the purpose, and the Court refuses to grant him a further extension of time, such refusal amounts to a dismissal of his claim, and he cannot turn round and ask the Court to change the procedure which he himself considered proper and to inquire into his claim and adjudicate on it in the liquidation proceedings. (Leach, C.J. and Venkataramana Rao, J.) General Agencies and Trades, Ltd. v. Viswanathan. 200 I.C. 603 = 15 R M. 88=1942 Comp. C. 14=54 L.W. 275=A.I.R. 1941 Mad. 855=(1941) 2 M.L.J.

## COMPANIES ACT (1913), S. 171.

-S. 171—Leave—Expiry of time for filing appeal. Leave to commence an appeal cannot be granted under S. 171 of Companies Act, when such leave is applied for at a time beyond that at which the commencement of the appeal would become time-barred. (Braund, J.) MAHARAJ KISHORE KHANNA v. BENARES. (Branua, J.) MAHARAJ KISHOR KHANNA V. DENARES BANK, LTD. I.L.R. (1941) All 565=196 I.C. 274=1941 R.D. 557=1941 Comp. C. 290=14 R.A. 144=1941 A.L.J. 385=1941 O.A (Supp.) 558 (2)=1941 A.L.W. 681=1941 A.W.R. (H. C.) 237=1941 O.W.N. 838=A.I.R. 1941 All 335.

Ss. 171 and 232—"Other legal proceeding" in S. 171—Meaning of—Crown debts—Reference in winding up. See Government of India Act, S. 226 (1). I.L.R. (1945) All. 352.

S. 171—Scope—If precludes proceedings being taken against servants of the Company.

There is nothing in S. 171 of the Companies Act which precludes action being taken against servants. of the Company in as much as they are not the Company itself. (Bennett. J.) RAGHUBAR SINGH D. EMPEROR. 19 Luck. 385=211 I.C. 220=45 Cr.L. J. 333=16 R.O. 222=1943 O.W.N. 339=1943 O.A. (C.C.) 214=A.I.R. 1944 Oudh 147.

S. 171-" Suit" and "legal proceeding"-Meaning of.

The word "suit" in S. 171 of the Companies Act means a proceeding which is instituted with the presentation of a plaint in a Court of original jurisdiction. The expression "legal proceeding" in this section is coupled with "suit" and obviously means proceedings ejusdem generies, that it to say, original proceedings in a Court of first instance, analogous to a suit, initiated by means of a petition similar to a plaint. It does not include proceedings taken in the course of the suit, nor proceedings arising from the suit and continued in a higher Court, like an appeal from and continued in a higher coult, like an appear home an interlocutory order or final order passed in the suit. (Tek Chand, Monroe and Beckett, JJ.) SHUKANTLA v. THE PEOPLES BANK OF NORTHERN INDIA LTD. I.L.R. (1941) Lah. 760=14 R.L. 195=197 I.C. 1=43 P.L.R. 505=1941 Comp. C. 309=A.I.R. 1941 Lah. 392 (F.B.).

\_\_\_\_\_S. 171—Suit instituted without leave—Leave subsequently granted after limitation—Suit, if liable to be dismissed.

A suit instituted against a company in liquidation without leave should not be dismissed on that ground alone. If leave is subsequently obtained, limitation should be calculated in the same way as if the suit had orginally been instituted with leave. It is immaterial whether the leave is granted before or after the period of limitation prescribed for the institution of the suit has expired. (Tek Chand, Ram Lall, and Beckett, 77.) NAZIR AHMAD v. PEOPLES BANK OF NORTHERN INDIA, LTD. I.L.R. (1942) Lah. 517= 204 I.C. 74=15 R.L. 239=1943 Comp. C. 1= A.I.R. 1942 Lah. 289 (F.B.).

S. 171—Suit under O. 21, R. 63, C. P. Code, against company in liquidation—Leave of Court—If necessary.

Where in execution of a decree obtained by a

company in liquidation, certain property has been attached as belonging to the judgment-debtor, and a third person has unsuccessfully objected to the attachment on the ground that the property belonged to him and not to the judgment-debtor, such person cannot bring a suit under O. 21, R. 63, C.P. Code, against the company for a declaration of his title without having first obtained under S. 171 of the Companies Act leave of the Court which had passed the winding up order. (Tek Chand, Monroe and

## COMPANIES ACT (1913), S. 176.

Beckett, 77.) SHUKANTLA v, THE PEOPLES BANK OF NORTHERN INDIA, LTD. I.L.R. (1941) Lah. 760 = 14 R.L. 195 (F.B.) = 197 I.C. 1=43 P.L.R. 505=1941 Comp. C. 309=A.I.R. 1941 Lah. 392 (F B.).

-S. 176 (1)—Construction—Official Liquidator— Right to resign—Due cause if to be shown—"Due cause".

The words, "on due cause shown" in S. 176 (1) of the Indian Companies Act govern the words "may resign or be removed by the Court." The acts of resignation or removal are linked together and subject to the same condition. An Official Liquidator can therefore resign on due cause shown. An Official Liquidator cannot be expected to carry on the affairs of the company at his own expense when there is no prospect whatever of recovering costs from the petitioner in the winding up proceedings who cannot be traced. In such circumstances he must be permitted to resign and should not be compelled to continue against his will. (Davis, C.J. and Weston, J.) Mulchand Lilaramsing v. Central AGENCY CORPORATION. I.L.R. (1942) Kar. 501= 206 I.C. 360=15 R.S. 175=1943 Comp. C. 81 =A.I.R. 1943 Sind 84.

-S. 178-Property of company-If vests

in liquidator.

Under S. 178 of the Companies Act, the Official Liquidator should take into his custody or under his control all the assets of the company, but the company's property does not vest in the liquidator. (Young, C.J. and Sale, J.) RAM RAKHA MAL AND SONS v. SURINDAR SINGH. Comp. C. 50=14 R.L. 76=43 P.L.R. 33
=A.I.R. 1941 Lah. 134.
S. 179 (f)—Liquidator—Power of at-

torney agent of—Authority to endorse promissory notes—Ratification by liquidator—Permissibility. Sankamma Hengsu v. Anantha Kamath. [See Q.D., 1936-'40, Vol. I, Col. 2058.]

192 I.C. 103=13 R.M. 537.

S. 179—Official liquidator—General duties

and powers-Application to Court-When to be

Generally all ordinary questions arising in the liquidation of a company are decided by the official liquidator himself. He ordinarily applies to the Court only when some special question of law arises or when he wishes a direction from the Court on a general question of policy. If this procedure is followed, an application under S. 183 (5) of the Companies Act will lie from the order of the official liquidator to the Court instead of the Court itself deciding the matter in the first instance. S. 179 of the Act lays down what powers may be given to the official liquidator. (Davies.) MATHURA the official liquidator. (Davies.). MATHURA PRASAD v. THE RAJPUTANA FILMS Co., Ltd. 1943 A.M.L.J. 21.

S. 184—Removal of name from share register—Right to—Sale of shares to company itsel'i-Effect-Incapacity of company to purchase own shares—Foreign company—Rule as to.

See Companies—Purchase of own Shares.

55 L.W. 653.

-S. 184—Share in company allotted to, and registered in name of minor girl on application by father as guardian-Company going into liquidation-Minor or father-If can be placed on list of contributories.

## COMPANIES ACT (1913), S. 186.

An application was made by one P, as guardian of his minor daughter for shares in a company and the company issued shares to and registered shares in the name of the daughter, des-cribing her as a minor. When the company went into liquidation, the Official Liquidator claimed against the minor for contribution, but she, through her father and guardian, set up her minority and disclaimed personal responsibility. The Official Liquidator then claimed that her father, P, who signed the application must be deemed to have contracted for the shares and should be placed on the list of contributories. There was no suggestion that the company were unaware of the daughter's minority; on the other hand they knew that they were being invited to contract with a minor and thought fit to contract with the minor. There was nothing on record to show that the father had at any time intended to become a subscriber of the company and there was no evidence that any of his money was used for the purpose.

Held, (1) that the contract was void in law. On the face of it, the contract was made by both sides under complete misapprehension as to the law, but no misapprehension as to the facts. The father P, could not be held to have contracted under an alias and could not therefore be placed (Mockett and on the list of contributories. (Mockett and Kunhi Raman, II.) PALANIAPPA MUDALIAR v. Aumin Rumin, 73.) FALANIAFPA MUDALIAR V. OFFICIAL LIQUIDATOR, THE PASUPATHI BANK LTD., COIMBATORE I.L.R. (1942) Mad. 875=201 I.C. 731=15 R.M. 383=1942 Comp. C. 89=A.I.R. 1942 Mad. 470=55 L.W. 200=1942 M.W.N. 252=(1942) 1 M.L.J. 425.

-Ss. 185 and 188-Direction to refund moneys paid—Jurisdiction of Court—Limits. Offi-CIAL LIQUIDATORS, GORAKHPUR ELECTRIC SUPPLY Co., Ltd. v. Siemens (India), Ltd. [See Q.D., 1936-'40, Vol. I, Col. 3310.] I.L.R. (1940) All. 730=192 I.C. 72=13 R.A. 293.

-S. 186—Calls prior to liquidation—Nature of liability in respect of, after liqudation—Jurisdiction of Court to interfere with liquidator's right thereto.

When there has been a valid call prior to liquidation and the date for its payment has passed, it becomes a debt due from the shareholder to the company and is just like any other debt. When subsequently the company goes into liquidation, that debt becomes an asset of the company which have to be realised by the liquidator. It has lost its character as a call and become a debt and as such is realisable by the liquidator as any other debt or asset. The Court has no jurisdiction at all to question the propriety of a liquidator seeking to get in a debt due to the company prior to the liquidation under S. 186 of the Companies Act. (Braund, J.) THE PUBLIC BENEFIT PROVIDENT INSURANCE SOCIETY, LTD. In the matter of. I.L.R. (1942) A. 26=199 I.C. (663=1942 A.L.W. 17=1942 O.A. (Supp.) 61 (2)=14 R.A. 397=1942 A.L.J. 47=1942 A., W.R. (H.C.) 4=A.I.R. 1942 A. 136.

-S. 186-If deprives contributory of right to claim set off. See 1940 Dig., Col. 366. Shri Nath Shah v. Official Liquidator. [See Q. D., 1936-40, Vol. I, Col. 3310.] I.L.R. (1941) COMPANIES ACT (1913), S. 186.

All. 153=1941 A.L.W. 12=192 I.C. 357=13 R.A. 311=1941 O.A. (Supp.) 1.

-S. 186 (1)—If mandatory—Refusal by Court to make an order under S. 186 (1)—Remedy of liquidator. Shri Nath Shah v. Official Liquidator. [Scc Q.D., 1936-40, Vol. I, Col. 3311.] I.L.R. (1941) All. 153=1941 A. L.W. 12=192 I.C. 357=13 R.A. 311=1941 O.A. (Supp.) 1.

-S. 186 (2)—Set-off—Discretion of Court

—Debt in respect of calls—If can be set-off.

By virtue of S. 186 (2) of the Companies Act, it is wholly discretionary in a Court whether any set-off can be allowed. It is now clear beyond any doubt and as a fixed judicial principle that the Court never allows a person to whom company is indebted to set-off that indebtedness against what is due from him as a contributory in respect of calls. It is otherwise where the two debts are of a purely commercial nature. But where the debt of the company is in respect of calls, the set-off is never available to a contriof calls, the set-off is never available to a confitutory. (Braund, J.) The Public Benefit Provident Insurance Society, Ltd., In the natteer of. I.L.R. (1942) A. 26=199 I.C. 663 =1942 A.L.W. 17=1942 O.A. (Supp.) 61 (2)=14 R.A. 397=1942 A.L.J. 47=1942 A. W.R. (H.C.) 4=A.I.R. 1942 A. 136.

-Ss. 191 and 229 and Madras Company Rules, Rr. 83 and 91—Scope—Delay in filing proof of claim—Effect—Power of Court to allow claim—Desirability of amending R. 91 to bring it in consonance with Ss. 191 and 229.

So long as justice can be done to a creditor without disturbing the dividend already declared or paid, there is no reason why he should be prevented from getting his dividend merely be-cause of failure to file proof of claim within the time limited by the notice under R. 83 of the Rles framed by the Madras High Court under the Companies Act. The delay in filing the affi-davit of proof of a claim can be excused under R. 91 of the rules. On a literal reading of R. 91, as it now stands, it would seem that unless a creditor satisfies the Court that owing to ignorance or want of notice he did not file proof of his debt, his claim cannot be admitted. It is desirable that R. 91 should be amended on the lines of R. 65 of the English Bankruptcy Act or S. 72 of the Presidency Towns Insolvency Act, as it would be in consonance with the provisions of Ss. 191 and 229 of the Companies Act. (Venkataramana Rao, J.) RAJAKUMARI V. MOTION PICTURE PRODUCERS COMBINE, LTD. 204 I.C. 164=15 R.M. 705=55 L.W. 99=1942 M.W. N. 347=1942 Comp. C. 113=A.I.R. 1942 Mad. 349=(1942) 1 M.L.J. 182.

-S. 195—Copies of depositions—Right of deponents. KAMAL BROTHERS (1937), LTD. SUNIL KUMAR CHATTERJI. [See O.D., 1936-'40, Vol. I, Col. 2061.] 191 I.C. 879=13 R. C. **2**99.

-S. 195—Depositions under—Nature of— Liquidator's right to refer to them in other pro-NIL KUMAR CHATTERJI. [See Q.D., 1936-'40, Vol. I, Col. 2062] 191 I.C. 879=13 R. C. COMPANIES ACT (1913), S. 202.

-S. 196-Ex parte order for public examination of directors—If can be made—Notice before order-Necessity.

There is nothing in the rules under the Companies Act which requires notice of applications under S. 196 of the Act to be given to the directors of a Company before the Court can pass an order directing their public examination. An ex parte order can therefore be made. (Lakshmana Rao and Horwill, JJ.) CHOKKALINGAM CHET-TIAR 7. OFFICIAL LIQUIDATOR. I.L.R. Mad. 540-211 I.C. 436=16 R.M. 530=56 L. W. 648=1943 M.W.N. 716 (2)=1943 Comp. C. 263=A.I.R. 1944 Mad. 87=(1943) 2 M. L.J. 499.

-S. 196-Public examination of directors -Order for-Grounds-Allotment of shares in consideration of promissory notes in contravention of Articles-If justifies order.

Where the leuding of monies on the shares of a banking Company is expressly prohibited by the Articles of Association, the allotment of shares in consideration of promissory notes executed by the shareholder is a contravention of the provisions of the Companies Act and contrary to the Articles of Association. It suggests fraud and would therefore justify the public examination of the directors of the Company. (Lakshmana Rav and Horwill, JJ.) CHOKKALINGAM CHERTTAR v. OFFICIAL, LIQUIDATOR. I. L. R. (1944) Mad. 540=211 I. C. 436=16 R. M. 530=56 L.W. 648=1943 M.W.N. 716 (2) =1943 Comp. C. 263=A.I.R. 1944 Mad. 87 = (1943) 2 M.L.J. 499.

-S. 201-Procedure-Order by Court under Companies Act-Enforcement by another Court-Transfer of order by Court-Necessity-Production of certified copy-Sufficiency-C. P.

Code, S. 39—Applicability.
S. 201 of the Companies Act provides its own special procedure and has to be followed. The procedure prescribed by S. 39, C. P. Code, is not applicable; an order made by a Court under the Companies Act can be enforced by another Court on the production of a certified copy of the order in the Court which is asked to enforce it. It is not necessary that the order should be transfer-red by the Court which made it to the Court which is asked to enforce as in the case of decrees under S. 39, C. P. Code. Where special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. (Davis, C.J. and Weston, J.) Golden Provident Funds Society, LTD., KARACHI V. NARAIN DECOMAL. I. L. R. (1942) Kar. 504=207 I.C. 275=16 R. S. 19=1943 Comp. C. 83=A.I.R. 1943 Sind 89.

—S. 202—Appeal against compulsory winding up order-Parties-Company not impleaded as such-Director shareholders made parties.

An appeal against a compulsory winding order is not incompetent merely by reason of the fact that the company as such has not been impleaded as a party, when it is in fact substantially represented before the Court by its director shareholders, all of whom are parties to the appeal. (Young, C.J. and Sale, J.) RAM RAKHA MALAND SONS v. SURINDAR SINGH. I.L.R. (1941)

## COMPANIES ACT (1913), S. 202.

Lah. 680=195 I.C. 511=14 R.L. 76=1941 Comp. C. 50=43 P.L.R. 33=A.I.R. 1941 Lah. 134.

—S. 202—Appeal against compulsory winding up order—Parties—Official liquidator—If necessary party.

The Official Liquidator is not a necessary party to an appeal against a compulsory winding up order. On the other hand, it is desirable that as a general rule, he should be made a party to such appeals in order to prevent possible collusion amongst interested parties and to ensure that all the necessary facts are laid before the Court and that the proceedings are conducted according to law. (Young, C.J. and Sale, J.) RAM RAKHA MAL AND SONS v. SURINDAR SINGH. I. L. R. (1941) Lah. 680=195 I.C. 511=14 R.L. 76=1941 Comp. C. 50=43 P.L.R. 33=A. I. R. 1941 Lah. 134.

S. 202—Scope—Order directing public examination of directors—Appeal—Competency.
The terms of S. 202, Companies Act are very

wide, and wide enough to cover an order directing public examination of the directors of Company in liquidation and hence such an order is appealable. (Lakshmana Rao and Horwill, II.) CHOKKALINGAM CHETTIAR v. OFFICIAL LI-OUIDATOR I.L.R. (1944) Mad. 540=211 I. C. 436=16 R.M. 530=56 L.W. 648=1943 M. W.N. 716 (2)=1943 Comp. C. 263=A.I.R. 1944 Mad. 87=(1943) 2 M.L.J. 499.

—S. 202—Scope—Order fixing remuneration of legal practitioner for services rendered to liquidators in winding up-Appeal-Competency.

An order by a Court winding up a company fixing the amount of remuneration payable to an advocate for legal services performed by him to the Liquidators of the company which is being wound up is not an order made or given in the matter of the winding up of the company within the meaning of S. 202 of the Companies Act, and therefore no appeal lies from such an order. It is of the nature of a ministerial order settling a dispute arising in the establishment employed under the Liquidators as machinery for effecting the winding up of the company. (Davis, C.J. and Weston, J.) TILOKCHAND CHATOMAL v. SIND HINDU PROVIDENT FUNDS SOCIETY. I. L. R. (1942) Kar. 496=206 I.C. 177=15 R.S. 163 =1943 Comp. C. 77=A.I.R. 1943 Sind 82.

-Ss. 209 and 209-A to H-Creditors' voluntary winding up—Provisions not complied with —Procedure to be 'followed. Light of Asia Insurance Co., Ltd., In re. [See Q.D., 1936-'40, Vol. I, Col. 3311.] 192 I.C. 222=13 R.C. 303=1941 Comp. C. 75=A.I.R. 1941 Cal.

S. 216—Discretion of Court—Company in voluntary liquidation-Liquidator's application to Court to enforce calls upon contributories—Power of Court—Direction to file suits. See Companies ACT, Ss. 156, 212 AND 216. (1941) 1 M.L.J. 369.

-S. 216—Right to apply—Company in voluntary liquidation-Application by Registrar of Joint Stock Companies for removal of liquidator and appointment of another by Court—Maintain-ability. Peoples International Travel, Educa-tion and Commercial Co., Ltd., In ré. [See Q. Act; (2) that though the Bank had a right to

COMPANIES ACT (1913), S. 229.

D., 1936-'40, Vol. I, Col. 3311.] I.L.R. (1941) Bom. 39=192 I.C. 595=13 R.B. 263=A.I.R. 1941 Bom. 25.

-S. 227 (2)—Applicability—Conversion of unsecured deposit account into security deposit account during pendency of liquidation proceedings—If amounts to disposition which is void—If would be sanctioned by Court.

Where during the pendency of winding up proceedings a Bank agrees to employ a cashier and to transfer his unsecured deposit with the Bank into a security deposit and does so transfer it, the whole transaction is void under S. 227 (2) of the Indian Companies Act as a disposition by the Company of its property made after commencement of winding up. Inasmuch as the cashier obtained an undue advantage over his fellow creditors, the Court would not validate the disposition by giving it its sanction. (Braund, J.) RAM LAL v. OFFICIAL LIQUIDATOR, BENARES BANK, LTD. I.L.R. (1942) A. 86= 200 I.C. 61=14 R.A. 407=1942 Comp. C. 170=1942 A.L.J. 78=1942 O.A. (Supp.) 62 (1)=1942 A.W.R. (H.C.) 7=1942 A.L.W. 21=A.I.R. 1942 A. 141.

——S. 227 (2)—Validation of payments under—Principles upon which Courts should act. OFFICIAL LIQUIDATORS, GORAKHPUR ELECTRIC Supply Co., Ltd. v. Siemens (India), Ltd. [See O.D., 1936-'40, Vol. I, Col. 3311] I. L. R. (1940) All. 730=192 I.C. 72=13 R.A. 293.

——S. 229—Applicability—Garnishee order on bank under O. 21, R. 46 (3) in execution of decree against depositor-Failure to pay money into Court-Bank subsequently ordered to be wound up-Subsequent application under O. 21, R. 63-B, C. P. Code-Effect-Right to preferential payment—Levy of execution against liquidator— Permissibility—Procedure. Sec C. P. Code, O. 21, R. 46 (3). 21 Pat. 287.

S. 229—Bank—Liquidation—Set off— Debt due by A to Bank—Security given by third party to Bank in shape of fixed deposit in Bank -Right to claim set off.

There can be no set off of claims under S. 229 of the Companies Act when there are no mutual dealings. A Bank lent a sum of Rs. 2,000 to the applicant on a promissory note dated 7-10-1936. As the Bank was not willing to lend without security, S, the motherin-law, offered to give security and gave as security a sum of Rs. 4,300 which she had in fixed deposit in the Bank under a fixed deposit receipt. This receipt was handed over to the Bank along with a letter under which S authorised the Bank to set off at any time the whole or any portion of the said deposit and interest accrued thereon towards the loan granted to the applicant at any time the Bank deemed it necessary. Before the fixed deposit matured the Bank went into liquidation and the applicant claimed to set off the amount due by the Bank to S against the amount due by him. S also filed an affidavit expressing her willingness to the set-off.

Held, (1) that there were no mutual deal-

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companies act (1913), S. 229.
set-off, the applicant could not say that he had a right to claim a set-off; (3) that having regard to the equity of the case, the should adjust the dividend payable under the deposit receipt towards amount due and recover only the balance. (Venkataramana Rao, J.) SAMUEL v. OFFICIAL LIQUIDATORS, T. N. & Q. BANK, LTD. 198 I.C. 578=14 R.M. 463=1941 M.W.N. 363 = A.I.R. 1941 Mad. 622=(1941) 1 M.L.J.

-S. 229—Company—Winding up—Set off

—Amount due to company by partners of firm—Amount due by company to one partner—Sct-off. Under the Indian law every case of a joint promise is treated as a joint and several promise. If a debt is incurred by the members of a partnership they are jointly and severally liable. If A and B, members of a firm, sue C, C cannot set-off a debt due by A alone, whereas if C sucs A and B, A can set-off a debt due by C. Where the liability of the partners is joined and several in a claim to enforce that joint and several liability, it is open to the partners to set-off a debt due to them. The rule of set-off in bankruptcy does not rest on the same principle as the right of set-off between solvent parties, because the principle is wider. (Venkataramana Rao, J.) MACHADO v. OFFICIAL LIQUIDATORS, T. N. & Q. BANK, LTD. 200 I.C. 17=14 R.M. 650=53 L.W. 560=1941 M.W.N. 358=1941 Comp. C. 221= A.I.R. 1941 Mad. 654.

S. 229—Company wound up—Assessment under S. 23 (4), Income-tax Act—Liquidation Court, if can go behind assessment—Onus of broof.

An assessment made by the income-tax authorities including an assessment made under S. 23 (4) of the Income-tax Act, is a determination made according to law of the taxable income of the assessee. In many ways an assessment is similar to a decree or judgment. A judgment is prima facie evidence of the debt but not conclusive. In cases where the facts give rise to a suspicion that there is no real debt, the Court can go behind the judgment or decree, but the onus of showing that the judgment or decree does not represent a real and valid debt, rests on those who seek to challenge it. That rule applies with equal force to assessments and a liquidation court can in proper cases go behind assessments though the latter are prima facie and evidence that certain income was earned that an amount of tax is due. The onus of proving that the assessment does not represent the real taxable income rests on the liquidator, and if the latter fails to discharge the onus the assessment must stand. The liquidation court is, therefore, not right in rejecting the claim of the Commissioner of Income-tax without investigation on the ground that the mere production of the assessment by him is not sufficient proof. It should treat the assessment as prima facie evidence and permit the liquidator to rebut it, if he can, by producing documents or such other evidence as might be in his possession. (Harries, C.J., Abdul Rashid and Beckett, IJ.) GOVERNOR GENERAL IN COUNCIL v. SARGODHA TRADING CO., LTD. I.L.R. (1943) Lah. 706=208 I.C. 17

COMPANIES ACT (1913), S. 230.

=16 R.L. 77=46 P.L.R. 1=1943 I.T.R. 368 =1943 Comp. C. 163=A.I.R. 1943 Lah. 228 (S.B.).

S. 229—Liquidation of company—Incometax assessment which had become final, if can be reopened.

Where an assessment under S. 23 (4) of the Income-tax Act has been made in respect of a company and it had also become final as against the firm and the company subsequently against the firm and the company subsequently goes into liquidation, the assessment cannot be reopened ordinarily. There could be an interference with the assessment only if there is reason to think that the assessment was vitiated on a different footing, interference being allowed only because of the possibility of fraud (Bennett and Ghulam Hasan, JJ.) DINSHAW & Co. v. Incometan Officer, Lucknow. 16 Co. D. INCOMETA OFFICER, EDGENOW. 10 Luck. 599=192 I.C. 856=1941 A. W. R. (C.C.) 86=1941 O.L.R. 237=1941 I.T.R. 215=13 R.O. 411=1941 Com. C. 147=1941 O.W.N. 118=1941 O.A. 129=A.I.R. 1941 Oudh 260.

229—Trust or agency—Customer having account with Bank at A branch paying cheque at B branch for collection and trans-mission to A branch—Bank suspending payment after collection of amount but before transmission to A branch-Rights of customer.

A cheque was handed over to the Bombay Branch of the T. N. and Q Bank by a company which had a current account with the Bank's branch at N in the Travancore State for collection and remission to the branch at N. The Bombay branch collected the cheque, but before it could send the amount to the branch at N, the Bank suspended payment and went into liquidation. went into liquidation.

Held, that as the money had not got into the company's account at N, the Bank's position was that of an agent holding his principal's moneys and not that of debtor and creditor. Although the branches might be the agencies of one principal firm, they might be regarded as distinct trading bodies for certain special purposes of banking business. As the money never got to the branch at N, it belonged to the comgot to the branch at N, it belonged to the company and the company's money could not be used for paying the Bank's creditors. The liquidator was therefore bound to pay it over to the company. (Leach, C.J. and Byers, J.) INDIAN HUME PIPE CO., LTD. v. T. N. & Q. BANK, LTD. I.L.R. (1943) Mad. 187=206 I.C. 520=15 R.M. 997=55 L.W. 430=1942 Comp. C. 124=1942 M.W.N. 529=A.I.R. 1942 Mad. 646=(1942) 2 M.L.J. 128.

S. 230—Income-tax becoming payable after visibling the Infortity.

after winding up—If entitled to priority.

The income-tax which has become due and payable by a company after the winding up order has been made is not a debt for which Rashid and Beckett, II.) Governor General In Council v. Sargodha Trading Co., Ltd. I.L.R. (1943) Lah. 706=208 I.C. 17=16 R. L. 77=46 P.L.R. 1=1943 I.T.R. 368=1943 Comp. C. 163=A.I.R. 1943 Lah. 228 (S.

COMPANIES Act (1913), S. 230.

S. 230—Security deposit of managing agent—If a trust fund—Test.

The managing agents of a company deposited in the general accounts of the company a sum of money as security for the fulfilment of their obligations under the agreement appointing them. They were to get interest on it and to have a second charge on the machinery and other assets of the company. Winding up of the company was ordered. The managing agents claimed that their deposit was a trust fund and not assets of the company and should

be returned to them.

Held, that the fair test whether such a sum of money was to be held as a trust fund or not was to ask whether, in the circumstances, it was intended that it should remain a segregated fund, or whether it should, on payment, become the property of the company and be compensated for by the company's express or implied covenant to repay it, in exactly the same way as the customer's deposit in a bank creates the relationship of debtor and creditor. The circumstance that it passed into the general assets of the company and was utilised by them for their general expenses and that interest was to be paid on it and that it was to be a second charge on the machinery, etc., of the company, clearly indicated that it was never intended to be kept aside in trust for the managing agents. (Ganga Nath, J.) Maheshwari Chunni Lal v. Official Liquidator of the Indra Sugar Works, 

charge on book debts.

On the winding up of a company an employee is, by virtue of S. 230 (1) (b) and (2) (b) of the Companies Act, entitled, in respect of salary to the extent of Rs. 1,000, to priority of payment as against the holder of a floating charge created by a debenture over the book debts of the company, from the proceeds of such book debts. (Leach, C.J. and Happell, J.) PARTHASARATHY v. MADRAS PUBLISHING HOUSE, LTD. 53 L.W. 513=1941 M.W.N. 444=1941 Comp. C. 218=A.I.R. 1941 Mad. (1941) 1 M.L.J. 577.

S. 231—Date of insolvency—Period of three months under S. 54, Provincial Insolvency Act—Computation of—Voluntary liquidation followed by compulsory winding up—Crucial date.

Where a voluntary winding up is followed by a compulsory winding up by the Court, the former is superseded on account of the inconsistency between the provisions which relate to the two forms of winding up. In such a case the crucial date for determining the period of three months under S. 54 of the Provincial Insolvency Act, is the date of the presentation of the petition to the Court for winding up. The presentation of the petition is the act of insolvency and not the prior resolution of the comCOMPANIES ACT (1913), S. 235.

I.L.R. (1943) Mad: 353=207 I. C. 202= 16 R.M. 56=55 L.W. 731=1942 M.W.N. 671=A.I.R. 1943 Mad. 54=(1942) 2 M.L. J. 583.

-S. 234-Consent-order-Power of Court to pass and enforce by execution-Suit challenging correctness of Court's orders-Permissibi-

Under S. 234 of the Companies Act, a winding-up Court has power to pass a consent order. and if such order provides for execution against a guarantor, the Court has jurisdiction to enforce the order by execution. It is not permissible to call into question the correctness of the decisions of the Court in a separate suit. (Derbyshire, C.J. and Panckridge, J.)

Clerryshire, C.J. and Fanckriage, J.) Fro-Bodh Lal v. Chandanmull. 46 C.W.N. 98 =1942 Com. C. 55. —S. 234—Trust monies—Disappearance— Claim entered as preferential claim under S. 234—Effect. Dinshaw and Co. v. Krishna Piary. [See Q.D., 1936-'40, Vol. I, Col. 3312.] 16 Luck. 241=1941 Comp. C. 138=191 I.C. 178=A.I.R. 1941 Oudh 126.

—S. 235—Applicability — Misfeasance— Signing prospectus without enquiry—Director resigning before commencement of business-

Liability of.

Where a director of a company signed a prospectus without caring to ascertain what the antecedents of the other directors were or how the company was going to be worked or who the partners of the firm of managing agents were, but nearly 12 days before the declaration under S 103 of the Companies Act was sent to the Registrar of Joint Stock Companies and before the company commenced business he resigned,

Held, that in the circumstances it could not be said that he was guilty of any misfeasance by reason of which any pecuniary loss was sustained by the company. (Venkataramana Rao and Horwill, JJ.) Subbayya v. Machayya. 204 I.C. 425=15 R.M. 753=55 L.W. 165= 1942 Comp. C. 102=A.I.R. 1942 Mad. 365

=(1942) 1 M.L.J. 207.

-S. 235—Powers of Court—Books possession of manager of company-Order for delivery to liquidator-Power of Court to pass. GOPALASWAMI GOUNDER v. KRISHNASWAMI GOUNDER. [See Q.D., 1936-'40, Vol. I, Col. 3312.] I.L.R. (1941) Mad. 120=195 I.C. 261=14 R.M. 161=A.I.R. 1941 Mad. 53.

**—S**. **235**—Scope—Misfeasance — Liability for non-feasance—Director becoming such gift of shares and acting as such negligently-

Liability of.
S. 235 of the Companies Act does not prima facie exclude non-feasance. The section would apply to every act whether of commission or omission which is a breach of duty to the company in consequence whereof loss to the company results. To become a director of a company by accepting a gift of shares without paying for them is a misfeasance. Where such a person continues to act as a director, and, in pany for voluntary winding up. (Krishnaswami spite of the auditor's report exposing the fraud Ayyangar and Kunhi Raman, JJ.) CHENNA- of the company does not make any enquiries or KESAVA AIYANGAR v. OFFICIAL LIQUIDATOR. take steps, but joins in a resolution condemning

## COMPANIES ACT (1913), S. 235.

the auditor's report and signs the balance sheet sanctioning the remuneration to the managing agents, he is guilty of gross and wilful negligence and clearly of misfeasance under S. 235. Sub-(Venkataramana Rao and Horwill, IJ.) RAYYA 7. MACHAYYA 204 I.C. 425=15 R. M. 753=55 L.W. 165=1942 Comp. C. 102 =A.I.R. 1942 Mad. 365=(1942) 1 M.L.J. 207.

S. 235—Scope—Misfeasance proceedings against liquidator—Death of liquidator—Continuance of proceedings against legal repre-

sentatives—Permissibility.

S. 235 of the Companies Act cannot be applied against the personal representatives of a deceased liquidator. It is concerned only with an inquiry into the conduct of the officers of the company in relation to the company's property; it was never intended to involve the Court on an application under the section in an inquiry relating to the estate of a deceased Where pending proceedings against a liquidator under S. 235 for misfeasance the liquidator dies, cannot be continued against such proceedings his legal representatives. (Beaumont, C.J. and Rajadhyaksha, J.) MANILAL BRIJLAL V. VANDRA-VANDAS C. JADAY. I.L.R. (1944) Bom. 284 =216 I.C. 313=17 R.B. 143=1944 Comp. C. 147=46 Bom.L.R. 391=A.I.R. 1944 Bom. 193.

S. 236—Applicability—Director or officer—Company—Voluntary liquidation—Director and Secretary appointed liquidator—Falsification of accounts and false returns—Offence—Director—If ceases to be such on appointment as liquidater

quidator.

A Bank, which was a limited company having gone into voluntary liquidation, the secretary who was also a director was appointed as the liquidator. As such he had to send periodical returns under S. 244 of the Companies Act. He was convicted on charges under S. 236 and S. 282 of the Companies Act for falsifying the accounts and for sending false returns.

Held, (i) that any wrongful act done by him as liquidator was a wrongful act by him as an officer of the company, so as to render him liable under S. 236, and that by his mere appointment as liquidator he did not cease to be a director so as to escape liability as director; and therefore whether as director or officer, S. and therefore whether as director or officer, S. 236 would apply to him; (ii) that he was also properly convicted under S. 282, though he may not have been legally appointed as a liquidator owing to want of quorum at the meeting at which he was appointed liquidator. (Horwill, J.) RANGAI GOUNDAN, In re. 206 I.C. 362 =15 R.M. 978=44 Cr.L.J. 503=55 L. W. 410=1942 M.W.N. 433=1942 Comp. C. 198 = A.I.R. 1942 Mad. 702=(1942) 2 M.L.J. 140.

-S. 237-Scope-Complaint to Court by

private party—If barred.

There is nothing in law to prevent a private person making a complaint to a Court of offences under the Companies Act or the Penal Code against directors or officers of the company in relation to the company even if the company is being wound up. (Davis, C.J.) EMPEROR v.

COMPANIES ACT (1913), S. 244-A. VISHWANATH. 198 I.C. 95=14 R.S. 134=43 Cr.L.J. 304=1942 Comp. C. 51=A. I. R. 1942 Sind 9.

S. 237—Scope—If limited to

under Act.

The whole scheme of S. 237 of the Companies Act appears to be enabling rather than mandatory or exclusive. The Court may order the liquidator to prosecute or refer the matter to the Registrar. The Registrar may refuse to prosecute and the liquidator with the previous sanction of the Court may prosecute, but it does not appear that the section is limited to the criminal liability of directors under the Companies Act that is, to special offences created under the Act. (Davis, C.J.) EMPEROR v. VISH-WANATH. 198 I.C. 95=14 R.S. 134=43 Cr. L.J. 304=1942 Comp. C. 51=A.I.R. 1942 Sind 9.

-Ss. 238-A (1) (b) and 282-A-Applicability-Managing Agent of Bank-Liquidation proceedings-Failure to deliver property to offcial Liquidator-Offence-Burden of proof

In a prosecution on a charge under S. 238-A (1) (b) of the Companies Act, the prosecution has to prove that the accused had in his custody, or under his control, property of the company at the time when the company was being wound up. In the absence of evidence to prove the same, he cannot be convicted. But if there is evidence to show, or an admission by the accused, that property of the company was with him or in his possession, and that he has wrongly withheld them by not delivering them to the Official Liquidator, he is liable to be punished for an offence under S. 282-A. (Kuppuswami for an offence under S. 282-A. (Kuppuswami Ayyar, J.) VEERAPPAN, In re. 1944 M.W.N. 272=57 L.W. 276=1944 Comp. C. 149=217 I.C. 306=46 Cr.L.J. 347 A.I.R. 1944 Mad. 424=(1944) 1 M.L.J. 390.

S. 244-A-Madras Company Rules, R. 66-Scope and effect of-Official Liquidator-Presentation of cheque for payment to Bank in cash-Duty of Bank-Payment over the counter and miscabbropriation by bayes-Isability of bank

and misappropriation by payee-Liability of bank

making payment for negligence.

A cheque drawn on a Bank in favour of "M.R., Official Liquidator in O. P. No. 5 of 1939 or order," was presented to the Bank by M.R. for payment over the counter. The Bank after calling for the order of appointment of the Official Liquidator and perusing the same, paid him the amount of the cheque. M.R. misappropriated the amount and he was removed from the office of Official Liquidator. The new Official Liquidator who was appointed to succeed him sued the Bank for recovery of the amount alleging that the Bank was negligent in paying the amount to M.R. over the counter, instead of insisting on presentation of the cheque through

a Bank and payment into a Bank account, Held, (1) that under S. 244-A of the Companies Act and R. 66 of the Madras Company Rules, it was incumbent on the Official Liquidator to open a Bank account and to get the about a paying by his in the course of liquidator to point a Bank account and to get the cheques received by him in the course of liquidation collected and cashed through such bank account, and the Bank on which the cheque was drawn should be deemed to be aware of the law on the subject; (2) that from the cheque

## COMPANIES ACT (1913), S. 277-K.

itself the bank had notice that it was made out to M.R. in his capacity as Official Liquidator and that the amount of the cheque could be collected by the payee only through his bank; (3) that there was a clear breach of a statutory duty placed on the bank and since there was negligence on the part of the bank and its officers, the bank must be held liable to make good the amount to the new Official Liquidator; (4) that since the bank did not pay the amount in due course and in good faith, S. 85 of the Negotiable Instruments Act would not help the Bank as S. 85 would only protect the Bank if it made payment in accordance with the tenor of the instrument, in good faith and without negligence. (Leach, C.I. and Shahabuddin, J.) MADRAS PROVINCIAL CO-OPERATIVE BANK, LTD, MADRAS V. SOUTH INDIAN MATCH FACTORY. I.L.R. (1945) Mad. 328=1945 M.W.N. 12=57 L.W. 533=1944 Comp. C. 228=A.I.R. 1945 Mad. 30=(1944) 2 M.L.

——(as amended in 1936), Ss. 277-K and 277-L—Applicability and scope—Banking Company incorporated before Act—Reserve fund—Disposal contrary to S. 277-K in 1939—Offence—Liability of director and secretary.

The proviso at the foot of clause (3) of S. 277-K of the Companies Act is a subsidiary clause to cl. (3) and applies only to that clause and does not apply to cls. (1) and (2) also. There is no warrant for holding that S. 277-K does not apply to a reserve fund already in existence. The use of the word "maintain" in cl. (1) means "maintain in tact" and necessarily prohibits the utilisation of the reserve fund in any way other than in accordance with cl. (3) of the section. The respondent was a director and also the secretary of a bank, which was a Limited Company incorporated before the Companies Amending Act of 1936, and the bank had a reserve fund amounting to over Rs. 20,000 on 15—1—1939. This sum related to profits earned before 1934 and since then no profits were earned. On 15—1—1939, the Company capitalised this reserve fund and distributed it among its then share-holders in the form of shares in accordance with a resolution passed at an extraordinary general meeting of the company held on that day. The accused and other members of the company were proceeded against and prosecuted under S. 277-K, i.e., to invest the reserve fund in accordance with S. 277-K.

Held, that on 15—1—1939, the Amending Act had already commenced its third year of life and the provisions of cl. (3) of S. 277-K were in operation, and the disposal of the reserve fund contrary to its mandatory provisions was an offence punishable under S. 277-L (4) and the accused was therefore liable to conviction. (Byers, J.) Public Prosecutor v. Anantha Krishna Iyer. 211 I.C. 412=16 R.M. 551=45 Cr.L.J. 391=(1943) M.W.N. 338=56 L. W. 342=A.I.R. 1943 Mad. 629=(1943) 2 M.L.J. 19.

——S. 278—Scope—If restricts S. 362, Cr. P. Code. See Cr. P. Code, S. 362. 46 Bom. L.R. 204 (F.B.).

COMPANIES ACT (1913), S. 281.

\_\_\_\_\_S. 280—Order refusing to direct company in liquidation to furnish security—Appeal—If

No appeal lies from an order refusing to direct a Company in liquidation to furnish security under S. 280 of the Companies Act. (Pandrang Row and King, JI.) RAMA RAO v. THE NATIONAL ASSURANCE CO., LTD., VIZAGAPATAM. 202 I. C. 44=15 R.M. 441=1942 M.W.N. 80 (2)=55 L.W. 89 (1)=1941 Comp. Cas. 292=A.I.R. 1942 Mad. 405 (2)=(1942) 1 M.L. J. 180.

S. 281—Applicability — Conditions — Company doing business of investment trust—Managing director gambling in differences on stock exchange—Borrowing money on company's account and using them for own purposes—Liability of other directors.

Before S. 281 of the Companies Act can be invoked, it must be shown that the directors have acted honestly as well as reasonably. Though directors of a company are not trustees in the technical sense, they hold a fiduciary position with regard to the assets of the company and they are guilty of a grave breach of duty if they permit the managing director to gamble in differences on the stock exchange and to dissipate the company's funds in such gambling. Gambling in differences on the stock exchange can by no stretch of imagination be said to be legitimate business of a company which is carrying on business as an investment trust. Where in misfeasance proceedings against the directors of the company it is found that the managing director indulged in gambling on the stock exchange and borrowed money on the company's account which, however, he used for his own purposes, the ordinary directors together with the managing directors must be held liable for the losses sustained by the company as the result of the gambling transactions, but as regards. the individual borrowings by the managing director, the other directors and the co-managing director cannot be held liable to repay the com-pany, when it is apparent that they were not aware of the borrowings and there was no aware of the borrowings and there was no ground for suspicion that the managing director was not acting properly. (Leach, C.J. and Lakshmana Rao, J.) THINNAPPA CHETTIAR v. RAJAGOPALAN. I.L.R. (1945) Mad. 107=1944 M.W.N. 544=1944 Comp. C. 207=A. I.R. 1944 Mad. 536=(1944) 2 M.L.J. 85.

——S. 281 (2)—Scope of—Resort to exercise of power under—Proper stage—Relative functions of Registrar of joint stock companies and Court—Sequence of events with respect to exercise of their powers.

It is wrong to think that S. 281 (2) of the Companies Act is a section under which the Court is empowered to extend the time for holding meetings. The section does no such thing. It gives to the High Court a power to relieve certain classes of persons from the consequences of the default where they have an apprehension that they will be prosecuted and that apprehension can arise only after the Registrar of joint stock companies has done his duty and decided whether or not he proposes to prosecute. The duty of deciding whether there should be a pro-

## COMPANIES ACT (1913), S. 282.

secution or not, is not a function which is intended by S. 281 (2) of the Act to be cast upon the High Court. The proper sequence of events is that the Registrar of joint stock companies should state whether he intends to launch prosecution or not. If he makes up his mind to prosecute and actually initiates the prosecution, then there can be an application under S. 281 (2) to the Court in which the prosecution is pending. If in such a case relief is sought before the prosecution is actually lodged, then that will be a proper case in which to apply to the High Court under S. 281 (2). But in such a case it would only be upon strong grounds and for special leasons, properly proved, that the High Court would interfere with a proposed prosecution. (Braund, J.) Companies Act (VII of 1913), In the matter of. 1941 A.L.W. 1076.

S. 282—Liquidator—If includes le facto liquidator—Legal appointment as liquidator—If

The liquidator referred to in S. 282 of the Companies Act is presumably the de facto liquidator. A person who accepts an appointment as liquidator of a company and who acts in accordance with the powers granted to him must be deemed to have accepted the duties and responsibilities of that office and so any wrongful act done by him is a wrongful act done by him as liquidator, even if his appointment is not legal. (Horwill, J.) Rangai Goundan, In re. 206 I.C. 362=15 R.M. 978=44 Cr.L.J. 503=55 L.W. 410=1942 M.W.N. 433=1942 Comp. C. 198=A.I.R. 1942 Mad. 702= (1942) 2 M.L.J. 140.

S. 282—Private prosecution — Offence under S. 282—Private complaint—If barred. See Companies Act, Ss. 137, 138 and 141-A. A.I.R. 1942 Sind 9.

S. 282-A—Applicability—Bank in liquidation—Managing agent failing to deliver property to liquidator—Offence. See Companies Act, Ss. 238-A (1) (B) and 282-A. (1944) 1 M.L.J. 390.

—S. 282-B (1)—Bank taking cash security from employees and depositing same in Scheduled Bank—Latter if a trustee or holds it for specific purpose—Liquidation of latter Bank—Right of depositor to preferential payment. NAYAR MODERN BANK, LTD. v. OFFICIAL LIQUIDATOR OF T. N. Q. BANK, LTD. [See Q. D., 1936-'40, Vol. I, Col. 3313.] I.L.R. (1941) Mad. 125=193 I.C. 821=13 R.M. 720=A. I.R. 1941 Mad. 48.

COMPROMISE. See also C. P. Code. O. 23, R. 3.

Allotment of properties under—One of the parties dispossessed of property allotted to him and obtaining compensation—Suit by other for share in it—Right to relief if exists.

Where a suit for partition is compromised and different properties are allotted to the different parties according to their rights and subsequently one of the parties is dispossessed of the property allotted to him and compensa-

#### COMPROMISE.

tion is paid to him, it is not open to the other parties to sue for a share in that compensation money because, the property which was not specifically given to them under the compromise must be deemed to have been refused or denied to them by the compromise and so they would not be entitled to the money obtained in lieu of that property. (Allsop and Hamilton, JJ.) RAFIUNNISA BEGAM v. COLLECTOR OF MUTTRA. 1942 A.L.J. 681=1943 A.L.W. 47.

——Binding nature—Dispute between two communities — Compromise signed by certain members of both communities.

A compromise signed by certain members of two communities cannot, without proof of valid authority express or implied, bind the other members of the communities who were no parties to it or could not validly give consent. Self-constituted leaders or even the leaders chosen by the officials cannot legally represent an entire community. (Puranik, J.) AME ALI v. KADTU PATIL. I. L. R. (1945) Nag. 273=1945 N.L.J. 80=A.I.R. 1945 Nag. 106.

Binding nature—Subsequent attempt to effect compromise on different lines—Failure of

-Effect.

Where the parties to an appeal who have agreed upon a compromise subsequently, without any intention of either resiling from or abandoning the agreement that had already been arrived at, prepare a draft petition which is no more than an attempt to carry the existing agreement into effect though in a way that would minimise the risk of future litigation, but the attempt fails owing to the default of one of the parties, the failure of such attempt will remit the parties to the position in which they stood at the time of the first agreement. (Lord Romer.) GADADHAR DHIR SAMANTA v. LABANYABATI DEI. I.L.R. 1942 Kar. (P.C.) 143=202 I. C. 373=15 R. P. C. 31=1942 A. L. J. 650=1942 A. L. W. 671=1942 O. W. N. 715=9 B.R. 1=47 C.W.N. 68=56 L. W. 3=1943 Pat. W. N. 18 (P.C.).

Compromise of suit by lessor against lessee—New condition, imposed on lessee—If a penalty—If can be questioned in execution.

A lease was granted to build a house and plant a garden but the lessee sublet the land and the subtenants built houses thereon and the suit by the lessor for breach of the conditions of the lease was compromised. One of the conditions of the compromise was that the lessee should get the land vacated and build a house within two years. The lessee failed to build a house within the time. In execution of the compromise decree it was contended that the condition of building within two years was in the nature of a penalty, and not enforceable.

Held, that the condition was not in the nature of a penalty though it was not in the original lease and it related directly to the suit and the validity of the compromise could not be questioned in execution. (Thomas, C.J. and Ghulam Hasan, J.) UMAN SHANKAR v. ASHRAF HULAIN. 210 I.C. 558=16 R.C. 196=1943 O. W.N. 372=1943 O.A. (C.C.) 221=A.I.R. 1944 Outh 12

#### COMPROMISE.

Execution proceedings ending in compromise—X acting as adviser to decree-holder—Defendant agreeing to pay off creditors of decree-holder including X, and executing promissory notes—Suit on promissory note by X's representatives—Defences available to defendant—Improper conduct of X—If relevant.

While certain Ranees sought execution of a decree obtained by them, negotiations for a compromise ensued, in which X acted as adviser to the Ranees. The negotiations resulted in a compromise under which the defendant agreed among other things, to pay certain creditors of the Ranees, of whom X was one. It was arranged that the Ranee's creditors thus to be paid by the defendant should be given promisory notes by the defendant to the amount of their respective debts, and that the Ranees should thereupon be absolved by them from liability for those debts. In a suit by the representatives of X for the balance due on the promisory note given by the defendant to X.

Held, (i) that the defendant was not entitled to establish that the Ranees, if they had been sued by X could have resisted the payment to him of the whole or part of the amount which, as part of the compromise, the defendant had bound himself to the Ranees to pay to X; (ii) that the defendant could not suggest that X had intervened in the litigation between the defendant and the Ranees as adviser to Ranees for the purpose of making money for himself out of the litigation, and was on that ground disentitled as against the defendant to derive any advantage for himself. When it was once admitted by the defendant that he did not seek to upset the compromise (as indeed could not possibly do in the present suit, to which the Ranees were not parties), it must be taken as against him that the sum which he had by the compromise undertaken to pay, by virtue of the promissory note, to X, was, as he had agreed with the Ranees, a sum for which had agreed with the Ranees, a sum for which he was liable to X, and the impropriety of X's conduct in regard to the litigation became, as between the defendant and X or his representatives, completely irrelevant. Nor could the defendant's case be bettered by the fact that he paid to X and X accepted a bribe to facilitate the provenitions. While that circumstance tate the negotiations. While that circumstance might well give the Ranees certain rights, it could not possibly operate to relieve the defendant in any measure from the obligation he had undertaken to the Ranees as well as to X to undertaken to the kanees as well as to X to discharge the burden which he had taken upon his own shoulders as part of the compromise. (Sir Charles Clauson.) Shiva Prasad Singh v. Tincouri Banerji. 1942 A.W.R. (P. C.) 20=1942 O.A. 327=55 L.W. 474=8 B.R. 787=201 I.C. 1=15 R.P.C. 9=1942 P.W.N. 196=46 C.W.N. 923=44 P.L.R. 435=1942 O.W.N. 471=1942 A.L.W. 487=23 Pat.L. T. 563=44 Bom J. R. 787=A I.R. 1042 B. T. 563=44 Bom.L.R. 782=A.I.R. 1942 P. C. 42=(1942) 2 M.L.J. 656 (P.C.).

**COMPROMISE DECREE.** See Decree-Compromise Decree.

CONSENT DECREE. See DECREE—CONSENT DECREE.

## CONSTITUTIONAL LAW.

CONSIDERATION. See (1) CONTRACT—CONSIDERATION.

(2) CONTRACT ACT, S. 10.

——Absence of—Burden of proof. See DEED—Consideration.

CONSTITUTIONAL LAW. See GOVERNMENT OF INDIA ACT (1935).

——Dominion and Provincial Legislation— Legislation within exclusive authority of Dominion Parliament—Powers of Provincial Legislature.

Legislation which is in pith and substance in relation to a class of subject within the exclusive legislative authority of the Dominion Parliament is beyond the legislative competence of the Provincial Legislatures. In such a case it is immaterial whether the Dominion Parliament has or has not dealt with the subject by legislation, or to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament. (Viscount Maugham.) Attorney-General of Alberta v. Attorney-General of Canada. 207 I.C. 327=16 R.P.C. 25=6 F. L.J. (P.C.) 1=A.I.R. 1943 P.C. 76 (P.C.).

——Dominion and Provincial Legislation— Main subject within legislative competence of Dominion Parliament—Matters incidental to such subject within legislative competence of Province—Legislation by Province in respect of such matters—When competent.

It has been a settled proposition that if a subject of legislation by the Province is only incidental or ancillary to one of the classes of subjects within the exclusive legislative authority of the Dominion Parliament and is properly within one of the provincial subjects, then legislation by the province is competent unless and until the Dominion Parliament chooses to occupy the field of legislation. (Viscount Maugham.) ATTORNEY-GENERAL OF ALBERTA v. ATTORNEY-GENERAL OF CALBERTA v. ATTORNEY-GENERAL OF CALBERTA v. ATTORNEY-GENERAL OF CALBERTA v. 1943 P.C. 76 (P.C.)

Extra-territorial legislation — Imposition of income-tax on non-residents—Permissible limits—Income-tax Ordinance (1940) (C. 33), No. 1, Ss. 5 and 30—Trinidad and Tobago—S. 30, if extra-territorial in effect—Payment of dividend to non-residential share-holder by cancellation of the Company's claim in a like amount against him—Book entries—Company, if liable to tax as statutory agent—Transmits—Meaning of.

There is no general rule of international comity which renders taxation on non-residents in respect of income derived from property in the colony imposing the tax, incompetent. Nor is it incompetent by reason of the circumstance that the colony in question cannot pass extraterritorial legislation. A tax in this form is not extra-territorial so long as it does not affect to tax property not situate in the colony. There is no ground for treating S. 30 of the Trinidad Income-tax Ordinance as extra-territorial in effect. It is not extra-territorial merely be-

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cause its purpose is indirectly to secure payment from the non-resident alien of the tax validly imposed on him. The person directly affected is the statutory agent, who is within the colony. The obligation is imposed directly on him. His liability is complete when within the colony he does the act which transmits the income to the non-resident. The transmission begins in the colony, though it continues until delivery to the non-resident alien. Where a Company ing on business in a colony agrees with its principal non-resident share-holder to the payment of dividend to the latter by cancellation of the company's claim in a like amount against such non-resident share-holder and both parties make the necessary entries in their books of account, the transaction involves a transmission of "revenue" within the meaning of S. 30 from the company to its share-holder with the consequence that the company becomes liable as statutory agent for the amount of the tax. Though "transmission" involves an intermediate space, it does not depend on the extent of the space, to does not depend on the extent of the space, (Lord Wright.) Trinidad Lake Asphalt Operating Co., Ltd. v. Commissioners of Incometax, Trinidad. (1945) F.L.J. 97=1945 M. W.N. 596=A.I.R. 1945 P.C. 85 (P.C.).

——Functions of Legislature—Delegation t Executive—Validity.

Per Munir, J.—In the case of a constitution of the British model the legislative power of the Legislature involves, as part of its content, the power to confer law-making powers upon authorities other than the Legislature itself and an increase in the extent of such power cannot of itself invalidate the grant unless the grant amounts to an abdication of the functions of the Legislature. The question of the constitutionality or unconstitutionality of the grant has to be determined not by the principle of the maxim delegatus non potest delegare but by the consideration whether the Legislature in performing its functions of law-making has down the principle of the legislation and laid merely the filling up of details to the executive or whether by empowering the executive make the rules, the Legislature has delegated to the executive the power to lay down the principles of legislation itself. (Harries, C.J., Blacker and Munir, JJ.) HARKISHAN DAS v. EMPEROR. 212 I.C. 321=16 R.L. 274=45 Cr.L.J. 580=11944 F.L.J. 72=A.I.R. 1944 Lah. 33 (F.B.).

Legislatures—Sovereign and Subordinate— Powers of—Difference between—Subordinate Legislature—If can validate ultra vires Act passed by it.

Per Sen, J.—There is a fundamental difference between a sovereign and a subordinate Legislature. No Court can question the validity of a law made by a sovereign Legislature like Parliament in as much it has unfettered legislative powers. Bodies or persons given legislative powers by a Parliament are in a different position—they are subordinate or non-sovereign legislatures and as such their Acts may be adjudicated upon by Courts which, in a proper

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case, may declare them to be ultra vires. A subordinate or non-sovereign Legislature has definite limits upon its law-making powers. It can legislate only within the ambit of the powers which are conferred upon it by the enactment which creates it. Any law which it passes outside this ambit is ultra vires. It follows from this that a non-sovereign Legislature which has made a law which is ultra vires of itself cannot by a subsequent Act declare such law or any part thereof to be intra vires. To permit this would be to permit a Legislature with powers limited by some other authority to enlarge its powers by its own act without reference to the authority creating it. Now if this cannot be done directly, obviously it cannot be done indirectly by means of drafting or other devices. (Derbyshire, C.J. and Kundkar, J.) Sushil Kumar Bose v. Emperor. 208 I.C. 605=16 R.C. 297=45 Cr.L.J. 37=78 C.L. J. 281=47 C.W.N. 757=A.I.R. 1943 Cal. 489 (S.B.).

——Liberty of subject—Modification or suspension—Proper authority.

Vivian Bosc, J.—The liberty of the subject is one of the most fundamental rights known to the constitution and the most highly prized, but it does yield place to another matter even more fundamental-the safety of the realm. Legislature has, no doubt, the right to modify the rights of the subject or even to suspend or take them away altogether and this in times of peace no less than war; for under the constitution the legislature is supreme. But it is the Legislature alone which is supreme, not the executive, and so, before the executive can claim the power to override those rights, it must show that the Legislature has empowered it to do so and under the constitution the Legislature can only act in particular ways. All empowering must therefore be done properly and formally, deliberately, in the manner laid down by the constitution. The executive cannot suddenly step in and claim the right to wield absolute and arbitrary power—not even in war time. (Pollock and Vivian Bose, JI.) Pra-BHAKAR KESHEO TARE v. EMPEROR. I. L. R. (1943) Nag. 154=205 I.C. 5=15 R.N. 178=44 Cr.L.J. 345=1943 N.L.J. 1=A.I.R. 1943 Nag. 26.

——Portion of an enactment impugned— Justification on the ground of its being necessary to make the whole scheme of the Act watertight.

The validity of a section of a particular Act must be judged according to its terms, and if its enactment by the Provincial Legislature be beyond the powers of that legislature, it cannot be justified on the ground that it is needed to make the whole scheme of the Act water-tight (Viscount Simon, L.C.) ATLANTIC SMOKE SHOPS, LTD. v. CONLON. 1944 F.L.J. 1.

Powers of legislation—Legislation in respect of property and civil right, if can be aimed at a particular right.

It cannot be said that legislation in respect of property and civil rights must be general in

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character and not aimed at a particular right. The legislature is supreme in these matters, and its actions must be assumed to be taken with due regard for justice and good conscience. They are not in any case subject to control by the Courts. (Lord Atkin.) Abitibi Power and Paper Coy., Ltd. v. Montreal Trust Company. 212 I.C. 261=10 B.R. 520=16 R.P. C. 197=1944 O.A. (P.C.) 4=1944 A.W. R. (P.C.) 4=A.I.R. 1944 P.C. 7=1944 F. L.J. 46 (F.C.).

——Proxincial and Central Acts—Conflict between—Rule of severability—IVhen arises.

The question of the severability of the invalid provisions of a Provincial Act from the valid provisions will be material only if the Act is in some measure held to be ultra vires the Provincial Legislature. Where the problem can only be one of conflict between the provisions of the local law and the provisions of a central enactment, each being intra vires the particular legislature, it is unnecessary to invoke the rule of severability to uphold the validity of the impugned Act. It is the doctrine of repugnancy and not the doctrine of ultra vires that has to be applied in this class of cases. (Spens, C.J., Varadachariar and Zafrulla Khan, J.J.) Bank of Commerce, Ltd., Khulna v. Amulya Krishna Basu. 212 I.C. 138=1944 M.W.N. 175=57 L.W. 213=1944 O.W.N. 184=1944 A.L.W. 271=16 R.F.C. 102=10 B.R. 506=I.L.R. (1944) Kar. (F.C.) 46=6 F.L.J. 221=48 C.W.N. (F.R.) 36=79 C. L. J. 220=A.I.R. 1944 F. C. 18=(1944) 1 M.L.J. 178 (F.C.).

**CONTEMPT OF COURT—**Apology. See also Contempt of Courts Act, S. 3, Proviso.

——Apology—Purging of contempt.

Courts are always reluctant to proceed in contempt. They are even more reluctant to punish. Except in scandalous and outrageous cases an unconditional apology is ordinarily considered to purge the contempt. Where in spite of ample opportunity given to apologize, the party in contempt persists in reckless and false allegations to support his action, it amounts to persistent aggravation of the contempt and merits exemplary punishment. (Bose and Sen, JJ.). Saoji v. N. S. Jatar. I.L.R. (1945) Nag. 74=1945 F.L.J. 73=1945 N.L.J. 30 =A.I.R. 1945 Nag. 33.

Arrest of counsel on his way to Court—When amounts to.

To constitute contempt in a case where a member of the Bar is arrested by the Police on his way to Court, there must be something more than arrest without legal justification. There must be something in the nature of mala fides, that is, an intention directly or indirectly to interfere with the due course of justice. An honest, though mistaken arrest, though it might interfere with the due course of justice, cannot amount to contempt. (Harries, C.J., Abdul Rashid and Abdur Rahman, JJ.) Hom Rustomji v. Sub-Inspector, Baig. 217 I.C. 78=

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46 Cr.L.J. 174=17 R.L. 219=A.I.R. 1944 Lah. 196 (S.B.).

Attorney of High Court—Scandalous allegations against Judge in notice sent under S. 80, C. P. Code. See Letters Patent (Bombay), Cl. 10. 43 Bom.L.R. 250.

——Chamber proceedings in High Court relating to appointment of guardian ad litem—Publication in newspaper without leave of Judge—If contempt.

The publication of a proceeding in Chamber in the High Court is not permitted without the express leave of the Judge, and if a newspaper does so, it amounts to contempt of Court. Proceedings relating to the appointment of a guardian ad litem of a minor are proceedings relating to a ward of Court, and if they are published in a newspaper without the express leave of the Judge that would amount to contempt. (Kania, J.) HARGOWANDAS B. KOTAK v. CHIMANLAL VADILAL SHAH. I.L.R. (1942) Bom. 151=199 I.C. 856=14 R.B. 384=43 Cr.L.J. 583=44 Bom.L.R. 95=A.I.R. 1942 Bom. 86.

———Comments on pending criminal case— Knowledge of pendency—Presumption.

The offence of contempt may be committed if the writer of the offending publication either knows a proceeding or cause to be imminent or should have known that it was imminent. If he knew that a report had been made to the police and their investigation had been followed by the attachment of property and arrest of the offenders, he must have known that a case was almost certain to be filed. (Teja Singh and Blandari, JJ.) Emperor v. Khushal Chand. 221 I.C. 195=1946 Lah. (Rul.) 87=A.I.R. 1945 Lah. 206.

Commitment—When to be made—Technical contempt—If to be punished—Principles. SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BIHAR V. MURLI MANOHAR PRASAD. [See Q.D., 1936-'40, Vol. I, Col. 3314:] 20 Pat. 306=191 I.C. 834=13 R.P. 399=7 B. R. 261=42 Cr.L.J. 225=A.I.R. 1941 Pat. 185.

——Committal—Other remedy open—If bar to order of committal.

There is no warrant for holding that a Court cannot commit for contempt if any other remedy exists. The fact that there is another remedy available is no doubt a matter for the Court to consider when exercising its discretion whether to commit or not to commit, but on the other hand, the desirability of speed and the necessity of ensuring that the orders of the Court should be obeyed are also matters of importance. (Lord Porter.) All MAMOMED ADAMALLI v. EMPEROR. 1945 M.W.N. 564=1945 P.W.N. 441=A.I.R. 1945 P.C. 147=(1945) 2 M.L.J. 356 (P.C.).

Contempt of High Court—Competency of that court to secure attendance of offender beyond its jurisdiction.

Where contempt has been committed within the territorial jurisdiction of a High Court in India, such a Court is competent to issue process to secure the attendance of the offender wherever he may be residing in Br. India, as in the case of an offence under the Penal Code m the case of an office under the Feral Code or under any other law for the time being in force. (Thomas, C.J. and Koul, J.) JATTLY V. HON. SIR 1981. AHMAD. 1945 O.W.N. 169=1945 A.L.W. (C.C.) 162=1945 O.A. (C.C.) 153=1945 A.Cr. C. 90=1945 A.W.R. (C.C.) 153=A.I.R. 1945 Oudh 266.

Criticism of Court-Absence of good Faith—Mis-statement and misrepresentation—
Effect. Emperor v. P. C. Tarapore. [See Q. D., 1936-40, Vol. I, Col. 3314.] I.L.R. (1941)
Kar. 3=191 I.C. 519=13 R.S. 143=42 Cr.
L.J. 1.

-Criticism of executive officer.

A criticism of an executive officer, no matter how severe, cannot amount to contempt Court unless such criticism contains matter calculated substantially to interfere with the ductourse of justice. (Harries, C.J., Munir and Teja Singh, JJ.) Subramanyan, In re. 212 I.C. 17=16 R.L. 238=45 Cr.L.J. 445 =A.I.R. 1943 Lah. 329 (F.B.).

of executive officer-News-–Criticism paper comments.

It is true that a criticism of an executive officer, no matter how severe, cannot amount to contempt of Court, but if such criticism contains matter which is calculated to interfere with the due course of justice it would amount to contempt. (Teja Singh and Bhandari, JJ.)
EMPEROR v. KHUSHAL CHAND. 221 I.C. 195=
1946 Lah. (Rul.) 87=A.I.R. 1945 Lah. 206.

-Defence-Plea of justification-If open. In a proceeding for contempt of Court, it is not open to a contemner to show that the allegations are true. Any attempt to justify a libel on a Judge by attempting to show that the libel was justified would itself be a fresh contempt. A contemner who has been called upon to show cause why he should not be punished for an attack on the Court or its judges does not an attack on the Court or its judges does not occupy the position of a defendant in a libel action, where he may plead or prove justification or the position of an accused person in a prosecution for defamation. (Young, C.J., Monroe and Mahomed Munir, JJ.) K. L. GAUBA, BAR-A-LAW, LAHORE, In the matter of, ILLR. (1942) Lah. 411=200 I.C. 182=14 R.L. 449=43 Cr.L.J. 599=44 P.L.R. 206=A.I.R. 1942 Lah. 105 (F.B.).

Defence—Quotation from other sources— If defence.

The fact that the article which amounts to contempt consists of quotations from another source would afford no defence because a persolute would allote the declare because a potential solution of the matter himself. (Harries, C.J., Munir and Teja Singh, J.). Subramanyan, In re. 212 I.C. 17=16

98=197 I.C. 56=14 R.N. 151=1941 N.L.J. 368=A.I.R. 1941 Nag. 241.

——Duty of Court to preserve proceedings from misrepresentation. Emperor v. P. C. Tara-

#### CONTEMPT OF COURT.

R.L. 238=45 Cr.L.J. Lah. 329 (F.B.). 445=A.I.R. 1943

-Defence-Truth of allegations-If can be

The truth of the allegations is no defence in proceedings for contempt. Nobody is allowed to scandalise a Court and make allegations against it even if they are true. Every attempt to justify must constitute a new offence of contempt thy must constitute a new offence of contempt committed in the very face of the Court. (All-sop and Mulla, JJ.) Kader v. Kesri Naran Jately. I.L.R. (1945) All. 7=1945 A.L.J. 26=1945 A. Cr. C. 17=218 I.C. 320=46 Cr. L.J. 458=18 R.A. 7=1945 A.W.R. (H.C.) 15=1945 O.A. (H.C.) 15=1944 O.W. N. (H.C.) 287=1944 A.L.W. 606=A.I.R. 1045 All 67 1945 All. 67.

——Direction of Court under S. 34, Trusts Act—Failure of trustee to follow—Liability for contempt.

Under S. 34 of the Trusts Alet the Court exercises what might be called its consultative jurisdiction. The advice, opinion or direction given under the section is not an order binding the parties. A trustee who fails to follow a direction given by the Court does not acquire protection, but he is not liable to contempt proceedings for the failure. (Davis, C.J., Tyabji and Constantine, JJ.) Mahomed Hashim Gaz-Dar, In rc. A.I.R. 1945 Sind 81 (F.B.).

——Discretion of Court—Interference on appeal—Privy Council—Practice.

The question of committal or non-committal for contempt is one for the exercise of the discretion of the Court before whom the application to commit is brought and unless there is found to be a serious disregard of the principles of natural justice, the Privy Council would be slow to interfere with that discretion. (Lord Porter.) ALI MAHOMED ADAMALLI v. EMPEROR. 1945 M.W.N. 564=1945 P.W.N. 441=A.I. R. 1945 P.C. 147=(1945) 2 M.L.J. 356 (P.C.).

-Duty of Courts-Accused defaming third person in his statement-Defamed person demanding apology under threat of legal action-If amounts to contempt,

Interference with the administration of justice is one of the well-recognized heads or contempt. Courts while they have to be jealous to guard against any interference with their functions should not be too sensitive where no harm has been caused or was intended to be caused. Where the accused in a case under the Copyright Act made certain defamatory statements about a certain third person and the latter wrote and demanded an apology and compensation under threat of legal action it did not amount to contempt and though he might have waited to contempt and mough he might have water for the termination of criminal proceedings, was not bound to do so. (Gruer, I.) EMPEROR v. Kolte. I.L.R. (1942) Nag. 506=43 Cr.L.J. 98=197 I.C. 56=14 R.N. 151=1941 N.L.J. 368=A.I.R. 1941 Nag. 241.

POPRE. [See Q.D., 1936-'40, Vol. I, Col. 3314.] I.L.R. (1941) Kar. 3=191 I.C. 519=13 R. S. 143=42 Cr.L.J. 1.

Essence of offence—Complaint for defamation in respect of allegations in insolvency petition—Distinction between threat before and after the starting of proceedings. RADHEY LAL V. NIRANJAN NATH. [See Q.D. 1936-40, Vol. I, Col. 3314.] 193 I.C. 260=13 R.A. 400=1941 A.Cr.C. 2=A.I.R. 1941 All. 95.

Essentials—Pendency of proceedings—Necessity for—Prejudicing mankind against person on trial. Superintendent and Remembrancer of Legal Affairs, Bihar v. Murli Manohar Prasad. [See Q.D., 1936-'40, Vol. I, Col. 3315.] 20 Pat. 306=191 I.C. 834=13 R.P. 399=7 B.R. 261=42 Cr.L.J. 225=A.I.R. 1941 Pat. 185.

Federal Court—Jurisdiction to commit for contempt. See Government of India Act (1935), S. 210 (2). (1942) 1 M.L.J. 74 (F.C.).

Guardianship proceedings—Application under S. 476, Cr. P. Code, and a complaint under S. 500, I. P. Code, by one against the other party—If can amount to contempt. HRISHIKESH SANYAL v. A. P. BAGCHI. [See Q. D., 1936-'40, Vol. I, Col. 2117.] I.L.R. (1940) All. 710=191 I.C. 641=13 R.A. 283=42 Cr.L.J. 211.

Ignorance of law—Plea of—Sustainability. Ignorance of the law will provide no excuse for the offence and the maxim applies to the general public and government officials alike. The fact that a person acts ignorantly and in that sense innocently, would make no difference to the offence of contempt. It would only be relevant regarding the measure of punishment. (Bose and Sen, JJ.) BALKRISHNA NARAYAN SAOJI v. N. S. JATAR. I.L.R. 1945 Nag. 74 = 1945 N.L.J. 30=A.I.R. 1945 Nag. 33= 1945 F.L.J. 73.

For words or action used in the face of the court, or in the course of proceedings to be a contempt they must be such as would interfere or tend to interfere with the course of justice. An insult to counsel or opposing litigant is very different from an insult to the court itself. (Lord Goddard.) Parashuram Detaram v. Emperor. 1945 M.W.N. 371=47 Bom. L. R. 733=49 C.W.N. 733=26 P.L.T. 176=1945 A.L.J. 335=58 L.W. 347=A.I.R. 1945 P.C. 134=(1945) 2 M.L.J. 109 (P.C.).

——Jurisdiction of High Court. See Contempt of Courts Act, S. 2.

——Lahore High Court—Jurisdiction to commit for. See Government of India Acr (1935), S. 220. I.L.R. (1942) Lah. 411.

——Letter by party to Judge seised of the case —Imputation against Judge's impartiality—Duty of Court. Subordinate Judge v. Jawaharlal. [See Q.D., 1936-'40, Vol. I, Col. 2112.] I.L.R. (1941) Nag. 304=191 I.C. 671=13 R. N. 209=42 Cr.L.J. 237.

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----Motive-Relevancy.

In cases of contempt the question of motive is irrelevant; what the Court has to consider is the effect—the probable effect of the publication. Motive of the contemner cannot be considered in determining his guilt; it may, however, be a proper criterion for awarding punishment. (Iqbal Ahmad, C.J. and Collister, J.) EMPEROR v. Debi Prasad Sharma. 1942 O.W.N. 6 = 1942 A.Cr.C. 28.

----Nature of proceedings for.

Proceedings taken against the offender for the contempt of the High Court are of a criminal nature as the contempt of the High Court is certainly an offence. (Thomas, C. J. and Kaul, J.) JAITLEY v. HON. SIR IQBAL AHMAD. 1945 O.W.N. 169=1945 A.L.W. (C. C.) 162=1945 O.A. (C.C.) 153=1945 A.Cr.C. 90=1945 A.W.R. (C.C.) 153=A.I.R. 1945 Oudh 266.

——Nature of proceedings—C. P. Code, if applies.

The proceedings for contempt of the High Court are in the exercise of the inherent jurisdiction of the Court and are of a criminal nature. When the matter is of a criminal nature, the C. P. Code does not apply. (Collister and Bajpai, JJ.) RADHEY LAL v. NIRANJAN NATH. I.L.R. (1941) All. 364=194 I.C. 606=1941 A.Cr.C. 98=1941 A.L.J. 265=1941 A.L.W. 319 (2)=42 Cr.L.J. 370=14 R.A. 3=1941 O.W.N. 455=1941 O.A. (Supp.) 193=1941 A.W.R. (H.C.) 120=A.I.R. 1941 All. 211.

——Nature of proceedings—Hotly contested question of fact—If may be decided.

It may well be said that contempt proceedings, being of a summary nature, are not suitable for the decision of a hotly contested question of fact. (Harries, C.J., Abdul Rashid and Abdur Rahman, IJ.) Hom Rustomji v. Substractor Baic. 217 I.C. 78=46 Cr. L. J. 174=17 R.L. 219=A.I.R. 1944 Lah. 196 (S.B.).

-----Nature of proceedings-Persons proceeded against for contempt-Right to benefit of doubt.

Contempt proceedings, though not criminal, are of a quasi-criminal nature. Where there is any reasonable doubt, persons proceeded against for contempt are entitled to the benefit of such doubt. (Harries, C.J., Abdul Rashid and Abdur Rahman, JJ.) Homi Rustomyi v. Sub-Inspector Baig. 217 I.C. 78=46 Cr.L.J. 174=17 R.L. 219=A.I.R. 1944 Lah. 196 (S.B.).

\_\_\_\_Nature of proceedings for—Position of alleged contemner.

Per Munir, I.—While it is true that proceedings for contempt are in the nature of criminal proceedings, it is not quite correct that the position of the alleged contemner is that of an accused person who cannot file an affidavit or make a statement on oath. (Harries, C.J., Munir and Teja Singh, JJ.) SUBRAMANYAN, In re. 212 I.C. 17=16 R.L. 238=45 Cr.L.J. 445=A.I.R. 1943 Lah. 329 (F.B.).

-Newspaper article-News item and comment-Suggestion that Chief Justice of High Court was directing collections for war fund by Judicial officers and litigants.

Where an editorial comment based upon news item contained a clear insinuation that the Chief Justice had issued a circular to all Judicial officers to raise contributions from litigants and others to the war fund the implication was that the Chief Justice had done something which was unworthy of a person holding that High Office, and that as the head and representative of the High Court he had committed the gross impropriety of forcing the Judicial officers subordinate to the High Court to ask for war contributions from litigants and that the probable effect of the news item would be to impair the authority of the High Court to lower its dignity and prestige and seriously to shake public confidence in the administration of justice. The publication of an editorial comment calculated to have the above effect is a clear contempt of Court. (Iqbal Ahmad, C.J. and Collister, J.) EMPEROR v. Debi Prasad Sharma. 1942 O. W.N. 6=1942 A.Cr.C. 28.

-Nèwspaper article-News item (false) and comment thereon in a daily newspaper not affecting administration of justice—Proceedings

for contempt if justified.
The cases of contempt The cases of contempt which consists of scandalising the Court itself require to be treated with much discretion. Proceedings for this species of contempt is a weapon to be used sparingly and always with reference to the administration of justice. The test to be applied in such a case is to see whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due administration of the law. Where the printer and publisher and editor o'f a daily newspaper were charged in contempt proceedings for having published a news item and comment thereon, untruly alleging that the Chief Justice had committed an ill-advised act, namely, writing to the Subordinate Judges asking (as the news item said), enjoining (as the comment said) them to collect money for the war fund the words did not contain any criticism of any judicial act of the Chief Justice, or any imputation on him for anything done or omitted to be done by him in the administra-tion of justice and hence the proceedings in tion of justice and hence the proceedings in contempt were misconceived. (Lord Atkin.) DEEN PRASAD SHARMA v. EMPEROR. 70 I. A. 216 =10 B.R. 256=16 R.P.C. 133=24 P.L.T. 405=I.L.R. (1944) All. 32=I.L.R. (1944) Kar. (P.C.) 7=210 I.C. 111=56 L.W. 702 =1943 A.L.J. 527=1943 A.W.R. (P.C.) 28=1943 O.A. (P.C.) 28=1943 A.L.W. 564 =48 C.W.N. 44=1943 O.W.N. 465=1944 M. W.N. 20=46 Bom.L.R. 11=1943 A.Cr.C. 141 (2)=A.I.R. 1943 P.C. 202=(1943) 2 M. L.J. 568 (P.C.) L.J. 568 (P.C.).

-Newspaper articles—Pending case—Likelihood to deter witnesses from giving evidence.

Where the effect of certain newspaper articles was likely to be to deter witness from giving evidence in a pending case, it amounts to contempt

## CONTEMPT OF COURT.

o'f Court though not of a serious nature. (Yorke or court thought not of a serious nature. (Yorke and Agarwala, Jl.) Anis Ahmad Abbasi v. Nasir Ahmad. 16 Luck. 758=194 I.C. 158=1941 A.W.R. (C.C.) 172=1941 O.W.N. 683=1941 A.Cr.C. 122=1941 O.L.R. 417=42 Cr.L.J. 524=13 R.O. 567=1941 A.L. W. 530=1941 O.A. 429=A.I.R. 1941 Oudh 399.

-Newspaper article—Pending defamation case-Article by complainant-Assertion of truth and challenge to accused to prove the falsity.

Where a complainant in a defamation case

writes an article a couple of days after the complaint is filed asserting the truth of the statements contained in his paper and challenges the accused to prove their falsity, the artithe activate to prove their faisity, the arti-cle does not amount to contempt of Court. (Yorke and Agarwala, JJ.) Anis Ahmad Ab-rasi v. Nasir Ahmad. 16 Luck. 758=194 I. C. 158=1941 A.W.R. (C.C.) 172=1941 O.W.N. 683=1941 A.Cr.C. 122=1941 O.L. R. 417=42 Cr.L.J. 524=13 R.O. 567=1941 A.L.W. 530=1941 O.A. 429=A.I.R. 1941 Oudh 399.

-Newspaper article-Pending trial-Publication designed to create atmosphere of sympathy for offenders—Offender in custody and not brought before Magistrate—Intention to commit contempt-If necessary-Criticism of executive officer.

Before a person can be committed for contempt, the Court should be satisfied (a) that something has been published which either is clearly intended or atleast is calculated to prejudice a trial which is pending; (b) that the offending matter was published with the knowledge of the pending cause or with the know-ledge that the course was imminent; and (c) that the matter published tended substantially to interfere with the due course of justice or was calculated substantially to create prejudice in

the public mind.
It is a contempt of Court to prejudice mankind for or against the party to the cause be-fore the cause is heard. The publication of a newspaper article which is deliberately designed to create an atmosphere of sympathy for the offenders and to mobilise public opinion in their favour and which is calculated to produce the impression that the offenders are not to blame and that they are being persecuted as they happen to belong to a particular community must, therefore, be treated as a contempt court.

It is not necessary in the case of a criminal trial that the accused should have been committed for trial or even that he should have been brought before a Magistrate provided he has been arrested and is in custody. The offence of contempt may be committed if the writer of the offending publication either knows a prooeeding or cause to be imminent or should have known that it was imminent.

A person may be guilty of contempt even though there was no intention to commit contempt. The question in such cases is not what was the intention of the offender but what was the effect of the publication. If the effect of the publication is to create prejudice for or

against a party or to interfere with the due course of justice it is contempt.

It is true that a criticism of an executive officer, no matter how severe, cannot amount to contempt of court, but if such criticism contains matter which is calculated to interfere with the due course of justice it would amount to contempt. Proprietors and publishers of newspapers who set out to criticise the public administration in respect of matters which are sub-judice or are about to be adjudicated upon do so at their peril for if such criticism falls within the ambit of the expression 'a contempt' they are liable to incur displeasure of courts and to be punished for the offence. (Teja Singh and Bhandari, JJ.) MAHASHA KHUSHAL CHAND, In the matter of. 47 P.L.R. 148=A.I.R. 1945 Lah. 206.

Newspaper article—Printer's and publisher's liability. EMPEROR v. P. C. TARAPORE. [See Q.D., 1936-'40, Vol. I, Col. 3313.] I.L.R. (1941 Kar. 3=191 I.C. 519=13 R.S. 143=42 Cr.L.J. 1.

\_\_\_\_Newspaper article—Responsibility of edi-

tor.

Per Munir, J.—The editor of a newspaper is responsible for what is published in his newspaper and if he wishes to absolve himself from any liability that would otherwise attach to him by the publication, it is for him to show that he had nothing to do with the publication in question. (Harries, C.J. Munir and Teja Singh, JJ.) Subramanyan, In re. 212 I.C. 17=16 R.L. 238=45 Cr.L.J. 445=A.I.R. 1943 Lah. 329 (F.B.).

Newspaper article—Scandalizing Court Court of its powers—If contempt. Emperor v. P. C. TARAPORE. [See Q.D., 1936-'40, Vol. I, Col. 3316.] I.L.R. (1941) Kar. 3=191 I.C. 519 =13 R.S. 143=42 Cr.L.J. 1.

Newspaper article—Special responsibility of editors. NASIR AHMAD v. ANIS AHMAD ABBASI, [See Q.D., 1936-'40, Vol. I, Col. 3315.] 191 I.C. 726=13 R.O. 299=16 Luck. 506=1941 A.W.R. (C.C.) 7=42 Cr.L.J. 221=1941 O.L.R. 17=A.I.R. 1941 Oudh 67.

Newspaper article—Statement suggesting that there was not and could not be proper judicial trial when magistrate knew that Government had instituted prosecution—Contempt of subordinate Court—Liability to punishment.

The editor of a newspaper, who was convicted of having published in his newspaper an obscene advertisement, published a leading article in his newspaper in the course of which he said: "The prosecution clearly stated that the case was filed as the result of 'correspondence from Government,' but with the blessings of the magistrate, refused to produce the correspondence and the statement had to go uncontested. Without meaning any disrespect, we doubt whether in any case where opinions count, any Subordinate Magistrate will give a judgment contrary to what he believes the Government of the day has decided. The fate of this case was sealed the minute the Police told the Magistrate that the Government was behind the prosecution."

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Held, that the passage suggested that there was not and there could not be any proper judicial trial, that the proceedings before the Magistrate were an empty formality, that the Magistrate were an empty formality, that the Magistrate had made up his mind to convict the accused even before the trial was over with a view to conform to what he believed to be the wishes of the Government, in other words, once the Magistrate knew that the Government had instituted the prosecution, there was bound to be a conviction, and the article amounted to a gross contempt of Court, and the contempt was so grave that the High Court could not allow attacks of this nature to be made against the subordinate Courts of the Province without taking serious action. (Leach, C.J., Lakshmana Rao and Krishnaswami Ayyangar, Jl.) Advocate-General, Madras v. Ramanatha Goenka. I.L.R. (1943) Mad. 26=204 I.C. 167=16 R.M. 729=44 Cr.L.J. 162=1942 M.W.N. 722=55 L.W. 799 (2)=A.I.R. 1942 Mad. 711 (1)=(1942) 2 M.L.J. 622 (S.B.).

Offence—Scandalizing the Court—Letter written by solicitor to another solicitor—Allegation that Judge has prejudged issue of fact—Liability of solicitor to be dealt with for contempt.

An allegation that a Judge hearing a case has prejudged an issue of fact, before any evidence whatever has been called on either side, is to charge the Judge with grossly improper conduct. It means that the Judge has some outside knowledge. When a solicitor makes such an allegation in a letter written by him to another solicitor, the inevitable result would be that public confidence in the judiciary would be shaken. That is always the basis of contempt proceedings of the nature known as scandalizing the Court. (Beaumont, C.J.) A FIRM OF SOLICITORS, In re. 203 I.C. 514=15 R.B. 254=44 Cr.L.J. 93=44 Bom.L.R. 796=A. I. R. 1942 Bom. 331.

Pending proceedings—Speech at meeting. RADHA KRISHNA v. RAJA RAM. [See Q. D., 1936-'40, Vol. I, Col. 2112.] 16 Luck. 61= A.I.R. 1941 Oudh 14.

Power of Court to proceed under S. 476, Cr. P. Code. See Cr. P. Code, Ss. 476 AND 482. I.L.R. (1941) Lah. 145.

——Powers of High Court—If can be invoked—Sheriff's officer prevented from serving summons on defendant on account of his threatening conduct

where the Sheriff's officer who, accompanied by the plaintiff's men, went to serve the defendant with a writ of summons in a suit which had been instituted against him was prevented from doing so because of the threats and the apprehensions into which he was put by the conduct of the defendant who made offensive remarks against him and called his employees who assaulted one of the plaintiff's men,

Held, that the defendant was in contempt and that the powers of the High Court could rightly be invoked. (Gentle, J.) MOHON SINGH v. HAII MAHOMED ARBAR. 48 C.W.N. 825.

Proceedings for Adjournment—Grant

Proceedings for Adjournment Grant Cr. P. Code, S. 344.

The provisions of Cr. P. C. are not applicable to summary proceedings taken for punishing a contempt. But even if S. 344 of the Code be applicable, the Court will not be disposed to adjourn the proceedings in a case where the Court is scandalised and an attempt is made by a scurrilous publication to undermine and impair the authority of the Court, as immediate action is necessary with a view to vindicate the authority of the Court. (Young, C.J., Monroc and Mahomed Munir, Jl.) K. L. GAUBA, BAR.-AT LAW, LAHORE, In the matter of. I.L.R. (1942) Lah. 411=200 I.C. 182=14 R. L. 449=43 Cr.L.J. 599=44 P.L.R. 206=A.I. R. 1942 Lah. 105 (F.B.).

Proceedings for—Costs—Appeal against order punishing for contempt—Crown appearing and endeavouring to uphold order—Costs of successful appellant—Power to award.

Where the Crown appears to uphold a conviction in a criminal case, it is not the practice to award costs to the appellant in the event of the appeal succeeding. But a case of criminal contempt, is obviously in a different category from an ordinary criminal case. Where in spite of the opinion expressed by the Chief Justice and another Judge of the court, of which the appellant was alleged to be in contempt, that no contempt had been committed, the executive deems it necessary not only to appear but to endeavour to uphold an order punishing the appellant for contempt, the successful appellant should have his costs of the appeal. (Lord Goddard). Parashiuram Detaram v. Emperor. (1945) M.W.N. 371=58 L.W. 347=47 Bom.L.R. 733=49 C.W.N. 733=26 P. L.T. 176=1945 A.L.J. 335=A.I.R. 1945 P.C. 134=(1945) 2 M.L.J. 109 (P.C.).

——Proceedings for—Forum—Cr. P. Code, S. 556.

S. 556, Cr. P. Code, does not apply to summary proceedings taken for punishing a contempt. In such a case the practice has been for the Judges who have been defamed to hear the case and to state in their judgment the facts within their knowledge or their reasons for taking a particular course of action. While it is unpleasant for any Judge to have to sit in judgment in a case in which he has been personally attacked, it is his duty to do so where he has been the subject of a malicious and impudent publication containing imputations which are obviously false and of the falsity of which he himself has the best knowledge. In fact he has no alternative but to sit as it is impossible to vindicate the reputation of the Court which has been attacked by taking proceedings in any Court for libel or otherwise. The sole object of these summary proceedings is to vindicate the prestige of the Court. They are not to establish the position of an individual Judge. (Young, C.J., Monroe and Mahomed Munir, J.). K. L. GAU-BA, BAR-AT-LAW, LAHORE, In the matter of I. L.R. (1942) Lah. 411=200 I.C. 182=14 R. L. 449=43 Cr.L. J. 599=44 P.L.R. 206=A.I.R. 1942 Lah. 105 (F.B.).

Proceedings for—Initiation of—Necessity of affidavit from some person.

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There is no rule of law which prevents the Court from proceeding against a person who has been guilty of contempt without first obtaining an affidavit from some person. If doubtful questions of fact are involved, the Court may refuse to issue notice to the person charged with contempt without satisfying itself by means of an affidavit that there is reasonable ground for thinking that an offence of contempt has been committed. (Allsop and Mulla, IJ.) KADIR V. KERR NARAIN JATLY. I.L.R. (1945) A. 7 = 218 I.C. 320=1945 A.L.J. 26=1945 A. Cr.C. 17=46 Cr.L.J. 458=18 R.A. 7=1944 O.W.N. (H.C.) 287=1944 A.L.W. 606=1945 A.W.R. (H.C.) 15=1945 O.A. (H.C.) 15=A.I.R. 1945 A. 67.

Proceedings for—Whether can be instituted after disposal of action.

Per Munir, I.—The jurisdiction of the Court exists not only to prevent mischief in a particular case but also to prevent similar mischief arising in other cases. Therefore, although an action has been disposed of and there is no possibility of the due course of justice being interfered with, the court can still institute proceedings for contempt. In such cases, the question is not whether when the Court issued the notice there was any apprehension of interference with the course of justice but whether on the date the article objected to was published it was calculated to interfere with the due course of justice. (Harries, C.J., Munir and Teja Singh, J.) Subramanyan, In re. 212 I.C. 17=16 R.L. 238=45 Cr.L.J. 445=A.I.R. 1943 Lah. 329 (F.B.).

Proceedings for—Practice—Affidavit in support of application by clerk—Propriety of—Duty to get affidavit sworn to by responsible officer. Superintendent and Remembrancer of Legal Affairs, Bihar v. Murli Manohar Prasad. [See Q.D., 1936-'40, Vol. I, Col. 3316.] 20 Pat. 306=191 I.C. 834=13 R.P. 399=7 B.R. 261=42 Cr.L.J. 225=A. I. R. 1941 Pat. 185.

Proceedings—Right to initiate—Legal Remembrancer of Bihar—Right to move High Court on behalf of Government or Governor. Superintendent and Remembrancer of Legal Affairs, Bihar v. Murli Manohar Prasad. [Sec Q.D., 1936-'40, Vol. I, Col. 3316.] 20 Pat. 306=191 I.C. 834=13 R.P. 399=7 B. R. 261=42 Cr.L.J. 225=A.I.R. 1941 Pat. 185.

Proceedings for—When may be instituted. Per Harries, C.I.—Contempt proceedings are summary and a very arbitrary method of dealing with an offence. That being so, they should be sparingly instituted and a person should not be convicted unless his conviction is essential in the interests of justice. There must be something more than a technical contempt. There must be a substantial contempt, that is something which tends in a substantial manner to interfere with the course of justice or to prejudice the public against one of the parties to a proceedings. (Harries, C.I., Munir and Teja Simph, II) Subramanyan, In re. 212 I.C. 17=16 K.L. 238=45 Cr.L.J. 445=A.I.R. 1943 Lah. 329 (F.B.).

Receiver—Decision to appoint receiver without actual appointment of one—Subsequent collection and disposal of funds by person aware of order or party to proceedings—If amounts to contempt—Applicability of equitable rule of deeming that to be done which ought to be done -Disposal of moneys collected as rent-If disturbance of possession of receiver appointed to collect rents.

The jurisdiction to deal with people for contempt of Court is quasi-criminal and the Court has no right to punish people merely because it might disapprove of what they do, if their conduct does not clearly bring them within the four walls of some offence known to law. Where the Court comes to a decision that it will appoint a Receiver but does not name any officer or individual as receiver, it is not contempt of Court for a person who knows that that decision has been arrived at-even if he is a party to the proceedings who knows—to collect and disburse moneys which it is intended are to fall within the powers of the Receiver. It cannot be said that for a party bound by a judgment to do anything which will make judgment ineffective, is in itself a contempt of Court. The equitable rule of deeming that to be done which ought to be done could not apply to such case, for it could not be imported into the realms of criminal or quasi-criminal Where a Receiver is appointed among other things to collect rents, there is no disturbance of his possession when there is a disposal of moneys already collected as rent, for such moneys are not moneys of which the Receiver is appointed receiver. The word 'rent', in its proper sense, ceases to be such when it is paid by a tenant to a person authorized by the landlord to give a good discharge for it. Blagden, J.) S. P. L. P. NARAYANAN CHETTYAR v. DORAIKANNU. 1941 Rang. L. R. 747.

Receiver—Interference with possession of —Levying execution against property in possession of receiver without leave of Court-Effect -Proper order to be passed in such cases-

Order directing status quo.

Any person, whether a party to the suit or proceeding or an outsider, who interferes with the possession of a Receiver is guilty of a contempt of Court. No decree-holder or Receiver can proceed against property of which a Receiver has been appointed by the Court and of which he has taken possession, without leave of that Court. The levying of execution clearly disturbs and interferes with the possession of the Receiver, and if execution is levied without leave of the Court, the persons responsible therefor would be guilty of contempt of Court. But where the Court is of opinion that those responsible for levying execution without leave of Court did not realise that the carrying out of execution proceedings would constitute contempt, the proper order would be to direct the status quo, to order restoration of possession to the Receiver of which he was dispossessed in execution, leaving the parties to take any action they deem fit with regard to the possession. No further action would be justified in such a case, it would also be improper to make any order l Bar can surely maintain its dignity and prestige

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amounting to a condonation of the contempt. (O'Sullivan, J.) RAMZAN MOOSAKHAN v. ABUBUCKER SAKHI. I.L.R. (1944) Kar. 396=A. I.R. 1945 Sind 75.

Summary jurisdiction. Emperor v. P. C. Tarapore. [See Q.D., 1936-'40, Vol. I, Col. 3316.] I.L.R. (1941) Kar. 3=191 I.C. 519 =13 R.S. 143=42 Cr.L.J. 1.

-What amounts to—Acts affecting Court's dignity.

Per Mitter, J.—It is not merely those acts which are calculated to affect the authority of the Court or to hamper the administration of justice that constitute a contempt of Court, but also acts which are calculated to affect the dignity of the Court. (Derbyshire, C.J., Mitter and Kundkar, II.) NIHARENDU DUTTA MAZUMDAR, In re. I.L.R. (1944) 1 Cal. 489=47 C.W. N. 854 (S.B.)=76 C.L.J. 292.

—IVhat amounts to—Essence of offence— Proceedings, if must be pending-Intention, if necessary.

Anything which is calculated to interfere with the due course of justice or is likely to prejudice the public for or against a party amounts to contempt. In this class of cases, the essence of the matter is the tendency to interfere with the due course of justice. Any publication which is calculated to poison the minds of jurors, intimidate witnesses or parties or to create an atmosphere in which the administration of justice would be difficult or impossible, amounts to contempt. It is however of the very essence of the offence that proceedings should be pending when the offending publication appears. It is not necessary in the case of a criminal trial that the accused should have been committed for trial or even for him to have been brought before a Magistrate provided that he had been arrested and was in custody. Further, the offence of contempt may be committed even if there is no proceeding or cause actually pending provided that such a proceeding or cause is imminent and the writer of the offending publication either knew it to be imminent or should have known that it was imminent. Again, a person may be guilty of contempt though there was no intention to commit contempt. It is sufficient if the effect of the article complained of is to create prejudice and to interfere with the due course of justice. (Harries, C.J. Munir and Teja Singh, JJ.) Subramanyan, In re. 212 I.C. 17=16 R.L. 238=45 Cr.L.J. 445= A.I.R. 1943 Lah. 329 (F.B.).

–What amounts to—Jurisdiction to punish— Duty of court to use sparingly-Words used by litigant appearing in person against opposing counsel in heat of argument—Tactless remarks suggesting summary dealing by Taxing Master-If contempt of court-Punishment-If justified.

The summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy, which are merely offensive, is to use it for a purpose for which it was never intended.

without having to invoke this jurisdiction. Nor should tactless and intemperate statements by litigants in person he taken as contempt of court.

The appellant who had been an unsuccessful plaintiff in a suit in the High Court and ordered to pay costs, took out a summons objecting to the taxation of costs and seeking to review it and appeared in person without counsel in support of his objection. In the course of the hearing counsel for the opposite party stated that the appellant was misleading the Court as to the nature of the issues raised in the action and insisted that he should read out a paragraph in the plaint. The appellant retorted: "I do not keep anything back at all. My fault is that I disclose everything, unlike members of the Bar who are in the habit of not doing so and misleading the Court." This led to a protest from the opposing counsel, whereupon the appellant at once apologised and expressed regret. Later when dealing with the Taxing Master's statement in the order that he had considered all matters set out in the relevant rule, the appellant said "It is customary for the Taxing Master to write what is written at end of the paragraph, but is it considered at all? No protest against, or comment on this was made at the time either by counsel or by the Bench or when judgment was given. Subsequently the Court was moved to take action against the appellant and punish him for contempt in respect of his remark against the Bar and the Taxing Master, and in spite of the apology and expression of regret by the appellant the court held the appellant guilty of contempt of court in respect of the two remarks and sentenced him to imprisonment and fine.

Held, on appeal to the Privy Council, (1) that the words used by the appellant respecting the Bar did not and could not amount to contempt of court, and consequently there was no jurisdiction in the court to exercise its summary powers in respect of them; (2) that the words used by the appellant relating to the Taxing Master were no more than a tactless way of suggesting that Taxing Masters were apt to deal somewhat summarily with such matters as there in question, and afforded no reasonable grounds for adjudging the appellant guilty of so grave an offence as contempt of court, and that therefore the order of imprisonment and

fine should be set aside.

Words used in the course of argument, however irrelevant, would not amount to contempt when they relate to an opponent, whether counsel or litigant. (Lord Goddard.) Parasuram Detaram v. Emperor. 1945 M.W.N. 371=58 L.W. 347=47 Bom.L.R. 733=49 C.W.N. 733=26 P.L.T. 176=1945 A.L.J. 335=A.I. R. 1945 P.C. 134=(1945) 2 M.L.J. 109 (P.C.).

-What amounts to—Person released Court on habeas corpus writ re-arrested under Regulation III of 1818 within Court precincts.

Per Curiam.—A person who is directed by Court to be released from illegal detention in habeas corpus proceedings or proceedings under S. 491, Cr. P. Code, is only free from arrest on civil process until he reaches home from Court, but not free from arrest on criminal

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process. As a warrant of commitment Regulation III of 1818 is akin to criminal process, the re-arrest of that person under such a warrant in the Court room when the Court is not sitting or within the precincts of the Court even when the Court is sitting will not amount to contempt unless it is a fraudulent proceeding for evading the order of the Court which is made in habeas corpus proceedings or proceedings under S. 491, Cr. P. Code, or the arrest is made in the face of the Court so as to create a disturbance of the Court's business.

Per Mitter, J.-It would amount to contempt if the person holding the warrant says to the face of the Court that he would not release the person ordered to be released by it. Such a warrant issued by the Governor-General or by the Governor of a province does not amount to a decision of a Court but is only an exe-cutive act and as such it cannot be set up against the order of the Court directing the release. (Derbyshire, C.J., Mitter and Khundkar, JI.)
NIHARENDU DUITA MAZUMDAR, In re. 47 C.
W.N. 854=I.L.R. (1944) 1 Cal. 489 (S.
B.)=76 C.L.J. 292.

-What constitutes-Withholding or delaying applications addressed to High Court by prisoner from jail—Tampering with such documents by jail authorities.

Though the exigencies of war have armed the executive with immense powers and Courts of Justice, including the High Court, have to some extent been neutralised and rendered ineffective, it is not for the executive to judge how far their powers extend. That is the sole and ex-clusive privilege of His Majesty's Judges and clusive privilege of ris Majesty's Juuges am of His Majesty's Privy Council. No official, however highly he may be placed, has the right to determine the extent of his authority and power and any attempt by whomsoever made and however highly he may be placed, to withhold matter or delay applications addressed to the High Court, however frivolous or worthless they may appear to be, constitutes a gross contempt of Court. Tampering with such documents addressed to the High Court is improper and is in itself a contempt. It is most objec-tionable to add a figure to the date on the document so as to make it appear that it bears a different date to the one which it originally bore, and it is tampering with it, whether done with innocent intent or from an improper motive.

In so far as criminal contempts are concerned, the offence is committed if, among other things, the acts complained of either obstruct or have a tendency to obstruct, the administration of justice. It is not necessary to establish an actual obstruction or interference. It is enough to show that the acts have a tendency to interfere. (Bose and Sen, JJ.) SAOJI v. N. S. JATAR. I.L.R. (1945) Nag. 74=1945 F.L.J. 73=1945 N.L.J. 30=A.I.R. 1945 Nag. 33.

-What constitutes — Intention—Relevancy of. Superintendent and Remembrancer of Legal Afrairs, Bihar v. Murli Manohar Prasad. [See Q.D., 1936-'40, Vol. I, Col. 3316.]
20 Pat. 306=191 I.C. 834=13 R.P. 399=

7 B.R. 261=42 Cr.L.J. 225=A.I.R. 1941 Pat. 185.

-What constitutes-Prohibitory order-Disobedience by party and stranger, difference-Marriage in spite of prohibition. DISTRICT JUDGE, CHHINDWARA v. BASORILAL. [See Q.D., 1936-'40, Vol. I, Col. 2125.] I.L.R. (1942)
Nag. 45.

What constitutes—Withholding of petition by detenue under S. 491, Cr. P. Code.
Petitions addressed by detained persons to the

High Court under S. 491, Cr. P. Code, must be forwarded and that without any delay. Whether the petition has in the events that have happened become infructuous is a matter in every case for the High Court to decide and no one has the right to take upon himself that responsibility. It is no business at all of any official to form any conclusion about an application addressed to the High Court. The withholding of such petitions amounts to a technical contempt even when such withholding does not tend substantially to interfere with the due course of justice. (Harries, C.J., Abdul Rashid and Abdur Rahman, JJ.) Homi Rustomji v. Sub-Inspector Baig 217 I.C. 78=17 R. L. 219=46 Cr.L.J. 174=A.I.R. 1944 Lah. 196 (S.B.).

CONTEMPT OF COURT AND CRIMINAL PROCEDURE CODE (V OF 1898), Ss. 4 (o) and 5 (2)—Contempt committed within territorial jurisdiction of a High Court in India—Offender outside its Jurisdiction— Competence of that High Court to issue pro-cess to secure his attendance.

A contempt of the High Court is an made punishable under a law for the time being in force" within the meaning of S. 4 (a) of the Cr. P. Code and such offence can be inquired into according to the provisions of the Code as set out in S. 5 (2)—Hence where a contempt has been committed within the territorial Jurisdiction of a High Court in India, such Court is competent to issue process to secure the attendance of the offender wherever he may be residing in British India as in the case of an offence under the Penal Code or under any other Act for the time being in force. (Collistèr and Allsop, II.). EMPEROR v. BENJAMIN GUY HORNIMAN. I.L.R. (1944) A. 665=217 I. C. 247=17 R.A. 136=46 Cr.L.J. 272=1945 A.W.R. (H.C.) 97=1944 A.L.J. 459=A. I.R. 1945 A. 1. (Collister

CONTEMPT OF COURTS ACT (XII OF 1926)—Applicability—Mussalman Waki Act, as amended by Bombay Amendment Act-Order under S. 6-F—Disobedience—Proceedings for contempt—Propriety. See Mussalman Wakf Act, as amended by Bombay Amendment Act (1935), S. 6-A. 44 Bom.L.R. 231.

Scope—Powers of High Court—Order by

Chief Judge of Bombay Small Cause Court-Direction to mutawalli to furnish particulars and statement of accounts under Mussalman Wakf Act—Disobedience—Proceedings for contempt.

An order made by the Chief Judge of the

CONTEMPT OF COURTS ACT (1926), S. 2.

Bombay Amendment Act of 1935, directing a mutawalli of a wakf to furnish within a specified period a statement of accounts and particulars, is an order directing him to do a specific thing within a limited time. An order of such a nature, if disobeyed, can be enforced by proceedings for contempt by the High Court under the Contempt of Courts Act. (Beaumont, C.J. and Wadia, J.) EMPEROR v. ALI MAHOMED ADA-MALLI (No. 2). 201 I.C. 441=15 R.B. 101 = 43 Cr.L.J. 667=44 Bom.L.R. 249=A.L. R. 1942 Bom. 154 (1).
S. 2—Application under—Maintainability

-Filing of complaints under S. 500, I. P. Code and S. 195, Cr. P. Code, when no proceedings are pending.

Where an application under S. 100, Cr. P. Code, directed against a particular individual has terminated the filing of complaints under S. 500, I. P. Code and S. 195, Cr. P. Code, by the individual against whom the disposed off application was directed does not in any way affect. the trial of any pending proceedings and hence an application under S. 2 of the Contempt of Courts Act on the basis of such complaints would not be maintainable. (Thomas, C.J. and Ghulam Hasan, J.) MAHADEO PRASAD v. Dr. Tej Narain Bahadur. 208 I.C. 212=16 R. O. 109=1943 A.Cr.C. 123=45 Cr.L.J. 108 =1943 O.W.N. 331=1943 O.A. (C.C.) 212

Contempt of Subordinate Court—Power of High Court to take proceedings suo motu—Application defective as being taken out by person not competent to represent Government—If bar to proceedings. Superintendent And Remembers and BRANCER OF LEGAL AFFAIRS, BIHAR v. MURLI MANOHAR PRASAD. [See Q.D., 1936-'40, Vol. I, Col. 3317.] 20 Pat. 306=191 I.C. 834=13 R. P. 399=7 B.R. 261=42 Cr.L.J. 225=A.I.

R. 1941 Pat. 185.

S. 2 (1)—Jurisdiction of subordinate Courts-Contempt not committed in their presence:

A Court subordinate to the High Court has no jurisdiction to entertain contempt proceedings if the contempt is not committed in its presence. (Bose, J.) KISAN KRISHNAJI v. NAGPUR CON-FERENCE OF SOCIETY OF ST. VINCENT DE PAUL. 211 I.C. 442=16 R.N. 203=45 Cr.L.J. 407 =1943 N.L.J. 505=A.I.R. 1943 Nag. 334. —S. 2 (1)—Jurisdiction to punish—High

Court-Powers of-Contempt by person resident outside jurisdiction-Power to arrest or take. action.

The power to punish for contempt of Court is a power inherent in superior Courts of Record, which in India are the High Courts. Each High Court has inherent power to punish contempt of itself; but no other Court has any power to deal with contempt of Court. If a High Court considers that a person has committed contempt of that Court although the contempt may have been committed outside t'e jurisdiction of that Court, it can deal with that person if he were within its jurisdiction. But there is no power in Bombay Small Cause Court under S. 6-A of any High Court to arrest for contempt of Court the Mussalman Wakf Act as amended by the a man outside the jurisdiction of that Court, CONTEMPT OF COURTS S. 2.

(Beaumont, C.J. and Sen, J.) B. G. HORNIMAN, In re. I.L.R. (1944) B.m 333=212 I.C. 631=45\_Cr.L.J. 647=17 R.B. 30=46 Bom.L.R. 94= A.I.R. 1944 Bom. 127.

S. 2 (2)—Sind Chief Court—Iurisdiction of. Empfror v. P.C. Tarapore [See Q.D. 1936-40, Vol. I, Col. 331+] I.L.R. (1941) Kar. 3=191 I.C. 519=13 R.S. 143=42 Cr.L.J. 1.

S. 2 (2)—Sind Chief Court—Power to

punish for contempt.

The Chief Court of Sind is also a Court of Record and his power to pulish in a summary way contempt of itself. (O'Sullivan, J.) RAMZAN MOOSAKHAN V. ABUBUCKER SAKHI. I.L R (1944) Kar. 395=A.I.R. 1945 Sind 75.

Judge of Bombay Smill Cause Court to furnish information under Mussalm in Wakf Act-Failure to obey-Proceedings for contempt-Per-

missibility.

Failure to obey an order of the Chief Judge of the Court of Small Cruses at Bombay to furnish information as required by S. 3 of the Mussalman Waki Act, 1923, as amended by the Bombay Amendment Act of 1935, though it is an offence under that Act, is not an offence punishable under the Indian Penal Code. The High Court is consequently not precluded from taking action in respect of it by the terms of S. 2 (3) of the Contempt of Courts Act. (Lord Porter.) ALI MAHOMED ADAMALLI V. EMPEYOR. 1945 M. W.N. 564=1945 P.W.N. 441=A.I.R. 1945 P.C. 147=(1945) 2 M.L.J. 356 (P.C.).

-S 2 (3)—Jurisdiction of High Court.

The idea underlying the Act is that if a person can be sufficiently punished by some other tribunal, then the High Court should not entertain summary proceedings for contempt. (Bose, J.)
KISAN KRISHNAJI v. NAGPUR CONFERENCE OF
SOCIETY OF ST. VINCENT DAPUL. 211 I.C. 442=
16 R.N. 203=45 Cr.L.J. 407=1943 N.L.J. 505 =A.I.R. 1943 Nag. 334.

-S. 2 (3)—Scope of prohibition contained in. Subordinate Judge v. Jawaharlal. [See Q.D. 1936-40, Vol. I, Col. 218.] I L.R. (1941) Nag. 304=191 I.C. 671=13 R.N. 209=42 Cr.L.J. **2**37,

S. 3 Proviso—Apology—Court's power to reject. EMPEROR v. P. C. TANAPORE [See Q.D., 1936-40, Vol. I, Col. 3313.] I.L.R. (1941) Kar. 3 = 191 I.C. 519=13 R.S. 143=42 Cr.L.J. 1.

S. 3 Proviso—Apology—Expression of re-

gret-If amounts to.

Where a contemner states that he is 'extremely sorry, it may amount to an expression of regret. but it is certainly not an apology—which is the word used in the Contempt of Courts Act. (Igbal Ahmad, C.J. and Collister, J.) EMPEROR V. DEBI PRASAD SHARMA. 1942 O.W.N. 6=1942 A. Cr C. 28.

S. 3 Proviso-Apology-Nature and contents of. Suborbinate Judge v. Jawaharlal, [See Q D., 1936-40, Vol. I, Col. 2112] I.L.R. Nag 304=191 I.C. 671=13 R.N. 209=42 Cr.L. J. 237.

S. 3, Proviso—Belate i apology—Value. NASIR AHMAD v. ANIS AHMAD ABBASI. [See Q.f.) 936-40, Vol. 1, Col. 3317] 16 Luck. 506:-191 C· 726=13 R O. 299=1941 A.W.R. (C.C.) 7=

ACT (1926), CONTRACT.

42 Cr.L J. 221=1941 O.L.R. 17=A.I.R. 1941 Oudh 67.

CONTRACT-Agency-Brokerage-Right to. See Contract Act, S. 219.

-Arbitration clause-Party repudiating liability under contract-Right to plead arbitration

clause in bar of suit on contract.

The total repudiation by a person of any liability under a contract to which he is party operates as a bar to a plea by him that the contract is subject to an arbitration in a suit by the other party on the contract. It is not open to him to say that though he is not bound by the contract the other party is bound by the arbitration clause in it. By repudiating liability he loses all right to insist upon compliance with the arbitraright to hists upon compilate with the aroutation clause. (Blackwell, J.) CHIRANJILAL RAM CHANDRA v. JATASHANKAR N. JOSHI. I.L.R., (1942) Bom. 744=15 R B 213=203 I C 322=44 Bom.L R. 692=A.I.R. 1942 Bom. 297.

Assignability—Contract for construction of building—Contract involving personal qualifications-Benefits under-If assignable-Right of assignee to demand accounts from promisor.

The 2nd defendant entered into a contract with the 1st defendant for the construction of a building for the 1st defendant, and according to the terms and conditions the 2nd defendant had to complete the work within 6 months and if he failed to do so or if any defects were noticed, he would be subject to such penalty as the 1st defendant might fix, he was to forfeit all his claims for the work till then done, and the 1st defendant might then cancel the contract and get the work done by a separate agency.

Held, that the contract was one involving special personal qualifications and as such was not assignable and an assignee of the benefits of that contract from the 1st defendant was not, therefore, entitled to demand from the 1st defendant accounts of the value of the work which the 2nd defendant had executed more especially when the 2nd defendant had not executed his contract. (Nageswara Iyer and Singaravelu Mudaliar, JJ.) ABOUL RAVYOOF-KHAN SHIRANI v. CORONATION (O-OPERATIVE SOCIETY, HONNAVALLI. 21 Mys.L.J. 389 = 48 Mys. H.C R. 329.

-Breach-Contract of sale of goods-Measure of damages.

In the case of a breach of a contract of sale of goods, the measure of damages is the differrate at the expiry of the period agreed upon as the time for delivery in the contract. (Bobde, J.) JIVRAJ KHIMJI v. CHAINKARAN. I.L.R. (1944) Nag. 749 = 1944 N.L.J. 283=A I.R, 1944 Nag. 279.

Breach—Damages— Measure of—Sale of goods—Payment of sale price—Breach by non-delivery—Suit for refund of price and damages—Interest on price paid—Difference between contract price and market price—Market price pre-vailing on date of breach or on date of trial of

In a suit for return of the sale price paid under a contract of sale of goods on the basis of a breach and total failure of consideration and for damages for breach of contract by reason of non-delivery of the goods sold, the plaintiff is entitled to a return of the price paid by him with

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interest thereon from the date on which it was paid till date of judgment as compensation for having been kept out of his money and also damages for breach. The measure of damages is the difference between the contract price and the market price of the goods on the date of breach. The material date is the date of the breach and not the date of trial of the suit (Chagla, J.) RAMESHWARDAS PODDAR v. PAPER SALES LTD. 211 I.C. 93=16 R.B. 265=45 Bom. L.R. 906=A.I.R. 1944 Bom. 21.

 Breach—Remedy — Suit for damages-Express term in contract providing for damages on breach—If essential. See Provincial Small CAUSE COURTS ACT, S. 15 AND ART, 31. 23 Pat.

-Building contract—Construction—Agreement to abide by certificate of architect named— Effect—Certificate of auditor—Finality—Grounds for challenging certificate—Provision for decision of architect bring made, a rule of Court—If makes architect arbitrator or judicial person-

Form of certificate.

If the parties to a building contract choose to agree to abide by the certificate of an architect whom they have named in the agreement, then they must accept the decision of the architect however wrong and erroneous it may be. A final certificate given by the architect can be challenged by the owner of the building only on three grounds, viz., fraud, collusion or misconduct on the part of the architect. If there is an arbitration clause in the contract and if there are pending disputes between the parties, then the power given to the architect under the terms of the contract to give a final certificate comes to an end, and the architect can only act under the arbitration clause as arbitrator and cannot act as a certifier. But the mere fact that the contract provides for the decision of the architect being made a rule of the Court would not alter his capacity in giving his decision, which is not judicial, but administrative; nor would his decision be an award. Nor can the certificate be attacked on the ground that it is not in proper form. The law does not make it necessary for the architect to issue his final certificate in any prescribed form. All that is required is that it should give clear intimation to the owner what is the amount finally due and payable by him under the contract. (Chagla, J.) MOTILAL TETSI AND Co. v. RAMCHANDRA GAJANAN. 204 I.C. 159=15 R.P. 285=44 Bom. L.R. 745=A.I.R. 1942 Bom. 334.

-Building contract - Contractor to build and engineer to supervise—Building as built not according to plan, unsightly and not fit for use-Owner's remedy—Joint decree against contractor and engineer, if could be passed—Measure of damages. RAJARAM KODURAM v. MADHAORAO CHITNAVIS. [See Q. D., 1936-40, Vol. I, Col. 2138.] 194 I.C. 257=13 R.N. 361=A.I.R. 1941 Nag. 111.

Building contract—Decision of owner's agent regarding rates and quantities to be final— Final bill prepared by such agent-Whether can

be questioned by owner.

In the case of building Contracts where work is agreed upon to be executed to the approval of a third person, the general principle is that it is not open to the employer to complain of defects !

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in work done after a final and conclusive certificate has been granted by such person in respect of it. This principle is subject to a possible excep-tion in case of fraud. Where the agreement between the parties provided that the decision of the owner's authorised agent regarding rates and quantities was to be final and a final bill prepared by such agent was accepted by the contractor, it is not open to the owner to question the final bill on the ground of fraud unless there are circumstances sufficiently strong to indicate that the agent was in fact acting rather as an agent on behalf of the contractor, as might possibly be indicated by the amount or character of the overcharges. (Tekchand and Beckett, II.) E. M. BAINES v. RAMSAHAI SETHI. 192 I.C. 747=13 R.L. 404=A.I.R. 1940 Lah. 505.

-C. I. F. contract—Documents to be tendered under--Policy of sea insurance-Certificate of insurance containing all terms covering war risk and risk from strikes, riots, etc.—Sufficiency. See STAMP ACT, S. 2 (20). I.L.R. (1943) Kar. 491.

Completion—Agreement as to terms of lease and sale of forest produce—Contemplation of execution of formal deed—If renders the agree-

ment incomplete.

Where when an agreement is reached as to the terms of a lease and sale of forest produce the parties contemplate the execution of a formal deed of lease and sale, that would not per se make the agreement incomplete. (Bajpai and Dar, II.) DEVI PRASAD SRI KRISHNA PRASAD V. SECRETARY OF STATE. I L.R. (1941) All. 741=197 I.C. 390=14 R.A. 191=1941 A.L.J. 570= 1941 O.A. (Supp.) 776=1941 A.W.R. (Rev.) 891=1941 A.L.W. 983=4 F.L.J. (H.C.) 361= A.I.R. 1941 All. 377.

Completion—Agreement between parties and settlement of terms—Understanding that agreement should be reduced to formal contract—Effect—Contract—If complete before executions of the contract o

tion of formal agreement.

In the case of a contract in which a draft agreement and engrossment are evidently contemplated by the parties, the contract cannot be said to be complete without the formal agree-ment being signed and executed, even though all the terms have been settled one by one and embodied in the draft. Once it is clear that the parties intended that the terms of their bargain are to be reduced to a formal contract, although that understanding is not in writing but is only a matter of oral agreement or of inference from the conduct of the parties, the consequence is that there must be a formal contract signed and executed by the parties before the contract can be said to be complete. (Broomfield and Divatia, JJ.) NEW MOFUSSIL CO., LTD. v. SHANKARAL NARAYANDAS. I.L.R. (1941) Bom. 361=196 I.C. 146=14 R.B 100=43 Bom. L.R. 293= A.I.R. 1941 Bom 247.

-Completion—Contract by correspondence-Formal execution of document contemplated— Parties acting upon contract-Execution of formal document-If necessary.

Where the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution ot the further contract is a condition or term of

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the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a conratct to enter into a contract. In the latter case, there is binding contract and the reference to the more formal document may be ignored. The conduct of the parties in acting upon the contract before the formal agreement was drawn up is the clearest evidence of the fact that the execution of the formal document was not necessary to the completion of the contract. (Almond, J. C. and Mir Almad, J.) GUJJAR MAL v. GOVERNOR-GENERAL OF INDIA. 209 I.C. 429= 15 R. Pesh. 1=A.I.R. 1942 Pesh. 33.

-Completion - Contract by Government Officers - Negotiation and agreement-Proper

procedure.

It will be in the public interest and desirable from every point of view if the Government Officers, after an agreement is reached, take the precaution of preparing a memorandum signed by both parties, setting out the terms which are reached. The practice of leaving the agreement in the form of correspondence and tenders in anticipation of a formal deed to be executed later on is irregular and has nothing to recommend. The proper procedure should be that after an agreement is reached a memorandum of the agreement should be contemporaneously prepared and signed by both parties as evidence of the agreement to be followed later on by a formal document drawn up by a Government conveyancer; but it cannot be said that the law requires that contemporaneously with an oral agreement a document should also be prepared and signed; it is permissible to record the agreement, arrived at orally, later on by correspondence. (Bajpai and Dar, JJ) DEVI PRASAD SRI KRISHNA PRASAD v. SECRETARY OF STATE. I.L.R. (1941) All. 741=197 I.C. 390=14 R.A. 191=1941 A.L.J. 570=1941 O.A. (Supp.) 776=1941 A.W.R. (Rev.) 894=1941 A.L.W. 983=4 F.L. J. (H.C.) 361=A.I.R. 1941 All. 377.

—Conclusion of—Place—Insurance policy— Proposal signed, and medical examination made in a particular place—Acceptance by Head Office

in different place.

Where a proposal for an insurance policy is signed at Nagpur and the medical examination is made at Nagpur but it is accepted in Calcutta by the Head Office the contract is made at Calcutta and not at Nagpur. (Clarke, J.) Calcutta and not at Nagpur. (Clarke, J.) HINDUSTAN INSURANCE Co. v. NATHU. 1941 N. L.J. 37.

-Consideration—See Contract Act, S. 2 (d)

AND S. 10.

Consideration-Failure of-What amounts to-Sale of property subject of litigation-Stipulation that in case litigation went against vendor, vendee not to claim refund of sale price—Vendor declared not entitled to property—Right of vendee to plead want of consideration for sale.

Where certain property, subject of a pending litigation, is sold under a sale deed which expressly stipulates that that if the pending litigation is decided against the vendor, the vendee would not be entitled to a refund of the purchase

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against the vendor who is declared to be not entitled to the property, it is not open to the vendee to plead that there is no consideration for the sale deed or that there is a failure of consideration. There is no covenant for title in such a case, and the subject of the sale is only the vendor's interest, if any, in the property in the litigation and subject to the litigation them pending. Nor can it be said that the deed of sale is void by reason of the fact that the property did not exist; the property did exist; the vendor only lost it by the result of the litigation. The vendee having purchased whatever interest his vendor had in the property with his eyes open, and no deception having been practised upon him, he cannot be heard to say that the transaction is void because the rights purchased by him are worth little or nothing. The vendee must be held to obtain what he bargained for and his failure to obtain possession of the property is not due to the act of his vendor. (Harries, C.J., and Manohor Lal, J.) BHULAN PRASAD SINGE v. RUP NARAIN SINGH, 195 I.C. 664=7 BR. 955=14 R.P. 142=22 Pat. L.T. 12=A.I.R. 1941 Pat. 233.

---Construction-Agreement between company and management-Provision for payment of Commission to managing agent at fixed percentage on net profits-Provision for deduction of all proper allowances and deductions for interest on loans and deposits and for working expenses chargeable against profits but for no deduction for depreciation on machinery and buildings or in respect of any expenditure on capital account-Ascertainment of net profits for calculation of managing agent's Commission -Excess profits tax-If to be deducted. See Excess Profits Tax Act. 45 Bom L.R. 951.

Construction - Agreement for period with option of renewal-Negotiations for renewal after expiry of period-Construction-Agreement to renew-If effected. (Lord Romer.) A V. & SON v. AKONJEE JADWET & CO. 8 B.R. 636=14 R.P.C. 132=199 I.C. 570 (P.C.).

-Construction— Arbitration clause — "All unpaid claims whether admitted or not arising out of or in relation to contracts," etc.—Meaning of. Sukhanandan Ramdhin v. Maniklal Kanialal. [See Q D, 1936, 40, Vol. I, Col. 3318.] I.L. R. (1941) Bom. 200=193 I.C. 779=13 R.B. 350=A.I.R. 1941 Bom. 82.

Construction — Building contract - Lump sum or rate contract. PANCHANAN GANGULY V. KALIPADA BANERJEE. [Sce Q.D., 1936'40, Vol. I, Col 2139.] 191 I.C. 739=13 R.C. 279

-Construction—Building contract—Tenders Conditions-"Entire contract"-Meaning of Provisions for additions or deductions-Effect of -Deviation materially altering original contract-Tenderer refusing to accept—Work done by other agency—Breach—Damages—Measure of—Interest -Right to.

The appellant Company invited tenders for the construction of a factory as well as subsidiary buildings in connection with their new cement works at a place called Kalakudi and the works were to be carried out strictly in accordance with the schedule, specification and conditions attached to the tender. The works had to be carried out according to the terms under the supervision, price, and the litigation is ultimately decided of the company's Works Manager and had to be

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completed within the time mutually agreed upon between the contractor and the Works Manager "when ac eptance of a particular tender had been intimated to the tenderer." The tenderer had to submit a sum of Rs. 1,000 as earnest money along with the tender, which amount was to be appropriated towards his security deposit if the tender was accepted by the appellant company. Other conditions in the contract inter alia, were Cl. 22: "The Works Manager shall have the power of "deviating" either by way of addition or deduction, from the drawings, specifications, bills of quantities the value of all additions and deductions being ascertained by measurement and added or deducted from the amount of the contract price at the prices mentioned therein." Cl. 23: "Should any work be ordered which cannot be priced on the basis specified hereinbefore, the prices to be allowed shall be settled previously to the execution of the order. In the event of a price being inserted in the order of the contractor, it will be understood that he has accepted it unless he objects in writing to the same previous to the commencement of the work or delivering the articles or within six days from the receipt of the order, in which case he will be entitled to represent his case to the Works Manager." Cl 25: "If at any time after the the commencement of the work, the company shall for any reason not require the whole or part thereof as specified in the tender to be carried out, the Works Manager shall give notice in writing to the effect to the contractor who shall have no claim to any payment of compensation whatsoever on account of proprietary or other advantage which he might have derived from the execution of the works in full, but which he did not derive in consequence of the full amount of the work not being carried out." The respondent's tender for Raw Meal Silos, Lepolin kiln, etc., was accepted and a security of Rs. 5,000 was fixed by the Works Manager and paid by the respondent. A lay out plan was sent by the company of Raw Meal Silos and the plaintiff began excavations in accordance with the contract. The original tender was accepted for construction by use of granite jelly for mass concrete, etc., but later the company wanted to alter it into limestone jelly and offered fresh terms to the respondent who would not agree to them as the change suggested would reduce the value of the contract to the plantiff by 50 per cent. or more according to the prices suggested by the company. Before the work progressed far, the company entrusted the works to other petty contractors and had the works completed through them with the modifications suggested by the company. The respondent therefore sued the appellant company for damages for breach of contract.

Held, (1) that this was a completed contract between the parties for the construction of such portion or portions of the appellant company's new Cement Works proposed to be built by them as might have been given to the respondent either at or about the time when the tender was accepted or afterwards; (2) that the contract was a bilateral contract and the appellant company must be held to have impliedly agreed that they would have the work of construction of Raw Meal Silos at least carried out by the respondent; (3) that of agent—Principles. See Principal and Agent the contract was an "entire contract" and the —Relationship. 1940 A.M.L.J. 74.

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company was under an obligation to allow the respondent to complete the whole of the work; (4) that the power to "deviate" in Cl. 22, either by way of addition or deduction, did not mean way the contract in such a addition or deduction from the contract in such a way as to result in the extinction of the contract or to transfer it into one that was to all intents and purposes a new one. The deductions or omissions could only be such as were within the limits of the contract; (5) that Cl. 23 had no application to any other work than what had been mentioned in the first part of the clause itself; (6) that the words "not require" in Cl. 25 were meant to convey a set of circumstances when the company did not intend to continue the contract on the ground that it did not require the whole or part of the building for which the contract was given to the respondent (plaintiff) but could have no application to a case like the present where the company wanted those very buildings but built of a different material and at lower rates; (7) that the breach was committed by the appellant company which was therefore liable to pay damages; (8) that the measure of damages would be the amount of profit which the respondent would have made if he had been permitted to do the work in addition to what was due to him for the work actually done. No interest was payable on damages prior to the date of suit. (Abdur Rahman and Somayya, JJ.) DALMIA CEMENT CO., LTD. v. LOURDUSAMI PILLAI. (1943) 1 M.L.J. 303

-Construction-Considerations-Antecedent, surrounding and contemporaneous circumstances

-Reference to, if permissible.
When the words used in a contract are plain, no extraneous considerations are permissible; neither antecedent correspondence, nor surrounding circumstances nor subsequent conduct. When a formal contract has been entered into, that must be constitued according to its own terms and not be explained or interpreted by the antecedent communings which led up to it. The latter could only show what parties meant to do but cannot show what they did. Though when the terms of an agreement are ambiguous the surrounding and contemporaneous circumstances (not subsequent conduct) can be looked to, the rule has to be applied with the greatest care even in the rare cases to which it is applicable. Where one of parties thought there was a completed contract while the other insisted that there was not and the contemporaneous circumstances were that both the parties dealt in the commodities in question and that both were negotiating, one for the purchase and the other for the sale, of the goods in question and the circumstances fitted equally well with the existence or non-existence of a completed contract, it was held that it was not a case in which all the parties concerned had for years acted along a given set of lines which could only fit one case and not the other and that hence that it was not legitimate to try and correlate the meaning of the words used to existing facts, that is to say, to facts existing at the time of the dispute. (Bose, J) MARKANDELAL v. SITAMBHARNATH. I.L.R. (1943) Nag. 10=15 R.N. 122=203 I C. 941=1942 N.L.J. 481=A.I.R. 1943 Nag. 81.

-Construction-Contract for remuneration

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-Construction-Contract subject to rules and bye-laws of East India Cotton Association-Rules and bye-laws providing for reference of disputes to arbitration-Clause in contract providing for institution of suits in regard to matters arising out of transactions in particular Court only—If bars reference to arbitration.

A clause in an agreement fot the purchase and sale of cotton provided that no suit in regard to any matter arising out of the transactions should be instituted in any Court save the High Court of Bombay or the Court of Small Causes at Bombay. The transactions under the contract were to he subject to the rules and regulations of the East India Cotton Association, under which the dis-

putes had to be referred to arbitration.

Held, that the clause referring to the institution of "suits" had no operation unless a suit was filed, in which case the Court was defined and that the clause in question did not oust the provision requiring arbitration under the rules and byelaws of the East India Cotton Association or affect reference of disputes to arbitration. (Beaumont. C.J. and Somjee, J.) PATLL BROS v. SHREE MEENAKSHI MILLS, LTD. I.L.R. (1942) Bom. 558—202 I.C. 188—15 R.B. 140—44 Bom. L.R. 485=A.I.R. 1942 Bom. 239.

-Construction-Contract to sell goods "as may arrive"-Performance, if conditional upon

arrival of goods.

The relevant terms of the suit contract were as follows:—"The defendant firm agree to sell and the plaintiffs agree to buy the undermentioned goods of shipment August/September, 1939, or such portion thereof as may be ready for delivery or as may arrive and be deliverable under the conditions of the contract."

Held, that the words "as may arrive" render the performance of the contract conditional upon the event of the arrival of the goods, and if the goods of the contract description do not arrive, performance of delivery by the sellers is excused. (Gentle, J.) BISWESWAR LAL v. JAI DAYAL. 49 C.W.N. 368.

Construction—Contract to sell house— Undertaking to "produce all the documents relating to the house"—Interpretation—Duty to produce documents not in the possession or power of seller. See T. P. Acr, S. 55 (1) (b). (1943) 1 M.L.J. 461.

—Construction—Exemption from statutory hability—Rights of parties—Absence of express covenant in contract—Rights and liabilities—How

determined.

It is open to the parties to a transaction to contract themselves out of the provisions of a statute, such as the Cess Act, but it must be clearly and satisfactorily established not only that the parties did intend that their rights and liabilities should be different from those created by the statute, but also that they intended the variations to go to the extent pleaded by them. In the absence of an express covenant in the agreement or contract, the question has to be determined on a construction of the terms of the covenants in the contract. (Sinha and Pande, J.) HYMAYUN v. HARENDRA. 24 Pat. 438—1945 P.W.N. 425=A.I.R. 1945 Pat. 447.

-Construction—Express term that no remuneration to be paid unless work is check-measur-

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check-measured-Quantum meruit-Application

of principle.
Where by the terms of a contract, the person who does a work agrees that he is not entitled to any remuneration unless the work has been checkmeasured, then clearly he cannot claim for any work which has not been check-measured. There is no room for any implied contract, where there is an express contract in existence, and in such a case the principle of quantum meruit cannot be applied. (Horwill, J.) VANJEESWARA AIVAR V. Dr. BOARD OF SOUTH ARCOT. 54 L.W. 342=1941 M.W.N. 834=A.I.R. 1941 Mad. 887=(1941) 2 M.L.J. 469.

-Construction-Government kabuliyat in respect of toll on public road-Clause prohibiting sub-letting or assignment without permission of Collector—Effect—Assignment without permission—If void. BHAGWANT GENUJI v. GANGABISAN RAMGOPAL. [See Q. D. 1936-40, Vor. I. Col. 21-4.] I.L.R. (1941) Bom. 71=13 R.B. 202=191 I.C. 806.

-Construction-Implied term-Contract of service-Appointment of chief agent of Insurance Company for ten years-Term or stipulation to Company for ten years—term or stipulation to carry on active business for ten years—If implied—Financial state of company necessitating stopping of work and of continuance as closed fund—If breach of contract of service.

The Court ought not to imply a term in a contract unless there arises from the language of the contract itself and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied. Where a person is appointed as Chief Agent of an insurance Company for a period of ten years with a stipulation that he should give a guarantee in respect of the volume of work he would secure, and there is no express stipulation that the company continues to carry on active business of an Insurance Company for that full period of ten years, it cannot be held that there is an obligation on the part of the company to continue to carry on its business for ten years for the purpose of enabling the Chief Agent to earn his commission by discharging his duty as Chief Agent. The whole contract would depend upon the company being able to work as an active Insurance Company for that period. If the company becomes unable to work for that period and has to stop active work for bona fide reasons, and decides to function only as a "closed fund", that would not amount to a breach of an express contract and would not furnish the agent a cause of action for a suit for damages for wrongful termination of the contract of service. (Kunhi Ramun J.) RANGANATHA IYER v. INDO UNION ASSURANCE Co., LTD. (1945) 2 M.L.J. 297.

-Construction—Indemnity—Assignment by debtor to creditor of promissory notes and mortgage deeds in settlement of dues—Undertaking to make good loss arising from any "Kalan"— Madras Agriculturists' Relief Act passed subsequently reducing the realisations—Liability under indemnity.

It cannot invariably be said that people must ordinarily be taken to contract with reference to the law as existing at the time and that a term ed-Right to claim compensation for work not or condition should be implied that the obliga-

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tion should cease if the law is subsequently altered so as to affect the rights of parties in a manner not contemplated by them. It is a question of construction in each case. The defendant owed Rs. 11,854 to the plaintiff, and assigned to the plaintiff certain promissory notes and mort-gages of lesser value (Rs. 9,833) in full satisfaction, undertaking to indemnify the plaintiff against loss in realising the debts. The defendant also agreed that "if in the matter of recovery of the debts any dispute ("Kalan") arises, I shall make good 'the loss'." When the plaintiff filed suits to recover the debts, he was not able to recover more than the amounts found due after scaling down the debts under Madras Act IV of 1938, passed subsequent to the assignments. He therefore sued the defendant for recovery of the difference between the amounts realised by him and the full amounts payable thereunder.

Held, (1) that "Kalan" was a word of some-what loose connotation and in this sense the covenant must be taken to provide for indemnification of the plaintiff against loss arising out of any dispute raised by the debtors in the matter of realising the debts assigned to the plaintiff by the defendant; (2) that the contract being absolute in terms prima facie, should be taken to cover losses attributable even to a change of the law which the parties could not have foreseen at the time of the contract, viz., the coming into operation of the Madras Agriculturists' Relief Act IV of 1938; (3) that the assignment deeds and the so-called receipt were parts of the same transaction and must be read together; (4) that the "receipt" could not be read as a contract of guarantee, but read as a whole, with the covenants in the assignment deeds, was only a contract of indemnity, and must receive effect accordingly. (Wadsworth and Patanjali Sastri, JJ.) JANA-KUMARA NAINAR v. SAMANTHABANRA NAINAR I.L.R. (1945) Mad. 491=58 L.W. 92=1944 M.W.N. 692=A.I.R. 1945 Mad. 98=(1944) 2 M.L.J. 371.

-Construction-New term-If and when can be implied-"Forward delivery of Penang tin"-Meaning of-Delivery, if dependant on arrival of tin from Penang.

The Court ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter would not have made the contract unless the term was included. It must be such a necessary term that both parties must have intended it to be a term of the contract and have only not expressed it because its necessity was so obvious that it was taken for granted. Where a contract for the purchase and sale of tin of Penang quality merely provides for forward delivery of such tin, a term cannot be read into the contract that its fulfilment is contingent upon the arrival of the tin from Penang. Such a term is not necessary to give business efficacy to the contract. "Forward delivery" means delivery in the future subject of course, to a reasonable limit of time. (Derbyshire, C. J. and Lodge, J.) JEEWANLAL (1929), Ltd. v. Pragdas Mathuradas. 49 C.W. N. 615.

Construction- Pakka adatia contract-Undertaking to do forward business without deposit for four lots of wheat or linseed or hundred

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bales of cotton, or ten or twelve bars of silver-Interpretation.

The defendants who were pakka adatias undertook to do business for the plaintiff on the terms contained in a letter which the defendants wrote to the plaintiff. The letter, after stating the various charges which they would make for adate, stated: "We shall do forward business for four lots of wheat or linseed or one hundred bales of cotton or ten or twelve bars of silver without any deposit. Deposit will be necessary for more business (than this)."

Held, that having regard to the fact that a pakka adatia who did forward business without an initial deposit might incur a considerable risk if the market suddenly dropped, the Court was bound to give a strict meaning to the word "or" used in the letter and must be read as giving to the plaintiff alternative rights to do business in respect of the different classes of commodities mentioned up to the limits mentioned, and should not be given an inclusive or non-alternative sense. Once the plaintiff had done business to the limit mentioned in any one of the commodities specified, if he wished to do business in any of the other commodities, he must, so long as the business already done to the limit mentioned, was outstanding, pay deposit in respect of the further business. (Blackwell, J.) ULFATRAI HUKUM-CHAND v. NAGARMAL GOPINAL. I.L.R. (1941) Bom. 441=195 I.C. 28=14 R.B. 12=43 Bom.L. R. 269=A.I.R. 1941 Born. 211.

-Construction-Rules-Apparent inconsis-RANEEGUNGE COAL ASSOCIATION, LTD. v. TATA IRON AND STEEL CO., L.TD. [See Q.D., 1936-'40, Vol. I, Col. 3318]. I.L.R. (1940) Kar. (P.C.) 361

43 Born.L.R. 403=1941 A.L.W. 25 (P.C.).

—Construction—Sale of goods—"Delivery—November, December, January, February, 1933" tency.

Meaning of.

Where a term in a contract of sale provides for "Delivery.—November, December, January, February, 1933" it means that delivery has to be made in equal instalments in each of the four months, or at any rate some quantity has to be delivered in each of the four months. It cannot be construed as meaning that it is at the option of the seller or supplier to deliver at any time before the end of February, 1933, or that it is not obligatory on the seller to make deliveries in each of the four months. (Abdul Ghani and Subramanya Aiyar, JJ) VENKIAH & BROS. v. GUFTA. 20 Mys.L.J. 194.

——Construction—Sale of goods—Implied negative covenant—Breach—Interlocutory injunciton—Specific Relief Act, S. 57—Sale of Goods Act, S. 58. JARAM VALJEE v. INDIAN IRON AND STEEL CO. LTD. [See Q.D 1936.'40, Vol. I, Col. 2146.] 191 I.C. 847=13 R.C. 287.

-Construction-Terms-Printed form with typewritten portion—Conflict—Effect. See Sale of Goods—C. I. F. Contract. (1941) 2 M.L.J. 281.

-Construction—Terms—Printed terms inconsistent with written or typed terms-Construc-

Where the terms of a contract are partly printed and partly written or typed, the position in law is that if the printed terms are inconsistent with what has been written or typed, the latter must prevail over what is printed. (Black

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well, J.) RATILAL M. PARIKH v. DALMIA CEMENT AND PAPER MARKETING Co., LTD. 208 I.C. 301= 16 R.B. 67=45 Bom.L.R. 405=A.I.R. 1943 Bom. 229.

-Contract of agency of Life Insurance Company-If terminable on notice-Length of reason-

able notice.

In the absence of any reference in the correspondence between the parties as to the duration of an agency of a Life Insurance Company, the agency is one terminable on notice. A notice of 31 months given by the company is inadequate to determine an agency which had lasted for nearly 50 years, under which a very large business had been built up, and great expenses incurred by the agents. (\*\*ir John Beaumont.) Shorabli v. Oriental Government Life Assurance (OMPANY, LTD 50 C.W.N. 73=1946 M.W.N. 59= A.I.R. 1946 P.C. 6=(1945) 2 M.L.J. 496 (P.C.).

——Contract to run ferry granted to one but lease actually executed by another—Party hable

to pay lease amount.

Obligations flow from a contract or legal status and it is only legal obligations which can be recognized by a Court of law. Where a contract to run a ferry is granted to K but the lease is executed by N, then there is no legal obligation on the part of K to pay the leave amount; at any rate, no obligation which could be recognized or enforced by a Court of law. (Sinha, J) BHAG-MAL v. THE DISTRICT BOARD, BULANDSHAHR. 1945 A.W.R. (H.C.) 254=1945 A.L.W. 316=1945 O.W.N. (H.C., 269=A.I.R. 1945 All, 428.

-Contract for sale of goods in two instalments—Wiongful refusal to take delivery—Right of seiler to cancel contract and claim damages. See SALE OF GOODS—C. I. F. CONTRACT. (1941) 2 M.L. J. 281.

-Contract o' indemnity-Agreement between Mahomedan co-heirs-Division of estate and apportionment of debts-Agreement to pay portions of debt and to indemnify each other against default - Enforceability - Actual damage-If necessary. See Quia timet Action. (1943) 1 M.L J. 131.

-Deposit in French Cochin China-Payment under judgment of Court of that country opera-ting as discharge—Suit in British India—Not maintainable See International Law. (1942) 1 M.L<u>.</u>J. 430.

-Earnest money - Return - Right to - Breach

of contract by party claiming return.
Where there is a stipulation that earnest money shall be forfeited and there is a breach of contract by the party who claims the return of the earnest money his claim is not entertainable because the opposite party has the right under the contract between the parties to retain it in case of breach by the person claiming it. (Mulla and York, JJ) Khuda-t-tala v. Hamida Khatoon. I L R. (1944) All. 743=1944 A.L.W. 620=1944 A.L.J. 427=1944 O A. (H.C.) 226=1944 A.W. (H.C.) 266=A.I.R. 1945 All 70.

—Enforceability—Agreement contemplating precession of a formal decement later. If compared to the contemplating of a formal decement later.

execution of a formal document later-If com-

plete or incomplete—Construction.

If a document relied upon as constituting a contract contemplates the execution of a further document between the parties, it is always a question of construction whether the execution of the further contract is a condition or term of the

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bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract, and the reference to the more formal document may be ignored, (Lokur and Gajendragadkar, JJ.) AMRITLAL A mritlal MAGANLAL v. HARKISANDAS. 47 Bom.L.R. 878.

-Enforceability — Agreement of lease -Amount of rent not determined-Rent agreed to be paid on basis of half the net proceeds-Lease,

if bad for uncertainty.

Though the actual figure of the rent payable under a lease is not determined, if there is no uncertainty regarding the way in which it should be fixed, there being a definite fixation of rent on an agreed basis, namely, half the net proceeds, it cannot be said that the agreement of lease is bad for uncertainty and so unenforceable (Wadsworth and Patanjali Sastri, JJ.) RAJA OF VIZIA-NAGARAM v. MAHARAJA OF JEYPORE. I.L.R. (1945) Mad. 355=A.I.R. 1944 Mad. 518=(1944) 2 M. L.J. 131.

-Essentials-Transaction signed under legal duress.

The essence of a contract is that the parties should be free to enter into the contract or not as they please and no penalty is attached to either for a refusal to do so. A transaction made and signed under duress, even when the duress is legal, can hardly be termed a contract. (Boss, J.) Kunwarlal Singh v. Provincial Government, C. P. and Berar. I.L.R. (1944) Nag. 180 — A.I R. 1944 Nag. 201.

-Frustration—Doctrine of—Applicability— Conditions.

The applicability of the doctrine of frustration of contracts depends upon the particular circumstances of the case in which it is sought to be invoked. Where it has not become impossible for a party to discharge his obligation under the contract, but merely burdensome to him to do, the doctrine cannot be invoked. Before the doctrine can be invoked it must be shown that the event which produced frustration was one which the parties to the contract did not foresee and could not, with reasonable diligence, have foreseen. (Fazl Ali, C.J. and Shearer, J.) Surpat Singh v. (Fazl Ali, C.J. and Shearer, J.) SHEO PRASAD GUPTA. 24 Pat. 197=(1945) P.W. N. 106=A.I.R 1945 Pat. 300.

-Frustration-Doctrine of-Principles and

meaning of.

The doctrine of frustration is the effect that when the performance or further performance of a contract has been rendered impossible or has been indefinitely postponed in consequence of the happening of an event which was not and could not have been, contemplated by the parties to the contract when they made it, a Court will consider what, as fair and reasonable men, the parties would have agreed upon if they had in fact foreseen and provided for the particular event, and if, in its opinion, they would have decided that the contract should be regarded as at an end would discharge the party who would otherwise be liable to pay damages for non-performance. (Fazl Ali, C.J. and Shearer, J.) Surpat Singe,

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v. Sheo Prasad Gupta. 24 Pat. 197=(1945) P. W.N. 106=A.I.R. 1945 Pat. 300.

—Frustration—Doctrine of—Scope and meaning—Contract to deliver rails silent as to the source of the goods—Fuilure to deliver—Action for breach—Plea of frustration based on the alleged mention of parties that the goods were to

come from Germany-Maintainability.

The word frustration used with reference to a contract has to be regarded as used in a technical legal sense. It is a sort of shorthand. It means that a contract has ceased to bind the parties because the common basis on which by mutual undertaking it was based has failed. It would be more accurate to say not that the contract has been frustrated but that there has been a failure of what in the contemplation of both parties would be the essential condition or purpose of the performance. Whether frustration occurs or not depends on the nature of the contract and on the events which have occurred. Modern English law has recognised how beneficial the doctrine of frustration is when the whole circumstances justify it, but to apply it calls for circumspection. The doctrine may apply to a contract for unascertained goods. A contract for the supply of certain Railway tract rails contained no term intended to define the source of the goods and was silent on that point. In an action for breach of the contract to deliver the rails in question, it was contended by the defendants that they were entitled to be relieved of the obligation to supply, because to the knowledge and intention of both parties, the goods were to come from Germany and as this had become illegal and impossible the contract was frustrated.

Held, that the defendants were not entitled to invoke the doctrine of frustration on the ground either of the nature of the contract or of the facts. Shipment from Germany could not be described as the basis or foundation of the contract within the meaning of the frustration doctrine. In such a case the contract is not frusdoctrie. In such a case the contract is not trustrated, because only one of the many possible ways of performing it has become illegal or impossible. (Lord Wright.) Twentsche Overseas Trading Co., Ltd. v. Uganda Sugar Factory, Ltd. 1945 A L. J. 272=58 L.W. 315=1945 M. W.N 538=A.I.R. 1945 P.C. 144=(1945) 1 M. J. I. A17 (P.C.)

L.J. 417 (P.C.).

"Frustration of venture"—Basis of doctrine.
The doctrine of "frustration of venture" is based not upon the existence of any actual impossibility in fact but upon the existence in the circumstances of the case, of an implied condition. In order to justify such an inference, the implied condition must be absolutely necessary to give effect to the transaction which the parties must have intended. (Henderson, J.) SARADA PROSAD DE v. BHUTNATH MALLICK. I.L.R. (1941) 2 Cal 78=200 I.C. 870=15 R.C. 107=45 C.W.N. 660=73 C.L. J. 294=A.I.R. 1942 Cal. 291.

-Hire purchase—Essentials.

An essential feature of a contract for hire purchase is the option given to the prospective purchaser to terminate the contract and return the chattel. Where such option is absent, the con-

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W. 448=1944 M.W.N. 595=A.I.R. 1944 Mad. 526=(1944) 2 M.L.J. 74.

Indemnity—Right of indemnity-holder to be indemnified—When arises. See CONTRACT Act, S. 125. I.L.R. (1944) 2 Cal. 318.

——Legality—Transaction in yarn at place where no licence is issued—Contract for sale of at place yarn at such place—Enforceability—Contravention of Madras yarn (Dealers) Control Order (1943).

Where a person makes a contract to sell yarn at a place where he has no right to sell it by reason of the Madras Yarn (Dealers) Control Order, he having no license to sell at that place, it is illegal ab initio; it is one of those contracts which the Yarn Control Order made under the Defence of India Rules was intended to prevent, namely, a transaction in yarn at a place where no licence is issued and where no control therefore can be exercised. Such a contract cannot be can be exercised. Such a contract cannot be enforced by the other party to the contract, i.e., the purchaser. (Bell, J.) DIVANJEE DHADA ABBULA SAHIB v. GURUVAPPA & Co. 57 L.W. 195=1944 M.W.N. 375=A.I.R. 1944 Mad. 387 =(1944) 1 M.L.J. 256.

-Marriage contract-Implied term-Hindu Law-Contract of marriage by mother of minor girl with father of adult male—Implied term—Breach of term—Suit for damages for breach—Right of minor. See HINDU LAW—MARRIAGE.

43 Bom.L.R. 35.

-Mercantile contracts-What is. Lucknow AUTOMOBILES v. REPIACEMENT PARTS CO. [See Q.D. 1936-40, Vol. I, Col. 3318]. 16 Luck. 357.

Merger-Hatchita executed by person in favour of himself and others—Portion of debt due to promisor if discharged.

No man can in his own right be under any obligation to himself, as the obligation would be destroyed by a merger or confusio. Where a hatchita is executed by a person in favour of himself and others, that person cannot in law be the promisees must be taken in law to be the persons mentioned in the hatchita other than that person. Even assuming that all of them would be promisees, the practical result will not be different. In the absence of any evidence or circumstances which would justify a contrary inference, it will be presumed that a debt due to a number of joint creditors is due to them in severalty. The debtor can make payment of such a debt to the several creditors and get valid discharge in respect of the share of the creditor concerned. This being so, that portion of the debt of the promisor which is ascribable to himself as one of the promisees will stand discharged by the doctrine of merger or confusio. (Nasim Ali and Pal, JJ.)
Nabendra Nath Basak v. Shasabindoo Nath
Basak. 197 I.C. 321=14 R.C. 332=A.I.R.
1941 Cal. 595.

-Minor-Lease by guardian-Minor approving it on attaining majority and executing new patta—Rights of parties—If governed by earlier or later lease.

Where a minor on attaining majority records his approval of the action of his guardian in granting a lease of his land and strikes his own tract is not one of hire purchase. (Leach. C.J. bargain with the lessee by executing a new patta, and Shahabuddin. J.) Subbarayalu v Annamathat patta and the corresponding kabuliyat alone LAI CHETTIAR. I.L.R. (1945) Mad. 269=57 L, record the bargain between the parties, and

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govern their respective rights and liabilities and the terms of the lease granted by the guardian the terms of the lease granted by the guardian cannot be treated as incorporated in that patta. (Lord Russell of Killowen.) Tikatr UMED NARAIN SINGH v. EQUITABLE COAL COMPANY. 196 I.C. 785=1941 O.L.R. 809=1941 OA. 1028 (P.C.)=1942 O.W N. 46=74 C.L. J. 445=1942 A.L.W. 34=44 Bom. L.R. 188=1942 P.W.N. 32=44 P.L.R. 120=1942 A.L.J. 107=23 Pat. L.T. 338=A.I.R. 1942 P.C. 1. (P.C.).

Oral agreement—Proof required.
An oral agreement must be proved by the clearest and most satisfactory evidence of credible witnesses, and it would be unwise to act upon oral evidence unless there is contemporaneous written evidence to corroborate it. (Tek Chand and Din Mohammad, JI) SIRI GORIND LALJI v. MILAP CHAND. 43 P.L.R. 97.

-Pakka adatia-Contracts in different markets for different quantities of particular com-modities with different delivery dates-If distinct separate outstanding transactions—Single general domand for margin—Non-compliance—

Right to close transactions.

Contracts effected in different markets for different quantities of particular commodities, with different delivery dates, evidenced by separate memoranda, are in law for all purposes distinct the one from the other, and the liabilities of the parties thereof in respect of each are separate. Where there are separate outstanding transactions with different provisions as to initial deposit and margin, the commission agent or pakka adatia, if he wants to insist upon the payment of margin, so as to give him a right to close any transaction for non-compliance with the demand, must specify to the constituent in respect of what outstanding transaction the demand is made, and what is the amount of the demand in respect of it. The constituent may wish to comply with the demand in respect of some transactions so as to keep them alive, and not wish to comply with it in regard to others. A single general demand in respect of all the outstanding transactions would not entitle the pakke adatia to close all the outstanding transactions on the ground of non-compliance with that demand. (Blackwell, J.) ULFATRAI HUKUM-CHAND 7. NAGARMAL GOPIMAL. I.L.R. (1941) Bom. 441=195 I C. 28=14 R.B. 12=43 Bom. L.R. 269=A.I.R. 1941 Bom. 211.

Pakka adatia-Wrongful closing of outstanding transactions-Right of constituent-

Damages-Measure of.

Where a pakka adutia wrongfully closes his constituent's outstanding transactions before the due date, the constituent is entitled to treat them as still outstanding and the constituent is entitled, owing to the special obligation imposed upon the pakka adatia by custom, to give instructions to the pakka adatia to close the transactions, and to be put in the position in which he would have been placed if the pakka adata had carried out his instructions. The constituent is entitled to have an account taken on the footing of the prices prevailing on the date on which the instructions to close are given. (Blackwell, I.)
ULFATRAI HUKUM CHAND v. NAGARMAL GOPIMAL. I.L.R. (1941) Bom 441=195 I C 28=14 MAL. I.L.R. (1941) Bom 441=1951 C 20-11 R.B. 12=43 Bom, L.R. 269=A,I.R. 1941 Bom.

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-Penalty-Liquidated damages.

Agreed inquidated damages, it to be enforced, must be the result of a 'genuine pre-estimate of damages'. They do not include a sum fixed in terrorem covering breaches of contract of many varying degrees of importance, the possible damages from which bear no relation to the fixed sum, and which obviously have at no time been estimated by the contracting parties. Where a contract provided that "the second party (the purchaser) shall pay to the first party £2,500 as agreed and liquidated damages without the necessity of notice if he commits a breach of all or part of his undertaking under this agreement" the stipulation as to £ 2,500 would be considered to be a penalty according to English rules. (Lord Atkin.) MICHEL HABIB RAJI AYOUB v. SHEIKE SULEIMAN. 196 I.C. 823=1941 A.W.R. (PC) 63=1941 O.L.R. 814=8 B.R. 118=14 R.P.C 72=1941 C.A. 618=A.I.R. 1941 P.C. 101 (P.C.).

-Public policy-Agreement in restraint of trade-Validity-Company doing sardine business -Sale of business-Covenant not to engage in any other sardine business in specified place directly or indirectly—Enforceability—Holding shares in such business-If breach of covenant.

Where a person enters into a covenant to the effect that "he will not directly or indirectly engage in any other sardine businees whatever in the Dominion of Canada," it cannot be said that a shareholder in a company carrying on such business or being a partner therein is necessarily a breach of the covenant. The pharase "directly or indirectly' is not void for uncertainty. It is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. In cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him within bounds, which, having regard to the nature of the business, are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is capable of being enforced. This principle is applicable even in the case of an important public company where the covenant is entered into by a managing director holding shares in the company. The same result may well follow in a case where, instead of selling the undertaking, the shares or stock of the company or a large interest therein is being sold, and one or more of the directors or managers of the company, being interested in the sale, are willing, in order to enable the transaction to go through, or to obtain a better price, to enter into restrictive covenants with the purchaser. Where there is a good will to be protected, a covenant in restraint of trade, even when imposed as a condition of employment may be so framed as to give adequate protection not only to the covenantee himself but also to his successors in the business, although it may be necessary for that purpose to impose a restriction upon the covenantor for the remainder of his life. The onus of esta-blishing that such a covenant is injurious to the public in the sense that it is calculated to produce a pernicious monopoly is upon the party who attacks the covenant. When the Court is satisfied that the restraint is reasonable as between the parties, and that there are no reasonable grounds

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for holding that the restriction is likely to produce a real monopoly, it is impossible to say that the public interest is affected. (Viscount Mauggam.) CONNORS BROS., LTD. v. CONNORS 196 I.C. 871=1941 O.L.R. 819=53 L.W. 266=8 B.R. 154=14 R.P.C. 60=A.I.R. 1941 P.C. 75 (P.C.).

Railway-Contract for carriage of goods-Charging by mistake of concession rate which had been cancelled—Right of rails ay to collect before delivery the amount of the difference in rates— Condition on the back of forwarding note (not read by consignor) enabling the railway to collect the amount-How far binding on consignor.

The forwarding note in the prescribed form signed by the consignor and addressed to the South Indian Railway Company stated "Please receive the undermentioned goods and forward by goods train to....on....Railway as consigned below and subject to the following conditions which are accepted by me, namely...." The consignor was required to sign a statement "I do hereby certify that 1 have satisfied myself that the description, marks, value and weight or quantity of goods consigned by me have been correctly entered on this forwarding note and I agree to be bound by the conditions printed above and at the back of this forwarding note; and on the railway receipt granted for these goods". On the back of the forwarding note were conditions No. 8 of which read as follows: "Goods booked to stations on the South Indian Railway or Railways worked by the South Indian Railway are carried subject to the rules and conditions printed from time to time in the Railway Company's Goods Tariff, and goods booked to or over a foreign railway are subject to the rules and regulations and to wharfage and other charges in force on such railway". Rule 15 of the rules published in such railway". the Goods Tariff of the South Indian Railway states that the weight, description and classification of goods, and quotation of rates as given in the railway receipt and forwarding note are merely inserted for the purpose of estimating the railway charges and the railway reserves, the right of re-measurement, re-weighment, re-classification and re-calculation of rates, terminals and other charges and correction of "any other" errors at the place of destination and of collecting any amount that may have been omitted or undercharged. The rules of the Ceylon Railway contain similar provisions. Where in respect of a consignment of some waggons of rice to Galle in Ceylon consigned from stations on the South Indian Railway, by mistake a concession rate which had been cancelled was charged; the consignor must be deemed to have had notice of the cancellation of the concession rate and the reimposition of the ordinary rate. The railway had under the rules and conditions in the contract contained in the forwarding note a right to collect the difference between the concession rate and the ordinary rate and where the consignee was compelled to pay the difference before delivery of the goods a suit for the refund of the amount is not maintainable. Failure of the consignor to read the conditions on the back of the forwarding note would not help him. Further the authority of the booking clerk is restricted and he cannot lawfully accept a rate outside the

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DAWOOD ROWTHER v. SOUTH INDIAN RAILWAY Co.,. Ltd. I L R. (1945) Mad. 174=57 L.W. 360= 1944 M.W.N. 626=A.I.R. 1944 Mad. 444= (1944) 1 M.L.J. 489.

—Sale and purchase of goods—Provision declaring indent null and void if goods not supplied for any cause whatsoever—Effect of.

One of the conditions of a contract of sale and purchase between the plaintiff and the defendants was as follows:—"It is understood that this indent is null and void in case the goods are not shipped or you cannot supply for any cause whatsoever without assigning any reason". Earlier in the condition reference was made to the defendants or their agents being exempted from responsibility for non-delivery of the goods by the makers or loss or inconvenience for reasons mentioned, and the delivery of the goods was subject to storm, fire and similar provisions.

Held, that the words "any cause whatsoever"

in the first sentence should not be read by the ejusdem generis rule and that they excused the defendants from all liability. (Gentle, J.) RADHAKISSEN MULL v. SOHANLAL MOHANLAL.

47 C.W.N. 86.

— Sale and purchase of goods—Provision declaring indent null and void if goods are not supplied for any cause whatsover—Effect of—

One of the clauses of a contract was as follows:—"You or your agents are not to be held responsible for non-delivery of the goods by the makers or any loss or inconvenience that may originate by fulfilment of these goods. Delivery of the above goods is subject to storms, fire, war, tempest, flood, drought, strikes, lock-outs, bankruptcy, accidents and such other causes beyond human control. It is also understood that this indent is null and void in case goods are not shipped or you do not supply for any cause whatsoever without assigning any reason.

Held, (i) that the inclusion of the word 'whatsoever' in the last paragraph excluded the appli-cation of the rule of 'ejusdem generis' when interpreting the meaning of the sentence in which the word appeared, that the provision in the last paragraph was intended and it did cover every possible reason for non-supply and non-shipment. and in the event of the defendant failing to supply the goods, then the indent was to be null and void and that consequently the defendants-could not be held responsible for loss which might be occasioned to the plaintiff through failing to obtain delivery of the goods specified in the indent; (ii) that there was nothing which prevented the parties to a contract including a term in it to the effect that the party who was obliged to deliver the goods should not be liable for non-delivery. (Gentle, J.) RADHAKISSEN MULL v. MAGANLAL BROS. 47 C.W N. 89=207 I.C. 155=16 R.C. 32=A.I.R. 1943 Cal. 206.

Sale and purchase of goods—Request to supply or instruct friends abroad to buy—If constitutes contract.

The relevant words of a letter signed by the plaintiff and addressed to the defendants were asfollows:—"We hereby request you to supply or to instruct your friends abroad to buy for and to ship if possible, on our account and risk" and then the contract goods were set out with the tariff. (Leach, C.J. and Shahbuddin, J.) SHEIK terms. The defendants wrote to the plaintiff as

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follows:-"We beg to inform you without any engagement on our part that your undermentioned valued indent has been placed with thanks.

Held, that the contract between the parties was one of sale and purchase, and that the defendants did not merely act as correspondents passing on the plaintiff's order to persons abroad. (Gentle, J.) RADHAKISSEN MULL v. SOHANLAL MOHAN-LAL. 47 C W N. 86.

-Sale of goods-Buyer accepting bill of exchange and passing trust receipt giving first

charge to seller over goods and sale proceeds— Effect—Right of buyer or trustees for his creditors to repudiate same as illegal or void. See CONTRACT ACT, S. 23. (1944) 1 M.L.J. 371.

——Sale of goods—Contract embodied in written deed—Previous offers and acceptances

-Value of.

It is well settled that when a contract of sale of goods has been embodied in a written deed the previous offers and acceptances lose all importance and the only contract between the parties is the written contract. The previous offers and acceptences are merely stages in the negotiations between the parties. (Abdul Rashid and Teja Singh, II) RALLI Bros, LTD. v. BHAGWAN DAS. A.I.R. 1945 Lah. 35.

Sale—Title—Passing of—If dependent on delivery of deed to vendee—Execution and regis-

tration of deed-Effect of.

It is settled law that unless there is a stipulation between a vendor and vendee that title would not pass from the vendor to vendee until a certain event has happened, e.g., until the consideration has passed, the vendee acquires title to the vended property as soon as the sale-deed is executed and registered. Execution of a deed merely means performance of what is required to give validity to a writing, as by signing and sealing it. Delivery of the same is not an essential part of the contract unless that is specifically agreed to between the parties to the deed. Where therefore a deed of assignment or sale of arrears of rent is executed and duly registered, title to the subject-matter of the sale would pass although the vendor for some unexplained reason refuses to deliver the sale-deed to the vendee after registration. (Fazl Ali, C.J. and Sinha, J.) Sheikh Sultan AHMAD v. SYED MARSAD HUSSAIN. 22 Pat 306 =211 I.C 35=16 R.P. 186=10 B.R. 320=25 Pat. L.T. 14=A.I.R. 1944 Pat. 3.

Settlement contract—No need for delivery or tender of delivery of goods-Payment of differences in prices alone to be made.

In cases of settlement contracts, that is, crosscontracts entered into with the very person with whom the prior contracts were entered into, with a view to settle the obligation arising under

the contracts.

Held, that there is really no need for either party to tender the goods or tender the price and the Courts may allow a set-off as regards delivery and as regards the payment of price for everything except the differences. (Somayya, J.) KARUPPASWAMI MOOPANAR v. CHOTTABHAI JANER-BHAI & Co. 57 L.W. 560 (2)=1944 M.W.N. 667 =A I R. 1945 Mad 59=(1944) 2 M.L.J. 307. -Specific performance—Contract not enfor-

ceable when made but capable of fulfilment at time of suit-Specific performance.

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A contract which cannot be enforced in full at the time it is entered into may nevertheless be enforced if it can be fulfilled at the time of the filing of the suit. (Horwill, J.) RAMULU 7, VENKATASUBBA RAO. 219 I.C. 182=18 R.M. 65 = 1944 M.W.N. 743=A.I R. 1944 Mad. 554= (1944) 2 M L.J. 103.

-Specific performance—Lease for 48 years-Clause giving lessee right to get renewal of lease after expiry of term—Terms not fixed—Agree-ment for renewal—If can be specifically enforced-If bad for vagueness. See MALABAR LAW-

Nambudiris. (1945) 1 M.L.J. 243.

-Specific performance—Sale of land—Contract by Hindu coparceners one of whom being a minor-Vendee taking possession and remaining in possession without repudiating—Suit by vendors after majority of minor for specific performance-Maintainability-Plea of minority of one vendor at time of contract-Sustainability, ADINARAYANA v. VENKATASUBBAYYA. [See Q. D. 1936-40, Vol. I, Col. 2163]. 194 I.C. 446=13 R. M. 775.

Third party—Right of suit—Insolvency—Creditors—Right to benefit of contract to which

they are not parties.

The general rule in India is that although consideration for an agreement may proceed from a third party, a person not a party to an agreement cannot sue upon it. The rule, however, is subject to certain well recognised exceptions. Where it is clear on the facts that some measure of privity is established between the third person and the contract on which he sues and which would enable him to get judgment in his favour in a Court of equity. This rule also applies in insolvency and creditors of an insolvent who are not parties to an arrangement cannot take advantage of it. In an insolvency, therefore, creditors cannot claim benefits under a contract which benefits would not be available to them in action by suit. A petition for adjudicating a debtor cannot therefore be presented by a person who claims a benefit under an agreement made by the debtor but to which he is not a party and which agreement does not render the debtor personally liable in respect of any debt due to the applicant creditor. (Davis, C.J. and Weston. J.) RIJHU-MAL NANDIRAM v. JAN MAH MED ABDUL HALIM, I.L.R. (1943) Kar. 238=210 I.C. 25=16 R.S. 122=A.I.R. 1943 Sind 190.

Third party—Right of suit—Trust—Partition suit in family—Arbitration—Award—Provision for charge on property of one son in respect of debts of father who took no property— Right of credit to sue to enforce award to which

he is not party.

Ordinarily a person who is not a party to a contract cannot sue upon it. The mere circumstance that a contract may be between relations cannot affect in any way the right of a stranger to sue upon it, and the only exception recognised to the general rule that a third person cannot sue upon a contract is where the third party is in the position of a cestui que trnst, e.g., where a family arrangement makes provision for the maintenance or marriage of a minor or of a female mem-ber of the family. Where in a family partition suit, an arbitrator is appointed and an award is made, under which, it is provided that the debts of the father who receives no property should be

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a charge on the immoveable property allotted to and taken by one of the sons it cannot be said that any trust is created in favour of the creditor to whom the debts are due by the father, so as to entitle him to sue the son for recovery of his debts on the basis of the award to which he has not been a party. It matters nothing that the parties to the contract are father and sons. The parties to the contract are father and sons. creditor has no right to sue upon this award and to obtain a charge. The creditor can only obtain a decree against the son limited to the assets of his deceased father in his hand. (Davis, C.J. and Weston, J.) NIRMALDAS PRIBADAS v. SUMATBAL I.L.R. (1943) Kar. 338=210 I.C. 52=16 R.S. 129=AI.R. 1943 Sind 221.

Third party-Right to enforce-Bank in liquidation-Compromise between manager and Official Liquidator-Manager undertaking to pay depositor-Suit by depositor against manager-If maintainable. SURJAN SINGH v. NANAK CHAND. [See Q D. 1936-40, Vol I, Col. 3318]. 191 I.C. 763=13 R.L. 332.

Third party—Right to sue.

A stranger to a contract which reserves a benefit for him cannot sue upon it except where it creates a trust in his favour, or where the promisor agrees after the contract to make payment direct to him or becomes estopped from denying his liability to pay him personally. (Grille, C.J. and Hemeon, J.) SARASWATI BAI v. HAIBATRAO. I. L.R. (1945) Nag. 581=1945 N.L.J. 258=A.I.R. 1945 Nag. 261.

-Third party-Right to sue-Purchaser of partnership business undertaking to pay its debts -Debts charged on business until payment—

Right of creditor to sue purchaser.

A receiver appointed in a suit for dissolution of partnership sold the business of the firm and its assets, one of the conditions of the sale being that the purchaser should indemnify the parties to the suit against the debts of the business and until such debts were paid the same should be a charge on the business. In a suit by a creditor

against the purchaser,

Held, that if the conditions of sale contained nothing more than a covenant by the purchaser of the business to pay the debts of the business, a creditor of the business could not enforce the covenant as against the purchaser but that the charge created on the business gave the creditor an equitable right as against the purchaser and the assets of the business in his hands. (Panckridge, J.) MAHOMED HAJI GHANI v. RAJ KUMAR DUTT. 46 C.W.N 371.

Third party—Right to sue—Rule and Exceptions.

It is well settled that a person who is not a party to the contract cannot sue on it. Such rights can be enforced by way of suit, as for example under a trust, or because of estoppel, or by way of charge, or under a family arrangement, but unless something over and beyond a mere contract can be inferred the suit will not lie. A trust does not arise simply because a party to a contract undertakes to confer a benefit on a stranger. A person who contracts to do a certain thing for consideration does not intend to create a trust. (Bose, J.) BHABHOOTMAL v. MOOL-CHAND. I.L.R. (1943) Nag. 643=209 I.C. 25= 16 R.N. 99=1943 N.L. J. 363=A.I.R. 1943 Nag. 266,

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-Third party-Right to sue-Rule-Exceptions-S. 23 (c), Specific Relief Act.

The general rule is that only those persons can sue upon a contract who are parties to it. This rule is subject to certain well-recognised exceptions, e.g., where a person has been allowed to sue on a contract to which he is not a party, on the ground that he claims through a party to the contract or that he is in the position of a cestui que trust or that he is a principal suing through an agent, or that he claims under a family settlement. S. 23 (c), Specific Relief Act, which refers to a compromise or family settlement is one of the statutory exceptions to the rule. (Rowlanthe statutory exceptions to the late. (Rownand Chatterji, JJ.) JANAKI BALA DEBYA v. MAHESHWAR DAS. 21 Pat. 377=201 I.C. 660=8 B.R. 812=15 R.P. 70=1942 P.W.N. 149=24 Pat. L.T. 33=A.I.R. 1942 Pat. 460.

by A to B-B taking delivery of them promising to pay price later and selling them to C-A, if can sue C for price.

Where A sells goods to B and B takes delivery

of them promising to pay the price later and resells them to C. A is not entitled to sue C for the price of the goods when C has not agreed to pay the price to him. He can only sue B. (Sen, I.) GULABHAND Z. LAXMINARAYAN. I. L. R. (1944) Nag. 46=212 I. C. 539=16 R.N. 230= 1944 N.L.J.110=A.I.R. 1944 Nag. 120.

Third party-Right to sue-Sale of property-Purchaser undertaking to satisfy creditors of vendor-Right of creditors to sue purchaser.

A stranger to a contract which reserves a benefit for him cannot sue upon it either in English or in Indian Law even though in India the consideration need not move from the promisee. There are two well-recognised exceptions to this doctrine: The first is where a contract between two parties is so framed as to make one of them a trustee for a third; in such cases the latter may sue to enforce the trust in his favour and no objection can be taken to his being a stranger to the contract. The other exception covers those cases where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party. Where the consideration for a sale of a property is that the purchaser would satisfy certain creditors of the vendor and release the latter from his liability in respect of the debts, and the property is not sold for a fixed consideration and the purchaser does not retain out of it a definite sum of money for payment to the creditors, the purchaser cannot be said to have constituted himself a trustee in respect of the property sold or the consideration money payable for it for the benefit of the creditors, and it is not competent for the latter to sue the purchaser for enforcement of his obligation under Contract of sale to which they were not parties. (Mukerjea and Roxburgh, JJ.) JNAN CHANDRA MUKERJI v. MONORANJAN MITRA. I.L.R. (1941) 2 Cal. 576=201 I C. 138=15 R.C. 130=74 C.L. J. 327=A.I.R. 1942 Cal. 251.

-Wagering contract—Gambling on differences Broker's claim against customer, See CONTRACT

Act, S. 30. I.L.R. (1940) 2 Cal. 385.

Want of mutuality—Contract of sale in favour of adult and minor jointly in considera-

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tion of discharge of debt due to adult by vendor —Enforceability by adult—If bad for want of mutuality. See Specific Performance—Agreement of Sale. (1944) 2 M.L.J. 187.

CONTRACT ACT (IX OF 1872)—Voluntary payment-Purchaser in execution of property subject to mortgage paying off mortgagee—Real owner of property establishing his title and recoverning property from the auction purchaser—Right of the latter to recover money paid to the mortgagee either from him or from the real

A & B, the uncles of C, bought a plot of land in their own name and built a house on it with money belonging to C. In order to raise further funds to complete the building they mortgaged the property to D. The property was subsequently sold subject to the mortgage in execution of a money-decree against  $A \in B$  after the dismissal of a claim petition by C. Xthe purchaser at the sale paid D, the amount due on his mortgage after the dismissal by the trial Court of C's suit under O. 21, R. 63 of the Civil Procedure Code, to establish his title; C however succeeded in establishing his title in the Court of appeal and ultimately recovered possession of his property from X. In a suit by X against C & D for recovery of the amount paid by him to D.

Held, that (1) X was not entitled to any relief against C, or his property. (2) X however cannot be regarded as a volunteer when he paid the amount due on the mortgage to D, and was therefore entitled to recover the amount from D as money paid under a mistaken belief that a valid mortgage had been created. (Leach, C.J. and Rajamannar, J.) SURYANARAYANA v. PURNACHANDRA RAO. 1945 M.W.N. 738=58 L.W. 596=(1945) 2 M.L.J. 513.

-S. 2 (b)—Acceptance—Silence.

Silence to a letter is not acceptance of the terms proposed. (Roberts, C.J. and Dunkley, J.) S. M. BHOLAT v. YOKOHAMA SPECIE BANK, LTD. 197 I.C. 890=14 R.R. 148=A.I.R. 1941 Rang. 270.

S. 2 (d)—Consideration—Forbearance to S. 2 (d)—Consideration—Forbearance to sue—Sufficiency—Agreement executed by husband to wife for payment of maintenance to ward off threatened suit by wife for maintenance—Wife forbearing to sue due to execution of agreement—Enforceability of agreement.

Forbearance to sue amounts to good consideration under the Contract Act. Where a wife was about to sue her husband in the Civil

was about to sue her husband in the Civil Court for maintenance, and the husband in order to avoid the suit executed a deed of agreement of maintenance in her favour and thereupon the wife forbore from instituting the suit because of the deed,

Held, that the forbearance to sue amounted to good consideration, and the deed was therefore supported by consideration and valid and enforceable. (Varma and Shearer, JJ.) RADHA RANI v. RAM DAS. 22 Pat.L. T. 278=194 I.C. 645=7 B.R. 815=1941 P.W.N. 511= 14 R.P. 14=A.I.R. 1941 Pat. 282.

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(d)—Consideration—Promise to 2 afford future personal service, if good consideration—Impossibility of enforcing specific performance, if renders contract bad.

There is nothing in S. 2 of the Contract Act to show that a promise to afford future personal service is not good consideration. In most cases where personal services are promised on the one side specific performance cannot be enforced from the other. Neither the mere fact that specific performance of such a contract cannot be enforced nor the mere fact that in the nature of things one of the promisors is bound to perform his part of the agreement first, renders the contract bad. So long as there is a promise coming from each side and each side promises a thing which can be done, and can legally be done there is consideration. (Madeley, J.) SRI MAHADEOJI v. BALDED PRASAD. 18 Luck. 647=15 R.O. 295=1942 O.A. 541=1942 O.W.N. 652=1942 A.W.R. (C.C.) 349=204 I.C. 253=A.I.R. 1943 Oudh 89.

-S. 2 (d)-Joint family business-Debts duc to a moncy-lender—Acknowledgment by a person newly admitted as partner—Fresh advances to partnership and reduction of rate of interest—Consideration—Liability of new partner for earlier debts on ground of novation.

M was taken in as a partner in a Joint Hindu

family business which was already indebted to a money lender in respect of the business, and on M's acknowledging the liability, fresh advances were made to the new partnership and the rate of interest also was reduced. In a suit for the recoery of the sums due,

Held, that there was sufficient consideration for M's undertaking to pay the firm's liabilities. Even assuming that the further loans and reduction of interest formed no consideration, the novation constituted by substituting the fresh partnership for the previous family liability was enough of itself to form a sufficient conside-Table 1 to form a sufficient consideration. (Lord Porter.) GOURI DUTT GAMESH LALL v. MADHO PRASAD, I.L.R. (1944) Kar. (P.C.) 85=208 I.C. 192=16 R.P.C. 100=48 C.W.N. 36=10 B.R. 149=56 L.W. 661=24 P.L.T. 314=1943 M.W.N. 737=A.I. R. 1943 P.C. 147=(1943) 2 M.L.J. 417 (P.C.).

—S. 6 (1) and (2)—Relative applicability
—Allotment of shares long after application—
Effect. RAMLALSAO v. K. B. M. E. R. MALAK
[See Q.D., 1936-'40, Vol. I, Col. 2174.] I.L.
R. (1941) Nag. 567.

-Ss. 11 and 25 (3)—Pronote in renewal of pronote executed during minority-Enforceability.

A subsequent ratification of a contract entered into by a minor cannot form a valid contract on which a suit can be maintained. Hence nothing could be recovered on a pronote which is in novation of a prior pronote which is entirely void, by reason of its having been executed during minority. (Gruer, J.) KISANLAL NANA KHANDUJI. 1941 N.L.J. 363.

S. 11—Scope—Minor—Agreement of partnership—Business carried on after attainment of majority—Subsequent dissolution by mutual consent—Suit for accounts by co-partner -Liability of ex-minor to account.

It is quite competent to a person emerging from a state of disability to take up and carry on transactions commenced while he was under disability in such a way as to bind himself as to the whole. The appellant entered into contract of partnership with the respondent who was a minor on 11th August, 1924, under which the appellant was to advance the necessary capital, and the profits and losses, after allowing interest on the appellant's advances, were to be shared equally between the appellant and the respondent. The latter attained majority within nine days of the agreement, and the business of the partnership was carried on for over ten years; on 15th January, 1935, the partnership was dissolved by mutual consent and the stock in trade of the creditors was divided between the two partners. The profits were divided for the first three years after taking accounts. The accounts were not, however, taken on dissolution in 1935. In April, 1937, the appellant sued for dissolution of the partnership, or in the alternative, for accounts and recovery of the amount found due to him. The respondent while admitting the agreement of partnership and its terms as well as the dissolution in 1935 pleaded that the agreement entered into by him in 1924 was void as he was then a minor.

Held, that though the original agreement was void, the relation was continued after the respondent attained majority and the business was carried on jointly by the parties, and the respondent had clearly so acted as to bind himself by the contract, although its terms had to be ascertrained by what passed when he was disabled from contracting and it would be grossly unjust if the respondent, after quietly carrying out fresh dealings from day to day for a period of ten years as a partner of the appellant and taken all the benefits from them, were allowed to turn round and disclaim everything he had done and refuse to render an account on the ground that when the dealings commenced at first his age was short of the age of majority by nine days. The new transactions made after those the void agreement, but fresh business conducted on terms which could be ascertained from that agreement. The appellant was therefore entitled to demand and obtain an account of the transactions made after the respondent became a major. (Lokur, J.) Maganlal Kishordas v. Ramanlal Hiralal. 210 I.C. 274=16 R.B. 198=45 Bom.L.R. 761=A.I. R. 1943 Bom. 362.

-S. 12-Unsoundness of mind-Onus-Shifting of.

The onus of proving insanity or unsoundness of mind is in the first place on the person who

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sanity to prove that the contract was made dur-J.) Mohanlal v. Vinayar. I.L.R. (1941) Nag. 236=14 R.N. 121=196 I.C. 660=1941 N.L.J. 287=A.I.R. 1941 Nag. 251.

-S. 12-Unsoundness of mind-Test. For the purposes of S. 12 of the Contract Act, the test of unsoundness of mind is whether the person is incapable of understanding the business concerned and its implications and mere weakness of mind is not sufficient. (Pollock, J.) KANHAIYALAL v. HARSING. I.L.R. 1944 Nag. 698=219 I.C. 113=18 R.N. 23=1944 N.L.J. 212=A.I.R. 1944 Nag. 232.

-S. 14-Consent, when free. Per Pal, J.:-Consent is free when the activity of man by which it is effected works withobstacles to impede its exercise. The obstacles are named in S. 14 of the Contract Act. (Syed Nasim Ali and Pal, JJ.) London And Lancashire Insurance Co., Ltd. v. Benov Krishna Mitra. 220 I.C. 379=78 C.L.J. 129=A.I.R. 1945 Cal. 218.

S. 15—Coercion, when may be pleaded. Per Pal, J.:—Coercion can be pleaded only where the end arrived at was achieved by the use of something in the nature of unlawful force, or the threat of unlawful force, against party. (Syed Nasim Ali and Pal, JJ.) London And Lancashire Insurance Co., Ltd. v. Benoy Krishna Mitra. 220 I.C. 379=78 C.L.J. 129=A.I.R. 1945 Cal. 218.

—S. 16—Presumption of undue influence— Existence of relationship of landlord and tenant,

if gives rise to.

Per Sathe, A.M.—A presmption of undue influence is not warranted by the mere fact of the existence of the relationship of landlord and tenant between the parties to a transaction. Before sch a presumption could arise there must be some positive evidence to show that the Zamindar exercised some undue influence on the tenant. (Shirreff, S.M. and Sathe, J.M.) Har-kesh v. Majlis. 1942 O.W.N. (B.R.) 27 =1942 O.A. (Supp.) 25=1942 A.W.R. (Rev.) 25=1942 R.D. 43=1942 A.L.J. (Supp.) 4.

-S. 16—Undue influence—Presumption of -Mortgage by wife of stridhanam property to secure husband's debts-Inference of undue influence—Effect on third party taking benefit.
Where a mortgage of her "stridhanam" pro-

perty is executed by a wife as security for the debts of her husband who is shown to be heavily involved, and the circumstances show that the wife knew nothing of the nature of the transaction and simply did as she was told by her husband (who has been managing her property always) and signed whatever document she was asked to execute, a presumption that she is acting under the influence of her husband is justialleges it, the normal presumption being of sanity. But where there is sufficient evidence to discharge that primary burden then the burden shifts to the person who alleges his

other; it will arise in any case in which the facts show that the circumstances are such that influence can fairly be inferred. It is not necessary to decide whether there was any actual fraud by the husband; it is enough to show that the wife was acting under the influence of her husband and not as a free agent. A third party benefiting by a transaction and having notice of the facts which raise the presumption is in no the facts which raise the presumption is in no better position than the person who exercises the influence, (Lord Goddard.) TUNGABAI BHRATAR 2! YESHVANT DINKAR, 49 C.W.N. 55=57 L.W. 605=1944 M.W.N. 664=A.I. R. 1945 (P.C.) 8=71 I.A. 184=I.L.R. (1945) Bom. 189=47 P.L.R. 27=1945 A.L. J. 31=47 Bom.L.R. 242=220 I.C. 362= (1944) 2 M.L.J. 350 (P.C.)

-S. 16-Undue influence, when may arise -Contract procured by threat of prosecution. Per Pal, J.-Undue influence may exist where a promise is extracted by a threat to prosecute certain person unless the promise is given. It is not necessary that there should be any direct threat. It may be enough if the undertaking is given owing to a desire to prevent a prosecution, and that desire is known to those to whom the undertaking is given. Undue influence usually arises in contracts made between relatives or persons in a fiduciary position. But even as between strangers between whom there exists no fiduciary relation certain forms of coercion, oppression, or compulsion may amount to undue influence invalidating a contract. Where the instrument of coercion is the doing or threaten-ing of wilfully illegal act of any description, it retains the name of coercion in the Indian statute. But even though the instrument of coercion is not thus in itself illegal as in the case of a threat of prosecution, it may amount to undue influence and the enforcement of a contract so procured may nevertheless be held, in appropriate cases, to be contrary to public policy. (Syed Nasim Ali and Pal, JJ.)
London and Lancashire Insurance Co., Ltd. v. Benoy Krishna Mitra. 220 I.C. 379=78
C.L.J. 129=A.I.R. 1945 Cal. 218.

dominate will of another—Circumstances—Undue influence-Onus.

Where the donor was a very old man whose vision was defective and whose sole companion in life was lying dangerously ill when the deed of gift was executed, the onus is on the donee to prove that the gift was not induced by un-due influence inasmuch as the donee was in a position to dominate the will of donor within the meaning of S. 16 (2) (b), Contract Act. (Mathur, J.) Tota Ram v. Lokman. 1942 (Mathur, J.) A.L.W. 666.

-S. 19—Coercion and undue influence— One of the parties being under criminal prosecution.

Where one of the parties to an agreement is under a criminal liability for which he is being

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was any undue influence or coercion. (Allsop, J.) RAM KHELAWAN 2'. BHAGWAN DASS. 1943 A.L.W. 329.

-S. 19-Contract treated as voidable by one party at option—Exercise of option—Right to enforce contract afterwards as subsisting one. Where a party to a contract treats it as void-

able at his option and exercises his option, he cannot go back afterwards to the contract and seek to enforce it. When he not only states clearly that he treats the document incorporating the agreement in question as void but also proceeds on that footing to make his demands on the other party, though the latter does not admit that the former could do so, and the former party does not at any time give up the attitude taken by him, he cannot afterwards be permitted to enforce the agreement as a subsisting contract. (Lobo and Tyabji, JJ.) PREMI DAMODAR v. L. V. GOVINDJI & Co. I.L.R. (1943) Kar. 49=211 I.C. 162=16 R.S. 162 =A.I.R. 1943 Sind 197.

19, Exception—Applicability—Con-

tract containing defeasance clause.

Per Edgley, J.—The exception to S. 19 of the Contract Act does not apply to a contract which contains within itself a defeasance clause. If the conditions demanded by that clause have been fulfilled, the contract can be avoided unless the right to avoid has been waived. (Deraching Co. 1974) byshird, C.J. and Edgley, J.) Western Inela Life Insurance Co., Ltd. v. Asima Sarkar I.L.R. (1942) 1 Cal. 100=203 I.C. 548=46 C.W.N. 759=15 R.C. 442=A.I.R. 1942 Cal. 412.

-S. 19-A-Contract procured by undue influence-Election by promisor-Exercise of right Effect of.

When a contract is procured by undue influence it is only a voidable one and consequently this only gives the person under undue influence a right of choice or election. Such a right, once exercised, is exhausted. So, if by notice expressly given or implied by conduct, the promisor elects to affirm, he can never afterwards claim to avoid; similarly if he has once elected to avoid, he can never afterwards be allowed to affirm in his own interests. There is no locus penitentiae in either case. (Pal, J.) Kunja La.
v. Haralal. 204 I.C. 385=15 R.C. 516=46
C.W.N. 947=A.I.R. 1943 Cal. 162.

-S. 20—Contract—Executant not knowing nature of deed-Contract, if void or voidable. Where a person is induced to execute a deed under the belief that he is signing some other instrument of a different nature, the transaction is void and not only voidable. (Hasan, J.) Mus-R. J. & K. 23.

-Ss. 20 and 21-Scope-Money paid under mistake—Low as to—English low—Application of The Indian Contract Act, though it deals with the effect of mistakes of fact and law upon a prosecuted, it cannot be said from that that there | contract, has no express provision relating to the

effect of payment made under such mistakes. The law relating to such matters is the same in India as in England. Money paid under a mistake of law cannot be recovered in an action for money had and received and neither can moneys so paid be set off against money due from the person who made the payments unless there is a special equity. (Harries, C.J. and Manohar Lall, J.) SHIVA PRASAD SINGH v. SRIS CHANDRA NANDI. 22 Pat. 220=210 I.C. 426=16 R.P. 147=10 B. R. 259=A.I.R. 1943 Pat. 327.

———S. 23—Abkari license—Partnership in respect of—Legality—Tender by one partner on behalf of partnership—License in name of such partner only—Suit for dissolution of partnership—Maintainability—Madras Abkari Act, S. 15.

On 23-8-1937, the Collector of Madras called for tenders in respect of toddy shops in Madras for the year commencing on 1—10—1937, and the plaintiff who had entered into a partnership with the defendant prior to 23-8-1937, submitted a tender on behalf of the partnership but in his own name. He had informed the secretary to Board of Revenue of the partnership and the revenue authorities were fully aware of the arrangement at all material dates. On 31-8-1937, the tender was accepted and on 2-9-1937 formal notice of the partnership was given by the plaintiff to the Commissioner of Excise, the plaintiff stating that the shops would remain in his name. The defendant having objected to the issue of the licenses to the plaintiff alone, the plaintiff, on 11-9-1937, wrote to the Collector asking that the licenses for the shops should be issued in the joint names of the plaintiff and defendant ("J. D. Italia and D. Cowasjee") or in the name of "J. D. Italia & Co."; whichever the Collector might think fit. On 24—9—1937, pending deficient on the recommendation of th ing decision on the question of the issue of licenses, the Collector issued a temporary license in the name of the plaintiff, and on 20—10—1937, the plaintiff again wrote asking that the licenses should be issued in the joint names of himself and the defendant. On 10-3-1938, the Collector replied that the request could not be granted. The plaintiff who had made a full disclosure of the position before his tender was accepted asked for a reconsideration of this decision. 11-4-1938, the Collector wrote inquiring whether the plaintiff was prepared to register a company "Italia & Co.," with himself and Mr. D. Cowasji as partners and with himself authorised to act in the name of the company." The Collector, though he used the word "company" was obviously inquiring whether the plaintiff was prepared to register a partnership under the Partnership Act. There was delay as the plaintiff had to correspond with the defendant who was in Bombay. On 30—4—1938, the Collector called for a reply within a week, adding that otherwise the licenses would be issued in the plaintiff's name only. The plaintiff's request for time till 1-6-1938 was refused, and on 18-5-1938, the Collector wrote to the plaintiff informing him that the licenses of the shops wold be issued in his name only and that he should produce security to the extent of ment not to apply for restoration of possession Rs. 15,000 in the place of the Government pro- under S. 35, U.P. Encumbered Estates Act—

## CONTRACT ACT (1872), S. 23.

missory notes belonging to the defendant which had been deposited as part of the security. The defendant was not agreeable to the partnership being registered and the plaintiff being authorised to represent it, and wanted to avoid his agreement with the plaintiff. The defendant was controlling the management of the shops from 1—2—1938 to 19—6—1938 and was contributing his share of the Funds required for the business till 13—7—1938. Throughout the year licenses were issued in only temporary plaintiff's name, which were being renewed every fortnight. Thus up to 18-5-1938, the temporary licenses were intended to apply to plaintiff though issued in the plaintiff's name, and up to that date the revenue authorities were agreeable to the business being carried on in partnership and it was only when the partners refused to follow the suggestion of the Collector that partnership should be registered and the plaintiff authorised to represent it that they decided they would recognise only the plaintiff. The plaintiff sued for a declaration that the partnership between him and the defendant was dissolved on 30—9—1938, and for accounts of the partnership from 1—10—1937 to 30—9—1938. The defendant pleaded that the partnership was illegal and that therefore the suit was not maintainable.

Held, that the partnership would have to be declared unlawful ab initio if a full disclosure of the position had not been made to the revenue authorities. But as, until 18-5-1938, the revenue authorities had indicated no objection to the business being carried on in partnership it could not be held that the partnership before 18—5—1938 was an unlawful one; however, after that date the partnership was illegal, as it was void under S. 23 of the Contract Act, and in the circumstances, therefore, the plaintiff would be entitled only to an account up to 18-5-1938.

Quaerc: Whether, when a partnership is entered into before the auction of toddy shops and one of the partners is deputed to bid for and obtain a license in his own name on behalf of the partnership, the partnership would be a

lawful one?

Held, further, that there was nothing in the Madras Abkari Act or in the rules thereunder with regard to the sale of Abkari privileges to prevent a firm from holding a license. (Leach. C.J. and Lakshmana Rao, J.) J.D. ITALIA v. Cowasji. I.L.R. (1944) Mad. 697=218 I. C. 330=18 R.M. 30=57 L.W. 93=1944 M. W.N. 87=A.I.R. 1944 Mad. 295=(1944) 1 M.L.J. 97.

\_\_\_\_\_S. 23—Abkari sale—Bidder entering into partnership with another after sale and before grant of licence in respect of running of business of sale of toddy—Legality. Narasim-HALU NAIDU v. NAGA REDDY. [See Q. D., 1936-'40, Vol. I, Col. 2189.] 193 I.C. 827=13 R.N. 721=A.I.R. 1941 Mad. 64.

-S. 23-Acts defeating statute-Agree-

Legality. See U. P. ENCUMBERED ESTATES ACT, S. 35 AND CONTRACT ACT, S. 23. 1940 O.W. N. 1246.

S. 23—Agreement not to enhance rent in the case of a permanent lease—Validity.

There is nothing contrary to law in an agree-ment between a permanent lessee and his lessor that there should be no enhancement of rent. It cannot be said to be illegal. There is no prohibition against such a condition as nonenhancement of rent and it can be pleaded in bar of a suit for enhancement. (Ross, A.M.) Chhannoo Lal v. Ram Ghulam Bind. 1943 R.D. 512=1943 A.W.R. (Rev.) 278.

-S. 23-Agreement to compound offences -Complaint disclosing non-compoundable offences -Sworn statement disclosing only compoundable offences and summons issued only for those offences-Agreement to compound such offences -Validity.

The object of a sworn statement is to see whether there is any justification for taking action in respect of all offences disclosed in the complaint as complaints are often exaggerated. Where the complaint disclosed non-compoundable offences under Ss. 147 and 148 of the I. P. Code but the sworn statements disclosed only compoundable offences under Ss. 147 and 148 of the I. P. Code and summonses were issued only for those offences and there was an agreement between the parties to compound those offences.

Held, that the validity of the agreement could not be impugned as the parties were at perfect liberty to compound compoundable offences. The real object of the agreement was not to stifle non-compoundable offences. (Somayya, J.) Kalianna Goundan v. Settia Goundan. 1945 M.W.N. 697=58 L.W. 605=A.I.R. 1946 Mad. 80=(1945) 2 M.L.J. 468.

23—Applicability—Agreement

agent exceeding his powers.

Where a statute prescribes no penalties an agreement in breach of a condition imposed under powers given by it does not fall under S. 23, Contract Act, and where a condition is imposed under statute purely for administrative purposes an agreement in violation thereof is not void. Hence where a Cantonment Board agrees to confer on a person 'old grant' rights in land in the Cantonment area there is nothing unlawful about it, but only a doubt as to whether the Board had the power to do so. It is really a case of an agent exceeding his authority and the principal not repudiating his action. Even if there is ground for considering whether S. 23 is applicable on the view that the agent's powers were circumscribed by law and that he acted ultra vires, the section would not be applicable because the consideration or object of the cable because the consideration or object of the agreement is neither forbidden by any statute hor is of such a nature that, if permitted, it would defeat the provisions of any statute (Bennett and Agarwal, JI.) TAJAMMUL HUSAIN v. THE CANTONMENT BOARD, LUCKNOW. 203 I.C. 555=1942 O.A. 558=15 R.O. 216=1942 A.W.R. (C.C.) 353=1942 O.W.N. 699=A.I.R. 1943 Oudh 99.

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23—Applicability—Contract to sell -S. liquor on credit-If void-Bombay Abkari Art -Scope and object.

The supply of intoxicating liquor on credit is forbidden under the Bombay Abkari Act and Rules thereunder; hence a contract for the supply of liquor on credit is illegal or void coming within the mischief of S. 23 of the Contract Act. The Abkari Act has a dual purpose. Its primary object might be fiscal or administrative, but it also has a social purpose The prevention of the sale of intoxicating liquor on credit has a social or moral purpose, and any contract made in contravention of such a prohibition is clearly a contract which would defeat the provisions of the law within the meaning of S. 23, Contract Act. It makes no difference that the prohibition is contained in a statutory rule and not in the statute itself (Davis, C.J. and Weston, J.) Sugnomal v. Moosa Issa, I.L.R. (1943) Kar. 350=209 I. C. 528=16 R.S. 100=A.I.R. 1943 Sind 219.

23—Applicability—Contract violating Government Servants Conduct Rules-Validity

The fact that a contract was made in breach of the Government Servants Conduct Rules, would not invalidate the contract. Those rules appear prima facie rules of conduct and would not render such a contract invalid but only render the person who commits a breach of the rules liable to departmental action. (Yorke, J.) MUJTABA HUSAIN v. RAGHUNATH PRASAD, 1943 A.L.W. 537.

S. 23—Applicability—Device to avoid property being taken over by Court of Wards-Legality.

It is an established principle that the Court will not lend its aid to enforce a contract entered into with a view to carry into effect anything which is prohibited by law. Prima facie, there is nothing illegal about trying to avoid or successfully avoiding having one's property taken under the superintendence of the Court of Wards so long as the device adopted is not illegal in itself. There is nothing in the adopted in the device a tion of such a device which would make it invalid in law. The purpose does not appear to be an unlawful one. (Yorke, J.) Huzur Ara Begam v. Deputy Commissioner, Gonda. 196 I.C. 787=1941 O.A. 621=1941 O.W.N. 906=1941 A.W.R. (C.C.) 274=1941 O.L. R. 764=A.I.R. 1941 Oudh 529.

—S. 23—Champerty—Sale of property to finance litigation—If amounts to.

Where A contracts with B that B will finance a litigation and that if A wins that litigation so as to be in a position to complete a transfer agreed to between A and B, A will complete the transfer, it is not champertous. It is a case in which A is selling property in order to raise money to finance litigation and the agreement is enforceable. (Stone, C.J.) HIRALAL V. MUNSHI RAHMANALI. 1942 N.L.J. 340.

-S. 23—Compromise—Agreement not to claim exproprietary rights on transfer-If unlawful.

Where in a compromise, one of the parties agrees not to claim ex-proprietary rights on a transfer by him, the agreement, is neither forbidden by, nor defeats the provisions of S. 7-A (5) of the Oudh Rent Act and hence is neither unlawful nor would it defeat the provisions of any law. (Thomas, C.J. and Agarwal, J.) Lat. BHAGWAT SINGH v. HARI KISHEN DAS. 17 Luck. 249=197 I.C. 167=14 R.O. 268=1941 O.A. 865=1941 A.W.R. (Rev.) 949=1941 O.W.N. 1138=A.I.R. 1942 Oudh 1.

S. 23-Fraudulent perpetual lease by widow to defeat reversioners—If can confer ordinary tenancy rights, at the least. See Lease—Perpetual lease by widow. 1941 A.W.R. (Rev.) 858.

-S. 23—Immoral consideration — Past illicit cohabitation-Promissory note to woman in consideration of past illicit intercourse—Enforceability.

The weight of authority in the Madras High Court is in favour of the view that past illicit co-habitation may validly support a promise to pay a sum of money. Such a consideration is not regarded as immoral though future illicit co-habitation will not support a promise, because it is immoral consideration. A promissory note executed in favour of a woman by a man in consideration of past illicit intercourse is not therefore void and unenforceable. (Kunhi DHANAMMAL. 209 I.C. 381=16 R.M. 309=56 L.W. 24=1943 M.W.N. 33=A.I.R. 1943 Mad. 253=(1943) 1 M.L.J. 56.

-S. 23—Immoral contract—Public Policy Promise in consideration of past co-habitation

A promise made in consideration of past cohabitation is enforceable. Such a promise is not rendered invalid by the mere fact that the parties contemplated a continuance of the cohabitation so long as that is not the consideration for the promise. The promise made in consderation of past cohabitation cannot be regarded as void as being immoral or opposed to public policy. (Venkataramana Rao, C.J. and Medapa, J.) Rudrappa v. Sanjeevamma. 23 Mys.L.J. 82=50 Mys.H.C.R. 86.

**-S. 23**-Knock out agreement between bidders at auction-Validity.

An agreement between intending bidders at an auction to form a knock out ring and share the profits resulting therefrom, is opposed to public PARDUMAN CHAND v. KASHMIRA SINGH. I.L. R. (1943) Lah. 837=206 I.C. 496=15 R.L. 330=45 P.L.R. 119=A.I.R. 1943 Lah. 100.

-S. 23—Public policy—Agreement inter-

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of State is to be the real owner of the lorries plying and receive the profits of the contract obtained by another, is entirely contrary to public policy and is void. Such an agreement is likely to lead to a condition of affairs which will seriously interfere with the proper maintenance of a service vital and necessary to the public. Further it involves deceit of the Secretary of State in respect of a matter in which the public as a whole are vitally interested. (Niyogi and Digby, JJ.) BHURMAL v. GODURAM. I.L.R. (1943) Nag. 565=209 I.C. 474=16 R.N. 127=1943 N.L.J. 345=A.I.R. 1943 Nag. 260.

S. 23—Public policy—Burden of proof—Plea that deed is opposed to public policy—Onus. See Deed—Validity. (1941) 1 M.L.J. 807.

——S. 23—Public policy—Combination of persons—Agreement not to bid against one another at public auction in respect of Government tolls—Legality—If opposed to public policy.

BHAGWANT GENUJ v. GANGABISAN RAMGOPAL.

[See Q.D., 1936-'40, Vol. I, Col. 2191.] I.L.R.

(1941) Bom. 71=13 R.B. 202=191 I.C. 806.

S. 23—Public policy—Marriage prohibited by Child Marriage Restraint Act performed in Native State to evade Act-Decree for payment of money towards marriage expenses— Enforceability in British India—Bar of public Dolicy. Anandaramayya v. Subbayya. [See Q.D., 1936'40. Vol. I, Col. 2192.] 193 I.C. 112=13 R.M. 618=(1940) 2 M.L.J. 353.

-S. 23—Public policy—Promissory note by Hindu to bridegroom for amount promised to be paid in consideration of his marrying the former's daughter—Enforceability. See Hindu Law—Marriage. (1945) 1 M.L.J. 145.

Salary below attachable limit—Agreement between public servant and execution creditor for deducting portion from salary—Enforceability. See C. P. CODE O. 21, R. 148. 43 Bom.L.R.

-S. 23-Promissory note in name of patwari who is mere benamidar-Validity-C. P. Patwari Rules, R. 2 (g) (ii).

A promissory note executed in the name of a patwari who is prohibited by the patwari rules from carrying on money-lending business is not void under S. 23 of the Contract Act when the patwari is a mere benamidar for his wife who advanced the money and he did no more than lend his name to the transaction for her accommodation. (Bobde, J.) INDAR SINGH v. RAMNARAYAN. I.L.R. (1944) Nag. 645=1944 N.L.J. 448=A.I.R. 1944 Nag. 325.

fering with service vital to public and involving deceit of Secretary of State—Validity.

An agreement by which a person on failing to obtain a postal contract from the Secretary Act, Ss. 57 and 89 and R. 143. 22 Pat. 334.

S. 23—Public policy—Maintenance suit by wife against husband—Compromise—Provision that wife should live with husband for a year and not execute decree during such period-Wife given right to execute decree if husband failed to maintain her or neglect to treat her properly—If opposed to public policy. See Decree—Executability. (1943) 2 M.L.J.

——**S**. 23—Public policy—Maintenance suit by wife against husband-Compromise-Agreement to live together-Provision for payment of maintenance in case of disagreement and sepa-ration in future—If void—Enforceability by wife in case of separation—Plea of invalidity in execution—Sustainability.

Where a suit for maintenance by a wife against her husband is compromised and the parties agree to live together and in case of future disagreement between them, the husband agrees to pay a certain rate of maintenance to the wife, if, after living together for some time, the parties fall out and the wife begins to live separately owing to disagreement, she is entitled to enforce execution of the compromise decree. It cannot be said that the agreement or compromise is void as being opposed to public policy on the ground merely that it contains a provision for future separation. The agreement being one in furtherance of the husband and wife living together and for the purpose of effecting reconciliation between parties then living apart, it is valid and enforceable and not void. Nor can the plea that the compromise is opposed to public policy be raised in execution proceedings. The case is not one of inherent want of jurisdiction but one where the question of jurisdiction is to be decided by the Court itself. The decision, though wrong, is one which the Court is competent to give and will operate as res judicata. The Court recording the compromise having power to decide whether it was lawful, its decision is binding and competent and the executing Court cannot go behind it. (Kuppuswami Ayyar, J.) Sup-BAYYA 7. GOVINDAMMA. 57 L.W. 485=1944 M.W.N. 573=A.I.R. 1945 Mad. 36= (1944) 2 M.L.J. 210.

-S. 23—Public policy—Moncy receivéd in consideration of marriage.

Receiving consideration by those who arrange marriages in India when the money received is intended to benefit those persons and not for the expenses of the ceremony or for the benefit of the bride or bridegroom, is against public policy and falls within the mischief struck at by S. 23 of the Contract Act. (Grille, C.J. and Sen, J.)
ALSIDAS PANNALAL V. PUNAM CHAND. I.L.R.
(1944) Nag. 535=214 I.C. 168=17 R.N. 31
=1944 N.L.J. 124=A.I.R. 1944 Nag. 159.

—S. 23—Scope and applicability—Mortgage to pay debt incurred for bribing an officer-If can be impeached. Kashinath v. Bapurao. [See Q.D., 1936-'40, Vol. I, Col. 3319.] 191 I.C. 241 =13 R.N. 168.

# CONTRACT ACT (1872), S. 23.

-S. 23-Scope and applicability-Pronote in respect of arrears of rent the recovery of which was later on prohibited.

S. 23, Contract Act covers cases in which the consideration or object of an agreement is forbidden by law, at the time when the agreement is entered into or is of such a nature that, if permitted it would defeat the provisions of any existing statute. The section could not possibly be interpreted to render void an agreement which was perfectly lawful when it was entered into. A pronote in respect of arrears of rent the recovery of which was later on prohibited by U.P. Act XVIII of 1939 is not void. (Yorke, J.) SHYAM SUNDER 2. SHIRI NIRANJAN GASAYAN NAGA. 1943. A.L.W. 87.

S. 23—Scope—Contract seeking to defeat provisions of bankruptcy law and to prevent cauality of distribution among creditors-If illegal or invalid as between parties-Buyer and scller—Buyer executing trust receipt over goods in favour of seller—Trustees for creditors of buyer—If bound—Right to repudiate.

Where a debtor transfers property to one creditor with a view to give a fraudulent preference to that creditor over others, there is nothing illegal, though in the event of bankruptcy supervening, the transaction would be invalid as against the assignee in bankruptcy. When the object of the transaction is to defeat the equality of distribution among all the creditors, required by the hankruptcy law, it can be avoided in the even of a bankruptcy, but as between the parties to the transaction, they are bound by it. plaintiff, a merchant of Calcutta, sold goods to the 1st defendant, a firm in Madras, and despatched them by train. The railway receipts were sent to a Bank at Calcutta with instructions to hand them over to the first defendant at Madras through the Madras Branch of the Bank on the 1st defendant accepting a bill of exchange drawn by the plaintiff on the 1st defendant for the price, freight, etc., payable at 60 days after sight and on the 1st defendant further executing a trust receipt. The hill of exchange was accepted by the 1st defendant and handed over to the Madras Branch of the Bank along with a trust receipt executed by him in favour of the Bank. The railway receipts and other documents were handed over to the first defendant. The bill of exchange was not, however, honoured on the due date. Later on some payments were made. The plaintiff sued for the balance due, claiming that he was entitled to a first charge over the goods so long as they were unsold by the first defendant and on the sale proceeds thereof in case the first defendant sold them, alleging that the Bank was only an agent for collection and that he was entitled to the benefit of the trust receipt given to the bank by the first defendant. Defendants 2 and 3, who were the trustees for the creditors of the first defendant under a deed of trust executed. cuted by him denied the plaintiff's claim to a first charge over the assets in their hands. They also pleaded that the trust receipt was invalid. Held, (1) that the mere fact that the object

of the transaction, trust receipt, was to prevent

equality of distribution among the creditors was not a ground for holding that the contract itself was illegal or that it was not binding upon the seller or upon voluntary transferees from him, and that except as against an assignee in bankruptcy or against transferees for value, the contract was valid as between the buyer and seller and the buyer could not repudiate the contract as illegal; (2) that defendants 2° and 3 could claim no higher position for themselves, though they were trustees for the general body of creditors and there was no reason for holding that they were not bound by it. (Somayya, J.) FAZAL ELLAHI v. RAM MOHAN & CO. A.I.R. 1944 Mad. 403= (1944) 1 M.L.J. 371.

——Ss. 23 and 24—Scope—Licence to ply motor bus—Transfer of right by licensee—Failure to obtain previous permission of District Magistrate—Suit on basis of transfer—Maintainability—Agreement—If void. See Mysore Motor Vehicles Rules. 19 Mys.L.J. 262.

Per Pal, J.—Embezzlement is a crime as also a tort and so far as the tortious liability involved in it is concerned, the remedy of the injured is an action for unliquidated damages. Embezzlement may also create a relation within the confines of what may be said to be quasi contract. When embezzlement takes place, the injured party may waive the tort and seek his remedy in an action based on quasi contract for "money had and received." No party is bound to sue in tort, when by converting the action into one of quasi contract he does not prejudice the tort-feasor. If the tort-feasor agrees to give the injured party a promissory note and a collateral security for the amounts embezzled by him and the consideration for the agreement is the undertaking given by the latter not to sue the former in damages or for money had and received, the agreement is valid and is for a perfectly valid consideration. If, however, the consideration for the agreement is the undertaking given by the latter not to prosecute the former criminally, the agreement is void as the consideration is illegal, the offence being non-compoundable and its composition being opposed to public policy. An undertaking not to prosecute cannot however be inferred from the mere fact that the injured party held out threats of prosecution. Where there is a debt actually due, the mere use of such threats, though followed by an abstaining from prosecution, will not vitiate the transaction. (Syed Nasim Ali and Pal, JJ.) London and Lancashire Insurance Co., Ltd. v. Benoy Krishna Mitra. 220 I.C. 379=78 C.L.J. 129=A.I.R. 1945 Cal. 218.

not to file suit in consideration of forbearance to prosecute for forgery—Legality—If bar to suit. Karnidan Sarda v. Sailaja Kanta

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MITRA. [See Q.D., 1936-'40, Vol. I, Col. 3320]. 192 I.C. 187=13 R.P. 416=7 B.R. 330.

S. 23— Stifling prosecution—Agreement to pay for composition of compoundable offence. Certain criminal cases are compoundable according to the Indian Criminal Law and it follows that an agreement to exonerate an accused person on receipt of compensation cannot in itself be invalid. (Allsop, J.) RAM KHELAWAN v. BHAGWAN DAS. 1943 A.L.W. 329.

———S. 23—Stifling prosecution—Agreement when illegal or void—Test—Express or implied agreement not to prosecute—Necessity.

There can be no doubt that if even a part of the consideration for an agreement is shown to be the stifling of a non-compoundable offence, the agreement must be held to be void. But that does not mean that the possibility of a prosecution, or the existence of a threat to prosecute or even an actual prosecution make it necessarily impossible for the possible or actual prosecutor and the possible or actual accused and others to enter into a bona fide legal transaction regarding the dispute the consideration or object of which is not to stifle a prosecution. There must be an agreement, either express or necessarily implied, not to prosecute, to make the agreement void or illegal. (Loba and Tyabji, II.) PREMJI DAMODAR v. GOVINDJI & Co. I.L.R. (1943) Kar. 49=211 I.C. 162=16 R.S. 162=A.I.R. 1943 Sind 197.

——S. 23—Stiffing prosecution—Agreement when void—Surety how affected.

An agreement is void under S. 23 of the Contract Act if the entire consideration or a portion thereof was the agreement not to prosecute or to drop a prosecution which had already been started. This will apply equally to the case of a guarantee but where no portion of the consideration can be traced to an agreement not to prosecute criminally or not to withdraw a pending criminal prosecution, the surety cannot escape liability on the ground of an unlawful consideration. (Ghulam Hassan and Agarwal, JJ.) HAR NARAIN KAPUR v. RAM SWARUP NIGAM. 195 I.C. 253=1941 O.W.N. 391=1941 O.L.R. 563=1941 A.L.W. 785=14 R.O. 65=1941 A.W.R. (C.C.) 251=1941 O.A. 578=A.I.R. 1941 Oudh 593.

———S. 23—Stifling prosecution—Agreement with reference to compoundable offence—Validity.

An agreement arrived at between the complainant or the prosecutor on the one hand and the accused or another person closely interested in the welfare of the accused on the other in the case of a compoundable offence or of an offence which may be compounded with the leave of the Court, is not against public policy and accordingly is not void and is valid. (Myo Bu, J.) Lewai Khan v. Goolreze Khan. 1941 Rang. L.R. 316=197 I.C. 25=14 R.R. 102=A.I.R. 1941 Rang. 231.

Threat of prosecution—Execution—Cheating— Sorty note by strangers jointly with offender— Consideration—If lawful — Enforceability of

The 1st defendant had obtained loans from the plaintiff by perpetrating a gross fraud on him, involving the offence of cheating punishable under S. 420, I. P. Code. On discovery of the fraud the plaintiff threatened to prosecute the 1st defendant, but he was induced to refrain from taking this step in consideration of the 2nd and 3rd defendants executing jointly with the 1st defendant a promissory note in favour of the plaintiff. In a suit on the promissory note,

Was actually launched by the plaintiff, the consideration for the promissory note so far as the 2nd and 3rd defendants were concerned was manifestly unlawful and therefore the note could not be enforced against them. (Leach, C.J. and Lakshmana Rao, J.) VENKATASUBBA RAO v. CHANDANMAL. I.L.R. (1943) Mad. 183=15 R.M. 639=203 I.C. 272=1942 M. W.N. 487=44 Cr.L.J. 29=55 L.W. 493=A.I.R. 1942 Mad. 652 (1)=(1942) 2 M. L.J. 191.

able offence—Promissory note in consideration of abstention from prosecution—If void.

In the case of offences falling under S. 345 (2), Cr. P. Code, the matter may be lawfully compounded before it goes to Court, and a promissory note executed or taken in consideration therefor is not void under S. 23, Contract Act, and is therefore enforceable. (Somayya, J.) CHANDANMAL v. RAMAKRISHNAYYA. 201 I.C. 91 =43 Cr.L.J. 734=15 R.M. 327=54 L.W. 571=A.I.R. 1942 Mad. 173=(1941) 2 M. L.J. 827.

- S. 23—Stifling prosecution—Conviction for theft—Appeal—Agreement pending appeal not to contest appeal in consideration of accused paying certain sum on his success in appeal—Enforceability. Jacquidou v. Byramma. [See Q.D., 1936-'40, Vol. I. Col. 2195.] 199 I.C. 876=14 R.P. 635=8 B.R. 643=A.I.R. 1941 Pat. 349.
- S. 23—Stifling prosecution—Elements of agreement—Mortgage bond by wife as part of consideration for withdrawal of criminal proceedings against husband—Enforceability.

A contract whereby a proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue criminal proceedings for some alleged offence is an agreement to stifle prosecution falling under S. 23 of the Contract Act. Proof that there has actually been a crime committed is obviously unnecessary. But it is of course necessary that each party should understand that the one is making his promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting. Such agreements are from their very nature seldom set out on paper; like many other con-

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tracts they have to be inferred from the conduct of the parties after a survey of the whole circumstances. An agreement whereby a wife executes a mortgage bond of her property in discharge of debt due by her husband as part of the consideration for a promise by the husband's creditor to withdraw criminal proceedings against her husband is illegal and falls under S. 23 of the Contract Act, as there is an infringement of public policy. The fact that there was a debt really due by the husband is irrelevant when the agreement to abandon the prosecution is part of the consideration for payment of the debt. In most cases of this kind there is a debt or liability. Indeed if there were not a demand and receipt of money in consideration of refraining from or withholding a prosecution would apparently in itself be a crime. (Lord Athin.) Bhowantpur Banking Corporation, Ltd. v. Durgesh Nandini Dasi I.L.R. (1941) Kar. (P.C.) 141=74 C.L.J. 408=44 Bom.L.R. 1=1942 M.W.N. 1=I.L.R. (1942) 1 Cal. 1=23 Pat.L.T. 237=196 I.C. 463=14 R.P.C. 31=1941 O.A. 857=1941 A.W.R. (P.C.) 90=54 L.W. 529=1941 O.L.R. 715=46 C.W.N. 1=1941 A. L.J. 668=1941 P.W.N. 648=8 B.R. 73=A. I.R. 1941 P.C. 95=(1941) 2 M.L.J. 726 (P.C.).

——S. 23—Stifling prosecution — What amounts to—Test—Undertaking by complainent not to object to withdrawal of non-compoundable criminal case—Agreement giving rise to—Enforceability.

An agreement which consists of a promise to do some act directed towards the stifling of criminal proceedings in respect of a noncompoundable offence is against public policy and is therefore void and unenforceable in a Court of law. If the agreement is the outcome of an understanding that the promisee (complainant) should not object to the withdrawal of the prosecution in respect of a non-compoundable offence is against public policy. The fact that it is not within the power of the complainant to withdraw the prosecution or complaint himself makes no difference. To avoid an agreement as being against public policy, it is not enough that the motive which impelled the party undertaking the liability under the agreement was that a pending criminal case should be withdrawn. The test is whether it was an express or implied term of the bargain between the parties that a non-compoundable criminal case should not be proceeded with (Lokur, J.) Shrifad v. Sanikatta Co-operative Salf Sale Society. I.L.R. (1945) Bom. 208=46 Bom.L.R. 745=A.I.R. 1945

S. 23 Suicide, if opposed to public policy—Insurance covering risk by suicide—Validity.
Suicide is not an offence in India and is not against public policy by reason of its being a crime. Hence a policy of life insurance which covers such a risk is not on that ground opposed to public policy. (Misra and Madeley, JJ.) Scottish Union and the National

Insurance Company v. Raushan Jahan Begam. 20 Luck. 194=1945 O.A. (C.C.) 15=1945 A.W.R. (C.C.) 15=1945 O.W.N. 8=A.I.R. 1945 Oudh 152.

25—"Near relation"—Meaning—Requirements to constitute.

The words 'near relation' used in S. 25, Contract Act, cannot be construed as the same thing as 'a near relative'. The words 'near relation' must be taken in their ordinary and natural sense and it would be a question of fact to be decided in each case as to whether a particular relationship would satisfy the statute or not. The law does not insist either on the relationship being a blood relationship or the relationship of love and affection being mentioned in the document in question. (Bajpai and Dar, JJ.) JASOBA v. CHHANGAN LAL. 1943 A.L. W. 78.

-S. 25 (1)—Applicability—Agreement to pay maintenance to distant relative—Absence of consideration—Enforceability.

Where an agreement not supported by consideration but in writing registered provided for payment of Rs. 100 every year as maintenance to the plaintiff who was the defendant's fatherin-law's divided brother's wife, as it was impossible for her to maintain herself decently

otherwise, and she sought to enforce the same: Held, that the parties could not be said to stand in a near relation to each other within the meaning of S. 25 (1) of the Contract Act, and the agreement could not therefore be enforced. (Patanjali Sastri, J.) TARANATA BHATTA v. GOPALAKRISHNA MALLAYYA. 209 I.C. 92=16 R.M. 274=56 L.W. 311=1943 M.W.N. 425=A.I.R. 1943 Mad. 591= (1943) 1 M.T. I 422 (1943) 1 M.L.J. 422.

S. 25 (3)—Applicability—Agreement to pay time-barred debt, when not affected by S. 25 (3)—Mere implied promise to pay, if enough—Effect of express promise to pay interest on debt acknowledged.

S. 25 of the Contract Act only applies to contracts which are wholly without consideration and not to contracts which may be for inadequate consideration. Indeed under Expln. (2) of S. 25 inadequacy of consideration is not relevant unless it affects the question of free con-sent to contract. It is true that under S. 25 (3), Contract Act, an agreement to pay a timebarred debt is regarded as one without consideration but this sub-section only applies when a wholly gratuitous promise is made to pay a time-barred debt and not to those cases when a promise to pay a time-barred debt is made for some consideration though the consideration might be inadequate. When a new contract is made for a fresh consideration superseding the previous contract which had become barred by time but including it as a part consideration in the new contract, an action could be founded upon the new contract and it can be enforced in its

### CONTRACT ACT (1872), S. 25.

case of an agreement to pay a time-barred debt and an implied promise would satisfy the requirement of S. 25 (3). An express promise to quiterient of S. 25 (3). An express promise to pay interest on the debt acknowledged would reasonably include a promise for payment of principal also. (Bajpai and Dar, JJ.) Debt Prasad v. Bhagwati Prasad I. L. R. (1943) All. 171=206 I. C. 377=15 R.A. 516=1943 A. L. W. 291=1943 O. W. N. (H.C.) 183=1942 A. W. R. (H.C.) 382=1942 A. L. J. 656=A. I. R. 1943 All. 63.

-S. 25 (3)—Applicability—"By the person to be charged therewith"—Meaning of. Govinda Nair v. Achuthan Nair. [See Q.D., 1936-'40, Vol. I, Col. 2203.] 193 I.C. 399=13 R.M. 661.

S. 25 (3)—Applicability—Offer by debtor before Debt Conciliation Board undertaking to pay creditor seven annas in the rupee—Creditor not accepting offer-Right to found claim under S. 25 (3).

S. 25 (3) of the Contract Act is based on an agreement, but when there is no agreement, the section will not apply. Hence an offer by the before the Debt Conciliation Board, undertaking to pay a creditor seven annas in the rupee of the debt due to him, which the creditor does not accept, cannot be utilised to found a claim based on S. 25 (3) of the Contract Act. (Rajamannar, J.) VENKATAPPAYYA. V. VENKATAPPAYYA. 1945 M.W.N. 713=58 L.W. 618=A.I.R. 1946 Mad. 72=(1945) 2 M.L.J. 405.

-S. 25 (3)—Applicability—Requisites.

Unless a promise to pay is in writing it cannot fall within the purview of S. 25 (3) of the Contract Act. The implied promise to pay which is contained in all acknowledgments does not attract the provisions of S. 25 (3) because the promise to pay is not in writing. (Stone, C.J. and Clarke, J.) Shivjiram Dhannalal v. Gulabchand Kalooram. I.L.R. (1941) Nag. 144=194 I.C. 806=1940 N.L.J. 607=14 R. N. 14=A.I.R. 1941 Nag. 100.

——S. 25 (3)—Barred debt—Promise to pay Essentials of validity—Debtor if should know that the debt was already barred—Writing, if should purport itself to pay or describe consideration as past debt.

Though a barred debt may not be recoverable in a Court of law, yet, if by a fresh contract that debt is promised to be paid, then it would be a good consideration and the contract would be valid under S. 25 (3) of the Contract Act. It is not necessary for the creditor, in order to get the benefit of S. 25 (3), to show that the debtor knew when he promised to pay that the debt for the payment of which he was making a promise had become time-barred; nor is it necessary that the promise or contract itself must show that it was made for a past debt. There is nothing in the wording of S. 25 (3) to terms without raising any question about the acknowledgment of a time-barred debt. An in writing must be to pay a debt of which the express promise to pay is not necessary in the creditor might have enforced payment but for

the law of limitation. S. 25 (3) does not require that in the writing itself the consideration should be described as past debt, when in fact it was such past debt and known to the debtor as such. The conditions necessary to make it a promise within S. 25 (3) are that it should be in writing; be signed by the person to be charged therewith; and be a promise to pay wholly or in part a debt, of which the credit might have enforced payment but for the law for the limitation of suits. The writing itself need not purport to pay such a debt, if in fact the writing was passed for the payment of such debt. (Lobur, J.) Kasturchand Jiwaji v. Manekchand. 211 I.C. 421=16 R.B. 302=45 Bom.L.R. 837=A.I.R. 1943 Bom. 447.

S. 25 (3)—Construction—"Wholly or in part"—Express promise to pay a portion of barred debt—If gives cause of action to sue for whole debt. GOVINDA NAIR V. ACHUTHAN NAIR. [See Q.D. 1936-40, Vol. I, Col. 2205.] 193 I.C. 399=13 R.M. 661.

\_\_\_\_\_S. 25 (3)—Scope—Burred debt—Execution of mortgage in lieu thereof—If amounts

to promise to pay in writing.

There can be no doubt that in order to comply with the terms of S. 25 (3) of the Contract Act, there must be an express promise to pay a time barred debt. If there were two debts, one barred and the other not, the promise to pay the latter could not possibly be interpreted as a promise to pay the former. Similarly there is no reason why a promise to pay an imaginary debt be interpreted as a promise to pay an imaginary debt. The fact that in a mortgage there is a promise in writing to repay the consideration money and the consideration for the mortgage is part of a barred debt is not a sufficient compliance with the terms of the section. (Henderson, J.) Nur Hassein Serang v. Tamijuddin. 197 I.C. 495=14 R.C. 366 =A.I.R. 1941 Cal. 449.

- S. 25 (3) of the Contract Act makes a debt recoverable only when a certain form of acknowledgment is made as regards a time expired debt. It does not allow the institution of a subsequent suit, where a debt was held irrecoverable in an earlier suit owing to the minority of the debtor. (Davies.) Rupchand v. Gambira. 1940 A.M.L.J. 72.
- Express promise or may be implied. Govinda Nair v. Achuthan Nair. [See Q.D. 1936-'40, Vol. I, Col. 2206.] 193 I.C. 399=13 R.M. 661.
- S. 26—Scope of—Partial or indirect restraint on marriage if within—Provision in combromise between widows as to deprivation of roperty on re-marriage.

Though S. 26 of Contract Act is general in ts terms it is doubtful whether partial or in-

### CONTRACT ACT (1872), S. 28.

direct restraint on marriage is within its scope. A provision in a compromise between two widows whereby either of them would be divested of her share in her husband's property on her re-marrying is not void. Igbal Ahmad, C.J. and Dar, J.) RAO RANI v. GULAB RANI. I.L.R. (1942) All. 810=205 I.C. 249=15 R.A. 397=1942 A.W.R. (H.C.) 221=1942 A.L.W. 475=1942 A.L.J. 446=1942 O.A. (Supp.) 530 (2)=A.I.R. 1942 All. 351.

S. 27—Applicability—Agreement forbidding partner of dissolved firm from doing particular business anywhere, directly or indirectly, except at a particular place except as broker and except through other partners—Validity. See Partnership Act. S. 54. I.L.R. (1943) Kar. 49.

\_\_\_\_\_S. 27—Applicability—Partial restraint of trade.

There is nothing in the wording of S. 27 of the Contract Act to suggest that the principle stated therein does not apply when the restraint of trade or business is for a limited period only or is confined to a particular area. Such matters of partial restriction have effect only when the facts fall within the exception to the section. (Davis, C.J. and Weston, J.) Khemchand V. Dayaldas Bassarmal, I.L. R. 1942 Kar. 25=15 R.S. 8=201 I.C. 376=A.I.R. 1942 Sind 114.

——S. 27—Scope—Bare agreement in restraint of competition—Validity.

It is settled law that a bare agreement in restraint of competition cannot be upheld. Such an agreement can only be sustained when it is ancillary to some main transaction and is reasonably necessary in the interests of both parties in order to render that transaction effective and is consistent with the interests of the public. (Lobo and Tyabji, JJ.) Premyi Damodar v. Govindi & Co. I.L.R. (1943) Kar. 49=211 I.C. 162=16 R.S. 162=A.I.R. 1943 Sind 197.

S. 28—Agreement between parties that the case should be tried by one of two Courts having jurisdiction—Validity.

When two Courts have jurisdiction to try a case, an agreement between the parties that it should be tried by one Court rather than by the other is not void under S. 28 of the Contract Act. (Gentle, J.) RAMNICKLAL V. VIVEKANAND MILLS CO., LTD. 49 C.W.N. 58.

S. 28—Agreement divesting only competent Court of its jurisdiction and vesting it in another having no pecuniary jurisdiction—Validity.

Latifur Rahman, J.:—Where in a contract entered into between two parties the cause of action partly arises in one place and partly in another, and the parties agree in terms of the contract that in case of any dispute arising out of the contract it shall be litigated only within the jurisdiction of one particular Court, and where the Courts in both places have jurisdic-

tion, such an agreement is a valid one and enforceable under the law and the parties are bound by it. But this principle has no application when the particular Court has no pecuniary jurisdiction to entertain the suit. If such a case the agreement will in effect amount to divesting the only competent Court of its jurisdiction and vesting it in another which has no pecuniary jurisdiction, and it is, therefore, invalid. (Biswas and Latifur Rahman, JJ.) DHANMAL MARWARI v. JANKIDAS BAIJNATH. 49 C.W.N. 123.

-Ss. 28 and 23-Agreement restricting litigants to one Court out of two-If prohibited

or opposed to public policy.

S. 28 of the Contract Act does not prohibit an agreement which restricts a litigant to one Court out of two. Nor is there anything contrary to public policy in an agreement between parties that disputes between them should be tried in one rather than the other of two Courts having jurisdiction to try the matter. (Thomas, C.J.) Sharma v. Sunder Talkies Distributors. 20 Luck. 105=1944 O.A. (C.C.) 219=1944 A.W.R. (C.C.) 219=A.I.R. 1944 Oudh 275.

**S. 28**—Agreement that transactions shall be deemed to have been effected at particular

place-Effect of.

Per Biswas, J.:—An agreement that all payments and other transactions should be deemed to have been effected at a particular place, does not vest jurisdiction solely in the Court at that place. Its only effect is to introduce a sort of fiction as to the place of accrual of the cause of action, and the ordinary law as to jurisdiction is thereupon to operate. (Biswas and Latifur Rahman, JJ.) DHANMAL MARWARI V. JANKIDAS BAIJNATH. 49 C.W.N. 123.

S. 28—Applicability—Clause in contract that suits arising therefrom should be filed only

in Courts of specified place-Legality.

A clause in a mercantile contract to the effect that all suits arising out of it should be filed only in the Courts in a specified place which is the place of business of one of the parties to the contract, is not illegal and does not offend against S. 28 of the Contract Act. (King, J.) RAGHAVAYYA v. VASUDEVAYYA CHETTY. 211 I.C. 480=16 R.M. 537=56 L.W. 580=1943 M.W.N. 703=A.I.R. 1944 Mad. 47= (1943) 2 M.L.J. 375.

S. 28—Scope—Agreement limiting choice

of forum—Validity.
S. 28 of the Contract Act makes void only those agreements which absolutely restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. It has no application when a party only agrees to a selection of one of those ordinary tribunals in which ordinarily a suit would be tried. Accordingly, an agreement between the parties to a contract, where a suit can be tried within the territorial limits of several Courts to the effect that it will only be tried in one of the Courts having territorial jurisdiction and that the par- and genuine transactions though of a specula-

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ties will be limited to have recourse to only one thes will be infinited to have recounts to the several competent Courts, is not within the mischief of the section and is valid and enforceable. (Abdur Rahman, Mchrchand enforceable. (Abdur Rahman, Mehrchand Mahajan and Achhru Ram, JJ.) MUSAJI LUK-MANJI v. DURGA DASS. I.L.R. (1945) Lah. 281=47 P.L.R. 378=A.I.R. 1946 Lah. 57 (F.B.).

-S. 29-Applicability-Claim based on vague document - Enforceability-Acknowledgment-Effect of-Limitation Act, S. 19.

The appellant's assignor and the respondents had dealings in mica in 1930, and in 1933 the respondent undertook under a document to pay to the appellant's purchaser after two years the sum of Rs. 12,600 with a certain interest "after deductions as would be agreed upon." The appellant became the assignee of the claim based on the document with its original cause of action in 1938 and he filed a suit in 1938 to enforce the claim. The parties were in dispute as regards the deductions.

Held, that the expression "after deductions as would be agreed upon" rendered the document vague and the claim was therefore unenforce-

able by reason of S. 29 of the Contract Act.

Held, further, that the acknowledgment contained in the document of 1933 extended the period of limitation only for three years from that date, and the suit to enforce the claim KRISHNA MITTER I.L.R. (1945) Mad. 521 = 219 I.C. 231=18 R.M. 67=57 L.W. 499= A.I.R. 1945 Mad. 10=(1944) 2 M.L.J.

-S. 30-Applicability-Transaction where

buyer can insist on delivery.

Where according to the rules of an Association when jute is bought and sold under those rules, the buyer can insist on delivery, the transaction cannot be of a wagering nature. (Davies.) CHANDAN MAL KAN MAL LODHA v. MAGNIRAM BANGUR & Co. 1943 A.M.L.J. 18.

-S. 30-Contract of purchase through pucca arhatias-Absence of intention to make or accept delivery—Right to recover loss by plain-

tiff and deposit by defendant.

Where in the case of a contract of purchase through pucca arhatias there was no intention 'from the very beginning of the transaction either to make or accept delivery, it is a wagering contract and as such neither the plaintiff could recover the loss in the contract nor the defendant recover the deposit made with the plaintiff. (Sinha, J.). RAM GOPAL v. GOVIND DAS. I.L. R. (1944) All. 397=219 I.C. 381=1944 A. L.J. 295=1944 O.A. (H.C.) 159=1944 A. W.N. (H.C.) 145=1944 A.W.R. (H.C.) 159=A.I.R. 1944 All. 196.

-S. 30-Forward contracts-If wagering contracts—Test—Proof.

Forward contracts for the purchase and sale of goods are recognised forms of commercial transaction. They may be perfectly legitimate

tive character, or simply gambling or wagering contracts. To be a wagering contract there must be a bargain for differences. It would be still regarded a wagering contract and so void, even if a party thereto had an option under the terms of the contract to demand deliery. Where a contract on the face of it appears to be a contract for the sale of goods for a price, extrinsic evidence may establish that there was a common intention to wager, that is, the intention of both the parties to the contract was that the title to the goods would not pass (i.e) there is to be no delivery, but the intention was only to take differences according to the rise and fall of the market on the date of delivery, mentioned in the contract. If such an intention is established, the contract is a wagering one and so void. If such an intention on the part of one of the contracting parties is established and it is further established that the other party, though intending a trading transaction, aware of the other's intention at the time of the formation of the questioned contract, possibly it would be regarded as a wagering contract. The common intention to wager can be established either by direct evidence or from surrounding circumstances. But when it is found that all or a substantial part of goods were actually taken delivery of, such a forward contract must necessarily be taken to represent a genuine commercial transaction, as the fact of delivery destroys the inference of a common intention to wager. (Mitter and Khundkar, JJ.) SHEWKISSEN v. MANGALCHAND. 195 I.C. 885=14 R.C. 148=45 C.W.N. 478=A.I.R. 1941 Cal. 341.

S. 30—'Forward' contract with 'pacca arhatis'—If wagering contract.

Where the effect of the clauses in a series of Forward' contracts with a 'pacca arhati' is that the 'pucca arhati' was to be in a position to choose whether he delivered or not and was, if he so liked to be able to settle the matter by paying or receiving, as the case might be, a mere difference, and where in not one of such contracts is there any delivery except in one small instance, the contracts are based upon terms which are singularly appropriate to mere gambling transactions. The Court is entitled, if not bound, to regard the course of dealing between the parties in such case as a reliable indication of what their real intentions were. Such a a transaction is a wagering contract and cannot be enforced in view of S. 30 of the Contract Act. (Braund and Yorke, JJ.) RAMKRISHNA DAS v. MUTSADDI LAL. I.L.R. (1942) All. 289=200 I.C. 225=14 R.A. 416=1942 A.W. R. (H.C.) 99=1942 A.L.W. 137=1942 A.L.J. 131=A.I.R. 1942 All. 170.

The essence of a bet is that both parties agree that they will pay and receive respectively on the happening of an event in which they have no material interest. The transaction may be cloaked behind the forms of genuine commercial transactions; but to establish the bet it is necessary to prove that the documents are but a cloaked.

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and that neither party intended them to have any effective legal operation. Where the documents show an ordinary commercial transaction, and in conformity with them one of the parties incurs personal obligations on a genuine transaction with third parties so that he himself is not a winner or loser by the alteration of price, but can only benefit by his commission, the inference of betting is irresistibly destroyed. In such cases the fact that no delivery is required or tendered is of practically no value. (Lord Atkin.) ISMAIL LEBBE v. BARTLETT AND Co. 199 I.C. 574=1942 A.L.J. 258=8 B.R. 640=55 L.W. 332=14 R.P.C. 136=1942 A.W. R. (P.C.) 43=A.I.R. 1942 P.C. 19 (P.C.)

S. 30—Wagering contract—Gambling on differences—Broker's claim against customer.

There can be no doubt that where a broker acts on behalf of his customer and the customer gambles, the customer cannot set up a plea of gaming and wagering against the broker's claim. Where the plaintiff acting as a broker on behalf of the defendant entered into contracts for the sale and purchase of jute, and the defendant never intended to give or take delivery and was simply gambling in differences but the plaintiff was not a party to those gambling transactions.

Held, that the defendant could not set up a plea of gaming and wagering against the plaintiff's claim for brokerage. (Lort Williams, I.) GOPAL DAS DAGA v. MANICK LAL BAITY. I.L. R. (1940) 2 Cal. 385=193 I.C. 603=13 R. C. 442=A.I.R. 1941 Cal. 125.

S. 30—Wagering contract—Money deposited as security—Suit to recover—Maintainability.

A wagering contract cannot of course be enforced; but a deposit made by one gambler with the other as security can be recovered unless the amount has in fact been appropriated for the purpose for which it was deposited. (Leach, C.J. and Lakshmana Rao, J.) Boomtanthan Chettiar V. K. S. N. Charl & Co. I.L.R. (1944) Mad. 713=216 I.C. 183=57 L.W. 137=1944 M.W.N. 151=A. I. R. 1944 Mad. 321=(1944) 1 M.L.J. 188.

S. 30—Wagering contract—Test—No. delivery intended—Enforceability of pronote for debt due under such transaction.

Where it is found in respect of a transaction that no delivery was ever intended by the parties thereto, the transaction is to be construed as a wagering one. As between the original parties a promissory note which had for its consideration a debt due on a wagering contract is void and therefore not binding in the hands of the original payee. (Yorke, J.) GAURI SHANKER AGARWAL V. NEMI CHAND GUITA. 1944 A.L.W. 291 (1).

S. 37—Annuity created by deed—Death of promisor—Mode of enforcement.

cloaked behind the forms of genuine commercial transactions; but to establish the bet it is necessary to prove that the documents are but a cloak!

An annuity for the life of a person may be created either by will or by deed. Where after the death of the promisor there is a default in

the payment of the annuity, the annuitant can recover it by a suit against the legal representative of the promisor, limited of course to the extent of the assets of the deceased in the hands of the legal representative. Actions against the executor or administrator do not exhaust the remedy open to the annuitant in India. (Bajpai and Dar, JI.), JOSODA v. CHHANGAN LAL. 1943 A.L.W. 78.

——S. 39—Applicability—Agreement to assign arrears of rent in discharge of debts due—Execution and registration of deed of assignment—Assignee handing back vouchers to assignor—Effect—Non-delivery of deed by vendor to vendee—If renders contract null and void.

S. 39 of the Contract Act applies to executory and not to executed contracts. Where in pursuance of an agreement to assign certain arrears of rent in discharge of debts due, the vendor executes the deed of assignment and has it registered and the vendee gives back the vouchers there is a completed transaction. The non-delivery of the deed of assignment by the vendor to the vendee is not such an act as would render the contract null and void at the choice of the vendee. (Fasl Ali, C. J. and Sinha, J.) Sheikh Sultan Ahmed v. Syed Maksad Husain. 22 Pat. 306=211 I. C. 35=16 R.P. 786=10 B.R. 320=25 Pat. L. T. 14=A.I.R. 1944 Pat. 3.

——S. 39—Contract of shipment—Shipper demanding for space—Shipper having no goods but only trying to take advantage of rise in freight—Shipping company, if can repudiate contract.

Where a shipper makes a demand for space in accordance with a contract made with a shipping company, the latter cannot refuse to consider the demand on the ground that the demand is not genuine and the shipper has, in fact, no goods to ship, but is attempting to obtain an advantage due to the rise in freight. While this may be a matter to be considered on question of damages, it is no answer to a charge of breach of contract on the part of the shipping company. In such circumstances, the shipping company is not entitled to put an end to the contract under S. 39 of the Contract Act on the ground that the shipper has disabled himself from performing his part of the contract. (Weston, J.) HERMAN AND MOHATTA v. ASIATIC STEAM NAVIGATION CO., LTD. 196 I.C. 529 = 14 R.S. 70=A.I.R. 1941 Sind 146.

——Ss. 39, 64, 65 and 75—Party putting an end to contract—If liable to restore benefit received—His right to damages.

When one party to a contract has refused to perform his obligation thereunder so as to give rise to a right in the other party "to put an end to" the contract under S. 39 of the Contract Act, the latter is a person at whose option the contract is 'voidable' under S. 64 of the Act, and if he does put an end to the contract, he rescinds a voidable contract. When he has so rescinded, the contract becomes 'void' under S. 65 of the Contract Act. A party who has "put an end to" a contract under S. 39 is, therefore,

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liable to restore any benefit received by him under the contract from the other party. He is, however, entitled to damages for the defaulting party's breach under S. 75 of the Act. (Sir George Rankin.) MURLIDHAR CHATTERJEE R. INTERNATIONAL FILM CO., LTD. I.L.R. (1943) 2 Cal. 213=206 I.C. 1=70 I.A. 35=I.L.R. (1943) Kar. (P.C.) 30=15 R.P.C. 71=9 B. R. 287=1943 A.L.J. 387=1943 M.W.N. 744=56 L.W. 283=47 C.W.N. 497=1943 O.A. (P.C.) 56=46 Bom.L.R. 178=A.I.R. 1943 P.C. 34=(1943) 2 M.L.J. 362 (P.C.).

———S. 43—Contribution among joint promisors—Costs incurred in legal proceedings with promisee.

A joint promisor cannot claim contribution from the others regarding the costs incurred by him in the legal proceedings between him and the promisee (i.e.) the costs which he has had to pay to his own attorney. There is no joint promise regarding these costs and S. 43 of the Contract Act would not apply. He cannot claim contribution under general equitable principles, where when such costs were incurred the promisee had already settled his claim so far as the other promisors were concerned, and he was fighting the promisees claim against himself and incurred the costs in getting that claim reduced, although the other promisors have indirectly gained by the reduction of the amount of contribution payable by them. (Sen. I.) Kanto Mohan Mullick v. Gour Mohan Mullick. 45 C.W.N. 357.

——S. 43—Contribution among joint promisors—Costs paid to promisee.

A joint promisor is entitled to claim contribution from the others regarding the costs paid by him to the promisee, when the payment of such costs is part of the joint promise. (Sen, J.) Kanto Mohan Mullick v. Gour Mohan Mullick. 45 C.W.N. 357.

Ss. 43 and 44—Contribution among joint promisors—Promisee remitting part of promise in favour of some—Right of others to demand contribution from them.

Under S. 43 of the Contract Act, each joint promisor is entitled to insist upon an equal performance by all the joint promisors of the promise. If the promise remits the performance of part of the promise in favour of one or some of the joint promisors, such remission cannot destroy the right of the other joint promisors to demand that all the joint promisors should contribute equally to the performance of the remaining portion of the promise, (Sen, J.) Kanto Mohan Mullick v. Gour Mohan Mullick. 45 C.W.N. 357.

S. 43—Contribution — Co-judgment-debtors—Satisfaction of decree by one—Right to sue for contribution—Rule.

Where a number of defendants are made jointly and severally liable under a decree, and the entire decretal amount is realised from one of them, then that one can sue his co-defendants for contribution of equal proportionate share:

from each; that is the prima facie position. It may, however, be shown that there are special circumstances in the case which render the rule inapplicable. (Meredith and Shearer, JJ.). MUSAMMAT JAGPATI KUAR v. DAMRI SAHU HALKHORI KAM. 20 Pat. 811=198 I.C. 521=14 R.P. 460=8 B.R. 421=23 Pat. L. T. 588=A.I.R. 1942 Pat. 204.

S. 43—Contribution—Joint lessees—Decree against for arrears of rent—Two groups having equal rights in the lease—One group making payments not exceeding their half share before Madras Act IV of 1938 came into force -Subsequent sealing down reducing the balance due—Contribution cannot be claimed from joint lessees for the amount paid before the Act came into force by the other lessees.

In respect of a decree for arrears of against two groups of lessees equally interested in the joint lease of agricultural lands group was compelled to pay the lessor as a result of execution proceedings before Madras Act IV of 1938 came into force sums which in the aggregate were less than half the decree amount. In 1939, that group applied for the scaling down of the balance due under the decree and after the scaling down sued

other joint lessees for contribution.

Held, that there is nothing in Madras Act IV of 1938 which gives the plaintiffs a right to contribution in respect of the payments made by them before that Act came into force. When the plaintiffs made the payments they were not entitled to contribution because the total amount paid by them was less than the share of the debt as it then stood. Up to their half share their liability was as principal debtors and not as sureties. Accordingly there was no right of contribution. (Léach, C.J. and Wadsworth, J.)
NAYUDU SIVAYYA v. CHINNA VENKATAPPAYYA.
58 L.W. 247=1945 M.W.N. 315=A.I.R.
1945 Mad. 266=(1945) 1 M.L.J. 405.

-S. 43—Contribution—Right of joint pro-

misor-Payment, if must be compulsory.

There is nothing in the Contract Act which says that before contribution can be claimed there must be a compulsory payment. S. 43 permits any joint promisor performing the promise to claim contribution. It makes no distinction between voluntary or compulsory performance. (Sen, I.) KANTO MOHAN MULLICK V. GOUR MOHAN MULLICK. 45 C.W.N. 357.

43—Contribution—Right of-When arises

Right of contribution can only arise when there was admittedly a joint liability which has been discharged by one of the two persons jointly liable. (Rachhpal Singh, C.J. and Hasan; J.) JIJU MAL v. VAS DEV. 43 P.L.R.J. & K. 149.

-S. 43-Satisfaction made by one of parties jointly and severally liable—If discharges claim against all—English Law—Applicability. ties jointly and severally liable—If discharges claim against all—English Law—Applicability.

Under the English Law accord and satisfaction made by one of several parties jointly liation made is payable immediation.

# CONTRACT ACT (1872), S. 49.

ble or jointly and severally liable to the same creditor for the same debt discharges the claim of the creditor against all. There is no reason of the creditor against all. There is no reason why this principle would not apply to cases of joint and several liability under S. 43 of the Contract Act. (Nasim Ali and Pal, JJ.) NEW STANDARD BANK, LTD. 7. PROBODH CHANDRA CHAKRAVARTHY. I.L.R. (1941) 2 Cal. 237-45 C.W.N. 830=76 C.L.J. 514=198 I.C. 768=14 R.C. 494=A.I.R. 1942 Cal. 87.

-S. 44-Release by decree-holder of some of joint judgment-debtors-Discharge of others. The fact that the decree-holder may have released some of the joint judgment-debtors from some part of their share of the judgment-debt does not affect the liability of the others to contribute, and under S. 44 of the Contract Act it does not discharge the other joint-debtors. (Roxburgh and Blank, JJ.) ARJUN LAL AGAR-WALLA 21. BANABEHARI CHATTERIEE. 77 C.L.J. 434=A.I.R. 1944 Cal. 328 (2).

-S. 44-Scope-Partial discharge of some of joint promisors by promisce-Right of others to

contribution-If affected.

S. 44 of the Contract Act applies not only to the case of a complete discharge but also to one of a partial discharge of some of the joint promisors by the promisee. A partial discharge of some of the joint promisors by the promisee does not release them from their liability to contribute equally with others to the performance of the promise. (Derbyshire, C.J. and Panckridge, J.) Gour Mohan Mullick v. Kanto Mohan Mullick. 46 C.W.N. 234.

-S. 45-Hatchita executed in favour of several persons-Money due thereunder forming assets of business in which cach of them has definite share-Right of some of them to sue for their share.

S. 45 of the Contract Act contemplates, that the promise should be to one or more persons jointly. Where there are no express words in a hatchita to indicate that the promise was to the promisees jointly, but on the other hand, the money due on the hatchita is a part of the assets of the money-lending business in which cach of the promisees has a definite and specified share, some of the promisces may sue for their share of the money impleading the others who refuse to join with them in enforcing the promise as pro forma defendants. The plaintiffs in such a suit need not pray for a decree for of themselves as well as the pro forma defendants. (Nasim Ali and Pal, IJ.) NABENDRA NATH BASAK v. SHASABINDOO NATH BASAK. 197 I.C. 321=14 R.C. 332=A.I.R. 1941 Cal. 595.

-S. 49—Applicability—Negotiable instrument—Promissory note payable on demand—"On demand"—Meaning and effect of.

tely, or at sight, and the words "on demand" do not by themselves take the note out of S. 49, Contract Act. S. 49 of the Contract Act does not however, apply to negotiable instruments. S. 49 deals with a contract between a promisor and a promisee, and has no application to matters governed by the law merchant contained in the Negotiable Instruments Act. (Beaumont, C.J. and Samjee, J.) JIVATLAL PURTAPSHI v. LALBHAI FULCHAND. I.L.R. (1942) Bom. 620=203 I.C. 27=15 R.B. 184=44 Bom.L. R. 495=A.I.R. 1942 Bom. 251.

S. 49—Scope—Contract—Place of performance—Implied intention of parties—Power of Court to find out—Place of creditor—If place of payment.

S. 49 of the Contract Act does not preclude the Court from finding out what the implied intention of the parties was in regard to the performance of the contract. Defendants who resided in Calcutta entered into a contract to purchase goods from the plaintiff who resided in Arrah. There was no express mention as to where the money was to be paid. But there was a part-payment of a sum of money by the defendants to the plaintiffs at Arrah. The plaintiff sued for the balance at Arrah, but the Court declined jurisdiction on the ground that the plaintiff did not establish where the payment was to be made.

Held, that in the circumstances it could be implied that the payment was to be at Arrah and therefore the Court at Arrah had jurisdiction. (Wort, J.) BALA PRASAD v. FIRM BENI PRASAD BHAGAT. 22 Pat.L.T. 282.

S. 50—Applicability — Company — Chit fund—Prize-winner depositing amount in special Savings Bank Account as sanctioned by rules made by the company—If good performance—Bank going into liquidation—Liability of prize-winner.

Where a subscriber to a chit fund conducted by a company deposits with the Bank a certain amount in the manner sanctioned by the company (in a special Savings Bank Account in a Bank) for the performance of his contract, viz., the payment of future subscriptions to the chit fund in respect of the chit held by him, he having won the prize, the performance is good under S. 50 of the Contract Act. The promisee company has to take the risk, and if the Bank goes into liquidation the subscriber cannot be held liable. (Lakshmana Rao, J.) Travancore National Bank Subsidiary Co., Ltd. v. Venkataraman. 1942 M.W.N. 148 (1)=55 L.W. 254=A.I.R. 1942 Mad. 337=(1941) 2 M.L.J. 908.

S. 51 and Sale of Goods Act (1930), S. 32—Contract for sale of goods—Suit for damages for breach—Proof of readiness and willingness to perform—Delivery of shares at seller's option—Notice to deliver, if and when necessary. Jagannath Sagarmal v. Arron & Co. [See Q.D., 1936-'40, Vol. I, Col. 3320.] 191 I.C. 766=13 R.R. 150.

# CONTRACT ACT (1872), S. 59.

———Ss. 55 and 63—Contract—Performance —Failure of—Extension of time—What amounts to—Forbearance to sue or to repudiate—Effect.

S. 55 of the Contract Act puts an agreement after the original date on the same footing as an agreement just before the original date. But it must be an agreement. Mere forbearance from suing or giving a formal notice is not enough. Mere forbearance to institute proceedings or to give notice of rescission cannot be an extension of time for the performance of a contract within the meaning of S. 63 of the Act. Time for the performance of a contract can be extended only by an agreement arrived at between the promisor and the promisee. (Stone, C.J. and Chagla, J.) Anandram Mangturam v. Bholaram. 47 Bom.L.R. 719=A.I.R. 1946 Bom. 1.

——Ss. 55 and 63—Contract—Time for performance—Extension by agreement or by forbearance—Right to sue for damages for non-performance at extended time.

It is well-established that a party to a contract may at the request of the other party forbear from insisting upon delivery at the contract time and may allow time to be extended, without binding himself to do so, or may expressly contract for an extension of time, and that he may claim damages for non-performance at the extended time. (Blackwell, J.) RATILAL M. PARIKH v. DALMIA CEMENT & PAPER MARKETING CO., LTD. 208 I.C. 301=16 R.B. 67=45 Bom.L.R. 405=A.I.R. 1943 Bom. 229.

——S. 55—Time, when essence of contract—Extension, where time is the essence—Effect. Lucknow Automobiles v. Replacement Parts Co. [See Q. D., 1936-40, Vol. I, Col. 3320.] 16 Luck. 357.

——S. 56—Construction and scope—"Impossible"—Meaning of—Absence of provision exempting from liability in case of impracticability due to act of third parties—Claim to exemption from liability—Sustainability.

There are two matters which are dealt with by paragraph 2 of S. 56 of the Contract Act, viz., an act which becomes impossible and an act which becomes unlawful. In the case of an act which has become unlawful, the promisor is exonerated from performing if he is not responsible for the act having become unlawful. The first part of the paragraph does not speak of the act having become impossible by reason of the act of the promisor. Though it is not clear what exactly is meant by speaking of an act having become impossible in the sense referred in the section, there is no reason to hold that the Legislature intended to depart from the general common law rule which is that where a party has not qualified his obligation, he is liable to make compensation in damages for non-performance although the performance has been rendered impracticable by some unforeseen cause over which he has no control. The defendants hired twelve lights and a Kila from the plaintiffs in connection with a marriage

procession. In the course of the procession three of the lights and the Kila were damaged by rioters who attempted to stop the procession. The police took charge of the three damaged lights and the Kila. The plaintiffs were later asked by the Police to take charge of the three damaged lights and the Kila but they refused. The remaining nine lights were with the defendants. The plaintiffs claimed compensation for all the lights and the Kila. Under the terms of the contract between the parties, the defendants were to be liable for damage arising to the articles hired; there was no term expressly exempting the defendants from liability for loss or damage caused by third parties; nor was there anything from which it could be inferred that such an exemption was intended by the parties.

Held, that the defendants not having qualified their obligation to return to the plaintiffs the lights hired and the Kila, they were liable to compensate the plaintiffs for all the lights and the Kila which had not been returned to the plaintiffs, and the defendants were not absolved from liability by reason of paragraph 2 of S. 56 of the Contract Act. (Agarwala, I.) Noon Mahomed v. Sonu Mistri. 7 B.R. 412=192 I.C. 768=13 R.P. 521=A.I.R. 1941 Pat. 429.

as to enforceability being dependent on vendee's ability to find customers for goods contracted for—If can be read into contract.

Courts cannot read into a contract of sale an implied term that the enforceability of the contract is to be dependent upon the ability of the vendee to find customers for the goods to be purchased by him. (Horvvill and Kuppuswamy Ayyar, JJ.). Samuel Fitz and Co., Ltd. v. Standard Cotton and Silk Weaving Co. 58 L.W. 255=1945 M.W.N. 465=A.I.R. 1945 Mad. 291=(1945) 2 M.L.J. 24.

S. 56—Contract to transport goods by motor trucks—Trucks requisitioned under Defence of India Rules—Contract, if becomes impossible of performance.

Where a party to a contract agrees to transport goods for the other party by means of his motor trucks and the trucks are requisitioned under R. 75-A of the Defence of India Rules, the contract becomes impossible of performance. There is a frustration of the contract on account of the circumstances beyond the control of the party. (Sen, J.) Noorbux v. Kalyandas. I.L.R. (1945) Nag. 475=1945 N.L.J. 267=A.I.R. 1945 Nag. 192.

S. 56—Employee agreeing to indemnify employer in case of thefts—Enforceability.

Where an employee binds himself to indemnify his employer if theft occurred of the property for which he was responsible, no question of impossibility of performance arises and the stipulation could be enforced and the employee made liable for loss occasioned by theft. (Davis.) CHAND MAL v. BADRI DASS. 1941 A.M.L.J. 98.

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——Ss. 56 to 65—Scope—Contract becoming void—Return of advantage received under Duty of person receiving advantage or benefit,

A contract to do an act which, after the contract was made, has become impossible, becomes void when the act becomes impossible. When a contract becomes void, any person who has received any advantage under such contract is bound to restore it or to make compensation for it to the person 'from whom he received it. (Chandrasakhara Iyer, J.) Manasseh Film (Co. 2'. Gemini Pictures Circuit, Madras, I., L.R. (1944) Mad. 124=218 I.C. 235=18 R. M. 3=1944 M.W.N. 200=57 L.W. 23=A. I.R. 1944 Mad. 239=(1944) 1 M.L.J. 58.

Ss. 59 and 60—Amount deposited in Court—Power of Court to order appropriation,

There is nothing in law under which a Court can order an appropriation. Appropriation is a matter which arises when payment is made and accepted. Where payment is not accepted by the decree-holder the appropriation towards an earlier debt or a later debt does not really arise, and there is no law under which a Court could force a decree-holder to accept payment against his wishes, particularly when the judgment-debtor is in default. (Puranik, J.) Govindraov. Narayan Ganpat. I.L.R. (1945) Nag. 885=1945 N.L.J. 394=A.I.R. 1945 Nag. 277.

Ss. 59 to 61—Scope—Case in which principal and interest are due on single debt.

Ss. 59 to 61 of the Contract Act embody the general rules as to appropriation of payments in cases where a debtor owes several distinct debts to one person and voluntarily makes payment to him. They do not deal with cases in which principal and interest are due on a single debt, or where a decree has been passed on such a debt, carrying interest on the sum adjudged to be due on the decree. (Tek Chand, Monroe and Beckett, JJ.) JIA RAM v. SULAKHAN MAL. I.L.R. (1941) Lah. 740=14 R.L. 169=43 P.L.R. 521=196 I.C. 625=A.I.R. 1941 Lah. 386 (F.B.).

S. 60—Appropriation—Intention—Proof—Circumstantial evidence. See Madras Acriculturists Relief Act, S. 8 (1). (1942) 2 M.L. J. 724.

ments in principal's separate account—Surety, if can object.

If a creditor exercising his option under S. 60 of the Contract Act appropriates the repayments in the account which he has with the principal debtor independently of the contract of guarantee the surety cannot in law raise any objection to this appropriation. (Tek Chand and Din Mahomed, II.) Kuckreja, Ltd. v. Said Alam. I.L.R. (1941) Lah. 323=193 T.C. 206=13. R.L. 440=43 P.L.R. 539=A.I.R. 1941 Lah. 16.

61—Appropriation of payments— Payment not indicated to be towards a particular transaction.

Where there is nothing to show that a particular payment was made towards any particular transaction, then under S. 61 of the Contract Act the payment should be appropriated towards the earlier transaction. (Agarwal and Madeley, JJ.) PIARRY LAL v. MAHADEO PRASAD. 199 I.C. 698=14 R.O. 514=1942 R.D. 320 =1942 A.W.R. (C.C.) 109=1942 O.W.N. 157=1942 O.A. 88=A.I.R. 1942 Oudh 311.

S. 62—Applicability—Agreement made after breach of original contract—Cause of action arising from breach—If may be discharged

by accord and satisfaction.

Whatever difficulties there might be in applying the provisions of S. 62 of the Contract Act where the agreement to substitute a new contract for the original one is made after the breach of the original contract, it is beyond all controversy that where a breach of contract has taken place, the cause of action that arises from the breach may be discharged by accord and satisfaction. (Nasim Ali and Pal, JJ.) NEW STANDARD BANK, LTD. v. PROBODH CHANDRA CHAKRAVARTHY. I.L.R. (1941) 2 Cal. 237= 45 C.W.N. 830=76 C.L.J. 514=198 I.C. 768=14 R.C. 494=A.I.R. 1942 Cal. 87.

S. 62—Execution of second promissory note in substitution for first—Liability under original loan—Effect on. See Promissory Note. 49 C.W.N. 37.

-S. 62-Novation-Requirements.

A novation of contract requires in every case that the new contracting party has consented to assume liability for the contract and also that the person on whom the correlative right resides has agreed to accept the new party's liability in substitution of the original liability. It requires as an essential element that the rights against the original contractor should be relinquished and the liability of the new contracting party accepted in their place. The mere fact that a person agrees on behalf of the original contracting party to deliver goods to the purchaser would not operate as an acceptance by him of all his contractual liabilities. (Davis, C.J. and O'Sullivan, J.) HUKUMATMAL v. JETHANAND. I.L.R. (1944) Kar. 208=215 I.C. 42=17 R. S. 35=A.I.R. 1944 Sind 205.

-S. 62-Novation-Intention-Question of fact-Novation of mortgage which has become irredeemable.

The question whether the parties intended to substitute a new contract for the old one is a question of fact in each case depending for its decision upon the circumstances of the particular cases. Where a mortgage has become irredeemable and the mortgagee has become the owner of the property there can be no novation of that mortgage for there is no mortgage in existence. (Ghulam Hasan, J.) Kedar Nath Pandey v. Kripal. 1943 O.A. (C.C.) 311=1943 A.W. R. (C.C.) 179=1943 A.L.W. 577=1943 O.

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W.N. 476=212 I.C. 408=16 R.O. 286=A. I.R. 1944 Oudh 63.

Act (II of 1933), S. 12—Novation—Suit on original contract—If lies—Agreement before the Debt Conciliation Board—Refusal to carry out—Suit on original debt—Maintainability. SYED AHMAD v. RAMGOPAL BHAGWANDEEN. [See Q. D., 1936-40, Vol. I, Col. 2225.] I.L.R. (1941) Nag. 664.

-S. 63-Extension of time for performance—What amounts to—Forbearance to sue or to give notice of rescission—Effect of. See Contract Act, Ss. 55 and 63. 47 Bom.L.R. 719.

-S. 63—Partial remission—When permissible—Agreement or consideration—If necessary

-Form of expression of remission.

Under S. 63 of the Contract Act, a promisee can remit in part the performance of a promise made to him whether it has or has not already fallen due and whether or not such remission causes cessation of the subsisting contractual relation altogether. It is therefore, open to the promisee to remit a portion of the obligation under the section, even though the obligation on the part of the promisor to perform the un-remitted part still continues. The section deals with actual remission, as distinguished from an agreement to remit, and in order to produce the legal effect such a remission does not require any support either in the shape of a consideration or of any prior agreement. A future liability can be remitted in *praesenti* and a remission of such liability will not necessarily require an agreement to remit.

Per Pal, J.—(1) An agreement to remit to be enforceable must be supported by consideration. (2) The answer to the question whether the remission or the agreement to remit need be expressed in any particular form in order that it may have the intended legal effect, depends upon the facts of any particular case. The remission of the performance of a promise to pay interest on a promissory note is not required by law to be put in any particular form. (Mukerjea and Pal, JJ.) JITENDRA CHANDRA ROY v. S. N. BANERJEE. I.L.R. (1943) 1 Cal. 101=206 I.C. 439=15 R.C. 703=76 C. L.J. 115=47 C.W.N. 213=A.I.R. 1943 Cal. 181.

63—Scope—English doctrine—Application of.

S. 63 of the Contract Act makes a wide departure from the English Law inasmuch as it parture from the English Law inasmuch as it does not refer to any agreement and valuable consideration. It should not, therefore, be enlarged by any implication of English doctrine. (Nasim Ali and Pal, II.) New Standard Bank, Ltd. v. Probodh Chandra Chakravarthy. I.L.R. (1941) 2 Cal. 237=45 C. W.N. 830=76 C.L.J. 514=198 I.C. 768=14 R.C. 494=A.I.R. 1942 Cal. 87.

about to become insolvent—Validity as against

Official Receiver-Consideration for remission-What accounts to—Standing surety for debtor and joining him in executing mortgage—Sufficiency. Narasimharaju Garu v. Official Receiver, East Godavary. [Sec Q.D., 1936-'40, Vol. 1, Col. 2226.] 192 I.C. 79=13 R.M.

-Ss. 64 and 73—Applicability—Contract for purchase of machine-Deposit-Provision for for seiture in case of breach of condition—If penal—Power of Court to grant relief—Hire purchase.

On 21st August, 1941, the appellants agreed to purchase from the respondent a cinematograph projector and its accessories (of a German make for which the demand was far greater than the supply) for Rs. 4,500 under a writing which provided, inter alia, that (1) the buyers were to pay an advance of Rs. 1,000 which could be forfeited by the vendor in the event of default on the part of the purchasers in the performance of the contract, (2) that the balance of the consideration of Rs. 3,500 was to be paid in monthly instalments of Rs. 350 on specified dates, that (3) in the event of default by the purchasers the vendor could forfeit the advance, demand the immediate return of the machine and charge rent at the rate of Rs. 350 per mensem for the period the machine was in the possession of the buyers or the vendor could demand the immediate return of the balance of the purchase money with interest at 6 per cent. The appellants defaulted in the payment of the instalments.

Held, (1) that the contract was not one of hire purchase; (2) that neither S. 64 nor S. 73 of the Contract Act applied to the case, the stipulation for forfeiture of the deposit in case of breach of the conditions not being by way of penalty and not being unreasonable in the circumstances; and (3) that the appellants could, however, not be called upon to pay the value of the machine at the date of the contract plus the hire, but only the present value of the hire.

Held further, that the Court could grant relief against forfeiture when the circumstances warranted. (Leach, C.J. and Shahabuddin, J.) SUBBARAYALU v. ANNAMALAI CHETTIAR. I.L. R. (1945) Mad. 269=57 L.W. 448=1944 M. W.N. 595=A.I.R. 1944 Mad. 526=(1944) 2 M.L.J. 74.

Ss. 64, 73, 74 and 75—Applicability—Contract of sale of immovable property—Buyer failing to complete payment—Seller putting end to contract—Duty to restore benefit receied—Buyer's right to get back portion of price paid.

The Transfer of Property Act does not provide expressly for the return of a portion of the purchase money paid in pursuance of a contract of sale, when the buyer fails to complete the payment and the sale in consequence falls through. The provisions of the Contract Act, however, apply generally to contracts of sale of immovable property. In cases not falling under S. 74 of the Contract Act, where there is no stipulation that a certain payment shall be ment is discovered to be void within the meaning

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damages on the failure of the buyer to complete payment would arise under S. 73 or 75 of the Contract Act, and is something quite independent of the amount of any part payment made. Under S. 64, the party rescinding a voidable contract must restore such benefit as he may have received from the other party. If the buyer fails to complete payment, and the seller avoids the contract, he must pay back the buyer the payments made by the buyer, ie, restore the benefit. (Davis, C.J. and Weston, J.) MADHAVIAS PARMANAND V. JAN MAHOMED.
I.L.R. (1941) Kar. 495=199 I.C. 438=14
R.S. 181=A.I.R. 1942 Sind 37.

-Ss. 64 and 65-Applicability-Policy of life assurance void by reason of fraudulent concealment of material facts in proposal and declaration—Right to refund of moneys paid by way of premium. See Insurance—Life Insurance. (1944) 1 M.L.J. 190.

-Ss. 64 and 65-'Benefit' and 'advantage' -Meaning of.

Ss. 64 and 65 of the Contract Act do not refer by the words "benefit" and "advantage" to any question of "profit" or "clear profit". Money received by a party under a contract is a benefit or advantage to him even though it has been spent to enable him to perform his part of the spent to enable him to perform his part of the contract. (Sir George Rankin.) MURLIDHAR CHATTERJEE v. INTERNATIONAL FILM CO. LTD. 70 I.A. 35=I.L.R. (1943) Kar. (P.C.) 30 =I.L.R. (1943) 2 Cal. 213=1943 O.A. (P.C.) 56=46 Bom.L.R. 178=15 R.P.C. 71=9 B.R. 287=1943 A.L.J. 387=1943 M.W. N. 744=206 I.C. 1=56 L.W. 283=47 C.W. N. 497=A.I.R. 1943 P.C. 34=(1943) 2 M. L.J. 369 (P.C.).

-Ss. 64, 65, 75 and 39-Party putting an end to contract-If liable to restore benefit received—His right to damages. See Contract Act, Ss. 39, 64, 65 AND 75. 47 C.W.N. 497 (P.C.).

-S. 65—'Discovered to be void'—Assignment of mortgagee rights where mortgage was prohibited—Suit by assignee on ejectment for recovery of consideration-Date of cause of action.

Where the assignee of the mortgagee rights in regard to a mortgage of an occupancy holding, which is prohibited by the Agra Tenancy Act, is ejected, and sues for the recovery of the consideration paid by him, he must be taken to have known that the mortgage was void at the date of the assignment itself and he could not be heard to say that he came to know that the transaction was void at the date of the ejectment. (Yorke, J.) JANG BAHADUR RAI v. RAM SUNDAR TEWARI. 1944 A.L.W. 244.

-S. 65-Agreement discovered to be void -Time at which it is so discovered-Date of agreement or later date.

Although normally the time at which an agree-"earnest" or penalty, the right of the seller to of S. 65 of the Contract Act is the date of the

agreement, there may be special circumstances in which it is so discovered at a later date. Where in a suit to enforce a mortgage hit by the provisions of para. 11, Sch. III, C. P. Code, it was found to be an open and honest transaction and its invalidity was at the time of its execution obscured by the difficulty in applying the paragraph correctly to the particular facts of the execution proceeding and to the terms of the orders as recorded; and payments of interest were made and received thereunder for ten years

Held, that in the special circumstances of the case, the mortgage was not discovered to be void until after the suit to enforce it was instituted. (Sir George Rankin.) RAJA MOHAN MANUCHA v. Manzoor Ahmad Khan. 70 I.A. 7. MANZOOR AHMAD KHAN. 70 I.A. 1=18 Luck. 130=206 I.C. 457=1943 O.W.N. 214 =1943 A.L.W. 381=9 B.R. 353=15 R.P.C. 94=1943 A.L.J. 421=I.L.R. (1943) Kar. (P.C.) 19=47 C.W.N. 509=46 Bom.L.R. 170=1943 O.A. (P.C.) 52=A.I.R. 1943 P. C. 29=(1943) 1 M.L.J. 508 (P.C.).

-S. 65-Agreement void ab initio-If

affected by section.

On the language of S. 65, Contract Act, an agreement discovered to be void, would include an agreement that was void in that sense from its very inception. (Clarke, J.) DISTRICT COUNCIL, WARDHA v. ANNA DAULATRAO. I.L. R. (1942) Nag. 294=14 R.N. 156=197 I.C. 76=1941 N.L.J. 371=A.I.R. 1941 Nag. inception. (Clarke, J.) DISTRICT 273.

\_\_\_\_\_S. 65—Applicability—"Becomes void"— Meaning of—Contract becoming unenforceable

by reason of bar of limitation.

Where a contract has become unenforceable by reason of the fact that the claim to enforce the contract has become barred by limitation it does not become void so as to attract the provisions of S. 65, Contract Act. (Kuppuswami Ayyar, J.) Venkatappa Naidu v. Chinnappa Naidu. 221 I.C. 153=A.I.R. 1945 Mad. 171=(1945) 1 M.L.J. 158.

S. 65—Applicability—Case in which there is transfer of property and not mere agreement. S. 65 of the Contract Act applies also to a case where there is a transfer of property and case where there is a transfer of property and not a mere agreement. (Sir George Rankin.) RAJA MOHAN MANUCHA V. MANZOOR AHMAD KHAN. 70 I.A. 1=18 Luck. 130=206 I.C. 457=1943 O.W.N. 214=1943 A.L.W. 381=9 B.R. 353=15 R.P.C. 94=1943 A.L.J. 421=I.L.R. (1943) Kar. (P.C.) 19=47 C.W.N. 509=46 Bom.L.R. 170=1943 O.A. (P.C.) 52=A.I.R. 1943 P.C. 29=(1943) 1 M.L.J. 508 (P.C.) 508 (P.C.).

65—Applicability—Contract contrary -S. to law-Right to return of consideration paid.

S. 65 of the Contract Act does not apply to the case of a contract void as being contrary to the statute law which the parties must be pre-sumed to have known at the time when they entered into the contract. When the object of the agreement is illegal to the knowledge of both the parties at the time it is made the section has no application. (Agarwala, J.) DHANNA MURDA v. KOSILA BANIAN. 7 B.R. 624=193

CONTRACT ACT (1872), S. 65.

I.C. 851=13 R.P. 635=A.I.R. 1941 Pat.

-S. 65—Applicability—Contract not executed according to statutory requirements-Party receiving advantage-If liable to compensate. See Bengal Municipal Act, S. 103 (3). 46 C.W.N. 393.

—S. 65—Applicability—Contract of suretyship in favour of Local Board in respect of contract of lease by contractor-Failure to comply with formalities—Suit on contract—Right to restitution. Bhumeho Metharam DISTRICT LOCAL BOARD, HYDERABAD. [See Q.D. 1936-'40, Vol. I, Col. 2228.] 191 I.C. 768=13

R.S. 170. 65—Applicability—Loan by

authority without sanction—Right of creditor to relief. See Local Authorities Loans Acr, S. 4. (1941) 2 M.L.J. 216.

——Ss. 65 and 70 and T. P. Act, S. 108 (f) and (p)—Applicability of Ss. 65 and 70, Contract Act—Lease not satisfying requirements of S 107 T. P. Act, Lasses abouting or ments of S. 107, T. P. Act-Lessee spending on shed and chabutra without complying with Cls. (f) and (p) of S. 108, T. P. Act—Right to reimbursement.

Where a lessee under an instrument not satistying the requirements of S. 107, T. P. Act, spent money on putting up a shed and chabutra without giving notice to the lessor or obtaining her consent as he should have done under Cls. (f) and (p) of S. 108, T. P. Act. Held, that he was not entitled to reimbursement as S. 65 of Contract Act would not apply to the agreement since it was not void and that S. 70, Contract Act, also would not apply as the requirements of Cls. (f) and (p) of S. 108, T. P. Act, were not complied with. (Bennett and Agarwal, JJ.) QAMAR JAHAN BEGAM v. BANSI DHAR. 17 Luck. 530=199 I.C. 35=14 R.O. 455=1941 O.W.N. 1395=1942 A.W., R. (C.C.) 42=1941 O.A. 1050=A. I. R., 1942 Oudh 231.

-S. 65—Applicability—Village panchayat —Illegal contract by—Contract of lease right to collect taxes from occupants of sites in village market—Suit to recover money—Maintainability. See Bombay Village Panchayats Act, S. 27. 43 Bom. L. R. 800.

-S. 65-Applicability-Void contract-Party in pari delicto—Right to recover money paid under illegal contract. See Bihar and Orissa Excise Act, Ss. 57 and 89 and R. 143. 22 Pat. 334.

65—Applicability—Void transfer-Suit for recovery of possession of property transferred-Duty to make compensation for benefit received. See T. P. Acr, S. 6 (a) & (b). (1942) 2 M.L.J. 364.

S. 65—Contract to admit to tenancy and confer occupancy rights-Failure owing to subsequent Legislative enactment-Right to refund

of consideration.
Where there was an admission to tenancy and conferring of occupancy rights on the plaintiff for consideration but owing to the subsequent passing of the U. P. Tenancy Act the plaintiff was dispossessed and the holding restored to a former ejected tenant, in a suit by the plaintiff

to recover the consideration paid held, that the covenant between the parties was perfectly valid when it was made and that as the defendant did all that was required of him under the contract and there was no guarantee in the contract against an act of the legislature the plaintiff could not recover the consideration paid. (Collister, I.) Mewa Ram v. Karan Singh. I.L.R. (1943) All. 745=209 I.C. 304=16 R.A. 128=1943 O.W.N. (H.C.) 226=1943 A.W.R. (H.C.) 147=1943 A.L.J. 317=1943 O. A. (H.C.) 147=1943 A.L.W. 374=A.I.R. 1943 All. 327.

-----S. 65—Contract with minor—Minor representing as major—Liability to restore money

received.

A contract entered into by a minor representing himself as a major, is void and unenforceable. The minor caunot be compelled to restore the money which he has received under the contract. (Almond, J.C. and Soofi, J.) KALA RAM v. FAZAL BARI. 194 I.C. 824=14 R. Pesh. 6=A.I.R. 1941 Pesh. 38.

———S. 65—Liability to restore benefit obtained —Landlord making profit out of a surrender and granting of lease to another—Mother of tenant getting transaction set aside and obtaining possession—Right to recover profits made by landlord.

When a contract becomes void under S. 65 of the Contract Act, any person who has received any advantage under the contract is bound to restore it. Where the landlord arranged for the surrender of a holding by a tenant and executed a lease to a third person and made a profit by the transaction, he is bound to restore it to that lessee when he loses possession by reason of the mother of the original tenant moving the Revenue Court and getting placed in possession on the ground that the transaction was in violation of S. 12 of the C. P. Tenancy Act. (Pollock, J.) Sego v. Shivaji. 1942 N.L.J. 324.

deed by minor's guardian—Purchaser dispossessed under decree in suit by minor challenging sale—Liability of minor's father to refund sale price to purchaser. See Deed—Construction. (1943) 2 M.L.J. 645.

Ss. 65 and 23—Money paid under unfulfilled void agreement—If can be recovered— Money paid in consideration of marriage—Marriage not taking place—Right to recover money paid.

Money paid in consideration of a marriage between a bride and a bridegroom of disparate ages, and not on account of expenses can be recovered under S. 65 of the Contract Act if the marriage does not in fact take place, although the agreement under which the money is paid is void under S. 23 of the Contract Act. S. 65 makes no distinction between agreement void ab initio and subsequently discovered to be void. [Grille, C. J. and Sen, J.) Alsidas Pannalal v. Punam Chand. I.L.R. (1944) Nag. 535 = 214 I.C. 168=17 R.N. 31=1944 N.L.J. 124=A.I.R. 1944 Nag. 159.

———S. 65—Mortgagee obtaining sale of mort-

gaged property after mortgagor's death from that and of his minor sons—Sale subsequently

CONTRACT ACT (1872), S. 65.

set aside—Effect on mortgage—Remedy of mortgagee in respect of money due under mortgage. See Limitation Act, Art. 97. 197 I.C. 498.

S. 65—Mortgage void under para. 11, Sch. III, C. P. Code—Lender, if can claim restitution—Claim both under personal covenant and under S. 65—Whether can be made—Lender advancing hypothetical or alternative arguments in suit to enforce mortgage—Whether can be said to have affirmed personal covenant.

Where a mortgage is discovered to be void by reason of its having been granted in violation of para. 11, Sch. III, C. P. Code, the lender is not obliged to proceed on the personal covenant. He can repudiate or rescind the contract of loan and claim his money back by way of restitution under S. 65 of the Contract Act, if such claim is not barred by limitation. He cannot however claim at one and the same time both under the covenant to repay and also under S. 65 of the Contract Act. The lender cannot be said to have elected to affirm the personal covenant merely by reason of any arguments addressed by him hypothetically or by way of alternative to his main contention in his suit to enforce the mortgage that the transaction was not hit by the provisions of para. 11. Election to affirm must, if it is to be gathered from action, be gathered 'from unequivocal acts. (Sir George Rankin.) RAJA MOHAN MANUCHA 10. MANZOOR AHMAD KHAN. 70 I.A. 1=18 Luck. 130=206 I.C. 457=1943 O.W.N. 214=1943 A.L.W. 381=9 B.R. 353=15 R.P. C. 94=1943 A.L.J. 421=I.L.R. 1943 Kar. (P.C.) 19=47 C.W.N. 509=46 Bom.L.R. 170=1943 O.A. (P.C.) 52=A.I.R. 1943 P. C. 29=(1943) 1 M.L.J. 508 (P.C.).

—S. 65 and Trust Act, S. 84—Person bidding at an abkari auction—Contract entered with him their tentered with the contract and the cather are the same and the cather are the same and the cather are the same are the contract entered with him their tentered with him their ten

S. 65 and Trust Act, S. 84—Person bidding at an abkari auction—Contract entered into by other persons with him prior to the auction to share in the business to be obtained after successful bidding—Suit upon such a contract—Unsustainable.

Some persons entered into a contract under which each of them was to advance a certain sum of money to the first defendant, who was to bid at an abkari sale to be held, and as consideration for the money paid by them they were to share in the business which the first defendant was to bid for. The first defendant did bid and obtained the business and it was alleged he also made profits. The plaintiffs brought a suit 'for the dissolution of partner-ship and accounts.

Held, that on no ground could the plaintiffs, to any extent, succeed, as the contract was illegal and could not be sued upon. It makes no difference if the contract had been entered into before the auction and not subsequently. (Horwill, J.) Chennaya v. Janikamma. 57 L.W. 325=1944 M.W.N. 408=A.I.R. 1944 Mad. 415=(1944) 1 M.L.J. 434.

S. 65—Provisions when come into play—Agreement void ab initio—Limitation—Starting point.

The provisions of S. 65, Contract Act, come into play when an agreement is discovered to be void or when a contract becomes void. When an agreement is void in its inception it is ordi-

narily to be considered to have been discovered to be void at the time when parties entered into it. Hence a suit to recover money advanced under S. 65 of the Contract Act in respect of a void mortgage has to be brought within limitation beginning from the execution of the agreement of mortgage. (Allsop and Varma, JJ.)
SANA ULLAH v. JAI NARAIN SINGH. I.L.R.
(1942) All. 817=15 R.A. 279=203 I.C. 428
=1942 A.L.J. 390=1942 A.W.R. (H.C.)
252=1942 A.L.W. 427=A.I.R. 1942 All.

-S. 65—Suit under to recover consideration paid for a void mortgage—Limitation. See Limitation Act, S. 20, Arts. 62 and 97 and Contract Act, S. 65. 1943 A.L.W. 360.

-S. 65-Void alienation-Alienation of debotter estate—Expenses legitimately incurred by alienee—Alienee's right to compensation.

Where an alienation made by the shebaits of a deity is held to be void, and the alienee has spent large sums of money in carrying on litigation against those persons who were in illegal occupation of the *debotter* estate, and but for his efforts the deity would never have got back its properties, and the alienee has also spent money for repairs of the temples and for carrying on deb-sheba which was neglected by the shebaits, the plaintiff before he can recover the properties on behalf of the deity must compensate the alienee for all the expenses which he has legitimately incurred. (Mukkerjea and Biswas, JJ.) ISWAR LAKSHI DURGA HAR JATNESWAR v. SURENDRA NATH SARKAR. 45 C.W. N. 665.

S. 68 and U. P. Court of Wards Act (1912), S. 37—Claim under S. 68, Contract Act —S. 37 of Court of Wards Act, if a bar—Claim for supply of cloths—Credit for amount disproportionate to the allowance of the ward.

To a claim under S. 68 of the Contract Act for the price of necessaries supplied to a Ward of Court, S. 37 of the Court of Wards Act is no bar. But a supplier of goods which are necessaries must take care to see that he is really protected by S. 68. A claim for an amount in respect of necessaries, very disproportionate to the allowance granted to the ward could not be recovered. (Bennett, J.) DEPUTY COMMISSIONER OF BARA BANKI V. MADAN GOPAL. 18 Luck. 318=15 R.O. 248=204 I.C. 38=1942 A.W.R. (C.C.) 343 (2)=1942 O.W.N. 560 =1942 O.A. 507=A.I.R. 1943 Oudh 119.

-S. 68-Marriage expenses of male Hindu minor—Advances for—If amounts to supplying him with necessaries. TIKKI LAL v. KOMAL CHAND. [See Q.D., 1936-'40, Vol. I, Col. 2239.] 193 I.C. 178=13 R.N. 297.

—S. 68—Suit for reimbursement for 'necessaries' supplied to minor-Facts to be proved.

To succeed in a suit for reimbursement for necessaries' supplied to a minor, not only must it be shown that the articles supplied are necessaries in the sense they are things ordinarily required by the minor in question but that they were actually necessary at the date when they upon the plaintiff to show this much at least that he did make inquiries in order to ascertain for sale retained with him under agreement to

# CONTRACT ACT (1872), S. 69.

whether the minor, had an actual necessity of being supplied with the goods at the time when they were supplied. (Yorke, J.) PRAGDAS v. COLLECTOR OF FARUKHABAD. 1943 A.L.W. 303.

S. 69—Applicability—Conditions.

Under S. 69, Contract Act, two elements must exist in order to entitle a person to claim reimbursement: viz., (1) he must on the date, on which he made the payment, have been interested in the payment of the money; (2) the person from whom re-imbursement is sought must have been bound by law to pay it. The law of India does not recognise equitable estates. Unless the conditions are satisfied, S. 69 cannot apply. Unless the party making the payment has a contract to pay, or interest-present, future or contingent, a payment by him can only be regarded as a voluntary payment. (Stone, C.J. and Kania, J.) State of Gondal v. Govindram Seksaria. 46 Bom.L.R. 822=A.I.R. 1945 Bom. 187.

-S. 69—Applicability—Conditions.

S. 69 of the Contract Act applies where a person has paid money which another is bound by law to pay. It is obvious that the section cannot apply unless the obligation of the other to pay was in existence at the date when the payment in respect of which the suit is laid was made. It is, further necessary that the plaintiff must be interested in the payment of money, and this interest must be in order to avert some otherwise be lost to him. (Bose, I.) Banwari-Lal Guru v. Rajkishore Guru. I.L.R. (1945) Nag. 820=1945 N.L.J. 563=A.I.R. 1946 Nag. 21.

sion of estate without title—Payment of Government revenue—Right to sue for reimbursement— Omission to claim set off in prior suit for damages—If bars subsequent suit—Res judicata.

Where a person in possession of an estate, in good faith, pending litigation makes the necessary payments for the preservation of the estate in dispute and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. The case of Government revenue would stand on quite a different footing from other outgoings incurred by the person in possession of an estate without title and it would be open to him to maintain an action for the recovery of the amount paid. It may also be open to him to set-off the amount in a suit for damages or mesne profits against him; what could be set-off can always be claimed in an independent suit, and the fact that a set-off was not claimed against a demand in a prior suit would not preclude the claim being agitated in an independent action. (Venkataramana Rao and Somayya, IJ.). VENUGOPALA PILLAI v. THIRUGNANANAVALLI AMMAL (2). 54 L.W. 286=1941 M.W.N. 965=200 I.C. 443=15 R.M. 52=A.I.R. 1941

pay—Right to claim reimbursement on loss of property purchased. See T. P. Acr, S. 92. 43 Bom L.R. 225.

S. 69—A suing B for partition—Mortgage paid off by B—B's right to reimbursement. If A sues B for partition and B claims that he has discharged the mortgage debt of the entire estate, B is entitled to demand from A that, before A gets partition, A should recoup B for the proportionate share of the mortgage which had been paid off by B alone. (Dalip Singh and Sale, JI.) QAISAR JAHAN BEGAM v. COURT OF WARDS. 193 I.C. 829=13 R.L. 489 =A.I.R. 1941 Lah. 88.

S. 69—"Bound by law to pay"—Includes liability on property without personal liability. The phrase "bound by law to pay" in S. 69 of the Contract Act not only includes personal liability of the "other" but also liability on his property even when he was under no personal liability to pay. (Mitter and Blank, JJ.) Joy CHAND SERAOGI V. DOLE GONINDA DAS. 48 C. W.N. 454=A.I.R. 1944 Cal. 272.

W.N. 454=A.I.R. 1944 Cal. 272.

S. 69—"Interested in the payment of money"—Meaning of—Honest belief, if sufficient.

The words "interested in the payment of money" used in S. 69 of the Contract Act do not mean that the interest should be such as would stand the test of a judicial trial. It is sufficient if the person who makes the payment honestly believes that his own interest requires that it should be made, even though that belief is not quite sound in law. (Puranik, J.) BHAGIRATHIBAI v. DIGAMBER AMBADAS. I.L.R. (1945) Nag. 247=1945 N.L.J. 98=A.I.R. 1945 Nag. 179.

——Ss. 69 and 70—Limitation—Suit for reimbursement of money paid towards mortgage decree—Limitation. Sec LIMITATION ACT, ARTS. 61 AND 120. (1945) 1 M.L.J. 341.

——Ss. 69 and 70—Principle of unjust

——Ss. 69 and 70—Principle of unjust enrichment—Basis of—Applicability—Extent and limits.

A payment made by a person who puts forward a bona fide claim to property in dispute is entitled to the protection afforded by S. 69 of the Contract Act, even though it ultimately transpires as a result of litigation that he had not in law or in fact the interest for the protection of which the payment was made by him. A payment in satisfaction of a decree by a person who is a party to a decree is a payment lawfully made within the meaning of S. 70. The principle underlying these sections would also apply to the case of a person who advances money to the person making the payment in such circumstances. The basis of the doctrine is that if a person has received some property or benefit from another, it is just that he should make restitution as otherwise he would be unjustly enriched at the expense of the other. This is, however, always subject to the limitation that a man cannot make another liable for a benefit done officiously. It is by the application of this

# CONTRACT ACT (1872), S. 70.

principle of unjust enrichment that an obligation is imposed in law in order to satisfy the requirements of justice. (Venkataramana Rao, C.I. and Venkataranga Iyengar, J.) ARAVINDAMMA 7. RAJASEKHARIAH. 48 Mys.H.C.R. 534=22 Mys.L.J. 150.

Mys.L.J. 150.
S. 69—Right of reimbursement—Rent suit dismissed against one defendant and decreed against another—Decree satisfied by person interested in payment—Right of such person to reim.

bursement from both.

Where a rent suit filed against two defendants is dismissed as against one and decreed as against the other, and another person interested in the payment of the decretal amount satisfies the decree, such person is not disentitled by the mere fact of the dismissal of the suit against one of the defendants from claiming reimbursement from him also, if he is otherwise entitled (Mitter and Blank, JJ.) JOYCHAND SERAGE 7. DOLE GOBINDA DAS. 48 C.W.N. 454=A.I.R. 1944 Cal. 272.

——Ss. 69 and 70—Scope—Contribution or reimbursement.

Ss. 69 and 70 of the Contract Act deal with entirely different conditions and they cannot both apply to the same set of facts. If one applies the other cannot. Further more, they deal not with contribution but with reimbursement. If a plaintiff can make out a case under either of these sections, he is entitled to recover the whole of the money spent and not merely a part of it Neither of these sections can have any application when a man pays a debt for which he himself is personally liable. (Henderson, J.) SUDHANSU KUMAR ROY v. BANAMALI ROY. 49 C.W.N. 711.

S. 69—Surety erroncously made to pay by coercive process decretal debt due by another—Claim by former against latter for reimbursement

—If legal.

Where a person on whom there was no longer any obligation to pay as surety, as subsequently discovered, had been erroneously made to pay in execution, by coercive process, the decretal debt due by another a claim by the former against the latter under S. 69 of the Contract Act for reimbursement would be quite legal and valid. (Bobde, J.) HARICHAND v. GYANIRAM I.L.R. (1944) Nag. 638=1944 N.L.J. 433 = A.I.R. 1944 Nag. 282.

——S. 69—Surety for Court guardian—Payment of debt incurred by guardian for expenses of minor girl's marriage with sanction of Court—Right to reimbursement from person succeeding to estate. See Mys. LIMITATION ACT, ARTS. 61, 81 AND 120. 45 Mys. H.C.R. 403.

——S. 70—Applicability—Conditions for.

S. 70 of the Courtest Act can only have an

S. 70—Applicability—Conductors for S. 70 of the Contract Act can only have application where there is direct benefit to the person for whom the work is done. (Leach, C. J. and Lakshmana Rao, J.) SOUTH INDIAN RY. Co., LTD. v. MUNICIPAL COUNCIL, MADURA. 58 L.W. 338=1945 M.W.N. 441=A.I.R. 1945 Mad. 427=(1945) 2 M.L.J. 155.

S. 70—Applicability—Irrigation tank

S. 70—Applicability—Irrigation tank owned by Government and shrotriemdar as co-owners—Repairs effected by Government—Right to recover contribution from co-owners.

Where the Government effects repairs to an irrigation tank owned by the Government jointly with a shrotriemdar and sues the latter (coowner) for contribution in respect of the expenses incurred for the repairs, it must be held that the Government in carrying out the repairs has acted lawfully and has not intended to carry them out gratuitously, and that the defendant coowner, who has enjoyed the benefit of the repairs which were necessary and but for which his lands would have suffered is liable to pay contribution to the Government. All the conditions of S. 70 of the Contract Act having been fulfilled, the Government would be entitled to recover contribution. Though under the English law, the defendant would not be liable, the provisions of S. 70 of the Indian Contract Act are wider than the English law, and therefore the defendant is liable under S. 70. (Leach, C.J., Lakshmana Rao and Krishnaswami Ayyangar, JJ.) SRIRAMA RAJA v. SECRETARY OF STATE.
 1943 M.W.N. 6=I.L.R. (1943) Mad. 158=
 204 I.C. 581=15 R.M. 788=56 L.W. 58= A.I.R. 1943 Mad. 85=(1942) 2 M.L.J. 800 (F.B.). S. 70-Applicability-Lessee under

valid lease not satisfying requirements of Cls. (f) and (p) of S. 108, T. P. Act—Right to reimbursement. See Contract Act, Ss. 65 and 70 and T. P. Act, S. 108 (F) and (P). 1941

O.A. 1050.

-S. 70-"Lawfully"-Meaning of. The word "lawfully" as used in S. 70 of the Contract Act is of the very essence of the section, and in every case we have to find out whether the person making a payment of money had any lawful interest in making it at the time when the payment was made. If a person holding a charge on a property makes a payment in order to save it from being sold bona fide believing that it is necessary to do so in order that it may remain in tact for satisfaction for his debt, the payment is made "lawfully" within the meaning of the section. (Puranik, J.) BHAGIRATHIBAI v. DIGAMBER AMBADAS. I.L.R. (1945) Nag. 247=1945 N.L.J. 98=A.I.R. 1945 Nag. 179.

S. 70—Scope and applicability—"Lawful"
—Meaning of.

S. 70 of the Contract Act applies when a person lawfully does something for another, not intending to do so gratuitously. The section must not be read so as to justify the officious The section interference of one man with the affairs or property of another man, or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered. The word 'lawful' in the section contemplates cases in which a person holds such a relation to another as either directly to create, or by implication reasonably to justify an inference that by some act done for another person the party doing the act is entitled to look for compensation for it to the person for whom it is done. It is impossible to hold that when a person divests himself of all interest in property and gifts it to another and agrees that he shall no longer have any right to the management of that property and vests the sole rights of management in another, he can be said to stand in the relationship con-(Bose, J.) BANWARILAL templated above.

### CONTRACT ACT (1872), S. 72.

GURU v. RAJKISHORE GURU. I.L.R. (1945) Nag. 820=1945 N.L.J. 563=A.I.R. Nag. 21.

-S. 72—Applicability—Landlord and tenant-Tenant leaving rent in arrears-Part of arrears barred by time-Landlord locking up premises preventing tenant from carrying on business therein-Payment by tenant to get rid of improper re-entry of landlord—Right to recover amount of barred arrears paid by him. See Mys. T. P. Act, S. 111. 49 Mys.H.C.R. 522.

S. 72—Applicability—Money paid under

mistake-Recoverability-Carelessness of payer-If bar-Privity between payer and payee-If es-

sential.

S. 72 of the Contract Act is unambiguous, and under that section, if money is paid to a person by mistake, he is bound to repay it. There is nothing in S. 72 to suggest that it should only be applied when there is privity between the payer and the payee. G falsely representing himself to be the real owner of a certain house and land induced the appellant to lend him Rs. 2,000 on a mort-gage of the property. The real owner had no knowledge of the fraud. Again falsely repre-senting himself to be the real owner, G afterinduced the respondent to advance wards Rs. 3,500 on a second mortgage of the property. Out of the Rs. 3,500 which the respondent agreed to advance, she was to pay to the appellant Rs. 2,000 in discharge of the 1st mortgage. Believing that G was the real owner and that the appellant was a first mortgagee of the property the respondent paid to her the Rs. 2,000. When the fraud was discovered the respondent instituted a suit to recover from the appellant Rs. 2,000 as a payment made in mistake of facts.

Held, that the money having been paid under the impression of the truth of a fact which was untrue, it could be recovered back, however careless the party paying might have been in omit-ting to use diligence to inquire into the facts. The receiver (appellant) was not entitled to the

money nor intended to have it.

Held, further, that assuming that there should be privity between the payer and the payee that condition was fulfilled in the present case, though the appellant was not a mortgagee, she regarded herself as a mortgagee, and the respondent also thought that she was a second mortgagee discharging a first mortgage. (Leach, mortgagee discharging a first mortgage. (Leach, C.J. and Bell, J.) Sowdra Bai v. Saraswati Ammal. I.L.R. (1942) Mad. 669=55 L.W. 233=204 I.C. 269=15 R.M. 724=1942 M.W. N. 335=A.I.R. 1942 Mad. 590=(1942) 1 M.L.J. 441.

S. 72—Applicability—Sale of one's pro-

perty in execution of decree against another-Application by owner to set aside sale under 0. 21, R. 89, C. P. Code—Suit to recover money deposited under 0. 21, R. 89—Maintainability.

A suit by a person to recover the amount which he deposited in an application under O. 21, R. 89, C. P. Code, on the ground that he was compelled to make the deposit in order to save what he claimed to be his property is maintainable. The payment made into Court by the plaintiff when he applied for an order to set aside the

sale of his property in execution of a decree against some one else, though not made under protest, must be considered to be a made under coercion within the meaning of S.
72 of the Contract Act. (Leach, C.J. and Happell, J.) Apparao v. Venkata Kutumbarao.
198 I.C. 552=15 R.M. 456=53 L.W. 644= 1941 M.W.N. 499=A.I.R. 1941 Mad. 635

=(1941) 1 M.L.J. 793. ——S. 72—Deposit under O. 21, R. 89, C. P. Code, as sale held in spite of objection as to decree being time barred-Objection upheld on appeal—Recoverability of deposit as money paid under coercion. See C. P. Code, Ss. 144 AND O. 21, R. 89. 1943 A.L.W. 277.

S. 72—Mistake—Mistake as to the con-

struction of contract and as to rights under it— Money paid under—Recoverability.

A mistake as to the construction and meaning of a contract is not a mistake of fact but a mistake of law. If a party acts on a mistaken view of his rights under a contract, he is not entitled to any relief under the heading mistake and if money is paid under a contract in consequence of a mistake as to the true construction of and as to the rights of the party under a contract, it is money paid under a mistake of law and not a mistake of fact and is not recoverable. (Harries, C.J. and Manohar Lall, J.) SHIVA PRASAD SINGH V. SRIS CHANDRA NANDI. 22 Pat. 220= 200 I.C. 426=16 R.P. 147=10 B.R. 259= A.I.R. 1943 Pat. 327.

-S. 72—Overcharges made by public utility company—Payments—Recoverability as money had and received.

It is settled law that overcharges made in violation of an obligation imposed upon public utility companies to charge only at certain specified rates are recoverable as "money had and received." The payments cannot be said to be voluntary payments. (Patanjali Sastri, J.)

PAIGHAT ELECTRIC CORPORATION, LTD. v. VEERA-RAGHAVA AYYAR. 200 I.C. 346=15 R.N. 83= 1941 M.W.N. 253=53 L.W. 359=A.I.R. 1941 Mad. 439=(1941) 1 M.L.J. 411.

Fees to Panchayat Board under mistaken belief that properties and business are situate within that Board—Claim for refund—Maintainability. AUDINARAYANA NAIDU v. PANCHAYAT BOARD OF MUNAGAPAKA. [See Q.D., 1936-'40, Vol. I, Col. 2251.] 194 I.C. 657=14 R.M. 31=(1940) 1

M.L.J. 582.
S. 72—Payment of tax to municipal council—Tax paid without formal protest—If volun-tary payment—Right to sue for refund on ground of levy being illegal.

The fact that a person pays a tax such as octroi to a local body without a protest at the time does not lead to the inference that payment is voluntary so as to disentitle him from suing for refund of the tax paid on the ground that the tax has been illegally levied. Where the consequences of not paying the tax would he that the articles or paying the tax would be that the articles on which tax is claimed would be seized and detained, the payment of tax to avoid such consequence is a payment and such sums of money by way of deposit or earnest under duress and not a volunteer and such sums can be forfeited by the vendor when

# CONTRACT ACT (1872), S. 73.

Act. (Nageswara Iyer and Singaravelu Mudaliar, JJ.) Town Municipal Council, Nanjangud v. Nanjundappa. 18 Mys.L.J. 477= 46 Mys.H.C.R. 1.

S. 72—Payment of tax to Municipality under misapprehension as to liability-Suit for refund-Maintainability. RAMJEE RAO v. MUNI-CIPAL COUNCIL, MASULIPATAM. [See Q.D., 1936. '40, Vol. I, Col. 2252.] 193 I.C. 559=13 R. M. 686=(1940) 2 M.L.J. 469.

-Ss. 73, 74 and 75-Applicability-Contract of sale of immovable property-Avoidance by seller on failure of buyer to complete payment—Effect—Right of buyer to recover monies paid. See Contract Act, Ss. 64, 73, 74 and 75. I.L.R. (1941) Kar. 495.

-S. 73-Applicability-Contract of sale of immovable property-Breach-Damages-Principles.

S. 73, Contract Act, is general and can equally apply to contracts for sales of immovable property. But the damage alleged to have been caused must have arisen "naturally in the usual course of things 'from such breach". Further under the Explanation to S. 73, the damages recoverable for consequential expenses are limited by the test of what a prudent man might have reasonably done under the circumstances. (Abdul Ghani and Venkataranga Iyengar, II.) PRESIDENT, HEGGADADEVANAKOTE MUNICIPAL COUNCIL V. KAREEM SAB. 23 Mys.L.J. 105=49 Mys.H.C.R. 509.

-S. 73-Applicability-Deposit under agreement of purchase-Provision for forfeiture-If penal-Relicf against forfeiture-Power of Court. See Contract Act, Ss. 64 and 73. (1944) 2 M.L.J. 74.

Breach of contract of sale—Failure to deliver goods under contract to deliver "as and when goods come" -Measure of damages. See SALE OF GOODS ACT, S. 35.

(1944) 1 M.L. J. 391.
S. 73—Breach — Sale of goods—Breach by purchaser—Right to refund of sale price—Claim by defendant

to set-off damoges—Sustainability—Burden of proof.
Where a contract for the sale of goods falls through the default of the purchaser, the latter is entitled to recover the purchase-money paid by him (excluding the earnest or deposit), and the seller can only resist the claim by seeking to set-off against the said sum any damages which he might have incurred by reason of the purchaser's non-performance of the contract. But before the seller can substantiate this claim to set-off, he should prove his readiness and willingness to perform his part of the contract and that he was in a position to perform the contract on the date fixed for the performance of the contract. (Venkataramana Rao, J.) NARAYANA-MURTHI V. NAGESWARA RAO. 193 I.C. 751=13 R.M. 710=1940 M.W.N. 756=52 L.W. 251=A. I.R. 1941 Mad 108.

S. 73—Breach-Sale of goods—Default by purchaser—Deposit or earnest—Forfeiture—Right of vendor—Vendor equally in default—Effect.

In the case of mercantile contracts, even in respect of sale of goods, it has been customary in India to under duress and not a voluntary payment and default is committed by the vendee in the performance can be recovered under S. 72 of the Contract of his part of the contract. The fact that the vendor

was equally at fault in performing his part of the contract makes no difference. (Venkataramana Rao, 7.) NARAYANAMURTHI v. NAGESWARA RAO. 193 I.C.
 751=13 R.M. 710=1940 M.W.N. 756=52 L.W. 251=A.I.R. 1941 Mad. 108.

-----S. 73—Contract giving uncontrolled discretion to seller regarding time of resale—Validity.

S. 73 of the Contract Act lays down the general principle of law where there is no provision in the deed of contract regarding re-sale. The re-sale in deed of contract regarding re-sale. such circumstances must take place within a reasonable time. The purchasers can, however, agree to ive uncontrolled discretion regarding the time of the re-sale to the sellers and they can also agree that they will not raise any objection regarding a re-sale taking place after an unreasonable lapse of time. Such a clause though harsh is not unconscionable or illegal in mercantile contracts. There can be no question in a mercantile contract of one party being able to dominate the will of the other party or to over-reach it. In such circumstances the Court cannot relieve the purchaser on equitable grounds of the effect of a harsh or onerous term to which he has agreed by means of a solemn written contract. (Abdul Rashid and Teja Singh, JJ.) RALLI BROTHERS, LID. v. BHAGHWAN DAS. A.I.R. 1945 Lah. 35. LID. v. BHAGHWAN DAS.

-S. 73-Construction-Shipowner refusing to convey goods in accordance with contract of affreightment Shipper's right to damages—Latter having no goods to

inconvey.

In the ordinary case of refusal by a shipowner to convey goods in accordance with a contract of affreightment, the shipper is entitled to recover the necessary additional cost curred by him or which would be incurred by him in shipping his goods by other means. But if the shipper had no goods and is proved to have had no intention of obtaining goods, and his contract is non-transferable, the shipper is not entitled to recover damages. Illustration (g) and other illustrations to S. 73 of the Contract Act are not more than general rules, and it is necessary to look to the words of the section itself. S. 73 lays down that compensation is to be given "for any loss or damages caused to him thereby." The words following "which naturally arose in the usual course of things from such breach" do not mean that general rules such as those given in the Illustrations must be followed irrespective of the facts, but only impose a limitation upon the damages which can be allowed, that the damages must not be remote. No doubt, ordinarily. loss or damages will be presumed when a contract at a lower rate of freight than the market rate is broken by the shipowner, but there is nothing in the wording of S. 73 which precludes the rebuttal of such a presumption. (Weston, J.)
HERMAN AND MOHATTA v. ASTATIC STEAM NAVIGATION CO., LTD. 196 I.C. 529=14 R.S. 70=A.I.R. 1941 Sind 146.

-S.73—Interest as damages when recoverable— Right to interest on compensation decreed for use and occu-

pation.

Interest cannot be recovered as damages under S. 73 of the Contract Act where it is not recoverable under the Interest Act. As interest can be recovered under the Interest Act only on debts of sums certain payable at a certain time no interest can be allowed on compensation decreed for use and occupation of land because it cannot be said that it relates to sums payable at a certain time. (Mathur, J.) MADAN LAL v. RADHAKISHAN. 1942 A.L.W. 659.

-S. 73—Interest as part of damages for the breach

of contract-If can be awa ded.

## CONTRACT ACT (1872), S. 74.

Though where payment of money is claimed on a contract, interest cannot be allowed except under the provisions of the Interest Act, the position is different where interest is claimed as part of the damages for breach of the contract and it could be allowed. (Allsop and Bennett, 77.) DIGBIJAI NATH v. TIRBENINATH TEWARI. 1945 O.W.N. (H.C.) 275=1945 A.L. J. 459=1945 A.L.W. 322.

-S. 73—Lease of ferry dues by statutory body-Threat of prosecution as rate levied was contrary to schedule agreed upon-Lessee levying fee as desired by statutory body -Suit to recover loss thereby sustained—Maintainability.

Where a lessee from a District Board of the right to collect certain ferry dues according to certain rates on being threatened with prosecution for charging rates contrary to the schedule of rates agreed upon gave up charging those rates and sued the statutory body for the loss sustained by him in not being allowed to charge the higher rate, held that the suit was not maintainable as the plaintiff had no cause of action, for, there was neither a breach of contract by the Board nor any wrongful act which would justify a claim for damages. (Allsop 7.) THE DISTRICT claim for damages. (Allsop J.) THE DISTRICT BOARD, BIJNOR v. MOHAMMED SHARIF. 1943 A.L.

S. 73, Expl.—Scope of.

The Explanation to S. 73 of the Contract Act seems to cast a burden upon the person complaining of the breach of contract to show that he did not possess the means of remedying the inconvenience caused by the mon-performance of the contract. (Ghulam Hasan and Agarwal, JJ.) Aliya Begam v. Mohini Bibi 1942 A.W.R. (C.C.) 339 (1)=1942 O.A. 461=1942 O.W.N. 664=18 Luck. 327=15 R.O. 301 —A IR 1943 Oudb 17 =A.I.R. 1943 Oudh 17.

S. 74—Applicability—Agreement among pattadars for payment of suota of kist due by each under irrigation scheme—Clause providing for payment of double the amount

in default of payment within time-Penalty.

An agreement for the due maintenance of a village irrigation system provided that samudayam lands were to be under the management of the respondent who was a leading mirasdar of the village, being the largest single owner therein, but that the kist due thereon should be paid by the several pattadars including the appellant proportionately to the extent of the land in their respective pattas and that in default of payment of the proportionate share by any pattadar, the manager (respondent) was to collect from the defaulting pattadar double the amount of the kist payable by him. The appellant failed to pay his share within the time fixed and therefore the respondent sought to recover from him double the amount under the agreement. The appellant pleaded that the clause in question was penal falling within S. 74 of the Contract Act.

Held, that the clause in question was penal and was not enforceable in terms, but that the respondent was certainly entitled to reasonable compensation for the breach committed by the appellant in not paying his quota according to his contract. (Krishnaswami Ayyangar, J.) RAMASWAMI AIYAR v. SAPTHARISHI REDDIAR. 56 L.W. 302=212 I. C. 487=16 R. M. 617=A.I.R. 1943 Mad. 598=(1943) 1 M.L.

8. 74—Applicability—Clause in consent decree providing for instalment payment—Default clause providing for payment of amount higher than that fixed for instalment but less than amount sued for—If penal—If to be relieved

against—Construction of decree.

In a suit on a promissory note to recover a sum of Rs. 6,500 (Rs. 6,000 being the principal and Rs. 500

### CONTRACT ACT (1872), S. 74.

interest at Rs. 1-8-oper cent. per mensem) a decree by consent was passed which provided, inter alia: "That defendant do pay Rs. 3,200 in full satisfaction of the plaintiff's claim in suit including costs and interest as under: (a) Rs. 50 on 15—10—1937, (b) Rs. 100 on 15—11—1937, (c) Rs. 100 on 15—12—1937, (d) Rs. 1,050 on 15—1—1938 and thereafter Rs. 100 per month till full amount of principal is paid; the first instalment after 15-1-1938, will begin from 15-2-1938. Interest to run from date of decree till payment at 6 per cent. per annum. If the defendant fails to pay any instalment due up to 15-1-1938 he will have to pay Rs. 5,000 in all in satisfaction of the plaintiff's claim in suit and the plaintiff will be entitled to recover this amount with interest at 6 per cent. per annum from the defendant from the date of decree." The defendant failed to pay the instalments and thereupon execution was taken out. The defendant pleaded that the clause providing for payment of Rs. 5,000 and interest on default was penal and therefore should be relieved against.

Held, (1) reading the decree as a whole the plain meaning interpretation) was that the defendant admitted that the plaintiff's claim not to the full extent of Rs. 6,500 but to the extent of Rs. 5,000 and that as a concession it was agreed that Rs. 3,200 should be paid by instalments at certain times and that on failure to pay, the claim to the admitted amount revived; (2) that there was no room for the application of S. 74 of the Contract Act, as there was no question of a penalty but of a concession. (Davies, C. J. and Lobo, J.) MONTEIRO v. ASTRIDGE. I L.R. (1943) Kar. 245=210 I.C. 397=16 R.S. 141= A.I.R. 1943 Sind 247.

-S. 74-Applicability-Decree for fixed sum of money-Clause providing for payment of lesser sum in case of regular payment of fixed instalments-Default—Effect—Power of Court to relieve against condition. See C. P. Code, Ss. 148 AND 151. I.L.R. (1941) Kar. 389.

-S. 74-Applicability-Deposit to secure perfor-

mance of contract—Deposit not made as required by contract—If liable to be forfeited.

The provisions of S. 74 of the Contract Act do not apply to a deposit of money made to secure or guarantee the performance of a contract. Such a deposit can, therefore, be forfeited upon the failure of the depositor to perform the contract within time if the amount is not unreasonable, although no damage is proved. The fact that a party has not paid the security deposit required by the contract does not affect the question of his liability to forfeit the amount required to be deposited, as he cannot be in a better position by reason of his own default than if he had fulfilled his obligations, (Gentle, J.) W. J. YOUNIE v. TULSIRAM JANKIRAM. 201 I.C. 525=15 R.C. v. Tulsiram Jankiram. 201 I.C. 525=15 E 222=46 C.W.N 522=A.I.R. 1942 Cal. 382.

S. 74—Applicability to consent decrees. S. 74 of the Contract Act applies also to a consent decree just as it applies to any other contract. A decree embodying a compromise does not make the compromise any the less the contract of the parties. (Davies, C.J. and Lobo, J.) Monterro v. Astribge. I.L.R. (1943) Kar. 245=210 I.C. 397=16 R.S. 141=A.I R 1943 Sind 247.

-S. 74-Consent decrec-Penal clause-Relief-

Power of Court.

incorporated in the form of a decree and the Courts have power under S. 74, Contract Act, to relieve the judgment-debtor of the effect of a penal clause in the decree if it is considered equitable to do so. The Bom. 302.

## CONTRACT ACT (1872), S. 124.

section allows the Court to come to the help of the person against whom a penal clause operates on the happening of a particular event and the Courts have therefore to see in each case whether the condition is penal or not. If it is, they could interfere under the section, if not the section would not be applicable and they could not step in at all. It is a question of fact in each case whether a condition in the decree amounts to a penalty. (Almond, J.C. and Mir Ahmad, J.) GAWRI DEVI v. SHIV SARAN LAL. 206 I.C. 625= 15 R Pesh 113=A.I.R. 1943 Pesh. 33.

-S. 74-Penalty-Provision in compromise decree to transfer property in lieu of amount due.

Where a compromise decree after reciting the amount due to the plaintiff states that it would be paid by the execution of a sale deed in his favour by the other party, the agreement to transfer property in payment of the decretal amount cannot be called a stipulation by way of penalty. (Thomas, C.J. and Agarwal, J.) Lal Bhagwat Singh v. Hari Kishen Das. 17 Luck 249=1941 O.A. 865=1941 A.W.R. (Rev.) 949=1941 O.W.N. 1138= A.I.R. 1922 Oudh 1.

per cent. interest in addition in default of payment of mortgage money within time fixed-If penal-Power of Court to relieve against—Clause—If wholly unenforceable. See Mortgage—Interest. 55 L.W. 661.

S. 87—Applicability—Sale of future crops of garden—Effect of—Rights of vendee. See Mysore T. P. Acr, S. 5. 19 Mys. L. J. 475.
——Ss. 124 and 126—Applicability—Contract of

guarantee and contract of indemnity—Distinction— Broker and sub-broker-Agreement by latter to save former loss occasioned in effecting transactions of constituents to be introduced by latter-Ifindemnity or guarantee. RAMCHANDRA B. LOYALKA v. SHAPURJI. [See Q. D. 1936-40, Vol. I, Col. 2266.] 192 I.C. 375 =13 R.B. 246.

-Ss. 124 and 125-Scope--If exhaustive -Indemnityholder-Right of action-Suit before actual loss is suffered

-If premature.

The Contract Act is both an amending and a consolidating Act and is not exhaustive of the law of contract to be applied by the Courts in India. Ss. 124 and 125 of the Act do not embody the whole law of indemnity. S. 124 only deals with one particular kind of indemnity which arises from a promise made by the indemnifier to save the indemnified from the loss caused to him by the conduct of the indemnifier himself or by the conduct of any other person, but does not deal with those classes of cases where the indemnity arises from loss caused by events or accidents which do not or may not depend upon the conduct of the indemnifier or any other person, or by reason of liability incurred by something done by the indemnified at the request of the indemnifier. S. 125 only deals with the indemnity-holder in the event of his being sued and is by no means exhaustive of the rights of the indemnity-holder. There is no justification or authority for holding that in no case can an indemnity-holder maintain an action against an indemnifier unless he has suffered actual loss. If the indemnifier has incurred a liability and that liability is absolute, he is entitled to call upon the indemnifier A consent decree is more or less a sort of contract to save him from that liability and to pay it off (Chagla, J.) GAJANAN MORESHWAR v. MORESHWAR MADAN. I.L.R. (1942) Bom. 670=203 I.C 261 = 44 Bom.L.R. 703=15 R.B. 208=A.I.R. 1942

## CONTRACT ACT (1872), S. 125.

-S. 125-Indemnity bond in respect of sale of minor's property-Undertaking to refund sale price and mesne profits in case of dispossession of purchaser and payment of mesne profits by him in suit by minor -Purchaser dispossessed and made liable for mesne profits in suit by minor-Liability of indemnifier for costs of suit incurred by purchaser in suit—Implied term of contract. See DEED—Construction. (1943) 2 M.L.J. 645.

-S. 125—Indemnity-holder—Right to be indemnified -When arises.

When the injury becomes imminent, the indemnityholder can come to Court and ask that he be protected, and the Court must decide whether or not the claim of the third party against the indemnity-holder is well founded; if it so decides, it must grant relief to him, and not postpone the indemnity-holder until a decree has been passed against him. He may sue quia timet. S. 125 of the Contract Act is not exhaustive and does not set out all the reliefs which an indemnityholder who has been sued may get. It leaves untouched certain equitable reliefs which he may get. (Sen, J.) Praphulla Kumar Basu v. Gopee Ballabh Sen. I.L.R. (1944) 2 Cal. 318.

-- S. 125 (1)--" May be compelled to pay"--Contract of indemnity-Indemnifier-Liability of-When arises -Decree against person indemnished-If gives rise to cause f action against indemnisier—Suit before actual damage-

If premature.
"To indemnify" does not merely mean to reimburse in respect of moneys paid but to save from loss in respect of the liability against which indemnity has been given. Where a person contracts to indemnify another in respect of any liability which the latter may have undertaken on his behalf, such other person may compel the contracting party, before actual damage is done, to place him in a position to meet the liability that may hereafter be cast upon him. The words "may be compelled to pay" in Cl. (1) of S. 125 of the Contract Act cannot be construed as signifying that indemnity cannot be claimed unless and until damages have already been paid. There is no justification for putting such a narrow construction upon the words. In a suit by D against the appellants and the respondent and others for royalty in respect of a colliery, the appellants and the respondent had a common defence (though they filed separate written statements), that the appellants had never acquired any right to the property in question and were not liable for any royalty or rent and that the respondent was in possession of the property. On the same day the appellants and the respondent entered into a private arrangement in and by which the appellants took upon themselves the extent of the liability on account of the expected decree in the suit which would be charged upon the respondent and exonerated the respondent from all sorts of liabilities inasmuch as he had nothing to do with the property and the appellants were practically and really the owners of the colliery, and they agreed to validly take upon themselves all sorts of liability. "In future when you would be liable for the sum decreed against you we do hereby promise to remove the said liability and also do promise that we will be legally bound to repay you the dues for which you would be liable upon the decree that would be passed against you and we shall further be liable for any cost incurred by for the realisation of the same." The common The common defence raised by the appellants and the respondent succeeded and a decree was passed against the respondent, the suit being dismissed against the appel-

## CONTRACT ACT (1872), S. 125.

lants. This judgment was given on 15-7-1938. Thereafter on 30-1-1939 the respondent sued the appellants for recovery of the amount of the decree passed against him in the earlier suit with future interest. The appellants inter alia pleaded that the

suit was premature.

Held, (i) that the contract relied upon by the plaintiff was essentially a contract of indemnity; (2) that payment by the respondent was not a condition precedent to his recovering from the appellants the amount of the decree passed against him in the earlier suit; (3) that the appellants having undertaken "to remove the said liability," under the contract of indemnity the respondent became entitled to claim the amount from the appellants immediately after the decree and even before the decree was realised from him. (Fazl Ali, C. J. and Shearer, J.) Chunibhai v. Nathabhai. 22 Pat. 655=213 I.C 385=17 R. P. 16=10 B R. 606=A.I.R. 1944 Pat. 185. CHUNIBHAI

-S. 125 (3)—Scope—Indemnity bond—Assignment-Enforcement by assignee against indemnifier and his assignee —Proof of claim against indemnified—If conclusive against indemnifier—Pleas open to indemnifier—Hindu Law —Debts—Father—Surety debts—Son's liability.

A, the father of a minor Hindu widow M, acting as her next friend and guardian, sued B and C, the surviving coparceners of her husband, to recover Rs. 10,000, alleged to have been paid to her husband as katnam at the time of the marriage and claimed as being returnable on the death of the husband. The suit was, with the leave of the Court, compromised before trial, on terms that B and C should pay M, Rs. 4,500 for katnam and Rs. 185 per annum for her maintenance during her life, that the former amount should be paid to A, the next friend before the registration officer at the time of registration of the indemnity bond which A was to execute on the security of certain immovable properties, undertaking to indemnify B and C against all losses arising from M raising disputes after attaining majority as to katnam and maintenance, and that B and C should in their turn execute a deed of maintenance charging the agreed maintenance amount on certain immovable properties belonging to their joint family. A decree was passed in terms of the compremise and after taking out execution proceedings, A was paid Rs. 4,500 on his executing an indemnity bond for himself and his minor son, charging immovable properties belonging to their joint family. The agreed amount of maintenance was also paid to A every year during M's minority. M on attaining majority, gave notice to B and C, repudiating the compromise, but without persisting in that attitude, she took out execution against B and C, claiming the katnam amount of Rs. 4,500 and arrears of maintenance for six years as agreed in the compromise with interest, aggregating in all to Rs. 9,566, alleging that the payments made to her father A, were invalid and not binding on her as no leave of Court was obtained under O. 32, R. 6, C. P. Code, in respect of the payments. Neither A, who by now had neen adjudged insolvent, nor the Official Receiver in insolvency were made parties to the execution proceedings. The objections raised by B and C were rejected and execution was ordered to proceed. Pending appeal by B and C against the order, the Madras Agriculturists' Relief Act came into force, and B and C claimed the benefit of the Act. Ultimately another compro-mise was effected and it was provided inter alia, that M should drop all further proceedings in execution and refund certain sums drawn by her from the amount deposited in Court by B and C (after

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the direction of the lower Court that execution should proceed) and that B and C should assign to her the indemnity bond executed in their favour by A and his son without recourse against themselves in full discharge of her claims. The assignment was duly effected and M sued to enforce the bond. lands secured under this bond as well as other lands had been mortgaged to X by A for himself and for his minor son for discharging an antecedent debt. Xultimately obtained a decree on his mortgage, executed it and ultimately himself purchased the mortgaged properties (which were comprised in the indemnity bond) for Rs. 1,085 subject to the incumbrance created under it, and the rest of the hypotheca were purchased by a third party. X alone contested the suit filed by M.

Held, (1) that the compromise in execution pro ceedings by which the indemnity bond was assigned to M was not the result of any fraud or collusion; (2) that the order in the execution proceedings and the compromise based thereon were conclusive against X though he was not a party thereto; (3) that in the absence of a notice calling upon the indemnifier to satisfy or contest the claim, it would only be open to the indemnifier to impeach the compromise as an imprudent bargain, and if such notice had been given he would be estopped from raising even such an objection; (4) that as the compromise was entered into bona fide and without collusion, and was not an improvident transaction, it was conclusive against the indemnifier and X the purchaser in execution of the property charged by the indomnity bond; (5) that though M might have had the benefit of the amounts received by A for her maintenance, that would not preclude her from claiming the full amount settled under the compromise in the execution proceedings (Rs. 12,000) as payable to her by B and C in respect of which they assigned to her their rights under the indemnity bond; (6) that generally speaking, the promisee was entitled not only to recover from the indemnifier what he had been required to pay to the creditor to whose demand or claim the indemnity related but he was also entitled, as soon as such creditor made a demand or obtained judgment and before paying him off, to require the indemnifier to carry out the promise to save him from such demand or judgment by paying the debt either to the creditor or to himself. The former relief would correspond to damages for breach of contract by the indemnifier while the latter was in the nature of specific performance of the promise to indemnify, both reliefs being now recognised to be admissible; (7) that M, the assignee of the indemnity bond, though she was the original creditor, was entitled, not qua creditor (for her debt was satisfied by the assignment) but as assignee of the bond, to call upon the indemnifier to discharge the liability of the indemnified, though in effect she was obtaining payment of her own debt. She was accordingly entitled to enforce the indemnity charge against the properties in the hands of X; (8) that the charge created under the bond did not bind the interest of A's son in the properties dealt with therein, because apart from legal necessity or benefit, an obligation incurred by a Hindu father as a surety unless it be antecedent to the creation of the charge on the family properties would not bind 

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debtor and creditor without consent of surety-Effect-Discharge of surety.

The provisions of the Contract Act with regard to contracts of guarantee do not apply in the case of security bonds given to a Court under the C. P. Code: it is only the general principles which underlie them that have to be applied to determine the nature and extent of the liability of a surety under such a bond, An ex parte decree of a Small Cause Court obtained by a bank was ordered to be set aside on the furnishing of security for a certain amount. A third party deposited some shares of the required value and also executed a bond to the Court along with the judgment. debtor for the amount that might be decreed. The claim was ultimately decreed. The bank also obtained other decrees against the same judgment-debtor in the same Court and also in another Court. On the bank being compulsorily wound up, the judgment-debtor obtained a composition of all the decrees held by the bank against him from the Official Liquidator, after obtaining leave of the Court under S. 204, Companies Act. Meanwhile the surety who had furnished security in the Court of Small Causes had become insolvent and the Official Receiver claimed the shares deposited as security on the ground that the surety was discharged by reason of the composition.

Held, that it was a fundamental rule of law that a surety would be relieved from liability if the creditor compounded or gave time to the principal debtor without his consent. As the surety was not made a party to the application under S. 234 of the Companies Act and the order made thereon with the consent of the Official Liquidator, it amounted to com. pounding with the debtor and allowing him time to pounding with the debtot and anowing in the top pay a reduced amount, and the surety was therefore discharged. (Leach, C. J. and Lakshmana Rao, J.)
OFFICIAL LIQUIDATOR, T. N. &. Q. BANK, LID. v.
OFFICIAL ASSIGNEF OF MADRAS. ILR. (1944)
Mad. 708—57 L.W. 180—1944 M.W.N. 169— A.I.R. 1944 Mad. 396=(1944) 1 M.L.J 234.

8. 126—Scope—Two persons liable for same debt one primarily and the other secondarily—Hindu son ioining father in execution of mortgage of father's property. for debt incurred by father for his own purposes—Discharge of debt by son out of own moneys-Right to henefit of security.

The Court in granting relief to a person in the position of a surety is not confined to contracts of guarantee within the meaning of S. 126 of the Contract Act, and is free to apply the principles of equity unless the position is governed by some positive provision of law. Where in a mortgage deed executed by a Hindu father over his separate properties in respect of amounts borrowed by him for his own purposes, his son is made a party at the request of the mortgagee, and is made liable for the repayment of the debt, though not as a mortgagor, and the son, after the death of his father pays off the mortgage out of his own moneys, he falls within the category of cases in which without any contract of suretyship there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid. The son therefore would be entitled to the benefit of the security held by the mortgagee whom he has paid off, although he cannot be regarded as a surety within the meaning of S. 126 of the Contract Act. (Leach,

## CONTRACT ACT (1872), S. 126.

C. J. and Bell, J.) RAJAGOPALA IYER v. RAMAUHANDRA IYER. I.L.R. (1942) Mad. 851=207 I.C. 49= 16 R.M. 20=55 L.W. 417=A.I.R. 1942 Mad. 628=(1942) 2 M.L.J. 406.

Ss. 126 and 134—Surety—Person offering cheque to plaintiff to prevent attachment of property of defendant—

To be a surety within the meaning of S. 126 of the Contract Act, a person should promise to pay if the principal debtor commits a default. A person who makes no such promise but only offers a cheque to the plaintiff to prevent an attachment by him of the property of the defendant, is not a surety. If he stops payment of the cheque, the plaintiff has an independant cause of action to bring a suit against him alone, and he cannot take advantage of S. 134 (Almond, J.C. and Mir Ahmad of the Contract Act. 7.) KARAM DIN v. ANANT RAM. 193 I.C. 51=13 R. Pesh 49=A I R. 1941 Pesh. 6.

- S. 126-Surety bond in favour of Court for benefit of creditor-Court if "creaitor."

In the case of a surety bond executed in favour of a Court for the benefit of a creditor, the Court cannot be brought within the definition of a creditor in S. 126 of the Contract Act. (Harries, C. J. and Abdul Rahman, 7.) PIRTHI SINGH r. RAY CHARAN AGGAKWAL. 46 P.L.R. 240=A.I.R 1944 Lah. 428.

-S. 127—Acknowledgment by newly admitted partner—Effect. See CONTRACT ACT, Ss. 25 (3) AND 127. (1943) 2 M L J. 417 (P.C.).

S. 127-Scope of-Benefit done to principal debtor-If should have been at the desire of the surety-Past benefit, if can be a good consideration for a bond of guarantee. Ghulam Hussain Khan v. Faiyaz Ali Khan. [See Q. D. 1936-'40, Vol. I, CGL. 2267.] 15 Luck. 656.

-Ss 128 and 34-Applicability and scope-Principal debtor discharged from liability for part of debt under Madras Agriculturists' Relief Act-Surety not agriculturist—If also discharged pro tanto. MAD. AGRICULTURISTS' RELIEF ACT—APPLICABILITY. (1941) 2 M L J. 751.

-S. 128—Liability of surety—Surety saying that if price of goods supplied is not paid by debtor, he and his

property would be responsible for its payment.

If a surety says that if the price of goods supplied to the principal debtor under his orders could not be recovered from the principal debtor, he and his property would be responsible for the payment thereof, this is exactly what is implied in a contract of guarantee. It is impossible to read into those words any condition insisted upon by the surety that it was only if all remedies failed against the principal debtor that his liability would come into operation. The liability of the surety is, therefore, co-extensive with that of the principal debtor. (Tek Chand and Din Mahomed, JJ.) Kuckreja, Ltd. v. Said Alam. I.L. R. (1941) Lah. 323=193 I.C. 206=13 R L. 440 =43 P.L.R. 539=A.Y.R. 1941 Lah. 16.

-S. 128—Liability of surety—Guarantee for repayment of money advanced on promissory note-Guarantee to remain in force until debt due is fully and finally adjusted-Payment of interest by debtor-If extends period

of liability of surely.

A letter of guarantee for the re-payment of money advanced on a promissory note payable on demand with interest stated that the guarantee would remain in force until the debt due was fully and finally adjusted and would not be affected by any forbearance or arrangement for giving time or other facilities to the proved as against him in accordance with the ordinary principal debtor. The creditor accepted small pay- law. If, on the other hand, the principal debtor

## CONTRACT ACT (1872), S. 133.

ments of interest. by the debtor from time to time and thus enlarged the period of limitation.

Held, that in view of the terms of the guarantee the period of liability of the surety was also extended by the payments made by the debtor and that the surety remained liable so long as the principal debtor remained liable. (Derhyshire, C. J. and McNair, J.) Gana Nath Sen v. Ranjit Ray. I.L.R. (1942) 1 Cal. 11.

Ss. 129 and 130—Applicability—Surety under S. 55 (4), C. P. Code—Right to apply for discharge at pleasure. See C. P. Code, S. 55 (4). (1941) 2. M.L.J. 650.

---Ss. 129, 130 and C. P. Code. O. 2, R. 2-Surety for one year's theka money-Widow succeeding thekadar-Decree against her-Recourse to surety-Suit if

barred by O. 2, R. 2, C. P. Code.

Where a person executes a security bond for the period of the theka, for the payment of one year's theka money in case the thekadar fails to pay it and the theka is for five years and on the death of the thekadar the theka is continued in the name of his widow who commits default in the payment of the theka money, the surety is liable. Inasmuch as the guarantee was given for the period of the theka it must be regarded as being also a guarantee on behalf of the heirs and successors of the thekadar in the absence of any contrary intention in the security bond. A suit by the land-holder for the recovery of the theka money in default from the surety is not barred by O. 2, R. 2 on the ground that the former had already brought a suit in the rent Court against the new thekadar prior to the proceeding in the civil Court against the thekadar and the surety. (Madeley, f.) KAPURTHALA ESTATE v.SHEO SHANKAR. 17 Luck 712=200 I C 311=14 R.O. 594=1942 O.A. 126=1942 O.W N. 198=1942 A.W.R. (C. C.) 147=A.I.R. 1942 Oudh 325.

-Ss. 133 to 141-Applicability-Surety bonds in favour of Courts.

Although Ss. 133 to 141 of the Contract Act are not in terms applicable to surety bonds executed in favour of Courts under C. P. Code, the principles upon which they are based are applicable to them. Consequently the liability of a surety who has executed. a bond in favour of a Court comes to an end if the creditor for whose benefit the bond was given is found without the surety's knowledge to have entered into a: contract with the debtor which would be hit by the provisions contained in Ss. 133 to 141 of the Contract Act. (Harries, C.J. and Abdur Rahman, J.) PIRTHI SINGH & RAM CHARAN AGGARWAL. 46 P.L.R. 240 =A.I.R. 1944 Lah. 428

\_\_\_\_\_S. 133—Guarantor—Right to insist on proof of debt as against him—Proof as against or admission by principal debtor-If binds guarantor-Nature and mode of proof.

It is well established that a guarantor is prima facie entitled to have the debt proved as against him. The fact that the principal debtor has admitted the debt, or that a judgment or award has been given against him for the debt, does not bind the guarantor, unless. he was a party to the proceedings in which the judgment or award was given, or was party to the admission of the principal debtor. The liability of a guarantor must depend on the true construction of the guarantee which he has given. If the guarantor merely guarantees payment of the debt of the principal debtor, then he is entitled to require the debt to be law. If, on the other hand, the principal debtor-

## CONTRACT ACT (1872), S. 134.

has agreed that as against him the debt shall be proved in a particular way, and the guarantor has guaranteed the debt so to be proved, then there can be no doubt that the guarantor would be bound by the particular method of proof agreed to by the principal debtor and accepted by himself. (Beaumont, C. J. and Kania, J.) SREE MEENAKSHI MILLS, LTD. v. RATILAL TRIBHOVANDAS. I.L.R. (1941) Bom. 273=196 I.C. 732=14 R.B. 154=43 Bom.L.R. 53=A.I.R. 1941 Bom, 198.

-S. 134—Applicability—Discharge of p incipal

debtor by contract between surety and creaitor.

S. 134, Contract Act, has no application to a case where by a contract between the creditor and the surety the principal debtor is discharged and the surety assumes the whole burden of the liability of the original principal debtor. (Yorke, J.) SHYAM SUNDER v. Shri Niranjan Gasayan Naga. 1943 A.L.W. 87. ---Ss. 134 and 137—Bar of remeay against principal debtor-Surety, if discharged.

A creditor does not lose his remedy against the surety by reason of the fact that he did not prefer his claim within time against the principal debtor. (Agarwal, J.) JAGDAMBIKA PRATAP NARAIN SINGH V. TIR SINGH BAHADUR SINGH. 193 I. C. 344=1941 O.L.R. 270=1941 A.L.W. 358=13 R.O. 451= 1941 O.W.N. 473=1941 O.A. 308=1941 A. W.

R. (C.C.) 123.

-S. 135-Applicability -Conditions.

A person cannot take advantage of the provisions of S. 135 of the Contract Act, and cannot plead that he is a surety, unless he comes under the definition of the word in S. 126 of the Act and must be a party to a contract of guarantee. (King and Kunhi Raman, 33.) MAHALINGA AIYAR v. UNION BANK, LID., KUMBA-KONAM. 207 I.C. 191=16 R.M. 54=55 L.W. 664=1942 M.W.N. 623=A.I.R. 1943 Mad. 216=(1942) 2 M.L.J. 532.

S. 135—Applicability—Decree—Surety for judgment-debtor—Adjustment between creditor and debtor-Effect-Discharge of surety. See C. P. CODE,

S. 47. 45 Bom. L.R. 438.

-S. 135—Discharge of surety -Surety undertaking to pay decretal amount, if judgment-debtor does not pay by certain date—Court granting judgment-debtor further time

10 pay—Effect of.
Under S. 135 of the Contract Act, a surety who undertakes to pay the decretal amount due if the judgment-debtor does not satisfy the decree by a certain date is not discharged from his liability by the executing Court granting further time to the judgment-debtor for making the payment. (Puranik, 

honesty of servant-Servant continued in service after mis-

-conduct without surety's knowledge.

On a continuing guarantee for the honesty of a -servant if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service. It is the duty of the master, if he proposes to continue the servant in his service, to inform the surety of the misconduct of the servant. The failure to inform the surety of the continuance of the employment of the servant after his misconduct discharges the surety from

## CONTRACT ACT (1872), S. 140.

Mahajan, 3.) Co-operative Commission Shop, LTD. v. UDHAM SINGH. 219 I.C. 17=18 R.L. 30=46 P.L.R. 236=A.I.R. 1944 Lah. 424.

-Ss. 140 and 141—Applicability and relative scope-Rights of surety paying off debt to securities held by creditor.

When a surety has paid all the debts he was liable for, there is little coubt that, on the language of S. 140 Contract Act, he is entitled to demand all the securities held by the creditor at the time of payment whether they had been received simultaneously with the loan advanced or subsequently. S. 141, when it says that a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, only means that a surety cannot complain if before payment the creditor loses or parts with a security obtained by him after the contract of surety was entered into. S. 141 does not enable the creditor to withhold from the surety any security actually held by him at the time when the debt is paid or in any other way to detract from the rights of the creditor as declared by S. 140. S. 141 only gives him liberty of action in respect of securities not held by him at the time of the contract of suretyship provided he exercises it before payment. But Ss. 140 and 141 prima facie have reference to the simple case of a surety for a single debt for which the creditor holds a security or securities. (Krishnaswami Ayyangar and Somayya, Jf.) BHUSHAYYA v. SURYANARAYANA. I.L.R. (1944) Mad. 340=217 I.C. 106=1943 M.W.N. 684=17 R.M. 260=A.I.R. 1944 Mad. 195=(1944) 1 M.L.J. 1.

——S. 140—Surety—Right to security held by creditor—When arises—Surety discharging debt undertaken by him-Right to share in security taken by creditor as additional security for debt as well as for other debts-T. P. Act,

S. 92—Applicability.
Under S. 140 of the Contract Act, as also under the English law, the surety's right to the benefit of the security held by the creditor vests in him the moment he pays the guaranteed amount. The cerditor cannot afterwards make an appropriation to the prejudice of the rights of the surety which have accrued to him. Indeed he cannot do so even before as the surety is entitled to the benefit of every security held by the creditor at the time when the contract of suretyship was entered into. The security held by the creditor as cover for a debt attaches to every rupee of the debt and if he chooses to accept the guarantee with respect to part only of the debt the surety on payment of that part, is by force of law entitled to a proportionate part of the security. There is nothing to prevent a creditor from stipulating and obtaining a guarantee for the whole debt and there is nothing against the surety waiving the right to which he is entitled under law. In the absence of any such arrangement or waiver, the law must prevail. A surety for a part only of a debt is, on payment of that part, entitled pro tanto to the security held by the creditor as cover for the debt as a whole. S. 92, T. P. Act, under which the right of subrogation is not available until the mortgage is redeemed in full, is wholly inapplicable to the case of a surety who guarantees to pay a debt. Where the surety undertakes to pay a debt and the creditor subsequently takes a mortgage from the debtor as additional security in respect of that debt and other debts of the same debtor but for which the sureties are different, the surety cannot be regarded as a surety for the payment of the mortgage debt. The surety discharging the debt for which he has stood further liability. (Harries, C.J. and Mehr Chand surety, is therefore entitled to a share in the mortgage

## CONTRACT ACT\_(1872), S. 143.

security in the proportion which the debt discharged by him bore to the other debts of the common debtor. It is not necessary that all the debts of the debtor must be discharged before he can claim the security. (Krishnaswami Ayyangar and Somayya, JJ.) BHUSHAYYA V. SURYANARAYANA. I.L.R. (1944) Mad. 340=217 I.C. 106=17 R.M. 260=1943 M.W.N. 684=A.I.R. 1944 Mad. 195=(1944) 1 M.L.J. 1.

S. 143—Applicability—Surety for debtor to bank—Bank if bound to disclose state of account of debtor to surety—Agreement by surety to be liable in spite of composition between lender and debtor—Effect. Krishnaswami Ayyar v. Travancore National Bank, Ltd. [See Q.D., 1936-40, Vol. I, Col. 2277.] 193 I.C. 332—13 R.M. 648—(1940) 1 M.L.J. 424.

past dishonesty—Liability of surety.

A contract of gurantee for the honesty of a servant who is already in the employment of the master and has been guilty of acts of dishonesty is invalid, if the master says nothing about them and allows the surety to enter into the contract in ignorance of the true state of affairs. The past conduct of the servant is not only a material but a vital circumstance and a contract induced by the silence of the master upon this vital question is invalid under S. 143 of the Contract Act, and the surety is therefore not liable under it. (Harries, C. J. and Mehr Chand Mahajan, J.) Cooperative Commission Shop, Ltd. v. Udham Singh. 219 I.C. 17=18 R.L. 30=46 P.L.R. 236=A.I. R. 1944 Lah. 424.

Ss. 151 and 167—Bailee's responsibility-Rival claims to goods bailed—Remedy of bailee—Bailee aware of passing of title in goods bailed to third person—Subsequent delivery to bailor—Bailee's liability to the third person. K. J. PATEL v. T. K. V. R. V. CHETTIAR. [See Q.D. 1936-40, Vol. I, Col. 2279.] 191 I.C. 532—13 R.R. 143.

S. 170—Engine delivered to owner after repairs— Cost of repairs not paid—Repairer taking goods for further repairs—If entitled to lien for cost of original repairs.

When a contract for repairs to an engine was fully performed and when the goods were handed back (although the cost of the repairs had not been fully paid), the lien was ended and it could not be revived because the repairer took the engine for further repairs. (Digby, 7.) E. C. EDULJEE v. JOHN BROS. I.L.R. (1944) Nag 37=209 I.C. 356=16 R.N. 119=1943 N.L.J. 397=A.I.R. 1943 Nag. 249.

S 171—Applicability—Banker's lien—Right of banker to combine accounts of customer. See BANKER AND CUSTOMER. 1945 N.L. J. 468.

———Ss. 172 and 178—Pledge—Validity—Conditions—Deposit of share certificates—Sufficiency to create valid pledge.

As the law stands at present in India, a mere deposit of share certificates would not be enough to create a valid pledge. In order to constitute a valid pledge there should be such delivery of possession to the pledgee by virtue of which he can effectively exercise the power of sale for realising the debt. Though share certificates would not be "goods" within the meaning of Ss. 172 and 178 of the Contract Act, the Act is not exhaustive. The principle that an assignment is necessary is recognised in S. 178. (Venkataramana Rao, 7.) Krishna Pattara v. Kunhunni Elana Navara. I.L.R. (1941) Mad. 419=53 L.W 220=199 I.C. 828=14 R.M. 634=1941 Comp, C. 63=1941 M.

CONTRACT ACT (1872), S. 178.

W.N. 40=A.I.R. 1941 Mad. 394=(1941) 1 M. L.J. 178.

——S. 176—Applicability—Pledge of jewels without specifying date of repayment of loan—Right to sell, when exercisable—Notice—Contents.

In all cases of borrowings on pledge of jewels where no time is stipulated for repayment the presumption is that the amount of loan taken is payable on demand. If the creditor makes a demand and informs the debtor that he should pay the amount by a particular date it can reasonably be concluded that the creditor being entitled to claim the amount on demand stipulated the time for such payment by his notice, and if the debtor commits a default the case falls under S. S. 176, Contract Act, because it is a case in which the pawnor had made default in the payment of debt at the time stipulated by making a demand. Where the debtor is fully aware of what debts he had incurred and what is the interest due thereon, it could not be said that it is necessary for the creditor to mention specifically the amount due and also the amount of interest due. (Puranik, J.) MOTILAL v. LAKSHMICHAND. I.L.R. (1943) Nag. 234=205 I.C. 142=15 R.N. 175=1943 N.L.J. 71=A.I.R. 1943 Nag. 162.

S. 176—Pledge—Time of redemption—Limitation—No time fixed by contract—Effect—Right of pawnee to sell—Notice.

Where no date is fixed for the redemption of the pawned articles the debtor is not in default until notice is given by the creditor that he requires payment on a certain day and that day is past. The debtor is then in default in the same way as where a day for repayment is fixed in the original contract. If the date fixed in the notice for payment passes without redeeming the pawned articles, then under S. 176 of the Contract Act, the pawnee is entitled to sell the articles pledged by giving a reasonable notice of the sale to the pawnor. (Varma, J.) RAMMAYAL PRASAD V. SYED HASAN. 212 I.C. 384=16 R.P. 321=10 B.R. 509=45 Cr.L.J. 633=A.I.R. 1944 Pat. 135.

S. 176—Scope—Suit on pledge—Power of Court to order sale.

S. 176 of the Contract Act defines the personal rights of the pledgee of goods arsing out of his special property in them conferred by the pledge, and does not cut down in any way any remedy he may have through the Courts. The Court always has an inherent jurisdiction to administer, by sale or otherwise, the property of which it has seisin in any suit which is in effect an administration suit. A suit on a mortgage or pledge in its essential characteristics is not anything but an administration suit of the same kind as a suit for the execution of a trust, for the administration of the estate of a deceased person, for the administration of partnership assets in a partnership suit or any other suit of the same kind. All such suits are in substance suits to ascertain and declare the rights of some person having an interest in specified property and asking the Court, in its administrative jurisdiction to ascertain Court, in its administrative practical effect to his rights. (Braund and Transiline 77.) Invan Das v. Sarju Prasad. I.L. Hamilton, 77.) JIWAN DAS v. SARJU PRASAD. I.L. R. (1945) A. 373=1945 A.L.J. 144=A.I.R. 1945 All. 299.

Ss. 178, 178-A and 179 (as amended in 1932)—Applicability and scope—Pledge by husband of wife's property without authority—Validity—Right of wife to recover pledged articles from pawnee, Mallamma v. Basamma. [Sze Q D. 1936-40; Vol. I, Col. 3321.] 45 Mys. H.C.R. 342.

## CONTRACT ACT (1872), S, 178,

of title—Mortgage deed -S. 178—Document -Custody given to creditor of mortgagee at time of loan borrowed by mortgager-Rights of creditor as against assignee of mortgage - Assignce if bound to redeem " pledge" before suing to enforce mortgage.

A mortgage deed is not a document of title contemplated in S. 178 of the Contract Act, which is capable of being pledged. A mortgagec borrowed a sum of money from a third person assuring him that he would collect the money due under his mortgage from the mortgagor and pay it over to his creditor in satisfaction of the loan. In order that the arrangement should be worked out and that the mortgagee (debtor) should not evade it the custody of the mortgage deed was made over to the creditor. In a suit on the mortgage deed by the assignce thereof the creditor of the mortgagee (assignor) who was also impleaded as a party to the suit pleaded that he was a pledgee of the deed and that the plaintiff should first redeem his pledge before he could recover anything on the mortgage decd.

Held, that the deposit of the mortgage deed with the creditor gave him no rights at all and he could not therefore claim a right to be redeemed by the plaintiff Venkataranga Iyengar, J7.) ERAPPA v. THIMMANNA. 49

Mys. H.C.R. 160=22 Mys.L.J. 13.

S. 178—"Goods"—Shares in Joint Stock Company

-Deposit of shure certificate as security-Effect of-Rights

of pledgee—Power of sale.

There is no valid reason for giving the word "goods" in S. 178 of the Contract Act a different meaning from that which it has in the Sale of Goods Act. "Goods" would include shares in a Joint Stock Company and there can be a valid pledge of the shares. When a person delivers a share certificate to another to be held by him as security, there is under the law of India a pledge which he can enforce, but unless the pledgee at the time of the deposit secures a deed of transfer which he can use in case of necessity or obtains one from his debtor at a later stage, he must have recourse to the Court when he wishes to enforce his security. There is nothing to prevent the pledgee suing on the debt and asking the Court to sell the goods for him. If the goods happen to be shares, the Court can confer a full title on the buyer by following the procedure laid down in O. 21, R. 80, C.P. Codc. (Leach, C.J. and Happell, J.) KANNAMBRA NAYAR v. KRISHNA PATTAR. I.L.R. (1943) Mad. 115=205 I.C. 210=15 R.M. 823=55 L.W. 428=1942 M.W.N. 450=1942 Comp. C. 189=A.I.R. 1943 Mad. 74=(1942) 2 M.T. I. 120 M.L.J. 120.

——(as amended in 1930), Ss.'178 and 178-A Jewels deposited for safe custody—Pledge by depositee— Validity.

Jewels entrusted merely for safe custody cannot be subject of a valid pledge by the depositee even in cases arising after the Contract (Amendment) Act of 1930. (Somayya, J. Visalakshii Ammal v. Comba-Tore Janopakara-Nidhi, Ltd. 201 I.C. 766=15 R.M. 402=55 L.W. 319=1942 M.W.N. 25= A.I.R. 1942 Mad. 299=(1942) 1 M.L.J. 44.

-S. 182—Agent—Employment by principal—If necessary

Per Pal, J.—The definition of an agent in S. 182 of the Contract Act does not limit the employment of an agent to one by the principal only. It will include an employment by any authority authorised by law to make the employment. (Nasim Ali and Pal, JJ.)
SUKUMARI GUPTA v. DHIRENDRA NATH ROV. 197
I.C. 869=14 R.C. 401=73 C.L.J. 356=A.I.R. 1941 Cal. 643.

# CONTRACT ACT (1872), S. 202.

-S. 189-Agent acting without principal's instructions—When protected. HAR KISHAN SINGE instructions—when protected. HAR AISHAN SINGE v. NATIONAL BANK OF INDIA LTD., AMRITSAR. [Sw. Q.D., 1936-40, Vol. I, Col. 2286.] 191 I.C. 263—13 R.L. 278.

S. 195—Agent's power to revoke nomination of

substituted agent.

S. 195 of the Contract Act implies the power of revocation in an agent in the case of a substituted agent. It cannot be said that because the agent is responsible to the principal for negligence in the selection of a substituted agent his hands would be tied as soon as he made the nomination and that the principal alone can revoke the nomination. (Chagla, J.) RAMACHANDRA LALBAI v. CHINUBHAI LALBHAI, 214 I.C. 42=17 R.B. 55=45 Bom.L.R. 1075= A.I.R. 1944 Bom. 76.

-S. 196-Admission to tenancy by agent without

authority-Right of landholde; to disown it.

If a tenant is admitted to the tenancy by an agent of the landholder without his knowledge or authority then under S. 196, Contract Act, it is open to the landholder to disown it. (Bennett, J.) Partap Brader Singh v. Mulchand. 202 I.C. 454=15 R.0. 121=1942 A.W.R. (C.C.) 313=1942 O.W.M. 473=1942 O.A. 389=A.I.R. 1943 Oudh 174.

-Ss. 196 and 200-Assignment of decree by agent without authority—Ratification by decree-holder—Validity of assignment. See C. P. Code, O. 21, R. 16. (1943) 2 M.L.J. 48 (P.C.)

-S. 200-Duration of agency-Transfer or assign-

ment-Permissibility.

An agency, unless it is for a fixed term, obviously. continues and may be terminated at the pleasure of the principal. By its very nature, it is personal, neither transferable nor assignable and depends entirely on the agreement made with the principal.

Chief of the agreement made with the principal (Lobo and Tyahji, JJ.) Premii Damodar v. L. V. Govindji & Co. I.L.R. (1943) Kar. 49=211 I. C. 162=16 R.S. 162=A.I.R. 1943 Sind 197.

—S. 200—Scope—If exhaustive—Ratification—Effect on third parties. Thinnappa Chettiar v. Krishna Rao. [See Q. D., 1936-40, Vol. I, Col. 2287.] 195 I.C 329=14 R.M. 173=A.I.R. 1941 Mad 6—(1940) 2 M.I. I. 726 Mad. 6=(1940) 2 M.L.J. 726,

S. 202—"Applicability"—Agency coupled with interest—Assignment of decree—Power of attorney by assignee to authorising agent to execute decree and to take one half of the fruits of execution as remuneration—Agent to expend money and recoup it out of realisations—Revocability,

On 19—7—1939, G. K. executed a power-of-attorney to one V, authorizing him to execute a mortgage decree of which G.K. had become the assignce. It provided, inter alia, "you shall yourself bear the cost of executing the said decree, and, if money has to be realised by filing a suit against the said S.M. Rao (original decree-holder) the cost of filing that suit also. We shall take accounts at the end, take the amount of cost due to you out of the amount realised and you shall take one half and I the other half of the amount that remains. As in respect of the said amounts having to be realised by me, in respect of the said decree amount and in respect of my having obtained assignment, I have made you to incur expenditure and take trouble and realise, I shall not in respect of the said documents receive without your permission any amount from any person in any manner either amicably or through Court. Nor will I do anything opposed to the steps I shall not for any reason taken by you ..... whatever cancel without your permission this authority which I have given to you, without paying the amount

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expended by you and without giving the aforesaid relief for your trouble."

Held, construing the document, that its primary object was to recover on behalf of the principal the fruits of the decree and not to protect or secure any interest of the agent, and that latter part was purely incidental. The last portion contained express provision for the revocation of the power on certain terms. Hence, the power did not create an agency coupled with interest as contemplated by S. 202, Contract Act, and was not irrevocable although an action for breach of contract of the agreement would lie by V against G.K. (Mockett and Yahya Ali, 37.) PALANI VANNAN v. KRISHNASWAMI KONAR. 1945 M.W.N. 648=58 L.W. 479=(1945) 2 M.L.J. 303.

———S. 202—Scope—Agency coupled with interest— What is—When irrevocable.

S. 202, Contract Act, is wide in its terms; but it makes no departure from the English Law. Under S. 202, as under the English Law, some specific connection must be shown between the authority and the interest, and there must also be an agreement, express or implied whereby the authority is given to secure some benefit which the donee is to obtain by reason of the authority. (Chagla, J.) Ramachandra Lalbhai v. Chinubhai Lalbhai. 214 I.C. 42=17 R.B. 55=45 Bom.L.R. 1075=A.I.R 1944 Bom 76.

S. 206—Termination—Authority of agent—Revocable or irrevocable—Construction of agency agreement—Insurance company—Appointment of chief agent—Commission on premium after termination of agency—Insurance Act, S. 44—Applicability—Contract Act, S. 206—Reasonable notice.

The defendant, a Life Assurance Company, appointed D.J.M. carrying on business as D.J.M. & Co., as its chief agent for Gujerat, on conditions, inter alia, that commission would be allowed to him on all premiums remitted through his agency by persons already assured before now and by those who might be hereafter assured through his agency or others, and that the premiums of persons assured through his agency should be always subject to his commission so long as they remained within the Province of Gujerat whether the premium be remitted through his offices or direct. The agency was to stand in the name of D.J.M. & Co., but D.J.M. alone was to be the recognized agent and was to be able to be presented agent and was to be able to be to be the recognised agent and was to be solely responsible and on his retiring or otherwise discontinuing the work, the agency was to cease and his partner would have absolutely no claim under the agreement. Subsequently the firm of D.J.M. & Co., whose partners were D.J.M., C.H.M., and P.D.M., was recognised as the chief agents and the partners were acknowledged as the company's agents. D.J.M. died and thereafter the agency was continued by the two remaining partners, who were the nephew and the eldest son of D.J.M. After the death of the latter and the retirement of the former for reasons of ill-health, the widow of D.J.M. wrote to the company, requesting that her two sons S and  $\mathcal{J}$  (plaintiffs) may be recognised as partners of the firm along with herself and in 1917, April, the company informed her that sanction was given at a meeting of the Board to the plaintiffs coming into the firm as partners in connection with the company's agency. Subsequently by a written notice

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The plaintiffs then brought a suit for damages for wrongful termination of the agency.

Held, (1) that looking at the correspondence as a whole no irrevocable authority was either given or intended and that the authority on which the agency depended was revocable; (2) that there was no express or implied term in the agreement between the parties that D.J.M. or his successors should be entitled after termination of the authority to commission on the renewal premiums on the policies previously taken out in their sphere of operation; (3) that in the absence of a definite agreement, the commission did not continue, especially was this so if the payment was for services, for when the services ceased the commission ceased also; (4) that the plaintiffs could not rely on S. 44 of the Insurance Act, as the firm of D. J. M. & Co., and their successors did not come within the category of persons to whom the benefit of S. 44 was given, viz., "an insurance agent"; (5) that the plaintiffs were entitled to a reasonable notice of termination under S. 206 of the Contract Act which should be held to be two years in the case. (Stone, C. J. and Kania, J.) SOHRABJI DHUNJIBHOY v. ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE Co., LTD. I.L.R. (1944) Bom. 637=17 R.B. 103=214 I.C. 305=46 Bom.L.R. 279=A I.R. 1944 Bom. 166.

If relieved from liability to account.

Where the defendant has been let into possession of property as agent of the plaintiff, it is not open to the defendant in a suit for accounts against him to challenge the title of the plaintiff (his principal) to receive the moneys which have been realised by the defendant who was appointed as the agent for this purpose by the plaintiff. The mere fact that the defendant is under a suspicion and is working under the supervision of other agents deputed by the principal would not relieve him from liability to account. An agent under suspicion or under supervision is still an agent and must be held liable to account on proof that prima facie he has made realisations himself even in the period of suspicion or while subject to supervision. (Fazl Ali and Manohar Lall, 33.) Deb Prasanna Mukherjee v. Lakhi Narain Mandal. 1941 P.W.N. 565=196 I.C. 641=14 R.P. 222= 8 B.R. 67=AIR. 1942 Pat. 108.

———S. 219—Brokerage—Right to—General and special employment.

In order to found a legal claim for commission there must not only be a causal, there must also be a contractual relation between the introduction and ultimate transaction of sale. If a person has a general employment to find purchasers for a certain party and thereafter introduces a customer which results in several contracts, he will no doubt be entitled to his brokerage because he has implemented his contract by giving the introduction. If on the other hand he introduces a customer for the specific purpose of effecting a particular transaction of sale and earns his brokerage, he is not entitled-to any further remuneration, however many contracts the parties may conclude thereafter. (Derbyshire, C. J. and McNair, J.). Standard Coal Co., Ltd. v. Valarshak.

S. 219—Brokerage—Right to—When arises—Sale of Land—Commission when payable.

the firm as partners in connection with the company's agency. Subsequently by a written notice dated 14—9—1939, the defendant company informed the plaintiffs that they had resolved to terminate the plaintiffs' chief agency as from 1—1—1940.

In the absence of a contract, the ordinary rule is broker's commission in respect of a sale of land is payable only on the completion of a deed of conveyance; the broker's duty is to introduce a person willing and able to complete the purchase. Brokerage is not

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payable immediately; a mere contract of sale is brought about by the broker. (Davis, C.J. and O'Sullivan, J.) SUNDERDAS v. TARASING. I.L.R. (1944) Kar. 42=216 I.C. 40=17 R.S. 49=A.I. R. 1944 Sind 168.

—S. 219—Agency contract—Construction—Insurance— Contract between company and agent-"Completed business" —Agent convassing and bringing about policy acceptable to company—Signing of policy brought about by another—Right to commission—Test.

Where a contract of agency between an Insurance Company and an Insurance agent says that the agent is to place with the Insurance Company "completed business" of specified amounts in order to be entitled to commission, the expression "completed business" being explained in the contract iftself as meaning such business as is accepted by the company and on which the first year's premium has been received in full, it must be held that the contract speaks of "completed business" merely in order to exclude business that might come to nothing from the point of view of the company, and the requirement that the agent is to place with the company "completed business" does not preclude commission in those cases in which such business is substantially due to the work of the agent, though its technical completion, such as the singing of the policy and so on may be actually brought by another person and not by the agent. Ifit be found that the policy was the result of sound canvassing done by the agent, he would be entitled to commission on it, although he may not have brought about the signing, etc., of the policy himself. (Harries, C.J. and Dhavle, J.) SATGUR DAS v. BOMBAY LIFE ASSURANCE CO., LTD. 201 I.C. 289=15 R.P. 45=8 B.R. 784=23 Pat L.T. 318.

-S. 219—Construction—Agency—Commission agent -Introduction of buyer to seller resulting in contract for sale and purchase—Undertaking to pay commission "after satisfactory expiry and conclusion of the business" -Meaning of—Right to commission—When arises.

The plaintiff, a commission agent, introduced the defendants, agents of a German manufacturing firm, to the management of a Cotton Mill K, and as a result a contract was entered into under which the German Firm was to sell, and the cotton mill was to buy two sets of cotton spinning machinery packed and delivered F.O.B. Hamburg. In consideration of the same the defendants' manager wrote a letter to the plaintiff undertaking to pay the latter a sum of Rs. 6,000 "after the satisfactory expiry and conclusion of the K. business." Subsequently, as the cotton mill K was not in a position to pay for the two sets of machinery contracted for, further negotiations took place and a fresh contract was entered into under which the manufacturers were to supply only one set of machinery, and this contract was duly fulfilled. The plaintiff sued the defendants for Rs. 6.000 on the basis of the letter written to him by the defendants' manager. The defendants resisted the claim on the ground that the first contract had not been carried through, but admitted their liability for Rs. 3,000 in respect of the

second contract.

Held, that the words "after the satisfactory expiry and conclusion of the R business," in the letter of the defendants' manager, meant payment only after the completion of the contract, and the "satisfactory expiry and conclusion" of that contract would take place only after the goods had been shipped and the buyer had paid for them against delivery of the shipping documents or of the goods; and as that contract was not fulfilled the plaintiff was not entitled to claim the full amount of Rs. 6,000. (Leach, C. 7.

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and Krishnaswami Ayyangar, J.) Chinnaswami Doctor & Co. I.L.R. (1945) Mad. 338=1944 M.W.N. 520=A.I.R. 1944 Mad. 546=(1944) 2

M.L.J. 122.
S. 230—Applicability—Claim by purchaser against auctioneer for refund of deposit when sale has failed. See Autioneer-Position and Liabilities of. 1941 A.W.R. (H.C.) 365.

S. 230—Contract by agent—Personal liability Extent.

Per Pal, J.—The question whether an agent, who has made a contract on behalf of his principal, is to be taken to have contracted personally, or merely on behalf of the principal, and if personally, what is the extent of his liability on the contract, depends on what appears to have been the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circum. stances. (*Nasim Alli and Pal*, *JJ*.) Sukumari Gupta v. Dhirendra Nath Roy. 197 I C. 869=14 R.C. 401=73 C.L.J. 356=A.I.R. 1941 Cal. 643.

-S. 230 and Ajmer Taluqdar's Loan Regulation, S. 16-Loan obtained by agent of Istimrardar under disability-Liability of agent.

Where the kanamdar of an Istimrardar under disability borrowed money on behalf of his principal. there is no bar under the Ajmer Taluqdar's Loan Regulation to a suit where the object for the advancement of the loan was nowhere mentioned. S. 230, Contract Act, must be held to apply to the time when the liability was incurred and not to the time when the suit was instituted. (M. R. Davies,) RAM PERTAP v. DHULI LAL. 1941 A.M.L.J. 126.

S. 230—Organising agent with power to appoint selling agents and receive deposits—Payment of deposit to such organising agent-Effect-Insolvency of principal

-Liability of the organising agent.

Where an organising agent of a company is allowed to appoint selling agents and receive deposits from them and appropriate those deposits against the deposits made by him with the company, when he receives such a deposit from a selling agent acts as agent of the company and when he informs the company that he has retained this amount as he was entitled to and asks the company to send a receipt for that amount and the company agrees to do so, that is equivalent to an acceptance by the company of the deposit. On the insolvency of the company, the selling agent cannot sue the organising agent for the recovery of the deposit made. (Grille and Pollack; 77.) MOTIRAM BHOLARAM v. RAMGOPAL. 1942 N. L.J. 515.

-S. 230-Presumption under-Scope of-Contract made directly in name of foreign principal—Right of agent

to sue personally on contract.

The presumption arising under S. 230 (1) of the Contract Act that an agent can personally enforce the contract entered into through him on behalf of a foreign principal is one that canbe rebutted by evidence or by the circumstances of the case. It is in fact rebutted when the foreign principal is, in writing made the contracting party and the contract is made directly in his name. (Abdul Ghani and Subramanya Aiyar, 77.) Venkiah & Bros. v. Gupta. 20 Mys. L.J. 194.

—S. 230 (3)—Applicability—Unregistered union— Contract entered into by member as agent of union-Suit against union—Competency—Liability of signatory—C.P. Code, O. 1, R. 8.

Where a member of an unregistered union of the employees of a firm signs an agreement for and on behalf of the union, as its agent the union cannot be

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sued on such agreement or contract, and therefore the member who signs the contract can be proceeded against by virtue of S. 230 (3) of the Contract Act. The other members of the union cannot be sued and the procedure under O. 1, R. 8, is not applicable to the case. (Somayna, J.) TRAVANCORE NATIONAL BANK SUBSIDIARY CO., LTD. v. TRANABANK UNION. 209 I. C. 392=16 R M. 312=56 L.W. 325=1943 M. W.N. 450-A.T. 100. W.N. 450 = A.I.R. 1943 Mad. 530 = (1943) 1 M.L.J. 425.

-Ss. 238 and 186-Agent with implied authority -Fraud by him for his benefit-Liability of principal.

The authority of an agent may, according to S. 186 of the Contract Act, be expressed or implied. A principal is liable for the fraud of his agent acting within the scope of his implied authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. (Grille, C.J. and Hemcon Bansilal Abirchand J. Kabulchand Asaram.
 L.R. (1945) Nag. 204=1945 N.L.J. 115=A. I.R. 1945 Nag. 121.

-S. 238—Applicability—Fraud practised by agent -Absence of evidence as to whether principal was a party to the fraud-Agreement to sell by principal if affected.

The provisions of S. 238, Contract Act, according to which a fraud or misrepresentation practised or made by an agent invalidates a contract into which the agent enters on behalf of the principal do not apply to a case where an agreement to sell a house is entered into between the vendor himself and the vendee and the deed of sale itself is executed by the vendor. There may be cases outside the scope of the provisions of S. 238 in which such fraud may invalidate agreement entered into by the principal. But where there is no evidence to show that the principal was a party to the fraud practised by the agent or that there was express authority to the agent to give the false information in question, an agreement followed by a sale deed executed by the principal himself to the vendee could not be avoided on the ground of the alleged false information having been given by the agent. (Allsoh and Verma, 37.) RAMACHAND b. Hira Lal. 1942 A.W.R (H.C.) 249=1942 A.L.W. 395=204 I.C. 141=15 R.A. 313= A.I.R. 1942 All. 341.

S. 239—Business—Meaning.
The word 'business' in S. 239, Contract Act, is not used in the sense of an undertaking of an industrial or commercial nature. Two doctors may form a partner-EDULJI MEHARBANJI BOYCE V. SHYAM SUNDER LAI. I.L.R (1943) A. 450=206 I.C. 530=15 R A 528=1943 A.L W. 184=1943 A.L J. 147=1943 O.W.N. (H.C.) 102=1943 O.A (H.C.) 39=1943 A.W.R. (H.C.) 39=A.I.R. 1943 A. 192.

Ss. 239 and 240—Advance of money to person doing business in consideration of interest and share in profits -No risk to advances-Partnership-If constituted.

Where all that is established by the evidence is that a person agreed to finance another in business in consideration of receiving interest on the monies advanced and a share of the profits of the business, that he was doing nothing else in common with that other to whom everything is left, and that there was no capital fixed, it cannot be said that there is an agreement to combine property, labour or skill in some business within the meaning of S. 239 of the Contract Act. There is therefore no partnership in such a case especially when the person advancing money never risks his advances in the business. The true test is | Co-operative

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whether there is really a common business between the parties who claim to be partners. Each of such parties must have the right to control the property the right to receive the profits and the liability to share in losses. (Abdul Ghani and Subramania Aiyar, 33.) Bashettapppa v. Firm of Channaveerappa Kalva-Nappa. 19 Mys L. J. 351=46 Mys.H.C.R. 234. S. 239—Partnership—Firm—If can enter into partnership with another individual.

There is nothing in S. 239 of the Contract Act to preclude a firm from entering into a partnership with another individual. (Abdul Ghani and Subramania Aiyar, JJ.) BASHETTAPPA v. FIRM OF CHANNAVEERAPPA KALYANAPPA. 19 Mys.L.J. 351=46 Mys. H.C. R. 234.

CONTRIBUTION-See (1) CONTRACT ACT, S. 43 (2) TORT-JOINT-TORTFEASORS-CONTRIBUTION

-Co-defendants—Decree for costs —Payment by one

-Liability of other to contribute—Equities.

When a joint decree for costs is passed against two defendants and execution has been levied against one, the latter is not entitled to claim contribution from the other when he has not contested the suit and no benefit has accrued to him from the defence made by the co-defendant. It is impossible to hold that the mere act of the Court in imposing a liability on all the parties to the contribution suit in invitum creates any equity in favour of them interse. An equity can only arise from some conduct and it must be established by the party who relies on it. (Henderson, 7.) SUDHANSU KUMAR ROY v. BANAMALI ROY. 49 C.W.

CONVERSION—See HINDU LAW—CONVERSION, CO-OPERATIVE SOCIETIES ACT (I OF 1912)—See also Bengal Co-operative Societies ACT (XXI of 1940); BIHAR AND ORISSA CO-OPERATIVE SOCIETIES ACT (VI of 1935); MADRAS CO-OPERATIVE SOCIETIES ACT (VI of 1932).

-S. 2 (c)—Joint Hindu family—If can become member.

There is nothing in the Co-operative Societies Act to prevent a joint Hindu family from becoming a member of a Co-operative Society. (Grille, C.J. and Niyogi, J.) KISANLAL KAPURCHAND v. CO-OPERATIVE CENTRAL BANK, LTD., SEONI. I.L.R. (1945) Nag. 677=1945 N.L. J. 482.

-S. 23—Period of two years—Mode of calculation. The period of two years mentioned in S. 23 of the Co-operative Societies Act is to run backwards not from the date on which the award of the liquidator is made but from the date of the dissolution of the Society, that is the date on which its registration was cancelled. (Tek Chand and Beckett, JJ.) ALLAH YAR v. ANJUMAN IMDAD QARZA, BASTI CHAH KOTWALA DAKHLI JALALPUR. I.L.R. (1942) Lah. 379=195 I.C. 688=14 R.L. 83=43 P.L.R. 305=A.I.R. 1941 Lah. 284.

-S. 23—Scope and applicability.

The words 'the debts of a registered society as they existed at the time when he ceased to be a member occurring in S. 23 of the Co-operative Societies Act clearly refer to the debts due from the society to third persons and it is with regard to these debts that the liability of a past member has been confined in the section to a period of two years from the date of his ceasing to be a member and no further. The debts referred to in the section have no bearing whateves to the debts of the outgoing members due to the society itself. (Yorke and Ghulam Hasan, JJ.) BELAHARI Society v. PUTTU LAL.

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Luck. 658=193 I.C. 524=13 R.O. 466=1941 O. L.R. 297=1941 A.L.W. 299=1941 O.W.N. 404 =1941 O.A. 285=1941 A.W.R. (Rev.) 236= A.I R. 1941 Oudh 315.

-S. 42 (2)—Contributory order—Power of Civil Court to examine if it is ultra vires the liquidator-Order

when should be maed.

A Civil Court can examine the question whether a liquidator appointed under the Co-operative Societies Act has acted within his powers when he makes a contributory order. The relevant rule limits the power of the liquidator to make a contributory order to a time posterior to the determination of the assets. He cannot make such an order until he has ascetained the assets. He cannot be regarded in law as having ascertained the assets where he is in the course of realising the assets of the individual debtors and until the amount that can be obtained on such realisation Until then any contributory order is determined. made is ultra vires. These contributory orders are exceedingly oppressive and should in fairness to the contributories and in the interest of the co-operative last resort. (Stone, C.J. and Niyogi, J.) HARISA RAWAJISA v. YAOLI CO-OPERATIVE SOCIETY. 1941 N.L.J. 412.

-S. 42 (2) (b) and (5)—Order of liquidator assessing member's contribution after his complete discharge by Insolvency Court-If ultra vires-Power of Civil Court to refuse execution. See Prov. Insolvency Acr., Ss. 34 (2) AND 44 (2). 44 P.L.R. 376.

ACT, Ss. 34 (2) AND 44 (2). 44 P.L.R. 376.

—S. 42 (b)—Society in liquidation—Jurisdiction of Civil Court to entertain suit for Provident Fund money in

The Civil Court has no jurisdiction to entertain a suit against a Co-operative Society which has gone into liquidation for the recovery of Provident Fund money in its hands, in a case governed by the provisions of the Co-operative Societies Act. (Edgley, J.) CHATRA SERAMPORE CO-OPERATIVE CREDIT SOCIETY v. AKLOO MAHATO. 49 C.W N. 164.

S. 42 (2) (e)—Debt due to Society—Power of

liquidator to make order having force of decree.

S. 42 (2) (e) of the Co-operative Societies Act does not give a liquidator power to make an order having the the force of a decree in respect of a debt due to a Co-operative Society in liquidation. (Beckett, J.)
Co-operative Society, Thathi Musalian v. Aqu.
Hussain. 196 I.C. 688=43 P.L.R. 446=14 R.
L. 176=A.I.R. 1951 Lah. 355.

S. 42 (6)—Suit for declaration that Liquidator's order of contribution is void—Jurisdiction of Civil Court.

The Civil Court has no jurisdiction to entertain a suit for a declaration that an order of contribution made by a Liquidator of a co-operative society under S. 42 (2) (b) of the Co-operative Societies Act is null and void on the ground that the Liquidator did not hold a proper enquiry as required by the rules, when it is not contended that the society in question had not been validly dissolved. (Edgley, J.) Meherdi Munshi v. Inspector, Co-operative Societies, Goalpara Circle. I.L.R. (1943) 2 Cal. 186= 215 I.C. 33=47 C W.N. 384=17 R.C. 50=A.I. R. 1944 Cal. 245.

S. 43, Rules under, Rule 18—Payment order of Registrar—Execution by Civil Court—Guardian for minor appointed by Registras-Executing Court-If must appoint

guardian—C.P.Code, O. 32, R. 3 (5).

No procedure is provided in R. 18 of the Rules framed under S. 43 of the Co-operative Societies Act, for the conducting of the inquiry either by the Registrar

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the appointment of a guardian by a Registrar in the summary proceeding and to extend it to the execution in a Civil Court, which should by its very nature be governed by the Civil Procedure Code, As a matter of general policy, therefore, it would be just that whenever an executing Court is approached to carry out the order of the Registrar and there are minors in the case, the execution Judge should act under O. 32, C.P. Code, and appoint a proper person to protect the interests of the minors concerned The legal aspect is also very strong. There is great force in the contention that O.32, R. 3 (5), C.P. Cole, extends the operation of the order appointing a guardian to execution proceedings only if the guardian has been appointed in a "suit" and not otherwise. On this ground also, the appointment of a guardian by a Registrar in a summary proceeding is not covered by O. 32, R. 3 (5), C.P. Code, and O. 32 read with S. 141, C.P. Code, makes it compulsory that guardians of the minors should be appointed by the execution Judge before he starts executing a payment order of the Registrar. (Almond, C.J. and Mir Almad, J.)
MAHOMED ASHRAF KIJAN v. NOOR-UNNISSA. A.I.R. 1945 Pesh. 39.

\_\_\_\_\_S. 43—Rules framed under R. 26—'Dispute-"Business of a Co-operative Society"—Meaning of-Dispute between Society and its treasurer-member -- Jurisdiction

of Registrar to decide.

A "dispute" within the meaning of R. 26 of the Rules framed under S. 43 of the Co-operative Societies Act arises, when a demand made for payment of a debt is not immediately paid and cannot be recovered without recourse to law. The expression "the business of a Co-operative Society" occurring in R. 26 is not restricted to the dealings with the members of the Society only but it includes business which the Co-operative Society is under the law empowered to transact. Where a joint Hindu family is in its corporate capacity a member of a Co-operative Society and also its treasurer, it cannot exonerate itself from the liability arising in its capacity as treasurer by discarding its character as member. As member of the Society, it is bound to fulfil the obligation which it has undertaker as treasurer of the Society and in that sense a dispute relating thereto can well be treated as a domestic dispute between the member on the one side and the Society on the other. The Registrar of the Co-operative Societies has, therefore, jurisdiction to decide that dispute. (Grille, C. J. and Niyogi, J.) KISANLAL KAPURCHAND v. CO-OPERATIVE CENTRAL BANK, LTD., SEONL I.L.R. (1945) Nag. 677=1945 N.L.J. 482.

-S. 43—Rules framed under R. 33—Recovery of money due under award-Power of Deputy Commissions to sell property covered by award without previous attachment

-C.P. Land Revenue Act, S. 128. Under R. 33 of the Rules framed under S. 43 of the Co-operative Societies Act, the Deputy Commissioner cannot sell any property specified in the award by force of the award, as a Civil Court can. All that he can do under that rule is that he can recover "any sum falling due under the award" as an arrear of land revenue. Accordingly he is not empowered to deal with the property covered by the award except under the powers conferred on him under S. 128 of the Under this section, C.P. Land Revenue Act. if the award does not create a charge on the property, he can only sell it if he first attaches it, with the consequence that any one who purchases it before such attachment is protected. (Bose, J.) NIRANDGARH or by the arbitrator. It would be unsafe to rely on SMARIA CO-OPERATIVE SOCIETY v. BINAIVATI. I.L.R.

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(1945) Nag. 651=1945 N.L.J. 510=A.I.R. 1945 Nag. 281.

-S. 43 and Bengal Government Rules, R. 25—Non-compliance with rule—Loan, if invalid.

R. 25 of the Rules framed by the Bengal Government which requires the Co-operative Societies to inform the Registrar appointed under the Co-operative Societies Act whenever a loan exceeding Rs. 1,000 is granted, is a sort of departmental rule the breach of which would be a matter between the particular Cooperative Society and the Registrar but would not make the loan given to be an invalid one nor a loan not given by a Co-operative Society. (Mitter and Blank, JJ.) AMAL SANKAR SEN v. DACCA CO-OPERATIVE HOUSING SOCIETY, LTD. 49 C.W.N. 377 =A I.R. 1945 Cal. 350.

-Ss. 43 and 44—Powers of Registrar—Award if can be both against society as well as against the members

-Sale in execution—Questioning.

The Registrar of Co-operative Societies has the power under the rules and regulations made under the Co-operative Societies Act to pass an award not only against a society but also against its members individually. A consolidated award both against the society and its members mentioning all the members though it may be irregular in form is not invalid. Its validity could be questioned by a judgment-debtor and when not objected to by him, it cannot be raised after a sale in execution of it. (Niyogi, J.) Co-operative Central Bank, Ltd.
Makapur v. Narayan Ramjee Kunbi. I.L.R.
(1942) Nag. 685=202 I.C. 512=15 R.N. 85=
1942 N.L. J. 462=A.I.R. 1943 Nag. 7.

S. 43—Rules under R. 22—Award—Execution

-Limitation-Starting point. See LIMITATION ACT,

ART. 182. I.L R. (1940) 2 Cal 460.

S. 43 (1)—Rules under—Award by Registrar relating to mortgagee in favour of society—If mortgage decree—Claims of priority—Power of Registrar to decide.

An award relating to a mortgage in favour of a Co-operative Society made by the Registrar under the Rules made by the Local Government under the provisions of S. 43 (1) of the Co-operative Societies Act, can in no sense be a mortgage decree. The Registrar has no power to decide disputed claims of priority or to make a decision which in any way affects the rights of other persons interested either in the mortgage security or in the equity of redemption. (Henderson, J.) Satish Chandra Nag v. Silchar Co-operative Town Bank, Ltd. I.L.R. (1941) 2 Cal. 551=201 I.C. 585=15 R.C. 246=A.I.R. 1942 Cal. 290.

-S. 43 (2) (g) and Rules under—Power of Co-operative Bank to suspend accountant—Accountant, if "officer" or servant—Rights between Bank and its servants.

A Co-operative Bank has no power to suspend an accountant of the Bank. An accountant has no power to give any direction in regard to the business of the Bank and he is, thus, not an officer within the meaning of S. 2 (d) of the Co-operative Societies Act; he is merely a servant of the Bank. There is no statutory provision in the Act empowering the Bank to appoint, suspend or dismiss its servants. Nor has any rule been framed by the Provincial Government empowering the Bank to do so. As no power has been conferred on the Bank to appoint an accountant either under the Act or the rules framed thereunder. of the General Clauses Act, which provides that a power, conferred by an Act on any appointing authority, to appoint a person includes a power to suspend or dismiss him, has no application. The rights bet-

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ween the Bank and its servants are regulated by the ordinary law of master and servant. (Sen, J.). Co-operative Central Bank, Daryapur v. Trimbak. I.L.R. (1945) Nag. 457=1945 N.L.J. 221=A.I. R. 1945 Nag. 183.

-S. 43 (2) (1), R. 22 (1)—Applicability—Conditions—Suit by assignee from Co-operative Society to recover

loan-If barred.

Before R. 22 (1) of the rules framed under S. 43 (2) (1) of the Co-operative Societies Act can apply, two conditions must co-exist; (1) the dispute must touch the business of the registered Society and (2) the dispute must be one between members or past members of the Society, or persons claiming through a member or past member interse or the dispute must be one between a member or past member, or persons so claiming on the one hand and the committee or any officer of the Society on the other. Where a Co-operagive Society assigns to the plaintiff who is a nonmember, a loan advanced by it to the defendant, a suit by the plaintiff, for the recovery of the loan from the defendant is not excluded from the jurisdiction of the Civil Court by the provisions of R. 22 (1) as neither of the conditions mentioned above are fulfilled. (Sen and Das, 77.) PANCHANAN BANERJEE v. NIRMAL CHANDRA. 50 C.W.N. 7.

S. 43 (2) (1) and R. 115 of Rules (U.P.)

framed under-Strict construction-Necessity Personal decree against alleged representative of a past deceased member—If can be passed—Power of Civil Court to set it aside. ARYA CO-OPERATIVE BANK SOCIETY v. SHIV CHARAN. [See Q.D., 1936-'40, VOL. I, COL. 23 12.] 192 I.C. 337=13 R A. 309. CO-OWNERS, CO-SHARERS—Abandonment—

Presumption—One of brothers left in possession of property -Others taking no interest in it-Evidence Act, S. 114. Where four brothers lived together for a short time and then three of them went away leaving their elder brother in possession of a piece of land out of other property belonging to their parents,

and from that time they had not taken the slightest interest in the land and their elder brother had been in fact using it as if it were his very own,

Held, that the Court might presume from these facts that the three brothers had abandoned their claim to the property and that the eldest brother was asserting his exclusive right to it. (Mackney, J.)
MAUNG PO HLANG v. PO NYI. 195 I.C. 234=14

R.R. 34=A.I.R. 1941 Rang. 111.

-Admission to tenancy by one—If binds the others. Where in a compromise of a suit filed under S. 180 of the U. P. Tenancy Act by one of the two recorded co-sharers, a person is admitted as a hereditary tenant, it would not bind the other co-sharer who was not a party to it. Where the land is not the severalty of the plaintiff in that suit, the plaintiff could not by himself admit any body to the tenancy. (Dible, J.M.) SHANKER LAL v. SUBEDAR ANCHHA RAM. 1944 R.D. 592=1944 A.W.R. (Rev.) 308.

-Adverse possession—Ouster—Facts justifying inference.

The ancestors of the parties were co-sharers. Though the title of the ancestor of one set of cosharers to a half share was recognized at the first settlement it was only the other co-sharers who were in possession thereafter continuously. It was only their names that appeared in the Khewat at the second and third settlements exclusively. They alone had effected some transfers of property to which no objection was raised by the other set of co-sharers.

Held, that under the circumstances the co-sharers in

possession had established ouster to the knowledge of the other set of co-sharers and their possession was hostile and amounted to a clear denial of the title of the co-sharers not in possession nor in participation of the rents and profits of the property. (Ghulam Hasan, J.) CHANDI V. ANANT BAIL. 19 Luck. 216=212 I. C. 555=16 R.O. 290=1943 O.W.N. 274=1943 O.A. (C.C.) 205=A.I.R. 1943 Oudh 398.

——Adverse possession—Starting point—Evidence of ouster—Withdrawal of application for correction by party whose name was removed.

Where a co-sharer whose name is removed applies for correction of record but withdraws it and takes no further steps in the matter for over 12 years thereafter the co-sharer in exclusive possession prefects his title by adverse possession as against the other co-sharer. From the withdrawal it must be assumed that the correction was opposed by the co-sharer in possession and hence his adverse possession must be taken to have started from the date of the withdrawal. (Sathe, S.M.) Sinyam Singh v. Ram Kumar Singh. 1945 R.D. 134 = 1945 A.W.R. (Rev.) 70.

——Adverse possession—What will and what will not constitute—Possession of one—Nature of. Hader Hussain v. Subhan Khan. [See Q.D., 1936-40, Vol. I, Col. 2335.] 191 I.C. 602=13 R.A. 238.

——Collection of rent by one in the absence of lambardar —Right to costs of collection—Liability to account to others.

Where in the absence of a lambardar a co-sharer collects rent for the others, he is entitled to a reasonable cost for collection. Where he collects more than his share of the profits, he must surrender to the non-collecting co-sharer more than the excess in the collections over his own share in the demand. (Bennet, J.) NATHU LAL v. DIN DAYAL. 220 I.C. 209 = 1944 O.W.N. 199=1944 O.A. (C.C.) 130 (2) = 1944 A.W.R. (C.C.) 130 (2)=A.I.R. 1944 Outh 285.

——Common land—Co-sharer landlord in sole possession of land by mutual arrangement—Implied authority to settle tenants.

Per Fail, Ali, C.J. and Chetterji, J.-Where the co-sharers are by mutual arrangement among themselves in possession of separate portions of the lands of the estate, then from the manner in which these co-sharers deal with the respective portions in their respective possession, a Court of fact may presume that each of them has been authorised by the other co-sharers to represent them for ordinary details of management in dealing with the portion of the estate in his separate possession including the settling of raiyats upon the lands of that portion for convenience of cultivation. If it appears, for example, that each co-sharer has been settling tenants upon the lands in his possession to the knowledge of the other co-sharers and without any objection or protest by them, the authority may be readily presumed. Similarly the authority may perhaps be presumed in certain special cases if the settlement is evidently for the benefit of the entire estate and is one which the other co-sharers would have readily assented to if they had been in direct possession of the land settled. But at the same time it is to be remembered that the right of being in khas possession of lands appertaining to the estate is one of the cherished rights of the landlord and the induction of occupancy raivats on them or leasing them out to persons who will by operation of law automatically acquire occupancy rights therein may amount to a serious curtailment of that right. Where therefore there is no express

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land to persons who may acquire occupancy rights therein, the courts will require very strong and cogent circumstances to enable them to presume that the co-sharer who had inducted such a person upon the land had authority on behalf of the other co-sharers to do so.

Per Sinha, J.—The mere fact fact that a co-sharer landlord has been in sole possession of certain land for convenience or by mutual arrangement amongst the co-sharer landlords is not sufficient to raise an inference that he has implied authority to settle tenants upon the land for convenience of cultivation. This is so both on general principles and on a proper construction of the provisions of the Bihar Tenancy Act. ((Fazil Ali, C.J., Chetterji and Sinha, JJ) KANIZ FATIMA v. HOSSAINUDDIN AHMAD. 22 Pat. 382=207 I.C. 353=16 R.P. 21=9 B.R. 401=1943 P.W. N. 161=24 P.L.T. 175= A.I.R. 1943 Pat. 194 (F.B.).

——Common land—Exclusive possession by one in defiance of the rights of others—Claim to compensation by others—Maintainability—Limitation—Limitation Act, Arts. 109 and 120—Compensation—Basis of calculation—Rental basis or produce basis. RAJ RANJAN PRASAD SINHA v. KHOBHARI LAL. [See Q.D., 1936-40, VOL. I, Col. 3322.]. 20 Pat. 162—192 I.C. 456—13 R.P. 478—7 B.R. 425—A.I.R. 1941 Pat. 90.

——Co-tenants—Ancestral holding—Loss of right
—Absence of proof of abandonment or adverse
possession. Risal Singh v. Baldeo Singh. [See Q.
D., 1936-40, Vol. I, Col. 3322]. 1941 O.A. (Supp.)
76=1941 A.W.R (Rev.) 88.

The possession of one co-tenant means the possession of all the co-tenants unless the possession of the former is openly adverse to the other co-tenants (Sathe, A.M.) RAM SAHAI v. DOONGAR SINGH. 1941 R.D. 892=1941 A.W.R. (Rev.) 1081 (1)=1941 O.A. (Supp.) 871 (1).

——Ejectment of trespass—Suit for by one co-sharer— Maintainability.

In a suit by some co-owners to eject certain trespassers on the co-owners' property, the non-joinder of the other co-owners does not vitiate the suit. To eject a trespasser one co-owner is at perfect liberty to institute an action. (Davies, J.) WAZIRA v. MANA. 1943 A M.L. J. 78.

Ejectment suit—Ijmal property—Person intruding upon land against will of one co-sharer but with consent of another co-sharer—Right of former to eject intruder.

It has long been settled that one of several co-sharers of Ijmal property may partially eject a person who has intruded upon such property against his will though with the consent of another co-sharer, by obtaining a decree for possession of his share jointly with the intruder. (Harries, C.J. and Dhavle, J.) RAM RAN BIJAYA PRASAD SINGH v. RAMIWAN RAM. 200 I C. 769=15 R P. 11=8 B.R. 727=23 Pat. L.T. 294 =A.I.R. 1942 Pat. 397.

——Exclusive possession of common land by one in defiance of rights of others—Compensation to excluded co-sharers—Right to interest on—Mesne profits—Distinction. Raj Ranjan Prasad Sinha v. Khobhari Lal. [See Q.D. 1936-40, Vol. I, Col. 3322.] 20 Pat. 162—192 I.C. 456—13 R.P. 478—7 B.R. 425—A.I.R. 1941 Pat. 90.

of that right. Where therefore there is no express authority given by the co-sharers for settlement of amounts to ouster—Co-sharers allowing one to remain

in possession for some time—If lose right to claim partition—If amounts to ouster. HARHAR PRASAD SINGH v. HITLAL SINGH. [See Q.D. 1936-40, VOL. I, Col. 2330.] 192 I.C. 502=7 B.R. 472=13 R. P. 491.

an action in ejectment against a trespasser on the joint property without making the other co-owners parties to the action. (Agarwala, J.) Sambhu Gosain v. Pigari Mian. 193 I.C. 253=13 R.P. 561=1941 P.W.N. 497=7 B R. 520=A.I.R. 1941 Pat. 351

Joint lease—Suit by one of the co-lessors for his

share of rent-Maintainability.

Where there is a joint lease, one of the co-lessors cannot maintain a separate suit against the lessee for his share of the rent. But this principle has no application to a case where the share due to a colessor has already been paid and a suit is brought by the other lessor for his share of rent due and such a suit would be maintainable. (Mulla and Torke, JJ.)
JOTI BHUSHAN GUPTA v. B. N. SARKAR. I.L.R.
(1945) All. 165=A.I.R. 1945 All. 311.

Joint property—Division under unregistered deed—Deed inadmissible—Co-owner in possession disturbed by another co-sharer-Remedy-Suit in ejectment—Maintainability. See REGISTRATION ACT, S. 17 (1) (b). (1941) 2 M.L.J. 707.

- Joint property—Mode of enjoyment—Common well—Power of Court to alter existing mode of enjoyment and prescribe another-Matter to be decided in suit itself

and not in execution.

At a division of properties among three brothers a well was reserved in common. There were two picottas or baling stands for baling out water from that well. The plaintiff, who was one of the sharers entitled to  $\frac{1}{6}$  share in the well, wanted to construct a separate baling stand for his own use in another place, on land exclusively belonging to him. The lower appellate Court gave him a decree allowing him to put up a new picotta subject to the condition that in execution the turns should be fixed by having a Commissioner appointed. It was urged in second appeal that the existing mode of enjoyment of the well by the several co-sharers could not be interfered with.

Held, (1) that in a case where partition was not feasible or possible as in this case, the Court had undoubtedly a right to prescribe the best method in which the well could be enjoyed by the parties, and it was open to the Court to prescribe a better method of enjoyment in modification of the existing mode of enjoyment; it was consequently open to the Court to permit the plaintiff to have a separate picotta at the same time fixing the turns during which each sharer could bale out water from the common well; (2) that the Court should, however, enquire into the best method of enjoyment and decide the same in the suit itself and not leave it to be dealt with in execution. (Somayya, 7.) Lingappa Goundan v. Ramaswami Goundan. 1945 M.W.N 337=58 L.W. 292 (2)=A.I.R. 1945 Mad. 244=(1945) 1 M.L. **J.** 347.

-Joint tenants or tenants-in-common—Possession of one—When adverse to the rest. See Adverse Possession—Co-owners. 43 Bom L.R. 971.

——Land revenue—Arrears of—Payment by lambardar —Charge, if created—Right to interest.

A lambardar or sadar lambardar who pays arrears of land revenue on behalf of his defaulting co-sharers same time to pay a proportionate part of the mortgage acquires a charge on the share of the defaulting co- | debt. To ignore the liability of one of the parties

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sharer or the patti lambardar and in such cases he is GULAB v. BINDRABAN. I.L.R. (1941) Nag. 474= 197 I.C. 327=14 R.N. 163=1941 N.L.J. 311= A.I.R. 1941 Nag. 245.

-Leave by one-Right of another to dispossess lessee. There is nothing to warrant the supposition that in Oudh an ordinary agricultural lease must be granted by all the co-sharers in the village or patti as the case may be. Hence where a lease is granted by one out of several co-sharers, another co-sharer who has not joined in the lease has no right to come and dispossess such a lessee for the lease is a valid one and the lessee acquires tenancy rights under it. (Sathe, A.M.)
JIWAN LAL v. NIZAMUL HAQ. 1941 O.A. (Supp.)
806=1941 A.W.R. (Rev.) 932=1941 R.D. 921.

-Lease of specific plots—Validity—No exclusive

possession-No partition.

Where the property is joint and there has been no partition in the village, if a co-sharer who is not in exclusive possession of the plots in question purports to transfer a specific area in the plots in question by a perpetual lease authorising the lessee to take possession of that area and to exercise all conceivable rights over the same, the lease is void and inoperative. (Ghulam Hasan and Madeley, JJ.) Debi Prasad Single v. Surjan Singh. 195 I C 597=14 R.O. 107=1941 A.W.R. (Rev.) 699=1941 R.D. 747=1941 O.L.R. 604=1941 O A. 711=1941 O W.N. 989.

In the case of co-owners, where one is left in charge of the common property and makes the collections of the profits, there is no liability on the part of such co-owners to pay interest on another's share of the profits from the date of collection. A co-sharer who sues for his share of the profits can get interest only From the date of suit. (Somayya, 7.) CHINNASAMI BATTAR v. RAMASAMI PILLAI. 216 I C. 218=17 R.M. 213=1944 M.W.N. 116=A.I.R. 1944 Mad. 153=(1943) 2 M.L.J. 653.

Oudh-Liberty to lease by one-Conditions necessary to make lease valid.

In Oudh a lease could be executed in favour of a tenant by one out of several co-sharers. But for this purpose a co-sharer must be himself in possession of the land before he can lease it. A lease given in respect of land in the effective possession of another co-sharer cannot be valid when the alleged lessee does not even obtain possession in pursuance of the lease. (Shirreff, S. M. and Sathe, 7.M.). GHISAL TELI v. SHEO MURAT MISIR. 1942 O.A. (Supp.) 293=1942 R D. 594=1942 A.W.R. (Rev.) 267 =1942 O.W.N. (B.R.) 477.

—Partition—Adjustment of rights and liabilities— Duty of Court—Suit by owner of 1/4 share for partition and possession—Defendant owning 3/4 share and holding mort-gage over whole—Form of decree—Liability of plaintiff to proportionate part of mortgage debt.

In a suit by co-owner of an one-fourth share for partition and recovery of that share against the owner of the remaining three-fourths who was also a mortgagee of the suit property as well as of certain other properties, it is the duty of the Court to adjust the rights and liabilities inter se between the parties and to determine the shares on such adjustment. The plaintiff cannot claim and cannot be given an unconditional decree without being obliged at the

to the other or others and proceed merely to effect a division without regard to it, is to ignore the very character of the suit and the nature of the relief which the Court is bound to grant. There is no distinction between a case of co-owners and a case of members of a Hindu joint family in this respect. The fact that the mortgage does not confer upon the mortgagee a right to possession is immaterial, when the suit is one for partition calling for the adjustment of mutual rights and liabilities. (Leach, G.J. and Krishuaswami Ayyangar, J.) Anantanarayana Iyer N. SIVARAMA KRISHNA IYER. 56 L.W. 44=1943 M.W.N. 95=209 I.C. 330=16 R.M. 306=A.I. R. 1943 Mad. 370=(1943) 1 M.L.J. 100.

——Partition—Land subject to vaiyati tenancy created by one co-sharer allotted to another—Occupancy rights acquired by tenant—If can be claimed in respect of original holding.

A co-sharer to whom a parcel of land has been allotted by a decree for partition does not take it subject to a raiyati Jama created by another co-sharer without his concurrence when the land was the joint property of the co-sharers, when there is nothing to show that the land has been allotted to him as raiyati land and rated as such. On partition the tenancy itself is transferred by operation of law to the land allotted to the other co-sharer who created it, and any occupancy rights acquired by the tenant in the original holding could attach only to the land to which the tenancy is so transferred. (Binus, J.) DEBENDRA NATH BINNAS v. UMESH CHANDRA MANDAL. J.L.R. (1942) 1 Cal. 408=202 I.C. 635=15 R. C. 377=46 Cal. W.N. 904=A I.R. 1942 Cal. 513.

----Partition-Mining area-Guiding principle.

In effecting partition, compactness is no doubt a very important element but in the case of mining areas where mines have been opened and developed by different co-sharers at considerable cost and labour, it is fair and just that more importance should be attached to present possession than to compactness. But this will not prevent the Commissioner from exercising his discretion in making the allotments as fair and equitable as possible. (Fazl Ali, C. J. and Chatterji, J.) Tradders and Miners, Ltd. v. Dhirenders Nath. 23 Pat. 115=A.I.R. 1944 Pat. 261.

Partition—Part owner of proprietary interest having also partial mokarrari interest—Right to sue other co-sharers for partition. See Practice—Partition Suit. 24 Pat. 193.

Presumption—Division of portion of joint estate—

The presumption that where one portion of a joint estate has been divided, the whole of it has been divided, is merely a presumption of fact and depends on the particular circumstances of each case. (Almond, J.C.) MIAN SHARIF GUL v. SAID GUL. 196 I.C. 444=14 R. Pesh. 30=42 Cr.L.J. 872=A.I. R. 1941 Pesh. 65.

Partition—Suit for—When and when not maintainable.

Per Mitter, J.—As the scope and object of a suit for partition is to convert the joint possession of the co-sharers into possession in severalty, it is essential that the plaintiff should at the date of the institution of the suit be in possession of the joint property either actually or constructively. If at that material time he is in actual possession of a part of the joint property or if he be not in actual possession of any part of the property but his co-sharer, the defendant is, and there is no ouster, the suit would be maintainable,

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for his co-sharer's possession in such a case is constructively his possession. But if he was not at the date of the suit in actual possession of any item of the properties claimed as joint and the defendant is in actual possession of the whole on the assertion of a hostile title known to the plaintiff, a suit for partition is not maintainable, but a suit for possession, either joint possession or possession after partition must be brought. (Mitter and Khundkar, JJ.) MAHOMED HASHIM ALI KHAN v. IFFAT ARA HAMDI BEGUM, 200 I C. 392=15 R.C. 7=46 C.W.N. 561=74 C.L.J. 261=A, I.R. 1942 Cal. 180.

----Payment to one-Effect.

Payment to one co-sharer is in law a payment to all the co-sharers. One co-sharer's possession is possession of all co-sharers. (Vyas, J.) WAZIR ALI V. ABDUL KADAR SHEIK. 1945 A. M. L. J. 37.

—Possession of one—Effect of—Common properly owned by manager of joint family and member of separated branch—Possession by junior member of joint family and admission by him—Effect on right of other co-owner.

Where the co-owners of common property are a manager of a joint Hindu family and a member of a separated branch of the family, possession by one of the junior members of the joint family is the possession of the manager of the family. The possessions by such junior member or any admission by him of the right of the co-owner cannot enure for the benefit of the latter and can give the other co-owner no advantage when the manager denies or in any case has not been proved to have admitted the other co-owner's rights. (Loba, J.) Khem Chand 7. Dayaram, I.L.R. (1940) Kar. 534=194 I.C. 137=13 R.S. 249=A.I.R. 1941 Sind 50.

——Private partition—Legal effect, if different from partition by Court—Co-sharer in exclusive possession—Gift by—Competency—Rights and remedies of others.

A private partition is not unknown to law. So far as the legal effect is concerned there is in principle no difference between a private partition and one by Court. Hence a co-sharer in exclusive possession for a long time of certain property under a private partition is quite competent to make a valid gift of it. While the exclusive possession enables a co-sharer to transfer it, it does not deprive the other co-sharer of the title to the plots in question and they can obtain a declaration to that effect. (Wali-ullah and Sinha, Jf.) SADA NAND v. SHER SINGH. I.LR. (1945) All. 159=1945 A.W.R. (H.C.) 42=1945 O.W.N. (H.C.) 59=1945 A.L.J. 106=1945 A.L.W. (H.C.) 59=A.I.R. 1945 All. 153.

The ancestors of parties were co-sharers. Though the title of the ancestor of one set of co-sharers was recognised at the first settlement the other co-sharer alone were in continuous possession of the property. Held, that the title recognised at the settlement must be held to subsist all through unless it was extinguished by adverse possession on the part of the other co-sharers. (Ghulam Hasan, J.) Chandi v. Anant Ball. 19 Luck. 216=212 I.C. 555=16 R.O. 290=1943 O.W N. 274=1943 O.A. (C.C.) 205=A.I.R. 1943 Oudh 398.

Remedy—Suit by one for trespass—Competency—Alleged partition not proved as deed unregistered—Remedy—Unregistered document—Use of—Proof of partition by other evidence—Permissibility.

Where a deed of partition in respect of Hindu joint family properties is inadmissible for want of registration the Court can only regard the property as still

belonging to the joint family. The co-owner in sole enjoyment cannot in such a case maintain a suit for trespass against the other co-owners who had disturbed his possession. He can only bring a suit for partition of all the properties owned in common or for joint possession with his co-owners. It cannot be said that an agreement which cannot be proved for want of registration can be proved by other evidence. All that can be said is that an unregistered deed may be examined to see under what circumstances a person Came into possession. (Leach, C.J., Wadsworth and Krishnaswami Ayyangar, JJ.) RAMAYYA v. ACHAMMA. I.L R. (1945) Mad. 160=216 I.C. 255=17 R. M. 214=57 L.W 472=1944 M.W.N. 612=A.I. R. 1944 Mad. 550=(1944) 2 M.L.J. 164 (F.B.).

-Right of-Grant of occupancy rights by co-sharer in respect of his undivided share.

A joint owner can, before partition, grant occupancy rights in respect of his undivided share without the consent of the other co-sharers. The fact that the grantees are tenants-at-will of the whole of the proprietary body is immaterial. (Monroe and Abdur Rahman, JJ.) RALLA v. DINA NATH. 209 I.C. 520 = 16 R.L. 135=45 P.L.R. 210=A.I.R. 1943 Lah. 217.

-Rights inter se-Changing character of plot by one

-Planting of grove on arable land.

Where on a plot of land being used as arable land, a grove is planted by a co-sharer, the others have a right to object to the changing of the character of the plot. (Bennett, J.) SHAMBHU RATAN v. BADRI NARAYAN. 203 I C. 613=15 R.O. 237=1942 A. W.R. (C.C.) 358=1942 O.A. 605=1942 O.W. N. 750=A I R. 1943 Oudh 123.

-Right of one co-tenant to deal with property of another. Nanuram v. Radhabat. [See Q.D. 1936-40, Vol. I, Col. 2336.] I.L.R. (1942) Nag. 24= 192 I.C 630=13 R.N. 272.

-Right of one to recover entire profits from trespasser.

The right of each co-owner extends to the whole property jointly with the others. Hence one of several co-owners is entitled to recover from a trespasser the whole of the profits which are payable by the trespasser on account of his wrongful possession and the whole amount of the compensation payable account of the injury caused to the property. (Allsop Cycles 7. Bansidar. I.L. and Verma, 77.) RAM CHARAN v. BANSIDAR. I.L. R. (1942) All. 671=203 I.C. 223=1942 A.L.J. 411=1942 A.W.R. (H.C.) 278=1942 A.L.W. 380=A.I.R. 1942 All. 358.

Right of one to recover property on behalf of another. One sharer cannot claim to recover property on behalf of another sharer if that sharer is a party to the suit and does not take the necessary steps to support his claim. (Horwill, J.) Adhilassimi Ammal v. Nallasivan Pillai. 219 I.C. 151=18 R.M. 57=1944 M.W.N. 628=A.I.R. 1944 Mad. 530=(1944) 2 M.L.J. 109.

Right of suit—Joint property—Suit to eject trespasser by one only or by alience from one—Maintainability without joining the other co-owner. Munisami Raju v. Madhava Rao. [See Q. D. 1936-40, Vol. I, Col. 3321.] 45 Mys. H.C.R. 439.

-Right of suit-Right of co-sharer to sue trespasser

without impleading other co-sharers.

One co-sharer can maintain a suit against a trespasser without impleading the other co-sharers. (Almond, J.C. and Soofi, J.) Mukarram Khan v. S. Hardit Singh. 196 I.C. 301=14 R. Pesh. 25 =A.I.R. 1941 Pesh. 69.

#### CO-OWNERS, CO-SHARERS.

-Right of suit—Suit against trespasser.

It is well-established law that one co-sharer of property can maintain a suit against a trespasser without impleading all the other co-sharers. (Almona, J.C.) Mahomed Yunas v. Jahan Sultan. 198 C. 803=14 R. Pesh. 76=A.I.R. 1942 Pesh. 9.

-Rights inter se-Claim for joint possession with

one in exclusive possession of a portion—Maintainability.

Where without demur or protest from the other co-sharers, one of them has been using a portion of the land owned in common with the rest in a proper and husbandlike manner for 5 years at least and has not been raising any plea of adverse possession as against the others or denying their title, it is not possible to give a decree for joint possession in favour of any of the others, in respect of such land. (Bajpai, J.) JACDISH SHANKAR v. JANKI SINCH. 1942 A.L. W. 592.

-Rights inter se-Decree entitling one to maintain a garden in a plot-Right to put up a building therein-

Others, if prejudiced.

Where a co-sharer is declared by decree to be entitled to maintain a garden and nursery planted by him in a particular plot, to that extent he is entitled to put that plot under exclusive use. By putting up a small building in it which is absolutely necessary for the purpose of the garden and nursery, he is not enlarging the scope which has been reserved to him for the use of the land, nor are the rest of the co-sharers prejudiced by it. (Dar, 7.)
MAHOMED SHAKIR v. KALKA PRASAD. 197 I.C. 492
=14 R.A. 199=1941 A.W.R. (Rev.) 638=1941
O.A. (Supp.) 592=1941 A.L.J. 402=1941 R.D. 697=1941 A.L.W. 796=A.I.R. 1941 All. 353.

-Rights inter se-Right of one to put up constructions on joint land-Remedy of others.

The general rule in regard to land which is in the joint possession of co-sharers is that one co-sharer is not entitled to make any constructions upon a plot which will have the result of ousting his co-sharers from their possession. The putting up of a temporary structure, such as a thatched shelter, does not come within this condemnation. But it may be added that even if when there is exclusive possession by means, for example, of the erection of cattle-sheds, it is not open to a co-sharer to alter the nature of that possession and substitute for the cattle sheds a pucca residential house. Prima facie where one co-sharer upon open ground over which possession, actual or constructive, is exercised by other co-sharers, erects a building, it is the right of the co-sharer who as a result of this construction is ousted completely from use of the plot covered thereby to obtain a decree which will necessitate the demolition of the construction. This, of course, is subject to the proviso that there shall be due diligence on the part of the co-sharer complaining of ouster and it shall not be possible to say that there has been such delay as will make him subject to an estoppel by reason of acquiescence and presumed consent. (Yorke, J.) RAM SEWAK v. RAM SAHAI. 1942 A.L.W. 225=1942 O.W.N. 281.

----Rights inter se-Vacant land-Possession taken by one of the co-sharers-Remedy of others.

Where land belonging to several co-sharers is lying vacant and one of the co-sharers takes possession of it the remedy is not by way of a suit for ejectment but by way of a suit for joint possession or partition. (Hamilton, J.) GIRJA PRASAD SINGH v. SHABBIR HUSAIN. 1944 A.L.W. 293.

—Rights of —Shamlat Deh.
The "Shamlat Deh" comprise the uncultivated and pasture land in the village and in the absence of custom it is not open to an individual proprietor to appropriate a portion of it and use it in such a way as to affect the rights of all the co-sharers. (Nawalkishore, C.J.) BIRDHA v. CHHATRA. 1943 M.L.R. 83 (Civ.).

---Rights-Right of one in exclusive possession by arrangement to mortgage-Effect of transferor not claiming

ex-proprietary rights.

Per Iqual Ahmed, C.J., agreeing with Allsop, Ismail and Dar, JJ. (Collister, Bajpai and Verma, JJ., contra). -It cannot be disputed that a person, who is the exclusive proprietor and sir-holder of a specific plot of land, has the right to transfer his whole proprietary right in that plot, and if he does not, after the transfer, claim ex-proprietary rights, no ex-proprietary rights will come into existence and, in such a case, the transferee will be entitled to actual possession of that plot. There is no reason why similar consequences should not follow in a case where, by an arrangement between several joint sir-holders, one single individual has been put in separate possession of what before the arrangement was a joint sir plot and has thus virtually become, for the time being exclusive proprietor and sir-holder of that plot. The latter is fully competent to transfer that plot by way of a mortgage and if he does not claim ex-proprietary rights, after the transfer those rights would be extinguished. The mortgagees would be entitled to continue in peaceful possession of the plot till the arrangement above referred to is put an end to by the other co-sharers. If and when that arrangement is put an end to, the mortgagees will, by the operation of the doctrine of substituted security, become entitled to the proprietary rights of the mortgagor in the other joint sir plots and in that case they (the mort-gages) will not be entitled to remain in actual possession of the plot and the only remedy open to them will be to claim profits from the Revenue Court. (Iqbal Ahmad, C.J., Collister, Allsop, Bajpai, Ismail, Verma and Dar, JJ.) RAM RAJ SINGH v. RAJENDRA SINGH. I.L.R. (1943) All. 519=209 I.C. 358=16 R.A. 108=1943 A.L.W. 471=1943 A.W.R. (H.C.) 172=1943 O.W.N. (H.C.) 274=1943 O. A. (H.C.) 172=1943 A.L.J. 213=A.I.R. 1943 All. 247 (F.B.).

-Right to alienate-Other co-sharers' rights. Sukh Dev v. Parsi. [See Q. D. 1936-40, Vol. I, Col. 3323.] I.L.R. (1941) Lah. 583=192 I.C. 266=13 R.L. 366=43 P.L.R. 626.

-Right to joint possession--Lambardar taking un-

registered surrenders and obtaining possession.

Where a lambardar took from the tenants a number of unregistered surrenders and obtained possession, whatever the position of the proprietary body vis-a-vis, the surrendering tenants might be so far as the proprietors were concerned, the lands were taken by the lambardar on behalf of all and a co-sharer had as much right and title to those lands as the lambardar. Where one co-sharer obtained possession of any part of the joint property, the others were entitled to share in the benefit which that co-sharer had obtained and no question of title arose because the title as between the various co-sharers was the same and a co-sharer could obtain joint possession with the lambardar. (Bose, J.) Numan Singh v. Mst. Gurudeo Kumari. 1942 N.L.J. 207.

#### CO-OWNERS, CO-SHARERS.

-Right to possession-Co-owner out of possession-Whether can sue for possession alone.

A co-owner who is out of possession can bring a suit for possession alone without suing for partition. He has just as much right to possession as a co-owner as he has to possession by partition. (Bennett and Madeley, 77.) ALI RAZA KHAN v. NAWAZISH ALI KHAN. 19 Luck. 109=206 I.C. 7=15 R.O. 443 = 1943 O.A. (C.C.) 22=1943 O.W.N. 50=A.I.R. 1943 Oudh 243.

-Right to profits-Decree for possession not executed. A person who has obtained a decree for joint possession cannot become a shareholder with the judgment-debtor without executing his decree, and cannot consequently ask for a share in the profits of the property. (Almond, J.C. and Mir Ahmad, J.) RAMESHRI v. VAISHNO DITTI. 193 I.C. 819=13 R. Pesh, 68=A.I R. 1941 Pesh. 25.

-Right to share in commission paid to the lambardar. Dhundiraj Madho v. Ganpat Vithal. [See Q.D. 1936-40, VOL. I, Col. 2339.] I.L.R. (1941) Nag. 345.

-Sale of a fractional share—Meaning. If TIKHAR Khan v. Hayat Khan. [See Q.D. 1936-40, Vol. I, Col. 3323.] 192 I.C. 379=13 R.O. 354=1941 O. L.R. 118=A.I.R. 1941 Oudh 72.

-Separate possession of mines by one-If proof of

custom of exclusive right.

The fact that different co-sharers have opened different mines and are in separate possession of them is quite consistent with their position as co-sharers. Such separate possession by no means proves any custom that a mine opened by a co-sharer becomes his exclusive property. (Fazl Ali, C.J. and Chatterji, J.) TRADERS AND MINERS, LTD. v. DHIRENDRA NATH. 23 Pat. 115=A.I.R. 1944 Pat. 261.

-Severalty-Recognition of holding in severalty by one-Effect.

Where the several co-sharers have recognised one of the co-sharers as holding a plot as his severalty, the latter is entitled to undisturbed possession of it. (Harper, S.M.) KHALIL AHMAD v. RAM CHANDAR. 1941 A.W.R. (Rev.) 556 (1)=1941 O.A. (Supp.) 487 (1)=1941 R.D. 676.

-Share of profits-Liability to pay money order and registration charges incurred by the lambardar, DHUNDIRAJ MADHO v. GANPAT VITHAL. [See Q.D. 1936-40, VOL. I, COL. 2339.] I.L.R. (1941) Nag.

Suit for profits—Proof of title—Recording of his name in village papers—If sufficient.

The right to sue for village profits is dependent upon title to sue for village profits. upon title to a share in the village and title can only be transferred by ways known to law. The mere recording of a man's name in the village papers is not enough even if it is coupled with an omission by the rightful owner to sue or to claim. (Bose, J.)
DAGDULAL v. RAMESHWAR. I.L.R. (1945) Nag.
296=1944 N.L.J. 380=A.I.R. 1944 Nag. 305.

Suit for profits—Right—Excessive use and occupation. Punjab National Bank, Ltd. v. Pars Ram. [See Q.D. 1936-40, Vol. I, Col. 2337.] I.L. R. (1941) Lah. 246=43 P.L.R. 612.

-Tenants in common—Unity of possession—Usufructuary mortgage of share by co-sharer—Effect on right to joint possession or enjoyment—Suit for partition during subsistence of mortgage—Competency—T. P. Act, S. 44.

Where persons are said to hold land in common or as tenants-in-common, the reference is to the form of their possession in which there is unity, and not to the nature of the titles held in which there may be diversity. Under S. 44, T. P. Act, a usufructuary mortgagee of a share in immovable property acquires his mortgagor's right to joint possession in or over common property or part enjoyment of the joint property; and so long as the mortgage subsists it cannot be said that the mortgagor co-sharer has a unity of possession with his co-sharers or co-owners. If heattempts to exercise any joint possession or common enjoyment of the property while the mortgage subsists he is liable to a suit for ejectment at the instance of his own mortgagee. So long as the mortgage remains unredeemed the mortgagor-co-sharer has no right to possession and cannot therefore sue for partition because he has no unity of possession with the other co-sharers, and it cannot be said that he holds the land in common with them. (Fazl Ali, C.J. and Beevor, J.) HARNANDAN DAS v. SYED MAHOMED KALIM. 218 I.C. 65=11 B.R. 239 =1944 P.W.N. 113=A.I.R. 1944 Pat. 341.

\_\_\_\_Undivided village—Co-sharer of villages in posses-sion of specific plots of bakasht land—Exchange of plots Between one co-sharer and another—Others not parties— Binding character of—Co-sharer lawfully in possession of

land of another—Liability for mesne profits.

The plaintiffs and defendants were co-sharer landlords in a Mauza and in possession of specific plots of bakasht lands, but there had been no partition of the village among the co-sharer landlords by metes and bounds. The plaintiffs gave the defendants 14 decimals of bakasht lands for building a zanana house and on 2-12-1935, the defendants executed a deed of exchange by which they declared the plaintiffs' right to be in possession of 502 decimals of land in exchange for the land given by them to the defendants. There was a house on  $3\frac{1}{2}$  decimals of land out of the  $50\frac{1}{2}$ decimals and the deed of exchange provided that "the plaintiffs should enter into possession and occupation of the property given to them in exchange, bring it under cultivation, take up their abode in the house and continue to enjoy the same for all time." In 1937, the plaintiffs sued the defendants for arrears of rent and ejectment and mesne profits of the house standing on 3½ decimals of lands alleging that they had let out the house to the defendants after the deed of exchange on a monthly rent of Rs. 10 and that the defendants had committed default in payment of rent. The allegation of the letting out was found to be false, and the suit was dismissed on the ground that since the other co-sharers were not parties to the suit the plaintiffs were not entitled to any relief.

Held, (1) that the arrangement was nothing but a mutual arrangement between the landlords who were in possession of specific plots of bakasht land in the willage, though this arrangement might not be binding on the other co-sharer landlords not parties to it and might be disregarded when there was a partition of the village by metes and bounds, yet so long as the village was not partitioned it must be binding on the plaintiffs and defendants, and the plaintiffs, though they were not entitled to the rent claimed—the letting out being found to be false, were entitled to a decree for possession of the house under the deed of

Held, further, that the defendants were not liable for mesne profits as they were according to the plaintiffs' case, lawfully in possession of the house as tenants. (Harries, C.J. and Fazt Ali, J.) KHAKHAN SINGH v.

CORONERS ACT (1871), S. 19.

RAM ISHWAR SINGH. 193 I.C. 345=13 R.P. 581= 1941 P.W.N. 561=7 B.R. 593=A.I.R. 1941 Pat. 451.

COPYRIGHT-Infringement - Advertisement in newspaper to sell the copyright in a drama-Remedy of owner of copyright -Jurisdiction-Applicability of the Imperial

Copyright Act.

The Imperial Copyright Act of 1911 is applicable to India under the Indian Copyright Act except in so far as it has been modified by the latter Act. The sole right to offer for sale the copyright in certain dramas belongs to the owner of the copyright and hence an advertisement by another claiming that he had the right to sell the same, clearly comes under the definition of the word "Infringement" of "copyright." The language of S. 2 of the Imperial Copyright Act is wide enough to include not only a sale of the copyright by a person not entitled to sell the same but also an attempted sale and the owner can in such a case claim a declaration and if necessary an injunction. Wherever the advertisements circulated, there is a whichever the advertisements the character, there is a cause of action for the plaintiff and jurisdiction for the Courts. (Allsop and Malik, JJ.) Om Prakash v. Radhey Shyam Kathawachar. I.L.R. (1945) All. 20=1945 A.L.W. 41=1945 OW.N. (H.C.) 41=1945 A.W.R. (H.C.) 57=1944 A.L.J. 496=A.I. R. 1945 All. 55.

——Infringement—Picture of idol produced with variations resulting from artist's imagination—Copyright in—Infringement of—What constitutes—Test.

Where a person produces and publishes a picture of an idol with several variations and points of difference and embellishments which are the result of his own imagination, he acquires a copyright in the reproduction, as it is an original work containing skill and artistic merit. If another person brings out a picture of the same idol with the same variations and points of difference and embellishments, he infringes the copyright of the former in the picture. The test and the best way of detecting the piracy in an alleged infringing work is to make a careful examination of it to see whether any of the deviations and mistakes which artistic licence permits in the original have been reproduced in the alleged infringing copy. (Stone, C.J. and Divatia, J.) LALLUBHAI MOTIRAM v. LAXMISHANKAR. 219 I.C. 98=18 R.B. 81=46 Bom. L.R. 679=A.I.R. 1945 Bom. 51.

COPYRIGHT ACT (III OF 1914). Sch. I, Ss. 6 and 7—Reliefs under, if alternative—Damages for conversion —Method of assessment.

The reliefs to which a person complaining of infringement is entitled under Ss.6 and 7 of the 1st schedule of the Copyright Act, are not alternative. He is entitled to recover both damages for infringement under S. 6 and also damages for conversion under S. 7. value of the infringing articles that have been disposed of, is not to be taken as the sale price. It has to be assessed by the methods or principles laid down in Caxton Publishing Co. v. Sutherland Publishing Co., (1939) A.C. 178. (Ameer Ali, J.) MACMILLAN & Co. v. All India Publishing Co., Ltd. 49 C.W. N. 280.

CORONERS ACT (IV OF 1871), S. 19— Record of confession by coroner—Formalities required by S. 169, Cr. P. Code, or High Court Criminal Circulars

—If to be observed.

Though under S. 19 of the Coroners Act, a coroner recording a statement is a magistrate for the purposes of S. 26 of the Evidence Act, it does not mean that a

#### CO-SHARERS.

coroner recording a confession by an accused should observe the formalities prescribed by S. 164, Cr. P. Code, or by the High Court Criminal Circulars issued in this behail. (Divatia, Lokur and Weston, 77.) GOVERNMENT OF BOMBAY V. DASHRATH RAMNIVAS. 220 I.C. 182=47 Bom. L.R. 145=A.I.R. 1945 Bom. 265 (F.B.).

CO-SHARERS. See Co-OWNERS.

COSTS. See (i) C.P. Code, Ss. 35 and 35-A.
(ii) Criminal Procedure Code, Ss. 147 AND 148.

(iii) Divorce Act, S. 7.

-Appeal or cross-objection in regard to-When lies. Costs is a matter which is entirely in the discretion of the Court and unless there is any manifestly wrong ground upon which a lower Court has proceeded there can be no appeal or cross-objection regarding an order for costs. (Bennett and Ghulam Hasan, 37.) Avadha Narain Singli v. Badri Prasad Singh. 215 I.C. 37 =17 R.O. 45=1943 O.W.N. 470=1943 A.W.R. (C.C.) 159=1943 A.L.W. 561=1943 O.A. (C.C.) 291=A.I.R. 1944 Oudh 57.

-Application for security for costs-Case printed-Appeal ready for hearing-Security not to be ordered.

Promptness is the essence of an application for security for costs. Where long after the records in the appeal to the High Court had been printed and the case itself had appeared in the rough list, the decreeholder cannot have an order for security for costs. (Leach, C.J. and Lakshmana Rao, J.) Kunhi Kannan v. Chappan. I.L.R. (1945) Mad. 562=220 I.C. 377=57 L.W. 621=1944 M.W.N. 724 (1)=A.I. R, 1945 Mad. 121=(1944) 2 M.L.J. 407.

-Attorney of deceased party-Right to apply to Court for order of payment. SARBA SUNDARI DASI v. NANDA RANI DASI. [See Q.D. 1936-40, Vol. I, Col. 2340.] 194 I.C. 13=13 R.C. 484=A.I.R. 1941 Cal. 144.

-Award of-Government made party on its own

Government should not be allowed its costs where it was made a party on its own request, although the point in which it became interested was raised by the plaintiff. (Mer Chana Mahajan and Achhru Ram, 77.) RAGHUNATH DASS v. BHAGWAN DASS. 47 P.L.R. 259.

-Commissioners of partition—Right to apply to Court for order for payment-Taxation of bills of Commissioner, Sarba Sundari Dasi v. Nanda Rani Dasi, [See Q.D. 1936-40, Vol. I, Col. 2340.] 194 I.C. 13=13 R.C. 484=A.I.R. 1941 Cal. 144.

-Court forgetting about costs and making no order-

Interference on appeal.

An appeal will lie against an order as to costs where a question of principle is concerned. e.g., where no discretion has been exercised in making the order as to costs, or where the order proceeds upon a misconception of facts. Where the Court forgets all about the question of costs when giving judgment and exercises no discretion at all, the appellate Court will interfere in appeal and make the necessary order. (Davis, C.J. and Lobo, J.) Hemandas Topandas v. Bakhshu Singh Dharam Singh. I.L.R. (1943) Kar. 242 =210 I.C. 12=16 R.S. 115=A.I.R. 1943 Sind

-Decree for against benamidar—If can be executed against real owner.

#### COSTS.

A Court executing a decree cannot go behind it, If a decree, on the face of it, awards costs against the benamidar, it is not open either to the decree-holder or to the benamidar in such a case to ask the execution Court to make the beneficial owner liable for the costs, If the question of the liability of the beneficial owner cannot be raised in the execution department much les can it be enforced by means of a separate suit, Can it be endoted by means of a separate suit. (Iqbal Ahmad, C.J., Ganga Nath and Dar, JJ.) Снамара. Sekhar v. Маноная Lal. I.L.R. (1942) All. 832=1942 A.L.J. 367=201 I.C. 695=15 R.A. 79=1942 A.W.R. (H.C.) 241=1942 A.L.W. 478=A.I.R. 1942 All. 233 (F.B.).

–Discretion—Company—Winding up proceedings— Costs of company, shareholders and creditors—Separate sets—Company and shareholders appearing by different counsel but instructed by same solicitor—Right to separate set of costs.

It is clear that when a petition for winding up a company is dismissed, the company is entitled to its costs. The shareholders are entitled to one set of costs and the creditors are also entitled to one set of costs, Where the company and the shareholders appear by the same solicitor, separate counsel should not be briefed and separate set of costs should not be allowed to them especially when the shareholders have solely relied on the affidavits filed on behalf of the company and have not put in any separate affidavit. A creditor who appears by separate counsel and takes a noncontentious attitude cannot get his costs. (Chagla, J.) In re The Cine Industries and Recording Co., Ltd. 203 I.C. 116=15 R.B. 193=1942 Comp. C. 215 =44 Bom.L.R. 387=A.I.R. 1942 Bom. 231.

-Discretion-Court acting on basis of events subsequent to suit and refusing relief to plaintiff on such ground—Power to disallow costs to successful defendant. See Madras Co-operative Societies Act, S. 57 and R. 22 (1) (iii). (1942) 2 M.L.J. 603.

-Discretion-Mortgage suit -Preliminary decree-Appeal by non-mortgagor defendant—Order for costs against appellant—Execution against appellant—Maintainability.

Where in an appeal against a preliminary decree in a mortgage suit, preferred by an alience of the mortgagor he is made liable to pay the costs of the mortgagee, he being the only person who can be made liable for costs as the sole appellant, such person cannot escape liability for costs on the ground that the mortgagee should recover his cost from the sale proceeds of the property in the first instance and that the personal remedy is barred. Costs are in the discretion of the Court and the Court can lawfully direct who shall be liable for costs. (Leach, C.J., Wadsworth and Krishnaswami Ayyangor, JJ.) PURUSHOTHAMA NARR V. RAYA PANDARAM. I.L.R. (1945) Mad. 165=217 I.C. 37=17 R.M. 259=57 L.W. 462=1944 M.W.N. 570=A.I.R. 1944 Mad. 553=(1944) 2 M.L.J. 178 (F.B.).

-Dismissal of suit-Separate sets of costs to different defendants—Rule—Different charges of fraud against different defendants—Appearance and defence by separate counsel—If justified.

As an ordinary rule, each of the defendants appearing and succeeding in the suit is entitled to have a separate set of costs the broad principle being that a person who is brought before the Court, wrongly as it turns out, is entitled to defend himself in his own way and by the employment of such advocate as he thinks fit. There are of course exceptions to this

#### COSTS.

general rule. If parties to a suit are charged with fraud or misappropriation or breach of trust, they are fully entitled in defence of their character to employ such solicitor and such counsel as they think fit. Where there are different charges of fraud against different defendants, they are entitled to employ different counsel separately, as it cannot be said that the defences are common. (Chogla, J.) TRIMBAK YESHWANT v, ABDULLA ABDUL RAHIMAN. I.L.R. BAK YESHWANT v, ABDULLA ABBUL RAHMAN. I.L.R. (1942) Bom. 163=199 I.C. 434=14 R.B. 355= 44 Bom.L.R. 105=A.I.R. 1942 Bom. 81.

-Divorce suit—Dismissal—Award of costs to wife as between party and party-Right of selicitor to recover from husband costs as between solicitor and client.

Where, in a divorce suit, an unsuccessful wife is given costs against her husband as between party and party but not as between solicitor and client, her solicitor is entitled to sue the husband and recover solicitor and client costs, if he proves, among other things, that he acted on reasonable grounds, made adequate inquiries and showed proper diligence and full care. (Beaumont, C.7.) CHARLES MORTIMER EASTLEY v. ERNEST Do ROZARIO. 220 I.C. 313=46 Bom.L.R. 389= A.I.R. 1944 Bom. 189. ERNEST

-Intervener-Right of.

As a usual rule an intervener is not entitled to costs. Megh Raj v. Allah Rakhia. I.L.R. (1942) Kar. (F.C.) 40=I.L.R. (1942) Lah. 623=14 R.F.C. 25=200 I.C. 198=5 Fed.L.J. 33=1942 V.W. N. 403=23 Pat.L.T. 502=55 L.W. 484=46 C. W.N. (F.R.) 61=8 B.R. 695=44 P.L.R. 437= 1943 P.W.N. 73=AI.R. 1942 F.C. 27 (F.C.).

-Order as tc-Adjustment as against sum payable to party against whom costs are awarded-Appellate Court awarding costs to appellant-Appellant liable under decree respondent for certain amount—Order allowing

deduction of costs-Right to.

Where in an appeal the appellant is awarded costs as against the respondent to whom the appellant is ordered to pay a certain amount under the decree, and the Court finds that it is very improbable that the appellant will recover any costs at all if he does not deduct them from the amount payable by him to the respondent under the decree, the appellant is entitled to an order that he should pay the sum payable under the decree to the respondent after deducting the costs awarded to him under the appellate judgment, (Davis, C.J. and Lobo, J.) HEMANDAS TOPANDAS v. BAKSHU SINGH DHARAM SINGH. I.L.R. (1943) Kar. 242=210 I.C. 12=16 R.S. 115=A.I.R. 1943

Order for—Executing Court—Powers of— Dismissal of suit by minor—Next friend of minor— Liability of in execution. See C. P. Code, S. 35. 45 Bom.L.R. 1029.

-Party failing to appear on date fixed for scrutiny

of processes—Costs, if may be imposed.

It is not open to a Court to impose an order for costs on a party for his failure to appear on the date fixed for scrutiny of processes, which is not a date fixed for the hearing of a case and on which the attendance of the parties is not compulsory, since the object of such a date is to enable a Court to ascertain whether the case is likely to be ready for trial on a date next fixed for hearing. There is no rule of procedure which enables a Civil Court to impose fines on a party in this manner. (Tek Chand and 1944.

C. C. & Y. (CON.) ORD. (1944), S. 2.

Beckett, 37.) Mahomed Baksh v. Shahu. 201 I.C. 240=15 R.L. 36=44 P.L.R. 186=A.I.R. 1942 Lah. 162 (2).

-Security for. See C.P. Code, (i) O. 25, R. 1. (ii) O. 45, R. 7.

-Taxation as between attorney and client—Suit for specific damages—Collision between two motor cars.

In a suit for damages caused by a collision between two motor cars, an order directing the costs awarded to the successful plaintiff to be taxed as between attorney and client, is not proper. The principle applied to cases under the Fatal Accidents Act in assessing general damages will not be applicable to a case where specific damage is alleged and is sought to be recovered. Further, the provisions of S. 35 (A), C.P. Code, should not be applied to the case where the defendant was not himself present at the time of the accident and in his defence he is merely putting forward the case of which he has received information. (McNoir and Gentle, JJ.) DAYARAM PODDAR v. SHAM MOHAN KAUL. I.L.R. (1944) 2 Cal. 346 Sham Mohan Kaul. =48 C.W.N. 330.

——Taxation—Third party—Indemnity in favour of defendant by third party—Suit dismissed—No order as to costs—Liability of third party to costs of defendant as

between attorney and client.

In a suit for damages for breach of contract the defendant claimed an indemnity against a third party in respect of the decree that might be passed against him and the payment of all costs, charges and expensesin relation thereto and at his instance the third party was added as a party to the suit. The latter adopted the defendant's written statement and his defence. The suit was ultimately dismissed by consent of the parties, and no order was made as to the costs of the suit. The indemnity was not confined or restricted to the costs of the action but was a very wide indemnity.

Held, that the defendant was entitled to recover from the third party his costs of the action to be taxed asbetween attorney and client and his costs of the third party proceedings as between party and party. (Chagla, J.) NAGINDAS PURSHOTTAMDAS v. BAJRANG. LAL KHEMKA. 216 I.C. 175=17 R.B. 135=46 Bom, L.R. 345=A.I.R. 1944 Bom, 187.

CO-TENANTS. See LANDLORD AND TENANTS: -Co-tenants.

COTTON CLOTH AND YARN (CON-TRACTS) ORDINANCE (II OF 1944), S. 2

-Retrospective effect-Deliveries on 29th September, 1943, of yarn contracted for on 15th April, 1943—Buyer compelled to pay contract price which was higher than the maximum price fixed under the Cotton Cloth and Yarn Control

Order, 1943-Right to refund of excess.

In pursuance of a contract made on 15th April, 1943, for sale of some bales of cotton yarn, deliveries were made on the 29th September, 1943. The buyer was forced to pay before delivery the price at the contract rate. Meantime on the 23rd September, a maximum price was fixed for yarn of the particular count by a notification under the Cotton Cloth and count by a notification under the Cotton Cloth and Yarn Control Order, 1943. A suit was filed by the buyer against the seller for the recovery of the difference in price between the contract price which he had been compelled to pay and the selling price fixed by the notification. Subsequently the Cotton Cloth and Yarn (Contracts) Ordinance (1944) of 13th January, 1944, was published on 20th January,

## C. C. & Y. CONTROL ORDER (1943).

Held, that the Ordinance has retrospective effect and applies to all contracts made before or after the commencement of the Ordinance and to sales made on or after the 15th August, 1943, in pursuance of a contract made before or after the Ordinance and therefore the buyer was entitled to recover the excess price paid by him by virtue of the provisions of S. 2 of the Ordinauce. (Leach, C.J. and Lakshmana Rao, J.) Mahomed Janoo v. Lakshmana Aiyar, 1945 M.W.N. 471=(1945) 1 M.L.J. 436.

COTTON CLOTH AND YARN CONTROL ORDER (1943) AND D.I. RULES, R. 121 -Offence under control order-Plea of accused being only a manager-If a good defence.

As under R. 121 of the D. I. Rules an abettor is also punishable an accused charged with an offence under the Cotton Cloth and Yarn Control Order cannot escape from the consequences by setting up a plea that he was only the manager of the firm and was mat ne was only the manager of the hrm and was neither the manufacturer nor the dealer. (Malik, 3.) AHMAD MUJTABA v. EMPEROR. I.L.R. (1945) A. 644=1945 A.L.W. 180=1945 O.W.N. (H.C.) 165=1945 A. Cr. C. 99=1945 A.W.R. (H.C.) 175=1945 A.L.J. 203.

C1. 12—Contravention of—Servant of dealer selling at a price higher than the control price-Liability of 'dealer'.

Where the "dealer" puts his servant in charge of a shop to sell goods to the public and the shop assistant, while acting for and on behalf of the "dealer" sells goods to the public at a price higher than the control price, the "dealer" is guilty of a contravention of cl. 12 of Cotton Cloth and Yarn (Control) Order. (Malik, 7.) Harish Chandra Bagla v. Emperor. I.L.R. (1945) All. 540=219 I.C. 87=1945 A.W.R. (H.C.) 160=46 Cr. L.J. 472=18 R.A. 32=1945 A.L.J. 151=A.I.R. 1945 All. 90.

Cl. 12-Liability of dealer for sale by servant-Servant also if liable.

Where a servant of a dealer sold cloth at above than the controlled price, the dealer cannot escape liability for the offence under Cl. 12 of the Cotton Cloth and Yarn (Control) Order. He is liable whether present or absent for he is responsible for the sale by the servant. The servant is liable as he abets the offence. (Walford, 7.) Prem Naranv. Emperor. 20 Luck, 529=1945 O.W.N. 374=1945 A.L.W. (C.C.) 339=1945 A.W.R. (C.C.) 228=1945 O.A. (C.C.) 228.

-Cl. 14—Scope and applicability.

Cl. 14 of the Cotton Cloth and Yarn (Control) Order relates only to dealers or those who are the owners of the bales having the legal right and authority to open them. Hence it cannot be said that during the process of the transit of the bales, any one, who is in charge of unopened bales of Cotton Cloth, was bound to open the bales and thenceforward carry the cloth unpacked. (Malik, 7.) Винкка Мал v. Емреков. I.L.R. (1945) All. 617=220 I.C. 324 = 46 Cr. L.J. 678=1945 O.W.N. (H.C.) 192= 1945 A.L.W. 207=1945 A.W.R. (H.C.) 174= 1945 A. Cr. C. 103=1945 A.L.J. 180=A.I.R. 1945 A.U. 214. 1945 All, 214.

-Cls. 14 and 15-A-Possession of cloth by dealers after 31st December, 1944-If punishable.

Cl. 15-A of the Cotton Cloth and Yarn (Control) Order, 1943, overrides Cl. 14 thereof. The possession of cloth by the dealers after 31st December, 1944, was permitted under Cl. 15-A of the Order. Cl. 14 is incomplete and unworkable in so far as no provision has been made for the disposal of cloth lying unsold 1945 A.W.R. (H.C.) 175=1945 A.L.J. 203.

# C.C. & Y. CONTROL ORDER (1943), Cl. 23.

with the dealers after 31st December, 1944. dealers had lawful excuse for possession of the cloth after 31st December, 1944 and did not contravene Cl. 14 of the Order and are not punishable under R. 81 (4), Defence of India Rules. (Sen and Henson, JJ.) Provincial Government, C.P. and Berar 2. SHAMSHERALI. I.L.R. (1945) Nag. 909=1945 N. L.J. 532=A.I.R. 1945 Nag. 249.

— C1. 23—Applicability—Prosecution under Ss. 3 and 8 of the Bihar Cotton Cloth and Yarn Dealers (Licensing and Control Order), 1944-Sanction-Necessity. See Bihar Cotton Cloth and Yarn Dealers (Licensing and Control Order), 1944, Ss. 3 AND 8. 24 Pat. 487.

-C1. 23—Sanction after prosecution—Different offence -Curability.

Where not only was a sanction not obtained before the commencement of the prosecution, but after it was obtained, it was found to be for a different offence.

Held, that the language of cl. 23 was so clear and emphatic that it was not open to the Courts to say that it was a mere irregularity which did not vitiate the proceedings. (Malik, J.) Bhikka Mal v. Emperor. I.L.R. (1945) All. 617=220 I C. 324=46 Cr. L. J. 678=1945 O.W.N. (H.C.) 192=1945 A.L.W. 207=1945 A.W.R. (H.C.) 174=1945 A. Cr. C. 103=1945 A.L.J. 180=A.I.R. 1945 All, 214.

-C1. 23-Sanction-Proof of-Production of carbon copy of sanction-Sufficiency-Presumption under S. 114, Evidence Act-If available.

The Legislature has intended that prosecutions under the Cotton Cloth and Yarn (Control) Order should not be instituted without the sanction of the Provincial Government. It is, therefore, necessary that the fact that the prosecution has been sanctioned by the Provincial Government must be proved according to law, as it goes to the root of the jurisdiction of the Court.

Where a mere carbon copy of an order sanctioning prosecution under the control order is produced purporting to come from a Deputy Secretary to Government which is signed "Illegible for Deputy Secretary", it does not satisfy the requirements of a proper sanction and is defective and the prosecution must fail. S. 114 of the Evidence Act cannot be invoked for the purpose of raising a double presumption in favour of the prosecution and making a paper admissible in evidence when it is not admissible under the Evidence Act. (Mallik, J.) HARISH CHANDRA v. EMPEROR. I.L.R. (1945) All. 540=219 I.C. 87=1945 A.W.R. (H.C.) 160=46 Cr. L.J. 472=18 R.A. 32=1945 A.L.J. 151=A.I.R. 1945 All. 90.

— C1. 23—Strict compliance with—Necessity— Absence of proof of sanction by Provincial Government— Effect—Carbon copy of G. O. relating to sanction— Sufficiency.

The provisions of Cl. 23 of the Cotton Cloth and Yarn (Control) Order must be strictly complied with and where there is no valid proof of sanction to prosecute having been obtained from the Provincial Government in regard to an alleged contravention of the control order any prosecution and conviction would be illegal and the sentences would have to be set aside.

The filing of a mere unsigned carbon copy of a G. O. relating to sanction is not a valid proof of sanction. (Malik, 7.) AHMAD MUJTABA v. EMPEROR. I. L. R. (1945) All. 644=1945 A. L. W. 180 = 1945 O.W.N. (H.C.) 165=1945 A. Cr. C. 99= COURT-FEE—Decree directing inquiry into mesne profits—Inquiry not held and amount unascertained—Appeal objecting to inquiry—Court-fee if payable.

Where a decree directs an inquiry into mesne profits but no inquiry is held and no amount is ascertained, in an appeal against the decree objecting to the inquiry, it is not necessary to pay Court-fee in that respect. Court-fee has to be paid only if, after the amount is ascertained in inquiry the appellant challenges the finding, and not until then. (Nagewara Iyer and Singaravelu Mudaliar, II.) KENCHE GOWDA v. PARVATHAMMA. 22 Mys.L.J. 92-49 Mys.H.C.E. 38.

Determination—Form of prayer—If the desiding factor.

The taxing authority must look to the whole plaint and not merely to the form of the prayer. A plaintiff cannot evade payment of Court-fees by clothing his relief in a form which would appear to seek no consequential relief if in fact consequential relief is actually involved and would ensue if the prayer were to be granted. (Bose, J.) VINAYAKRAO v. MANKUNWARBAI. I.L.R. (1943) Nag. 440=202 I.O. 643=15 R. N. 97=1942 N.L.J. 466=A.I.R. 1943 Nag. 70.

——Determination—Test—Principles—Substance of plaint and not form to be looked into. See COURT-FEES AGT, S. 7 (IV) (C) AND SCH. II ART. 17 (III). A.I.R. 1944 Pat. 17 (F.B.).

Duty of Court in fixing time for payment of deficit court-fee—Plaintiff not guilty of laches and fairly large amount asked for as court-fees—Peremptory order fixing short date and directing dismissal of suit on default—Propriety.

Where a Court granting a decree to a plaintiff orders him to pay a fairly large amount of money by way of deficit court-fee making it a condition precedent, it should give the plaintiff a fairly long time for the same and should not make a peremptory and final order leaving no possibility for any extension of time, such as, that the suit shall stand dismissed if the court fee is not paid by a fixed date. In a case where there has been no grave laches on the part of the plaintiff, such an order is unnecessarily stringent and is liable to be set aside in appeal. (Chatterji and Meredith, JJ.) RAMLAKHAN PANDEY v. TRIBENI DAS. 1941 P.W.N. 516=197 LO. 433=14 R.P. 302=8 B.R. 204=A.I.B. 1942 Pat. 234.

----Hindu co-parcener-Purchaser of interest in joint family property-Suit for partition-Court-fee.

Where the purchaser of the interest of a Hindu Coparcener in the joint family properties brings a suit for partition of joint family property in which he has no co-parcenary interest, he asks for a declaration of the entire share of his vendor and then seeks possession of what he has purchased. The separation or declaration of the vendor's share is a relief independent of the relief of possession and separate court-fees have therefore to be paid for the two reliefs, (Lokur and Weston, JJ.) MAHADEO GOPAL v. HARI WAMAN. 47 Bom, L.B. 350-A.I.R. 1945 Bom, 336.

Mesne profits—Claim for—Tentative valuation—If to be given, MIDNAPORE ZEMINDARY Co., LTD. v. BIJOY SINGH DUDHURIA. [See Q. D. 1936—'40 Vol. I, Col. 2352.] 193 I.C. 578=13 R.C. 420=A.I.R. 1941 Cal. 1.

Oral plea of set off-No Court-fee payable.

There is nothing in the Court-fees Act directing payment of Court-fee on oral representations made before Q.D. I—99

## COURT-FEES ACT (VII OF 1870),

a judge. When admittedly no written statement is filed by the defendant no Court-fee is payable on any set-off or counterclaim made orally by the defendant, (Davis.) BHURA LAL v. PANNA. 1945 A.M. L.J. 28.

Refund—Inherent power of courts to order. See C. P. Code, S. 151—Inherent powers—Refund of court-fees.

Refund—Loss of original certificate—Power to issue duplicate—Proper order to be made, See C. P. CODE, S. 151. (1943) 2 M.L.J. 377.

Suit for partition—Claim by defendant for share—Liability to Court-fee.

There is no reason why a defendant in a partition suit should pay Court fees on the share which he claims in the suit. He has to pay his share of Stamp duty on the decree in respect of the property allotted to him at partition. (Loba, J.) KHEMCHAND v. DAYARAM. I.L.R. (1940) Kar. 534=194 I.C. 137=13 B.S. 249=A.I.R. 1941 Sind 50.

Taxing dept, (Nagpur H. C.)—Position of— Nature of the powers of the taxing officer—Relative province of taxing officer and Judge.

A High Court is not in the same position as a lower Court as regards the determination of Court-fees. The taxing department of the High Court (Nagpur) is quite separate from its judicial side. The taxing officer has no judical powers except as regards the one matter of Court-fees, nor has the Taxing Judge. If the appellant in an appeal to the High Court insists that he wants a declaration only and nothing more the taxing authorities cannot decide whether such a suit will lie. All they can say is that the Court-fees payable on a relief for declaration simpliciter is a certain figure and they must leave the wider question of consequential relief to the Judge deciding the appeal on the judicial side. Even there the taxing authority can decide whether the relief sought is in fact a declaration simpliciter or whether consequential relief is implicit in it. In case of doubt the taxing authority can insist on the necessary amendments. Once that is done then the Judge hearing the appeal decides whether the suit so framed can lie. The taxing authority cannot do it. (Bose, J.) VINAYAK RAO v. MANKUN-WARBAI. I.L.R. (1943) Nag. 440 = 202 I.C. 643 = 15 R.N. 97=1942 N.L.J. 466=A.I.R. 1943 Nag. 70.

COURT-FEES ACT (VII OF 1870) (as amended by Bihar Court Fees War Surcharge (Amendment) Act (1943)—Scope—If retrospective—Pending application for probate—If liable to surcharge—Patna High Court Rules, Ch. XI, R. 4 (a).

An application for probate was made on 6—11—1942 and on 6—4—1943, the applicant was called upon to pay the Court-fee payable under the law as it then stood and he paid it on 10—11—1943. Subsequently on 1—12—1943, the Bihar Court-Fees (War Surcharge Amendment Act IX of 1943) came into force, providing for a surcharge and the applicant was called upon to pay the surcharge, but he objected,

Held, that under R. 4 (a), Ch. XI of the Patna High Court Rules the application could not come up for hearing with the Registrar's Certificate that the duty payable had been paid, and the Registrar could not give the required certificate unless the extra stamp duty under the Amending Act had also been paid, as the Registrar had to proceed upon the basis of the law as it stood at the time. The surcharge must therefore be paid, though, if the Amending Act be repealed at the time of the grant of probate, the appellant might be

COURT-FEES ACT (1870), Ss. 4 and 19-I.

entitled to apply for a refund. (Meredith, J.) JAGAT-KISHORE v. GIRJADEVI. 24 Pat. 171=A.I.R. 1945 Pat. 361.

Ss. 4 and 19-I—Scope and effect of—Probate—Grant of—Stamp duty—When payable—Law applicable—Law amended after application and before order of grant—Effect—Bihar Court-fees Amendment Act (XI of 1943), S. 2—Patna High Court Rules (1916), Ch. XI, R. 4.

On 28—2—1943 an application for probate of a will was filed in the Patna High Court. A certificate by the Registrar that the stamp duty payable under Sch. I. Art. II of the Court-fees Act, as it then stood, was paid, was also filed along with the application as required by R. 4, Ch. XI, of the Patna High Court Rules. On 1—12—1943, the Bihar Court-fees (War Surcharge Amendment) Act came into force. An order for grant of probate was made on 22—3—1944, but proabte was not issued on the ground that the increased dury payable under the Bihar Amendment Act (IX of 1943) had to be paid but was not paid.

Held: (1) that the effect of S. 19-I read with S. 4 of the Court-fees Act was to make the Court-Fee payable not upon the application, but as a condition precedent to the grant of probate, and the crucial time was the time when the probate was granted; the fee had therefore to be determined upon the law as it stood at the time of the order granting the probate; (2) that since Bihar Court Fees Amendment Act (IX of 1943) was in force at the time of the grant, the additional Court-fees leviable under that Act must be paid before the issue of probate; (3) that R. 4 of Ch. XI of the High Court Rules was only an administrative rule made for convenience and did not affect the position. (Meredith, J.) SURAJNARAIN v. SAROSIBALA. 23 Pat. 672 = 218 I.C. 293=18 R.P. 27=11 B.R. 294=A.I.R. 1945 Pat. 86.

Ss. 4 and 19 (i)—Amendment of Court-fees Act after filing of an application for letters of administration—Cour-fee payable.

Where after the filing of an application for the issue of letters of administration the Court-fees Act is amended and the Court-fee is increased thereby, it is the Court-fee according to the amended Act that has to be paid for the issue of the letters of administration.

(Allsop and Yorke, J.). A.N. BEECHEY, In the matter of. I.I.B. 1944 All. 229 = 213 I.C. 162=17 B.A. 6=1944 A.W. (H.C.) 97 (1) = 1944 A.L.W. 230 (1)=1944 A.L.U. 133=A.I.R. 1944 All. 119.

Ss. 5, 8 and Sch. II, Art 11—Applicability

Award by orbitrator under S. 19 (1) (b)

Defence of India Act—Appeal—Court fee—
"Order".

An arbitrator making an award under S. 19 (1)(b) of the Defence of India Act for compulsory acquisition of land under R. 75-A of the Defence of India Rules, is not a court and his award is not an "order" within the meaning S. 8, of the Court-fees Act. The court fee payable on the memorandum of appeal against such an award is not ad valorem under S. 8 but the fixed fee under Sch. II, Art. 11 of the Court-Fees Act. (Wadia, J.) HIRJI VIRII v. GOVERNMENT OF BOMBAY. 47 Bom. B.R. 327=A.I.R. 1945 Bom. 348.

S. 5-Jurisdiction of taxing Judge-Finality of decision-Extent of.

COURT-FEES ACT (1870), Ss. 5 and 28.

Under S. 5 of the Court-fees Act, the taxing Judge of the High Court has jurisdiction only with regard to the Court-lee payabe in the High Court on the memorandum of appeal or second appeal as the case may be On this point his decision is final, but he cannot give a decision as to the Court-fee payable in the Court or Courts below. (Meredith, J.) BISHWANATH SINGH P., KISHORE SINGH. 23 Pat. 749—1945) P. W.N. 199—A.I.E. 1945 Pat. 81.

—Ss. 5 and 28—Scope and effect of—Patna High Court Rules, Ch. VII, Rr. 16 and 19—Admission of appeal by Registrar—Revised Stamp-Report by Stamp Reporter demanding turther court-fee — Jurisdiction to submit — Taxing Officer's power to order payment of additional court-fee—C. P. Code, O. 1, R. 11.

The Stamp Reporter first reported through inadvertence that the court-fee on a memorandum of appeal was sufficient, and the Registrar admitted the appeal under R. 16 of Chap. VII of the Patna High Court Rules and ordered notice to respondent. A tew days later the Stamp Reporter detected his mistake, sent for the record and after examining it submitted a fresh report under R. 19 of Chap. VII of the Rules to the effect that further court fee should be paid. When the matter came before the Taxing Officer, the appellant contended that (a) the Stamp Reporter was functure officer, (b) that he had no right to submit a revised report after the appeal was admitted by the Registrar and (c) that the Taxing Officer had no jurisdiction at that stage to make an order for payment of deficit courtfee. Taxing Omcer held as regards, the first two contentions, that the Stamp Reporter had power under R. 19 to re-open the question of the sufficiency of the Court-fee- so long as the appeal remained pending, and on the third contention he held that in view of S. 28 of the Court Fees Act that was a matter not for him but for the Taxing Judge to decide. It was pleaded further before the Taxing Judge that the respondent had no locus standi to be heard in the matter.

Held, (1) that though the question of court-fees was primarily one between the appellant and the Crown, it could not properly be said that it did not affect the respondent at all and that he could not be heard on the question; (2) that the Stamp Reporter had power to reopen the question of the sufficiency of the court-fee when the matter had not already been decided by the Taxing Officer so long as the appeal was pending; (3) that the mere admission of a plaint or appeal did not operate to deprive the Court of power to reject it under O. 7, R. 11 (c) C. P. Cdode; and the admission of the appeal by the Registrar under R. 16 of Chap. VII in no sense involved any decision by the Taxing Officer under S, 5 of the Court-Fees Act 3 (4) that such admission did not prevent the Taxing Officer from functioning under S. 5 of the Court-Fees Act when a dispute as to court-fee subsequently arose; (5) that it was only when the Taxing Officer had given his decision under S. 5 as regard the court-fee payale on a memorandum of appeal that such decision would befinal and it could not be questioned even in the exercise of the powers vested in the Court under S. 28; (6) that S. 5 enabled the Taxing Officer to deal with the question and he had jurisdiction to make an order for payment of additional court-fee and S. 28 did not take away his jurisdiction under S. 5 to deal with the revised Stamp Report.
(Dhavle, J.) HASAN MIRZA v. SYED BAKER (Dhavie, J.) HASAN MIRZA v. SYED BAKER HUSAIN. 21 Pat. 720=206 I.C. 241=9 B.R. 282 =15 B.R. 326=A.I.R. 1943 Pat. 102.

**COURT-FEES ACT (1870), S. 5.** 

S.5—Taxing officer—Power to review decision as to court-fee — Erroneous decision—Remedy of party.

Under S. 5 of the Court-Fees Act, the scheme is that if there is a difference of opinion between the officer of the Court whose duty it is to accept a memorandum of appeal and the party presenting it as to the amount of court-fee payable on such memorandum, that difference has to be referred to the taxing officer, whose decision is final. The taxing officer is not a Court but is a special officer named by the section. He is an officer nominated by the statute to determine a particular class of questtions and he is not acting as an officer of the Court or as a deputy for the Judge or Bench before whom the appeal is to come. His decision being made final, it is not open to him or to any one else to review it. He can only review his decision before it has become binding, i.e.. before he signs and communicates it to the parties, The taxing officer has no power to review his decision, even when it is patently wrong, and the only remedy of the party is to submit the matter to Government, and ask for the remittal of the fee which ought not to have been charged. (Beaumont, J.) MOHANLAL NAROTTAM-DAS v. KESHAVLAL NAROTTAMDAS. 211 I.C. 637 = 16 R.B. 324=45 Bom. L.R. 880=A.I.R. 1943 Bom. 441.

——S. 6, Cl. (4)—Appeal in partition suit—Office report as to proper Court-fee—Appellant attacking hading of trial Court as to possession—Question of Court-fee to be decided prior to hearing of appeal.

Where in an appeal in a partition suit, the question of proper Court fee is raised on an office report and the appellant attacks the finding of the trial Court as to possession, he has to satisfy the Court that it is erroneous and if he fails to do so, the finding as to possession must be regarded as prima facie correct for the purposes of Court-fee. The question of Court-fee must be decided before proceeding with any other issue. It cannot be postponed till the hearing of the appeal. (Misra and Madeley, J.) MUNESHWAR BAX v. HAR PRASAD. 1945 O.W.N. 114=1945 A.L.W. (C.C.) 107=1945 O.A. (C.C.) 85=1945 A.W.R. (C.C.) 85=A.I.R. 1945 Outh 207.

Any conflict between S. 6 of the Court-tees Act and S. 149, C. P. Code, is resolved by S. 28 of the Court-Fees Act. When an insufficiently stamped memorandum of appeal is received and comes before the Court it falls to be dealt with under S. 149, C. P. Code, read with S. 28 of the Court-Fees Act. The Court acting under S. 149, C. P. Code, may reject the memorandum as inadmissible in cases in which it sees no good ground for extension of time to make good the deficiency or merely return it. In either case re-presentation with proper Court-fee is not precluded. (Nivogi and Clarke, J.J.) GOREYLAL v. DAYASHANKAR. I.L.R. (1941) Nag. 467—196 I.C. 60—14 R.N. 79—1941 N.L.J. 258—A.I.R. 1941 Nag. 220.

——S. 6. (2), (3) (4)—Duty of Courts to follow provisions of, BAIJNATH PRASAD v. TEJPAL. [See Q. D. 1936-'40 Vol. I, Col. 3323.] 193 I.C. 133=13 B.A. 394=1940 A.L.J. 891=A.I.R 1941 All. 55.

S. 6-A (1) (as amended by U. P. Act XIX OF 1938)—Appeal under—Cross objections if can be filed in. See C. P. CODE. (1908), O. 41, R. 22 AND COURT-FEES ACT, S. 6-A (1). 1942 O.W.N. 382.

COURT-FEES ACT (1870), S. 7.

S. 6-A, (as amended by U. P. Act XIX of 1938)—Appeal under—Orders incidental to payment of Court-tee—If can be set aside.

When an appeal lies against an order directing payment of Court-fee, incidental orders which lead up to it can be set right. (Ganga Nath and Dar, JJ.) MOHRI KUNWAR V. KESHRI CHANDRA. I.L.R. (1941) All. 558=195 I.C. 758=14 R.A. 78=1941 A.L.J. 376=1941 A.L.W. 550=1941 A.W.R. (H.C.) 188 = 1941 O.W.N. 704=1941 O.A. (Supp.) 394=1941 R.D. 394=A.I.R. 1941 All. 298.

—— S. 6-A (as amended by U. P. Act XIX of 1938),—Right of appeal under—Nature of—Right coming into existence after the institution of suit—Availability.

The right of appeal given to a suitor under S. 6-A of U. P. Act XIX of 1938, is a part of procedure relating to determination of Court-fee and is purely a matter in which the Crown in interested and in which neither the plaintiff nor the defendant has such a vested right as cannot be affected by a subsequent enactment. The Act (IX of 1938) which allows an appeal against the order demanding Court-fee does not take away any right which was vested in the plaintiff on the date when he filed the plaint; it only confers upon him new right, and it does not take away any right which was vested in the defendant either and the defendant has no vested right in the procedure by which the proper Court is determined and thus procedure can be changed and a change in procedure cannot be said to deprive him of any vested right. Where in respect of a suit filed before the Act XIX of 1938 came into force, an order for payment of Court fee is passed subsequent to the Act coming into force, the right of appeal under S. 6-A is available to the aggrieved party. (Ganga Nath and Dar, JJ.) MOHRI KUNWAR v. KESHRI CHANDRA. I.L.R. (1941) All. 558=195 I.C. 758=14 B.A. 78=1941 A.L.J. 376=1941 A.L.W. 550=1941 A.W.R. (H.C.) 188=1941 O.W.N. 704=1941 O.A. (Supp.) 394= 1941 R.D. 394=A.I.R. 1941 All. 298.

————Ss. 6-B and 6-C—Reference by whom competent —Chief Inspector of stamps, how to move High Court.

Under S. 6-C, Court-Fees Act it is only the Chief Controlling Revenue Authority that is given the power to make a reference to the High Court. The Chief Inspector cannot make a reference under that section. He is only entitled under S. 6-B within the perscribed period to move the prescribed Court "by an application in writing" for revision. A letter sent by the Chief Inspector containing a statement of his opinion and not bearing a stamp cannot be considered to be an application in writing for revision under S. 6-B. (Ighal Ahmad and Baipai, JJ.) KALLU SINGH v. MIR KUNWAR. I.I.R. (1941) All. 585=198 I.C. 287=14 B.A. 273=1941 B.D. 763=1941 A.L.W. 867=1941 A.W.B. (H.C.) 254=1941 O.A. (Supp.) 684=1941 A.L.J. 487=A.I.R. 1941 All. 369.

——S. 7 and Sch. I, Arts. 6 and 7—Basis of valuation for purposes of determining proper Court-fees on copies of judgment and decree.

In the absence of any direction in Arts. 6 and 7 of Sch. I, of the Court Fees Act, the valuation of the subject-matter of the suit for the purposes of the determination of proper Court-fee payable on copies of judgment and decree must be made according to the provisions of the Court Fees Act itself (i.e.) S. 7 and not according

COURT-FRES ACT (1870), S. 7.

to the provisions of the Suits Valuation Act. (Sathe, S. M. ant Aston, A. M.) DARSHAN v. EMPEROR, 1945 R.D. 131=1945 A.W.R. (Rev.) 74.

Where a suit for injunction is filed before the amendment of the Court-Fees Act by U. P. Act XIX of 1938 and court-fee paid according to the law then in force but a second appeal is filed after the amendment, as to the court-fee payable on the appeal Held that it was the amount mentioned in the plaint which was the basis of valuation and that one must look back to the date of the institution of the suit to ascertain it. (Allsop, J.) CHHAKAURI SINGH v. SRI KRISHNA PANDE, I.L.B. (1940) All. 793=193 I.C. 747=13 R.A. 453=1941 O.W.N. 238=1941 O.A. (Supp.) 283=1941 A.L.W. 170=1940 A.L.J. 904=1941 A.W.R. (H.C.) 17=A.L.B. 1941 All. 134.

S. 7(1)—Applicability—Co-mortgagees or cocharge holders—Suit by one for share of debi—Courtfee—Valuation for Court-fee and jurisdiction—Entire mortgage debt or share of plaintiff—Suits Valuation Act, S. 8.

A co-mortgagee suing to recover his individual share in the mortgage must value his suit according to the full amount due under the deed and cannot value it according to his own share. One of several co-mortgagees who are in the position of tenants-in-common can sue to recover his own share of the mortgage debt provided he makes his co-mortgagors defendants, if they refuse to join him as plaintiffs. He must ask for a preliminary mortgage decree in respect of the entire debt; he has to ask the Court to decide what is due on the mortgage as a whole and to fix a period for redemption of the mortgaged property in its entirety as there can be no redemption in part. The plaint must be stamped accordingly on the value of entire mortgage debt under S. 7 (1) of the Court-Fee Act; which is also the valuation for purposes of jurisdiction under S. 8 of the Suits Valution Act. This principle applies also to the case of a charge on immovable property. (Leach, C.J, and Happel J.) KAILASA AIVAR v. SUNDARAM PATTAR, I.L.B. (1942) Mad. 438=201 I.C. 103=15 R.M. 218=54 L.W. 679=1941 M.W.N. 1055=A.I.R. 1942 Mad. 205=(1941) 2 M.L.J. 986.

—S.7 (ii) and Sch. II, Art. 17 (vi)—Applicability—Wakf-deed—Suit to remove mutawalti, for accounts and for recovery of amounts directed to be paid annually to descendants of wakif and for appointment of new mutawalli—Court-fee—Relief—If incapable of valuation—C. P. Code, O. 7, R. 11—Failure to pay requisite Court-fee—Proper order.

In 1925 A, a Mahomedan, executed a wakf-deed, the terms of which roughly were that the children of the wakif should reside in the house and be maintained from the income of the lands forming part of his estate, and that on the eventual failure of any descendant, the property should go to charity and applied to musafirkhanas for the general public, the maintenance and clothing of widows, poor persons and travellers and the building and repairing of mosques. S appointed himself mutawalli in his lifetime and directed that after his death his son H should be mutawalli with power to appoint his successor. The deed provided, inter alia, that the mutawalli should render proper accounts to the wakif's children, and if he acted dishonestly or was lazy,

COURT-FEES ACT (1870), S. 7 (iv).

he should be dismissed and another mutawalli appointed. The deed also provided that all the members of the family should, it possible, live together, but that if after A's death, and if they were not able to agree to live logether, H should separate them, thereafter paying all expenses of the administration of the estate, and after paying amounts set out to be paid to his widow and two daughters, H should divide the balance, appropriate half to his own family and give over half to the widow and her daughters. A di d in 1933 and thereafter, his son, H, managed the estate as mutawalli. Sometime later, the widow and some daughters and grand-children of A, brought a suit against H and one of the daughters of A for removal of H from the office of mutawalli and for appointment of a new mutawalli, tor accounts and for recovery of amounts misappropriated by H, on the allegations that the mutawalli H was not carrying out the terms of the wakt, that he was not making the payments enjoined by the deed to the widow and the daughters of the settlor and that he was misappropriating the income and alienating the property. The suit was valued for purposes of jurisdiction at Rs. 20,000 but only a court-fee of Rs. 15 was paid under Art. 17 (vi) of Schedule II of the Court-Fees Act on the plea that it was not possible to estimate the money value of the reliefs sought. The lower Court holding that the valuation for court-fee and jurisdiction should be the same, ordered the plaintiff to pay court-fee on Rs. 20,000 in 10 days and in default thereof dismissed the suit.

Held, (1) that the suit was not governed by Art, 17 (vi) of Sch. II of the Court-Fees Act, but fell under S. 7 (ii) of the Court-Fees Act, as what the plaintiffs sought were material benefits to which they were entitled or might be entitled under the clause in the wakf-deed. that on disagreement between the parties the income should be divided and enjoyed in the proportions set out; (2) that the plaintiffs' claim to annual receipts was capable of valuation at least on an average basis and courtfee should therefore be paid on ten times the annual value of the receipts to which they claimed they were entitled; (3) that the correct figure should be arrived at by deducting from Rs. 20,000, the value of the total property, the interest of the two defendants, namely, Rs. 10,000 being the 1st defendant's share, and Rs. 500 the value of 2nd defendant's share being 10 times the amount of Rs. 50, which was the amount to be paid to defendant No. 2 annually, and the plaintiffs should therefore pay court-fee on Rs. 9,500 which was the value of their shares; (4) that the proper order to make was to allow the plaintiffs one month's time for payment of the requisite Court-fee and to provide that in default of such payment the plaint do stand rejected with costs, under O. 7, R. 11, C. P. Code. (Davis C.J. and Weston, J.) IBRAHIM SHAH v. HATIMALI SHAH. I.L.R. (1942) Kar. 424-204 I.O. 469-15 R.S. 96-A.I.R. 1942 Sind 160.

——S. 7 (iv) (U. P. Amendment)—Applicability
—Appeal against a finding by an unnecessary party to
the suit—Court-fee payable.

Where in a partition suit a mortgagee of certain property is unnecessarily impleaded as a party to the suit and a finding is given which would bar a part of his claim in a subsequent suit on his mortgage and he appeals against it, as he is entitled to, he cannot be said to be seeking any consequential relief in the appeal and hence Court-fee as on a claim for a declaration is quite enough. (Misra and Madeier, 17.) DURGA PRASAD

COURT-FEES ACT (1870), S. 7 (iv).

v. MST. PANA. 20 Luck. 101=1944 O.A. (C.C.) 220. =1944 A.W.R. (C.C.) 220 = A.I.R. 1945 Oudh. 30.

Where a suit by a ward who has attained majority is for accounts against his former guardian, he need not specify the amounts he expects to receive; it is sufficient to pay Court-fees on the relief of accounting and to pay Court-fees later on on the amount found due. Where accounts had already been furnished by the guardian to the Court and examined by auditors, the ward cannot sue for accounts but can sue only on the accounts already furnished for recovery of what is payable after surcharging and falsifying. The suit really is to surcharge and falsify accounts already furnished and to recover specific sums, and therefore, the plaintiff must value and stamp his plaint on an ad valorum basis. (Byers, J.) SOK-KAMMAL v. ARUNACHALAM PILLAI. (1945) 2 M.L. J. 460.

A suit to declare a sale fraudulent and fictitious does not involve a consequential relief and so ad valorem court-fee is not necessary. (Bennett, J.) SWAMI DAYAL v. RAM BAHADUR SINGH. 193 I.C. 363=13 R.O. 454=1941 O.L.R. 279=1941 A.L.W. 356=1941 O.W.N. 471=1941 O.A. 309=1941 A.W.R. (C.C.) 124.

——S. 7 (iv) (a) and Sch. II; Art. 17 (iii)—(U. P. Amendment)—Nature of suit for declaration in respect of property in possession of receiver.

Where a plaintiff sues for a declaration of title in respect of properties some of which are in his own possession and some are in the possession of a receiver of Court, the suit is purely one for a declaration and not one implicitly for possession inasmuch as the receiver was in custody of some of the properties not on his own right but for the rightful owner. (Bennett and Missa, JJ.) RAHAM ALI v. FAKHRUL HASAN. 210 I.C. 48=1943 A.L.W. 428=1943 O.W.N. 245=1943 O.A. (C.C.) 173=16 R.O. 137=A.I.R. 1943 Oudh 462.

——S. 7 (iv) (a) and (iv-B) (U. P. Amendment)

—Suit for declaration and infunction—Valuation as independent reliefs if justified—'Relief sought', in S. 7 (iv) (a)—Meaning.

Where a suit was filed for a declaration that certain persons were the duly elected office-bearers of a certain committee and not the defendants and for an injunction to restrain the defendants from acting as such office-bearers.

Held, the words 'relief sought' in S. 7 (iv) (a) of the Court-fees Act meant the whole relief which was prayed for in the suit and that as the relief for injunction could not be treated as an independent relief, it could not be valued under sub-S. (iv-B) of S. 7 of the Act. (Yorke, J.) CHIEF INSPECTOR OF STAMPS P. KEDARMATH MURARRA. I.L.B. (1944) All. 214=213 I.C. 227=17 R.A. 5=1944 A.L.W. 145=1944 A.W.R. (H.C.) 78=1944 O.W.N. (H.C.) 40=1944 O.A. (H.C.) 78=1944 A.L.J. 95=A.I.R. 1944 All. 113.

———Ss. 7 (iv)(a) and (v-a) and 17—Suit to declare sale invalid and for delivery of possession—Proper Court-fee.

COURT-FEES ACT (1870), S. 7 (iv) (b).

Where the plaintiffs in a suit pray that certain sale deeds be declared invalid and ineffectual and that the possession of the property should be delivered to them, they must pay Court-fee both on the relief for possession and on the relief for adjudging the deeds of sale to be void or voidable. (Allsep and Hamilton JJ.) ZAFAR ALI SHAH v. COLLFCTOR OF MEERUT I.L.R. (1945) All. 516=1945 A.L.J. 244=1945 A.W.R. (H.C.) 128=1945 A.L.W. 177=1945 O.W.N. (H.C.) 162=A.I.R. 1945 All. 290.

Agriculturists' Relief Act. See U. P. AGRICULTURISTS RELIEF ACT. S, 33 (3) AND COURT FEES ACT. S, 7 (iv) (b). 1941 O.W.N. 479.

——S. 7 (iv) (b)—Suit for delivery of share and accounts and delivery of amount found due—Court-fee psyable.

S. 7 (iv) (b) of the Court-fees Act makes no difference between a plaintiff who is in actual possession and one who is merely in constructive possession of the property which is to be partitioned. Where a plaintiff never alleged that he was in actual or constructive possession but asked for delivery of his share to him and turther asks for accounts and delivery to him of his share of the amount that night be found due to the estate, it clearly is not a case where a ten rupee stamp would be sufficient. (Mya Bu and Shaw, JJ.) NARAYANASWAMY KONAR v. MUNUSWAMY KONAR, 1941 Rang. L.R. 249=197 I.C. 111=14 RR. 108, —A.I.R. 1941 Rang. 297.

S. 7 (iv) (b)—Suit by Mahomedan co sharer for partition—Allegation that he is in constructive possession of entire property and in partial actual possession—Court-fees. See COURT-FEES ACT, SCH. II, ART. 17 (VI) AND S. 7 (IV) (b). A.I.P. 1941 Lah. 152 (F.B.).

There is nothing in the law to prevent the plaintiff from valuing a relief for accounting at any figure chosen by him. (Ismail and Mulla. JJ) THE CHIEF INSPECTOR OF STAMPS v. RAMESH CHANDRA. I.L.R. 1944 All. 133=213 I.C. 412=17 R.A 7=1944 A.W.R. (H.C.) 38=1944 O.A. (C.C.) 38=1944 A.L.W. 57=1944 O.W.N. (H.C.) 25=1944 A.L.W. 57=1944 O.W.N. (H.C.) 25=1944 A.L.J. 70=A.I.R. 1944 All. 84.

——S. 7 (iv) (b)—Suit for accounts of dissolved partnership and for recovery of plaintiffs' share of assets—Decree directing plaintiff to pay amounts to defendant—Appeal by plaintiff—Valuation—Court-Fee

In a suit for accounts of a dissolved partnership and for delivery of the plaintiff's share of the partnership assets, the relief in which was valued at Rs. 100, the Court passed a final decree directing the plaintiff to pay the defendants Rs. 4,582-5.0 with interest at 6 per cent, from 31-12-1936 and a sum of Rs. 242-10-0 with interest at the same rate from 30-10-1941, the date of the decree. The plaintiff perferred an appeal valuing the relief at Rs. 100 as in the lower Court and paid court-fee accordingly but the appellate Court called upon the plaintiff to pay court-fee on the amount decreed against him.

Held, (1) that there was a difference between a plaintiff appellant and a defendant appellant and under S, 7 (iv) (j) the plaintiff appellant had greater freedom in the matter of valuation than a defendant appellant

COURT-FEES ACT (1870), S. 7, (iv) (b).

(2) that the Court-fee paid was correct and the plaintiff was not liable to pay the additional Court-fee demanded of him. (Shahahuddin J.) RAMADOSS v. APPALANARASAYVA. 211 I.C. 10=16 R.M. 473=56 L.W. 510=1943 M.WN. 817=A.I.R. 1943 Mad. 685=(1943) 2 M.L.J.347.

\_\_\_\_\_S. 7 (iv) (b) and Sch. II, Art. 17 (vi)— Suit for partition—Plaintiff alleging joint possession— Court-fee.

In a suit for partition of joint property, where the plaintiff alleges joint possession, a Court-fee of Rs. 10 only is sufficient under Sch. II, Art. 17 (vi) of the Court-fees Act. S. 7 (iv) (b) of the Act does not apply to such a claim. In determining the Court-fee leviable regard must be had to the allegations in the plaint and the substance of the relief sought apart from the consideration of any evidence in the case. The Court has, however, the power to go behind the outward nature of the allegations in the plaint, to determine what, in its, essence, is the real nature of the dispute between the parties. (O'Sullivan, J.) HIRANAND DEOOMAL v. MURIJMAL KUNDANMAL. I.L.R. (1945) Kar. 84 —A.I.R. 1945 Sind 128.

S. 7 (iv) (b)—Suit for partition—Defendants claiming separation of share—Court-fee if payable—stranger in possession of jont family property made defendant—Plaintiff compromising claim with him—Other defendants claiming accounts from him—If must pay court-fee.

Ordinarily in a suit for partition of joint family property, where the defendants claim that their share should be separated and placed in their separate possession, no court-fee is payable. In a suit for partition, a stranger who was in possession of the joint family property was made a defendant, and the other defendants claimed as against him accounts of the profits of the property held by him. Later, the plaintiff compromised with the stranger and agreed to his being discharged. The court thereupon directed the other defendants to present their claims against the stranger in the form of plaints with proper court-fees.

Held, that the plaintiff's claim against the stranger would stand adjusted under O. 23, R. 3, C.P. Code, and that the claim of the other defendants against him was triable in the suit itself as a part of the partition claim and that they could not be called upon to pay court-fee on their claim. (Puranik, J.) GIRJASHANKAR v. CHAINKARAN. I.L.R. (1945) Nag. 856=1945 N.L.J. 361=A.I.R. 1945 Nag. 273.

——S. 7 (iv) (b) and Sch. II, Art. 17—Suit to recover a sum as profits—Alternative prayer for decree for whatever found due—If makes suit a suit for accounts—Court-fee payable.

Where a plaintiff brings a suit for recovery of a sum of Rs. 900, the mere fact that he adds a prayer for relief for any other sum that may be found due, cannot have the effect of converting the money suit into a suit for accounts, and S. 7, Ci. (iv) (i) of the Court-Fees Act will not apply and the case would be governed by Art. 17 of Sch. II. (Agarwal. J.) NANHE SINGH v. RAM NARAIN. 17 Luck. 246=196 I.C. 441=14 R.O. 171=1941 O.W.N. 1095=1941 R.D. 845=1941 O. I.B. 685=1941 O.A. 810=1941 A.W.R. (Rev.) 865=A.I.B. 1941 Oudh. 622.

S. 7 (iv) (b)—(U.P.)—Suit when one for accounts—Suit for dissolution of partnership—

COURT-FEES ACT (1870), S. 7 (iv) (c).

Absence of any money decree and preliminary decree purely of a declaratory nature—Nature of suit.

In order that a suit which does not expressly ask for accounts may be treated as one for accounts in essence, the substance of the allegations in the plaint may legitimately be looked into and these allegations must show that the plaintiff is asking for accounts against the defendant as an accounting party. Where a plaint does not indicate that the defendant was proceeded against as an accounting party and that accounts should be taken to asscertain the amount due from him, and the relief claimed by him and granted to him is one purely of a declaratory character and no money decree is passed, the suit is not a suit for accounts falling under S. 7 (iv) (i) of the Court-fees Act. (Ghulam Hasan, J.) LACHMI NARAYAN v, PIRTHIPAL SINGH, 211 I.C. 125=16 R.O. 211=1943 A.W.R. (C.C.) 184 (2)=1943 O. W.N. 480=1943 O.A. (C.C.) 316 (2)=A.I.R. 1944 Oudh 101.

S. 7 (iv) (c) and Sch. II, Art. 17 (iii)—Agreement having force of decree under S. 12 (2), C. P. Debt Conciliation Act—Suit by legal representative of deceased debtor for declaration that it is unenforceable against him—Court-fee payable.

A sait brought by the legal representatives of a deceased debtor who is a party to an agreement registered under S. 12, of the C. P. and Behar Debt Conciliation Act having the force of a decree to have that "decree" made unenforceable against him, requires an advalorem Court-fee stamp. (Bose, J.) RATAN SINGH v. RAGHURAJ SINGH. I.L.R. (1945) Nag. 975=1945 N.L.J. 431=A.I.R. 1946 Nag. 30.

—S. 7 (iv) (c)—Applicability—Alienation by Hindu widow—Suit by reversioner after death of widow to declare invalid—Prayer for setting aside—If necessary—Suit for declaration, possession and partition by person out of possession—Court-fee.

An alienation by a Hindu widow is not absolutely void but voidable at the election of the reversionary heir of the last male owner. A reversioner suing after the death of the alienating widow need not sue to set aside the alienation besides praying for a declaration of its invalidity, so as to make his suit fall under S. 7 (iv) (c), Court Fees Act, leviable to ad valorem court-fee. Where however, in a suit for partition, accounts and declaration, the plaintiff, who is, on the allegations in the plaint, not in possession, asks for a declaration possession and partition, the suit falls under S. 7(iv)(c), the consequential relief being partition and possession therefore ad valorem court-fee has to be paid (Davis, C.J. and Weston, J) KARAMCHAND v. NARAINDAS. I.R. (1942) Kar. 358 = 205 I.C. 27 = 15 B.S. 115 = A.I.B. 1943 Sind 56.

S. 7 (iv) (c) and Sch. II, Art. 17 (iii)— Applicability — "Consequential relief" — Suit to declare property not wakf and not liable to registration—Nature of.

A suit for a declaration that certain darga and other properties belonging to the darga were not wakf within the meaning of the Mussalman wakf Act, 1923, and were not liable to registration under the Bombay Amendment Act of 1935, is a suit for declaration and consequential relief falling under S. 7 (iv) (c) of the Court-Fees Act. Art. 17 (iii) of the second schuedle does not apply. There

COURT-FEES ACT (1870), S. 7 (iv)(c)(v) & S. 17. COURT-FEES ACT (1870), S.7 (iv) (c) and (d).

is no warrant for reading the words "consequential WANATH SINGH v. KISHORE SINGH. 23 Pat. 749 = relief" in S. 7 (iv)(c) as consequential relief other than a 219 I.C. 453 = 18 R.P. 136 = 11 R.R. 423 = (1945) P. declaration. Where in suit a plaintiff asks for two declarations, and the second declaration is not an independent declaration but merely one which is consequential upon the first it is a suit to obtain a declaratory decree where consequential relief is prayed for. (Chagla, J.) HAFIZULLA LATIFF v. WAKF COMMITTEE, KOLABA. 47 Bom. L.R. 859.

-S. 7 (iv) (c) (v)and S. 17—Applicability-Hindu son-Suit for possession of properties alienated by father by private sale and properties sold in execution of mortgage decrees—Court-fee.

Where a Hindu son seeks to recover possession of joint family porperties which have been sold in execution of decrees on mortgages executed by his father from purchasers of those properties who are in possession thereof, he cannot ask for possession without getting a declaration that the debts covered by the mortgages were incurred for an illegal or immoral purpose, the son being bound by such sales unless he proves that the debts are illegal or immoral. Hence S. 7 (iv) (c) of the Court Fees Act applies to the suit. But where the son sues for possession of properties conveyed by his father by private sales the position is different. He can treat such sales as not binding on him leaving it to the alienees to prove necessity or antecedent debts. It is open to him to treat such sales as null and void, and in a suit on that note, S. 7, (v) of the Court Fees Act would apply. In a suit for possession of properties, some of which have been sold under private sales and the rest in execution of decrees on mortgages, the Court-fee is payable on the total value of the properties in suit. S. 17 of the Act will not apply. (Manohar Lall and Das, JJ.) SALA-HUDDIN HYDER v. DHANOOLAL. 24 Pat. 334=1945 P.W.N. 327 (2) = A.I.R. 1945 Pat. 421.

-S.7 (iv) (c) and Sch. II, Art. 17 (iii)-Applicability-Suit cast in form of declaratory relief-Suit in substance aiming at setting aside deed formally executed and registered.

A suit though cast in the form of a declaratory relief only, but in substance aiming at setting aside a deed formally executed and registered in accordance with law is not liable to the fixed fee under Art 17, Sch. II Court Fees Act. The plaint in such a suit is liable to ad valorem court-fees either under S. 7 (iv) (c) or Art. 1 of Sch. I of the Act. The weight of judicial authority of the different High Courts, and particularly of the Patna High Court, is in favour of the view, that such a suit is governed by the provisions of S. 7 (iv) (c) of the Act. (Fazi Ali, C.J. Chatteriee and Sinha, IJ.) MT. RUPIA v. BHATU MAHTON. 22 Pat. 783 = 216 I C. 132 = 11 B.R. 111 = 17 R.P. 126 = 24 P.L.T. 446 = 1944 P.W. N. 54=A.I.R. 1944 Pat. 17 (F.B.).

-S. 7 (iv)(c)and Sch. II, Art.17 (iii)—Applicability-Suit for declaration that alienation by Hindu widow is not binding on reversionary interest-Court-fee.

A suit by certain plaintiffs claiming to be reversioners to the estate of a deceased Hindu for a declaration that a sale made by the widow of the last male holder is not binding upon the reversionary interest is a suit for a single declaration and not for two declarations. vis., (1) that the plaintiffs are reversioners and (2) that the alienation is not binding on the reversionary interest. Nor is the suit one for a declaration and consequential relief failing

219 I.C. 453=18 R.P. 136=11 B.R. 423=(1945) P. W.N. 199 = A.I.R. 1945 Pat. 81.

-S. 7 (iv) (c) and Sch. II, Art. 17 (iii)-Applicability - Suit by landlord-Suit by landlord for declaration that order of Revenue Officer fixing rent roll is wrong, illegal and not binding on plaintiffs and for enhancement of reduced rent to old rent--Court fee-Bihar Tenancy Act, S. 104-H.

The plaintiffs landlords brought a suit praying, inter alia for a declaration that an order of the Revenue Officer fixing a reduced rent roll under S. 112 of the Bihar Tenancy Act was wrong, illegal, unenforceable and not binding on the plaintiffs, and for enhancement of the reduced rent to the rent formerly paid; they paid ad valorem Court-fee on the basis of one year's rental in respect of these two prayers.

Held, (1) that the suit was in no sense a suit under S. 104-H of the Bihar Tenancy Act; (2) that the first prayer was the only relief which the plaintiff need ask the Court to grant, and the second prayer, being unnecesstry, should be disregarded as surplusage; (3) that in substance the suit was for a declaration, pure and simple, (a necessary declaration), and Court fee was clearly payable under Sch. II, Art. 17 (iii) of the Court-Fees Act; (4) that S. 7 (iv) (c) of the Court-Fees Act did not apply.

Per Shearer, J .- The suit was one under S. 42 Specific Relief Act for a declaration and for nothing else. (Meredith and Shearer, JJ.) BAGESHWARI PPASA v. TULSI GARAIN. 194 I.C. 378=7 B.R. 755 = 22 Pat. L. T. 453=18 R.P. 709=1941 P.W.N. 447 =A.I.R. 1941 Pat. 463.

-S. 7 (iv) (c) and Sch. II Art 17 (iii) Applicability - Suit for declaration that property is not liable to sale in execution of decree and for cancellation of sale—Plaintiff not party to decree—Relief for cancellation of sale-If consequential.

Where after a property is sold in execution of a decree, a person who was not a party to the decree and was unconnected with the judgment-debtor who did not and could not represent him, institutes a suit for a declaration that the property was his and was not liable to sale in execution of the aforesaid decree, the suit is not one for declaration and consequential relief and is such is not governed by S. 7 (iv) (c) of the Court-Fees Act. The relief for cancellation of the sale is not consequential as it does not necessarily follow from the declaration asked for. It is a mere surplusage and the proper court-fee payable on the plaint is Rs. 10 under Art. 17 (iii) of Sch. II. Art. 17 (iii) of Sch. II. (Tekchand and Beckett J.J.)
HARWANT SINGH v. JAGANNATH, I.L.R. 1943
(Lah.) 565=46 P.L.R. 83=16 R.L. 160=210 I.C. 218 = A.I.R. 1943 Lah. 348.

-S. 7 (iv) (c)and (d)—Applicability—Suit for injunction to restrain defendant alleged to be under raiyat from making permanent constructions on land -Va'uation. VINODE BEHARI MUKHERJEE v. K. C. BISW S & Co. [See Q. D. 1936 - 40 Vol. I, Col. 2365.] 191 I.C. 381=17 R.C. 240.

-S. 7 (iv) (c) and (d)—Applicability—Suit for injunction in respect of easement as occupier of property situate in Hyderabad—Title of plaintiff in property—If to be gone into—Court-fce payable—Valuation—Right of plaintiff-Plaintiff native of Hyderabad and claiming under S. 7 (iv) (c) of the Court-Fees Act. Art. 17 (3) easement as appurtenant to property in Hyderabac—Sch. II of the Act applies. (Meredith, J.) BISH- I aw applicable—Jurisdiction of British Indian Court. COURT-FEES ACT (1870), S. 7 (iv) (c).

VENKATARANGA RAO BAHADUR v. SITA RAMA-CHANDRA RAO BAHADUR. [see Q.D. 1936-40 Vol. 1, Col. 3324.] I.L.R. (1941) Mad. 157=195 I.C. 489= 14 R.M. 189=A.I.R. 1941 Mad. 91.

—S. 7 (iv) (c)—Applicability—Suit for partition of joint family property—Plaintiff claiming to be in joint possession—Allegations in plaint that defendant got up colourable deed of partition executed by plaintiff while a minor and that same was not acted upon or intended to be acted upon—Court-fee.

If a suit for partition of joint family property is really or actually in the nature of a title suit, ad valorem Court-fees are payable, whether the suit be regarded as falling under S. 7(iv) (c), 7(iii) or 7(v) of the Court-Fees Act. But where in substance the relief sought is the partition of the property of which the plaintiff claims to be in joint possession, the suit falls under Art. 17 (vi) of Sch. II of the Court-Fees Act, and ad valorem Court-fee is not leviable. The plaint has to be construed as it is and care should be taken not to import into it anything which it does not contain, either actually or by necessary implication. A relief not asked for cannot be imported so as to charge Court-fee thereon. The plaintiff, a Hindu, brought a suit against his elder brother for partition of joint family properties in which he claimed a partition of the suit property of which he claimed to be in joint possession. There was no prayer in the plaint either for any declaration, cancellation of any document or for possession. There were allegations to the effect that the father of the plaintiff and the defendant died in a state of jointness with them that the defendant then became the karta, the plaintiff being then only about a year old, that the defendant got up a colourable deed of partition, subsequently with false recitals, allotting to himself the best portions of the properties, and got it executed by the plaintiff, as if he were major though he was only a minor, on false representations as to the object of the same, that the deed was never acted upon and did not represent any actual family arrangement, that the family still continued joint in spite of the deed, and that until a short time before suit the joint state continued, when on account of some differences the plaintiff separated in mess from the defendants. The plaintiff paid a Court-fee of Rs. 15 only under Art. 17 (vi) of Sch. II of the Court-Fees Act. The trial Court held that the suit was really one for a declaration that the previous deed was not binding on the plaintiff and for cancellation of the same, and therefore fell under S. 7 (iv) (c) of the Court-Fees Act, and called upon the plaintiff to pay ad valorem Courtfee under S. 7 (iv) (c).

Held, in revision, that if the plaintiff established his case, the document referred to would be void and not voidable, and would be a colourable transaction not intended to be, and never, acted upon, and that neither a prayer for a declaration nor a prayer for cancellation could be imported into the plaint by necessary implication. Hence the plaint did not fall under S. 7 (iv) (c), but fell under Art. 17 (vi) of Sch. II. (Chatterli and Meredith, JI.) RAMAUTAR SAO v. RAM GOBIND SAO. 20 Pat. 780 = 198 I.C. 866 = 14 R.P. 512 = 23 Pat.I.T. 218 = 8 B.E. 471 = A.I.B. 1942 Pat. 60.

\_\_\_\_\_S. 7 (iv) (c) and (v)—Applicability—Suit for possession after declaration of title—Court-fee payable—Nature of suit.

In all cases where possession is claimed, the plaintiff has to establish his title before he can get a decree for

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possession. Where a suit is in reality one for possession the fact that the plaintiff asks in his plaint for something in the nature of a declaration will not make it a suit for declaration and consequential relief for the purposes of Court fee. The suit being really one purely for possession, Court-fee is payable only on that basis, (Harries, C. J. and Manohar Lall, J.) BESAR KUAR v. RAMHIT SINGH. 193 I.C. 538=7 B.R. 557=13 R.P. 599=21 Pat.L.T. 1063=A.I.R. 1941 Pat. 167.

(as amended by Bombay Finance Act 1932), S. 7 (iv) (c) and Sch. II, Art. 17 (v)—Applicability—Suit to declare decree for over Rs. 5,000 void and unenforceable and for restraining execution—Court-fee—Jurisdiction—Suits Valuation Act, S. 8—Bombay Civil Courts Act, S. 24.

A plaint has to be valued according to the relief claimed and not according to the recitals in the body of the plaint. A suit for a declaration that a decree passed against him for Rs. 5,366 and was obtained by misrepresentation, fraud and undue advantage and was therefore unenforceable and void, and for an injunction restraining the defendant from executing it, is in effect a suit for setting aside the decree passed against the plaintiff. Such a suit falls, for purposes of Court-fee. under Art. 17 (v) of Sch. II to the Court-fees Act as amended by the Bombay Finance Act (1932). S. 7 (iv) (c) closes not apply to such a case. Hence a Court-fee of Rs. 15 for the relief of setting aside, under Art, 17 (v), Sch. II, and another Court-fee for the injunction on the valuation given by the plaintiff must be paid. The plaintiff cannot be allowed to value the whole suit as "he chose under S. 7 (iv) (c) of the Court-fees Act. S. 8 of the Suits Valuation Act does not apply and the valuation for purposes of jurisdiction is the amount of the decree: that being over Rs. 5,000 a second class subordinate judge has no jurisdiction to entertain and try it in view of S. 24 of the Bombay Civil Courts Act. (Lokur and Weston, J.) BAI LILAVANTI v. VADILAL. 47 Bom. L.R. 386 - A.I.R. 1945 Bom. 474,

S 7 (iv) (c)—Applicability—Suit to set aside decree effecting partition by metes and bounds and for fresh partition of all properties held by plaintiff and defendants exclusively since date of prior partition—Court-fee payable—Plaintiff—If in joint possession—Sch. II, Art. 17 (vii).

In deciding whether a suit falls within the ambit of S. 7 (iv) (c) of the Court Fees Act, the substance and not the language of the plaint must be looked at; and in determining the court fees payable the Court should have regard to the cause of action as stated in the plaint. The defendant's denial of the plaintiff's joint possession at the date of the suit does not alter the character of the suit. Where a plaintiff prays to have a prior partition by metes and bounds effected by a decree set aside as void and not binding on him, and to bring into the hotchpot for the purpose of making a fresh partition, the properties which since the date of the prior partition have been in the exclusive possession of one or other of the defendants and for separate possession thereof to the plaintiff by dispossession of the defendants, the suit is one for a declaratory decree and for consequential relief and is covered by S. 7 (iv) (c) of the Court-Fees Act. It cannot be said that in such 2 case the plaintiff is in joint possession with the defendants, so as to take the suit out of S. 7 (iv) (c), and to bring it under Sch. II. Art. 17 (vii), as being liable to

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a fixed court-fee instead of ad valorem court-fee. The fact that the plaintiff is already in possession of a portion of the property of which he seeks a re-partition cannot entitle him to credit for court-fees payable in respect of that part of the property. (Davis, C.J. and Lobo, J.) FAZILAT KHATUN v. RAHIM BUX. I.L.B. (1941) Kar. 102=197 I.C. 590=14 B.S. 112=A.I.B. 1941 Sind 154.

\_\_\_\_\_S. 7 (iv) (c)—Applicability—Test—Specific relief claimed.

The Court has to look at the substance of the plaint in each case to determine whether the suit is really one for a declaration with a consequential relief or is merely a camouflage attempt in words to disguise a specific relief claimed in the garb of a suit for declaration coupled with a consequential relief. It cannot be held that in all suits where possession is one of the reliefs claimed the suit must fall within S. 7(v) of the Court-Fees Act any more than if the relief was not possession but was somewhere specifically provided for say in Art. 1 of the Schedule the relief would necessarily fall within that article It will depend on the facts and circumstances of each case whether the relief by way of possession or any other relief claimed is or is not consequential on the declaration sought. If it is consequential on the declaration sought then the suit would fall under S. 7(iv)(c). If it is not so consequential. then the suit may fall if relief claimed was possession partly under S. 7 (v) or if the relief was not for possession but did come within Art. 1, Sch. I, then under that article. (Dalip Singh and Salt, JJ.) HARKISHAN LAL v. BARKAT ALI. 202 I.C. 174=15 R.L. 109=44 P.L.R. 162=A.I.R. 1942 Lah. 209

# S. 7 (iv) (c) and Sch. I, Art. 1—Basis of Valuation.

Though both under S. 7 (iv) (c) and Art. 1, Sch. I of the Court-Fees Act, ad valorem court-fee is required to be paid, the basis of valuation is not the same. Whereas under the former provision ad valorem court-fee has to be paid on the amount at which the relief sought is valued in the plaint or memorandum of appeal under the latter provision of the Court Fees Act ad valorem court-fee has to be paid on the amount or value of the subject-matter in dispute; in other words in accordance with the former provision the plaintiff can put his own valuation on the relief sought by him, whereas under the latter provision the value of the subject-matter must necessarily mean the market value. (Fazl Ali, C. J., Chatterlee and Sinha, JJ.) MT. RUPIA v. BHATU MAHTON. 22 Pat. 783 = 24 P.L.T. 446 = 216 I.C. 132 = 11 B.R. 111 = 17 R.P. 126 = 1944 P.W.N. 54 = A.I.R. 1944 Pat. 17 (P.B.)

# S. 7 (iv) (c)—Court's power to revise valuation put by plaintiff.

In a suit to obtain a declaratory decree with consequential relief the Court is empowered under the law to revise the valuation put by the plaintiff, and if, on such revision, it is of opinion that the valuation is insufficient or arbitrary, it has jurisdiction to fix a right value, (Fazi Ali. C.J., Chattejee and Sinha. JJ.) MT. RUPIA v. BHATU MAHTON. 22 Pat. 783=24 P.L.T. 446=216 I.C. 132=11 B.B. 111=17 R.P. 126=1944 P.W.N. 54=A.J.R. 1944 Pat. 17 (F.B.).

——Ss. 7 (iv) (c) and Sch. II, Art. 17 (iii)— Declaratory suits—Determination of court-fee—True criterion—Consequential and sustantial reliefs—Distinction—Suit for declaration that proterty is wakf and its alienation is void—Court-fee payable.

### COURT-FEES ACT (1870) S. 7 (iv) (c) & (v).

The true criterion for determining the question of court fee in cases of declaratory suits is the substance of the relief claimed as disclosed by the plaint, taken as a whole. If the relief so disclosed is a declaration pure and simple and involves no other relief, the suit would fall under Sch. II, Art. 17 (iii) of the Court-Fees Act and the court fee payable would be Rs. 10 only. At the initial stage of determining the court-fees on a plaint, the question whether the declaratory suit is liable to be dismissed, either because it does not fall within the purview of S. 42 of the Specific Relief Act, or because the plaintiff has failed to sue for a further relief which was open to him or for some other reason does not arise. That question will arise only after the necessary courtfee on the true relief as disclosed in the plaint is paid and the plaint is properly before the Court. If on the other hand, it is found that the declaratory relief claimed involves a consequential relief within the meaning of S. 7 (iv) (c) of the Act, it will be for the plaintiff to state the amount at which he values the relief as provided in that section. Lastly, there may be cases, where the declaration asked for is merely a surplusage, and the socalled consequential relief is in reality an independent substantial relief. The expression "consequential relief" means some relief, which would follow directly from the declaration given, the valuation of which is not 'capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration of a "sub-stantial relief." If the relief claimed in any case is found in reality to be tantamount to a substantial relief and not a mere "consequential relief" in the above sense, the plaintiff must pay court-fee on the substantial relief. Where the plaintiff sues for a two fold declaration, viz., (1) that a certain property is wakf and (ii) that the alienations which certain mutwallis have effectted are null and void and are ineffectual against the wakf property, the first part of the relief is purely declaratory and it does not involve any consequential relief. But the second part of the relief is tantamount to the setting aside or cancellation of the alienations and cannot be treated as a purely declaratory one. It cannot be treated as a declaration with a consequential relief falling within S. 7 (iv) (c) of the Act. For, as the alienors had the power to alienate the property for certain purposes, the declaration that the property is wakf would not by itself entitle the plaintiff to ask for the cancellation of the alienations. It is a substantial relief and would require ad valorem court-fee on the value of the subject-matter of the alienations under Sch. J, Art. 1 of the Act. (Monroe, Bhide and Ram Lall, JJ.)
ZEB-UL-NISA v. DIN MOHAMMAD. I.L.R. (1941) Lah. 451=193 I.C. 641=13 R.L. 465=48 P.L.R 106 = A.I.R. 1941 Lah, 97 (F.B.).

S. 7 (iv) (c)—Right of plaintiff to value relief

—Power of Court to determine the valuation.

Under S. 7 (v) (c) of the Court-Fees Act, a plaintiff is at liberty to state the amount at which he values the relief sought. But he cannot be allowed to put an arbitrary valuation on the relief he seeks; if he does so, it is open to the Court to determine the value and ask the plaintiff to pay court-fee on the value so determined. (Manohar Lall and Das, J.). SALAHUDIN HYDER V. DHANOCIAL. 24 Pat. 334=1945 P.W.N. 327 (2) = A.I.R. 1945 Pat. 421.

S. 7 (iv) (c) and (v)—Sale of foint family property by father—Suit by son for declaration that it is not binding and for possession—Court-fee.

A suit by a son for a declaration that a sale of joint Hindu family property effected by his father had not

## COURT-FEES ACT (1870), S. 7 (iv) (c).

been made for family necessity and was not binding on the family, and for joint possession of the property sold along with his father, falls within the purview of S. 7(xv) (c) and not of S. 7(v) of the Court-Fees Act. An alienation by the father of a Hindu jointfamily is not void but is only voidable at the instance of his sons. It is therefore, necessary for 'the plaintiff to get rid of this voidable document by having the Court to declare that in the circumstances of the case it should be avoided at the plaintiff's request. The possession which he then claims flows from and is a necessary consequence of the relief claimed, namely, that the document does not stand in the way of the plaintiff. The remedy of possession, therefore, is essentially in this case a consequential relief flowing from and arising out of the declaration sought by the plaintiff. (Daligo Singh and Sale, JJ.) HARKISHAN LAL v. BARKAT ALI. 202 I C. 174=15 R.L. 109=44 P.L.R. 162= A.I.R. 1942 Lah 209.

The reliefs asked for in the plaint were in substance (1) a declaration that the properties in the Schedule belonged to the idols, (2) a further declaration that the plaintiffs were shebaits under the law, (3) removal of the defendants from shebaitship, (4) the framing of a scheme of management, (5) an injunction against the defendants restraining them from dealing with the properties in the schedule as secular properties, and (6) accounts. The plaintiffs valued the claim for accounts tentatively at Rs. 100, and the remaining reliefs at Rs. 2000 presumably treating the case as one under S. 7 (iv) of the court-fees Act. The trial Court valued the relief for injunction alone at Rs. 6,975, according to the valuation of the properties in the schedule on the basis of net profits.

Held, that in so far as the suit was one under S. 7 (iv) (c) of the Court-Fees Act the relief sought was a declaration coupled with consequential relief and that it would not be right to detach the declaration from the consequential relief and value them separately. The declaratory relief asked for as regards the character of the properties in suit and the status of the plaintiffs as shebaits could not be estimated at a money value, but admitted of such valuation only if it was coupled with the consequential relief prayed for. The consequential relief here was the framing of a scheme of management, and also the injunction, though the latter might be regarded as an independent relief by itself. As the court had valued the injunction alone at Rs. 6975 and as there was no objective standard by which the other part of the relief, namely the framing of a scheme, could be valued, the total valuation of the suit under Cl. (c) of para (iv) should be raised from 2,000 to Rs. 6,975. In addition to this, the plaintiffs must pay a fixed fee of Rs. 15 on the prayer for removal of the defendants from shebaitship, and as for the prayer for accounts they should pay ad valorem on their own tentative valuation of Rs. 100. (Biswas and Roxburgh, JJ.) KANAKLATA DASSIV. RAM GOPAL DAS. 197 I.C. 128=14 R.C. 312 = A.I.R. 1941 Cal. 509.

——S. 7 (iv) (c)—Suit for declaration by Hindu son that mort gage decree against father is null and void—Court-fee payable.

In the case of a suit by a Hindu son for a declaration hat a decree passed on the foot of a mortgage against he father is null and void on the ground of want of con-

## COURT-FEES ACT (1870), S. 7 (iv) (c).

sideration and necessity, it is essential for him to ask for the setting aside of the decree as a consequence to the declaration claimed and to pay Court-fee under S. 7 (v) (c) of the Court-fees Act. The decree unless set aside, would remain executable against the share of the son in the mortgaged property. If, however, the mortgage has not merged into a decree, a pure declaratory relief can be effectively given. (Harries, C. J. and Mehr Chand Mahalan, J.) PRITHVI RAJ v. RALLI. 46 P.L.R. 346 = 218 I.C. 57 = 18 R.L. 1=A.I.R. 1945 Lah. 13.

S. 7 (iv) (c), Sch. I, Art. 1, Sch. II, Art. 17 (vi)—Suit for declaration and for cancellation of intrument—Court-fees.

The delivery and cancellation of an instrument under S. 39 of the Specific Relief Act is something quite distinct from a mere declaration. A person who is put to some inconvenience, through the existence of an instrument to which he is not a party, may seek merely to have his own rights established and treat the instrument as a nullity if he is not affected thereby; but if he chooses to go further and have the instrument delivered up to the Court for cancellation, he is then asking for a different form of relief. If prayer for this relief is attached to a prayer for a declaration, the question which then arises is whether the cancellation should be regarded as consequential on the declaration or as a substantial relief in itself which requires separate valuation. In the former case, a single Court-fee will have to be paid on the value of the reliefs sought under S. 7 (iv) (c) of the Court-fees Act. In the other event, a Court fee will have to be paid on the value of the subject matter in dispute under Art. 1, of Sch. I, if the subject-matter is capable of valuation, otherwise a fixed fee of Rs. 10 under Art. 17 (vi) of Sch. II. (Tek Chand and Beckett, JJ.) GURDWARA PARAM HANS MAHATMA PANAP Dass Jimaharaj v. Gopichand. 196 I.O. 254=14 R.L. 146=43 P.L.R. 252=A.I R. 1941 Lah. 265.

5.7 (iv) (c)—Suit for declaration of title and injunction—Plaintiff claiming to be in possession of suit land—Valuation for court-fees and jurisdiction.

Where a plaintiff claiming to be in possession of land sues for a declaration of his title to it and for an injunction restraining the defendant from interfering with his possession, the suit is one for declaration and consequential relief, and therefore under S. 7 (iv) (c) of the Court-Fees Act, the plaintiff is entitled to put his own valuation for purposes of court-fee and under S. 8 of the Suits Valuation Act the value so fixed automatically becomes the value for jurisdiction. (Tek Chand and Beckett, JJ.) GHULAM NABI v. UMAR BAKHSH. 197 I.C. 609=14 R.L. 263=43 P.L.R. 337=A.I.R. 1941 Lah. 307.

—S.7 (iv) (c)—Suit for declaration that liquidator's order against plaintiff is void and for injunction—Arbitrary valuation.

A suit for a declaration by a member of a co-operative society that an order passed by the Liquidator of the Society against him is null and void and is not executable against him and for an injunction restraining the defendant from executing it, is a suit for a declaration and consequential relief, and, therefore, under S. 7 (iv) (c) of the Court-fees Act the plaintiff is entitled to fix any value he likes on the plaint. (Tek Chand and Beckett, JJ.) ALLAH YAR v. ANJUMAN IMDAD QARZA, BASTI CHAH KOTWALA DAKHLI JALALPUR

COURT-FEES ACT (1870), S. 7 (iv), (c) and (v). I.L.R. (1942) Lah. 379=195 I.C. 688=14 R.L. 83=43 P.L.R. 305=A.I.R. 1941 Lah. 284.

Where it is open to the plaintiff to frame his suit in one of two ways, there is no obligation in law that he should frame his suit, in any other way than he would choose to frame it. In other words, if it is open to the plaintiff to bring a suit for possession or to bring a suit for a declaration with consequential relief for possession it is entirely for the plaintiff to choose in which form he brings the suit and to the results that may flow from his choice in the way of limitation or otherwise the question of Court-fee payable is wholly irrelevant. The Court-fee will be determined on the nature of the suit as framed at the choice of the plaintiff always provided it is legally open to him to do so. (Dalip Singh and Sale, JJ.) HARKISHAN LAL v. BARKAT ALL. 202 I.C. 174=15 R.L. 109=44 P.L.R. 162=A.I.R. 1942 Lah. 209.

—S. 7, (iv) (c)—Suit to declare decree debts not binding by person not a party to decrees—ad valorem fee, if payable—Test.

Ordinarily a decree binds only parties and privies. For one not a party and hence not bound, it is not necessary to get the decree set aside. But in the case of one who is for some reason or another bound by the decree there is implicit in the prayer for declaration that the decree does not bind him, a further prayer that the decree be modified so as to exonerate his interests.

Where a Hindu son sues for a declaration that certain debts represented by decrees against his father are not binding on him or on the joint family property, there is involved in it a prayer for setting aside the decree and hence ad valorem court-fee is payable. (Bose. J) VINAYAK RAO v. MANKUNWARBAI. I.L.R. (1943) Nag. 440=202 I.C. 643=15 R.N. 97=1942 N.L. J. 466=A.I.R. 1943 Nag. 70.

——S. 7 (iv) (c) and (d)—Suit for injunction for removal of drain—Value for jurisdiction and court-fees See Suits Valuation Act, S. 9. 47 P.L.R. 436 (F.B.).

——S. 7 (iv) (c) and (d)—Suit to set aside decree — Valuation. NALINI NATH MALLIK v. RADHASHYAM MARWARI. [see Q.D. 1936—'40 Vol. I, Col. 2374.] 192 I.C. 574=13 R.C. 321.

S. 7 (iv) (c)—Valuation of relief—Power of Court.

The plaintiff can place any valuation he likes for purposes of Court-Fees in a case falling under S. 7 (fv) (c) of the Court Fees Act and the Court has no power to question that valuation, however arbitrary it may be and the value for purposes of jurisdiction must be the same as the value for purposes of Court-fee. The Court cannot decide that a relief claimed is undervalued if it is in accordance with the provisions of the Court-Fees Act. (Almond, J.C. and Mir Ahmad, J.) NAJAB SULTAN v. RAM KISHAN. 197 I.C. 782=14 R. Pesh. 64=A.I.R. 1942 Pesh. 4.

——Ss. 7 (iv) (d) and 8 (c)—Suit for permanent injunction—Prayer restraining execution of decree against property in plaintiff's possession—

COURTFRES ACT (1870), S. 7 (iv)(f).

Proper valuation. MIR AKHTAR HOSSAIN v. GURU-PADA HALDAR. [see Q D. 1936-40 Vol. I Col. 2381,] 192 I.C. 279=13 R.C. 306.

—S. 7 (iv) (f)—Art. 17-B, Sch. II—Administration suit—Court-fee to be paid on market value of property—Iurisdiction of Court should be gone into—Revision proper to correct error at early stage.

In a suit for the administration of the estate of a Muhammadan lady, for accounts and for division of the assets among the heirs under the Muhammadan Law, on the question whether the provisions of S.  $7(f_{\mathcal{D}})(f)$  or Art. 17-B of Sch. II of the Court-Fees Act applied to the case.

Held, that as an administration suit is not merely a suit for accounts and ought not to be so regarded for any purpose relating to Court-fee, especially where the suit is not one by a creditor for the administration of the assets of a deceased but one where a division of properties may have to be made, it should be valued under Art. 17-B of Sch. II of the Court-Fees Act.

Held. further, that in such a case the jurisdiction is to be determined by the market value of the property. Where the lower Court had erred in holding that it had jurisdiction the High Court can interfere in revision to correct such error when the suit was still in its earlier stages though if the suit had been decreed in favour of the plaintiff the defendant would have been entitled to raise the question of jurisdiction in appeal. (Horwill, J.) KHAJA MOIDEEN SAHIB v. ABDUL GAFFOOR SAHIB. 201 I.C. 261=15 R.M. 291 = I.L.R. (1942) Mad. 455=54 L.W. 663=1941 M.W.N. 1053=A.I.R. 1942 Mad. 247=(1941) 2 M.L.J. 962.

——S. 7 (iv) (f)—Administration suit—Valuation of plaintiff—If can be questioned by defendant—Remedy in case of under-valuation.

A suit for administration is a suit for accounts and falls under sub-paragraph (f) of Cl. (iv) of S. 7. Court-Fees Act. The valuation for the purposes of jurisdiction must be the same as the valuation for the purposes of Court-fees. In such a suit the valuation for purposes of Court-fees and or for jurisdiction made by the plaintiff cannot be questioned by the defendant. In the case of its turning out that too small a sum had been paid in Court-fees, provision is made in S. 11 for payment of additional Court-fees. (Roberts, C.J., Dunkley and Sharpe, JJ.) MAUNG VA v. MAUNG LU GYAND. 1941 Rang. L.R. 512=198 I.C. 414=14 R.R. 201=A I.R. 1941 Rang. 322 (F.B.).

S. 7 (iv) (f)—Final decree in suit for dissolution of partnership and accounts—Appeal—Court-fee payable. SHEO KISAN DAS v. DANDAS. [See Q. D. 1936-'40 Vol. I, Col. 2382] I.L.R. (1941) Nag. 344.

S. 7 (iv) (f)—Suit for accounts—Appeal—Valuation.

Where the claim in a suit for accounts has been valued in the trial Court for purposes of court-fees and jurisdiction at a particular figure, if the defendant appeals against the decree claiming dismissal of the plaintiff's suit in its entirety, the same valuation would continue throughout the litigation and court-fee thereon would have to be paid. (Grille, C.J. and Pollock, J.) SHEORAM SITARAM v. ATMARAM RAGHOJI. I.L.R. (1943) Nag. 17=205 I.C. 17=15 R.N. 168=1942 N.L.J. 557=A.I.R. 1943 Nag. 13.

COURT-FEES ACT (1870), S. 7 (iv) (f).

S. 7 (iv) (f) and Sch. I. Art. 1—Suit for account—Decree for specific amount against plaintiff—Appeal by plaintiff—Valuation—Court-fee payable—If same as in suit—Linbility to ad valorem Court-fee.

A plaintiff in a suit for accounts, is no doubt entitled to place his own valuation on the relief claimed. If his suit fails and he appeals against the refusal to take an account, the appeal would relate solely to a right to an account, and the appeallant might place his own value on the memorandum of appeal. But if the suit results in a decree for a certain amount against the plaintiff, his appeal against such decree is not merely in relation to an account, but is really an appeal against a money decree and he must pay ad valorem Court-fee on the amount of the decree. He cannot be permitted to place an arbitrary value on his appeal for purposes of Coure-fee. (Beaumont, C. J. and Sen, J.) KASHI RAM SENU v. RANGLAL MOTHALSHET, I.L.R. (1941) Bom. 477. = 195 I.C. 894=14 R.B. 84=43 Bom.L.R. 475=A.I.R. 1941 Bom. 242.

S. 7, (iv) (f)—Suit for accounts of partnership—Nominal valuation—Higher valuation in prior suit between same parties on account stated?—Plaintiff if should be pinned down to his prior estimate.

Where a plaintiff in a suit for 'accounts of partnership' gives a nominal valuation, the fact that he on an earlier occasion filed a suit against the same defendant claiming a much larger amount 'on account stated' is no reason for pinning him down to his original estimate. He can value his suit as he pleases and there is no likelihood of any loss of revenue as the exact fees due have to be paid later on. He can put his own valuation in such a suit as it is only tentative. (Gruer, J.) MOTILAL ONKARSA CHAURE v. GULABSA MANIKSA BANORE. 1942 N.L.I. 197.

\_\_\_\_\_S. 7, (iv) (f)—Suit for accounts—Valua-

The plaintiff, when he brings a suit for account, is bound to value his suit tentatively by doing his best to give a fair estimate of the relief which he hopes to obtain and he must not fix the valuation arbitrarily in order to avoid payment of the proper Court-fee or overvalue it. (Harries, C. J. and Manchar Lall, J.) MANI DEVI D. ANPURNA DAI. 22 Pat. 114=206 I.C. 126=15 R.P. 309=9 B.R. 260=A.I.R. 1943 Pat. 218.

-S. 7, (iv) (f)—Suit for accounts—Valuation— Option of plaintiff or appellant,

In suits for accounts it rests with the plaintiff or appellant to assess the amount at which he values the relief desired. (*Davies.*) RAM PAL v. BHAGWAN DAS. 1942 A.M.L. J. 11.

—(as amended in Madras) S. 7 (Iv-A)—
Applicability—Decree against person as Karnavan
and manager of Thavashi—Suit to declare decree
not binding on Thavashi—Allegation that person was never Karnavan or manager—Court-fee
payable.

Where the junior members of a putravakasam tavashi in a Malabar tarwad bring a suit on the allegations that the second defendant is the karnavathi and manager of tavazhi and that the third defendant had never the karnavathsanam or the right of management and that a decree passed with the third defendant as karnavan

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does not bind the plaintiffs or their tavazhi, it is not necessary for the plaintiffs to ask for cancellation of that decree or to pay ad valorem court-fee on the amount of the decree in question. (Somayya, J.) KUTTI AMMU v. KALLIANI AMMAL. 210 I.C. 477=16 R.M. 442=56 I.W. 255=1943 M.W.N. 265=A.I.R. 1943 Mad. 474=(1943) 1 M.L.J. 296.

S. 7 (iv-A) (as amended in Madras)—Applicability—Decree aginst temple in suit filed on promissory note by hereditary trustee—Suit by worshipper to declare not binding on temple as being collusive—Temple and trustee made defendants—Court-fee.

The worshippers of a temple, representing the temple, brought a suit for a declaration that a decree obtained against the temple properties by a grocer in a suit on a promissory note executed by the hereditary trustee for goods supplied by the grocer, was not binding on the temple as it was collusively obtained. Both the temple and the trustee for the time bring were put in the array of defendants.

Held, that in deciding a matter of Court-fee, the Court was entitled to examine the substance of the suit that the plaintiffs were in substance praying on behalf of the temple for cancellation of the decree obtained against the temple, and the suit was therefore liable to court-fee under S. 7 (iv) (A) of the Court-Fees Act as amended in Madras and Art. 17-A (1) of Sch. II did not apply. Though the position of the plaintiffs gave them an interest sufficient to justify the filing of a suit independently of the trustee, they really sued in the right of the temple and its trustee, and did not ask for the protection of any interest of their own and hence they should not be permitted to escape the natural consequence of their suit by arraying the temple and its trustee among the defendants.

Wadsworth. J.—It is well settled that when A gets a decree against B and B or his representative wishes to get rid of that decree, B must pay court-fee as for the cancellation of the decree whether he drafts his paryer only as one for cancellation or whether he disguises it in the form of a prayer for a declaration. (Mockett and Wadsworth. J.) RAMASUBBA IVER v. AYYALU NAIDU. I.L.R. (1941) Mad. 708—199 I.C. 528—14 R.M. 593. 1941 M.W.N. 243—53 L.W. 311—A.I.R. 1941 Mad. 493—(1941) 1 M.L.J. 414.

——(as amended in Madras), S. 7 (iv-A)— Applicability—Decree on promissory note against endorser—Suit by latter to declare decree unexecutable against him—Consequential relief—Court-fu payable.

A suit on a pormissory note was brought against the makers and also against the petitioner who was the payee of the note and who had endorsed it over to the plantiff in that suit for consideration. A decree was passed both against the makers and against the petitioner and in execution thereof some properties of the petitioner were sold. The petitioner then brought a suit for a declaration that the decree which was being executed was not executable against him and for consequential relief in the shape of setting aside the sale already held together with an injunction preventing further execution of the decree against him. The basis of the claim to avoid execution was an agreement which the petitioner alleged was entered in to between him and the decree-holder prior to the institution of the suit on the promissory note to the effect that no remedies should

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be claimed against him. The petitioner valued the reliefs at an arbitrary figure, but the lower Court held that the suit in effect was one to set aside the decree in so far as it bound him and must therefore be valued for purposes of court-fee accordingly and called upon the petitioner to pay such court-fee.

Held, in revision, that the only way in which the decree could be attacked by the petitioner was by setting it aside and not by way of a declaration, and the suit therefore fell within the scope of S. 7 (iv) A of the Madras Amendment of the Court-Fees Act; hence the order calling on the petitioner to pay additional court fee was correct. (Byers, J.) VENKATARAMA NARASIMHA RAO v. SITHA RAMA CHANDRA RAO. 205 I.C. 215=15 R.M. 622=1942 M.W.N. 792=55 L.W. 747 (2)=A.I.R. 1943 Mad. 106=(1942) 2 M.L.J. 658.

(as amended in Madras), S. 7 (iv-A)-Applicability—Gift deed—Allegation that it is sham and nominal and inoperative—Suit for declaration of executant's title to property covered by deed—Courtfee.

S. 7 (iv-A) of the court-fees Act, as amended in Madras, can have no application to the case of a document, such as a gift deed, which, being a sham, nominal and inoperative instrument has no legal effect. It was alleged in the plaint that the plaintiff executed a sham and nominal gift deed for the purpose of securing his property from his creditors. He was subsequently dispossessed of the property and he therefore sued for a declaration that he was still the owner of the property, despite the execution of the gift deed and for possession.

Held, that the suit must be looked upon as being merely for a declaration and consequential relief and cannot be regarded in substance as one for cancellation of the deed within the meaning of S. 7 (iv-A) of the Court-Fees Act. (Horwoill, J.) ADINARAYANA v. RATTAMMA. 1944 M.W.N. 424=57 L.W. 392—A.I.R. 1944 Mad. 408 (2)=(1944) 1 M.L.J. 497.

and 7 (v)—Applicability—Partition in joint Hindu family—Minor co-parcener represented by guardian—Suit by minor ignoring prior partition as null and void—If to be treated as one for cancellation of prior partition deed—Valuation for court—fee and turisdiction.

The plaintiff and defendants 1 and 2 were brothers, being the sons of the third defendant, who till 1922 constituted a joint family. In 1922, the 3rd defendant, the father became divided from his sons and left the family. The 1st defendant (eldest brother) managed the affairs of the joint family since 1922 until 1938 when a partition was effected between the brothers. As the plaintiff was a minor, he was represented by his father the third defendant. In 1940, the plaintiff filed a suit for partition, ignoring the partition of 1938 as null and void on the ground that the 1st defendant was allotted very much more than what he was entitled to. The plaintiff valued the suit at Rs. 503-3-4, but the valuation was raised at the instance of the Court-fee Examiner to Rs. 1010-6-8 and court-fee was paid on that amount under S. 7 (v) of the Court-Fees Act. The 1st defendant contended that the suit was one really for cancellation of the partition of 1938, and that when so treated the valuation would be higher than the limit of jurisdiction of the Court of the District Munsif, in

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which the suit had been filed, and that the suit should be treated as one for setting aside the partition of 1938 under S.7 (iv-A) of the Court-Fees Act as amended in Madras.

Held, that it was not necessary for the plaintiff to sue to set aside the partition of 1938 that he was entitled to ignore it and claim a partition as if there had been no partition, and the suit therefore fell under S. 7 (v) of the Court-Fees Act, and was maintainable as such. (Kuppuswami Ayyar, I) KUPPUSAMI GOUNDAN v. MARI GOUNDAN 210 I.C. 278=1943 M.W.N. 175=16 R.M. 414=56 L.W. 158=A.I.R. 1943 Mad. 427=(1943) 1 M.L.J. 249.

—S. 7 (iv-A)—Applicability — Plaintiff not party to a document—Can get his relief without avoiding it—Unnecessary for him to seek cancellation—Relief on the basis that the document was not intended to be acted upon—Cannot be treated as a relief for cancellation.

In a suit by a mortgagee the plaint averred that certain prior transactions (mortgages and sales) between the defendants and third parties being nominal and never intended to be given effect to were not binding on the plaintiff; that no consideration passed under the said documents and the recitals of consideration contained therein are false and fraudulent; that the parties to the transactions were not entitled to any rights in respect of items under those instruments and that the decree obtained by one of them in the prior suit was not valid or binding on the plaintiff. And as an alternative remedy it was urged that if the hypothecation was deemed to be valid and binding on the plaintiff, the plaintiff was willing and ready to redeem the property by paying a proportionate share of the sum due on the hypothecation bond.

Held, on the question of court-fee to be paid by the plaintiff that unless the plaintiff is a party to a particular document and he could not get the relief he seeks without avoiding the document, it being an insuperable obstacle in his way, it was unnecessary for him to seek cancellation of the document; and any relief he might otherwise ask for on the basis that the document was not intended to be acted upon and was inoperative cannot in substance and effect be treated as a relief for cancellation within the meaning of S. 7 (iv) A of the Court-fees Act. (Yakya Alf, J.) RAMANUJAM PILLAI. 59 L.W. 64=1946 M.W.N. 45=(1945) 2 M.L.J. 582.

——(as amended in Madras) S. 7 (iv-A)—Applicability—Suit for declaration that a compremise decree passed in prior suit was not binding on the plaintif's—Reliefs estimated at Rupees Two lakhs—Ad valorem Court-fee to be paid.

A suit was brought for a declaration that a compromise decree passed in a prior suit wherein the 'plaintiffs, then minors had been represented originally by their mother as next friend and later on by their father was not binding on the 'plaintiff. There was nothing to show that the father's interests in that suit were in any way adverse to those of the minors but it appeared that their interests were very much identical. The plaintiffs estimated the value by the reliefs at two lakhs of Rupees.

Held, that ad valorem Court-fee should be paid under S. 7 (iv-A) of the Court fees Act, for the spirit and real meaning of the plaint was for the cancellation of the prior decree, (Horwill, J.) CHIDAMBARAM

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CHETTIAR v. NAGAPPA CHETTIAR. 57 L.W. 432=1945 M.W.N. 27=A.I.R. 1944 Mad. 478=(1944) 2 M.L.J. 35.

S. 7 (iv-A) (as amended in Madras)—Applicability—Suit for partition and possession by members of Malabar tarwad challenging validity of decree against karnavan—Court-fee—Prayer for setting uside decrees—Necessity.

In a suit for partition and possession of their shares by the members of a malabar tarwad against the karnavan of a tarwad, challenging the validity of certain decrees passed against the karnawan as such the plaintiffs have to ask for cancellation of the decrees, because the decrees are against the tarwad represented by the karnawan, and each member of the family is as much bound by the decrees as if he had been specifically impleaded by name in the suit. But if the plaintiffs allege that the decrees were against a person who was not the karnavan or manager, it may be unnecessary to set aside the decree and it would be sufficient if they pray for a declaration that the decrees were not binding on the family as they were obtained against a person who did not represent the family. (Horwill, J.) BHAVADA SAN BHATTATHIRIPAD 2. NELLAKANDAN BHATTATHIRIPAD. I.L.R. (1944) Mad. 430 = 217 I.C. 26 = 17 B.M. 241=56 L.W. 549=1943 M.W.N. 571= A.I.R. 1944 Mad. 19~ (1943) 2 M.L.J. 396.

——(as amended in Madras), S. 7 (vi-A) and (iv) (c)—Applicability—Suit to declare usufructuary mortgage deed sham and nonunal—Prayer for injunction to restrain defendant from interfering with payment of rents by tenants to plaintiff—Valuation—Court fee.

The first respondent brought a suit substantially for a declaration that a usufructuary mortgage deed in favour of the petitioner was a sham and nominal transaction and for an injunction restraining the petitioner from interfering with the payment of rents by the tenants to the first respondent who was not party to the document and who held another usufructuary mortgage over the property in dispute. The suit was first presented to the Subordinate Judge's Court, but that Court ultimately returned the plaint for presentation to the Court of the District Munsif on the ground that the value of the suit for Court fee and jurisdiction was Rs. 3,000. When the suit was presented in the District Munsiff's Court the petitioner raised a preliminary objection that the suit was undervalued and should have been presented in the Sub-Court, but the objection was over-ruled and the Court held that the suit was properly valued and presented to the proper Court. The petitioner applied in revision to the High Court, and the respondent raised a preliminary objection that the revision application was incompetent, the petitioner's remedy being an appeal under 0.43, R, 1 (a), C. P. Code, against the order of the Sub-Court returning the plaint under O. 7, R. 10, C. P. Code, and that it was not open to him to go behind that order once the plaint was presented in the District Munsiff's Court.

Held, (1) that the plaint having been returned before it was numbered as a suit, in the Sub-Court and without notice to the petitioner, the order was not one adverse to him against which he could appeal, and his omission to appeal could not preclude him from raising the question of valutaion for jurisdiction before the District Munsif; (2) that the relief of injunction was clearly consequential on the prayer for a declaration that the mortgage was sham and nominal, and that the suit fell a.W.R. (C.O.) 3 under S. 7 (is) (c) of the Court Fees Act and was liable

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to Court fee on the basis of one half of the estimated market value of the property and as the respondent was not a party to the usufructuary mortgage deed, S. 7 (iv. 4) of the Court Fees Act did not apply. (Happell, I.) RANGASWAMI AYYANGAR v. AMMAYEE AMMAL, 213 I.C. 96=17 R.M. 22=(1943) M.W.N. 272=A.I.R. 1943 Mad. 490=(1943) 1 M.L.J. 316.

S. 7 (iv-A) (U. P. Amendment)—Applicability—Suit to declare decree inoperative so far as plaintiff's share is concerned.

Where a plaintiff, not a party to decree, wants it to be held to be inoperative and ineffective so far as his rights are concerned because the property in suit is joint family property and he is a member of the joint family, the proper Court fee payable is as provided in S. 7 (IV A.) of the Court-Fees Act. (Malik, J.) MADAN MOHAN 7. RAGHUNANDAN PRASAD. I.L.R. 1944 All. 338=1944 O.A. (H.C.) 161(2)=1944 A.L.W. 371=1944 A.L.J. 304=1944 A.W.R. (H.C.) 161(2)=A.L.R. 1944 All. 208.

S. 7 (iv-A) (U. P. Amendment)—Applicability—Test—Substance of relief claimed.

It is no doubt true that if a plaintiff deliberately does not choose to ask for a consequential relief which he should have asked and takes the risk of such omission the Court is not entitled to ask him to add a consequential relief and make him pay advalorem court-fee. But the Court should not be entirely guided by the language used by the plaintiff. It should look at the substance of the relief claimed. Where a substantive relief is really involved which comes under S. 7 (IV-A) but only a declaration is prayed for, court-fee should be charged on the substantive relief. (Malik, J.) Kamta Nath v. Chitanji Lal. I.I.B. 1944 All. 336=220. LO. 65=1944 A.W.E. (H.C.) 128=1944 O.A. (H.C.) 128=1944 A.I.J. 256=A.I.R. 1944 All. 271.

-----S. 7 (iv-A)-Applicability-Wills.

As a will is no more than a mere declaration of an intention it cannot possibly be described as an instrument securing any property. Hence a 'will' cannot fall within the meaning of S. 7 (iv-A). (Ismail and Mulla, JJ.) THE CHIEF INSPECTOR OF STAMPS v. RAMESH CHANDRA. I.I.B. (1944) All. 133=213 I.O. 412=17 R.A. 7=1944 O.A. (H.C.) 38=1944 O.W.N. (H.C.) 25=1944 A.W.R. (H.C.) 38=1944 A.I.W. 57=1944 A.I.J. 70=A.I.R. 1944 All. 84.

——S. 7 (iv-A) (U. P. Amenament)—Money decree—Meaning—Suit for cancellation of mortgage decree, the sale thereon and possession—Court-fee payable.

The words 'a decree for money' as used in S. 7 (iv-A) of the Court-fees Act does not necessarily mean a 'simple money decree'. Even in a mortgage suit money is decreed. In a suit to set aside a mortgage decree, the sale thereon and possession, the basis of valuation should be the amount of the decree and not the value of the property; court-fee is chargeable on the claim for cancellation of decree and for possession only; the relief of setting aside the sale would follow the setting aside of the decree and hence no separate court-fee is necessary. (Agrawl and Madeley, JJ.) DHONDHEY SINGH v. PATRAJ KUNWAR. 19 Luck, 54=211 I.C. 282=16 R.O. 219=1943 O.A. (C.C.) 81=1943 A.W.R. (C.O.) 33 (2)=1943 O.W.N. 148=A.I.R. 1944 Outh 118.

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—S. 7 (iv-A) (1) Sch. II, Art. 17 (1) U. P.— Relative applicability—Suit under R. 103 of O. 21, C. P. Code.

A suit for declaration under R, 103 of O. 21, C. P. Code necessitated by an order of the executing Court under R, 99 of that order is in substances not one for avoiding the decree under execution but in reality is a suit which seeks the reversal of the order of the execution Court, Hence it would be governed by Art, 17 (1) of Sch. II of the Court-Fees Act. Even if the reliefs fall under sub-section (iv-A) of S. 7 of the Act, the special provisions forsuits of this nature contained in Art, 17 (1) of Sch. II would override the general provisions contained in sub-section (iv-A) of S, 7 of the Court-Fees Act. (Waliulah, J.) THE CHIEF INS-SPECTOR OF STAMPS v. MST. HULASUYA. I.L.B. (1945) All. 68=219 I.C. 335=18 R.A. 63=1945 O.W.N. (H.C.) 30=1945 A.L.W. 30=1945 A.L.R. 1945 All. 111.

S. 7 (iv)-A (2) and Sch. II, Art. 17 (iii) (UP.)—Suit for declaration based on gift, the donor derwing title under will—Defendant impugning will and also questioning nature of interest conveyed—Appeal against rejection of pleas—Court fee payable.

Where a suit for declaration of right is based on a gift executed by a donor who had derived his title under a will and the defendant not only impugns the validity of will but also in the alternative questions the nature of interest conveyed by it and both his pleas are rejected and he appeals raising the same contentions, ad valorem court-fee must be paid under S. 17 (iv-A) (2) of the Court-Fees Act and not a fixed fee under Art, 17 (iii) of the same Act, (Bennett. J.) RAM NARAIN SINGH v. PANCHAM SINGH. 211 I.C. 432=16 B.O. 232=1943 O.W N. 250=1943 R.D. 345=1943 O.A. (C.C.) 128 (2)=A.I.R. 1944 Oudh 29.

The tahbazari right is a substantial right in land and hence a suit to restrain by an injunction the interference with such rights involves or affects the property upon which the bazar is held. The amount of fee payable has to be computed according to the amount at which the relief is valued in the plaint. (Ghulam Hasan and Madeley, J.J.) THE CHIEF INSPECTOR OF STAMPS, U. P. v. RAMCHARAN. 1945 O.A. (C.C.) 261=1945 A.W.B. (C.C.) 261=1945 O.W.N. 404.

——S. 7 (iv-B) (d), Expl. II (U.P. Court-Fees Amendment Act (1938)—Court-fee—Nature of—Basis of computation—Suit by representative of true owner against benamidar—Prayer for declaration that benamidar not the adopted son of another person —Court fee—Property to be taken into account.

A Court-fee is that fee which the State requires to be paid by the plaintiff on the presentation of his plaint and it has therefore to considered by reference to the point of time at which the plaint is filed and by reference to the case which is presented by it. Where a plaintiff sued as a universal legatee of a certain R for recovery of property bought by R benami in the name of the defendant who was styled as the adopted son of one M a nephew of R and also asked for a declaration that the defendant was not the adopted son of M, held (1) that what had to be considered for the purpose of determining the Court-fee was, what was the property that might be diverted by that adoption. (2) that the property

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which might be diverted or affected by that adoption, if the defendant were to establish it, would be that property which at the date of the death of R was joint and which the detendant or M himself as the case might be would have taken by survivorship and not the separate property of R. (Braund, f.) KUNDAN LAL v. GORE LAL. 1942 A.L. W. 192.

S. 7 (iv-B), Proviso—Construction of words involved in or affected by the relief sought?

The words 'involved in or affected by the relief sought' in the proviso to S. 7 (iv-B) of the Court-Fees Act, must be strictly construed. They clearly exclude all properties which are not involved in or affected by the relief sought. (Ismail and Mulla, J.). THE CHIEF INSPECTOR OF STAMPS v. RAMESH CHANDRA. I.L.B. (1944) All. 133=213 I.O. 412=17 B.A. 7=1944 A.W.B. (H.C.) 38=1944 O.A. (C. C.) 38=1944 O.W.N. (H.C.) 25=1944 A.L.W. 57=1944 A.L.W. 57=

S. 7(v) and (x)(a)—Applicability—Contract for sale of land—Suit for obtaining sale deed executed and registered by defendant and for possession—Court fees.

'A suit for getting a sale deed executed' and registered by the defendant by way of specific performance of a contract for sale, and for possession of the property contracted to be sold falls under S.7(x) (a) of the Court-fees Act and not under S.7(v). The mere fact that possession is claimed would not entitle the Court to ignore the essential character of the suit as a suit for specific performance, and to regard it as one for possession, because possession cannot be decreed unless and until the plaintiff gets specific performance of the contract. (Mackin and Sen, J/.) MULIJIBHAI PITAMBERDAS v. BAI CHANCHAL. I.L.R. 1945) Bom, 32=220 I.C. 439=46 Bom.L.R. 731=A.I.R. 1945 Bom. 81.

S. 7 (v) and Sch. II, Art. 17-B (as amended in Madras)—Applicability—Hinau widow—Sunt for partition under Hindu Women's Rights to Property Act—Court-fee.

A suit by the widow of a Hindu co-parcener for partition which she is entitled to file under the Hindu Widows' Rights to Property Act, 1937, the plaint containing no allegation that she has been kept out of possession or is out of possession in some other way, is governed by Art. 17-B of Sch. II of the Court-Fees Act (as amended in Madras). S. 7 (v) of the Court-Fees Act does not apply. The plaint cannot be regarded as one on the basis that the plaintiff is out of possession, (Mockett, J.) ROSAMMA v. CHENCHIAR. 210 LC. 121=16 R.M. 369=56 L.W. 417=1943 M.W.N. 519 (1)=A.I.R. 1943 Mad. 654=(1943) 2 M.LJ. 172.

—S. 7 (v) and (x) (a)—Contract of sale—Preperty agreed for sold in lieu of mortgage debt—Suit for specific performance—Mortgage debt liable to scaling down under Madras Act IV of 1938—Valuation for Court-fee—Prayer for possession as against persons not parties to mortgage or contract of sale—Separate courtfee payable.

The plaintiff had a mortgage right over certain properties and it was arranged that in view of the amount due under the mortgage the suit properties should be conveyed to him, and there was a further clause that in case the properties were not conveyed he would be entitled to recover the money due under the mortgage.

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Subsequently the Madras Agriculturists' Relief Act was passed and the amount payable to the mortgagee would have, it scaled down, entitled the plaintiff to recover only Rs. 4,000. The mortgagors refused to execute a conveyance, and a suit had to be filed for specific performance of the contract of sale or in the alternative for recovery of the amount due under the mortgage. Certain other persons who were not parties to the mortgage or the contract which was sought to be specifically entorced were implended and a prayer for recovery of possession of the properties from them also was made in the plaint. The plaintiff valued the claim at Rs. 4,000 and paid court-fee thereon, although the mortgage amount as at the time of the contract of sale was much larger.

Held, that the claim for specific preformance was leviable to court-fee under section 7, clause  $(x \cdot a)$  of the Court-Fees Act and that court-fee was payable on the amount due under the mortgage on the date of the contract and not on the amount which according to the plaintiff was due on the date of suit. (Kuppuswam: Ayyar, J.) NARAYANASWAMI v. VENKATASWAMI. 210 I.C. 157=56 L.W. 91=16 R.M. 386=1943 M.W.N. 55=A.I.B. 1943 Mag. 372=(1943) 1 M.L.J. 82.

# S. 7 (v)—Land with building thereon—Assessment for Court-fees.

The distinction which is drawn in S. 7 of the Court-Fees Act, between land, houses and gardens indicates that lands with buildings upon them come within the definition of 'houses'. Accordingly a mill should be assessed for purposes of court-fee on its market value. (Almond, J.C. and Soofi, J.) MUKARRAM KHAN v. HARDIT SINGH. 196 I.C. 301-14 R.Pesh. 25=A.I. R. 1941 Pesh. 69.

——S. 7 (v)—Partition suit—Final decree stamped under stamp Act—Application by defendant for share—Liability to pay court-fee. See STAMP ACT, S. 2 (15). 45 Bom.L.R. 1052.

S. 7 (V)—Subject matter—Suit for partition and possession of share in house by Hindu co-parcener—Order by Court that suit should be dismissed unless plaintiff brought to hotchput another house in his possession—Appeal—Court-fee—Court-fee on value of second house—If leviable.

In a suit for partition claiming one third share of a house which the plaintiff alleged was joint family property, the trial Court held that not only the suit house but also another house in the possession of the plaintiff constituted joint family property and ordered that unless the plaintiff amended his plaint and chose to bring into hotchpot the house in his possession his suit would be dismissed. The plaintiff appealed to the High Court paying Court-fee on his memorandum of appeal in respect of the suit house alone. The office, however, demanded court-fee ad valorem on the value of the house in his possession also.

Held, no court-fee ought to be charged in respect of the house in the possession of the plaintiff, which never formed any part of the subject matter of the litigation and was merely to be brought in if the plaintiff chose to bring it in, which he had not done. (Beaumont, C.J.) MOHANLAL NAROTTAMDAS v. KESHAYLIAL NAROTTAMDAS. 211. I.G. 637 = 16 R.B. 324 = 45 Bom.L.B. 880 = A.I.B. 1943 Bom. 441.

S. 7 (v) and Government of India Notification dated 10th September 1889. Cl. 18—Suit

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for fractional share in khata separately assessed to land revenue—Court-fee payable.

By Cl. 18 of the Notification No. 4650 issued by the Govt. of India on 10th September 1889, where the suit is for a fractional share of a part of an estate recorded as separately assessed to revenue, the value on which the tee is payable is not to exceed five times such portion of the revenue separately assessed on that part as may be rateably payable in respect of that share. Where therefore the subject-matter of an appeal is 1-3rd share in Khatas separately assessed to land revenue, court-fee is payable on only 1-3rd of five times the land revenue payable on the land originaly claimed in the khatas in dispute. (Almond, J.C. and Mir Ahmad, J.) PORDIL KHAN v. MT. SHAHANA. 212 I.C. 41=16 R.Pesh. 73=A.I.R. 1943 Pesh. 96.

——S. 7 (v) and Sch. II, Art. 17 (vi) (U.P. Amendment)—S uit between two rival Sarbarshkars for their right to manage trust properties—Court-fu payable.

Where the only dispute in a suit is as to whether the plaintiff was entitled to the management of certain trust property as a Sarbarakkar or the defendant was entitled to the management as a Sarbarakkar, it can hardly be deemed to be a suit for possession of the property because both naturally admit that the possession is with the principal. Hence S. 7, Cl. (v) of the Court-fees Act cannot apply to such a case and the provision applicable is really Sch. II, Art. 17 (vi) of the Act. (Ismail and Malik, J.). SITA RAMJI MAHARAJ v. RAGHUNATH DAS I.L.R. (1944) All. 564=218 I.C.50=1944 A.L.J., 408=1944 O.A. (H.C.) 194=1944 A.L.W. 430=1944 A.W.R. (H.C.) 194=A.I.R. 1944 All. 279.

(v) (1) (d)—Suit for pre-emption—No evidence of rental value—Market value—Computation—Value of encumbrances, if to be deducted.

Where in a suit for pre-emption the test laid down by S. 7 (v) (1) (d) of the Court-Fees Act could not apply owing to the absence of evidence of rental value of the land, it cannot be said that the market value means pre-emptive value and that this value should be deemed to be the cash paid after deducting the value of the encumbrances. Market value must be determined upon the state of things existing at the time of the sale. The amount paid to the vendor plus the value of the encumbrances, must for the purpose of the Court-fee, be taken to be the value of the subject matter. (Ghulam Hasan, J.) SHEONARAIN v. RAM KHELAWAN. 1944 A.W.B. (C.C.) 302=1944 O.A. (C.C.) 302=1944 O.M. (C.C.) 302=0000 Outh 135.

Where a suit is to declare the ownership of the plaintiff of a field and for delivery of possession thereof from the defendant and incidentally an alleged adoption of the defendant on which he rested his claim is also denied the Court-fee is payable only under Court-Fees Act. S. 7 (v) ( $\delta$ ) and not on the market value of the field. The suit is really one for possession and the mention of an anticipated defence of adoption does not oblige him to pay Court-fees on a declaration to a void it, (Gruer, f.) KADBABAL v. LALSA. 1942 N.L.J. 372.

COURT-FEES ACT (1870), S. 7 (v)(b) and (d).

——S. 7 (v) (b) and (d)—Property assessed to land revenue—Suit for possession of plot of land—Court-fee payable.

It is settled law in the Punjab that whenever a person sues for possession of a plot of land which can be arithmetically worked out as a proportion or a fraction of the property that has been assessed to land revenue and is so noted in the *lamabandi*, the provisions of S, 7(v) (b) of the Court-Fees Act are applicable and not the provisions of Ci. (v) (d). (Harries, C. J. and Mehr Chand Mahajan, J.) KULJAS RAI v. PALA SINGH. 219 I.C. 425=18 R.L. 61=46 P.L.R. 350=A.I.R. 1945 Lah. 15.

——S. 7 (v) (b) and (c)—Suit for partition and separate possession—Isara Village in Berar—Valuation for court-fees.

A suit for partition and separate possession of the interest of the plaintiff in an Izara Village in Berar falls under S. 7 (v) (b) and not under S. 7 (v) (c) of the Court-fees Act. (Puranik, J) PUSARAM MANIKLAL v. HIMATRAO. I.L.B. (1943) Nag. 802=208 I.C. 199=16 R.N. 115=1943 N.L.J 445=A.I.R. 1943 Nag. 315.

S. 7 (vi)—Appeal by defendant against decree for pre-emption questioning both the right to pre-empt as well as the amount—Court-fee payable.

Where the defendant in a suit for pre-emption appeals against the decree for pre-emption and challenges therein not only the right of pre-emption but also the pre-emption amount, there is no change in the nature of the case and the Court-fee payable is that paid in the suit. (Madeley, J.) BANS GOPAL SINGH v. SHEO BARDAN SINGH. 215 I.C. 243=17 R.O. 54=1944 O.A. (C.C.) 174=1944 O.W.N. 238=1944 A.L.W. 295=1944 A.W.R. (C.C.) 174=A.L.R. 1944 Outh 276.

A house was ostensibly sold for Rs. 1,200. The plaintiff in a suit for pre emption offered Rs. 700 as the actual price. The Court Amn fixed the market value at Rs. 750. The suit was dismissed but the price paid was held to be Rs.1,200. On appeal, on objection as to Court-fee paid, held that the Court-fee both in the trial Court and in appeal was to be paid only on the market value and that it could not be said that since the appeal was also for reduction of price the Court-fee should be paid on Rs. 1,200. (Mathur, /.) VIDYAVATI v. RADHEY LAL. I.L.R. (1944) All. 181=212 I.C. 431=16 B.A. 291=1944 A.L.W. 120=1944 A.W. (H.C.) 61=1944 A.L.J. 97=A.I.R. 1944 All. 83.

—(U. P. Amendts), S. 7 (vi-A) and Sch. II Art. 17 (vi)—Court-fee payable in appeal from decree in partition suits—No dispute as to share but only as to allotment of properties.

In the case of an appeal from a decree in a suit for partition the court-fee payable should be on the value of that share of the appellant which is in dispute in the appeal. Where no share is in dispute S, 7 (VI-A) has no application. Where the dispute is only to the allocation of the different properties it is impossible to attach any pecuniary value to the dispute and the fixed fee under Sch. II, Art. 17 (vi) should be paid. (Allsop, J.) ZAMURRAD HUSAIN v. RAM SARUP. I.L.B. (1943) All. 507-209 I.C. 411-16 B.A. 135-1943 O.A.

COURT-FEES ACT (1870), S. 7 (viii) (U,P.)

(H.C.) 118=1943 A.L.J. 247=1943 O.W.N. (H.C.) 211 (1) = 1943 A.L.W. 343 (1) 1943 A.W.R. (H.C.) 118=A.I.E. 1943 All. 281.

S. 7 (vi-A) (U. P. Amendment)—'Possession' If restricted to actual possession—Suit by co-owner for partition when he is in possession of portion of the joint property—Applicability of S. 7 (vi-A).

The meaning of the word 'possession' used in S.  $7(vi\cdot A)$  of Court-fees Act cannot be restricted to actual possession. Where a co-owner brings a suit for partition of a share in the joint property and he is in actual possession of some portion of the joint property, a presumption of constructive possession in respect of the property of which he is not in actual possession can arise and the suit would be governed by the first portion of S.  $7(vi\cdot A)$  of the amended Court-fees Act. (Ghulum Hasan, J.) Safdar Husain v. Achchan Beparn. 209 I.C. 442=16 R.O. 123=1943 A.W.R. (C.C.) 94=1943 O.W.N. 356=1943 O.A. (C.C.) 226=A.I.R. 1943 Oudh 456.

S.7(vi.A) (U. P.)—Scope and applicability. The words 'his claim to be a co-owner on such date is denied' occurring in S. 7-(vi-A) of the Court-fees Act as amended in United Province should be interpreted to mean both when it is denied in its entirety or even when only the extent of the share claimed is in dispute. (Malik, J.) CHIEF INSPECTOR OF STAMPS V. LALIT MOHAN, I.L.R. (1944) All, 478=1944 A.L.J. 367=1944 O.W.N. (H.C.) 82=1944 A.W.R. (H.C.) 166=1944 O.A. (H.C.) 166=1944 A.L.W. 327=A.I.R. 1944 All, 199.

——S. 7 (vi-A.) (U. P. Amendment)—Suit for partition—Amendment of plaint to include extra share after U. P. Court-Fees Amendment Act—Computation of Court-fee.

Where on the death of a plaintiff in a suit for partition of his share in certain property, his brother one of the defendants steps into his shoes and continues the suit and obtains an amendment of the plaint so as to include his share of the property also and this amendment is obtained after the passing of the U. P. Court-Fee (Amendment) Act of 1938, the Court-fee payable in respect of the extra share must be calculated according to the Amended Act and not according to the Act prior to its amendment. (Allsop and Verma, II.) MAHOMED SHARIF v. HAJIRA BIBI. I.L.R. (1942) All. 376=201 I.C. 460=15 R.A. 62=1942 A.W.R. (H.C.) 128 (1)=1942 A.L.J. 351=1942 A.L.W. 184=A.I.R. 1942 All. 222.

S. 7 (viii) (U. P.)—Applicability—Suit to declare plaintiff owner of property attached in proceedings under Ss. 87 and 88, Cr. P. Code.

S.7 (viii) includes but is not confined to attachments under O.21, C.P. Code. Hence a suit for a declaration that the plaintiff is the owner in prosession of certain properties attached in proceedings under Ss. 87 and 88, Cr. P. Code, against the plaintiff's husband as an absconder and an appeal against the decision therein, would fall under S. 7 (viii). (Bennett and Madeley, IJ.) MST. PARBATI DEVI v. U. P. GOVERNMENT. 20 Luck. 254=1944 O.W.N, 516=1944 O.A.

COURT-FEES ACT (1870), U. P. S. 7 (iii). (C.C.) 320=1944 A.W.R. (C.C.) 320=A.I.R. 1945 Oudh 104.

(as amended by U. P. (Amendment) Act of 1938), S. 7 (viii)-Scope and applicability of.

The words used in Cl. VIII of S. 7 of the Court-Fees Act (as amended in U. P.) viz., including suits to set aside an order passed under O. 21. Rr. 60, 61 or 62 of the C. P. Code, are of sufficient amplitude to embrace within its category a suit to challenge an order dismissing a claim as being filed too late. For the purposes of Cl. (viii) it is immaterial whether the order was right or wrong. (Ghulum, Hasan, I.) Bas-ANT RAI v. MST. TAHIRUNNISSAN BEGUM. 19 Luck. 405=16 R.O. 161=210 I.C. 191=1943 O.W.N. 378=1943 A.W.R. (C.C.) 105=1943 O.A. (C.C.) 237=A.I.R. 1943 Oudh. 422.

-S. 7 (ix)—Applicability—Suit for redemption-Decree-Appeal-Court-fee.

If an appeal from a decree in a suit for redemption relates only to the amount payable and not to the right of redemption, Court-fee on such appeal has to be paid ad valorem on the amount claimed to be payable. Even when the appeal purports to dispute both the right of redemption and the amount payable, if in substance it relates only to the amount payable there again court-fee must be paid ad valorem on the amount claimed. But if the right of redemption and the amount payable are both disputed in appeal and both grounds are grounds in substance and not merely in form, the court-fee payable would be as for a suit under S. 7 (ix) of the Court-Fees Act. It cannot be said that it is the form alone and not the substance of the appeal which determines the question of court-tee. Which determines the question of countrige. (Happell, J.) PACHAYAKKAL v. SHANMUGAVEL-AYUDHA GOPANNA MANNADIAR. I.L.R. (1943) Mad. 819=16 R.M. 171=208 I.C. 87=56 L.W. 778=1943 M.W.N.14 (2)=A.I.R. 1943 Mad. 146=(1942) 2 M.L.J. 785.

-S. 7 (ix)—Applicability—Suit for redemption of mortgage-Decree directing payment of fixed amount-Appeal disputing amount directed to be paid-Court-fee-Art. 1, Sch. I.

In an appeal from a decree in a redemption suit, when the right to redemption is no longer in dispute, and the appellant merely seeks to reduce the liability imposed upon him by the trial Court, the Court-fee payable on the memorandum of appeal is the fee on the amount in respect of which he seeks to avoid liability, under Art. 1, Sch. I of the Court-fees Act. S. 7 (ix) of the Act does not apply to such an appeal. (Wadia and Rajadhyaksha, JJ.) Jangumiya v. Hasham Sahee. 47 Bom. L.R. 400=AI.R. 1945 Bom.

-S. 7 (ix)—Suit to recover mortgaged property—Second appeal—Court-fee payable.

In a second appeal from a decree in a suit against a mortgagee for the recovery of the mortgaged property the Court-fees must according to S. 7 (ix) of the Court-fees Act, be calculatto be secured by the instrument of mortgage. So  $(x_i)$  (d) of the Court-Fees Act  $(x_i)$  and the result may seem to be some what

COURT-FEES ACT(1870), S (xi)(d)& Sch. I Art. 1 extraordinary, the Act has to be construed as it

stands. (Allsop, J.) ABDUL HAQ v. SHAMSHUBDIN. 1.L R. (1941) All. 469=1941 A.L.W. 740=197 I.C. 582=14 R.A. 207=1941 R.D. 866=1941 A.W.R. (H.C.) 249=1941 O.A. (Supp.) 602 =1941 A.L.J. 409=A.I.R. 1941 All. 357

-S. 7 (x) (a). Sch. I Art. 1 and Sch. II. Art. 17 B - Applicability-Contract of exchange -Suit for specific performance-Appeal-Court-

Neither S. 7 (x) (a) nor Art. 17-B of Sch. II of the Court-fees Act governs the question of Court-fee in a suit for specific performance of a contract of exchange of immovable property, It is not a suit for specific performance of a contract of sale nor can it be said that the subjectmatter of the suit is incapable of valuation. Art. 1, Sch. I has therefore to be applied in the case of a memorandum of appeal in such a suit, (Krishnaswami Ayyanagar, J.) VENKAMMA, In re. 219 I.C. 329=18 R.M. 83=1944 M.W.N. 133=57 L.W. 130=A.I.R. 1944 Mad. 252= (1944) 1 M.L.J. 187.

-S. 7 (x) (a)—Applicability—Suit for possession after specific performance of contract of sale-Court-fee. See Court-FEES Act. S. 7 (v) AND (x) (A). 46 Bom. L.R. 731.

sejectment of tenant served with notice of ejectment.

A suit for ejectment of a tenant who has been served with a notice of ejectment falls under S. 7 (xi) (cc) of the Court-Fees Act. The service of such a notice is not by itself sufficient to alter the status of the tenant into that of a trespasser. His position is that of a tenant holding over. (Bhide, J.) CHHABBA RAM v. NATHU RAM. 194 I.C. 262=13 R.L. 527=42 P.L.R. 784= A.I.R. 1941 Lah. 39.

S.7 (xi) (cc)—Suit to eject tenant who continues in possession after expiry of lease— Court-fees payable.

A tenant who continues in possession after the expiry of the term of his lease does not become a trespasser but remains a tenant by sufferance. The landlord can bring a suit for ejectment of such a tenant paying court-fee according to the provisions of S. 7 (xi) (cc) of the Court-Fees Act. (Mir Ahmad, J.C. and Mahomed librahim J.) ISHAR DASS v. QAZI MAHOMED. 220 I.C. 227= 18 R. Pesh. 21=A.I.R. 1945 Pesh. 16.

-S. 7 (xi) (d) and Sch. I, Art. 1-Suit contesting notice of ejectment-Appeal by tenant-Court-fees.

Where in a suit to contest a notice of ejectment the tenant files an appeal raising, without dis-puting the relationship of landlord and tenant, certain points in regard to the time of his ejectment and in regard to the decision that he should be ejected without compensation of any kind, the Court-fees payable on the appeal must be the same as those payable on the original suit under COURT-FEES ACT ( 870),S. 8 & Sch. II, Art. 11, COURT-FEES ACT (1870), S. 12,

-(as amended U.P.), S. 8 and Sch II, Art. 11-Relative applicability-Appeal under S. 30, Workmen's Compensation Act against award. See Workmen's Compensation Act. Ss. 30 and COURT-FEES ACT, S. 8 AND SCH. II, ART. 11. 1943 O.A. (C.C.) 269.

-S. 8-B (3) and (c)—Additional Court-fee found due on enquiry not paid-Proper order-C. P. Code, O. 7, R. 11. JARIMON KHATOON v. SECRETARY OF STATE. [see Q. D. 1/36-'40 Vol. I, Col. 2399.] 193 I.C. 144=13 R.C. 372.

-- S. 8 (c)-Applicability-Case falling within S. 7 (iv) (c) JARIMON KHATOON v. SECRETARY OF STATE, [see Q. D. 1936.'40 Vol. 1. Col. 2400] 193 I.C. 144=13 K.C. 372.

-S. 8(c)-Relief under S. 7 (iv) (c)-Revised valuation-Revision.

Where the only question is one of valuation, and not one relating to classification an appeal being excluded under S. 12 (i) of the Court Fees Act, the remedy of revision is open, though the revisional power should be exercised only in a proper case. Where while dealing with a case under S. 7 (12)(c) the Court applies a wrong standard in determining the context valuation under S. 8 (c), namely the standard laid down in para(zi) of S. 7, which is applicable to a different class of suits altogether, the revisional jurisdiction of the High Court under S. 115, C. P. Code, is attracted. (Biswas and Roxburgh, JJ.) KANAKLATA DASSI v. RAM GOPAL DAS. 197 I.C. 128-14 R.C. 312-A.I.R. 1941 Cal. 509.

-S. 8 (c)-Suit under S. 7 (iv)-Revision of plaintiff's valuation-Duty of Court. NALINI NATH MALLIK v. RADHASHYAM MARWARI. [See Q. D. 1936-'40 Vol. I, Col. 2400.] 192 I.C. 574=13 R.C. 321.

-S. 8-D (2)—Local investigation held at defendant's instance-Order directing plaintiff to deposit costs-Legality.

The Court has jurisdiction to direct the plaintiff to deposit the costs of a local investigation as to the valuation of a property under S. 8-D (2) of the Court-Fees Act held at the instance of the defendant. It can make the defendant responsible for such costs if the result is in favour of the plaintiff. (Henderson, J.) BASANTA KUMAR CHATTERJEE v. KALI KRISHNA MUKHERJI. 47 C.W.N. 373.

-Ss. 10(2) and 12 (ii)—Construction and scope - "Suit" in S. 10 (2)—If includes appeal—Duty of Court under S. 12 (ii)—Partition suit—Plaint not sufficiently stamped-Decree-Appeal by defendant-Liability of appellant to pay deficit Court-fee on plaint.

In a case falling under S. 12 (ii), the reference to the "suit" in S. 10 (2) which is expressly made applicable under S. 12 (ii) must be read as a reference to the appeal" and the Court is bound to stay the appeal until the additional Court-fee is paid, although the appeal is by the defendant and not by the plaintiff who failed to pay the proper Court fee on his plaint in the suit in the trial Court. In a partition suit in which the plaint was insufficiently stamped a preliminary decree was passed declaring that the plaintiff was entitled to a share in the

value of the compensation claimed. (Alan plaint property and directing that the plaintiff was Mitchell, F. C.) RAJA v. SHAM UD-DIN. 20 entitled to costs from the defendants. After reference Lah. L.T. 155 to the Commissioner for partition, there was a final decree in accordance with the division made by the Commissioner. The defendant appealed against the nnal decree. At the hearing of the appeal there was an objection raised that the plaint was insufficiently stamped and that the proper Court fee ought to be paid on the plaint before the appeal could be proceeded with.

> Held, (1) that though the appeal was by the defendant and not by the plaintiff respondent who ought to have paid the proper Court fee on his plaint, the Court was bound under the mandatory provisions of S. 12 (ii) of the Court Fees Act to stay the appeal until the additional fee was paid; (2) that the Court should direct the respondent (plaintiff) to pay the proper additional court-fee and to stay the appeal until that is done; (3) that if the respondent did not pay the Court-fee and if the appellants wished to save their appeal they would have to pay the Court-fee themselves in the name of the respondent (plaintiff) when alone, the appeal would come on for hearing; (4) that at the hearing it would be open to the Court of appeal to decide on whose shoulders the additional fee should fall and to make the necessary orders. (Beaumont, C. J. and Wadia, J.) ALABUX NAZARALLI v. ABDULLALLI KHANBHAI. 200 I.C. 323=15 R.B. 7=44 Bom.L.R. 117=A.I.R. 1942 Bom. 151.

> -S, 11-Administration suit-Decree-Direction for payment of additional court-fee by plaintiff-Plaintiff paying same before withdrawal of amount deposited in Court-Right to levy execution therefor.

A decree in a suit for an account of the defendants administration of an estate contained a clause to the effect that the decree should not be executed until the plaintiff paid a further court fee of Rs. 157-8-0, as is usual, under S. 11, Court-Fees Act. The decree amount was deposited in Court and the plaintiff applied to withdraw the same, but the amount was not paid out to him until he had paid the additional court-fee required to be paid by him by the decree. The plaintiff having paid the additional court-fee and withdrawn the amount from Court applied to recover from the defendants the amount of the additional court-fee paid by him in execution of. the decree.

Held, that the execution application of the plaintiff was competent and should be ordered the plaintiff under the decree having had to pay the additional court-fee before the full liability of the defendants could be ascertained. (King and Kunhi Raman, J.) PARASURAM BROS. v. ATCHUTARAMA RAO. 207 I.C. 397=16 R.M. 102=1942 M.W.N. 713=55 L.W. 786= A.I.R. 1943 Mad. 145=(1942) 2 M.L.J. 673.

-S. 11-Scope and effect of-Decree for mesne profits-Drawing up of before payment of Court-fee-If prohibited.

S. 11 of the Court-Fees Act only says that the decres shall not be executed until the Court-fee is paid; it in no way requires the Court to postpone the passing or the drawing up of the decree for mesne profits. (Rowland MAHABIR SAO. 21 Pat. 365=199 I.C. 818=14
R.P. 631=8 B.R. 631=23 Pat L.T. 202=1942 P.W.N. 139=A.I.R. 1942 Pat. 410.

-S. 12-Decision under-When becomes final-Sufficiency of stamp decided without reference to opposite side-1/ can be questioned later on by the other

# **COURT-PEES ACT** (1870), S. 12 (1).

The decision is not final within the meaning of the Court-fees Act, S. 12 unless it is reached after both sides have had a chance to be heard. After a plaint is filed and summons is issued to the other side, it is open to the other side to contend that the Court-fee paid is insufficient. It is on deciding such a plea that the Court would come to a 'decision' which under S. 12 of the Act would be final as between the parties. (Clarke, J.) GANGOO v. SALOO. 196 I.C 584=14 R.N. 114=1941 N.L.J. 303=I.L.R. (1942) Nag. 432=A.I. R. 1941 Nag. 217.

—S. 12 (1)—Construction and scope—Decision under—Finality—Conditions of—If parties should have been heard before decision—Object of sub-section.

It cannot be held that a decision would be final under S. 12 (1) of the Court-Fees Act only if it has been finally arrived at after both parties have heen heard. The words "decided" and "decision" are used without any qualifications at all and they must clearly apply to any adjudication by the Court whether both parties have been heard or only one party has been heard or even if no party at all has been heard. The only essential is that the Court should apply its mind to the questions at issue in arriving at the true calculation of the Court-fee. The real object of S. 12 (1) is to ensure that the Court at as early a stage as possible should finally determine what was the amount of the Court-fee payable before the subject-matter of the suit itself was to be embarked upon and; once the Court did so determine he parties were not to be permitted to raise the question again before it. (King, J.) MAHALAKSHMAMMA VENKATANARAYANAMURTHI. 198 I.C. 597=14 R.M. 479=1941 M.W.N. 406=53 L.W 740=A. I.R. 1941 Mad. 626=(1941) 1 M.L.J. 796.

——S. 12 (1) (as amended in U. P.)—Final order—Decision of Court as to sufficiency of Court-fee—Reconsideration on report of Inspector of stamps and on objection by other side—Competency.

Where on the report of the Munsarim a Civil Judge decides that the court-fee paid on an appeal is sufficient it is not such a final order within the meaning of S. 12 (1) of the Court-Fees Act as to preclude a District Judge from going into the question once again either on the report of the Inspector of Stamps or on the preliminary objection of the opposite side. (Bennett, 1.) CHHOTEY SINGH v. SURAT SINGH. 200 I.C. 223-14 R.O. 576=1942 O.W.N. 338=1942 A.W.R. (C.C.) 226=1942 O.A. 247=A.I.R. 1942 Oudh 385.

8.12 (1)—Scope—Finality—If refers to classification of suit—Court determining value of property for Court-fee—Power of Court to reconsider value of property for purposes of furisdiction—Madras Civil Courts Act, S. 14.

The finality referred to in S. 12 (1) of the Court-Fees Act is only with regard to arithmetical calculations of the Court-fee payable and not to questions of classification. A finding as to the value of the property in suit for purposes of Court-fee does not preclude the Court from afterwards coming to the conclusion that it has no jurisdiction to try the suit on the ground that on a proper valuation of the property the suit would go beyond the pecuniary jurisdiction of the Court. It cannot be said that because the Court has already determined the amount of Court-fee payable, it has no authority to reconsider the value of the property for purposes of jurisdiction. It would be strange if the Court, by making an error in fixing the value of the

# COURT-FEES ACT (1870), Ss. 14 and 15.

Court-fee payable, can obtain jurisdiction which it does not really possess. In a suit for possession of land, the true value of the land determines the jurisdiction and is also the basis for calculating Court-fee, subject to the qualification of S. 12 (1) of the Court-Fees Act that when once the amount of the Court-fee has been determined, it is final. (Horwill, J.) NARASIMHALU CHETTY v. RAMAYYA NAIDU. 202 I.C. 65=15 R.M. 427=1942 M.W.N. 243=55 L.W. 173=A.I.R. 1942 Mad. 502=(1942) 1 M.L.J. 400.

S 12 (1)—Valuation for Court-fees by the trial Court—If can be challenged. JARIMON KHATOON v. SECRETARY OF STATE. [see Q. D. 1936-40 Vol. I, Col. 2405.] 193 1.C. 144=13 R.C. 372.

S. 12 (ii)—Applicability—If confined to appeal by plantiff only. VENKTARAMA SASTRI v. VENKATASUBRAMANIA DIKSHITAR. [see Q.D. 1936-40 Vol. I, Col. 2406.] 193 I.C. 758=13 R.M. 712.

Power of Court to reconsider.

There is nothing in S. 12 (ii) of the Court-Fees Act to justify the view that a Court may not reconsider an order which it has already passed under the sub section. (King, J.) MAHALAKSHMAMMA v. VENKATANARAYANAMURTHI. 198 I.C. 597=14 B.M. 479=1941 M.W.N. 406=58 L.W. 740=A.I.R. 1941 Mad. 626=(1941) 1 M L.J., 795.

S. 12 (ii)—Power of appellate Court under, to demand additional Court-fee when no question was raised in Court below. Chidambaram Chertiar In re. [See Q. D. 1936—'40 Vol. I, Col. 2406.] 193 I.C. 490—13 R.M. 677.

S. 12 (ii)—Scope—Mandatory character of—Partition suit—Plaint not properly stamped —Decree—Appeal by defendant—Objection that proper Court-fee was not paid on plaint—Procedure—Duty of appellate Court—Liability of appellant to pay Court-fee on plaint. See Court-Fees Acr. Ss. 10 (2) AND 12 (ii). 44 BOM.LB. 117.

S. 13—Duty of Court—Remand under 0. 41, R. 23, C. P. Code—Refund of Court-fee—Discretion.

Under S. 13 of the Court-Fees Act, the Court has no discretion, and is bound to refund the Court-fee when a remand is made on any of the grounds mentioned in O. 41, R. 23, C. P. Code. (Kuppuswami Ayyar, J.) MUTYALAMMA V. KRISHNAMMA. 58 L.W. 252=1945 M.W.N. 288 (1)=A.I.R. 1945 Mad. 351=(1945) 1 M.L.J. 205.

—S. 13, Proviso—Remand order not covering whole of subject-matter—Refund of the whole Court-fee—Legality. Sheolal v. Jugal Kishore. [See Q. D. 1936—'40 Vol. I. Col. 2409.] 191 L.C. 566—13 R.N. 203.

Apart from the provisions of Ss. 14 and 15 of the Court-fees Act, the Court has power in proper cases to make an order for refund where it is found that the court-fees have been paid under an order subsequently held to be wrong. (Bisuas, J.) ABDUL MAJID D. AMINA KHATUK. ILB.

11.

COURT-FEES ACT (1870) S. 17.

(1942) 2 Cal. 258=201 I.C. 683=15 R C. 269=75 C.L.J. 393=46 C.W.N. 697=A.I.R. 1942 Cal. 539.

——8. 17—Applicability—Single suit for ejectment of different lessees of different properties obtained under a settlement—Court-fee payable— "Distinct subjects"—Test.

Where a person who obtained under a settlement different properties subject to various leases files a single suit for ejectment against the different lessees, the suit comprises a number of subjects as required by S. 17 of the Court-fees Act and the plaint will be chargeable with the aggregate amount of the fees to which the plaints in suits embracing separately each of such subjects would be liable. The plaintiff is seeking —it may be similar relief against the various defendants—but not the same relief. (Bell, J.) VENKATARAMA MOHANDAS V. KONIAH 58 L.W 667=1946 M.W.N. 40=(1945) 2 M.L J. 571.

S. 17—Applicability—Suit by Hindu son for possession of joint family properties—Properties in possession of alienees under private sales by father and under sales in execution of decrees on mortgages executed by father—Courtfee. See Court-Fees Act, S. 7 (IV) (c), (V) AND S. 17. 24 Pat. 334.

'Subject' in S. 17 of the Court-fees Act means 'cause of auction' and 'cause of action' means the whole of the facts on which, taken together, the right to relief is based. It is clear that there may be a series of events or facts of which some only are necessary as a foundation for a particular claim, whereas the same facts with others subsequently arising or disclosed may form the foundation of another and further claim. Separate claims to relief preferred by separate claimants are generally separate and "distinct subjects" within the meaning of S. 17 of the Court-fees Act. A suit for arrears of rent was filed by two plaintiffs who were co-sharer land-lords to the extent of 8 annas. They alleged that 8 annas rent of the years in suit was due to them and that so far as they were aware the whole of the arrear of rent was due. They impleaded as a pro forma defendant the co-sharer of the other 8 annas, and paid court-fee on the amount of rent claimed by them as due to them. Subsequently the other co-sharer who was a pro forma defendant applied to be transposed as a plaintiff alleging that his own share of the rent was also in arrears and praying for a decree in his favour for the rent due to him. His prayer was allowed on his paying court-fee on the amount claimed by him. The suit ended in a decree in favour of both the first two and the supplemental plaintiff. The tenant appealed paying a court-fee on the total of the amounts decreed in the suit, but the Stamp Reporter claimed court-fee under S. 17 of the Court-fees Act, i.e., on amount equal to the total of the court-fees paid by the three plaintiffs in the trial Court.

Held, (1) that the claim of the supplemental W.N. 802 (added) plaintiff was not a claim on the same L.J. 418.

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cause of action and was not within the same subject as the claim first put forward in the suit by the two original plaintiffs and therefore separate court-fees were correctly levied from the two sets of plaintiffs; (2) that the court-fee payable on the appeal must therefore be the same as the court-fee on the plaint and that the defendant-appellant must pay the court-fee demanded by the Stamp Reporter. (Rowland, J.) LACHMI NARAYAN LAL v. BHUPENDRA PRASAD SHUKUL, 22 Pat 275=209 IC. 534=16 R.P. 107=1943 P.W.N. 194=10 B.R. 164=A.I.B. 1943 Pat. 356.

\_\_\_\_\_S. 17—"Distinct subjects"—Separate claims to relief.

The word "subject" in S. 17 of the Court-Fees Act, is not the same as "cause of action." Separate claims to relief are ordinarily to be considered as separate and distinct subjects. (Rowland, J.) RAMADHIN SINGH v. BAIJNATH PRASAD SINGH. 209 I C. 530=16 R.P. 106=10 B.R. 163=A.I.R. 1943 Pat. 355.

——S. 17—Distinct subjects—Suit for maintenance at fixed rate and for amount by way of arrears—If comprises "distinct subjects"—Appeal—Court-fee.

In order that S. 17 of the Court-Fees Act may be applicable the suit must embrace two or more distinct subjects. What the Court has to consider in deciding the Court-fee payable on a memorandum of appeal is not whether the appeal embraces two or more distinct subjects, but whether the suit from which the appeal arises embraces such subjects. Distinct subjects mean distinct causes of action. A suit for maintenance at a certain rate and for a certain amount by way of arrears is not a suit which embraces two or more distinct subjects, whatever might be the case in appeal, and hence Court-fees cannot be levied under S. 17 in appeal. (Meredith, J.) Mt. Siabati v. Sibsahal. 23 Pat 675=218 I.C. 143=11 B.R. 257=A.I.R. 1944 Pat. 387.

——S. 17—"Distinct subjects"—Suit for recovery of possession of property under sale deed and in the alternative for recovery of consideration money—If comprises "distinct subjects"——Court-fee.

The appellant instituted a suit for possession of property purchased by him under a sale deed executed in pursuance of an agreement of sale, and in the alternative for the recovery of the consideration money paid by him. He valued the suit at Rs. 955, made up of Rs. 925, representing the value of the property and Rs. 30 the mesne profits claimed by him and paid court-fee on that amount. The value of the alternative relief also was the same, viz., Rs. 955, made up of Rs. 925, the amount of the consideration for the sale-deed and Rs. 30 for the incidental expenses.

Held, that a single court-fee based on the valuation of Rs. 955 was sufficient and was all that could be levied, and the suit did not comprise two "distinct subjects" so as to fall under S. 17 of the Court-Fees Act. (Krishnaswami Ayyangar, J.) NARASIMHAM. In re. 205 I.C. 224=15 R.M. 826=55 L.W. 612=1942 M. W.N. 802=A.I.R. 1942 Mad. 744=(1942) 2 M, L.J. 418.

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S. 17—Distinct subject—Suit for redemption of mortgage with claim for surplus profits—If comprises distinct reliefs, Radhakrishna Chetty v. Schomperg [see O D. 1936—'40 Vol. I, Col. 3325.] A.T.R. 1941 Mad. 115—(1940) 2 M L.J. 867.

K sold land to M for a sum of Rs, 1,42,300 by means of registered sale deed. It was stated in the sale deed by the vendor that he would receive sum of Rs. 50,000 in cash before the Sub-Registrar and that the balance of the sale price amounting to Rs. 92,300 had been received by him by the execution by the vendee of a mortgage bond for that amount. In accordance with the recitals in the sale deed, a registered mortgage bond for Rs. 92,300 was executed on the same day. A third mortgage bond was also executed on the same day for a sum of Rs. 15,000. It was stated in this bond that a sum of Rs. 50,000 was to be paid in eash to the vendor at the time of the registration of the sale deed, that it had been discovered that the cash in possession of the vendee amounted to Rs. 35,000 only and it had therefore become necessary to execute another mortgage bond in favour of the vendor by the vendee for a sum of Rs. 15,000. It was further stated in the bond that the entire balance of the purchase price after deducting a sum of Rs. 35,000 which had been paid in cash, would form a charge on the property sold. A suit was instituted by K for recovery of Rs. 43.298-2-6 on the basis of the two mortgage bonds alluded to above.

Held, that in the circumstances of the case the two mortgage deeds did not constitute two distinct subject within the purview of S. 17 of the Court-Fees Act, (Abdul Rashid, Blacker and Marten, JJ.) MEHR DIN v. KULTILAK RAM. 211 I.C. 53=16 P.L. 174=45 P.L.R. 382=A.I.R. 1943 Lah. 275. (F.B.).

S. 17—Main cause of action same in respect of all properties—Alternative pleas based on different cause of action in respect to of some of the properties—Separate fee on each property if chargeable—Separate fee on mesne profits if chargeable in a claim for possession and mesne profits.

Where the main case of a plaintiff is that he is entitled to all the properties under a primogeniture sanad and that is the main cause of action in respect of all the properties, the fact that some alternative pleas based on different cause of action are raised in respect of some of the items is no ground for charging a separate fee on each of the various items, for it cannot he said that they are distinct and separate from the main cause. A separate Court-fee cannot he charged under S. 17 on the claim for mesne profits in s suit for possession and mesne profits as if a separate suit had been instituted for them. (Bennett and Ghulam Hasan, JJ.) RAJ RAJ BAHADUR SINGH v. SHATRANJAI SINGH. 201 I.C. 567=15 R.O. 100=1942 A.W.R. (C.C.) 256 (2) = 1942 O.A. 284=1942 O.W.N. 394=AI.R.1942 Oudh 412.

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- S. 17-"Subjects"-Meaning.

The word "subjects" in S. 17 of the Court-fees Act means causes of action and should not be interpreted with reference to the different subjects mentioned in S. of the Act. (Manohar Lall and Das. II.) Salahuddin Hyder v. Dhanoolal. 24 Pat 334=1945 P.W.N. 327 (2)=A.I.R. 1945 Pat. 421.

S. 17 (as amended in Bengal)—Suit for possession of colliery, arrears of royalty and mesne profits—Trial Court decreeing claim for royalty in part and dismissing other two claims—Appeal—Court-fee payable.

Plaintiff filed a memorandum of appeal in a suit for khas possession of a colliery, arrears of rovalty and mesne profits against the decree of the trial Court dismissing his claim for khas possession and mesne profits but decreeing his claim for arrears of rovalty in part. He valued the claims for khas passession and mesne profits for purposes of court-fees at the same separate figures as in the plaint, and the claim for arrears of royalty at the difference between the amount claimed in the plaint and the amount decreed in his favour by the trial Court.

Held, that the three reliefs claimed in the memorandum of appeal were based on three separate and distinct causes of action within the meaning of S. 17 of the Court-fees Act, as amended in Bengal, and that the memorandum of appeal was chargaehle with the aggregate amount of fees with which the memorandum of appeal would be chargeable under the Act, in separate suits in respect of each such cause of action. (Nasim Ali, J.) KASHIMBAZAR RAJ WARDS ESTATE v. THE JOYRAMDANGA COAL CONCERN, LTD. 45 C.W.N. 996—201 I.C. 563—15 R.C. 241—A.I.R. 1942 Cal. 40.

—S 17 and T. P. Act. S. 67-A—Distinct subjects—Suit on more than one mortgage—Court-fee payable—S. 17 if controlled by S. 67-A, T. P. Act—Special Acts—One if can override another.

The word 'distinct subjects' in S. 17, Court-fees Act, means distinct causes of action. Where a suit is on more than one mortgage the Court-fee shall be paid on each mortgage. S. 67-A of the T. P. Act does not control S. 17 of the Court-fees Act. When a subsequent general enactment cannot override or interfere with a special Act, one special Act cannot override or interfere with the provisions of another special Act. (Ba U, J.) R. M. P. L. S. CHETTIAR FIRM v. KOORMIAH. 1940 Rang. L.R. 767=193 I.C. 711=13 R.R. 264 =A.I.R. 1941 Rang. 95.

S. 17 (2) Proviso (C. P. Amendment)— Applicability—Suit for Specific Performance of agreement to sell consideration being discharge of mortgage debt—Alternative prayer for decree on mortgage—Court-Fee on the two reliefs if necessary.

Where in a suit for specific performance of an agreement to sell, the consideration being the discharge of a mortgage debt due to the plaintiff, a decree on the mortgage is asked as an alternative relief, the two reliefs are based on the same cause of action, the alternative one being ancillary

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to the main one and separate Court-fee on each is not necessary. The matter falls under the proviso to S. 17 (2) of the Court-Fees Act as amended in C. P. (Bose, J.) Sham Rao v. Sheik DAWOOD. 1942 N.L.J. 352.

# -S. 19, (xvii)-Petition Contemplated by.

The petition mentioned in Cl. (xvii) of S. 19 of the Court-Fees Act must be a petition in respect of, or connected with or arising out of, the matter in connection with which the petitioner is in prison, in duress or under restraint. (Verma. J.) SARDAR SINGH v. CHAMPA, I.L.R. (1941) All. 793=198 I.C. 275=14 R.A 275=1941 A.L.J. 733=1941 A.W.R. (H.C.) 357=1941 A. L.W. 1083=A.I.R. 1942 All. 45.

-S. 19 (xvii)—Revision application by prisoner presented through counsel-If exempt from Court-fee.

Where an application for revision is presented by a proisoner, even if presented through a counselit is exempt from the payment of the Court-fees under the provsions of S. 19 (xvii) of the Court-Fees Act. (Almond, J. C.) GIAN CHAND v. EMPEROR. 202 I.C. 379=15 R. Pesh. 43=43 Cr.L.J. 837=A.I.R. 1942 Pesh.

-S. 19-D-Applicability-Hindu joint family-Death of manager-Application by widow for herself and minor sons for letters of administration limited to share certificates and bank deposits-Competency-Court-fee.

Where a father or a manager of a Hindu joint family dies possessed of the joint family properties and also of certain other properties of which (although members of co-parcenary have beneficial interest in it) the legal title tests in him, it is competent to take out letters of administration limited to that part of the property the legal title of which vested in the manager or the father.

Where the widow of the deceased head of joint Hindu family applies for letters of adminstration with respect to shares in joint stock companies standing in the name of the deceased and certain bank deposits in his name, on behalf of herself and her minor sons who with their father constituted a joint family such application is maintainable. It is not necessary that the application should be in respect of the whole property moveable and immoveable or that court-fee should be paid on the whole of the estate. The beneficial interest in the other joint family property having already passed by survivorship, is no longer an asset of the deceased to which representation is required to be taken out.

The application, comprised as it is to the property in the form of share certificates and bank deposits, is in order and the application is exempt from the payment of any court-fee under S. 19-D of the Court-Fees Act. (Macklin and Rajadhyaksha, J.) BIRDIBAI MOHAN-LAL v. CHUNILAL. 47 Bom. L.R. 862.

- S. 19-D-Hindu joint family property-Letters of administration-Court-fees.

Under S. 19-D of the Court-Fees Act, no Court-fee is payable on letters of administration in pespect of property which had been purchased with joint family funds and which stood in the sole name of the karta or another member of the faimly till his death as the property hadfor enquiry. He should place before the court materials

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been held by the deceased in trust for the family. The question of duty is in no way affected by the fact that the deceased had a beneficiary interest of his own in the property during his lifetime. (Tek Chani, Dalip Singh and Beck tt, [].) SRI RAM v COLLECTOR, LAHORE, I.L.R (1942) Lah 717=202 I.C. 114=15 R.L. 95 = 44 P L.R. 330 = A I R. 1942 Lah, 173 (F.B.).

-S. 19-H-Application to Calcutta High Court for probate-Will executed by resident of Assam-Properties left in Bengal, Assam and U. P. exceeding Rs. 10,000 in value in each case-Rate payable-Bengal or Assam rate-Letters Patent, Cl. 34 and Succession A:t. Ss. 273 and 300.

By Cl. 34 of the Letters Patent, 1865, 'he Calcutta High Court's testamentary and intestate jurisdiction was made to extend beyond the presidency proper in respect of the wills of any person dying within or without Bengal Division. The jurisdiction of this High Court over Behar and Orissa was taken away by the establishment of the Patna High Court. This court still has testamentary and intestate jurisdiction over Assam. Under S. 300 of the Succession Act, this court has concurrent jurisdiction with all district courts in Bengal and Assem. This High Court, therefore, is the High Court alike for Bengal as well as for Assam in respect of some of the jurisdictions specifically mentioned in the Letters Patent including the testamentary and intestate jurisdiction. Now if a testator dies in Assam leaving properties in Assam. Bengal and the United Provinces exceeding Rs. 10,000 in value in each case an application for probate having effect thoughout British India will have to be made to the Calcutta High Court or the High Court of the U.P., for the District Court of Assam has no power under S. 273 of the Succession Act to make a grant with effect thoughout British India as he cannot certify that the value of the assets in U. P. or Bengal does not exceed Rs. 10,000. If such an application is made to the Calcutta High Court, it must be treated as one made to that court as the court having jurisdiction in Assam, and the ad valorem court-fees are to be calculated at the Assam rate and not at the Bengal rate. (Das. J.) RAJA PRABHAT CHANDRA, In the goods of. 49 C.W.N. 695.

S. 19-H-Valuation of Zamindary estate in Assam-Deduction of 15 p.c. for collection charges-Permissibility.

In assessing the annual net profit of a Zamindari estate in Assam, a deduction of 15 p.c. of the gross annual rent demand for meeting the management and collection charges should be allowed, as allowed by the Assam Agricultural Income Tax Act, 1939, in the absence of any evidence as to the actual charges on this head. (Dar. J) RAJA PRABHAT CHANDRA, In the goods of. 49 C.W.N 695.

-S. 19-H (4)—Application by Collector to Calcutta High Court-Form.

An application to the Calcutta High Court by the Collector under S. 19-H (4) of the Court-Fees Act should be made in its testamentary and intestate jurisdiction, and not in its ordinary original civil jurisdiction (Dat. J.) RAJA PRABHAT CHANDRA In the goods of. 49 C.W.N. 695

S. 19.H (4)-Application under-Duty of Collector to place materials showing need for enquiry. Under S. 19-H (4) of the Court Fees Act, it is not enough for the Collector simply to make an application COURT-FEES ACT (1870), S. 19-I.

showing that an enquiry is needed (i.e.) he should make a case for enquiry upon definite facts. (Das. I.) RAJA PRABHAT CHANDRA, In the goods of. 49 C.W.N. 695.

\_\_\_\_\_S. 19-I—Court-fess not paid—Application if competent.

S. 19-I of the Court Fees Act says that the Court shall not grant probate until the court-fees are paid. It does not say that the Court shall not try an application for probate or letters of administration until the fees are paid or that the payment of the fees is a condition precedent to the making of the application. (Sen, J.) LILIAN SINGH. In the goods of. I.L.R. (1942) 2 Cal. 194-204 I.C. 457=15 R.C. 521=A.I.R. 1943 Cal. 19.

——S. 19-I—Court Fee on probate—When payable—Crucial date. See COURT FEES ACT, Ss. 4 AND 19-I. 23 Pat. 672.

S. 19-I—Court-fee on probate—When payable—Date of filing of application or date of grant—Proper fee paid on application at rate then prevailing—Subsequent increase of fee before grant—Increased fee—If payable on grant, See BOMBAY INCREASE OF COURT FEES ACT (XV of 1943). 46 Bom.L.R. 768.

Where certain shares though they stood in the name of the testator and his wife the legatee were described in the will as belonging to the testator which could be disposed of by him, duty should be paid on the market value of those shares in an application for probate. (Davies.) HALVE Inre. 1944 A.M.L.J. 17.

S. 20—"Process"—Order for sale of property pending suit by person specially appointed—Sale by such person—Poundage—Levy of—If justified—Madras Civil Rules of practice and Circular Order Rr. 197 and 200.

An order issued by the Court for the sale of property in its custody during the pendency of a suit either by the process establishment of the Court or by an officer specially appointed under R. 197 of the Madras Civil Rules of practice and Circular Order is a "process" within the meaning of S. 20 of the Court Fees Act and the sale is therefore chargeable with poundage under R. 200 It is a proceeding in execution within the meaning of the Rules. Any remuneration paid to a person appointed to conduct the sale is exclusive of the poundage which under R. 200, is one of the expenses of the sale and therefore the fixing of the remuneration of the person appointed to hold the sale does not obviate the necesstiy for the levy of poundage. (Byers, J.) BALAGURUMURTHI CHETTIAR v. MAHOMED ISMAIL. I.L.R. (1945) Mad. 816—A.I.R. 1945 Mad. 328—(1945) 1 M. L.J. 320.

——S. 28—Scope—Power of Taxing Officer and of Court—Order for further Court-fee on revised stamp report—Jurisdiction—Decision of Taxing Officer—When final. See COURT-FEES ACT, SS, 5 AND 28, 21 Pat, 720.

COURT-FEES ACT (1870). Sch. I, Art. 1.

S. 35—Madras Government Notification No. 5791, dated 17th May 1943—Applicability—Suit by trustee against person claiming to be trustee—Defendant not admitted by plaintiff to be trustee—Court-fee.

The Notification No. 5791, dated 17–5–1943, issued by the Government of Madras under S. 35 of the Court-Fees Act, is restricted in its application to suits in which the status of the defendant as trustee either at the time of the suit or previously is undisputed. It does not apply to a suit by a person claiming to be a trustee against a person who claims to be a trustee but whose claim to be a trustee is not conceded by the plaintiff. (King and Bell. JJ) R. G. RAJANV. SRINIVASA NAIDU. I.L.R. (1945) Mad. 584=219 I.C. 503=18 R.M. 103=(1944) M.W. N. 702 (1)=57 L.W. 615=A.I.R. 1945 Mad. 102=(1944) 2 M.L.J. 383.

Sch. I, Art. 1—Applicability—Application under 0.21, r. 16 and 0.34, r. 6, C.P. Code—Order recognising assignment and passing personal decree—Appeal from—Court-fee—C. P. Code, S. 2—Decree.

An appeal against an order recognising an assignment of the decree and passing a personal decree under O. 34, r. 6, C. P. Code, in which the appellant attacks the personal decree passed against him, must bear ad valorem court-fee on the amount of the personal decree as regular appeal. An order on an application under O. 34, r. 6, C. P. Code. is a decree. (Happell, I.) Shan-Mugam In re. 58 L.W. 318=1945 'M.W.N. 417=A.I.R. 1945 Mad. 425=(1945) 2 M.L.J. 87.

Sch. I, Art. 1—Applicability—Contract of exchange—Suit for specific performance—Appeal—Court-fee. See Court-Fees Act, S 7,(x) (a) Sch. I, Art. 1 And Sch. II, Art. 17-B. (1944) 1 M.L.J. 187.

Sch. I, Art. 1 and Sch. II, Art. 11—Applicability—Decision under C. P. Code, O. 21, R. 63-H (Pat.)—Appeal—Valuation—C. P. Code, S. 47.

S. 47, C. P. Code, has no application to decisions under R. 63-H of O. 21, C.P. Code. Appeals from such decisions must be valued by the appell ant and Court-fee paidad valorem on the value. Such appeal fall within Art. 1 of Sch. 1 and not within Art. II of Sch. 2 of the Court-Fees Act. (Rowland, J.) SHAMBHU SHARAN UPADHYA v. DWARKADHISH PRASAD SINGH. 22 Pat. 278=209 I.C. 394=16 R.P. 105=1943 P. W.N. 33=10 B.R. 178=A.I.R. 1943 Pat. 280.

Sch. I, Art. 1—Applicability—Equitable and legal set off—Court fees—Decree in excess of amount claimed—Permissibility.

There is no difference between an equitable set off and a legal set-off in the matter of court-fees. In both cases court-fees must be paid ad valorem on the amount claimed. No claim for set-off can be decreed in excess of the amount claimed. Payment of further court-fees after decision is not permissible. (Bose, J.) SADABEO KRISHNARAO V. NATHU BALA. I.L.R. 1944 Nag. 260=209 I.C. 241=16 R.N. 117=1943 N.L.J. 455=A.I.R. 1943 Nag. 314.

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Sch. I, Art. 1—Applicability—Equitable set off—Court-fee.

The expression "set-off" in Sch. I, Art. 1, Court-Fees Act, includes an equitable set-off and court-fee is therefore payable on a claim to an equitable set-off. (Macklin, I.) WILROW V. VIAHADEO GOVIND. 210 I.C. 88=16 R.B. 166=45 Bom.L.R. 516=A.I.R. 1943 Bom. 227.

- Sch. I, Art. 1—Applicability—Ex-minor—Suit against guardian for accounts and recovery amounts misapplied and misappropriated—Court-fee—Valuation. See Court-Fees Act, S. (vv) AND Sch. I, Art. 1. (1945) 2 M.L.J. 60.
- Sch. I, Art. 1—Applicability—Mortgage—Suit for redemption—Decree directing redemption on payment of fixed amount—Appeal dispuing amount fixed—Court-fee. See Court-fffs Act, S. 7 (ix). 47 Bom.L.R. 400.
- ——Sch. I, Art. 1—Applicability—Mortgage uit—Decree—Interest pendente lite and future nterest disallowed—Appeal—Court-fee—Sch. II, 4rt. 17 (vi)—Applicability.

In a suit on a mortgage, there was a decree but endente lite interest and future interest were isallowed. The plaintiffs appealed in respect of he interest pendente lite and future interest aying the Court-fee prescribed by Art. 17 (vi) of the Court-Fees Act, Sch. II.

Held, ad valorem Court-fee was payable on the mount of pendente lite interest disallowed under art. I Sch I of the Court-Fees Act. (Meredith, .) JAGARNATH PRASAD v. BHALA PRASAD. 23 at. 905=219 I.C. 234=18 R.P. 110=11 B.R. 86=1945 P.W.N. 7=A.I.R. 1945 Pat. 145.

——Sch. I, Art. 1—Applicability—Real nature frelief—Test—Suit not only to set aside award ut the agreement to refer as well.

In order to find out the real nature of the relief laimed by the plaintiff one has to look at the llegations in the plaint. Hence where from such llegations it is clear that the relief claimed is ot only for setting aside the award but also or the cancellation of the agreement on the basis f which the award was made as well the plainfield is liable to pay ad valorem court-fee. (Colster and Bajpai, JJ.) HABIBUL NISSA v. NAYAUT NISSA. 1942 A.L.W. 223.

- ——Sch. I, Art. 1—Applicability—Set off-ounter-claim Conditions necessary—Suit to estrain company selling shares for alleged debt. Written statement pleading right to exercise its ower of sale—If should be stamped. UBAPE v. UN PRES LTD. [see Q.D. 1936-40 Vol. I, Col. 325.] 191 I.C. 644—13 R.R. 145.
- —Sch. I, Art. 1—Applicability—Suit for count—Decree for specific sum of money gainst plaintiff—Appeal by latter—Court-fee ayable. See Court-Fees Act, S. 7 (IV) (f) AND CH. I, ART. 1. 43 Bom.L.R. 475.
- ——Sch. I, Art. 1 and Sch. II, Art. 17-B (as mended in Madras)—Applicability—Suit for toney claiming first charge on certain assets—lecree for money only without charge—Appeal laiming charge on assets—Court-fee payable.

COURT-FEES ACT (1870) Sch. I, Art. 1.

The word "estimate" in Art. 17-B of Sch. II of the Court-Fees Act (as amended in Madras) involves the idea of approximation and cannot be interpreted as meaning accurate valuation. Where in a suit to recover a sum of Rs. 18,897 and odd from the defendant as a first charge from and out of certain properties as trust money, the plaintiff gets only a decree but no charge, and the plaintiff appeals against the decree declining to give a first charge and seeks to get a charge on the properties which are valued in the memorandum of appeal at Rs. 9,500, it cannot be said that the relief is incapable of valuation so as to attract Art. 17-B of Sch. II of the Court-Fees Act. The Court-fee payable on the memorandum of appeal is the amount which would be payable under Art. 1, Sch. I on the sum of Rs. 9,500 which is the value placed by the plaintiff on the property over which the charge is claimed. (Venkataramana Rao, J.) VINAITHEERTHAL ACHI, In re. 201 I.C. 86=15 R.M. 206=1941 M.W.N. 970=54 L.W. 526=A.I.R. 1942 Mad. 152=(1941) 2 M.L.J. 774.

——Sch. I, Art. 1 and Sch. II. Art. 17-B (as amended in Madras)—Applicability—Suit on promissory note—Decree against defendant personally—Appeal alleging that defendant is not personally liable but only as trustee—Court-fee payable. Balavenkatarama Chettiar v. Maruthamuthu Chettiar [see Q.D. 1936-40 Vol. I, Col. 3325.] 195 I.C. 298=14 R.M. 171=1941 M.W.N. 169=A.I.R. 1941 Mad. 313=(1940) 2 M.L.J. 946.

Sch. I, Art. 1—Basis of valuation. See COURT-FEES ACT, S.7 (IV) (C) AND Sch. I, ART. 1. A.I.R. 1944 Pat. 17 (F.B.)

——Sch. I, Arts. 1, 11 and 17 (U. P.)—Claim under Encumbered Estates Act—Decree by Special Judge—Appeal—Court-fee payable—Provision of law applicable.

Where on a claim on the basis of a mortgage a decree is passed by the Special Judge under the Encumbered Estates Act and an appeal is filed whether by the landlord or creditor the case falls under Art. 1, Sch. I of the Court-fees Act and ad valorem court-fee is payable on the amount claimed in appeal. It cannot come under Art. 11 or 17. (Ghulam Hasan, J.) CHIEF INSPECTOR OF STAMPS v. GANGA BUX SINGH. 1945 O.A. (C.C.) 255=1945 A.W.R. (C.C.) 255=1945 O.W.N. 403=1945 A.L.W. (C.C.) 368.

—— Sch. I, Art. 1—Court-fee in appeal by defendant—Fixing of valuation—Principle.

When a dispute is at the stage of an appeal by a defendant who seeks to set aside the whole decree, then the value of the subject-matter in dispute must necessarily be the value of the relief granted by the decree which the appellant wishes to disembarrass himself of. In such a case one has to ask oneself the question 'what is the value to the appellant of immunity from the decree.' Upon the answer, depends the value at which the appeal ought to be assessed. It is not open to the appellant defendant to avoid assessing his appeal at its full valuation merely because it may prove, as a result of the appeal itself, that the plaintiff's valuation was excessive. (Braund, J.) Balma

COURT-FEES ACT (1870). Sch. I, Art. 1.

The expression "set-off" in Sch. I, Art. 1, Court-Fees Act, includes an equitable set-off and court-fee is therefore payable on a claim to an equitable set-off. (Macklin, J.) WILROW v. MAHADEO GOVIND. 210 I.C. 88=16 R.B. 166=45 Bom.L.R. 516=A.I.R. 1943 Bom. 227.

Sch. I, Art. 1—Applicability—Ex-minor—Suit against guardian for accounts and recovery of amounts misapplied and misappropriated—Court-fee—Valuation. See Court-Fees Act, S. 7 (W) AND Sch. I, Art. 1. (1945) 2 M.L.J. 460.

Sch. I, Art. 1—Applicability—Mortgage—Suit for redemption—Decree directing redemption on payment of fixed amount—Appeal disputing amount fixed—Court-fee. See Court-fffs Act, S. 7 (ix). 47 Bom.L.R. 400.

——Sch. I, Art. 1—Applicability—Mortgage suit—Decree—Interest pendente lite and future interest disallowed—Appeal—Court-fee—Sch. II, Art. 17 (vi)—Applicability.

In a suit on a mortgage, there was a decree but pendente lite interest and future interest were disallowed. The plaintiffs appealed in respect of the interest pendente lite and future interest paying the Court-fee prescribed by Art. 17 (vi) of the Court-Fees Act, Sch. II.

Held, ad valorem Court-fee was payable on the amount of pendente lite interest disallowed under Art. 1 Sch I of the Court-Fees Act. (Meredith, I.) JACARNATH PRASAD v. BHALA PRASAD. 23 Pat. 905=219 I.C. 234=18 R.P. 110=11 B.R. 386=1945 P.W.N. 7=A.I.R. 1945 Pat. 145.

——Sch. I, Art. 1—Applicability—Real nature of relief—Test—Suit not only to set aside award but the agreement to refer as well.

In order to find out the real nature of the relief claimed by the plaintiff one has to look at the allegations in the plaint. Hence where from such allegations it is clear that the relief claimed is not only for setting aside the award but also for the cancellation of the agreement on the basis of which the award was made as well the plaintiff is liable to pay ad valorem court-fee. (Collister and Bajpai, JJ.) HABIBUL NISSA v. NAYABUT NISSA. 1942 A.L.W. 223.

—Sch. I, Art. 1—Applicability—Set off—Counter-claim — Conditions necessary—Suit to restrain company selling shares for alleged debt—Written statement pleading right to exercise its power of sale—If should be stamped. UBAPEv. Sun Press Ltd. [see Q.D. 1936-'40 Vol. I, Col. 3325.] 191 I.C. 644=13 R.R. 145.

——Sch. I, Art. 1—Applicability—Suit for account—Decree for specific sum of money against plaintiff—Appeal by latter—Court-fee payable. See Court-Fees Act, S.7 (IV) (f) AND Sch. I, Art. 1. 43 Bom.L.R. 475.

Sch. I, Art. 1 and Sch. II, Art. 17-B (as amended in Madras)—Applicability—Suit for money claiming first charge on certain assets—Decree for money only without charge—Appeal claiming charge on assets—Court-fee payable.

COURT-FRES ACT (1870) Sch. I, Art. 1.

The word "estimate" in Art. 17-B of Sch. II of the Court-Fees Act (as amended in Madras) involves the idea of approximation and cannot be interpreted as meaning accurate valuation. Where in a suit to recover a sum of Rs. 18.897 and odd from the defendant as a first charge from and out of certain properties as trust money, the plaintiff gets only a decree but no charge, and the plaintiff appeals against the decree declining to give a first charge and seeks to get a charge on the properties which are valued in the memorardum of appeal at Rs. 9,500, it cannot be said that the relief is incapable of valuation so as to attract Art. 17-B of Sch. II of the Court-Fees Act. The Court-fee payable on the memorandum of appeal is the amount which would be payable under Art. 1, Sch. I on the sum of Rs. 9,500 which is the value placed by the plaintiff on the property over which the charge is claimed. (Venkataramana Rao, I.) VINAITHEERTHAL ACHI, In re. 201 I. C. 86=15 R.M. 206=1941 M.W.N. 970=54 L.W. 526=A.I.R. 1942 Mad. 152=(1941) 2 M.L.J. 774.

—Sch. I, Art. 1 and Sch. II. Art. 17-B (as amended in Madras)—Applicability—Suit on promissory note—Decree against defendant personally—Appeal alleging that defendant is not personally liable but only as trustee—Court-fee payable. Balavenkatarama Chettiar v. Maruthamuthu Chettiar [see Q.D. 1936-40 Vol. I, Col. 3325.] 195 I.C. 298=14 R.M. 171=1941 M.W.N. 169=A.I.R. 1941 Mad. 313=(1940) 2 M.L. J. 946.

Sch. I, Art. 1—Basis of valuation. See COURT-FEES ACT, S.7 (IV (C) AND SCH. I, ART. 1. A.I.R. 1944 Pat. 17 (F.B.)

——Sch. I, Arts. 1, 11 and 17 (U. P.)—Claim under Encumbered Estates Act—Decree by Special Judge—Appeal—Court-fee payable—Provision of law applicable.

Where on a claim on the basis of a mortgage a decree is passed by the Special Judge under the Encumbered Estates Act and an appeal is filed whether by the landlord or creditor the case falls under Art. 1, Sch. I of the Court-fees Act and ad valorem court-fee is payable on the amount claimed in appeal. It cannot come under Art. 11 or 17. (Ghulam Hasan, J.) CHIEF INSPECTOR OF STAMPS V. GANGA BUX SINGH. 1945 O.A. (C.C.) 255=1945 A.W.R. (C.C.) 255=1945 O.W.N. 403=1945 A.L.W. (C.C.) 368.

— Sch. I, Art. 1—Court-fee in appeal by defendant—Fixing of valuation—Principle.

When a dispute is at the stage of an appeal by a defendant who seeks to set aside the whole decree, then the value of the subject-matter in dispute must necessarily be the value of the relief granted by the decree which the appellant wishes to disembarrass himself of. In such a case one has to ask oneself the question what is the value to the appellant of immunity from the decree. Upon the answer, depends the value at which the appeal ought to be assessed. It is not open to the appellant defendant to avoid assessing his appeal at its full valuation merely because it may prove, as a result of the appeal itself, that the plaintiff's valuation was excessive. (Braund, J.) Balma

COURT-FEES ACT (1870), Sch. I, Art. 1.

KUND GUPTA 2. SECRETARY OF STATE. 195 I C. 448=14 R.A. 35=1941 A L.J 381=1941 A.L.W. 804=1941 A.W.R. (H.C.) 185=1941 O.A. (Supp) 391=A.I.R. 1941 All 295.

——Sch. I, Art. 1 and U. P. Encumbered Estates Act. (1934), S. 14 (5) Expl—Decree amount increased by amendment—Appeal against order of amendment—Court-fee payable.

Where the amount decreed was subsequently increased by an amendment in virtue of S. 14 (5), Expln. of the U. P. Encumbered Estates Act and an appeal is preferred against the order of amendment, it is in substance on appeal really directed against the amended decree passed by the learned special Judge, though the memorandum of appeal merely purported to appeal against the order amending the decree and the case therefore falls under Art. I, Sch. I and advalorem court-fee is payable. (Ghulam Hasan and Agarwal. IJ.) Abdul Aziz v. Nawab Khan. 16 Luck. 653=193 I.C. 354=13 R.O. 452=1941 O.L.R. 277=1941 A.L.W. 269=1941 R.D. 464=1941 O.W.N. 355=1941 O.A 275=1941 A.W.R. (Rev.) 217=A.I.R. 1941 Oudh 269.

——Sch. I, Art. 1—Mortgage decree—Some of mortgaged properties purchased in execution by mortgagee in part satisfaction—Mortgagee assigning properties purchased and also balance of decretal dues to third person—Decree thereafter re-opened and new decree passed under Bengal Money-Lenders Act, directing restoration of properties to mortgagor—Appeal by assignee challenging validity of decree, instalments and order for restoration, but not amount of decree—Court-fee payable.

Defendant No. 1 obtained a mortgage decree against the plaintiff, and in execution of the decree he sold some of the mortgaged properties and purchased them in part satisfaction of the decree. Defendant No. 1 then sold to Defendant No. 2 the purchased property as well as the balance of decretal dues; thereafter the plaintiff instituted a suit for re-opening original decree and getting relief in accordance with S. 36 of the Bengal Money Lenders Act, and this suit was decreed and a new decree was passed for a certain amount payable in instalments and direction was given in the decree for the restoration of possession of the auction-purchased properties to the plaintiff. Against this new decree, the Defendant No. 2 preferred an appeal questioning the validity of the decree, the direction for the restoration of possession and the number of instalments granted. He did not challenge in the appeal the correctness of the amount of the decree.

Held, that he must pay on the memorandum of appeal ad valorem Court fee under Art. I, Sch. I of the Court Fees Act, on the value of the properties (i.e.) on the amount for which they were sold at auction. (Akram. J.) HRISHIKESH MUKHREJEE v. JAGADISH CHANDRA. 49 C.W.N. 385=A.I.R. 1945 Cal. 354.

Sch. I, Art. 1—Order dismissing application under O. 34, R. 6, C. P. Code—Appeal— Court-fee.

COURT-FEES ACT (1870), Sc.

An application under O. 34, definitely in the nature of a cla from the person or other prop gagor of the balance, left or ceeds of the sale of the pr appropriated. The refusal to from the person and other progagor amounts to a final a matter in controversy betwee therefore amounts to a decree (2), C. P. Code. It follows the such an adjudication must be a Court-fee under Art. 1 of Sch Fees Act. (Mir Ahmad aud Sain v. Soyan Chand. 195 Pesh. 14—A.I.R. 1941 Pesh. 5

Preliminary mortgage decree and interest on part of principulation of the suit till date fixed for red claiming in appeal interest on a from date of suit till real payable.

Where by a preliminary decrease the plaintiff was awarded a account of principal, and interferom the date of the suit till the redemption and in the appeal the interest on the whole amount during the institution of the suit realization.

Held, that that period was d parts; (1) the period from the c tion of the suit up to the date of (2) the period from the date of the date of realization. As f period was concerned, the amou plaintiff was unascertainable. I pay a court-fee of Rs. 10 under Sch. II of Court-Fees Act in second period. As far as the t concerned Court-fees must be under Art. I of Sch. 1 of the Co the difference between the total in appeal and the total amoun plaintiff by the trial Court in period, both amounts being (Abdul Rashid, Blacker and Ma DIN v. KULTILAK RAM, I L.R. 211 I.C. 53=16 R.L. 174=45 I R. 1943 Lah, 275 (F.B.).

decree directing defendant to p interest from date of suit to demption—Appeal by defendate payable.

Where by a preliminary mortal defendant is directed to pay the interest from the date of the suredemption fixed by the Court, a defendant seeks the dismissal as uit in its entirety, he is bound Sch. I of the Court-Fees Act to Court-fee on the principal and thereon from the date of the in suit till the date fixed for rede Rashid, Blacker and Marten, JJ.

COURT-FEES ACT (1870), Sch. I, Art. 1 & Sch. I COURT-FEES ACT (1870). Sch. I, Art. 12. Art. 17 (iii).

Kultilak Ram. I.L.R. (1944) Lah. 24=211 I.C. 53=16 R.L. 174=45 P.L.R. 382=A.I.R. 1943 Lah. 275 (F.B.)

-Sch. I, Art. 1 and Sch. II. Art 17 (iii)-Suit on mortgage by one of two mortgages-Widow of the other added as defendant praying for declaration of right to half the money-Joint decree and declaration-Appeal against declaration-Court-fee payable.

Where in a suit on a mortgage by one of the two mortgagees the widow of the other impleaded as a defendant prays for a declaration that the mortgagees were not members of a joint Hindu family and that as they both had contributed to the mortgage money she is entitled to one half of anything found due and the Court grants the declaration and passes a decree in favour of both the plaintiff and the widow and the plaintiff appeals against the declaration alone he has to pay ad valorem court-fee on the valuation of the suit under Art. 1, Sch I of the Court-fees Act and not the fixed fee as given under Art. 17 (iii) of Sch. II of the Act. The question in such an appeal is whether the decree is to remain a joint deeree or whether it should become a decree solely in favour of the plaintiff. It cannot be said that it is merely a question of the manner in which the decree is to be executed. (Madeley, I.)
SADHNU v. MST. YASODA. 211 I.C. 456=16 R.O.
234=1943 O.A. (C.C.) 145=1943 A.W.R. (C.C.) 57=A.I R. 1943 Oudh 361.

Sch. I. Art. 1 and Sch. II, Art. 17 (iii) - Suit to declare decree void and illegal—If involves consequential relief-Court-fee pavable. BIREN-DRA KUMAR v. BANSA DEVI. | see O.D. 1936-'40 Vol. I. Col. 3326.] 16 Luck 526=191 I.C. 413= 13 R O. 225.

—— (as amended in Madras) Sch I, Art. 4— Applicability—Pauper appeal—Order dispaupering—Dismissal of appeal for failure to pay court fee and security for costs within time fixed— Application for review—Court-fee payable. See Court Fees Act (as Amended in Madras), Sch. II, Art. 1. (1941) 2 M.L.J. 500 (F.B.).

-Sch. I. Art. 5 and S. 14—Review—90 day's time-How to be calculated-Calculation of time according to Limitation Act, if permissible— Power to refund.

When considering the obligation of an applicant for a review to pay Court-fee according to Art 5 of Sch. 1 of the Court Fees Act, an obligation that depends to some extent on the time at which the application is made, the calculation of the 90 days' time is not to be according to rules applicable to times laid down in the Limitation Act but the 90 days mentioned in the court-fees Act is to be taken as simply 90 days. Holidays and time taken for obtaining copies could not be excluded. But in cases of hardship where delay is not due to laches on the part of the applicant the Court has a discretio undr S. 14, Court-fees Act to give a certificate directing the refund of the excess fee in proper cases. (Stone, C.J. and Rose J) GANPATRAO v. RAMA GANPATI. I.L. R. (1941) Nag. 392=196 I C. 556=14 R.N. 112 =1941 N.L.J. 205=A.I.R. 1941 Nag. 236.

Sch. I Art. 5—'Plaint or memorandum of appeal meaning—Court-fee payable on applica.

tion to review judgment of Oudh Chief Court in second appeal.

The words 'plaint or memorandum of appeal' in Art. 5 of Sch. I of the Court Fees Act do not mean plaint or memorandum of appeal asking for the same relief as that asked for ir the application for review, but they mean the plaint or memorandum of appeal in which the judgment, review of which is sought was passed. Hence where a review of the judgment of the Oudh Chief Court in second appeal is sought the courtfee pavable is according to Art. 5 of Sch. I of the Court-Fees Act, half of the fee which was paid in the memorardum of the second appeal in question and not half of the fee pavable on the valuation (Thomas, C.J. and Ghulam Hasan, I.) RAM ASREY C. RAMESHWAR PRASAD. 204 I.C. 486 =15 R.O. 361=1943 O.W.N. 14=1943 O.A. (C.C.) 1=1944 A.W.R. (C.C.) 1=A.I.R. 1943 Oudh. 225.

-Sch. I. Arts. 6 to 9—Copies not stamped--Acceptance by Deputy Registrar-Effect-Subesquent objection-Time to furnish stamps.

The acceptance of the copies without the stamps required by Arts. 6 to 9 of Sch. I, of the Court-Fees Act by the Denuty Registrar whose duty it is to see that all documents presented in the High Court are duly stamped, is an implied decision that the copies are in order and when an objection is raised that it is not in order time must be given to furnish the necessary stamps. (Roberts, C. J. and Dunkley, J.) U CHIT HLAING T. U LUN. 195 I.C. 892=14 R.R. 107=A.I.R. 1941 Rang. 294.

Sch. I. Art. 7 and C. P. Code, S. 149-Insufficient stamp on decree-Procedure to be followed.

Where a copy of the decree bears an insufficient stamp, it is only a minor error and should not be allowed to prejudice an appellant's inter-The appellate Court should immediately after the appeal is filed, point out the deficiency and direct the appellant to affix the proper stamp. S. 149. C. P. Code, permits the District Court to make suitable order in this respects. to make suitable order in this respects, (Davies) Mangilal v. Mool Chand, 1940 A. M.L.J. 91.

——Sch, I. Art. 11—Applicability—"property"
—Membership of Bombay Native Share and
Stock Brokers' Association—Right of—If property liable to probate duty. See Bombay.
NATIVE SHARE AND STOCK BROKERS' ASSOCIATION RULES (1939), Rr. 36 (h) AND 38. 43 Bom. L.R.

-(as amended in C. P.), Sch. I. Art. 12-Applicability—Aggregate of debts due exceeding Rs. 1,000—Individual items below Rs. 1,000— Court-fee, if payable—'Any' meaning of. Pre-MALABAT v. PRIYARUMARI. [see Q. D. 1936—'40 Vol. I, Col. 2423.] 191 I.C. 731=13 R.N. 207.

- (as amended by Bibar and Crissa Act.) Sch. 1, Art, 12-Court-fee-Assessment of.

Under the Bihar and Orissa Amendment of Art-12 of Sch. I Court-Fees Act, court-fee is payable COURT-FEES ACT (1870), Sch. I, Art. 14.

on each individual security and not on the total. (Meredith. J.) DEBIRANI DEBI. In the matter of 24 Pat. 100=1945 P.W.N. 347=A.I.R. (1945) Pat. 318.

——Sch. I, Art. 14—Meanino—Court fee payable in revision in suit under S.9, Specific Relief Act.

What Art 14, Sch. I of the Court-fees Act really means is that on an application for revision the same amount of Court fee is payable as has been paid on the plaint in a case where the subject matter in dispute is the same both in the suit and in revision. Therefore on an application for revision arising out of a suit instituted under S. 9, Specific Relief Act, the Court-fee payable is the same as has been paid on the plaint. (Ba U. J.) U Kyaw Zan v. U Tun Hla U. 1941 Rang L.R. 54=194 I.C. 70=13 R.R. 273=A.I.R. 1941 Rang, 126.

——Sch. II, Arts. 1 and 18—Applicability— Application under S. 33 Arbitration Act, to set aside award—Court-fee payable.

An application under S. 33 of the Arbitration Act praying that an award should be set aside is liable to a court-fee of annas twelve under Art. 1 of Sch, II of the Court-fees Act. A fiscal enactment such as the Court fees Act must be strictly construed and where there is any doubt the benefit of it should be given to the tax payer. (Bell, J.) VENKATASUBBARAO v. BHUJANGAYYA. 1945 M.W.N. 764=58 L.W. 631=(1945) 2 M. L.J. 536.

——Sch. II. Art. 1, (as amended in Madras)
—Applicability—Pauper appeal—Order for payment of Court-fee and security for costs—Failure to pay in time—Dismissal of appeal—Application for review—Court-fee payable.

A dispaupered appellant was ordered to pay Court-fee on his memorandum of appeal and security for costs of the respondent. On his default in paying them, his appeal was dismissed. An application for review of the order of dismissal was presented with a Court-fee stamp of Rs. 2, but the Taxing Officer held that the application should bear ad valorem stamp under Art. 4, Sch. I of the Court-Fees Act, as on a memorandum of appeal.

Held, that an order under O. 41, R. 10 (2) C. P. Code, rejecting an appeal for failure to furnish security within the time ordered by the Court was not a decree; nor was an order, rejecting an appeal for failure to pay court-fee within the time prescribed, a decree, as it was only an order of dismissal for default within the meaning of of S. 2 (2) C. P. Code. Hence the proper Courtfee on the application for review is Rs. 2 under Art. 1, Sch. II, C.P. Code. (Leach C.J. Venkataramana Rao and Horwill, JJ.) KAYAMBU PILLAI, In re. I.L.R. (1941) Mad. 954=14 R.M. 321=196 I.C. 894=54 L.W. 349=1941 M.W.N. 835=A.I.R. 1941 Mad. 836=(1941) 2 M.L.J. 500 (F.B.).

Sch. II, Art. (d)(i) (Madras Amendment)

-Order directing a decree-holder to refund a Encisum of Rs. 987-3-11 received by him in rateable distribution—Suit in which sale proceeds realised 109,

COURT-FEES ACT (1870), Sch. II, Art. 11.

valued at more than Rs. 1,000—Revision petition
—Proper Court-fee.

The proper stamp duty leviable on a memorandum of civil revision petition presented to the High Court against an order directing a decree-holder to refund a sum of Rs. 987.3.11 received by him in rateable distribution will be Rs. 10 and not Rs. 5 where the value of the suit or the main proceeding were in the order was made is above the value of Rs. 1,000. (Venkataramana Rao, I.) RAMANATHAN CHETTIAR, In re. 201 I.C. 753=15 R.M. 400=55 L.W. 323=1942 M.N. 66=A.I.R. 1942 Mad. 390=(1942) 1 M.L.J. 111.

——Sch. II. Arts. 5 and 17 (iii)—Suit to declare plaintiff statutory tenant on a certain rental—Article applicable.

Where a plaintiff prayed that a declaration may be given that he is a statutory tenant on behalf of the defendant No. 1 on a rental of Rs. 2, it cannot be a suit to establish a right of occupancy to fall under Art 5 and so it must fall under Art. 17 (iii) of the Court-Fees Act. (Harper, S. M.) BHIM SEN v. MADHO SINGH. 1941 R.D. 24=1941 A.W.R. (Rev.) 29=1941 O.A. (Supp.) 18.

Sch. II. Art. 11 and C. P. Code, S. 95— Appeal against order under S. 95, C. P. Code— Court-fee payable.

An order under S. 95, C. P. Code, is not a decree and so it cannot be an order having the force of a decree and so the fixed Court-fee under Art. 11 of Sch. II is the proper Court-fee payable on such appeal. (Davies.) RAMESHWAR LAL v. SWAROOP NARAIN. 1940 A.M.L.J. 70.

against decision under S. 14. U. P. Encumbered Estates Act. RAMESHWAR BAKHSH SINGH v. GOVIND PRASAD. [see Q. D. 1936—'40 Vol. I, Col. 3326.] 16 Luck. 153—A.I.R. 1941 Oudh 60.

——Sch. II, Art. 11—Applicability—Appeal under R. 9, Madras Agriculturists' Relief Act—Court-fee payable.

In the case of an appeal filed under R. 9 of the rules framed under the Madras Act IV of 1938. Court-fee is payable under Art. 11 of Sch. II of the Court-Fees Act, which is the proper Article to apply. (Wadsworth and Patanjali Sastri, Jl.) VENKATARATNAM, In re. ILR. (1941) Mad. 935=198 I.C. 322=14 R.M. 427=1941 M. W. N. 564=53 L.W. 637=A.I.R. 1941 Mad 639 = (1941) 1 M.L. J. 721

——Sch. II, Art 11—Applicability—Decision under C.P. Code, O. 21, R. 63-H (Pat.)—Appeal—Court-fee. See Court Fees Act, Sch. I, Art. I, AND Sch, II, Art. 11. 22 Pat. 278.

——Sch. II, Art. 11—Applicability—Defence of India Act. S. 19 (1) (b)—Award under—Appeal—Court-fee. See Court-Fees Act, S. 8 and Sch. II, Art. 11, 47 Bom.L.R. 327.

Sch. II, Art. 11—Applicability—Order of Special Judge under Encumbered Estates Act rejecting written statement of creditor. See U.P. ENCUMBERED ESTATES ACT, Ss. 9 AND 13 AND 100.

COURT-FEES ACT (1870), Sch. II, Art. 11.

Sch. II, Art. 11—Order having force of decree — Order enforceable under S. 199, Companies Act.

There is a distinction, both real and practical, between an order that has by statute the force of a decree and an order that may by statute be enforced in the same manner as a decree. An order made by court under the companies Act, which by virtue of S. 199 of that Act may be enforced in the same manner as a decree, is not an order having the force of a decree within the meaning of Sch. II, Art II of the Court-Fees Act. (Sale, Marten and Khosla, JJ.) Official Liquidator Universal Bank Ltd., v. Quresht. 221 I.C. 114-1945 Comp.C. 60-A.I.R. 1945 Lah. 146 (F.B.).

—Sch. II, Art. 17—Order under S. 38, Bengal Money Lenders' Act—Appeal—Court-fee payable.

An order made in a proceeding under S. 38 of the Bengal Money Lenders' Act which has the force of a decree for the purpose of an appeal, is a declaratory decree pure and simple where no consequential relief is prayed for. Consequently the court-fee payable on a memorandum of appeal from such an order is Rs. 20, under Art. 17, Sch. If of the Court-Fees Act. (Mukherjea and Blank, JJ.) BANK OF COMMERCE LTD. v. BANKIM CHANDRA GUPTA. 48 C.W.N. 680.

Sch. II, Art. 17—Suit under O. 21, R. 63, C.P. Code—Court-fees.

The Court-fee payable in a suit under O. 21, R. 63, C. P. Code, is that prescribed by Art. 17 of Sch. II of the Court-Fees Act. (Sen, J.) SONARAM DUTTA v. SITARAM CHAMARIA. 192 I. C 679=13 R.C. 332=72 C.L. J. 526=45 C.W.N. 50=A.I.R. 1941 Cal. 28.

Sch. II, Art. 17 (i) (as amended in Bihar and Orissa)—Applicability—Suit by defeated claimant under 0.21, R. 03, C. P. Code—Frayer for declaration of title and for injunction against defendant to restrain delivery of possession or any illegal act by defendant—Court-fee payable.

A suit by a defeated claimant under O. 21, R. 63, C. P. Code, for a declaration of his title to the property in suit, and for a permanent injunction on the defendant so that no delivery of possession of the property in suit may take place, and to prevent the defendant from taking any illegal action whatsoever to the detriment of the plaintiff is governed for purposes of court-fee by Sch. II, Art. 17 (1) of the Court-Fees Act as amended in Bihar and Orissa and the court-fee payable is that prescribed by that article and not ad valorem court-fee. (Harries, C. J. and Manohar Lall, J.) UDAI CHAND LAL v. PANNALAL CHAMPA LAL. 7 B.R. 640=193 I.C. 782=13 R.P. 646=21P.L.T. 1019=A.I.R. 1941 Pat. 174.

——Sch. II, Art. 17 (i) (as amended in U.P.)
—Scope—Suit by defeated claimant under O. 21.
R. 63—Prayer for injunction to restrain delivery
of possession—Delivery already effected—
Liability for levy of ad valorem Court-fee. Udat
CHAND LAL v. PANNALAL CHAMPA LAL. [see
Q. D. 1936—'40 Vol. I, Col. 3326.] 13 R.P. 646—
A.I.R. 1941 Pat. 174.

COURT-FEES ACT (1870), Sch. II, Art. 17 (iii)

—Sch. II, Art. 17 (iii)—Applicability—Suit by landlord—Prayer for declaration that order of Revenue Officer fixing reduced rent roll is wrong, illegal and not binding and for enhancement of reduced rent to old rates—Court fee payable. See Court-Fees Act, S. 7 (iv) (c) AND SCH. II, ART. 17 (iii). 22 Pat.L.T. 453.

——Sch. II, Art. 17 (iii)—Applicability—Suit for declaration that property is not wakf and not liable to registration as such—Valuation. See COURT-FEES ACT, S. 7 (IV) (C) AND SCH. II, ART. 17 (iii). 47 Bom.L.R. 859.

——Sch. II, Art. 17 (iii)—Applicability—Suit for declaration that alienation by Hindu widow is not binding on reversionary interest—Court-fee—If involves two declarations—If one for declaration and consequential relief. See Court-Fees Act, S. 7 (IV) (c) And Sch. II, Art. 17 (iii) 23 Pat. 749—(1945) P.W.N. 199.

—Sch. II, Art. 17 (iii)—Applicability—Suit cast in form of declaratory relief—Suit in substance aiming at setting aside deed formally executed and registered. See Court-Fees Act. S. 7 (iv) (c) AND SCH. II, ART. 17 (iii). A.I.R. 1944 Pat. 17 (F.B.).

——Sch. II, Art. 17 (iii)—Applicability—Suit for declaration that plaintiff is mortgagee of land in dispute.

Where the plaintiff who was directed by the Revenue Court to go to a Civil Court for establishing his title, sues for a declaration that he is the mortgagee of the land in suit, and does not pray for any consequential relief, the suit is one for pure declaration, and is governed by Art. 17 (ii) of Sch. II, and not by Art. 1 of Sch. I, of the Court-Fees Act. (Almond, J.C. and Mir Almad, J.) ABBULLAH JAN v. NURHUSSAIN. 202 I.C. 450=15 R.Pesh. 42=A.I.R. 1942 Pesh. 62.

Sch. II, Art. 17 (iii)—Applicability—Suit to declare plaintiff's interest not affected by gift in favour of defendant—Nature of—Ad valorem Court-fee paid by mistake in suit and appeal—Same fee if should be paid in second appeal also.

Where the plaintiff asks for a declaration that his right, title or interest in the lands in suit is not affected by a deed of gift in favour of the defendant and to which he was not a party, the suit is one for a declaration without consequential relief and falls under Art. 17 (iii), Sch. II, Court-Fees Act. Because the plaintiff by mistake overpaid the Court-fees both in the Court of first instance and in the lower appellate Court (i.e.,) paid ad valorem Court-fees, it does not follow that he should be called upon to pay the same fees in second appeal. (Ba U. J.) MA WA NU W. M. THAN. 1941 Rang. L.R. 387—A.I.R. 1941 Rang. 269—197 I.C. 220—14 R.R. 114.

——Sch. II, Art. 17 (iii)—Declaration that defendant is benamidar—Court-fee.

The Court-fees payable by the plaintiff in a suit for declaration that the defendant is a mere benamidar and has no right, title and interest in the property in suit, will vary according as the suit is for a mere declaration of title or declaration of title coupled with consequential relief.

COURT-FEES ACT (1870). Sch. II, Art. 17 (iti). COURT-FEES ACT (1870), Sch. II, Art. 17 (vi).

Whether it is incumbent for the plaintiff to ask for consequential relief must depend upon the circumstances of each case. But it he does sue for a mere deciaration it is not in the province of the Courts in assessing court-fees payable to see whether the suit is properly framed or not. (Tek Chand and Sale, JJ.) Sushila Devi v. Ram Kishan Das. 205 I.C. 145=15 R.L. 277=45 P. L.R. 22=A.I.R. 1943 Lah. 39.

-Sch. II, Art. 17 (iii)-Declaratory decree -When could be passed—Relief of possession not implied in-Court fee for possession, if necessary.

The law allows a plaintiff if he is in possession of property or if the detendant is not in possession to get a declaratory decree. If he is out of possession he will not be entitled to take possession under that decree. Where the relief of possession is not implied in the declaratory decree Court-fee for possession need not be paid. (Agarwal and Madeley, J.) BHABOUTI SINGH v. CHANDRAPAL SINGH. 196 I.C. 593=14 R.O. 195 =1941 O.L.R. 719=17 Luck. 145=1941 O.W.N. 1107=1941 A, W.R. (Rev.) 877=1941 R.D. 857=1941 O.A. 803=A,I.R. 1942 Oudh 58.

-Sch. II, Art. 17 (iii) and S. 7(iv) (c)-Suit for declaration that certain decree is not binding on plaintiff—Plaintiff not party to decree -Court-fee payable.

A suit for a declaration that a decree passed in a suit between the defendants to which the plaintiff was not a party is not binding on him, is a suit for a pure declaration with no consequential relief failing under Sch. 11, Art. 17 (iii) of the Court-Fees Act, and a court-fee of Rs. 10 only is payable. (Tek Chand and Beckett, JJ.) Alam Khan v. Mt. Bhag Bhari. 194 I.C. 613 =14 R.L. 3=43 P.L.R. 126=A.I.R. 1941 Lah. 159.

-Sch. II, Art. 17 (iv)—Applicability—Suit to declare award of Registrar of Co-aperative Societies ultra vires—'Award' what is included in

Where a suit is for a declaration that an award made by the Registrar of Co-operative Societies which directed the plaintiff to pay the opposite party a sum of Rs. 10,244-1-9 is ultra vires, the suit is governed by Art, 17 (iv) of Sch. II, and it is only a fixed Court-fee and not ad valorem Court-fee that is payable. There is no reason to limit the term 'Award' in the article to an award by arbitrators. Any Judicial decision which is not a decree might be considered to be an award for the purposes of Art. 17 (iv) of Sch. II. (Clarke, J.) AISANLAL v. CO-OPERATIVE CENTRAL BANK LTD. I.L.R. (1942) Nag. 636=14 R.N. 299=199 I.C. 765=1941 N.L.J. 254=A.I.R. 1941 Nag. 243.

-(as amended by Bombay Finance Act. II of 1932), Sch. II. Art. 17 (v)—Applicability --Suit to declare decree void and unenforceable and to restrain execution—Court-fee See Court Fees Act, S. 7 (iv) (c) and Sch. II, Art. 17 (v). 47Bom. L.R. 386.

-(as amended in Bombay). Sch. II, Art. 17 (v)—Court-fee in suit under—If ad valorem— Suits Valuation Act, S. 8—Applicability.

The fee prescribed under Art. 17 (v) of Sch. II to the Court-Fees Act, as amended in Bombay must be held to be an ad valorem fee, i, e,, a fee depending on the amount or value of the property involved. Hence S. 8 of the Suits Valuation Act is applicable to such a suit, and the value hand for Court-fee will be the value for purposes of jurisdiction also. (Sen. J.) KISANDAS BANKAT LAL v. RAGHO RAM. I.L.R. (1944) Bom. 352=218 I.C. 54=17 R.B. 176=46 Bom. L.R. 663=A.I.R. 1944 Bom. 316.

-Sch. II, Art. 17 (vi)-Appeal in partition suit-Finding by trial Court that plaintiff was not in possession-Court-jee payable.

Art, 17, Sch. II. Court-Fees Act shows clearly and indubitably that when a suit talls under any one of the clauses of that article, the plaint as well as the memorandum of appeal arising from such a suit, is chargeable with a fixed court-tee of Rs. 10 only, irrespective of whether the subject matter in appeal is or is not capable of being estimated in money value. Therefore, in an appeal arising from a suit for partition of alleged Joint properties, of which the plaintiff claimed to be in actual or constructive possession, a courtiee of Rs. 10 is payable on the memorandum of appeal, even though the trial Court has found the plaintiff not to be in possession of some or all such properties. (Tek Chand, Skemp and Din Mohammad, JJ.) DIWAN CHAND v. DHANI RAM. I.L.R. (1941) Lah. 234=194 I.C. 230=13 R.L. 521=43 P.L.R. 147=A.I.R. 1941 Lah. 123 (F.B.).

Sch. II, Art. 17 (vi)—Applicability, See COURT-FEES ACT, S. 7 (v) AND SCH. II, ART. 17 (vi) 1944 A.W.R. (H.C.) 194.

-Sch. II, Art. 17 (vi)-Mortgage suit-Decree not awarding pendente hie interest and tuture interest-Appeal-Court-fee. See Court-FEES ACT, SCH. I, ART. I. 23 Pat. 905.

-Sch. II. Art. 17 (vi) and S. 7 Cl. (iv) (b) -Partition suit-Allegation as to members andproperty belonging to joint jamily-Complaint as to wrong entries in regard to some of the properties-Court-jee payable.

The question of the amount of court-fee is primarily to be determind on the allegations in the plaint. Where the allegations are that all parties to the suit and properties involved belong to a joint family and partition of the properties is sought by the plaintiff, the case falls under Sch. 11. Art 17 (vi) even though the plaint might contain allegations regarding wrong entries in the records in regard to some of the properties. make a case fall under S, 7, cl. (iv) (b) the allegations must be such as to suggest that the plaintiff is out of possession of joint property and is seeking to establish a claim to a portion of the joint property. (Iqbal Ahmad. C. J. and Dar, J.) RAM NAIN RAI v. RAM DHARI RAI. 1943 A.L.W. 348.

-Sch. II, Art. 17 (vi)-Partition suit-Allegation of joint possession—Court-fee. See Court-Fees Act. S. 7 (iv) (b) AND ART. 17 (vi). I.L.R. (1945) Kar. 84.

COURT-FEES ACT 1870 , Sch. II, Art. 17 'iv).

-Sch. II Art. 17 (vi)—Partition suit—Appeal against rejection of defence of paramount possession in lieu of dower. Munican v. Mukh-TAR BEGAM. [see Q. D. 1936-40 Vol. 1. Col. 3326.] 192 I.C. 600=13 R.A. 346.

-Sch. II, Art. 17 (vi) and S. 7 (iv) (b)— Partition suit by Mahomedan co-sharer-Allega. tion that he is in constructive possession of entire property and in partial actual possession-Court-

In a suit for partition of joint property by a Mahomeda co-sharer who alleges that he is in joint possession of the entire property by reason of the possession of another co-sharer and who is also in partial actual possession of certain portion of the property as indicative of his right to co-ownership in the whole property, the proper Court fee payable is Rs, 10 under Art. 17 (vi) of Sch. II of the Court Fees Act, and the case does not fall within S. 7 (iv) (b) of that Act. A.I.c. 1939 Lah. 508, Overr, (Tek Chand, Abdul Kashiri and Sale, IJ.) MOHAMMAD SOHAIL v. GHULAM I.L.R. (1941) Lah. 308=194 I.C. 125 =13 R.L. 511=43 P.L.R. 238=A.I.R. 1941 Lah. 152 (F.B.).

--Sch. II, Art. 17 (vi)-Partition suit by Hindu co-parcener-Plaintiff claiming to be in joint possession—Court-fee. Act, S. 7 (w) (c). 20 Pat. 780. See Court-Fees

-Sch. II. Art. 17 (vi)—Suit for removal of mutawalli and for appointment of new mutawalli as provided under deed—Prayer for accounts and for recovery of amounts directed to be paid to descendants of wakif annually out of income of estate— Court-fee— Valuation. See Court-Fees Act, S. 7. (ii) AND Sch. II, Art. 17 (vi). I.L.R. (1942) Kar. 424.

-Sch. II, Art. 17 (vi) and S. 7-Suit to reduce decree for maintenance by certain amount -Court fees.

In a suit asking that a decree for maintenance should be reduced by a certain amount, the trial Court held that the suit fell under S. 7 (iv) (c) of the Court Fees Act and directed the plaintiff to pay a court-fee on ten times the amount of the reduction in the maintenance allowance asked for on the analogy of S, 7 (ii) of the Act. On appeal.

Held, that S. 7 (iv) (c) of the Act did not apply as the suit was not for a declaration, that the suit did not fall within any of the other subsection of this section and must consequently be relegated to the subsidiary Art. 17 (vi) of Sch. 11. (Grille, C. J. and Sen J.) NARAYAN v. GITABAT. I.L.R. (1945) Nag. 661=1945 N.L.J. 365=A.I. R. 1945 Nag. 264.

-Sch. II Art. 17(vi) (Bengal)-Suit under S. 92, C. P. Code—Questions for consideration Reliefs not covered by section also asked for-Court-fee payable.

Under the Court Fees Act as it stands in Bengal, a plaint in a suit under S. 92 C. P. Code, is not as such chargeable with a fixed Court fee

COURT-FEES ACT (1870), Sch. II, Art. 17-B.

made and the reliefs claimed in the suit. For the purposes of Court-fees, we are not at all concerned with the question as to what is the true scope of S. 92 and what reliefs may or may not be legitmately asked for in a suit under this section. Nor need we consider whether a suit is or is not maintainable where some of the reliefs claimed are within, and others are without, the scope of S. 92. All these considerations are wholly irrelevant to the question of the proper court-fee payable in a suit under, or which purports to be under, S. 92. Inat must depend upon the allegations and prayers in the plaint, whether they are covered by S. 92 or not or are covered by it only in part. If the plaintiff in a suit claiming reliefs under S. 92 also asks for reliefs not covered by that section, and those reliefs are allowed to stand, the Court cannot for purposes of Court-fees, ignore them as mere incidental or subsidiary reliefs in respect of which it is not required to pass a decree. Where in a suit purporting to be under S. 92, the prayers are for a decree (a) declaring that the property in suit appertains to a wakf (b) vesting the wrkf property in suit in the plaintiff mutwall (c) removing the defendants if any from the wakf property in suit (d) directing the defendants to render accounts of the income of the wakf property that may come to their hands, and (e) appointing plaintiff as permanent mutwalli of the the suit comes within the terms of S. 7(iv) (c) of the Court Fees Act and court-fees are payable accordingly. (Khundkar and Biswas. II.) MIRZA MOMATZALI v. BANEWARI LAL 48 C.W.N. 598.

Sch. II, Art 17 (vii) (as amended in Bombay)-Suit to set aside prior decree in suit for partition and for fresh partition of all properties—Court-fee payable. See Court-Fees Act S. 7 (iv) (c) I.L.R. (1941) Kar. 102.

-Sch. II, Art. 17 (viii)—Declaratory suits -Determination of court-fee - True criterion. See COURT- FEES ACT, SS 7 (iv) (c) AND SCH. II ART. 17 (iii). 43 P.L.R. 106 (F.B.)

Sch. II Art. 17 A (as amended in Madras Suit for declaration filed in District Munsif's Court—Transfer to Subordinate Judge's Court for re-trial—Decree by Sub Court — Appeal—Court-fee payable — Decree—If decree of Munsif's Court. Chidambaram Chttiar. Inre. [See Q. D 1936-'40 Vol, I. Col. 2436.] 193 I.C. 490—13 R.M. 677.

——Sch. II. Art 17 A (1) (as amended in Madras)—Applicability—Decree against temple in suit on promissory note by hereditary trustee -Suit by worshippers to declare not binding on temple as being collusive — Temple and trustee made defendants to suit—Court fee payable. See COURT-FEES ACT (MADRAS), S. 7 (iv) (a). (1941) 1 M.L.J. 414.

-Sch. II Art. 17 B--Applicability—Contract of exchange-Suit for specific performance-Appeal—Court fee. See Court Fees Act, S. 7 (x) (a) Sch. I. Art 1 And Sch. II, Art. 17-B. (1944) 1 M.L.J. 187.

-Sch, II, Art. 17-B (as amended in under Sch. II, Art. 17 (vi). As to whether it can be brought within the purview of that article depends on the nature of the allegations II, Art. 17-B. (1941) 2 M.L.J. 774. COURT-FEES ACT (1870) Sch. II, Art. 17-B.

——Sch. II. Art. 17-B (as amended in Madras),—Applicability—Hindu widow — Suit for partition under Hindu Women's Rights to Property Act—Court-lee. See Court-Fees Act (As AMENDED IN MADRAS), S. 7 (v) AND Sch. 11, ART. 17-B, (1943) 2 M.L.J. 172.

——Sch. II, Art. 17-B (as amended in Madras),—Applicability—Partnership—Suit for dissolution and accounts—Court-fee. See Court-fees ACT S. 7 (iv) (f). (1943) 2 M.L.J. 130

Sch. II. Art. 20 (U.P.) — Applicability— Petition under S. 16, Divorce Act for making decree usi absolute.

Art. 20 of Sch. II of the Court-Fees Act is applicable to a petition under S. 16, Divorce Act for making a decree nisi absolute and is chargeable with a fee of Rs. 37-8-0 and not with Court-fee payable on an ordinary application to the court concerned. (Ghulam Hasan and Madeley JJ.) ZUHRA SURAJ PARSHAD SINGH v. SURAJ PARSHAD SINGH. 1945 A.W.R. (C.C.). 91 (1) = 1945 O. A. (C.C.) 91.(1).

COURT OF WARDS ACTS: See LOCAL ACTS.

COURT SALE—Sale by tender—Order by Court directing Official Receiver of company to sell business by tender—Advertisment calling for tenders—No stipulation that highest tender will be accepted—Highest tender not accepted and fresh tenders called for—Propriety. See COMPANY — WINDING UP. (1943) 1 M.L.J. 123.

CRIMINAL LAW AMENDMENT ACT (XX OF 1938), S. 7 (1)—Jurisduction to try—Report of facts constituting particular offence—Necessity for.

Under S. 7 (1) of the Criminnl Law Amendment Act, before a person can be tried for any offence punishable under that section, there must be a report in writing of facts which constitute such offence. Although a number of offences punishable under S. 7 may be disclosed in the report, no magistrate can take cognizance of any one of those offences unless that particular offence is constituted by the facts set out in the report. (Horwill, J.) SATYANARAYANAMURTHI. In re. 208 I.C. 542=16 E.M. 276=44 Cr. I.J. 796=1943 M. W.N. 225=56 L.W-222=A.I.B. 1943 Mad. 572=(1943) 1 M. L.J. 315.

CRIMINAL LAW AMENDMENT) ORDIN-ANCE (XXIX OF 1943)—Scope—If altra vires.

The Criminal Law (Amendment) Ordinance, 1943, is not ultra vires the Governor General. (Agarwala and Imam, JJ.) HECTOR HUNTLEY v. EMPEROR. 23 Pat. 467=218 I.O. 282=18 R.P. 28=11 B.R. 283=46 Cr.L.J. 438=A.I.R. 1944 Pat. 378.

The words "as may be preferred" in S. 5 of the Criminal Law (Amendment) Ordinance, 1943, do not mean that the initiation of proceedings against the persons mentioned in the First Schedule was a matter which the Governor-General left to be decided in future; they cannot be construed as indicating that the question whether the persons in the First Schedule were to be actually prosecuted had not been determined by the Governor-General at the time the Ordinance was made and promulgated but was left open for future considuration and was to be decided by some undesignated

CR. P. CODE (V OF 1898) Ss. 1 (2) and 162.

authority or persons other than the Governor-General. What the Ordinance contemplates is that proceedings shall be initiated against the persons mentioned in the First Schedule, and if the prosecution evidence establishes a prima facee case against the accused in respect of certain specified offences, he is to be charged accordingly. Nor do the words "as may be preferred" contradict" the declaration in the preamble that an emergency had arisen justifying the use of his ordinance making powers. The Governor-General has himself decided that the persons mentioned in the First Schedule shall be prosecuted, but has, of course, left it to the Tribunal to decide whether the evidence led by the prosecution justifies the framing of a charge. Imam, J .- The words "as may be preferred" in S. 5 cannot be read as meaning that it was the decision of some one else than the Governor-General which gave effective jurisdiction to the Special Tribunals to try the cases mentioned in the First Schedule. The words mean that though the cases mentioned in the First Schedule have not yet come before any Court by way of a complaint or by way of a charge-sheet submitted by the Police at the commencement of the Ordinance, yet the Special Tribunals shall have jurisdiction to try such cases. The First Schedule clearly indicates that the persons named in them are to be tried for the offences charged therein. (Agarwala and Imam, JJ.) HECTOR HUNTLEY v. EMPEROR. 23 Pat. 457=218 I.C. 282=18 R.P. 28= 11 B.R. 283=46 Cr.L.J. 438=A.I.R. 1944 Pat. 378.

S. 8—Jurisdiction of High Court—Interference in revision—Grounds. See CRIMINAL TRIAL—REVISION. 23 Pat. 457.

S. 8-Validity.

The Ordinance is intra vires the ordinance-making authority of the Governor-General and S. 8 of that Ordinance embodies a valid and binding provision of law. (Igbal Ahmad, C.J. Allsop and Dar. JJ.) SHIVKALI GOSWAMI v. EMPEROR. I.L.R. (1944) All-758=216 I.C. 100=17 R.A. 109=46 Cr.L.J. 122=1944 A.I. J. 419=1944 A.L.W. 514=1944 A.W.B. H.C.) 273=1944 O.W.N. (H.C.) 201=1944 O.A. (H.C.) 273=A.I.R. 1944 All. 257 (F.B.).

CRIMINAL PROCEDURE CODE (V of 1898)—Absence of provision on a particular matterProcedure to be followed. See CRIMINAL TRIAL—
ABSENCE OF PROVISION ON A PARTICULAR MATTER
—PROCEDURE, I.L.R. (1942) Nag. 333.

Magistrate ordering de novo trial-Review of case by High Court for rehearing—Loss of records owing to fire—Circumstances justifying de novo trial.

Where a joint magistrate was not able to rehear an appeal remanded in revision for rehearing owing to the loss of records by fire, and he ordered a de novo trial of the same.

Held, that in a criminal case it is not certainly safe to dispose of the matter without having all the necessary materials before the Magistrate. In the circumstances a de novo trial was the best course to adopt. (Kuppuswami Ayyar, J.) Subramania Ayyar, In 71. 217 I.C. 225=17 B.M. 289=46 Cr. L.J. 263=1944 M.W.N. 685=A.I.B. 1944 Mad. 414 (1)=(1944) 1 M.L.J. 458.

Ss. 1 (2) and 162—Construction and scope— Information to police officer leading to discovery of fact—If inadmissible—S. 27, Evidence Act—If repealed by S. 162, Cr. P. Code. CB, P. CODE (1898), Ss. 1 (2)

Information leading to the discovery of a fact made to a poince officer and prima facie admissible under S. 27 of the Evidence Act is not inadmissible by reason of S. 162, Cr. P. Code, S. 27 of the Evidence Act is not affected by S. 162, Cr. P. Code, being saved by S. 1(2), Cr. P. Code, S. 1(2). Cr. P. Code, enacts a rule of construction to be applied in the interpretation of the Code, S. 162 does not contain a specific provision that S. 27 of the Evidence Act is not to prevail over it. To read S. 162, Cr. P. Code, as overriding S. 27 of the Evidence Act, is to ignore the terms of S-1(2), Cr. P. Code, (Beaumont, C. J. and Sen, J.) EMPEROR v. BIRAM SAEDAR. I.L.B. (1941) Bom. 333=194 I.C. 122=42 Cr. L.J. 519=13 R.B. 359=43 Bom. L.B. 157=A.L.B. 1941 Bom. 146.

S. 1(2)—Special law—S. 27 of the Evidence Act—If special law—It affected by S. 102 Cr. P. Code. See EVIDENCE ACT, S. 27, 1941 P. W.N. 653.

Ss. 4 (b) and 200—Joint complaint by two persons—Valianty—Proper procedure in regard to examination of complainants.

There is nothing in S. 4 (b), Cr.P.Code, to suggest that a complaint must be made by only one person. There is no reason why a joint complaint should not be made by two persons who allege similar and connected oftences against one or more persons committed in the course of the same transaction. There is no legal objection to such a complaint. Upon such a joint complaint it is incumbent upon the Magistrate to examine born complainants and if they are examined one after another without any delay there is a substaintial complaince with the requirements of S. 200 and the accused connot be accided on the ground that the procedure followed was illegal. (Bennet,  $f_*$ ) ABDUL KARIMT v. NANGOO. 18 Luck. 248 = 201 i.G. 54 = 43 Cr. L.J. 731 = 15 R.O. 59 = 1942 A.W.B. (C.C.) 259 = 1942 O.A. 287 = 1942 A. Cr.C. 114 = 1942 O.W.N. 388 = A.I.B. 1942 O.UM. 407.

——S. 4 (1) (i)—Applicability—Offence under S. 5, Bombay Prevention of Gambling Act—Power to arrest without warrant. See PENAL CODE, S. 342, I.L.R. (1942) Kar. 94.

——Ss. ± (1) (h) and 204—Complaint merely stating that certain account books used in Court contained false entries, without specifying those entries—If discloses any offence—Process, if can be issued.

A complaint which consists simply of a statement to the effect that certain account books used before a Court in the course of an enquiry into an offence alleged to have been committed under Ss. 400 and 424, I.P. Code, contained false entries, discloses no offence whatever when no attempt is made to specify what these entries were and all that was said was that they had been tabricated with the intention that they might appear in evidence in subsequent judicial proceedings. No process can issue upon vague allegations of this character which do not constitute a statement of any definite offence at all. (Bartley and Lodge, J.) HARI CHARAN BOSE B. BHABANI CHARAN CHARRAVARTY. 45 C.W.N.

——S. 4 (m)—'Judicial proceeding'—Inquiry by Sub-Divisional Magistrate under Police Order, No. 157 into case of torture by Police—If "judicial" inquiry. See CR. P. CODE, S. 435. (1943) 2 M.L.J. 182.

S. 4 (0)—Contempt of Court. See CONTEMPT OF COURT AND CR. P. CODE, Ss. 4 (0) AND 5 (2). 1944 A.L.J. 459.

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CB. P. CODE (1898), S. 9 (3)

After all there is no particular virtue in a formal notification. The notification does not confer the powers, S. 9, Cr. F. C. confers the necessary powers, so does S. 7. A Government. Notification merely ceclares or records the act of Government. The powers themselves are conferred by and exercised under the sections. Neither S. 7 nor S. 9 of the Code requires formal publication in the Government Gazette. Whether a Court of Session is established is a question of fact, whether the limits of a Sessions division or district are altered is a question of act. It is no downt desirable that in questions of jurisdiction the acts of Government should be declared with precision and particularly, by a formal notification which places the matter above all dispute or argument or doubt. (Davis, C. J., Lobo and Wiston, J.). NAWAB JAM KHAMBHUKHAN v. EMPEROR 204 LC. 415=15 R.S. 107=44 Cr. L.J. 293=A.I.R. 1043 Sind 39 (FB.).

Ss. 9, 193 (2) and 409 - Combined effect on the powers of Sessions fudge and Assistant Sessions fudge with reference to appeals.

The effect of Ss. 9, 193 (2) and 409, Cr. P. Code, is that an Auditional Sessions Judge can hear all the appeals which lie to the Sessions Judge and the Session Judge has power to transfer any appeal he likes to the Court of the Auditional Sessions Judge. (Agarwal, J.) CHANDRA KUMAR DIKSHIT v. RAMESH CHANDRA. 195 LC. 664=1941 A.W.R. (C.C.) 318=1941 A.Cr. C. 241=1941 O.L.R. 734=1941 O.W.N. 1130=1941 O.A. 822=14 R.O. 250=43 Cr. L.J. 59=A.I.R.1942 Oudh 50.

The establishment of a Court of Session and appointment of a Judge to such court are under the terms of S. 9, Cr.P.Code two things very closely connected. In the particular circumstances of a case, the establishment of a court of Session may be necessarily implicit in the terms of the creation of the post of a Sessions Judge and the appointment of a certain person as such Judge. (Davis, C.J., Lobo and Weston, J.) NAWAB JAM KHAMEHUKHAN v. EMPEROR. 204 I.C. 415—15 R.S. 107-244 Cr. L.J. 293—A.I.R. 1943 Sind 39 (F.B.).

—S. 9 (3)— Appointment of Subordinate Judge as Assistant Sessions Judge—If to be by name—General notification of appointment of Subordinate Judge of Specific Court as Assistant Sessions Judge of particular division—Sufficiency to confer jurisdiction.

A Sessions case which was pending in the Court of a Subordinate Judge who was appointed as Assistant Sessions Judge by name stood posted to 14—9—1940 for trial. He was succeeded by a Subordinate Judge who was not appointed Assistant Sessions Judge by name. He took charge of his office on 28—8—1940, and took up the trial of the case on 14—9—1940 and convicted the accused. There was a general notification of the Governor-in-Council dated 22—3—1929 appointing the Subordinate Judge of that Court as Assistant Sessions Judge of the particular Division, under S. 9 (3) of the Cr. P. Code.

CR. P. CODE (1838), S. 10 (2)

Held, on reference by the Sessions Judge, that the conviction must be set aside as it was without jurisdiction. (Lakshmana Kao, J.) EMPEROR V. SHAIK SILAR. 1941 M.Cr.C. 35=1941 M.W.N. 62=A.I.R. 1941 Mad. 681.

S. 10 (2) and Defence of India Rules R. 25—Power of Additional District Magistrate to direct detention—Such power delegated only to District Magistrate under S. 2 (5) of Defence of India Act.

An Additional District Magistate invested by a notification under S. 10 (2) Cr. P. Code, with all the powers of a District Magistrate under Cr. P. Code or under any other law for the time being in force cannot exercise the power delegated to the District Magistrate by a notification of Provincial Government under S. 2 (5) of the Defence of India Act. An order of detention passed by him under R. 20 of the Defence of India Rules merely on the strength of the notification under S. 10 (2), Cr. P. Code is therefore void and of no effect. The expression "under any other law" cannot include R. 26 of the Defence of India Rules for the reason that it does not expressly or impliedly authorise the District Magistrate to make an order under that Rule. The Rule confers power on the Central and Provincial Governments only, and any other officer or authority exercising power under that Rule has to derive his power from the Provincial Government's order made under S. 2 (5) of the Defence of India Act, Further the Provincial Government's order notified under S. 2 (5) of the Defence of India Act is not a statutory but an administrative or an executive order, and the word "law" in "any other law" is not meant to include an executive order but only legislative enactments, and rules, regulations or orders which have the force of law. Again the Provincial Government, when it conferred the power on the District Magistrate under S. 2(5) of the Defence of India Act, conferred the power on the officer actually holding the office of the District Magistrate and on no one else. (Niyogi and Bose, JJ.)
PRABHULAL RAMLAL v. EMPEROR. 1944 N.L. J. 44

=I.L.R. 1944 Nag. 114=211 I.C. 126=16 R.N.
182=45 Cr.L.J. 296=A.I.R. 1944 Nag. 84.

# \_\_\_\_\_S. 12—Headquarters — Magistrate—Jurisdiction over entire district.

The effect of the provisions of the two subsections to S. 12, Cr. P. Code, is that unless the powers of a Magistrate have been restricted to a defined local area, he has jurisdiction throughout the entire district. In the absence of any limitation of jurisdiction by S. 12 (1) a magistrate stationed at the headquarters of the district exercises jurisdiction under S. 12 (2) throughout the whole of the district. (Hemeon, J.) BALIRAM v. DAULAT SINGH. I.L.R. (1944) Nag. 836=1944 N.L.J. 508=220 I.C. 77=46 Cr.L.J. 654=A.I.R. 1945 Nag. 55.

Where a member of a Bench of two Magistrates fails to sign the statements of witnesses

CR, P. CODE (1898), S. 30.

and the charge sheet that does not show that he was absent or was not attending to the proceedings and so cannot lead to the conclusion that the conviction is bad. (Ayarwal, J.) JADONATH v. EMPEROR. 201 I.C. 243=43 Cr. L. J. 646=1942 O.W N. 444=1942 A.W.R. (C.C.) 277=15 R.O. 74=1942 A. Cr. C. 147=1942 O.A. 305=A.I.R. 1942 Oudh 423.

—S. 28—Scope—Powers of Sessions Judge—Committal of case under S. 511, I. P. Code, accused being old offender—Legality—Sessions Judge—Power to try case. See Penal Code, S. 75. (1942) 1 M.L.J. 455.

——S. 29—Jurisdiction—Offence under S. 10, Mussalman Waki Act—Proper Court to try and punish—Ordinary Criminal Court or District Court. See Mussalman Wake Act, S. 10, (1941) 2 M.L.J. 541.

——S.30— Magistrate invested with powers under—Powers of—Magistrate not describing himself as such—Sentence of fine—Limit to—Penal Code. S. 63.

The power of an Additional District Magistrate who is invested with powers under S.30 Cr. P. Code is not necessarily limited to the powers of a Magistrate of the first class, although he does not describe himself on the record as exercising such powers. What really matters is not what the Magistrate calls himself but what powers he really does exercise. The power of such a Magistrate to pass a sentence of fine is not specifically limited except as laid down in S. 63, I. P. Code, that it should not be excessive. (Skemp, J.) MIAN IFTIKHAR-UD-DIN V. EMPERGY 196 I.C. 485=14 R.L. 157=42 Cr.L.J. 890=43 P.L.R. 378=A.I.R. 1941 Lah. 324.

——S. 30—Scope—Jurisdiction and powers of magistrates—If he read with S. 8, Penalises (Enhancement) Ordinance—Offence of breach of R. 35, Defence of India Rules.

S. 30, Cr. P. Code does confer jurisdiction on a Magistrate, which he does not otherwise possess the power to try all offences not punishable with death. S. 30 is essentially a section conferring jurisdiction. It gives magistrates power to try offences which otherwise they cannot try. It deals with the trial of offences but confers no power to pass a sentence. S. 8 of the Penalties (Enhancement) Ordinance of 1942 deals with the trial of offences but confers the power to pass sentences. S. 30, Cr. P. Code, may be read with S. 8 of the ordinance and the effect is to remove the bar to the jurisdiction of the Magistrate, functioning as a Court under S. 30, Cr. P. Code, that would otherwise prevent his trying offences punishable with death. Therefore the Magistrate under S. 30, Cr. P. Code, can try an offence arising out of the contravention of R. 35 of the Defence of India Rules even though the offence be punishable with death, and having jurisdiction to try such offences under S. 30, Cr. P. Code, it necessarily follows that under S. 34, Cr. P. Code, he has the power to pass a sentence of seven years' regorous imprisonment if the offence is otherwise so punishable. (Davis, C, J.) RAM-

CR. P. CODE (1898), Ss. 33 and 262 (2)

SINGH KUNWARSING v. EMPEROR. I.L.R. (1942) Kar. 597=206 I.C. 283=15 R.S. 171 = 44 Cr.L.J. 461=A.I.R. 1943 bind. 87.

——Ss. 33 and 262 (2)—Applicability—Summary trial—Imprisonment in default of payment of fine—Power of Magistrate—Limits.

Even in the case of a summary trial, the question of a sentence of imprisonment in default of payment of fine is governed not by S. 262 (2), Cr. P. Code, but by S. 33 under which a magistrate may award in detault of payment of fine such a term of imprisonment as is authorised by law. S. 33 clearly contemplates a case where the powers of a magistrate to impose a sentence of imprisonment are extended when it is a case of imposing an alternative sentence of imprisonment in heuof a fine in addition to substantive sentence of imprisonment. S. 262 (2) appnes only to substantive sentences of imprisonment. But as a matter of prudence, where a case is tried summarily, a magistrate should not ordinarily in default of payment of fine impose a sentence of imprisonment greater than the sentence of imprisonment he can pass under the provisions of S. 262 (2), though the law permits him to do so. (Davis, L.L.R. (1944) Kar. 1=207 I.C. 348=16 R.S. 26=44 Cr. L.J. 637=A.I.K. 1943 Sind. 124.

—Ss. 35 and 415—Applicability—Sentences under Special Criminal Courts Ordinance II of 1942. See Special Criminal Courts Ordinance II of 1942, S. 13 and Cr. P. Code, Ss. 35 and 415. 1943 A.L.W. 353.

S. 35—Scope—Conviction under S. 457 and S. 380, I. P. Code—Separate sentences—Legalty.

The offence of lurking house-trespass may be committed without stealing anything at all just as theft may be committed without committing lurking house-trespass. The offences are quite distinct where a person is convicted of lurking house-trespass under S. 457, I. P. Code, and of theft in a building under S. 380, I. P. Code, there is no prohibition of separate sentences being passed in such a case. (Mockett. J.) NATESA MUDALIAR, In re. 1945 M.W.N. 106 (1)=58 L.W. 75 (1)=A.I.R. 1945 Mad. 330=(1945) 1 M.L.J. 179.

Code. S. 35-Scope-If controlled by S. 64, I. P.

When a sentence of imprisonment is to be in default of payment of a fine, the sentence of imprisonment in default must be consecutive to any substantive sentence of imprisonment, which may have been passed upon the accused. Although S. 35, Cr. P. Code, does not expressly refer to substantive sentence of imprisonment, it must be read with S. 64, Penal Code, which clearly contemplates that when imprison ment in default of payment of a fine is ordered, the imprisonment shall be in excess of any other imprisonment to which the accused may have been sentenced. (Davis, C.J. and Weston, J.) Emperor, v. Mitho Maroo Machi. I.L.R. (1942) Kar. 1=201 I.C. 772=15 R.S. 23=43 Cr.L.J. 779=A.I.R. 1942 Sind 80.

CB, P. CODE (1898), Ss. 54, 56 and 80

S. 35—Scope—If subject to S. 71, I. P. Code.

S. 35, Cr. P. Code is subject to S. 71, I. P. Code, which provides in effect against a person being punishe, more than outce for the same offence; a person must be held to be punished more than once for the same offence when he is punished for the offence as a whole and punished again for the parts which make this offence, e.g. when separate sentences are awarded under Ss. 147 and 149. (Davis, C.J. and (Vesten 1.) HAJI LALBAKHSH V. EMPEROR, I.L.R. (1943) Kar. 132 = 209 I.C. 232=15 K.S. 107=45 Cr.L.J. 130= A.I.R. 1943 Sind 212.

——S. 40—Scope—Deputy Tahsidar empowered to record confessions—Officer young on foreign service and subsequently recalled to regular service—Confession recorded by such officer—Vaudity—Absence of fresh notification—Effect of.

A Deputy Tahsildar empowered to record confessions was transferred to "foreign service" as manager of an estate under the Court of Wards. On his return to regular service as Tahsildar, he recorded the confession of the accused. It was contended that in the absence of a fresh notification authorising him once again as Tahsildar to record confessions, he had no power to record confessions.

Held, that since the Government who retained some form of control over the onicer's services had recalled him to direct service under Government, the case of the officer in question tell directly under S. 40, Cr. P. Code and the powers granted to him as Deputy Tahsildar were lawfully exercisable by him as Tainsidar and the contessions recorded by him could not be invalidated on the ground of the absence of a tresh notification conferring power to record contessions. (King and Shahabuddin, Jl.) KAMARATNAM v. EMPEROR. 220 I.C. 129=46 Cr.L.J. 667=57 L.W. 100=(1944) M.W.N. 57=A,I.R. 1944 Mad. 302=(1944) 1 M.L.J. 91.

——Ss. 51 and 54—Scope of power to search and arrest—Search of a person on the suspicion that he had some papers 'connected with the Congress'—Legality.

The only provision of law which allows a police officer to search a person is to be found in S. 51, Cr. P. Code. That section can come into operation only after a person has been arrested either under a warrant or without a warrant. Where a person is suspected to be in possession of papers 'connected with the Congress' he cannot be arrested without a warrant, for, having papers' connected with the Congress, cannot be a cognizable offence. Hence such a person could not be arrested under S. 54 and it follows he cannot be searched under the provisions of S. 51. (Mulla. J.) Ramain Rai v. Emperor. I.L.R. (1942) All. 914=15 R.A. 281=203 I.C 467=44 Cr.L. J. 67=1942 A L.W. 534=1942 A Cr.C. 178=1942 A.W.R. (H.C.) 300=1942 A.L J. 528=A.I.R. 1942 All. 424.

Ss. 54, 56 and 80—Applicability—Arrest of deserter from army. See Army Acr. S. 123 (1). (1943) 1 M.L.J. 59.

CR. P. CODE (1898), S. 54,

S. 54 — Applicability — Non-cognizable offence. See Penal Cove, S. 323. 22 Pat.L.T. 29.

-S. 54-Choukidar, if a police-officer.

A village choukidar is not a police officer within the meaning of S. 54, Cr. P. Code. EMPEROR v. JANGE SINGH. 1.L.R. 1944 All. 227=213 I.C. 95=17 R.A. 3=45 Cr.L. J. 643=1944 A. Cr.C. 32=1944 A. W.R. (H.C.) 96=1944 A.L.W. 229=1944 O.A. (H.C.) 96=1944 O.W.N (H.C.) 57=1944 A.L.J. 132=A.I.R. 1944 All. 117.

Powers of arrest—Arrest of person by Chowkidar on mere oral direction of Police Sub-inspector—Legality—Rescue of such person — Hurt caused to choukidar—Offence—Penal Code. Ss. 225 and 323. Jograf v. Emperor [See Q. D. 1950—40 Vol. I, Col. 2446.] 191 I.C. 590=13 R.P. 358=22 Pat.L.T. 80=7 B.R. 236=42 Cr.L.J. 199.

——Ss. 54 and 56—Cognizable offence—Arrest without warrant, when justified—Arrest under orders of superior officer—Procedure—Absence of written order—Legality of arrest.

A police officer may act under S. 54, Cr. P. Code, and arrest without a warrant any person concerned in a cognizable offence it he is acting on his own initiative or independently in the course of his duty. But if he is merely doing what his superior officer tells him to do, an order in writing must be delivered to him under S. 56. In the absence of such an order there is no valid or legal arrest. (Sharpe, J.) The King v. Sridhar. 1941 Rang. L.R. 148=194 I.C. 843 =14 R.R. 23=42 Cr.L.J. 629=A.I.R. 1941 Rang. 180.

Se. 54 and 56—Scope—Arrest by police officer under orders of superior officer without written order—When legal.

If a police officer has a reasonable suspicion himself that a person is a deserter from the army, he is entitled to arrest him under S. 54, Cr.P.C. on the other hand if he receives an order in writing under S. 56, Cr.P.Code he is entitled to make the arrest whether he has any personal knowledge or suspicion himself or not. The provisions of S. 54 are not restricted by the provisions of S. 56, and if the person ordered to be arrested is resonably suspected of being a deserter from the Army by the police officer the arrest by him would be legal under S. 54 even without an order in writing required by S. 56. (Almond, J.C. and Mir Ahmad, I.) Emperor v. Mirwal, A.I.R. 1945 Pesh. 46

Ss. 54(1) and 9 and 56(1)—Relative scope -S. 54(1) if limited or controlled by S. 54(9) or 56(1).

Neither S. 54 (9) nor S. 56 (1) in any way limits or confines or restricts the application of S. 54 (1) Cr. P. Code. S. 54 (1) permits a Police officer to arrest without a warant any person concerned in any cognizable offence or against whom information has been received or a reasonable suspi-

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cion exists of his having been so concerned. S. 54 (1) increty introduces another class of persons who can be acrested without a warrant. S. 50 (1) only lays do wn the procedure to be adopted by an officer in charge of a police station desirous of requiring an officer subordinate to him to arrest without a warrant. (Horwill I.) Manomed Medra Sahib v. Emperor. 205 I.C. 158=15 K.M. 839=44 Cr. L.J. 272=1942 M.W.N. 723=A.I.R. 1943 Mad. 207. (1942) 2 M.L.I. 710

S.54, (1) Ninthly—"Requisition"—If includes message sent by telephone—Power to order arrest by means of telephonic message.

There is no warrant for the proposition that a Police Officer cannot order the arrest of a person by means of a telephonic message. The word requisition in S. 54 (1) Ninthly of the Code of Criminal Procedure, is quite general and clearly covers a message communicated by telephone, though it would be necessary for him, when he is asking another Police Officer to do what he could have done himself, to disclose not only the identity of the person whom he wishes to be arrested but also the offence or the reason for which the arrest is to be made. (Abdur Rahman and Somayya, J.) MAHARANI GURUCHARAN KAUR OF NABHA v. PROVINCE OF MADRAS. I.L.R. (1942) Mad. 696 = 203 I.C. 45=44 Cr.L.J. 45=1942 M.W.N. 602=5 F.L.J. (H.C.) 103=AI. R. 1942 Mad. 539=(1942) 2 M.L.J. 14.

S. 54. (2)—Arrest under-When justified.

S. 54 (2), Cr. P. Code, contemplates that the police officer acting in the exercise of the powers given by it must have definite knowledge or at least definite information that a certain personis in possession of an implement of house breaking before putting that person under arrest. An arrest cannot be made when there is no such information and it could not be justified on the ground that on search, such an implement hapened to be found in the possession of the person arrested. (Ismail and Mulla, JJ.) EMPEROR V. ABDUL HAKIM. I.L.R. (1942) All. 35=14 R.A. 277=43 Cr.L. J. 338=198 I.C. 264=1942 A.L.J. 32=1941 A.W.R. (H.C.) 353=1941 A.L.W. 999=1941 A.Cr.C. 263.=A.I.R. 1942 All. 74.

S. 54 (9)—Scope—If limits S. 54 (1). See Cr. P. Code, Ss. 54 (1) and (9) and 56 (1). (1942) 2 M.L.J. 710.

S. 56 (1)—Scope—If confines and restricts S. 54 (1), See Cr. P. Code, S. 54 (1) AND (9) AND S. 56 (1), (1942) 2 M.L.J. 710.

S. 59—Applicability— Attempt to commit offence.

S. 59, Cr. P. Code, is not confined in its application to cases where the offence committed in the view of a person is a substantive offence. The section is equally applicable to an attempt to commit an offence where such attempt is itself an offence and is made in the view of the person arresting. (Muhammad Munir, J.) Dost Manomed v. Emperor. 47 P.L.R. 229—A.I.R. 1945 Lah. 334.

CR, P. CODE (1898) S. 75.

S. 75—Contents of warrant—Description of accused—Father's name not given—If makes process invalid.

Where a warrant of arrest described a person by name and as resident of a particular village, but his parentage was not given.

Held, that though the process was defective to that extent, still as the person could not be mistaken for another of the same name but resident in another village, it was not invalid. (Verma and Shearer. JL.) BISHUNDAYAL MAHTON OF EMPEROR. 22 Pat 504-210 I. C. 124-15 R.P. 110-10 B.R. 189-A.I.R. 1943 Pat. 366.

——Ss. 75 to 86—Duty of Court—Arrest of persons residing outside local limits of invisdiction of Court issuing warrant—When to be directed—Duty of court to satisfy itself that the persons to be arrested have committed offence.

SAGARMAL KHEMRAY, Inve. [See O.D. 1036—140 Vol. I., Col. 3327] I.R. (1041) Born. 16=191 I.C. 605=13 R.B. 199=42 Cr. L.J. 205.

S. 75 — Warrant under — Execution outside British India. EMPFPOR v. KAPIMBUX. [See Q D. 1936—40, Vol. I, Col. 2449.] 13 R.S. 121=42 Cr. L.J. 49.

——83. 77 and 83—Relative scope—Latter if overrides former. SAGARMAL KHEMRAI In re. [See O.D. 1936—40 Vol. I. Col 3328.] I.L.B. (1941) Bom. 16—191 I.C. 605—13 R.B. 199—42 Cr.L.J. 205.

Ss. 77 and 83—Warrants—Form and contents of—Warrant not addressed to any definite officer and not containing address, description and occupation of persons to be arrested—Validity of. SAGARMAL KHEMRAL In re. [See Q.D. 1936—40 Vol. I. Cal. 3328.] I.L. R. (1941) Bom. 16=191 I.C. 605=13 R.B. 199=42 Cr.L.J. 205.

——Ss. 82 and 83—Magistrate in Baluchistan Agency territories—Power to issue warrant for arrest of person in British India.

The Baluchistan Agency Territories are not part of British India, but are areas in which by lease, treaty or otherwise the Governor-General in Council, now to be replaced by the Crown representative has acquired jurisdiction. A Magistrate in those places cannot therefore issue a warrant for the arrest of a person in British India, and require its execution under S. 83, Cr. P. Code. (Davis. C.). Icho and Weston. J.) EMPROR v. KARIMBARSH. ILB. (1941) Kar. 247—192 I.C. v. KARIMBARSH. ILB. (1941) Kar. 247—192 I.C. soft—20 (F.B.).

Ss. 82 and 83—Magistrate in British Paluchistan or Baluchistan Agency Territories—Power to issue warrant to be executed outside British Baluchistan or Baluchistan Agency Territories. FMPEROR v. KARIMBUX. [Sw. O.D. 1936—"40. Vol. I. Col. 7450.] 13 R.S. 121—42 Cr. J. J. 49—A. I.R. 1940 Sind 154.

Ss. 82 and 83-Warrants issued by Courts in British Baluchistan-Execution in British India.

There can be no doubt that British Baluchistan is part of British India. Therefore a warrant is ued by the District Magistrate of Sibi which is part of Pritish Baluchistan, for the arrest of an accused in the district L.J. 515 (P.C.).

CE. P. CODE (1898), S. 87.

of Nawabshah can be lawfully executed in that District. (Duris. C.J., Lobe and Western, IJ.) FMPEROR v. KARIMBAKSH. I.L.R. (1941) Kar 247=192 I.C. 206=42 Cr L.J. 326=13 R.S. 206=A.I.B. 1941 Sind 20 (F B).

----- Ss. 87 and 88-Issue of processes under-furisdiction-Condition precedent.

It cannot be held that processes under S. 88 of the Cr. P. Code cannot be issued unless process under S. 87 had been first issued. It isnot necessary that the processes under S. 88 should be delayed till the time fixed in the process under S. 87 has elapsed. But processes under Ss. 87 and 88 cannot be issued unless it is established that a warrant of arrest had already been issued against the person wanted, and that such person is abscording. Where there has been no such warrant issued before the processes under Ss. 87 and 88 were applied for

Held, that the processes issued under Ss. 87 and 88 were without jurisdiction. (Urmaind Steerer, IL) BISHUNDAVAL MAHTON 1. EMPEROR. 22 Pat. 504 = 210 I.C. 194=16 R.P. 110=10 B.R. 189=AIR. 1943 Pat. 366.

----- Ss. 87 and 88-Orders under-Condition precedent to.

Unless it is clearly shown and found that the accused has absconded or is concealing himself so that the warrant against him cannot be executed, which is a condition precedent under Ss. 87 and 88, Cr. P. Code, reither a proclamation under S. 87 ror an attachment under S. 88 can issue. Where the accused is shown to have left Pritish India long before and is not shown to have left so, knowing of the warrant, an order of proclamation under S. 87 and an order of attachment under S. 88 are without jurisdiction. (Somotra, I.) VELLAYAPPA CHETTIAR D ALACAPPA CHETTIAR 197 IC. 102=14 B.M. 331=43 Cr. L.J. 11=54 L.W. 478 1941 M.W.N. 763=A.I.R. 1942 Mad. 289.

\_\_\_\_\_Ss. 87 and 587—Requirements of section not fulfilled—Failure of justice.

There are three requirements of S. 87. Cr. P. Code, and all of them must be fulfilled. The failure to fulfil any one of them may well result in a failure of justice with in the meaning of S. 537, Cr. P. Code. (Blacker, I.) MST. IAWAI v. EMPFPOR. 202 I.C. 15=43 Cr. L. J. 791=15 R.L. 112=44 P.L. R. 300=A.I.R. 1942 Lah. 214.

There is nothing in S. 87, Cr. P. Code, which makes the proclamations issued there under legal evidence of the issue of the warrant or order of arrest. Nor can the words of sub-sec. '3) of S. 87 expressly or by implication make the proclamation equivalent to notice to the public of its contents or even to the inhabitants of the tewn or village where it is published. (Lord Wright.) EASWARAMURTHY GOUNDAN v. FMPFROR. 71 I A. 83—I I.R. (1945) Mad. 237—1944 M.W.N. 440—214 I.C. 1=1944 A.L.J. 398—10 B.R. 667—45 Cr. L.J. 721—46 BOM.L. 844—1944 A.W.R. (P.C.) 40—48 C.W.N. 477—57 L.W. 374—1944 O.A. (P.C.) 40—17 R.P.C. 26—1945 P.W.N. 146—II.R. (1944) I.M. L.J. 515 (P.C.).

CB. P. CODE (1898), S. 88 (6-D).

——S. 88 (6-D)—Scope—Parties to suit under— Frame of—Relief—Attachment of paddy in execution of order under S. 488, Cr. P. Code—Claim—Rejection —Property sold and proceeds kept in Court—Suit for recovery of money by defeated claimant—Competency— Government—It necessary party—Failure to ask for declaration—If fatal.

The respondent obtained an order for maintenance against her hushand under S. 488, Cr. P. Code, and got some paddy attached in execution of that order. The paddy was subsequently sold by the Magistrate and the sale proceeds were kept in his Court. The appellant, the 2nd wife of the respondent's husband, had preferred a claim to the paddy attached but it was rejected. She then brought a suit to recover the money (sale proceeds) either from the Magistrate's Court or from the respondent in the event of the money having been paid over to her by the Magistrate. The suit was dismissed on the ground that the appellant failed to establish her title. In appeal, the appellate Court without going into the question of title, dismissed the appeal on the ground that the suit was not competent as the Secretary of State had not been impleaded as a party to the suit. It was also pleaded that the suit should have been framed as one for a declaration and not for recovery of money.

Held, (1) that the Government did not and could not lay any claim to any portion of the money realised by the sale of paddy and that the only party interested in the result was the respondent and the suit was against her, and since the Government was not a necessary party, the suit was maintainable without impleading the Government under S. 88 (6-D), Cr. P. Code; (2) that the mere fact that on account of the sale of the attached property the appellant (claimant) asked for recovery of the money instead of a declaration, did not take the suit out of the rategory of suits contemplated by S. 88 (6-D). Cr. P. Code; (3) that even assuming that the prayer in a suit under S. 88 (6-D) should be one for a declaration, since all the necessary facts had been given in the plaint, it was the duty of the Court to grant the relief to which a party was found entitled even if it had not been by a mistake asked for by the party concerned. (Abdur Rahman, I.) GANGAYYA v. I.AKSHMI Drvi. 198 I.C. 203=14 R.M 424=43 Cr.L.J. 325=54 L.W. 362=1941 M.W.N. 865=A.I.R. 1942 Mad. 93=(1941) 2 M.L.J. 510.

# - S. 89—Facts to be proved by applicant underAbscend or conceal'—What may not amount to.

Under S. 89, Cr. P. Code, before the property under attachment, can be delivered to the applicant under the section, it is absolutely necessary for him to prove that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant and that he had not such notice of the proclamation as to enable him to attend within the time specified therein. A person cannot be said to be absconding or concealing himself for the purpose of avoiding the execution of the warrant when though he was absent from Court, his address was throughout known to the Court. (Ghulam Hasan, J.) O.V.

CR. P. CODE (1898), S. 94.

FORBES 2. EMPEROR. 19 Luck. 149=209 I.C. 28=44 Cr L.J. 804=16 R.O. 103=1943 A.W.R. (C.C.) 54=1943 O.W.N. 269=1943 A.Cr.C. 109=1943 O.A. (C.C.) 138=A.I.R. 1943 Oudh 325.

S. 90 (b)—Power to issue warrant of arrest-

The power to issue a warrant of arrest under S. 90 (b), Cr. P. Code, depends on due service of summons, and in the absence of anything to show that the requirements of S. 70 of the Cr. P. Code have been complied with, a Magistrate has no power to issue a warrant of arrest against a witness. (Dhavle, J.) CHANDER KUER v. EMPEROR. 191 I.C. 193=13 R.P. 314=42 Cr.L.J. 103=7 B.R. 156=A.I.R. 1941 Pat. 206.

S. 94 Application under—Discretion of Magistrate to grant prayer in.

When an application is made under S. 94, Cr. P. Code asking that the record of the inquiry made under S. 144 Cr. P. Code should, be sent for from the District Magistrate's office, it is clearly within the discretion of the Magistrate, having details already on the record to refuse, if he so sees fit, to call for the further details. (Davies, J.) KRISHNA GOPAL v. CROWN. 1940 A.M.L.J. 96.

——S. 94—Construction—Order for production of account books—Duty of Court—Right of complainant to inspect all books—Court, if bound to give unrestricted inspection.

S. 94, Cr. P. Code, cannot be construed as meaning that an order for production under the section involves as a necessary consequence a right on the part of the complainant to inspect all the books produced. The true view is that when an application is made to a Court, or to a police officer in the mofussil under S. 94 for production of documents, the Court is bound to consider whether there is a prima facie case for supposing that the documents, are relevant. All that the Court can do is to consider whether books of a particular type are likely to have a bearing on the matter. If it thinks they are, then it can order production. But such an order for production cannot be held as involving an obligation on the Court to give inspection of all the books produced to the complainant, though the Court has power to order such inspection. The Magistrate must consider the question at a later stage, either at the trial or inquiry, or on a special application, at which the Mazistrate can hear the accused as well as the complainant, and he can only order inspection of those books which the complainant satisfies him are really relevant. (Beaumont, C.J., Divatia and Macklin, JJ.) HUSSENBHOY ABROOLABHOY v. RASHID B. VERSHI. I.L.R. (1941) Bom. 492=196 I.C. 267=14 R.B. 120=42 Cr.L.J. 831=43 Bom. L.R. 523=A.I.R. 1941 Bom. 259 (F.B.)

— S. 94—Discretion of Court—Limits to exercise of—If controlled by S. 162, Cr. P. Code—Interference in revision with order for production of documents. EMPEROR v. BILAL MAHOMED. I see Q.D. 1936-40 Vol. I, Col. 2452.] 42 Cr. L.J. 58.

CR. P. CODE (1898), S. 94.

documents-Conditions precedent to making of-Magistrate to satisfy himself of necessity or desirability of production.

S. 94. Cr. P. Code, gives power to the Court to require the production of documents when it considers their production necessary or desirable for purposes of investigation; but before an order under the section can be made, it must appear, at least prima facie that the documents are likely to be relevant evidence in the case It is the duty of the Magistrate to consider whether their production is necessary or desirable, especially when the application itself discloses no grounds why production of documents is necessary or desirable, and it is not open to the Magistrate to evade his responsibility on the plea that he might have to hear the nature of the defence which the accused, on whose behalf application is made, might make. (Davis, C J. and Weston. J.) GRAVES v. PITOOMAL HOONDOMAL I.L.R. (1942) Kar. 292=205 I C. 107=15 R.S. 124=14 Cr.L.J. 324=A.I.R. 1943 Sind 51.

-S 94—Issue of written order by Police Officer Necessity for.

Under S. 94, Cr. P. Code, a Police Officer cannot demand the production of books in any manner that he likes. The word 'may' in the section merely means that if a Police Officer makes up his mind to issue an order to the person concerned, he must do it in writing. (Din Mahamed and Blacker, IJ.) Durga Das v. Emperor. I.L.R. (1943) Lah. 805=204 I.C. 535=15 R.L. 266=44 Cr.L.J. 801=44 P.L.R. 549=A.I.R. 1042 I.B. 28 1943 Lah. 28.

-S. 100-Jurisdiction to issue warrant under-Pre-requisites.

In the absence of any allegation that a person i was being detained against his or her will in such a way as to amount to an offence within the meaning of S. 100 Cr. P. Code, there is no jurisdiction in a Magistrate to issue a warrant under section. A warrant issued under S 100 and an arrest in pursuance of it would be illegal when the circumstances afford no ground for the belief that the person concerned was so confined. (Ghulam Hasan, J.) MST. KHALIOAN V. FMPEROR. 221 I C. 6=1945 A W.R. (CC) 9 (1)=1945 A.L.W. (C.C.) 19=1945 O.W. 19=1945 O.A. (C.C.) 9 (1)=A.I.R. 1945 Oudh 170.

-Ss. 101 and 79-Search warrant issued under S. 5 of Public Gambling Act—Endorsement to another police officer—Legality. See Public Gambling Act, S. 5. 1945 N.L.J. 237.

-S. 102—Applicability—Apprehension for murder of person bolting himself in a house-Entry by police into house-Duty to effect search-Publicity.

S. 102, Cr. P. Code, relates only to formal searches under search warrants issued under Ss. 96 and 98. In an emergency, e.g., when a man is apprehended recently for murder under very clear circumstances, when the police are not going in for the purpose of a search for any specified purpose, but for a general investigation,

CR. P. CODE (1898), S. 106.

-S. 94—Duty of Court—Order for production of there is no provision in the Code which imposes on them the duty of publicly searching respectable citizens or themselves before the public. It is not surprising that in such an emergency the police-officer should at once go in and see what are the contents of the house into which the man had bolted himself in. (Mockett and Rell. II)
MADICA CHINNA ORIGADU. In re 58 LW.
491=1945 MW.N 556=(1945) 2 M.L.J. 249.

——S. 103—Aprlicability — Search under Opium Act. See Opium Act. S. 15 AND CR. P. CODE, Ss. 102 AND 103. 1941 Rang. L.R. 552.

-S. 103-Legality of search-One of witnesses alone coming from immediate neighbourhood.

The provision in S. 103, Cr. P. Code, that the officer making the search shall take with him two respectable persons "of the locality", must be regarded as directory rather than mandatory so only one witness came from the immediate reighbourhood and the others came from some little distance does not render the search illegal. Ittle distance does not render the scattin diegal. (Young, C.J. and Placker, I.) EMPROR v. Darshan Sinch, I L.R. (1941) Leh 370=196 I.C. 106=14 R.L. 136=43 P.L.R. 536=42 Cr.L.J. 812=A.I.R. 1941 Lah. 297.

-Ss 103 and 165-Search-Presence of witnesses-Object of - Applicability and object of S. 165.

The presence of witnesses at a search is always desirable and their absence will weaken and may sometimes destroy the acceptance of the evidence as to the finding of the articles, but their attendance at the search is not always essential in order to enable evidence as to the search to he given. Where the articles are produced by the accused himself, S. 165, Cr. P. Code does not apply. The section is meant to be used in cases where a search warrant would be made use of in the ordinary course but lack of time renders it impolitic to use it. Where the section applies, there would be no necessity to call either of the witnesses to the search having regard to the express terms of S. 103 (2) of the Cr. P. Code. (I ord Porter) MALAK KHAN V. FMPEROR. 222 I C 273-1945 M W.N 778-59 I W. 9-50 C. W.N 145=1046 A L.J. 29 (2)=A.I R. 1946 P.C. 16=(1945)2 M L.J. 486 (P.C.)

-- S. 106-Aprilicability-Care under S. 75, Madras C.ty Pilice Act.

In the case of a conviction under S. 75 of the Madras City Police Act, an order under S. 106, Cr. P. Code, is not called for. (Lakshmana Rao, J.) SIVARALATHI GRAMANI W FMPFROR. 196 I.C. 575=43 Cr L J. 40=1941 M W.N 221 (2)=14 R.M. 324=A.I.R. 1941 Mad. 488.

S. 106—Applicability—Person convicted under S. 510, Indian Penal Code—Order against him under S. 106. Cr. P. Code—Legality. Ven-KATAPPA. In re. [see O D. 1936—'40 Vol. I, Col. 2459.] 191 I.C. 240=42 Cr.L.J. 16.

- S. 106 to 126-A-(Chap. VIII)-Object of proceedings.

Weston, J .- The purpose of security proceedings is not punitive, but preventive. (Lobo and OR, P. CODE (1338), S. 103.

West's, J.) EMPEROR v. RASULBUX. I.L.R. (1942) Kar. 252-205 I.C. 372-15 R.S. 136-44 Cr.L.J. 378-A.I.R. 1942 Sind 122.

S. 106 and Penal Code (1860). S. 149— Order for security in case of conviction for an offence read with S. 149 Penal Code—Legality.

Where the accused were convicted under Ss. 147, 441. 323 and 325 read with S. 149, Penal Code and at the same time ordered to give security under S. 106. Cr. P. Code.

Held, that it was illegal and it was not possible to order the accused to give security under S. 106, if they had been convicted of any offence read with S. 149 I P. Code. If they had been convicted of rioting and sentenced under S. 147 or 148 it would have been possible to order them to give security under S. 106, Cr. P. Code. (Plowden, I) RAMZAM KHAN V JAMAL UDDIN. I.L.R (1944) All. 541=216 I.C. 79=46 Cr.L. J. 118=17 R.A. 105=1944 A.L.I. 348=1944 O.W.N. (H.C.) 78=1944 A.W.R (H.C.) 181=1944 O.A. (H.C.) 181=1944 A.C.R. C.C. 60=1944 A.L.W. 314=A.I.R. 1944 All. 272.

——S. 106—Scope—Duty of Magistrate—Charge and conviction of petty offence—Order under S. 106—Desirability of.

It is generally undesirable where a person is charged with some petty offence, to tack on to some small sentence of fine an order under S. 106, Cr. P. Code, which in most cases, in view of the poverty of the accused person, would necessitate his remaining in jail for a long period which very much exceeds the punishment legally permissible for the offence of which the accused is charged and convicted. An order under S. 106, Cr. P. Code, is of course, legally permissible, but should be made very sparingly in such cases. Before passing an order under S. 106, the Magistrate should be satisfied that it is necessary to require the accused to execute a bond for keeping the peace; in other words, the Magistrate should be satisfied that if he does not call upon the accused to furnish such a bond, there is a likelihood that there will be breaches of the peace in future. The Magistrate must consider only legal evidence and should not act on statements made by the prosecution from the Bar. (Horwill, J.) ARUMUGA THEVAR, In re. 205 I.C. 56=15 R.M. 838=44 Cr.L. J. 321=55 L.W. 746=1942 M.W.N. 760 (2) = A.I.R. 1943 Mad. 169=(1942) 2 M.L.J. 613.

S. 106—Scope—Duty of Magistrate—Omission to record express finding or reasons for order—If makes order illegal.

An order under S. 106, Cr. P. Code, is not illegal merely because no reasons have been given by the trial Magistrate for passing the order. There is no general rule that a trial Magistrate must give reasons for his opinion or record an express finding that a breach of the peace was involved, in order to empower him to make an order under S. 106, Cr. P. Code. (Horwill, J.) Sub-BIAH THEVAN, Inre. 200 I.C. 352=15 R.M. 85=43 Cr.L J. 674 (1)=55 L.W. 231 (2)=1942 M. W.N. 304=A.I.R. 1942 Mad. 501 |(1)= (1942) 1 M.L.J. 490,

CR. P. CODE (1898), S. 107-Applicability.

S. 106-Scope-Order under at time of sentence-Legality.

An order under S. 106, Cr. P. Code, can be passed at the time of passing sentence and it is not necessary that the trial Court or appellate Court should call upon the accused to show cause why he should not be bound over. (Horwill. J.) YAKUB SAHIB YEJAMAN v. EMPEROR. 207 I.C. 195=16 R.M. 118=44 Cr. L.J. 639=1943 M.W.N. 179=A.I.R. 1943 Mad. 405=(1943) 1 M.L.J. 264.

---S. 107.

Applicability.
Civil Dispute
Evidence.
Procedure.
Proceedings Under,
Scope.

# Applicability.

S. 107—Applicability—Dispute about land or water—Power to take action under S. 107 instead of under S. 145.

In the case of disputes about land or water, etc., Magistrates have power to proceed under S. 107, Cr. P. Code, in preference to S. 145, Cr. P. Code, if they think it desirable. (Horwill, J.) Krishnaswami Goundan v. Chinnaswami, 1941 M.W.N. 960.

Ss. 107, 144 and 145—Applicability—Dispute concerning land—Procedure.

When there is a dispute likely to cause a breach of the peace concerning land, it can be dealt with under S. 145, Cr. P. Code, and the section is not in applicable on the ground that the dispute is not bona fide. However mala fide such a dispute may be, it is neither outside the scope of S. 145 nor peculiarly amenable to S. 107, Cr. P. Code, and action under S. 145 cannot properly be said to be inadmissible or not warranted by law. However thet fact that such a dispute likely to cause a breach of the peace concerns land does not by itself deprive a Magistrate of jurisdiction under S. 107. But for S. 107 to apply it is essential that the acts committed or likely to be committed should be wrongful. Acts committed in the lawful exercise of the right of a private defence cannot support proceedings under S. 107, and therefore it is to the party who is not in possession of the property in dispute that the operation of S. 107 is usually restricted. Disputes concerning land can also be dealt with under S. 144, Cr. P. Code provided that there is sufficient ground for proceeding under it and immediate apprehension or speedy is msimedy desirable. But orders under S. 144 are merely temporary and cannot remain in force for more than two months. and cannot be said to decide anything about the respective rights of the parties. Or dinarily, thererfore, unless the facts are' on the face of them, quite clear a proceeding should be drawn up under S. 145 for the purpose of investigating the question of actual possession. (Dhavle. I.)
MADHO SINGH v. EMPEROR. 200 I.C. 316=8 B.R.
670=14 R.P. 658=43 Cr.L.J. 637=1942P.W.N. 79=23 Pat.L.T. 243=A.I.R. 1942 Pat, 331,

CR. P. CODE (1898), Ss. 107-Civil Dispute.

# Civil Dispute.

It cannot be laid down that when village feeling is running high over a disputed question of civil right, no one in the village should be bound down under S. 107, Cr. P. Code, if he is prepared to assert that he has right on his side, until the disputed question of right is finally settled one way or the other. It is true that the section lays down that the Magistrate must first have information that some person is likely to commit a breach of the peace or to do a wrongful act which is likely to lead to a breach of the peace, but this condition is met when the legality of the act is denied. Further the only requirement laid down in S. 118 for making an order for executing a bond is that it should be proved to be necessary for keeping the peace. There words are quite general and they do not exclude the power to require both the parties to furnish security where the legality of a disputed act is quite vond the scope of a magisterial enquiry. (Reckett, I.) BHORU v. EMPFROR. 206 I C. 355 = 44 Cr. L. J. 506=15 R.L. 329=45 P.L.R. 64=A.I.R. 1943 Lah, 99.

#### Evidence.

It is not illegal for a Magistrate in security proceedings under S. 107, Cr. P. Code, to admit evidence of a specific charge or offence which is the subject of a separate, current trial. The scope of the proceedings is entirely different, one being concerned with offences committed in the past and the other being concerned with the likelihood of a breach of the peace in the future. If the same evidence is relevant to both proceedings there is no reason why the same evidence should not be used in both these proceedings. (Horwill, I.) RANGASWAMI NADUL v. FMEROR. 208 I.C. 227=16 R.M. 246=44 C.L.J. 756=56 L.W. 217=1943 M.W.N. 149=A.I.R. 1943 Mad. 394=(1943) 1 M.L.J. 246.

#### Procedure.

S. 107—Procedure — Single broceeding against two opposing parties — Legality — S. 117 (5).

Two opposing parties in a dispute cannot be proceeded against under S. 107, C. P. Code, and bound over to keep the peace in one and the same proceeding. Such a procedure must inevitably result in prejudice. Persons opposed to each other cannot be said to be associated together within the meaning of S. 117 (5), Cr. P. Code. (Meredith, J.) SAJAN SAHU v. EMPFRCR. 211 I.C. 536=16 R P. 245=10 B.R. 391=45 Cr.L.J. 406=9 Cut.L.T. 16=A.I.R. 1943 Pat. 417.

## Proceedings under.

\_\_\_\_S. 107-Proceedings under-Jurisdiction-Requisites.

S. 107, Cr. P. Code, clearly requires that the either to proceed under S. 145, Cr. P. Code, and decide person proceeded against must be within the the dispute as to possession once for all so far as the Q.D. I—104

CR. P. CODE (1898), S. 107-Scope.

local limits of jurisdiction unless the District Magistrate chooses to initiate the proceedings. The person must be present be present at the time when the Magistrate receives information and commences proceedings. If a residence within jurisdiction is not proved then at least temporary presence at the critical time must be established. (Bose, J.) GAJANAD MANBORH LOPHI v. EMPEROR. I.L.R. (1943) Nag. 609=15 R.N. 140=44 Cr.L.J 82=203 I.C. 493=1942 N.L.J. 529=A.I.R.1943 Nag. 88.

——S. 107 — Proceedings under—Power of Chief Court to transfer from one district to another.

The Chief Court of Oudh as jurisdiction to transfer a case under S. 107 of Cr. P. C. from one district to another. (Ghalam Havin, J.) SARFARAZ AHMAD v. MOHAMMAD HASNAIN. 198 I C. 433=14 R.O. 417 43 Cr. L.J. 365=1942 A Cr.C.16=1941 O W.N. 1351=1941 O.A. 1047=1942 A.W.R. (C.C.) 3=A I.R. 1942 Oudh 186.

-S.107-Proceeding under-When not fustified.

A proceeding against a person under S. 107, Cr. P. Code, on the ground, that he cast a slur on the character and activity of a certain circle officer in a written statement filed by him in a proceeding by his wife for maintenance, and that he was carrying on a campaign of vilification against the said officer, is not justified and is liable to be quashed. (Edgley and Lodge, J.) ANANDAMAY KARMAKAR v. EMPEROR. 47 C.W.N. 731.

Where a party asserts an exclusive right to enjoy village Minpan at festival times and another party arranges to hold the festival at a different place and time without in any way interfering with the festival conducted by the other party, it is not proper to take proceedings under S. 107 against the latter party, for the acts complained of are not wrongful acts and the right asserted by the first party is not such as would be enforced by Courts. (Boss. 1) GOVINDA AMRITA 2. EMPEROR. I.L.R. (1942) Nag. 620=198 I.C. 409=14 R N. 226=43 Cr.L.J. 357=1942 N.L.J. 15=A.I.R. 1942 Nag. 45.

### Scope

Where in revision against an order under S. 144, Cr. P. Code, the High Court declines to interfere on the ground that the order would become time expired in a few days, but makes it clear that the finding of poession on which the order was based should carry no weight in subsequent proceedings, it is unjust and improper on the part of the Magistrate to proceed against one of the parties under S. 107, Cr. P. Code, on the footing of the order under S. 144 previously passed against such party. If the Magistrate so proceeds his order is liable to be quashed. The proper course is either to proceed under S. 145, Cr. P. Code, and decide the dispute as to possession once for all so far as the

CR. P. CODE (1898), S, 108.

Criminal Court is concerned or to proceed under S. 107 against both the parties to the dispute. (Phavle. J.) MADHO SINGH v. EMPFROR. 200 I.C. 316=8 B R. 670=14 R.P. 658=43 Cr.L I 637=1942 P.W.N. 79=23 Pat. L.T. 243=A.I.R. 1942 Pat. 331.

——S. 108 and Penal Code, S. 153-A—Isolated seditious or objectionable speech—Under what provision of law to be proceeded against. EMPTROR v. SWAMI SARUPANAND. [v. Q.D. 1936—'40 Vol. I, Col. 3328.] 16 Luck. 260—42 Cr.L.J. 35—A.I.R. 1941 Oudh 98.

——S, 108 (b) and Evidence Act (1872), S. 14
—Proceedings under S. 108 (δ), Cr. P. Code, to prevent delivery of objectionable speeches—Previous speeches of same party — Admissibility. JAGANNATH PRASAD VERMA v. EMPEROR. [see Q. D. 1936—'40 Vol. I, Col. 2468.] I.L.R. (1942) Nag. 62.

The mere fact that certain persons could be tried for the substantive offence of attempted theft cannot preclude the taking of proceedings against them under S, 109, Cr. P. Code, if the case can otherwise be estblished to fall under any of the clauses of that section (Ghulam Hatan, I) RAM I.AL. 7. EMPFROR. 198 I.C. 276=14 R O. 392=1942 A Cr C. 45=43 Cr L. J. 342=1942 O. A. 22=1942 A W R. (C.C.) 34=1942 O.WN. 3=A.I.R. 1942 Oudh 246.

The evidence of previous conviction is relevant in proceedings under S. 109, Cr. P. Code (Ghulam Hasan, I.) RAM TAL v. EMPEROR. 198 I.C. 276=14 R.O. 392=1942 A.Cr.C. 45=43 Cr L.J. 342=1942 O.A. 22=1942 A.W.R. (C.C.) 34=1942 O.W.N 3=A.I.R. 1942 Oudh 246.

In order to apply S. 109 (a). Cr. P. Code, there must be some definite attempt at concealment by taking precautions with that object in view, whether it be by disguise or otherwise indicating a desire to hide the fact that the person in question is present within the local limits of the Magistrate's jurisdiction. The clause should be applied with proper discretion. It cannot be applied to a person who is merely found talking at night time with bad characters in a place open to the public or to a person who merely shows a disinclination for the society of the Police and endeavours to avoid them by running away on their approach. (Manchar Lall, I.) LARHMAN KURMI v. EMPEROR. 194 I.C. 295=13 R.P. 700=7 B.R. 747=22 Pat L.T. 545=1941 P.W.N. 443=42 Cr.L.J. 554=A.I.R. 1941 Pat. 478.

------ S. 109 (a)-Applicability-Requisites.

S. 109 (a) Cr. P. Code, is applicable to a person who being or coming within the local limits of the jurisdiction of a certain Magistrate takes precautions to conceal his presence with a view to committing an offence. It is not limited to the more restricted case of a person who, with a similar object, takes precautions to conceal the fact of his presence within the local limits of the jurisdiction of a certain Magistrate. (Ghulan Hasan, J.)

CR. P. CODE (1898). S 109 (b).

CHHUTAI v. EMPEROR. 17 Luck. 105=194 I.C. 740=14 R.O. 38=1941 O.W.N. 867=1941 O.L.R. 521=1941 A.L.W. 767=1941 A.Cr.C. 180=1941 A.W.R. (C.C.) 241=42 Cr. L.J. 617=1941 O.A. 564=A.I.R. 1941 Oudh 509

S. 109 (a)—Scope—Concealing—What constitutes.

person cannot be bound under Cl. (a) of S. 109, Cr P. Code, merely because he is afraid of arrest of because he is making a nuisance of himself. But he can be bound over if the evidence shows that before running away and before being caught concealing himself there is reason to believe that he was about to commit an offence. It is doubtful whether the words taking precautions to conceal himself' would bear such a meaning but the phrase is wide enough to include the case of any one who is presumably about to commit an offence who is unexpectedly started and who then conceals himself to prevent arrest, the whole object of this clause being to prevent the commission of a particular offence, (Plowden, J) MAHOMED RAFT v. EMPEROR. I.L. R. 1943 All. 822=1943 OWN (H.C.) 321(1) =210 I.C. 538=16 R.A. 215=45 Cr.L.J. 280= 1943 A.L.J. 485 (1)=1943 A.W R (H C.)255 (1) =1943 O.A. (H C.) 255 (1)=1943 A.Cr C. 140= 1943 A.L.W. 536 = A.I.R. 1943 All. 369.

——S. 109 (a)—Scope — Concealing—What constitutes—Evidence of general way of life, if can be admitted.

The words concealing his presence in S. 109 (a), Cr. P. Code, are very wide. They are sufficient to cover the concealment of bodily presence in a house or grove or under a bridge, etc., but they also are sufficient to cover the case when a man conceals his appearance (e.g.) by wearing a mask or covering his face or disguising himself by a uniform or in some other manner. Evidence that the accused's general way of life in unsatisfactory cannot be admitted in S. 109 (a) cases. (Plowden, J.) Abdul Ghaffor v. FMPFOR I.L.R. (1943) All 816=210 I.C. 83=1943 O.W.N.(H.C.)318=1943 A. J. I. 481=194? A.W.R. (H.C.) 254=1943 O.A. (H.C.) 254=1943 A.C.C. 138=16 R.A. 189=45 Cr. L. J. 219=1943 A.L.W. 534=A.I.R. 1943 All. 367.

----S. 109 (b)-Scope of.

S. 109 (b) Cr. P. Code does not refer to the conduct of the accused on a particular occassion. The concluding words of the section refer to the general conduct or livelihood of a man. Proof of previous conviction do not by themselves, prove that he is now leading a life of crime or is dependent on the proceeds of crimes committed by others. No action can be taken under the words of 109 (b) or who cannot give a satisfactory account of himself on the strength of suspicious conduct on a particular occasion. Either the man has committed a substantive offence or he has not. If he has not, no action can be taken against him. (Plowden, J.) Abnut Latif v. Empfror. I L.R. (1943) All. 818=209 I. (C. 563=1943 O.W.N. (H.C.) 319=1943 A.L.J. 483=1943 A.W.R. (H.C.) 255 (2)=1943 O.A. (H.C.) 255 (2)=1943 O.A. (H.C.) 255 (2)=1943 O.A. (H.C.) 255 (2)=1943 A.L.W. 535=A.I.R. 1943 All. 368.

OR. P. CODE (1898) S. 109 (b).

----S. 109 (b) -- Scope of.

The first part of S. 1(9 (b), Cr. P. Code, refers to ordinary beggars and vagrants but to those words 'satisfactory account of himself' should have been added in general. A man may be financially well off but he may still be unable to give a satisfactory account of himself (e.g.) he may be engaged in cocaine traffic. (Plowden, I) ABDILL GHAFFOR T. EMPFROR I L.R. 1943 All. 816 =210 I C. 83=1943 O.W.N. (H.C.) 318=1943 A.L.I 481=1943 A.W.R. (H.C.) 254=1943 O. A. (H C.) 254=1943 A.L.W. 534=A.I.R. 1943 All. 367.

S. 110—Charge under—Evidence-Quantum and nature.

No hard and fast rule can be laid down as to the quantum of evidence necessary before a Court can act thereon nor is it necessary that the suspicion against a person charged under S. 110, Cr. P. Code must be embodied in some document. (Walford. J.) RAM DIN v. EMPEROR. 1945 O.A. (C.C.) 231=1945 A.T. W. (C.C.) 2326=1945 A. Cr. C. 195=1945 A.W.R. (C.C.) 231=1945 O.W. N. 361.

——Ss. 110, 117 and 256—Enquiry under S. 117 in proceedings under S. 110—Right of further cross-examination.

It is very doubtful whether a person whose conduct is under enquiry under S. 117, Cr. P. Code, in proceedings under S. 110, Cr. P. Code, is entitled at any stage of the proceedings to demand that witnesses who have been cross-examined should be recalled for further cross-examination. Such a question however is of no great importance in revision before the High Court where it had been rightly found by the lower Court that no prejudice had been caused by such a refusal. (Allsop. J.) I ACHMAN PRASAD v. EMPEROR, I.L.R. (1942) All 945=204 I C. 274=15 R.A. 329=44 Cr. L.J. 187=1942 A.W.R. (H. C.) 326=1942 A.L.W. 545=1942 A.L.J. 557=1942 A.Cr. C. 193=A.I.R. 1944 All. 23.

S. 110-Evidence of Police Officer-Value

It would be very dangerous to base an order under S. 110, Cr. P. C. on the bare ipse dixit of the Sub-Inspector of Police. He is certainly a Competent witness. But he must place facts before the Court to prove that his allegations against the accused are correct. (Almond. J.C. and Mir Ahmad, J.) MUZAFFAR V FMPEROR. 203 I.C. 458=15 R.Pesh. 64=44 Cr.L.J. 6=A.I.R. 192 Pesh. 84.

#### \_\_\_\_S. 110-Evidence-Value-Test

The accused in a case under S. 110, Cr.P. Code, is not entitled to an acquittal because the defence witnesses were as numerous or more numerous than the prosecution witnesses. It is the weight of the evidence and not the number of witnesses which the Court has to consider. (Agarwal, J.) SAHDEO SINGH v. EMPEROR. 198 I.C. 547=1942 A.W.R. (C.C.) 51=1942 A.L.W. 27=1942 A. Cr.C. 51=14 R.O. 422=43 Cr.L.J. 398=1942

CR. P. CODE (18-8), S. 110 (f).

OW.N. 39=1942 O.A. 27=A.I.R. 1942 Oudh 356.

——S. 110—Foldence\_Witness as to general repute —Residence in the locality—Necessity.

It is not necessary that the witnesses who speak to the general reputation of a person must be residents of the same place, a stranger could find out what the general repute of a person is and he is competent to testify to that effect. (Agarwal, I) Sahdeo Singht. Emperor. 198 I.C. 547=1942 A.W.R. (C.C.) 51=1942 A.L.W. 27=1942 A.C. C. 51=14 R.O. 422=43 Cr. L.J. 398=1942 O.W.N. 39=1942 O.A. 27=A.I.R. 1942 Oudh 356.

—S. 110—Jurisdiction—"Any person within the local limits of his furisdiction"—Construction—Residence within such furisdiction—If necessary.

S. 110. Cr. P. Code. does not require that the person proceeded against under that section must be resident within the local limits of the jurisdic, tion of the magistrate concerned. There is no justification for interpreting the words "within local limits" in S. 110, as meaning residing within such limits. To give jurisdiction to a magistrate it would be sufficient if the habits and acts leading to the proceedings are committed within his jurisdiction. (Loho and Tyabii II.) EMPEROR V. SARDAR KHAN. I.L.R. (1943) Kar. 514=212 I.C. 114=16 R.S. 246=45 Cr.L.J. 532=A.I.R. 1944 Sind 106.

——S. 110—Proceedings under—Failure to hear arguments of prosecution prior to order of discharge—Legality.

It cannot be said that a Court is bound, that is legally bound to hear arguments, if offered, in every criminal trial or proceeding. Hence where after hearing the entire evidence adduced by the prosecution in a proceeding under S. 110, Cr. P. Code, the magistrate discharges the accused without hearing the arguments of the Prosecuting Inspector, it cannot he said that in not allowing the prosecution to argue its case the magistrate was guilty of any illegality. (Rennett, I.) FM-PFFOR v. RADHFY SHAYAM. 20 Luck. 91=1944 O.W.N 291=1944 A.Cr. C. 52=1944 A.W.R. (C.C.) 202=1944 O.A. (C.C.) 202=A.I.R. 1944 Oudh 296.

Ss. 110 and 439—Revision in case under S. 110—Sufficiency of evidence—If can be considered.

The opinion of the Court of first instance in respect of the sufficiency or insufficiency of evidence in a case under S. 110, Cr. P. Code, will not be questioned in a revision against any order that may be passed therein (Agarwal, J.) SAHDEO SINGH v. EMPEROR. 198 I.C. 547=1942 A.W.R. (C.C.) 51 = 1942 A.L.W. 27=1942 A.Cr.C. 51=14 R.O. 422=43 Cr.L.J. 398=1942 O.W.N. 39=1942 O.A. 27=A.I.R. 1942 Oudh 356.

-S. 110 (f)—Desperate and dangerous character.

Where a person threatens and beats people, he can certainly be called a desperate and dargerous character; (Agarnal, J.) SAHDEO! SINGH V.

CR- P. CODE (1898), S. 112.

EMPEROR. 198 I.C. 547=1942 A.W.R. (C C.) 51 =1942 A.L.W. 27=1942 A.Cr.C. 51=14 R.O. 422=43 Cr.L.J. 398=1942 O.W.N. 39=1942 O.A. 27=A.I.R. 1942 Oudh 356.

——S. 112—Amendment—Original order mentioning particulars falling under S. 110 (c)—Subsequent order including S. 110 (f) also before showing cause—Irregularity—Effect—Ascused not prejudiced—Interference.

An order under S. 112, Cr. P. Code, is analogous to a charge framed in the case of a regular trial of an accused person for an offence, and just as a charge may be altered, added to or amended under S. 227, Cr. P. Code, at any time before judgment is pronounced subject to certain conditions so too can an order under S. 112, Cr. P. Code, be amended. Where on information in his possession, the District Magistrate makes an order under S. 112, Cr. P. Code, against two out of three persons who are brothers and five days later he makes a similar order against the third brother, asking them to show cause on a specified date, it being stated that the District Magistrate has "reliably learnt that you habitually protect and harbour thieves and dacoits", and subsequently on the date fixed for hearing fresh information is laid before the Magistrate in application by the Public Prosecutor, pointing out that the case of the three persons would fall not only under S. 110 (c), but also under S. 110 (f). and as a result of this, the Magistrate makes out a fresh order under S. 112 against all the three persons and the same is served on them on that date when they appear to show cause in answer to the original orders, it must be held that the third order is clearly an amendment of the previous orders on which no proceedings have actually been started, and that there is no irregularity in the procedure adopted by the District Magistrate in this regard. Further when no prejudice is shown to have been caused to the accused, there is no ground for interference at all. (Lobo and Weston, JJ.) FMPFROR 7. RASULBUX. I.L.R. (1942) Kar. 252=205 I.C. 322=15 R.S. 136=44 Cr.L.J. 378=A.I.R. 1942 Sind 122.

——S. 112—Contents of order under—Particulars to be mentioned—Omission of—Effect of irregularity—Further proceedings—If viliated.

Although it is not sufficient in an order under S. 112, Cr. P. Code, to quote the words of any particular clause of Ss. 108, 109 or 110, because an order under S. 112 is in the nature of a charge and the person to whom the order is issued is entitled to definite information as to the case he is called upon to answer, the question whether the omission of such particulars in an order under Ss. 112 has in any particular case any material effect is a question of fact. If the accused is shown to have had full knowledge, hefore he opened his cros sexamination, as to what the case of the prosecution against him was and what he was called upon to meet, the irregularity in the matter of the contents of the order is purely technical and may well be ignored.

Per Weston, J.—The sufficiency of the notice given in the order made under S. 112, Cr. P. Code

CR. P. CODE (1891) Ss. 112 and 107.

is a matter to be considered in the light of the facts of the particular case and with regard to the possibility of prejudice to the accused. Where it is clear that the accused are not taken by surprise by the evidence, or are in any way embarrassed in cross examination of the witnesses, there is no prejudice and there is no defect in the order with vitiates further proceedings. (Lobo and Weston, II.) EMPEROR v. RASULBUX. I LR. (1942) Kar. 252-205 I.C. 322-15 R.S. 136-44 Cr.L.J. 378-A.I.R. 1942 Sind 122.

——S. 112—Jurisdiction — Subsequent events— Magistrate's power to take notice of—Supplementary order based on subsequent events and on subsequent conduct of person proceeded against—Legality.

It is open to a Magistrate holding an enquiry after the passing of a preliminary order under S. 112. Cr. P. Code to take judicial notice of what has taken place after the institution of proceedings and the behaviour of a person proceeded against after the institution of proceedings and to pass a supplementary order under S. 112. There is nothing in the Code which prohibits the issuing of a supplementary order under S. 112. It is not illegal or objectionable. (Horwill. J.) SRINIVASALU REPDIAR, In re. 198 I.C. 528=14 R M. 494=43 Cr L I 409=1942 M.W.N. 426=55 L.W. 757 (1)=AIR. 1942 Mad. 242 (1)=(1941) 2 M.L. J. 1036.

S. 112-Order under—Contents of—Particulars required not set forth—Effect of—Order for security for good behaviour—Legality.

Where an order served under S. 112, Cr, P. Code, does not set forth the particulars required namely, the circumstances of the charges against him, the amount of the hond to be executed by him, the term for which it is to be in force and the number, class and character of the sureties required, it is defective, and it is not lawful for the Magistrate to pass an order for security for good behaviour under S. 110, Cr. P. Code. (Horwill, I.) MANICKAM v. EMPEROR, 1941 M.W.N. 512=54 L.W. 63.

S. 112—Preliminary order — Contents, JAGANNATH PRASAD VERMA v. EMPEROR. [see O.D. 1936-40 Vol. I, Col. 2477] I.L.R. (1942) Nag. 62.

——Ss. 112 and 107—Proceeding under S. 107 drawn up only after preliminary hearing—Notice not specifying any wrongful act—Validity of proceeding.

Proceedings under S. 107, Cr. P. Code, are liable to be quashed on the ground that the notice does not specify any particular wrongful act that the Magistrate was satisfied was likely to be committed by the accused, but not after the whole matter has been enquired into, unless there is a reasonable suggestion of possible prejudice, or unless the defect goes to the jurisdiction, But where such proceedings were drawn np only after a preliminary hearing in which the accused were made aware of what it was for which they were going to be proceeded against, the accused could not be prejudiced in any way by an omission to set forth the substance of the infor-

CR P. CODE (1898) S. 114.

mation in the initial proceeding nor could such omission affect the jurisdiction of the Hagistrate in the matter so as to make the proceeding void. (Dhavle, I.) BANGALI AHIR v. CHATURBHUJ PRASAD. 192 I.C. 463=13 R.P. 5J5=7 B.R. 430=42 Cr.L.J. 295=22 P.L.T. 967=A.I.R. 1941 Pat. 241.

S. 114, Cr. P. Code, is applicable only to the stage prior to the serving of the preliminary order under S. 112, and it has no application as a preventive measure after the persons proceeded against have appeared in order to snow cause. If speedy remedy is considered desirable after appearance has been entered, preliminary bonds may be taken under S. 117 (3), and pending their completion, the persons proceeded against may be held in custody, or, in derault of execution they may be kept in custody until the inquiry is completed. (Byers, J.) HAMPIAH. In re. 216 I.C. 308-40 Cr.L.J. 172=17 R.M. 304=1944 M.W. N. 557=A.I.R. 1944 Mad. 575 (2)=(1944) 2 M.L.J. 120.

The failure of the Magistrate to read out the order under S. 112, Cr. P. Code, to the accused or to explain its substance to him, is not a mere irregularity. It is an illegality which goes to the root of the proceedings. (Davis, C.J. and Tyabji, J.) EMPEROR v. YUSIF JUMO. 209 I.C. 614=16 R.S. 146=45 Cr.L.J. 164=A.J.R. 1943 Sind 175.

\_\_\_\_\_S. 117 (3)— 'Any offence" — Meaning of.

The words "any offence" in S.117 (3), Cr. P. Code, are not to be read as meaning a particular offence, the words have to be read as meaning an offence of the nature set out in S.110, Cr. P. Code, bearing in mind that an order under S.117 (3) must have reterence to the information under S. 110 and the order under S. 110 which follows it. (Davis C.J. and Lobo, J.) EMPEROR v. MAHOMED RAHIM. I.L.R. (1943) Kar. 275=209 I.C. 477=16 R.S. 130=45 Cr.L.J. 147=A.I.R. 1943 Sind 173.

——S. 117 (3)—Emergency for immediate measures
—Evidence of—Care to be taken—Ware of lawlessness
and proclamation of Martial law—If can be taken into
account as evidence of emergency.

While care must be taken that proceedings under Ch. VIII, Cr.P. Code, are not used oppressively, care must also be taken not to lay undue stress upon details. A case must be looked at fairly and squarely; if a wave of lawlessness exists in the province or any area of the province or martial Law is proclaimed, these are circumstances which are not to be lightly brushed aside. They may in themselves be strong evidence of just such an emergency as S. 117 relates to. (Davis C.J. and Lobo, J.) EMPERGR v. MAHOMED RAHIM I.L.R. (1943) Kar. 275=209 I.C. 477=16 R.S. 130=45 Cr.L.J. 147=A.I.R. 1943 Sind 173.

\_\_\_\_S. 117 (3) — Enquiry — Scote—Duty of Magistrate—Evidence—Necessity for.

CR. P. CODE (1898), S. 117, (3),

S. 117 (3), Cr. P. Code, dues, not contemplate the taking of evidence on oath and the cross-examination of withenses in the usual manner. The Magiscrate must record his reasons he must deal with applications under 5. 117 (3), with care and prudence, realising that they are not mere routine orders, nor orders designed to anticipate final orders, that may be made but that they are argent orders, arising out of an emergency and can only be justified in the exceptional circumstances of an emergency. But it the Magistrate is satisfied that such an emergency exists and that urgent orders are necessary, there is no reason why he only not act upon the application of a police other or upon the sworn testimony of a police prosecutor given in the witness-box. Davis, C. J. and Weston, J.) EMPEROR V. NABIBUX. 1.L.R. (1942) Kar. 189=202 I.C. 43=43 Cr.L.J. 788= 15 R.S. 28=A.I.R. 1942 Sind 86.

S.117 (3)—Object and effect of—Order under—Grounds for—Duty of Court and duty of police officers.

Quite clearly the effect and it may therefore he presumed the object of S. 117 (3), C. F. Code, is in certain carcumstances to keep people socked up in prison if they cannot give security; they may be detained in custody until the bond is executed or until the enquiry is concluded, if the bond is not executed. The magistrate must of course consider that immediate measures are necessary for the prevention of a breach of peace or public tranquility, or the commission of any offence or for the public safety before he passes his order and he must give reasons in writing. But the fact that in consequence of an order under S. 117 (3), the accused or suspected persons may be locked up is not insufficient to invalidate an order made under a section which contemplates the possibility and the not unlikely probability, of this very thing. A duty also lies upon policeofficers in taking proceedings under the chapter carefully to consider the clauses under which they wish to palce their application under S. 110. Cr.P. Code, before they make their application. (Davis C. J. and Lobo, J.) EMPEROR v. MAHOMAD RAHIM. I.L.R. (1943) Kar. 275=209 I.C. 477= 16 R.S. 130=45 Cr.L.J. 147=A.I.R. 1943 Sind

S. 117 (3)—Order under S. 117 (3) are designed to meet emergencies—Delay of two months—Effect.

Orders under S. 117 (3) Cr.P. Code are not mere routine orders to be appended to an order under S. 112, Cr.P. Code, nor are orders under S. 117 (3) meant merely to anticipate final orders that may be made under S. 118, Cr. P. Code. The orders contemplated by S. 117 (3) are orders designed to meet emergencies. Where an order under S. 117 (3) is passed after a delay of about two months after the initiation of proceedings under it, it cannot be justified, and must be set aside. (Davis C. J. and, Weston, J.) Emperor v. NABIBUX. I.L.R. (1942) Kar. 189=202 I.C. 43=43 Cr.L.J. 788=15 R.S. 28=A.I.R. 1942 Sind 86.

\_\_\_\_S. 117 (3)—Order under—When to be passed.

S. 117, Cr. P. Code, clearly contemplates that the order under, S. 117 (3) shall be passed after the

CR. P. CODE (1898), S. 117 (3).

order under S. 112 has been made and read out or explained to the accused under S. 113. An order under S. 117 (3) passed before the order under S. 112 is read out or explained, is premature and without the necessary legal basis. (Davis C. J. and Weston, J) EMPEROR v. SIDIK GHULAM. HYDER. I.L.R (1943) Kar. 513=209 I.C. 49=16 R.S. 88=44 Cr.L.J. 815=A.I.R. 1943 Sind 163.

Where an order under S. 117 (3), Cr. P. Code has not been passed as a matter of routine but the Magistrate has clearly considered the question of emergency as a separate question, there is nothing wrong in his relating it to his order under S. 112 or the Code and acting on the same information which justified his order under S. 112. The fact that the same information support and the same statements are the basis of both orders does not offend against the provisions of the Code. (Davis C.J. and Lobo, J.) EMPEROR v. GHULAM MAHOMED. I.L.R. (1943) Kar. 279=208 I.C. 338=16 R.S. 75=44 Cr.L.J. 779=A.I. R. 1943 Sind 122.

——S. 117 (3)—Scope of inquiry—Duty of Magistrate in passing order.

An order under S. 117 (3) Cr. P. Code, is not a mere matter of routine. Before a Magistrate passes an order under S. 117 (3) he must direct his consideration particularly to the question of emergency and the necessity of immediate measures. The section says that he may pass an order under sub-S. (3), when he considers immediate measures are necessary for the prevention of certain events. It means that the Magistrate must give a careful consideration to this separate case of an emergency under S. 117 (3) and the necessary immediate measures. It cannot be said that the Magistrate has done this when merely on a police report, without even calling the police officer in the witness box, without making any further inquiry into the general and vague allegations, he passes an order under S. 117 (3). A mere report by a police officer that the accused is a desperate and dangerous character should not satisfy a magistrate. He should make some further inquiry either from the police officer himself or from some other source before he is satisfied that an emergency justifying immediate measures under S. 117 (3) exists. (Davis, C.J. and Weston, J.) BACHAL SAMAHO v. EMPEROR. I.L.R. (1942) Kar. 9=14 R.S. 212=43 Cr.L.J. 692=200 I.C. 334=A.I.R. 1942 Sind 77.

 $\frac{S.117(3)-Scope-Charges under S. 110(a)}{(b) \text{ and } (c)_i}$ 

Charges falling under Cls. (a), (b) and (c) of S. 110, Cr. P. Code, do not, perhaps with one exception, bring the case under S. 117 (3), of the Code. It might be said that the words "commission of any offence" in sub-S. (3) cover cases falling under Cls. (a), (b) and (c) of S. 110, but only when the Magistrate considers that immediate measures are necessary to prevent the commission of any offence. (Davis, C. J. and Weston, J.) BACHAL SAMAHO v. EMPEROR. I.L.R. (1942) Kat. 9=14 R.S. 212=43 Cr.L.J. 692=200 I.C. 334=A.I.R. 1942 Sind 77.

S. 117 (5)—Applicability—Two persons charged with being habitual thieves—Joint inquiry—Legality.

CR. P. CODE (1898) S. 123 (2).

Where two persons are charged for being habitual thieves and for having formed a gang for the purposes of their criminal activities, the case ralls under sub-S. (5) of S. 117 Cr. P. Code and a joint inquiry held in respect of them is not illegal. (Walford, f.) RAM DIN v. EMREROR. 1945 O.A. (C.C.) 231=1945 A.L.W. (C.C.) 326=1945 A.Cr.C. 195=1945 A.W.R. (C.C.) 231=1945 O.W.N. 361.

——S. 117 (5)—"Associated together"—Meaning of—Persons opposed to each other—Single proceeding against—Legality. See Cr. P. Cops, S. 107. 9 Cut. L. T. 16.

Ss. 118, 120 and 123—Construction—Substantive sentences for their and under Criminal Tribes Act—Separate sentence for failure to gwe security under 5. 118—How to run—Cr. P. Code, 5. 397.

A Magistrate who convicted a person under the Criminal Tribes Act directed a sentence of six month's rigorous imprisonment under S. 22 (2), (2) of that Act to run after the expiry of two other sentences of imprisonment one of twelve months for an offence of their, and another of one year's rigorous imprisonment passed in default of giving security under an order made under S. 118, Cr. P. Code.

Held, on a reference by the District Magistrate (i) that neither the first proviso nor the second proviso to S. 397, Cr. P. Code, would apply to the case; (#) that under Ss. 120 and 123, Cr. P. Code, an accused who is sentenced to undergo imprisonment in default of security and at the same time is undergoing a substantive sentence of imprisonment for another offence shall be called upon to give sceurity only after the expiry of the substantive sentence and the order for imprisonment under S. 123 should not be made until after the sentence of substantive imprisonment has been undergone; (iii) that since no special order was made under S. 397, Cr.P.Code, the imprisonment for theft and that in default of giving security would be governed by Ss. 118, 120 and 123, Cr. P. Code, and the sentence under the Criminal Tribes Act must be considered apart trom the special provisions of S. 120 or 123, Cr. P Code, and would take its course according to the ordinary rule of law laid down in S. 327, Cr. P. Code, namely, that the sentences should be consecutive unless specially directed to run concurrently; and (iv) that therefore the sentence of imprisonment for the offence under the Criminal Tribes Act should commence on the expiry of the sentence for theft, and the order of imprisonment for failure to give security should be passed and the period of imprisonment for default should commence to run from the date of expiry of the sentence of imprisonment for the offence of theft. (Davis C. J. and Lobo J.) EMPEROR v. FAZUL KHUSH MAHOMED. I.L.R. (1941) Kar. 63 = 196 I.C. 891=43 Cr.L.J. 105=14 R.S. 93=A. I.R. 1941 Sind 190.

S. 123 (2) Jurisdiction of magistrate—Suspect failing to furnish survives—Award of imprisonment by magistrate—Legality—Procedure.

Under S. 123 (2), Cr. P. Code, it is the obvious duty of the magistrate to detain the suspect in

CR. P. CODE (1898), S. 123(2).

prison pending orders of the Sessions Judge before whom he is to lay the proceedings, if such ful obstruction or nuisance upon any State property, person does not give the security ordered. He has no jurisdiction himself to award imprisonment in default of the suspect furnishing the required sureties. (Lobo, A. C. I, and Thadam, J.) EMPEROR v. ALI MAHOMED. I.L.R. (1944) Kar. 440=219 I.C. 273=46 Cr.L.J. 553=18 R.S. 42=A.I.R. 1945 Sind 55.

S. 498. See Cr. P. Code, S. 498. I.L.R. (1942) Kar. 278.

S. 123 (2)—Power of Sessions Judge— Direction that punishment shall run from date of his order and not from date of Magistrate's order—Jurisdition to make. See Cr. P. Code, S. 499. I.L.R. (1942) Kar. 278.

-S. 123 (3)—Powers of Sessions Judge under -Power to order retrial of proceedings.

A Sessions Judge acting under S. 123 (3) Cr. P. Code, has no power to order a retrial of proceedings under Ch. VIII, Cr. P. Code, by directing the magistrate to issue a fresh order under S. 112. (Lobo A. C. J. and Thadam, J.) EMPEROR v. ALI MAHOMED. I.L.R. (1944) Kar. 440=219 I.C. 273=46 Cr.L.J. 553=18 R.S. 42=A.I.R. 1945 Sind 55.

-Ss. 123 (6) and 108—Rigorous imprisonment for failure to give security in proceedings under S. 108—Legality, EMPEROR v. SWAMI SARUPANAND [see Q.D. 1936-40 Vol. I, Col. 3329.] 16 Luck. 260=42 Cr.L.J. 35=A.I.R. 1941 Oudh 98.

-S. 133-Applicability-Causing costruction to public way by act done on private land.

Where an owner of a field adjoining a public road erected an embankment on his field at a point where water flowing from a field on the other side of the road entered it, which had the effect of banking the water up in the road until it formed a little lake, and the road was thus rendered quite impassable is S. 133, Cr. P. Code, is attracted. All that the Magistrate has to see is whether the person proceeded against caused the obstruction. How he caused it is immaterial. (Bose, J.) SADASHEO v. CHINTAMAN, I.L.R. 1945 Nag. 461=1945 N.L.J. 243=A.I.R. 1945 Nag. 226.

-S. 133-Applicability-Encroachment affecting complainant and not the public.

Proceedings under S. 133, Cr. P. Code, are not intended to settle private disputes between different members of the public, but on the other hand is intended to protect the public as a whole against inconvenience. Hence when an encroachment is found to cause inconvenience only to the complainant and not to the public generally, he cannot resort to proceedings under S. 133 for redressing his personal troubles. (Allsop, J.) RAM DAYAL MISRA v. JAGDAMBA DEVI. 203 I.C. 495 = 15 R.A. 284=44 Cr.L.J. 76=1942 A.Cr.C. 177=1942 A.L.J. 558=1942 A.W.R. (H.C.) 312 =1942 A.L.W. 533=A.I.R. 1942 All. 443.

-8. 133—Applicability—Encroachment on railway land-State Railway.

OR. P. CODE (1838), S. 133 and 135.

S. 133 Cr. P. Code is applicable to all cases of unlaweven though the pables may not be entitled to use it. (Agarwala and Meredich, IJ.) RAMKRIPAL SINGH v. SUPERINTENDENT, WAY AND WORKS, E. I. R. GAYA. 24 Pat. 104-1945 P.W.N. 355-26 P.L. T. 208 = A.I.R. 1945 Pat. 309.

-Ss. 133 and 139-A - Bona fide assertion of right-Long user-Evidence as to.

The proposition that long user by a person of what is claimed to be a part of a public way may be taken as a bona fide assertion of claim ousting the jurisdiction of the Criminal Court to pass a summary order under S. 133, may be correct in the absence of anything else, but a qualification is necessary. The evidence brought forward in denial of the public right must be taken as a whole; and if the statements of the witnesses on the point in themselves also contain a retutation of the claim made, then the suggested inference does not (Agarwala follow and the jurisdiction is not ousted. and Meredith, JJ.) RAMKRIPAL SINGH v. SUPERIN-TENDENT, WAY AND WORKS, E I. R. GAYA. 24 Pat. 104=1945 P.W.N. 355=26 P.L.T. 208 =A.I.R. 1945 Pat. 309.

-S. 133-Discretion of Magistrate-Inconvenience to public not great-Difficult legal questions -Parties if may be left to their civil rights.

In a case of obstruction to a public road, the magistrate has always a discretion. If the inconvenience caused to the public is not great or can be circumvented without much difficulty and difficult legal questions arise, then it might be a sound exercise of discretion to leave the parties to their civil rights. (Boss, J.) SADASHEO
v. CHINTAMAN. I.L.R. (1945) Nag. 461=1945
N.L.J. 243=A.I.R. 1945 Nag. 226.

-Ss. 133,139-A, 529(f) and 537-Jurisdiction -Magistrate passing conditional order transfer of case to another magistrate on party appearing and showing cause-Legality.

Where a sub-divisional magistrate makes a conditional order under S. 133 Cr. P. Code, and requires the person against whom it is made to appear before him and thereafter on the latter's appearance and showing cause transfers the case for disposal to a competent magistrate subordinate to him the latter has jurisdiction to deal with the case and any order passed by him under S. 139-A is not without jurisdiction. The order of transfer would be at most a mere irregularity in procedure which is cured by S. 529 (f) and S. 537, Cr. P. Code. (Chatterji and Shearer, J.).
TEJNARAIN SINGH. v. JAGDEO SINGH. 24 Pat. 23
=12 B.R. 134=1944 P.W.N. 561=221 I.C. 418 =A.I.R 1945 Pat. 316.

-Ss. 133 and 135 - Jurisdiction - Magistrate passing conditional orders-Transfer of case to another Magistrate - Legality - Application to transferes Magistrate for appointment of jury - Competency -Power to appoint jury.

There is nothing in the Cr. P. Code to prevent a magistrate who has passed a conditional order under S. 133. Cr. P. Code, from transferring the case to some other magistrate for making inquiry under S. 137. A sub-divisional magistrate who passes a conditional order is therefore competent to transfer the case to the second CR. P. CODE (1898), S. 183.

officer. But the second officer to whom the case is transferred has no jurisdiction to appoint a jury under S 135. An application for appointment of a jury must therefore be made to the magistrate who has passed the conditional order. (Munihar Lall and Chatterii, JJ.)

JAGDISH SINGH v. BAINATH SINGH. 21 Pat. 759

=205 I.C. 302=9 B.R. 217=15 R.P. 285=44

Cr.L.J. 364=A.I.R. 1943 Pat. 115.

S. 133 — Jurisdiction—Magistrate's powers— Transfer of case to second class Magistrate after person proceeded against shows cause—Effect — Jurisdiction of second class Magistrate—Ss. 529 (f) and 537.

A Magistrate of the second class has no more power to take cognisance of the existence of a public nuisance than he has power to take cognisance of an offence. But once cognisance has been taken by a sub-divisional Magistrate and the latter transfers it to him, the second class Magistrate has jurisdiction to try the matter and determine whether an order for removal of the nuisance should or should not be made. The power conferred by S. 133 (1) on a sub-divisional Magistrate to make a conditional order, requiring the person against whom it is made, to appear and show cause before another Magistrate of the first or second class is, in substance, a power to transfer the case to such other Magistrate for disposal. The jurisdiction over the subject matter is conferred by the Code itself. The fact that the sub-divisional Magistrate transfers the case at a subsequent stage i.e.. after the person shows cause instead of at a prior stage of the case i,e., by the conditional order itself, is a mere irregularity which is curable ander Ss. 529 (/), and 537, Cr. P. Code. It cannot obviously deprive the second class Magistrate of his statutory jurisdiction. (Chatteric and Shearer, J.J.) CHANDERUIP v. EMPEROR. 24 Pat. 16=221 I.C. 183=(1945) P.W.N 151=A.I.R. 1945 Pat. 334.

Proceedings under S. 133. Cr. P. Code, are not intended to settle private disputes between two members of the public. The complainant or informant has no right in the matter and is not a person who could be described as a party to the proceedings and he has no right in such proceedings. (Allsop, J.) RAMU v. MURLI DAS. I.L.R. (1943) All. 22=204 I.C. 326=15 R.A. 339=44 Cr.L.J. 205=1942 A.L.J. 584=1942 A. Cr. C. 207=1942 A.L.W. 541=1942 A.W.R. (H.C.) 325 (2)=A.I.R. 1943 All. 19.

Ss. 133, 139, 139-A—Order under S. 133— Proper procedure thereafter—Failure to proceed under S. 139-A in the first instance—Enquiry if proper.

S. 139-A, Cr. P. Coue, provides that where an order is made under S. 133 for the purpose of preventing obstruction to the public in the use of any way, the Magistrate shall on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, and if he does so, the Magistrate shall, before proceeding under Ss. 137 or 138, inquire into the matter. If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of he existence of such right has been decided by a com-

CR, P. CODE (1898), Ss. 135 and 139-A.

petent Civil Court; and if he finds that there is no such evidence he shall proceed as laid down under S. 137 or 138 as the case may require. Where the Magistrate proceeds under S. 137 without first proceeding under S. 139-A there is no proper enquiry. (Bennett, J.) PRATAP NARAIN v. RAM KUMAR. 192 I.C. 470=13 R.O. 333=1941 A. Cr.C. 8=1941 O.L.R. 55=1941 A.W.R. (C.C.) 90=42 Cr.L.J. 241=1941 O.W.N. 54=1941 O.A. 35=A.I.R. 1941 Oudh 271.

S. 133—Powers of Magistrate under—If affected by S. 44, Madras Public Health Act and S. 195, Madras Local Boards Act.

The powers of a Magistrate to abate a nuisance under S. 133, Cr. P. Code, have not been curtailed by the powers conferred on local authorities to abate nuisances under S. 44 of the Madras Public Health Act and S. 195 of the Madras Local Boards Act. There is nothing in S. 133, Cr. P. C. which is in any way in conflict with the corresponding provision in the two local Acts, the only differences being regarding the powers which the various authorities possess under the different provisions. Further, the provisions of the Cr. P. Code, cannot in any way be affected by a local Act. (Byers, 1.) RAJAGOPALA CHETTIAR v. SAMUDUM BEGUM, I.L.R. (1944) Mad. 64=206 I.C. 546=16 R.M. 18=44 Cr.L.J. 533=1943 M.W.N. 177=56 L.W. 152=A.I.R. 1943 Mad. 357=(1943) 1 M.L.J. 237.

——S. 133—Proceeding for removal of obstruction

—Considerations for Court—Opposite party setting up
adverse possession—Proper remedy.

In a proceeding under S. 133, Cr. P, Code, for removal of an obstruction, all that the Courts have to see is whether the encroachment has in fact been made upon a public place and not whether the encroachment causes or does not cause any inconvenience to the public. If the opposite party claims that by adverse possession the public have lost their right to use the place as a public place, his obvious remedy is to deny the existence of any public right in respect of this place in a proceeding under S. 139-A. The Court is precluded from considering the question whether the opposite party has acquired by adverse possession a right in this place. The only question to be gone into is whether the obstruction in such that it attracts the provisions of S. 133 and other relevant sections in Ch. X of the Code. (Manohar Lal, J.) JADUNANDAN LAL v. RAMPEYARE SAO. 43 Cr.L.J. 903=9 B.R. 55=15 R.P. 155=202 I.C. 783=1942 P.W.N. 218=A. I.R. 1943 Pat. 32.

Ss. 135 and 139.A—Procedure—Denial of right of public way—Magistrate deciding against plea Subsequent entertainment of prayer for jury—If justified.

Where the magistrate in proceedings under S. 135, Cr. P. Code, finds that the petition filed by the party called upon to show cause is practically a denial of the right of public passage, if after deciding it under S. 139-A, Cr. P. Code, against that party, he entertains his prayer for appointment of a jury, he acts rightly and his order cannot be interfered with in revision. (Dhaule, J.) HARILAL SINGH p. DEO NARAIN

CR. P. CODE (1898). S. 137. (3)

195 I.C. 602=14 R.P. 166=7 B.R. 954 =1941 P.W.N. 625=42 Cr.L.J. 784=22 Pat.L. T. 312=A.I.R. 1941 Pat. 370.

fication of order under S. 133-Competency.

Where a preliminary order issued under S. 133, Cr. P. Code, calls upon the owner of a tree to show cause why he should not be directed to take certain steps to prevent it from damaging a house close by and the notice contemplates the cutting of the tree or the securing of it with a wire, the Magistrate has no power to order the owner under S. 137, Cr. P. Code, to cut the tree giving him no option to secure it with wires. The Magistrate sitting alone and disposing of the matter under S. 137, has no jurisdiction to modify the original order. It is only when sitting with a jury and passing a final order under S. 139 that he has power to modify the original order. (Byers, J.) D'SILVA v. D'SILVA. 206 I.C. 573=16 R.M. 33=44 Cr.L. J. 545=56 L.W. 108=1943 M. W.N. 128 (1)=A.1.R. 1943 Mad. 335=(1943) 1 M.L.J. 165.

S. 139—Scope—Power of Court—Juror expressing opinion before completion of appointexpressing opinion before completion of appointment of jury—Effect—Jury with such juror—If proper—Report—Legality—Power of Court to appoint fresh jury. Kewal Saran Singh v. Kamla Pati Lal. [see Q. D. 1930—'40 Vol. I, Col. 3329.] 191 I.C. 595—13 R.P. 361—7 B.R. 239—42 Cr.L.J. 202.

-Ss. 139 (2) and 140—Applicability — Order under S. 133 not made absolute-Procedure.

Where an order under S. 133, Cr. P. Code, is not made absolute under S. 139 (1), Cr. P. Code, S. 140. Cr. P Code does not apply and further proceedings must be dropped under S. 139 (2). (Lakshmana Rao, J.) MANICKAVASAGA NADAR v. KRISHNASWAMI IYER. 1941 M.W.N. 813=198 I.C. 131=14 R. M. 413=43 Cr.L.J. 314=A.I.R. 1942 Mad. 113.

-S. 139-A—Denial of public right—If must be in good faith.

The denial of public right must be made in good faith-If it is only made as a pretext to oust the jurisdiction of the Magistrate, S. 139-A will not apply. (Bose, J.) SADASHEO z. CHINTAMAN. I.L.R. (1945) Nag. 461=1945 N.L.J. 243=A.I.R. 1945 Nag. 226

S. 139-A-Duty to put questions-Party filing statement denying public right.

It is unnecessary for the Magistrate to put any question whether a party denies the existence of any public right when such party, directly upon appearance, has put in a statement denying the extistence of such right. Agarwala and Meredith, J.) RAMKRIPAL SINGH v. SUPERINTENDENT, WAY AND WOKKS, E.I.R. GAYA. 24 Pat. 104=1945 P.W.N. 355=26 P.L.T. 208= A.I.R. 1945 Pat. 309.

S.139-A-Duty of Magistrate - Denial of public right of way-Long user by private person of alleged public way-Rona fide assertion of claim-Procedure. BHAJOO GOPE v. GHOLAM HAIDER. [see Q. D. 1936—'40 Vol. I Col. 3329.] 193 I.C. 336—13 R.P. 589=42 Cr.L.J. 401=7 B.R. 504.

CR. P. CODE (1898), S. 139-A

-S. 139-A — "Enquiry into the matter" -Meaning.

The words 'enquire into the matter" in S 139-A, Cr. -S. 137 (3) - Jurisdiction of Magistrate-Modi. P. Code, merely mean that the Magistrate is to hear any evidence that the person on whom a conditional notice under S. 133 has been served wants him to hear before proceeding further. It such a person neither tenders any evidence in support of the cause which he shows against the conditional order nor asks the Magistrate to give him an opportunity of producing such evidence, there is nothing for the Magistrate to enquire into. (Agarwaia, J.) RAJARAM SINGH v. KESHARI RAI. 198 I.C. 724=8 B.R. 462=14 R.P. 510=43 Cr.L.J. 423=1942 P.W.N. 177=A.I.R. 1942 Pat. 468.

> -Ss. 139-A, 137 and 138-Failure to take action under Ss. 137 or 138 prior to passing of final order-Legality.

> It is the duty of the magistrate before passing a final or ier to take action either under S. 137 or S. 138, Cr. P. Code, and when this procedure is overlooked and the final order is passed forthwith, it has to be quashed. (Davies.) RAM CHANDER v. CROWN. 1944 A.M. LJ. 54.

> -S. 139-A-Non-compliance-Effect-Magistrate not ascertaining whether there is evidence in support of cenial of public right but deciding question of existence of public right—Propriety. MUNI LAL AGARWALA v. PUBLIC OF BHAGALPUR. [see Q.D. 1936—'40 Vol.I, Col. 3329.] 42 Cr.I.J. 34=A.I.R. 1941 Pat. S8.

-S. 139-A-Non compliance-Effect on proceedings. NIRSU RAUT v. SOMAR NONIA. [see Q.D. 1936 -40 Vol. I, Col. 3330.] 193 I.O. 371=18 R.P. 592 =42 Cr.L.J 413=7 B.R. 601.

-S. 139-A-Omission to question as to existence of public right at first hearing-Irregularity, if cura-

The omission by the magistrate to question at the first hearing the person against whom an order is made under S. 133 as to whether he denied the existence of a public right is a curable irregularity. (Bose, J.) SADA-SHEO v. CHINTAMAN. I.L.R. (1945) Nag. 461 = 1945 N.L.J. 243 = A.I.R. 1945 Nag. 226.

-S .- 139-A - 'Public right'-Meaning of.

The words 'any public right' must be construed in each case with reference to the right which is said to have been interfered with or obstructed. The right denied must clearly be the right which is said to have been obstructed and not any and every right which has no bearing on the matter at issue. (Bose, J.) SADA-SHEO v. CHINTAMAN. I.L.B. (1945) Nag. 461= 1945 N.L.J. 243=A.I.R. 1945 Nag. 226.

-S. 139-A-Way encroached upon admittedly public way-Omission to put question-Irregularity.

Although it is the duty of the Magistrate to question the person against whom an order under S. 133, Cr. P. Code, was made, as to whether he denied the existence of any public right in respect of the way alleged to have been obstructed, the emission to do so in a case where it is an admitted fact that the way is a public way is a mere irregularity not affecting the merits, and the High

### JR. P. CODE (1898), S. 141.

Court will not interfere in revision. (Rowland, J.) BANSIDHAR MARWARI v. P. W. D., BIHAR. 203 L.C. 70=9 B.R. 56=43 Cr.L.J. 923=15 R.P. 160=A.I. B. 1943 Pat. 3.

——S. 141—Applicability—Jury defectively consti-uted or exceeding its functions. KEWAL SARAN SINGH v. KAMLA PATI LAL. [ see Q.D. 1936 - '40, Vol. l, Col. 3330.] 191 I.O. 595=13 R.P. 361=7 B.R. 39 = 42 Cr.L.J. 202.

-S. 141-Four only out of five jurors submitting eport-Power of Magistrate to proceed under section.

The verdict of four out of five jurors is not the verdict of the jury. Although it is not necessary that the jurors should return a unanimous verdict, they must all take part in the deliberations of the jury. If, therefore, only four of the jurors attend the meeting and submit a report, there is no verdict of the jury and the Magistrate is entitled to proceed under S. 141, Cr. P. Code and sither appoint fresh jury or hear the evidence, and on that evidence come to a decision whether the conditional order should be made absolute, (Agarwala, J.) RAJARAM SINGH v. KESHARI RAI. 198 I.C. 724= 8 B.R. 462=14 B.P. 510=43 Cr.L.J. 423=1942 P. W.N. 177 - A.I.R. 1942 Pat. 468.

-Prosecution and conviction under S. 291. I.P. Code -Sustainability.

A summary order under S. 143, Cr. P. Code, should not be made against a person without giving him an opportunity of being heard under the other sections of Ch. X of the Code, which provides a procedure for that purpose. When no proceedings are taken as provided in the chapter, a mere notice, purporting to be under S. 143, Cr. P. Code, is not sufficient or legal. In such a case a conviction under S. 291, I. P. Code, is improper and unsustainable. (Sinka, /.) MAHADEB BAL AGARWALA v. EMPEROR. 10 Cut.L T. 69.

#### **-8.** 144-

Applicability. Interpretation. Jurisdiction. Order Period Under. Powers of Magistrate. Procedure. Scope.

## Applicability

# -S. 144—Applicability—Conditions of.

S. 144, Cr. P. Code, provides for temporary orders in urgent cases of nuisance or apprehended danger; the urgency of a case of nuisance or apprehended danger; the urgency of a case of nuisance or apprehended danger is therefore essential to the application of S. 144. (Dhavle, J.) RAM NARAIN SAH v. PARMESHWAR PRASAD SAH. 200 I.C. 776=8 B.R. 722=15 R.P. 28=43 Cr. L.J. 722=1942 P.W.N. 144=23 P.L.T. 644=A,I.R. 1942 Pat. 414.

justified-Order under-Nature, operation and force of 1941 All. 70 (F.B.).

CR. P. CODE (1898), S. 144-Interpretation.

-How far conclusive as to rights of parties. See CR. P. CODE, SS. 107, 144 AND 145. 1942 P.W.N. 79.

# Interpretation

-S. 144-Interpretation.

To say that sub-S. (3) of S. 144 contemplates only orders issued to the general public when it is apprehended that the public may come in crowds from eisewhere and frequent or visit some specified public places and it is desired to have some check over them while they are there, is to put a narrow construction on that provision. I ne better way is to put a wider construction on it so as to make it include also cases where individual members of the public disobey the order in any part of the place specified, whether public or private, and whether they live in the locality specified or visit it from elsewhere. (Bennett and Mauetey, J.) EMPEROR v. TURAB KHAN. 17 Luck. 52=196 I.C. 488=14 B.O. 189 =1941 A.L.W. 934=1941 A.W.R. (C.C.) 306= 1941 A.Cr.C. 233=42 Cr.L.J. 884=1941 O.L.R. 701=1941 O.W.N. 1087=1941 O.A. 787=A.I.R. 1942 Oudh 39.

-S. 144-Interpretation-"Direct any terson to abstain from a certain act or to take a certain order with certain property" etc .- Meaning-Order requiring party to demolish wall-Legality.

The words "direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management" in S. 144, Cr. P. Code, do not empower a Magistrate to make a positive order requiring a person to do particular things. The abstention from certain acts must obviously not be carried too tar. The section does not authorise the passing of any mandatory order; the Magistrate may only pass a restrictive order of a temporary character. An order, such as an order directing a party to demolish or remove a wall erected by him, which is irrevocable in its nature is outside the section and is entirely unauthorised and illegal. (Dhavle, J.) RAM NARAIN SAH v. RARMASHWAR PRAPAD SAH. 200 I.C. 776 =8 B.R. 722=15 R.P. 28=43 Cr.L.J. 722=23 P.L.T. 644=1942 P.W.N. 144=A.I.R. 1942 Pat. 414.

-S. 144-Interpretation-'Frequenting or visiting'-Scope of order that could be passed under.

The act of residing in a place includes the acts of frequenting or visiting it. To live in a particular place is to frequent it. A person residing in a prohibited area is one who 'frequents or visits' it. The power of the Magistrate under S. 144 (3), Cr. P. Code, is confined to the direction to a particular person to abstain from acts of a certain character or to the public generally to abstain from similar acts when frequenting a particular place. It contemplates prohibition of some act on the occasion when the particular place referred to in the order is frequented or visited. Where an order is directed to the public generally when frequenting or visiting particular places or specified areas, there is no defect or illegality in the order, (Thom, C. J., Ganga Nath and 43 Cr. L.J. 722=1942 P.W.N. 144=23 Braund. J.J. EMPEROR V. AFAQ HUSAIN JAUHAR. T. 644=A.I.R. 1942 Pat. 414.

I.L.R. (1941) All. 186=192 I.C. 466=13 R.A. 337 = 1941 O.A. (Supp.) 4=42 Cr.L.J. 298=1940 Order under—When A.W.R. (H.C.) 642=1940 A.L.J. 885=A.I.R. 4 Cr.L.J. 298=1940 A.L.J. 885=A.I.R. CR. P. CODE (1898), S. 144-Interpretation.

-S. 144-Interpretation-'Or to the public generally when frequenting or visiting a particular place, BHAGWATI PRASAD v. EMPEROR. [see Q.D. 1936-40. Vol. I. Col. 2497.] I.L.R. (1940) All. 662=191 I.C. 360=13 R.A. 230=42 Cr.L.J. 120.

# -S. 144-Interpretation-'Particular place'.

A 'particular place' referred to in sub S. (3) of S. 144 Cr. P. Code may be a large area and all that is necessary is that the place should be so sufficiently defined that the public is reasonably notified of its extent. Where an order was directed to the public residing in the areas! administered by the Cawnpore Municipality, the Cawnpore Cantonment Authority and the Jahi Norified Area Committee, these could be no doubt as to the areas covered by the order and the delimitation was reasonably clear and description sufficiently detailed as to liberty of press-Duty of Magistrate. leave no doubt in the minds of the restornts therein. (Thom, C. J. Ganga Nath and Braund, JJ.) EMPEROR V. AFAO HUSAIN JAUHAR. I.L.R. (1941) All. 186=192 I.C. 465=13 R.A. 337=1942 O.A. (Supp.) 4=42 Cr.L.J. 298=1940 A.W.R.; H.C.) 642=1940 A.L.J. 885=A.I.R. 1941 Ail. 70 (F.B.).

——S. 144 —Interpretation— Particular place', BHAG-WATI PRASAD v. EMPEROR. [see Q. D. 1930-40 Vol I. Col. 2499.] I.L.R. 1940 All 6b2=191 I.C. 360 =13 R.A. 230=42 cr.L.J. 120.

### Jurisdiction.

-S. 144-Jurisaiction-Nature and extent of-Duty of Magistrate under to exercise care.

The orders to be passed under S. 144, Cr. P. Code, must be of a temporary nature. Such orders are passed in the general interests of society and may validly interfere, within the limitations laid down, with private rights of enjoyment of property. There is therefore all the more reason why the jurisdiction under S. 144, Cr. P. Code, ought to be exercised carefully and interference with private rights reduced to a minimum and regulated by a full observance of the limitations imposed by the section itself. (Dhavle, J.) RAM NARAIN SAH v. PARMESHWAR PRASAD SAH. 200 I.C. 776=8 B.R. 722=15 R.P 28=43 Cr.L.J. 722=23P.L.T. 644=1942 P.W.N. 144=A.I.R. 1942 Pat. 414.

-S. 144 (1) - Jurisdiction - Subordinate Magistrate refusing to pass order-Power of superior Magistrate to pass order on same materials.

There is nothing in S. 144, Cr. P. Code, which prohibits a superior Magistrate from re-enquiring into a matter and making an order under S. 144 (1), when a Subordinate Magistrate had already refused to pass an order on the same matter. Whether the material is gathered by himself or by a Subordinate Magistrate is irrelevant. (Horwill, J.) NAINAMALAI GOUNDAN v. RAMASAMY GOUNDAN. 198 I.C. 109=14 R.M. 462=43 Cr.L.J. 372=1941 M.W.N. 867 (1). A.I.R. 1942 Mad. 20.

## Order Under.

right of possession under-If can give rise to adverse possession. See LIMITATION ACT, ART. 120. (1941) 1 M.L.J. 322.

CR. P. CODE (1898), S 144-Period under.

-S. 144-Order under-Nature of-Value of as evidence of possession in subsequent proceedings.

An order under S. 144, Cr. P. Code, is of no use in determining po-session beyond the period during which it remains in force. Having regard to the peculiar juridiction conferred by S. 144, no inference of possessioin an be drawn from it. Being a summary order and the nature of temporary injunction intended for emergencies, it should not be utilised in su' sequent proceedngs as substantive evidence of possession of a successful party. (Pharte. J.) MADHO SINGH v. EMPEFOR. 200 I.C. 316=8 B.R. 670=14 R P. 658=43 Cr.L.J. 637=1942 P.W.N. 79=23 Pat. L.T 243=A.I.R. 1942 Pat. 331.

-S. 144-Order under-Order interfering with

The right of the public to have news published is common to all countries where there is liberty of the press and it is the might of all newspapers equally to pu lish news provided it does not offerd against any existing law. It is Jovious therefore that the powers given to a Magistrate under S. 144, Cr. P. Code, to interfere with the liberty of the press should be used very sparingly and only for good cause shown. It is for this reason that the section itself makes it obligatory for the Magistrate in any such order to incirate the material facts which justify such an order. (Young, C. J. Bhide and Mahomed Munir, JJ.) P. T. CHANDRA, EDITOR, 'TRIBUNE' v. EMPEROR. I.L R. (1942) Lab. 510=201 I.C 572=43 Cr.L.J. 747=15 RL. 65=44 P.L.R. 297=A.I.R. 1942 Lah. 171 (F.B.)

S. 144—Order under—When proper — BHAGWATI PRASAD v. EMPEROR. [re Q. D. 1936—'40 Vol. I Col. 2408.] I.L.R 1940 All 662=191 I.C. 360=13 R.A. 230=42 Cr.L.J. 120.

## Period Under.

-S. 144 (6)-Period Extension of order after its expiry—Power of Local Government. CHANAN SINGH v. EMPEROR. [see Q D. 1936—'40 Vol. I Col. 3330.] 191 I.C. 162=13 R.L. 272=42 Cr.L.J. 90.

-S. 144- (6)—Period of two months—Computation-Staring point.

The period of two months referred to in S. 144 (6). Cr. P. Code, runs from the date on which the first notice is issued and not from the date on which the order is passed after hearing the parties. (Dhavle, J.) RAM NARAIN SAH z. PARMESHWAR PRASAD SAH. 200 I.C. 776=8 B R. 722=15 R.P. 28=43 Cr. L J. 722=23 P.L.T. 644=19 P.W.N. 144= A.I.R. 1942 Pat. 414.

—S. 144 (6)—Period—Power to revie i riginal order-Evasion of S. 144 (6)-Jurisdiction.

A Magistrate has no jurisdiction under S. 144, Cr. P. Code, to make an order for the renewal of the original order which would operate to extend an injunction under S. 144 without the sanction of the Local Govern-Order Under.

-S.144—Order under—Effect of—Exercise of (Dhavle, J.) RAM NARAIN SAH, v, PARMESHWAR of possession under—If can give rise to adverse sision. See LIMITATION ACT, ART. 120. (1941)

L.I. 322.

ment. It is not open to the Magistrate to evalue of the section, (Dhavle, J.) RAM NARAIN SAH, v, PARMESHWAR PRASAD SAH, 200 I.C. 776=8 B.R. 722=15 R.P. 28=43 Cr. L.J. 722=23 P.L.T. 644=1942 P.W.N. 144=A.I.R. 1942 Pat. 414, It is not open to the Magistrate to evade S. ment.

CR. P. CODE (1893) 144-Powers of Magistrate CR. P. CODE (1898), S. 145.

-S. 144 - Powers of Magistrate-Decision of question of possession-Irregular order within juris. diction-Breach of-Offence.

Where there is a dispute regarding possession, it is improper for the Magistrate to decide the matter, in a summary proceeding under S. 144, Cr. P. Code. Under S. 144, nowever he has the authority for prevention or speedy remedy" to direct the party to keep away from the land. An order passed by the Magistrate to this effect is with jurisdiction. The accused therefore by acting contrary to that order contravenes the provisions of S. 188, Penal Code. (Reuben, J.) RUPAN SINGH v. EMPEROR. 215 I.C. 152=11 B.R. 70=45 Cr.L.J. 18=17 R.P. 110=A.I. R. 1944 Pat. 213.

-S. 144—Powers of Magistrate—Power to put in possession person not in possession and to direct him to karvest crops.

The powers of a Magistrate under S. 144 Cr. P. Code, extend to a direction, in the proper circumstances, to any person 'to abstain from a certain act or to take certain order with certain property in his possession or under his management." Where the property is not in the possession or under the management of a Sub-Inspector of Police the Magistrate has no authority to put him in posession of that property and direct him to harvest the crop. (Reuven, f.) RUPAN SINGH v. EMPEROR. 215 I.C. 152=11 B.R. 70=46 Cr.L. J. 18=17 R.P. 110=A.I.R. 1944 Pat. 213.

-S. 144-Powers of Magistrate-Questions of title- Jurisdiction to decide on taking measurements of property-Suit pending in Civil Court between parties -Magistrate assuming functions of Civil Court-Propriety.

A Magistrate's jurisdiction under S. 144, Cr. P. Code is not a jurisdiction to assume the functions of the Civil Court, though he can decide questions of possession and of rights of user by appropriate proceedings under Ch. XII of the Cr. P. Code. He has no jurisdiction to pass an order which is not limited in time but on the face of it purports to be of the nature of a perpetual injunction. He cannot decide disputed questions of title to property by taking measurements, etc., especially when a civil suit is pending between the Sant v. Parmeshwar Prasad San. 200 I.C. 776

8 B.R. 722=15 R.P. 28=43 Cr.L.J. 722=23

P.L.T. 644=1942 P.W.N. 144=A.I.R. 1942 Pat. 414.

## Procedure.

-Ss. 144, 145 and 147—Procedure—Duty of Magistrate-Proceedings under S. 147-Dispute about right exercisable at particular seasons- Magistrate dropping proceedings after season was over without taking evidence-Jurisdiction-Revision.

It is clear from the terms of Ss. 144, 145 and 146, Cr. P. Code, that whether a dispute is likely or not is a matter for the Magistrate but, where the Magistrate is satisfied that a dispute requiring to be dealt with under these sections does exist it is clearly necessary that he should proceed with the matter in accordance with the law and should not abuse the procedure by dropping the proceedings on an untenable ground and indirectly passing an order against one of the parties which he could not directly have passed without hear-

ing all the evidence. In the case of a right exercisable only at particular seasons or on particular occasions, it is not the law that it is open to Magistrate, when such a dispute arises, to start a proceeding under S. 147, Cr. P. Code, not only to drop it when the season is over but in addition to pass an order against one of the parties which could only be properly passed after hearing all the evidence that the parties may desire to produce in the case. To drop the proceedings after some time on the ground that there was no imminent danger of a breach of the peace as the season was over, is not in the spirit of Ss. 144 145 and 147 and the High Court will interfere in revision and set aside the order dropping the proceedings. (Dhavle, J.) DWARKA SINGH v.
JAMUNA SINGH. 194 I.C. 793=14 R.P. 72=7 B. R. 860=42 Cr.L.J. 620=1941 P.W.N. 188=A. I.R. 1941 Pat. 281.

#### Scope.

-S. 144-Scope-Acts interfering with easement rights.

A person is entitled to have the protection of S. 144, Cr. P. Code not only when the act or measure complained of is such as will amount to an offence when allowed to be completed but also when if completed it will furnish grounds for a civil action only, as for example, an infringement of a right of easement. (Akram and Pat. J.).) RASHID ALLIDINA v. IWAN-DAS KHEMJI. I.L.R. (1942) 1 Cal. 488=204 I.C. 370=44 Cr.L.J. 288=15 R.C. 538=46 C.W.N. 136=A.I.R. 1943 Cal. 35.

-S. 144-Scope-Acts interfering with individual rights.

S. 144. Cr. P. Code, is not limited in its operation only to cases of possible breach of general peace of the district but contemplates also cases of interference with individual rights. (Akram and Pal, J.). RASHID ALLIDINA v. JIWANDAS KHEMJI. I.L.R. (1942) 1 Cal. 488=204 I.C. 370=15 R.C. 538=44 Cr.L, J. 288=46 C.W.N. 136=A.1.R. 1943 Cal. 35.

-Ss. 144 and 145-Scope-Breach of peace likely about possession of land-Proper proceedings.

If there is a dispute likely to lead to a breach of the peace about the possession of land proceed ings should be drawn up under S. 145, Cr.P.Code. If, instead, the Magistrate passes an exparte order under S. 144 Cr. P. Code and directs the police to reap the paddy, his order is absolutely illegal. (Henderson J.) KALIPADA ROY v. SUNIL K. GHOSE. 198 I.C. 559=14. R.C. 477=43 Cr.L.J. 397=45 C.W.N. 1090=A.I.R. 1942 Cal. 66 (1).

-S. 145.

Applicability. Attachment under See also S. 145 (4) LAST PROVISO. Breach of peace. Compromise. Construction. Duty.of Magistrate.

Effect of order, See S. 145 (6). Evidence.

Iurisdiction.

CR. P. CODE. (1898) S. 145-Applicability.

Locus Standi to apply.

Period of two Months See S- 145 (4)
Proviso.

Possession.

Powers of Court.

Procedure.

Proceedings under.

Revision.

Scope.

S. 145 (4) Proviso—Period of Two Months Last Proviso.

\_\_\_\_S. 145 (6).

## Applicability.

S. 145—Applicability—Dispute not hove fide.—Proceedings under—If improper See Cr. P. Code, Ss. 107, 144 and 145. 1942 P.W.N. 79.

Where each party submitted that that party did not intend to break the peace and nothing was said about the intentions of the other party.

Held, that those two statements taken together could not be held to establish the facts required by S. 14<sup>5</sup> (5) Cr. P Code. (Edgley and Blank J.) INANENDRA NARAYAN v. SAMED MOLIA 208 I.C 215=45 Cr.L.J. 107=16 R.C. 338=A. I.R. 1943 Cal. 559.

## Attachment under.

One object of an attachment under S. 145 (4). Cr. P. Code is to keep effective control of the subject in dispute so as to prevent the contesting parties from creating a breach of the peace in their attempts to get physical possession. A mere restraint on alienation would generally be of no use in preventing a breach of the peace, and this is the object with which S. 145. Cr. P. Code, is enacted. The purpose of a Civil Court attachment is quite different from that of an attachment under S. 145 (4), Cr. P. Code. Attachment under the C. P. Code is a preliminary step to be taken to make the property available for sale for the satisfaction of the decree. The purpose of the attachment is to prohibit the judgment-debtor from transferring or charging the property in any way. Such purpose is wholly foreign to the scope of a proceeding under S. 145 Cr. P. Code. The magistrate acting under S. 145, Cr. P. Code, has nothing to do with the title to the property and is concerned with maintaining actual possession with a view to prevent a breach of the peace. (Manchar Lall and Chatterji, JJ.) NARP KISHOPF-PRASAP SINCH v. RAPHA KISHUN. 21 Pat. 743=205 I.C. 479=9 R.P. 231=44 Cr.L.J. 414=15 R. P. 292=A.I.R. 1943 Pat. 124.

CR. P. CODE, (1898) S. 145-Duty of Magistrate.

### Breach of Peace.

S. 145—Breach of trace—Titelihood at time of drawing up traceedings—Necessity for,

It is necessary that the Maristrate should be satisfied at the time of drawing up proceedings under S. 145. Cr. P. Code, that there was then existing a likelihood of the breach of the peace arising from disputes between parties as to possession of the land in question. (Edaley and Rlank, II) INANEXPA NEAVAN TO SAMED MOTIA. 200 I C. 215-16 R.C. 338-45 Cr.I.J. 107-A I.R. 1943 Cal. 559.

- S. 145—Breach of proceedings. fear-if necessary for initiation of proceedings.

S. 145. Cr. P. Code requires that there must be a present fear that the dispute that exists is likely to cause a breach of the peace pless proceedings are taken under the section (Menokar Lall and Chatterii II) Shundadan Das 11 Satyango Prasan, 203 I.C. 275-0 B.R 73 = 15 P.P. 168=44 Cr.L.J. 25=A.I.R. 1943 Pat. 44.

## Compromise.

- S. 145-Compromise-Effect on tenancy rights.

(Per Shirreff S. M.)—The compromise in a summary inquiry into possession in a criminal Court could n thave the effect of deciding any question of tenancy right. Nor could it operate as estoppel. (Shirreff S. M. and Sathe J. M.) HARKESH 2: NAJIIS. 1942 O. W.N. (B.R.) 27=1942 O.A. (Supp.) 25=1942 A. W.R. (Rev.) 25=1942 R.D. 43=1942 A.L. J. (Supp.) 4.

#### Construction.

S. 145 (4)—Construction "Hearing of parties"—Meaning of. See Cr. P. Code, S. 208 (1). 1945 N.L.J. 122.

— S. 145 (2)—Construction--Land-If includes movable property.

The definition of land in S. 145 (2) of Cr P. Code cannot include the movable property such as the stock of medicines in a shop and so no order could be passed in respect of them. (Ghulam Hasam, J.) MAHOMFD RFG v. FHSAN BEG. 195 I.C. 236=14 R.O. 69=1941 O.L.R. 556=1941 O.W.N. 848 (2)=1941 A.Cr.C. 149=1941 A.L.W. 749=1941 A.W.R. (C.C.) 247=42 Cr.L.J. 710=1941 O.A. 570=A.I.R. 1941 Oudh 515.

## Duty of Magistrate.

S. 145—Duty of magistrate acting under -Existence of adjudication of rights by Civil Court.

When there has been an adjudication of rights by a Civil Court, the dispute is at an end, and the magistrate acting under S. 145 Or F Code should maintain the right of the successful party and not allow the other party to reagitate rights OR.P. CODE (1838), S. 145-Evidence.

already decided by Civil Court. (Yorke, J.)
MAKHAN LAL v. MANGAL I.L.R. (1943) All.
150=1942 A.W.R.(H.C.) 361=1942 A L.W. 664
=1942 A.Cr.C. 211=1942 A.L.J. 629.

## ----S. 145 (4)—Duty of Magistrate under.

A Magistrate acting under S. 145 (4) of the Cr. P. Code has to decide the possession of the subject of the dispute without reference to the merits of the claims of any party. It is not within his province to determine the title of the parties or the question whether the possession was founded upon title or not. His only cancern is to see who is in de facto possession of the subject of dispute. The Magistrate is entitled to take notice only of exclusive actual physical possession and has nothing to do with constructive possesion or joint possession. (Ghulam Hasan, J.) Mahomed Beg v. Ehsan Beg. 195 I.C. 236 = 14 R.O. 69=1941 O.R. 556=1941 O.N.N. 848 (2)=1941 A.Cr.C 149=1941 A.L.W. 749=1941 A.W.R. (C.C.) 247=42 Cr.L.J. 710=1941 O.A. 570=A.I.R. 1941 Oudh 515.

#### Evidence.

In proceedings of the nature contemplated by S. 145, Cr. P. Code it is safer to rely, on the documentary evidence than on oral evidence. (Lobo A. C. J. and Thadani, J.) KODANMAL v. EMPEROR. I.L.R. (1945) Kar. 78=221 I.C. 112=A.I.R. 1945 Sind 110.

#### Jurisdiction.

When once a magistrate has found that the dispute is not of such a nature as to cause a breach peace, all proceedings with regard to the property should cease immediately. The attachment, if any on the property should be removed and the party claiming possession or ownership or both of the property should be directed to the competent Civil Court. It is not proper to direct any particular party to file a suit. (Davies.) HASHIM ALI v. EMPEROR. 1940 A.M.L.J. 62.

—S. 145—Jurisdiction—Decision on question of possession by Land Registration Court—If deprives Magistrate of jurisdiction to go into question of possession.

A Magistrate has jurisdiction to proceed under S. 145, Cr. P. Code, notwithstanding there being a decision of the Land Registration Court as to possession. Even when the Land Registration Court has given a decision on the question of possession, a Magistrate is not incompetent to investigate the question of possession in a proceeding under S. 145, Cr. P. Code. (Fazl Ali, J.) RAM KRIPAL v. SIDHESHWAR SINGH. 196 I.C 469 = 14 R.P. 203=8 B.R. 25=42 Cr.L.J. 876=1941 P.W.N. 89=A.I.R. 1941 Pat. 516.

S. 145 (1)—Jurisdiction—Dispute about undivided shares in land or produce of land—Nonjainder of one co-sharer—Effect—Procedure,

CR.P. CODE (1898), S. 145-Jurisdiction.

S. 145, Cr. P. Code is not ordinarily intended to apply to disputes as regards undivided shares in land or in the produce of land especially when a co-sharer is not a party to the proceedings. When, in proceedings under S. 145, Cr. P. Code, a magistrate comes to the conculsion that the applicant's possession is joint and not exclusive, and that he would not therefore be in a position to make an order of exclusive possession in favour of any party the proceedings can be terminated under S. 145 (1). In other words where a magistrate is seized of proceeeings under S. 145. Cr. P. Code, and he cannot legally act under clauses (4) and (6) of S. 145, and the facts do not warrant the application of cl. (5), he is entitled to cancel his order made under S. 145 (1) if he thinks fit. (Lobo A. C. J. and Thadami, I.) KODANMAL v. EMPPROR. I. L. R. (1945) Kar 78= 221 I.C. 112=A.I.R. 1945 Sind. 110

——S. 145 (2)—Jurisdiction—Dispute as to crops cut and gathered—If can be subject of proceedings under section.

The word 'crops' in S. 145 (2) Cr. P. Code, includes both standing crops and havested crops. S. 145 can therefore he invoked in respect of crops cut and gathered if there is a dispute relating to such crops. But the crops must unmistakably be associated with the crops grown on the land in question. If the produce of the lard has been removed and is wholly unconnected with and dissociated from the land in question, then the magistrate has no jurisdiction to deal with the matter under S. 145 (2). (Lobo A. C. J. and Thadani. J.) KIMATRAI v. EMPEROR. I.L.R. (1945) Kar. 72.

Ss. 145 and 146 – Jurisdiction – Dispute as to land—Order declaring two persons in possession of half of land – Subsequent dispute – Fresh proceeding under S. 145 – Magistrate attaching land being unable to decide possession Jurisdiction – Duty of Magistrate to maintain possession awarded under earlier order.

S took a settlement of a land measuring 45 bighas of land from the proprietors of a village and subsequently sold half of it (22½ bighas) forming the northern half of it to R. In a dispute between these lesses and the landlords on the one hand and certain persons on the other hand who claimed occupancy rights in the land, a proceeding under S. 145, Cr. P. Code, was instituted in respect of the entire area including the 45 bighas. R and S were made parties. An order was passed by which R and S were declared to he in possession of the 45 highas. Six months later R complained to the Magistrate that S was attempting to dispossess him from the 22½ highas which he had purchased from him, The Magistrate after some inquiries drew up another proceeding under S. 145, Cr. P. Code, S pleaded in this proceeding that he had been in exclusive rossession of the entire 45 bighas, that the sale deed by him to R. was only benami. The Magistrate was unable to decide who was in possession of the land in dispute and therefore attached the land under S. 146, Cr. P. Code.

Held, in revision, (1) that the Magistrate had no jurisdiction to institute a second proceeding

## CR. P. CODE (1898), S. 145-Juridiction.

under S. 145, Cr. P. Code, after having made an order in the earlier proceeding putting R in nossession of 22½ bigh as of land, he was bound to maintain him in possession of it; (2) that even if the earlier order he construed as one putting both R and S in joint possession of the 45 bighas, it was the Magistrate's duty to hind doth of them down until the matter was decided by the Civil Court or settled by arbitration. (Shearer I) RAMBACHYA SINGH V. SINGESHWAP RAL 195 I.C. 854=14 R P. 176=42 Cr. I. J. 791=7 B.R. 982=22 Pat L.T. 731=A.I.R. 1941 Pat. 667.

S. 145—Jurisdiction—Dispute as to undivided share in land or crops—Proceedings under to have anything to do with disputes relating to properly. However, it is its function to prevent breaches

S. 145, Cr. P. Code is not ordinarily intended to apply to disputes as regards undivided shares in land or in the produce of land. If there is, however, a dispute between co-owners of undivided shares among themselves, one of the sharers may ask that he be put in joint possession with the others of the whole land. (Davis, C. J. and Weston, I.) IAM BHAMPHO KHAMT, MAHOMED HASSAN SHAH, ILR. (1942) Kar 120=202 I.C. 617=15 R.S. 55=43 Cr.L.J. 876=A.I.P. 1942 Sind 117.

----Ss. 145 and 147—Iurisdiction—Dispute regarding right to receive offerings.

If a dispute as regards the right to receive the offerings at a certain shrine centres round and depends upon the right to sit in a particular spot, the dispute relates either to the possession of the land or to its use. The court has, therefore, juri-diction to make an order S. 145 or S. 147, Cr. P. Code (Rose I.) ABBULL MATHER. MAHOMED SAHIB, 1941 N.I. 110=195 I C. 122=14 R.N. 37=42 Cr.L.J. 675=A.I.R. 1941 Nag. 171.

An order under S. 145 (1), Cr. P. Code can he made only by a Magistrate having local jurisdiction over the land or water in dispute. (Hemeon, J.) BALIRAM v. DAULAT SINGH. I L.R. 1944 NAg. 836=1944 N.L I. 508=220 I.C. 77=46 Cr.L.J. 654=A.I.R. 1945 Nag. 56.

——S. 145 (1) and (5)—Jurisdiction—Order under S. 145 (1)—Cancellation under S. 145 (5)—Effect—Further order dividing crops—Legality—Procedure.

When once a Magistrate passes an order under S. 144 (5), Cr. P. Code, cancelling a previous order made by him under S. 145 (1) on the application of a co-sharer, he has no further jurisdiction to adjudicate upon the dispute between the parties or upon the division of the produce of the property other than to direct that the produce should he restored, if it had been taken, to the possession of the person from whom it had been taken. When an order under S.'145 (1) is cancelled under S. 145 (5), the parties must as far as possible he restored to the position which they occupied before the proceedings were started, not only with regard to the ard, but with regard to the produce of the land

CR. P. CODE (1898), S. 145-Possession.

or its proceeds. If that he not possible, the proceeds, if the produce had been sold, should be kept in the custody of the Court and the parties should be directed to seek redress of their prievances in a Civil Court. (Daris, C. J. and Weston, J.) IAM BHAMPHO KHAN v. MAHOMPH HASSAN SHAH. I.I. P (1042) Kar. 120-202 I.C. 617 = 15 R.S. 55=43 Cr.L.J 876=A.I.R. 1942 Sind 117.

- S. 145 - Jurisdiction - Scope of - Action in the absence of apprehension of breach of treace - Legality.

Generally it is not the function of the Criminal Courts perty. However, it is its function to prevent breaches of peace and breaches of peace might be caused by persons who have a dispute with regard to property. S. 145 and certain other sections of a like nature were, therefore, incorporated in the Code with the object of enabling the Criminal Courts to take suitable action in such cases to prevent breaches of peace. Put the jurisdiction thus conferred is a very limited one and is carefully restricted to a prevention of the apprehended breach of peace. Before an order is made under Subsec. (1) of S. 145, the Magistrate should be satisfied that there is an apprehension of a breach of the peace and he must state in writing the reasons for his being so satisfied. When he is not satisfied that there is an apprehension of a breach of peace he has no jurisdiction to nass the order under the first sub-section of S. 145, Cr. P. Code. (Verma, I.) MAHOMED ISHAO v. FM-PFROR. IL R. (1944) All. 797 = 218 I.C. 397 = 18 R A. 91=46 Cr.T. J. 504=1945 A W R. (H.C.) 294 =1944 A.L.W. 549=A I.R. 1945 All. 60.

## Locus Standi to Apply.

S. 145—Locus standi to apply—Dispute between tenant and sub-tenant—Right of landlerd to apply for order.

Where the dispute is between a tenant and his subtenants, the landlord is not a party to the dispute within the meaning of S. 145. Cr. P. Code. S. 145. Cr. P. Code, is concerned with persons in "actual" possession in contradistinction to "constructive" possession. But that does not mean that the landlord who is interested in the land and in his tenants has no locus standi to apply under S. 145. There is no legal objection to a Magistrate's taking notice of a dispute merely hecause his attention was drawn to the dispute by an absentee landlord. (Harvill, J) RAIARAM DAS RAVAII r. RAMANNA. 201 I.C. 477=43 Cr. L. J. 741=15 R.M. 350=1942 M.W.N. 379=55 I.W 297 (9)=1942 M.C. C. C. 97=A.I.R. 1942 Mad. 534 (1)=(1942) 1 M.L. J. 592.

#### Possession.

- S. 145-Possession contemplated by-Nature of.

The possession contemplated under S. 145, Cr. P. Code, is not only actual possession but the exclusive possession of the subject in dispute. There is no room whatever for the application of the dectrine of joint possession under that section. The question of joint possession or constructive possession are both foreign to the scope of that section. (Ghulom Hasan, J.) MAHOMED BEG v. FISAN PFG. 195 I.C. 286-14 R.O. 69-1941 O.I.R. 556-1941 O.W.N. £48 (2)-1941

CR. P. CODE, (1898) S. 145-Powers of Court.

A.Cr.O. 149=1941 A.L.W. 749=1941 A.W.R (C. C.) 247=42 Cr.L.J. 710=1941 O.A. 570=A.I.R. 1941 Oudh 515.

There is no warrant for holding that a declaration under S. 145, Cr. P. Code, cannot be given in favour of a landlord as against a rival landlord where his tenants were found to be in actual possession on the date when the preliminary order was passed. As between rival landlords in a case under S. 145, Cr. P. Code, the possession of a tenant can be treated as the possession of a tenant can be treated as the possession of this landlord and a declaration may be granted in favour of that landlord even though the tenant is not a party to the proceedings. (Habtell, J.) Venugopal Mudaliar D. Neelakanta Mudaliar. 220 I.C. 309 = 1945 M.W.N. 104 = 58 L.W. 272 = A.I.B. 1945 Mad. 255 = (1945) 1 M.L.J. 303.

#### Powers of Court.

—S. 145—Powers of Court—Matter in dispute—If can be referred to arbitration. AHMAD ULLAH v SRINIWAS JOSHI. [see Q.D. 1936-40, Vol. I. Col. 3330.] I.L.R. (1941) All. 14=13 R.A. 304=192 I.C. 16=42 Cr.L.J. 246=A.J.R. 1941 All. 42.

#### Procedure.

S. 145 Cr. P. Code, no doubt contains no reference to arbitration proceedings; but there is nothing in the section to forbid the parties by mutual consent adopting any procedure on which they may agree for the amicable settlement of their dispute. If the dispute is amicably settled and no likelihood of a breach of the peace remains, the Magistrate can act under S. 145 (5) cancelling his previous order and staying all further proceedings but if he does not do that the only alternative is to decide the dispute and pass order under S. 145 (6). Such an order must be based on evidence and the Magistrate before making it is bound under S. 145 (4) to receive all such evidence as may be produced by the parties. If the award is the only evidence tendered by either party, the Magistrate in accepting the award and acting on it can be held to proceed in accordance with S. 145 (4). But if before he disposes of the case a petition is filed asking that evidence should be received and the dispute determined according to law, it becomes his duty to receive such evidence as may he produced, under sub-S. (4) unless he decides to drop the proceedings under sub-S. (5). (Rewland, J.) SUNDAR GIR GOSSAIN v. JADUNANDAN JHA. 197 I.C. 491=8 B.R. 226=43 Or.L.J. 172=14 R.P. 321=A.I.R. 1942 Pat. 289.

S. 145 (1)—Procedure—Preliminary order when police reports no apprehension of breach of peace—Legality.

Where the police has reported in a case under S. 145, Cr. P. Code, that there is no apprehension of breach of peace, the Magistrate is not justified in directing the parties to file written statements acting on the affidavit of the applicant and ignoring the police report. The reversioners.

CR. P. CODE, (1898) S. 145-Proceedings Under.

preliminary order could not be justified by any evidence subsequently taken after issue of notice under sub-sec. (1) of S. 145. (Bennett. J.) BISRAM v. KAMTA PRASAD. 1944 A.W.B. (CC.) 295=1944 O.A. (C. C.) 295=1945 A.Cr.C. 2=A.I.R. 1945 Oudh 62.

S. 145 and 146—Procedure—Action under S. 146 (1), when can be taken—Absence of agreement as to delivery of property—Attachment if can be withdrawn,

There are two steps in S. 145, Cr. P. Code, which have to be kept clearly separate by Magistrates. In the first place a Magistrate has to be satisfied that there is a dispute likely to cause a breach of the peace and if satisfied he has to make an order under S. 145 (1), Second. ly, if the Magistrate finds that there is a danger of a breach of the peace he has to decide which party was in possession and to hand over the property to that party. If as it often happens, he is unable to decide which party was in possession he is forced to take action under S. 146. The proviso to S. 146 (1) empowers the Magistrate to withdraw the attachment if he was satisfied that likelihood of a breach of peace no longer existed; but the problem would still remain to whom he should hand over the property and for this no provision is made in S. 146. When once the matter has been agitated it is essential that the Magistrate should hand over the property to somebody and unless there is agreement on this point, he must keep it attached until the question has been decided by a competent Court, (Plouden, J.) NURUL HASAN v. MAJIDAN. I.L. R. (1944) All. 285=215 I.C. 45=45 Cr.L J. 769= 1944 A.L.W. 289=1944 A.W.R. (H.C.) 114=1944 A.L.J. 190=1944 O.A. (H.C.) 114=17 R.A. 64= A.I.R. 1944 All. 210.

## Proceedings Under.

The inquiry under S. 145, Cr. P. Code, is in its nature a summary one and the proceedings cannot be held up till all possible interests are represented in the inquiry and hence the non-impleadment of some persons cannot vitiate the proceedings. In such proceedings the duty of weighing evidence regarding possession is reserved purely to the trial Court. (Misra. J.) MAHADEO PRASAD v. RAM SARAN. 220 I C. 418=46 Cr L. J. 680=1944 O.W. N. 387=1944 A. Cr. C. 43=1944 A. W. R. (C.C.) 196=1944 O.A. (C.C.) 196=A.I.R. 1945 Oudh 12.

S: 145—Proceedings under—Propriety—Special Judge finding property to be that of the debtors in Encumbered Estates Act proceedings.

Where the special Judge has found in the U.P. Encumbered Estates Act proceedings that certain property belongs to the debtor applicant under the Act, it is not open to the opposits parties to agitate their claim except under S. 11 of the Act and hence initiation of proceedings under S. 145, Cr. P. Code, should not be permitted under such circumstances. (Rennett, J.) IMTIAZ ALI KHAN v. RADR-UD-DIN. 19 Luck. 300 = 208 I C 472=15 R.O. 90=44 Cr L J. 789= 1943 O.W.N. 299=1943 A.W.R. (C.C.) 81= 1943 A.Cr C 114=1943 O.A. (C.C.) 186= A.I.R. 1943 Oudh 410.

\_\_\_\_\_S. 145—Proceedings under — Validity—Joint possession—Dispute in regard to individual claims as reversioners.

## CR. P. CODE (1898) S. 145-Revision.

Proceedings under S. 145, Cr. P. Code, cannot be justified in cases of joint possession of the parties. But where the parties are disputing only their individual claims to property as reversioners, there is no question of joint possession and proceedings under S. 145 could be entertained. (Rennett, I.) BISRAM v KANITA PRASAD. 1944 A.W R. (C.C.) 295=1944 O A. (C.C.) 295=1945 A.Cr.C. 2=A.I.R. 1945 Oudh 62.

### Revision.

## -S. 145 - Revision - Delay - Effect of.

The revisional powers of the High Court under S. 439, Cr. P. Code, are discretionary and are exercised for the ends of justice. A party who waits for a year and allows the order initiating the proceeding under S. 145, Cr. P. Code, to go unchallenged so long. cannot thereafter be heard to complain of excess of jurisdiction, because the final order has gone against him. (Manoharlal and Chatterji. 17.) SHIRNARAYAN DAS v. SATYADEO PRASAD. 203 I.C. 275=9 B R. 73=15 R.P. 168=44 Cr.L. J. 25=A.I.R. 1943 Pat. 44.

——Ss. 145 and 439—Revision—Scope—Evidence —If can be gone into.

The High Courts have laid it down as a rule of practice that they will not go into the evidence in revision in a case under S. 145 unless it is necessary to do so by reason of special circumstances or by reason of the character of the error of law. (Dhavle, 1.) GOBARDHAN DAS v. SURESH CHANDRA. 203 I.C. 521=9 B.R. 91=15 R.P. 180=44 Cr.L.J. 95=A.I.R. 1942 Pat. 489.

——S. 145—Revision—Scope of enquiry—Sufficiency of materials for initiation of proceedings—High Court if can go into.

Whether the materials on the record are sufficient or not for the initiation of a proceeding under S. 145, Cr. P. Code, is entirely for the consideration of the magistrate. The High Court cannot go into the sufficiency or otherwise of those materials. (Manohar Lal and Chatterji, JJ.) SHIBNARAVAN DAS v. SATYADEO PRASAD. 203 I.C 275=9 B.R. 73=15R.P. 168=44 Cr.L.J. 25=A.I.R. 1943 Pat. 44.

## Scope.

——S. 145—Scope—Claim to possession of entire village—Order declaring party to be entitled to possession of undivided share — Legality. MUTHUSWAMI THEVAR v. RAJARAM PANDIAN. [see Q. D. 1936—40 Vol. I. Col. 2524.] 42 Cr. L. J. 67=13 R.M. 542=(1940) 2 M.L. J. 355.

——S. 145—Scope—Order based on statements to police not on record—Legality.

An order under S. 145, Cr. P. Code, which is to a large extent based on statements alleged to have been made to the police officers which are not on record and about which the persons who are alleged to have made them are not questioned, cannot be supported and must be set aside. (Lakshmana Rao, J.) RAJU v. ABDUL RAHIMAN SAHIB. 198 I.C. 16 (1)=14 R.M. 429 =43 Cr.L.J. 344=1941 M.W.N. 678=54 L.W. 392 (1)=A.I.R. 1941 Mad. 751 (1).

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CR. P. CODE, (1898) S. 145 (4)-Proviso.

A magistrate drawing up proceedings under S. 145 (1) Cr. P. Code, should by his order direct the parties to appear before 'his Court'. It is illegal for him to direct the parties to appear before another magistrate. Such an order is illegal and cannot be cured. The question of legality of such an order is a pure question of law and need not be raised before the magistrate himself and can be raised for the first time in the High Court in revision, from the order made after hearing the parties declaring a party to be entitled to possession. (Chatterji. J.) BASUDEVA SINHA v. RAMSAROOP SINGH. 24 P.L.T. 326.

S. 145—Scope—Power of Magistrate to proceed under S 107 instead of under S. 145. See CR. P. CODE, S. 107. 1941 M.W.N, 960.

S. 145(4)—Period of possession—Two months
—Computation.

The two months mentioned in the proviso to Cl. (4) of S. 145, Cr. P. Code, mean two months from the date of the preliminary order and not two months from the date of the complaint. (Ghulam Hasan, J.) MAHOMED REG v. EHSAN REG. 195 I C. 236=14 RO. 69=1941 O.L.R. 555=1941 O.W N. 848 (2)=1941 A.Cr.C. 149=1941 A.W. 749 = 1941 A.W.R. (C.C.) 247=42 Cr.L.J. 710=1941 O.A. 570=A.I.R. 1941 Oudh 515.

—S. 145 (4)—Proviso—Period of two months— Computation of—Proceeding under S. 144, followed by proceeding under S. 145—Starting point of period.

Where the proceeding under S. 144 is intended to be no more than a fore-runner of a proceeding under S. 145. Cr. P. Code, the period of two months mentioned in the first proviso to sub-S. (4) of S. 145 should be counted backwards from the date of the order under S. 144, as otherwise manifest injustice might result to a party forcibly and wrongfully dispossessed in this period but more than two months before the date when the proceeding under S. 145 is actually drawn up. (Dia-vic, J.) GOBERDHAN DAS v. SURESH CHANDRA. 203 I.C. 521=15 R.P. 180=44 Cr. L.J. 95=9 B.R. 91=A I.R. 1942 Pat. 489.

-S. 145 (4), proviso—Party admitting absence of possession for more than two months prior to preliminary order—If can be treated as being in possession on date of that order.

A person dispossessed can be treated as in possession on the date of the preliminary order under S. 145 (1), Cr. P. Code, only if he had been dispossessed within two months of that date. Where a party on his own admission had been out of possession for more than two months before the date of the preliminary order, such party cannot be treated as having been in possession on the date of the preliminary order. In such a case the opposite party has to be declared to be entitled to possession until evicted in due course of law. (Happell, J.) ARUNACHALAM GOUNDAN v. CHINNADORAI. 220 I.C. 451=58 L.W. 207=A.I.R. 1945 Mad. 216 = (1945) 1 M.L.J. 210.

S. 145 (4) first proviso-Temperary dispossession of person under ex parte order under S. 144-

CR. P. CODE (1898), S. 145 (4)-Last proviso.

Subsequent re-entry after expire of period of order-Effect of.

If a person in possession of property is temporarily dispossessed by an exparte order under S. 144. Cr. P. Code and his application to set aside that order is dismissed only on the ground that the time for which the order was in force has already expired, the re-entry into possession by the person so dispossessed cannot be considered to he wrongful dispossession of the person who obtained temporary possession under the exparte order (Horwill, J.) PACHAYAPPA UDAYAN v. PONNA GOUNDAN 206 I C. 630=16 R M 28=44 Cr. L J. 557=.56 L W. 220=1943 M.W.N. 178=A.I.R. 1943 Mad. 402=(1943) 1 M.L.J. 259,

——S. 145 (4) last proviso—Power of magistrate
—Settlement of attached land to highest hidder—Legality.

A magistrate attaching the subject of dispute under the last proviso to S 145 (4), Cr. P. Code, is competent to make suitable arrangements for the custody of the attached property. The right to attach carries with it the right to take the necessary steps for its custody and management. By attachment the land comes into the custody or control of the magistrate who has jurisdiction to settle the land to a highest bidder. Where in the presence of all parties the magistrate settles the attached land with the highest bidder, that is a suitable arrangement and is within the competence of the magistrate. (Manohir Lall and Chatterii, JJ.) NANDKISHORE PRASAD SINGH v. RADHAKISHAN. 21 Pat. 743=205 I.C. 429=9 B.R. 231=15 R.P. 292=44 Cr.L.J. 414=A.I.R. 1943 Pat. 124.

S. 145 (8), Cr. P. Code, is quite independent of the last proviso to S. 145 (4). S. 145 (8) is a special provision for cases where there is crop or other produce which is subject to speedy and natural decay. There may be cases in which there is no attachment under the last proviso to S. 145 (4), and yet some order of the magistrate is necessary if there is any crop or other produce on the land which is subject to speedy and natural decay. S. 145 (8) is primarily intended to provide for such cases. If the land with the crop is attached, the magistrate has full power to deal with the crop apart from the provisions of S. 145 (8). (Manahar Lall and Charterit, JJ.) NANDKISHORE PRASAD SINGH v. RADHARISHAN. 21 Pat. 743—205 I.C. 429—9 B R. 231—15 R. P. 292—44 Cr. L. J. 414—A. I. R. 1943 Pat. 124.

——S. 145(6)—Effect of order—Persons on whom it is binding—O der of Magistrate set aside in revision—Effect.

Under S. 145 (6), Cr. P. Code, once a declaration has been made as regards possession of the land it is, without using the words in the strict technical sense, binding upon all persons interested therein. It is, therefore, for the person whether he be a party to the proceedings or not who disputes that possession to take proceedings in a civil Court. The Magistrate can always maintain the order of possession by trking action under S.107 against persons interfering with that possession. The effect of an order of the High Court in revision setting asside an order passed by the Magistrate in favour of the

CR. P. CODE (1898), S. 146.

opposite party, is to substitute in its place an order in favour of the applicant. Possession should therefore be delivered to the applicant without any interference or obstruction from the opposite party or from his tenant. (Ghulam Hamn, J.) Parrag v. Ram Dillard. 206 I.C. 92=44 Cr.L.J 459=15 R O. 482=1943 A W R (C.C.) 14=1943 A Cr.C. 30=1943 O A. (C.C.) 42=1943 O.W.N. 76=A.I.R. 1943 Outh 229.

S. 145 (6)—Possession—Possession of well in railway property—Railway authority entitled to eject person as trespasser—Order declaring Railway authority in possession—If justified. HOTCHAND RAMCHAND v. EMPEROR. [see Q. D. 1936-40 Vol. I, Col. 2520.] 42 Cr. L J. 27.

———S. 146—Attachment of property—Power of criminal Court to dispossess third persons—Order of competent civil Court—Effect of—Power of criminal Court to deliver possession to successful party.

When an order of attachment is passed under S. 146. Cr. P. Code, the Criminal Court has power to take possession of the property, and further more during the continuance of such attachment in accordance with the terms of the section, can use its powers as a Court to make the attachment effective and summarliv eject a third party at any time by its own judicial process and judicial power. The juridical possession based on attachment under the section ends when the order of a competent civil Court has been pronounced, but the possession of the Court on behalf of the successful party, which originated by the judicial act of attachment, will properly continue even though the right to attach under the section has come to an end. Henceforward the Court can remain in lawful possession on behalf of the successful party and hand over its possession to it. But the criminal Court when it is out of possession after the decision of a competent civil Court cannot use its judicial process to recover possession in order to hand it over to the successful party. It can use its judicial process so long as the attachment juridically subsists, but v. AMIRKHAN. I.L.R. (1943) Nag. 752=238 I.C. 58=16 R.N. 88=44 Cr.L.J. 739=1943 N.L.J. 369=A,I.R. 1943 Nag. 246.

S. 146—Order under—Validity—Matter covered by decisio: of Civil Court,

An order under S. 146, Cr. P. Code, can be passed only in the absence of an order of a competent. Court binding as between the parties to the proceedings. Where the question of possession between the parties is decided in a Civil suit in which the parties and lesses claiming under them have been impleaded, the decision is prima facte valid and binding on them and there is no room in such a case for passing an order under S. 146. (Kuppuswami Ayyar, J.) CHINNAMMA NAICKEN. 216 I.C. 9=46 Cr.L.J. 104=17 R.M. 186=1944 M.W.N. 499(2)=A.I.R. 1944 Mad. 472=(1944) 2 M.L.J. 41.

- S. 146—Temple trusteeship—Lispute as to— Receiver appointed for properties by Migistrate—Subsequent appointment of trustee by Hindu Religious Endowments Board—Right of trustee to possession of properties.

effect of an order of the High Court in revision setting. Pending a dispute as regards the trusteeship of a aside an order passed by the Magistrate in favour of the temple, proceedings were started under S. 145. Cr. P.

## CB, P. CODE (1898) Ss. 146(1),

Code, and the Magistrate appointed a receiver under S. 146, Cr. P. Code, and handed over the temple properties to him till a competent authority decided the dispute. Subsequently the Madras Hindu Religious Endowments Board, after enquiry, appointed a person as the hereditary trustee of the temple. The latter's application for possession of the property and the income thereof was rejected by the Magistrate on the ground that a mere declaration that he was the trustee of the temple was not enough and that he should obtain also a declaration of his right to possession of the property.

Held, that the applicant having been declared to be the trustee, the lands under attachment should be restored to him and the order of the Magistrate could not therefore be sustained. (Lakshmana R. v., 1.) SESHA REDDI v. NARASIMHA REDDI. 1941 M.W.N. 767 —A.I.R. 1941 Mad. 803 (2).

——Ss. 146 (1) and 147—Applicability—Dispute as to existence of right of exsement—Magistrate unable to decile—Procedure—Order attaching land—Legility.

Where the question in dispute before a Magistrate is whether a right existed in the counter-petitioner to take rain water from the field of the petitioner through a bund separating the petitioner's field from the counter petitioner's field, the Magistrate cannot, after an inquiry under S. 145, Cr. P. Code, pass an order under S. 146 (1) ordering attachment on the ground that he is unable to decide whether such right exists or not. Magistrate in such a case should act under S. 147 which deals with disputes with regard to easements. Merely because the Magistrate is not satisfied that either S. 147 (2) or S. 147 (3) applies and is unable to pass an order. either prohibiting interference or prohibiting the exercise of the alleged right, he cannot pass an order attaching the land, as such an order can only be passed where there is a dispute with regard to immovable property which can be dealt with under Ss. 145 and 146. (Horsvill, J.) CHELLIAH PILIAI v. RAMIAH THEVAR. 196 I.C. 887=54 L.W. 314=1942 M.W.N. 424=43 Cr.L. J. 103=14 R.M. 326=A.I.R. 1942 Mad. 77= (1941) 2 M.L.J. 375.

——Ss. 146(1) and 561-A—Competent court— Meaning of—Magistrate releasing property from attachment after decision by trial Court—Decision of trial Court reversed on appeal—Magistrate, if competent to pass order regarding property—Power of High Court to pass order.

It is not at all necessary that the final Court of appeal should be considered to be the competent Court within the meaning of the words in sub-S. (1) of S. 146. Therefore, an order of the magistrate releasing the property from attachment after the decision of the suit by the trial court is in accordance with law, although an appeal has been preferred against that decision. The Magistrate is not thereafter competent to make any order regarding the delivery of the possession of the property if the decree of the trial court is reversed on appeal. Nor can the High Court pass an order under S. 561-A, Cr. P. C. which cannot be invoked to over ride an express provision of law or when there is another remedy available. (Socf., J.) MAHOMED ASHRAF KHAN v. ABDUL REHMAN. 198 I.C. 490=14 R. Pesh. 72=43 Cr.L.J. 384=A.I.R. 1942 Pesh. 11.

S. 146 (1)—Undivided share—in village— Attachability.

### CB. P. CODE (1898), S. 147.

The attachment of an undivided share in a village is not permissible under S. 146 (1). Cr. P. Code. (Lakinmana Kao, J.) MUTHUSAMI TEVAR v. RAJA RAM PANDIAN. 1941 M.W.N. 703=A.I.R. 1941 Mad. 744

S. 147—Applicability and scope—Dam on surplus were of tank causing submersion of crops and damage to sime—Order for removal of dam—Further order that no submersion or damage to crops be caused by putting obstruction—If furtified.

Where a person puts up a band or dam on the surplus weir of a tank, resulting in the obstruction of the flow of water and submers! an of another's crops and damage thereto. S. 147, Cr. P. Code. is applicable and an order directing removal of the dam can be passed. But the Magistrate dannot further direct that the party shall not cause any obstruction to the flow of water from the tank which would cause the submersion of and damage to the crops of the other party. Such a direction is beyond the slope of S. 147, Cr. P. Code. (Iak hmana Rag. I.) THOONGA VILIN V. PERTUAL GOUNDAN. 195 I. C. 606—42 Cr. L. J. 780—14 R. M. 240—1941 M. W.N. 481—A I.R. 1941 Mad. 752.

## - S. 147-Costs-Subsequent order for-Legality.

Where there has been no order as to costs in a decision under S. 147, Cr. P. Code, the award of costs by a subsequent order cannot be supported. (Lakimana Ra, I.) THOONGA VELAN V. PERUMAL GOUNDAL HOUSE ALC. 32=13 R.M. 768=42 Cr.L. J. 518=1941 M.W.N. 63=14 R.M. 240=53 L.W. 66=A.I.R. 1941 Mad. 374=(1941) 1 M.L. J. 43.

——S. 147—Order directing Police to maintain status quo—If authorises them to demolish wall and reopen drain.

On a complaint that the next door nighbour of the complainant was about to close a drain through which the complainant had been in the habit of discharging the rainwater from his house, the Magistrate directed that a proceeding under S. 147. Cr. P. Code, should be instituted and also made the following order: "Local Police to see that the status quo is maintained." The Police went to the spot, demolished the wall constructed over the drain and reopened the drain.

Hild, that the Magistrate had not authorised the Police to do what they did, and even if he had so authorised them it is very doubtful if his order would have been a proper and legal one. (Shearer. J.) SUKAR SAO v. EMPEPOR, 7 B.R. 945=195 I.C. 593=14 R P. 150=1941 P.W.N. 620=23 Pat.L.T. 232=42 Cr.L.J. 753=A.I.R. 1941 Pat. 560.

S. 147—Order for drawing up proceedings drawn up in form of final order by mistake—Advournments and addition of new parties—Free proceedings and notices ordered on discovering mistake—Proceedings, when deemed to have been instituted.

On the 14th May, 1940, a Magistrate passed an order for proceedings to be drawn up under S. 147, Cr.P.Code directing both parties to appear on a certain date and put in written statements. The clerk responsible for drawing up the order adopted in part by mistake the form in Form No. 24 of Sch. V of the Code with the result that a final order in the form required in S. 147 (2) was drawn up. The case was adjourned from time to

CR. P. CODE (1898), S. 147.

time and further persons were added as parties. The attention of the Magistrate was then drawn to the error in the order as drawn up andon 12th July, the Magistrate ordered fresh proceedings and fresh notices to issue upon both parties.

Held, that on the facts of the case the proceedings must be deemed to have been instituted on the 14th May, and not on 12th July, and that they must be deemed to be so even as regards the persons who were added subsequently. (Ledge and Roshurch, 11) MOTAHEDUDDIN MIA v. HARI PRASANNA. 46 C.W. N. 313.

——S. 147—Scope—Obstruction caused by person not party to proceedings—Order for removal—If can be passed.

An order under S. 147, Cr. P. Code directing the removal of an obstruction, such as a dam across a water-course obstructing the right of another to the user of the water, cannot be used when the person who has caused the obstruction is a person not a party to the proceedings and who is not on the record. (Lakehmana Rao, L.) MAHALAKSHMI NAIDH W. SATVAM. 197 I.C. 134—14 R.M. 356 (1)—43 Cr. I. | 136—1941 M.W.N. 764—A.I.R. 1941 Mad. 939.

While it is one thing to make an order prohibiting the doing of an act it is another to order the doing of an act. S. 147 (2), Cr. P. Code, allows the former but does not allow the latter. So far as future acts are concerned the Magistrate has power to issue an order, but he has no power to issue an order, but he has no power to issue an order in respect of something which has already been done. A right to user or a right of way which is not a public highway does not necessarily include, as an ordinary incident, a right to remove an obstruction, such as a wall placed across the way. A magistrate therefore would be acting beyond jurisdiction if he directs the removal of a wall in his order under S. 147 (2), Cr. P. Code. (Sinha and Recov. 11) SITARAM v. FAIYAZ HUSSAIN. 1944 P.W.N. 321.

S. 147 (2) - Mandatory order-If can be

A Magistrate acting under S. 147 (2), Cr. P. Code, can make an order prohibiting the doing of an act but cannot order the doing of an act. He has, therefore no power to issue a mandatory injunction directing the removal of an existing obstruction. (Derhychire, C.J. Bartley, Nasim Ali Lodge and Pal, JJ.) HFM CHANDRA BANKRII v. ABDUR RAHAMAN I.L.R. (1942) 2 Cal. 75=199 I.C. 297=14 R C. 535=75 C.L. I. 100=46 C.W.N. 452=A.I.R. 1942 Cal. 244 (F.B.)

——S. 147 (2) – Mandatory injunction—Power of Magistrate.

S. 147 (2). Cr. P. Code, empowers the Magistrate in a proper case, to order a person to do something or in other words, to direct a mandatory injunction. (Skent. J.) GHIIMANDA SINGH v. EMPEROR. 195 I C. 10 =14 R.L. 27=42 Cr.L.J. 651=43 P.L.R. 166=A.I.R. 1941 Lah. 210.

——S. 147 (2)—Mandatory injunction — Power of Magistrate. BADRIDAS AGARWALLA v. SOHAN LAL pSWAL. [see O. D. 1936—'40 Vol. I, Col. 2534.] 91 I.C. 171=13 R.C. 217=42 Cr.L.J. 94.

CR. P. CODE. (1898) S. 154—First information Peport.

S. 148 (3)—Duty of Magistrate—Duty to hear parties before making order as to costs.

There can be no doubt that a Magist at making an order as to costs under S. 148 (3) Cr.P. C. le ought to hear the parties, though the terms of the section do not make it necessary that such a hearing should be given. When a full hearing upon the matter has been given by the Court, nothing further is necessary. (Loho and Trahii II) DARRARSING T. HAFIZ A RDIT. ATT. L. I. 1944) Kar. 204—217 I.C. 199—46 Cr.L.J. 240—17 R.S. 92—A.I.R. 1945 Sind 3.

S 148 (3)—Jurisdiction to award costs—Successor of magistrate who passed order under Ss. 145 to 147—Order as to costs—Legality.

A successor to the magistrate who passed an order under Ss. 145 to 147. Cr. P. Code, cannot nass an order as to costs under S. 148 (3), although, there being no time limit laid down in S. 148 (3), there is no objection to an order as to costs being nassed on a subsequent application. (Hornill, I.) BAGAWANDAS MOOPANAR . MUHAMMAD GANI POWTHER, I.L.R. (1944) Mad 144.=208 I.C. 321=16 R.M. 251=44 Cr.I. 1, 778=1943 M.W.N. 226=56 L, W. 223=A.I.R. 1943 Mad. 478=(1943) 1 M.L. I. 319.

-S. 148 (3)—Scope—Costs incurred by Magistrate in making order under S. 145 (4)—Order for payment by both parties—Legality.

S. 148 (3), Cr. P. C. is not limited to a case where one of the parties is ordered to pay something by way of costs to the other party. The terms of the section are wide enough to cover all costs, and clearly cover all costs incurred by a Magistrate in making an order under Sec. 145 (4) of the Code. The Magistrate has therefore power to order both parties to pay equally certain sums by way of remuneration to a person appointed by the Court as manager of the property in dispute. (Loho and Tynhii, J.) DARRARSING v. HAPIZ ABDIL AZIZ I.I.R. (1944) Kar. 204=217 I.C. 199=46 Cr.L.J. 240=17 R.S. 92=A.I. R. 1945 Sind 3.

----S. 154-First information report.

Admissibility.

Case requiring sanction of local Govern-Evidentiary value. [ment. What may constitute.

A first information report recorded with all the formality required by law, is admissible in evidence against the maker or informant. It is not a confession. (Davis, C. J. and O' Sullivan, J.) GOPAL DAS v. EMPFROR. I.L.R. (1944) Kar. 456=A.I.R. 1945 Sind 132.

\_\_\_\_ S. 154—First information report—Evidentiary value.

The first information report is not a piece of substantive evidence. Its chief purpose is to acquaint the Court with the case which the prosecution has set out at the earliest stage and the statement is admissible, merely to corroborate or contradict the maker thereof. (Manohar Lall and Rowland. J.) EMPFROR 1. DUBAI. 196. I.C. 852=21 Pat. 153=43 Cr.L.J. 90=8 B.R. 129=14 F.P. 259=A.J.P. 1942 Fat. 113.

CR. P. CODE (1898), S. 154.

Ss. 154, 156 and 197—First information report—sase requiring Local Government's sanction—Power of Magistrate to cancel such report and stop police investigation till sanction is obtained.

A magistrate has no power to order that the first information report of a cognisable offence—of which a Court cannot take cognisance under S. 197, Cr. P. Code, without the sauction of the Local Government—should be cancelled and investigation by the police stopped till such sanction is obtained. (Derbyshire, C.J. and Lodge, J.) LEGAL KEMEMBRANGER, BENGAL v. HAMID. I.L.R. (1944) 2 Cal. 183—A.I.R. 1945 Cal. 385.

S. 154—First information report—Evidentiary value.

The first information report cannot be relied on as a piece of substantive evidence. It is merely a piece of corroborative evidence or a piece of evidence which may be considered for the purpose of ascertaining whether the story told in court is different from the story told at the time when the first information was lodged. (Khundkər and Sen, J.) PANCHU SHEIKH v. EMPEROR, 210 I.C. 17=16 R.C. 436=45 Cr.L. J. 170=A.I.K.1943 Cal 612.

S. 154—First information report—Evidentiary value.

Ordinarily, the first information report is proved by the prosecution for the purpose of corroborating the first informant. It may, or course, be used by the defence under the provisions of S. 145 Evidence Act. In such cases the first information report cannot be treated as substantive evidence. In certain cases, it may conceivably be treated as substantive evidence, for instance, in a case in which the first informant had died as a result of an attack on him, in which case the first information report would be admissible as substantive evidence under S. 32, Evidence Act. But this section has no application where the first informant disappeared almost immediately after filing the first information report and was not therefore available as a witness when the case came on for trial, and there is nothing to show that he is dead. (Edgley and Lodge, Jf.) INCHAN v. EMPEROR. 210 I.C. 322=45 Cr.L.J. 210=16 R.C. 446=A.I.R. 1943 Cal. 647,

S. 154—First information report—Evidentiary value.

The first information report is not ordinarily substantive evidence. It is merely a previous statement which may be proved by the prosecution for the purpose of corroborating the first informant and may be used by the defence for the purpose of contradicting him. If it is desired to use any statement contained in the first information report for the purpose of contradicting the first informant, it is essential under S. 145 of the evidence Act that the attention of the witness should be drawn to those parts of the document which it is intended to use for the purpose of contradicting him in order that he may be given an opportunity to furnish a suitable explanation with regard to the alleged contradiction. The requirements of this section are not met merely by asking him whether he made some other statement to the police. The first information report cannot be used for the purpose of discrediting the witnesses other than the first informant. To use it in this way is in effect to Treat it as substantive evidence. (Edgley and Sen, 11.)

EMPEROR 2. RAHENUDDIN MANDAL. I.L.R. EMPEROR 7. RAHENUDDIN MANDAL. I.L.R. (1943) 2 Cal. 381-217 I.C. 158-46 Cr.L.J. 199 =17 R,C, 169=A,I,R, 1944 Cal,323,

CR. P. CODE, (1898) S. 154.

-S. 154-First information report-Evidentiary Value.

A first information report is an important document. It is entitled to consideration along with other evidence and circumstances of the case, but can never be treated as a piece of substantive evidence. Its absence in a case under S. 323, I. P. Code, would be no ground to infow out the case. (Thomas C.J.) MAHADEO v. RAM KUBER. 1943 O.W.N. 319=1943 A.W.R. (C.C.) 88=1943 O.A. (C.C.) 190=209 I.C. 114=1943 A. Cr.C. 125=15 R.O. 101=45 Cr.L.J. 75=A.I.R. 1943 Oudn 451.

S. 154—First information report—Etidentiary value.

The first information report cannot be used to corroborate the depositions of the witnesses referred to in it. Bartley and Asram, J., ABDUL LATIF v. EMPEROR 190 1.C. 439=42 Cr.L.J. 871=45 C.W.N. 763 —A.I.K. 1941 Cal. 553.

——Ss. 154 and 162—First information report— What may constitute—Statement if fails under S. 154 or S. 102—Question of fact.

Where information which it first given to the police is of such a vague and indeanite character that it cannot be treated as coming under S. 154, Cr.P. Code so as to make it incumbent on the officer in charge of the police station to start an investigation and he may reasonably require more information before doing sogituther information given to him in such circumstances may fall within S. 154. It is a question of fact in each case whether a statement made to a police officer in the course of investigation comes under S. 102 or is made by way of complaint to commence an investigation under S. 154. (Agarwal, J.) QAMRUL HASAN v. EMPEROR. 197 i.C. 121=43 Cr.L.J. 115=14 R. O. 280=1941 O.A. 843=1941 O.W.N. 1166=1941 A.W.K. (C.C.) 322=1941 A.Cr.C. 247=A. i.R. 1942 Oudh 60.

Ss. 154 and 162—First information — Telepnone message—Subsequent statements—Nature of.

Where a station writer receives a telephone message as to the commission of a cognizable orience, it might be recorded by the writer as a first information report and he himself might sign it, as the first information report may be merely hearsay and need not necessarily be given by a person who has had first hand knowledge of the facts. All subsequent statements made to the police are statements made during the course of investigation and inadmissible under S. 162, Cr. P. Code. Any such statement cannot be put in as a first information report. (Roberts, C.J. and Dunkley, J.) Sawe PRU v. THE KING. 1941 Rang. L.R. 346=197 I.C. 350=14 R.R. 118=43 Cr.L.J. 157=A.I.R. 1941 Rang. 209.

-S. 154 - Statement to officer in charge of police outpost-value of.

It is the custom in Sind, where distances are so great, that it is not possible to establish police stations in remote places, to establish police outposts. These outposts are not in charge of police officers within the meaning of S. 154, Cr. P. Code, and the police officers are not therefore, formally empowered to record first information reports. Although a statement made by a first informant to a police officer at such an outpost can be admitted as evidance for the purpose of corroboration under S. 157, Evidence Act, as can be a first information under S. 154, Cr. P. Code it cannot be given

CR. P. CODE (1898) S. 162.

the same weight. ((Davis C.J. and O'Sullivan J.) EMPEROR v. KAKU MASHGHUL. I.L.R. (1944) .Kar. 123=212 I.C. 467=45 Cr.L. J. 650=17 R.S. 1 =A.I.R. 1944 Sind. 33.

——S. 155 (2) Prohibition under—Nature of. EMPEROR v. THAKURI. [see Q.D. 1936—'40 Vol. 1, Col. 3330.] 16 Luck 55.

The receipt and recording of an information report is not a condition precedent to the setting in motion of a criminal investigation. There is no reason why the police, it in possession through their own knowledge or by means of credible through informal intelligence which genuinely leads them to the better that a cognisable offence has been committed, should not of their own motion undertake an investigation into the truth of the matters alleged. (Lord Porter.) EMPEROR v. KHWAJA NAZIR AHMED. 71 I.A. 203=1.L.R. (1945) Lah. 1=1945 F.L.J. 48=1945 O.W.N. 127=11 B.R. 180=47 Bom.L.R. 245=217 I.C. 1=26 P.L.T. 56=46 Cr.L.J. 413=17 R.P.C. 51=80 C.L.J. 19=1945 A.L.W. 288=1945 O.W.N. 258=1945 A.W.R. (P.C.) 21=1945 A.Cr.C. 134=1945 M.W.N. 49=1945 A.L.J. 47=58 L.W. 57=49 C.W.N. 191=A.I.R. 1945 P.C. 18=(1945) 1 M.L.J. 86 (P.C.)

-S. 156 (3)—Order directing police investigation after issue of process—Legality.

S. 156 (3), Cr. P. Code, applies only to the stage before the issue of process and cannot apply to a case in which the Magistrate has already issued process and summoned the accused. After the process has been issued, the Magistrate must proceed in accordance with Ch. 21, S. 252 and the following sections which are mandatory and which provide that the Magistrate shall proceed to hear the evidence. An order directing police investigation under S. 150 (3) after the issue of process is therefore, without jurisdiction. (Young, C. J. and Sale, J.) KEHR SINGH v. KIRPAL KAUR. 1.L.R. (1943) Lah. 726=202 1.C. 609=15 R.L. 154=43 Cr.L. J. 865=44 P.L.R. 401=A.1.R. 1942 Lah. 256.

S. 156 (3)—Scope—power of Magistrate to refuse to take cognizance of offence on presentation of complaint—Duty of Magistrate on presentation of complaint. Shahdad Gadai v. Emperor. [562 Q. D. 1936—440 Vol. I, Col. 3331.] 191 I.C. 400—13 R. S. 161—42 Cr.L.J. 162

-S, 162.

Applicability.
Complaints during investigation.
Confessional statement of accused.
Copy of statements.
Duty of investigating officer.
Evidence of identification of stolen property.
I dentification parade.
Index to map prepared by investigating officer.
List of stolen property if "statement."
Police diary.
Scope.

Statements. Voluntary report by accused after F. I. R.

S. 162—Appircability—Departmental inquiry.
Where the proceedings are only a departmental inquiry and not an investigation under Chap. XIV of the Cr. P.

OR. P. CODE (1898), S. 162,

Code, S. 162 of the Cr. P. Code has no bearing. (Thom.s., C. J.) jAGDISH NARAIN v. EMPEROR. 197 I.C. 277 = 1941 A.Cr.C. 315=43 Cr.L. J. 139=14 R.O. 298=1941 A.W.R. (C.C.) 358=1941 O.A. 947=1941 O.W.N. 1255=A.I.R. 1942 Oudh. 163.

——S. 162—Applicability — Procedure under Ch. VIII—Previous statements of witnesses recorded by Police—Right of accused to copies—Refusal to grant—Irregularity—Effect.

There is no reason why S. 102, Cr. P. Code, should not apply or should not be followed in security proceedings under Cn. Vill in view of the fact that S. 117, Cr. 1'. Code, lays down that as far as practicable such enquiry should be conducted in the manner prescribed for conducting trials and recording evidence in warrant cases. But when there is a cognizable case that is being tried, which had been preceded by an investigation by the police in which the statements of witnesses for the prosecution had been recorded, either before the militation of the proceedings or during the progress of the proceedings, the accused are entitled, under S. 145. Evidence Act, to cross-examine the prosecution witnesses thereon, and therefore to be given copies thereof. and the refusal by the magistrate to afford the accused persons copies of those statements and to cross-examine the prosecution witnesses thereon must be held to be an aregularity which has prejudiced the accused. Such irregularity can, however, be remedied by the Sessions Judge under the powers he has under S. 123 (3), Cr. P. Code, and it is not necessary that the proceedings should be quashed on that ground and a re-trial or re-hearing ordered. Under S. 123, it is open to the Sessions Judge to send back the proceedings with the necessary directions in that benaif. (Lobo and Weston, JJ.) EMPEROR v. RASULBUX. I.L.R. (1942) Kar. 252=205 I.C. 322=15 R.S. 136=44 Cr.L.J. 378=A,I.R. 1942 Sind. 122.

S. 162—Complaints during impestigation preferred by persons concerned with reference to fruh instances of embezzlement—Admissibility in evidence.

The admission in evidence of fresh complaints to the investigation officer preterred by persons concerned with reference to fresh intances of embezzlement, merely for the purpose of showing now fresh instances of embezzlement came to be investigated is unobjectionable. Such complaints cannot be said to be statements coming under S. 102, Cr. P. Code, which would be inadmissible in evidence. (Waisworth and Shahabuadin, J.). SWAMINATHAN, In re. 58 L.W. 262=1945 M.W.N. 361 (2)=A.I.R. 1945 Mad. 284=(1945) I M.L.J. 449—S. 162—Contessional statement of accused by Police Officer and attested by witnesses leading to discovery of articles—Admissibility in evidence. See Evidence Act, S. 27. (1943) 2 M.L.J. 293.

S. 162—Copy of statements—Accused's right to
—Entry in drary summarising conclusions of investigazing officer—Accused, if entitled to copy.

Per Edgley, /.—S. 162, Cr.P.Code, provides that subject to Certain important restrictions which appear from the language of the section theelf, the accused has an absolute right to obtain copies of statements made by witnesses during the course of the police investigation. It is immaterial whether the statement is recorded in the actual words of the witness, and it is sufficient if it is written in the diary merely in the form of a memorandum. At the same time, the section only applies to the statement of a witness, which has been reduced to writing by the investigating officer, and the Court would

CR. P. CODE, (1898) S. 162.

be justified in refusing the copy of an abstract of the statements of several witnesses prepared in such a way that it was not clear what each witness was supposed to have said. Similarly, the defence would not ordinarily be entitled to a copy of an entry in the diary which merely summarised the conclusions at which the lavestigating officer had arrived after examining a particular witness. (£1gley and Koxburgh, J/.) HERABIBA LAL GHOSH v. EMPEROR. 220 I.C. 237=78 C.L. J. 217=A.I.R. 1945 Cal. 159.

Per Edgley, J.—The proper time to make an application for copies of statements made to the police is as soon as possible after suitable steps have been taken to secure the attendance in Coart of the prosecution witnesses. In cases triable by the Coart of Sessions the accused would be well advised to make the requiste application at the proper time in the Coart of the Committing Magistrate but, if he tails to do this, it would not be to his interest, not would it be warranted by law, for him to postpone his application until the witness has entered the witness-box or is on the point of being cross-examined. (Edgley and Muxourgh, J.) HERAMBA LAL GHOSH v. EMPEROR. 220 I.C. 237=78 C.L.J. 217=A.I.R. 1945 Cal. 159.

-----S. 162—Copy of witness's statement—Application for—When to be made—Duty of Court to grant copies.

The proper stage at which to apply for a copy of a witness's statement made under S. 162, Cr. P. Code, is at the beginning of the cross-examination of the witness; and if an application be made at the stage by the accused's counsel, the Magistrate is bound to grant the same. But the examination of the witness need not be held up as in practice the Court reads out the relevant part of the statement or the counsel for accused is allowed to look in to the drary. Copies are also granted in advance in practice. Some co-operation between the counsel and the Court is necessary to make S. 162, Cr. P. Code, work smoothly. (Horwill, J.) Subbaramiah, In re. 205 I.C. 632=15 R.M. 920=44 Cr. L.J. 400=55 L.W. 223 (1)=1942 M.W.N. 595=A.I.R. 1942 Mad. 451=(1942) 1 M.L.J. 489.

S. 162—Copies of statements—Refusal to grant—Legality of conviction—Recorded statements destroyed by police.

Courts will be compelled to quash the convictions in all cases in which there was refusal to supply the copies of the statements recorded under S. 162, Cr. P. Code. The denial to the accused of the benefit of these statements is tantamount to a departure from the mode of trial prescribed by law, and it would be presumed that a fair trial has not been accorded to the accused and that there has been a failure of justice. The fact that the recorded statements were destroyed by the police and the Court could not, therefore, supply copies would make the case still worse. If the effect of the Courts' refusal to grant copies is to prejudice the accused, that effect cannot be avoided where the investigating officer destroys the recorded statements and takes away from the Court the power to hold a fair trial. (Niyogi and Hemeon, JJ.) BALIRAM TIKARAM v. EMPEROR. I.L.R. (1945) Nag. 151=218 I.C. 294=46 Cr. L.J. 448=18 R.N. 10=1945 N.L.J. 17=A,I.R. 1945 Nag. 1,

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3.162—Copy of statements—Unauthorised Copies
—If may be used.

Per Edgley J.—Copies of statements of witnesses recorded under 5.102, Cr.P.Code, snould only be turnished under the direction of the Court. Unauthorised copies, that is, copies obtained by some method hot contemplated by this section hould not be used by the defence. (Edgley and Noxburgh, J.I.) ERAMBA LAL GHOSH v-EMPEROR. 220 I.C. 237=78 Cr.L.J. 217=A.I.R. 1945 Cal. 159.

——S. 162—Daty of intensignting officer—Omission from case mary—11 conclusive proof that statements were not a mustly made by without—Fest

It is not the duty of the police when investigating a crime to record a long and detailed deposition. All that the investigating officers are exrecieu to do is to make a short record of what he withesees examined by them have said. They are not expected to record the unimportant Letairs given by withe ses. Their business is to make a livie of such facts and circumstances as then seem to them important and useful for the purpose of the case. The absence of details in the case diary is no proof at all that the statements were not made by the witnesses. A court should permit a statement recorded under S. 102, Cr. P. Code, to be used for the purpose of proving an omission only when it is sure that the omission could not have occurred it the statement had really been made. (Mockett and Horwill, JJ.) GURUVA VANNAN, In re. I.L.R. (1944) Mad. 897=217 I.C. 275=46 Cr.L.J. 294 -17 K.M. 302:-57 L.W. 171=1944 M.W.N. 213 =A.I.R. 1944 Mad. 385=(1944) 1 M.L.J.253.

S. 164 - Duty of police officers to record substance of statements of astronouses - Statement in form that "A supports B" - Progress,

It is very undestrable for poince officers to record statements under S. 102, Cr. P. Code, in the torm, namely, "A supported b" or "A corroborated b," without a clear indication of the substance of the statement of A which the recording officer regards as supporting or corroborating B. All investigating others should be strongly discouraged from making in the case diaries records of the statements of witnesses in this form which is always ambiguous and may frequently be misleading. Such records are not of any assistance. (Simba and Beevor, JJ.) EMPEROR V. RAMSEWAN MISTRI. 23 Pat. 656=218 I.C. 405=40 Cr.L.J. 513=11 B.R. 321=18 R.P. 71=1944 P.W.N. 307=25 P.L.T. 163=A.I.R. 1945 Pat. 109.

Any identification of stolen property in the presence of a police officer during investigation is a statement made to a police-officer during investigation, and is, therefore, within the scope of S. 162, Cr. P. Code. A witness should not be allowed to depose to the fact that he has identified the stolen property in the presence of the police-officer. Such evidence is inadmissible. (Lodge and Das, JJ.) Khabiruddin v. Emperor. 210 I.C. 409=16 R.C. 483=48 C.W.N. 356=45 Cr.L.J. 258=77 C.L.J. 407=A.I.R. 1943 Cal, 644.

CB. P. CODE, (1898), S. 162.

—S. 162—Identification parades by police during investigation—Statements by witnesses—Admissibility—Mestators' reports drawn up at the parade—Admissibility.

Where identification parades are held by the police in the course of investigation of an offence, S. 162, Cr. P. Code, excludes any evidence about the statements made by witnesses at the identification parades. The fact that witnesses have identified persons at parades held by the police may be proved; but that fact can only be considered important evidence against the accused if the Court is satisfied that the parades have been held fairly. Mediators' reports containing the record of the proceedings at the parades and drawn up at the parades are wholly inadmissible in evidence. (Burn and Happell, 11.) EMPEROR R. RAM SINGH. 195 I.C. 342=14 R.M. 299=42 Cr.L.J. 848=1941 M.W.N. 521=54 L.W. 69=A. I.R., 1941 Mad. 675.

S. 162—Index to map prepared by investigating efficir containing statement of witnesses—Admissibility—Effect of admission—Jury trial—Evidence Act, S. 107.

Per Khundhar, J.—Information derived from witnesses during police investigation and recorded in the index to a map prepared by the investigating officer, must be proved by the witnesses concerned and not by the investigating officer. It sought to be proved by the evidence of the latter, this kind of information would manifestly offend against S. 102, Cr. P. Code. The detect cannot be cured by S. 167 of the Evidence Act, where the trial is by jury and the information relates to a matter of importance.

Per Lodge J.—Even if the statement in the index is inadmissible, owing to the provisions of S. 162, Cr. P. Code, the trial is not vitiated when the statement could not have affected the verdict

of the jury.

Per Das, J.—The index is clearly inadmissible in evidence having regard to S. 102. Cr. P. Code, and if it relates to an important matter the verdict of the jury is vitiated by its admission. (Lodge and Das, JJ.) IBBA AKANDA v. EMPEROR. 215 I.C. 67-45 Cr.L.J. 771-17 R.C. 53-48 C. W.N. 366-A.I.R. 1944 Cal. 339.

Ss. 162 and 154—List of stolen property if a statement' under S. 102—Proper procedure as to submission of such list—Its proper place on the record.

S. 162 Cr. P. Code, has no reference to any list of stolen property given by a complainant. Such a list of stolen property is not a 'statement' within the meaning of S. 162 Cr. P. Code. It is not even necessary for the complainant to state in the first information report that a list is being prepared and will be supplied to the police because such a remark is obvious, but it is advisable that such a remark should be entered in the information report and it is usually done. When it is so stated and the list is given the next day or the day after that, it cannot be said that the list cannot become part of the record because the investigation has already started. The list of the stolen property is part of the first information report and it should be signed. It is part of S. 154 and has nothing to do with S. 162. (Plowden J.) Emperor v. Brij Lal. 207 I.C. 15=16 R.A. 25=1943 A.L. J. 166=1943 O.A. (H.C.) 75=1943 A.W.R. (H.C.) 75=1943 A.L.W. 320=1943

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O.W.N. (H.C.) 207=1943 A.Cr.C. 80=44 Cr. L.J. 555=A.I.R. 1943 All, 216.

S. 162-Police diary-Proof.

Entries in a police diary, or parts of entries, in the diary as are admissible in evidence, that is to say which do not include statements made to the police during the course of an investigation, should ordinarily be proved by calling the station writer who recorded them to state orally the particulars recorded in each entry and then to produce the diary in corroboration of his oral evidence. (Roberts, C. J. and Dunkley, J.) SHWE PRUV. I'HE KING. 1941 Rang.L.R. 345=197 I.C. 350=43 Cr.L.J. 157=14 R.R. 118=A.I.K. 1941 Kang 209.

S. 162—Scope—If overrides S. 27 of the Evidence Act. See Cr. P. Code, Ss. 1 (2) And 162, 43 Bom.L.R. 157.

S. 162—Scope—If repeals S. 27, Evidence Act. See EVIDENCE ACT. S. 27. 1941 P.W.N. 653.

Ss. 162 and 164—Statement by accused to Magistrate — Admissibility — Self-exculpatory statement—If to be treated as confession statement, Appalanarasayya, In re. [see Q.D. 1936—'40 Vol. 1, Col. 2549.] I.L.R. (1941) Mad. 81=192 I.C. 586=13 R.M. 581=42 Cr.L.J. 308=A.I.R. 1941 Mad. 101.

S. 162—Statement by investigating officer that witness had named accused—Witnesses in cross-examination deposing that they had not named accused—Use of evidence of investigating officer—Legality.

In the cross-examination of the prosecution witnesses in a trial on a charge under R. 81 (4) of the Defence of India Rules, of having sold sugar at a price above the controlled price, the accused brought out the fact that the witnesses had not named the accused during the investigation though the investigating officer deposed that the witnesses had actually named the accused to the Sub-Inspector of Police. On a consideration of the entire evidence on record, the lower courts came to the conclusion that it was the accused who really had sold the sugar in question to the first informant. It was contended that the Police diary or the statement of the Sub-Inspector had been used in disregard of S. 162, Cr. P. Code.

Held, that there was no disregard of S. 162, and the High Court could not in revision interfere with the finding of the courts of fact. (Sinha, J.) SAGARVAL AGARWALA v. EMPEROR. 217 I.C. 102=11 B B. 169=46 Cr.L.J. 186=17 R.P. 166=26 P.L.T. 75=A.I.B. 1944 Pat. 390.

S. 162—Statement by police constable to Inspector about fact recorded in note book—Admissibility in evidence to show that entry was made then and there and not as after-thought.

Where a police constable, who is a prosecution witness, in order to show that he made an entry in his note book about a relevant fact then and there and not as a kind of after-thought, makes a statement that he had told the circle Inspector of police twice of this matter, such statement to the circle Inspector is not admissible in evidence in view of the prohibition in S. 162, Cr. P. Code, even as evidence of conduct. (Horwill, J.) VRIDICHAND SOWCAR v. EMPEROR. 208 I.O. 265-16 R.M. 243-44 Cr.L.J. 766-(1943) M.W.N. 290 (2)—A.I.R. 1943 Mad. 527—(1943) 1 M.L.J. 377.

8. 162—Statements made in the presence of Police-officer—Admissibility.

'CR. P. CODE, (1898) S. 162.

The object of S. 162, Cr. P. Code, is to insure that it should not be open to the police in a criminal prosecution to give evidence of admissions which were either not in fact made or obtained by improper means. Where the fact of the making of the statements is duly proved and it is clear that no improper means were used to obtain the statements the mere fact that a Police-oricer was present when they were made would be quite insufficient to make such statements inadmissible under S. 162, Cr. P. Code. (Agarwala and Brough, ff.) SATYANARAYANA v. EMPEROR. 22 Pat. 681=212 LC, 298=10 B.R. 494=16 B.P. 313=45 Cr. L.J. 624=25 P.L.T. 57=A.L.B. 1944 Pat. 67.

-S. 162 and Evid. Act. S. 145-Statements made to police—Proper procedure for admission and proof.

Courts should not take any notice of a previous statement made by a witness which is in contradiction of the statement which he or she makes before the Court unless the previous statement alleged to be contradictory is put to the witness for admission or denial and he or she is given an opportunity of offering an explanation of how it is that on a previous occasion he or she made the contradictory statement. The statements may be reconcilable and opportunity should be given to reconcile them if possible. (Yorke, /.) IQBAL AHMAD v. EM-PEROR. 204=1.C. 495=15 E.A. 347=44 Cr.L.J. 280 =1942 A. W.B. (H.C.) 379=1942 A.L.W. 686=1942 A.L.J. 637 = A...R. 1943 Ail. 49.

-S. 162—Statement of accused—Admissibility Conclusion as to what it did not contain-11 proper.

Direct evidence of the statement made by the accused during investigation is not aumissible under S. 102, Cr. P. Code, and the Coart cannot circumvent the provisions of this section by a process of deduction and arrive at a conclusion on the statement as to what it did not contain. (Roxburgh and Ormand, JJ.) NANDALAL CHAKRAVARTY v. EMPEROR. 49 C.W.N. 484.

-S. 162-Statement of accused leading to discovery of fast-Admissibility-Evidence Act, S. 27.

A statement made by an accused person to the police in the course of an investigation under Chapter XIV, Cr. P. Code, is not admissible in evidence though it leads to the discovery of some fact, it being hit by 5. 162 Cr. P. Code. The effect of this section is that S. 27 of the Evidence Act is pro tanto repealed. (Loage and Pal, JJ.) NARESH CHANDRA DAS v. EMPEROR. LL.R. (1942) 1 Cal. 436=204 LC. 111=75 C.L.J. 507=15 B.C. 497=44 Cr.L.J. 145=46 C.W.N. 180= A.I.B. 1942 Cal. 593.

-S. 162-Statements of accused to police-How far admissible- Evidence Act, S. 27.

Statements made to a police officer during investigation by an accused person are, generally speaking bit by the provisions of S. 162 (1), Cr. P. Code, and cannot under this sub-section be used for any purpose except as therein mentioned. By reason, however of Sub-S. (2) of that section, as amended by Act XV of 1941, certain kinds of statements which are hit by sub-S. (1) of that section, but which come within S. 27 of the Evidence Act, may be proved as against the person making it. (Khundkar and Das, JJ.) SATISH CHANDRA SEAL v. EMPEROR. I.L.R. (1944) 2 Cal. 76=219 I.C. 310 =46 Cr.L.J. 580=18 R.C. 99=A.I.R. 1945 Cal. 137. -S. 162-Statements of witnesses at time of sei-

sure of articles—Admissibility. A memorandum drawn up by a police officer of the

articles taken over by him from one of the villagers with a statement of the circumstances attending their

CR. P. CODE, (1898) S, 162.

Seizure, cannot be proved except as permitted under S. 102, Cr. P. Code, being a record by a police officer of a summary of statements made to nim during investigation by persons whom he examined. (Luage and Dis., 1/1.) KABIRUDDIN v. EMPEROR. 210 1.C. 409 =10 K.O. 483-48 U.W.N. 306=40 Or.L.J. 268= 77 U.L.J. 407=A.I B. 19±3 Cal. 6±4.

-S. 102-statement to police by person subsequently mase an accused—Admissipility.

Statements made to a police-ordicer by an accused person in the course of an investigation are not admisstole in evidence even though when the person making them was not accused at the time of making those statements. (Mosely, J.) RAMDAYAL MANGILAL v. I'HE KING. 1941 Rang, L.B. 784=A. I.B. 1942 Band. 62.

-8. 162—Statement to police—Method of proof.

Per Edgicy, J .- The ordinal method of proving the previous statement of a witness to the police by which it is sought to contradict him is:-(i) when the witness is controlled with his allegad previous statement to elicit from him an admission that he made it; (2) to call the investigating officer and to obtain evidence from him to the effect that the recorded statement in the diary is an accurate record or, at any rate, a substantially accurate record of what the witness said to him; and (3) to adduce any other regal evidence in order to establish the fact that the alleged previous statement was made. For example, in suitable cases, a witness may be examined who was present at the time when the record was made and is in a position to speak with regard to its correct preparation, it would then be for the Court to decide whether the previous statement had been proved after weighing against the evidence adduced for the purpose any explanation which the witness might have given with reference to the alleged statement or any other evidence which might be on the record to indicate that the previous statement as recorded had not actually been made. If the investigating officer is in a position to testify that the writing in the diary correctly represents the previous statements of the witness and the relevant portion of that statement has been recorded by the judge in his note of evidence, it is a matter of minor importance whether the corresponding portion of the writing in the diary is marked as an exhibit or not. All that is necessary is that the Judge's record should contain somewhere a clear note of what the witness is supposed to have said according to the evidence. (Eugley and Roxburgh, Jf.) HERAMBA LAL GHOSH v. LMPEROR. 220 1.0. 237 = 78 C.L.J. 217= A.I.R. 1945 Cal. 159.

-S. 162-Statement to police-Omissions from such statement amounting to contradictions-Proof-Procedure-Duty of Court.

Per Eugley. J .- Whenever the defence wish to contradict a prosecution witness by showing that he did not mention a particular matter to the police, it is the duty of the Court to decide whether the alleged omission, if established, would amount in substance to a contradiction. If the judge is so satisfied, he should allow the cross-examination to proceed "in the manner provided by S. 145 of the Evidence Act" and the attention of the witness should be called to such portion or portions of the recorded statement as may be sufficient fairly to place him in a position to say whether or not he omitted to mention the matter with regard to which the alleged contradiction arises, to explain the alleged omission. If, however, the Court is not satisfied that the omission amounts in substance to a contradiction, any question with regard to the recorded statements in the diary should be disallowed, for instance, when the evidence CB, P. CODE, (1898) S. 162

of the wingers although given in greater detail than in his statement as recorded by the investigating officer, is nevertheless substantially consistent therewith. If the Court is satisfied that the omissions amount in substance to contradictions, it must be proved that, at the time when he made his statement to the police, the witness concerned in fact made no mention of the matters which (in amplification of or in contradiction to, his recorded previous statement, he is alleged to have introduced 12to his testimony. The detence counsel (or if necessary the Judge himself) should, therefore, put such questions to the investigating officer as may be sufficient to ascertain what the witness really said with regard to the matter in respect of which he is supposed to have contradicted himself. It may often be necessary to put a number of questions to him to test the weight of his evidence. For this purpose in suitable cases the Judge might exercise his discretion under S. 164 of the Evidence Act or himself put the necessary questions to the investigating officer. For instance, it is important that there should be some evidence on the record with regard to the system which was followed by the investigating officer in recording the statements of witnesses under S. 101, Cr. P. Code. It would be useful to know what precautions, if any, were taken by the investigating officer to secure the accuracy of the record, whether the diary was written in the presence of the witness concerned or whether any portion of it were read over to him, whether it was customary to record full statements or whether the Sub-Inspector merely noted a tew points which he considered to be of importance with reference to the immediate investigation of the case. (Edgley and Roxburgh, JJ.) HERAMBA LAL GHOSH v. EMPEROR. 220 I.C. 237=78 C.L.J. 217=A.L.B. 1945 Cal. 159.

If the record made in the case diary does not purport to be either thorough or complete, the absence of a statement in the case diary is not in itself evidence that such a statement was not made. The proper way to prove an omission is to question the police officer who wrote the diary whether a particular statement was made to him. He may be able to say that it was not made to him because he feels sure that if it had been made it would have found a place in the case diary. If he cannot say so, an omission cannot be proved by filing the case diary. (Horwill, 1) PACKIRISAMI PILLAI. In 21. 199 I.C. 833=14 R.M. 669=43 Cr.L.J. 582=1942 M.W.N. 591=55 L.W. 771=A.I.R. 1942 Mad. 288 (2).

——S. 162—Statements to police signed by witnesses—Effect—Evidence of such witnesses—Admissibility.

See C. P. AND BERAR EXCISE ACT, S. 34. 1945

N.L.J. 303.

S. 162-Statement to Police-Use of-Power and duty of Court to act suo motu.

Per Sm, J.—There is nothing in S. 162, Cr. P. Code which prevents a Court from looking into the police diaries suo motu and itself using the statement of a person examined by the police recorded therein for the purpose of contradicting such person when he gives evidence in favour of the Crown as a prosecution witness. The Court may do this itself under S. 165 of the Evidence Act or it may make over the recorded statement to the lawyer for the accused so that he may use it for his purpose, though he has not asked for it. S. 162, Cr. P. Code, does not say that the statement can only be used at the request of the accused. The limitation or restriction imposed in the first part of that section reates to the purpose for which the statement may be

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used: it does not relate to the procedure which may be adopted to effect that purpose. In a case where the evidence given in Court implicates persons who are not mentioned in the first information report, it is always advisable for the Court to took into the police papers in order to ascertain whether the persons implicated by witnesses at the trial had implicated them during the investigation. Where the statements in the police diary very seriously affect the credibility of the important witnesses for the prosecution and the Court does not look into the diary until after the investigating officer and the other witnesses had been examined and discharged, it will be acting most injudiciously and improperly it it does not recall and question them in the manner provided by S. 165 of the Evidence Act. (Khundkar ani Sen. ff.) EMPEROR v. LAL MIA. I.L.R. (1943) 1 Cal. 543=209 I.C. 206=16 R.C. 339= 45 Cr.L.J. 99=47 C.W.N. 336=A.I.R. 1943 Cal. 521.

\_\_\_\_S. 162-Statement under-Uss of.

A statement made by a witness to the police under S. 162 Cr. P. Code, is of course not substantive evidence at all and can be used only to contradict statements made during the trial. (Horwill, J.) PACKIRISWAMI PILLAI, In re. 199 I.C.833=14 R.M. 669=43 Cr.L.J 582=1942 M.W.N. 591=55 L.W. 771=A.I.R. 1942 Mad. 288 (2).

\_\_\_\_\_S. 162-Statement to police-Use of-Procedure.

Per Edgley, J .- The effect of S. 162. Cr. P. Code, is subject to the provisions of sub-S. (2), to prevent a statement to the police made during the course of the investigation from being used for any purpose except (1) by the accused for contradicting a witness, provided the procedure laid down in proviso (1) is followed and (2) by the prosecution in re-examination for the purpose only of explaining any matter referred to in the crossexamination of the witness sought to be contradicted, Under proviso (1), the contradiction must be established by proving that the part of the recorded statement used for the purpose of contradicting a witness actually represents what was said by him to the police officer. It is not sufficient merely to prove the writing as contemplated by S. 145 of the Evidence Act for proof of the writing alone does not show that the witness actually made the statement by which it is sought to contradict him. The attention of the witness should be called to those parts of the diary entries in respect of which proof could be given that they represented the actual statement of each witness, in order to enable him, if he desires to do so, to furnish an explanation for any alleged contradiction or material omission. Therefore, after the witness has been cross-examined with regard to his previous statement without it being shown to him, he should then be allowed to read the relevant passage or it should be read to him by the cross-examiner and he should be asked whether he wishes to offer explanation of the statement which is alleged to represent what he has said. If he offers any explanation, the weight to be attributed to it will depend on whether the person who made the record is able to convince the Court that it was accurately made. (Edgley and Roxburgh, 11.) HERAMBA LAL GHOSH v. EMPEROR. 220 I.C. 237 =78 C.L.J. 217=A.I.R. 1945 Cal. 159.

Ss. 162 and 164—Statement to police—Use of Witness failing to name accused in statement under S. 164, but naming him at trial—Value of latter statement—Statement to Police naming accused—If sufficient to remedy defect in statement to magistyate.

CR. P. CODE, (1898) S, 162

Under S. 162, Cr. P. Code, a statement made to the police during the course of the investigation can be used only for the purpose of contradicting a prosecution witness, and, except in that connection, cannot be used for any other purpose, r. g., for remedying a defect or lacuna in a statement recorded under S. 164. Where a witness for the prosecution mentioned the name of an accused at the trial as one of the rioters, but had not mentioned his name in his statement before the magistrate recorded under S. 164, Cr. P. Code, only four days after the occurrence, and it was brought out in the cross-examination of the investigating officer that the particular accused had been named by the witness before the police.

Held, that the fallace of the witness to mention the accused's name in his statement to the magistrate robbed his subsequent statement against the accused made at the trial later of all value, and that this was not remedied by the statement to the rollie under 5. 162. Cr. P. Code. (Spens, C. J., Vivaua.harrar and Zarrullah Khan, J.) SAHDEO GOSAIN v. EMPEKOR. 1944 F.L. J. 129=48 C.W.N. (F.R.) 102=1944 P.W.N. 156=213 1.C. 47 = 10 B R. 569=17 R.F.C. 1=57 L.W. 299=1944 M.W.N. 230=A.I.R. 1944 F.C. 38 = (1944) 1 M.L.J. 410 (F.C.).

S. 162-Statement to Police-Use of Mede of proof of contradiction-Filing of case diary and use of whole statement recorded therein-Propriety.

Where the accused in a criminal case seeks to show that a witness has made a statement in Court which is contrary to what he had told a police officer, the proper way of contradicting him is to ask the police officer, when he is in the witness-box about it and to permit, if necessary, the filing of such portions of the record in the case diary as will support the police officer's statement. Where it is alleged that the statement made by the wit ness in Court was not made before the police officer, it is useless to refer to the record in the case diary at ail. To allow the police officer to be asked whether certain copies of the case diary are true copies of the statements recorded from the witness, and then to permit the fixing and making tree use of the whole of the entry in the case diary relating to the statement of the witness, whether it is strictly relevant or not to the alleged contradiction, is to make an improper use of the case diary. (Burn and Horwill, JJ.) EMPEROR v. BANGARU-RAJU 201 I.C. 390=15 R.M. 335=1942 M.W.N. 42=A.I.R. 1942 Mad. 58.

—S. 162 and Evidence Act (1872). S. 8— Voluntary report to police by accused, subsequent to first information report—Admissibility.

Where subsequent to the first information report in respect of a murder, one of the accused voluntarily makes a report to the police which is by way of a defence or reply, the report is not one made in the course of the police investigation and is admissible in evidence under S. 8 of the Evidence Act. (Bennett and Ghulam Hasan, JJ.) EMPEROR v. BHAGI. 194 I.C. 236=1941 A.W.R. (C.C.) 188=1941 A.Cr.C. 127=13 R.O. 578=1941 O.L.R. 441=42 Cr L.J. 539=1941 A.I.W. 581=1941 O.A. 483=1941 O.W.N 722=A.I.R. 1941 Oudh, 359.

—S. 164,
Applicability
Approver
Non-compliance
Recording of confession
Retracted confession
Statement after acceptance of pardon
Statements under

CR. P. CODE, (1898) S. 164—Applicability,

Applicability

—S. 164 — Applicability — Confession recorded under S. 539 (2), before paraon was tensered—Almostophy—Evidence Act, 5. 20.

S. 104, Cr. P. Code, would not apply to a statement of a confession for which special provision is made under S. 301 (2) but a statement to be within S. 301 (2), Cr. P. Code, must be a statement by a person who has accepted the lender of pardon and not a statement made before a pardon has been accepted. A confession recorded before and not after the pardon, was tendered and which is not recorded in accordance with the provisions of S. 104 Cr. P. Code, is not admissible either under S. 204 of S. 104, Cr. P. Code, or under S. 204 if the Evidence Act read with S. 104 Cr. P. Code, (Davis, C. J. and Love. J.). Miral Islam v. Emperon. I.L.R. (1945) Kar. 285—209 I.C. 242—45 Cr.L.J. 119—16 R.S. 90—A.I.R. 1943 Stad 100.

——S. 164—Applicability—Coroner recording confession—Duty to observe formalities. See CORONERS ACT, S. 19, 47 Bom. L.K., 145 (F.B.).

## Approver

S 164—Approver—Corrovation—Accused and approver not on good terms—Accused fount in possession of stoken property—If good corroporation of approvers statement,

Athough the accused was not on good terms with the approver, the fact that he was found in possession of valuable property, which has been proved to be the property stolen, is good corroboration of the approver's statement that the accused was a member of the conspiracy to commit dacoffy, calunomed alimit, J.) SHERA V. EMPEROR. 203 1.C. 02—44 P.L.R. 545—15 K.L. 225—44 Cr.L.J. 62—A.I.R. 1945 Lah, 5

----S. 164 — Approver — Statement made after accused's arrest—Value of.

It is not correct to state that the evidence of an accomplice in a case of dacoity is not entitled to any credence if he made his statement as an approver under S. 104, Cr. P. Code, after all the accused had been arrested and recoveries of stolen property made from them. This is a criticism to which the evidence of almost every approver is subject because the question whether pardon should be tendered to an accomplice is generally considered at a late stage when the investigation of the case is completed. Of course it is a circumstance which the Court will take into consideration when deciding the question whether the approver's evidence should or should not be beneved. In such cases the question is not whether a story could be put into the mouth of the approver to nt in with the fact discovered but whether the circumstances show that this might have been done and its decision will depend upon the character of the approver, his position vis-a-vis the Police the incriminating tacts discovered against him and the story alleg-(Mahomed ed to have been narrated by him. Munur. J.) SHERA v. EMPEROR. 203 I.C. 62=44 P.L.R. 545=15 R.L. 225=44 Cr.L.J. 62=A.I. R. 1943 Lah. 5.

S. 164-Approver-Statement of If can be re-

When an approver has been tendered a pardon under S. 337 (1). Cr.P.Code, and he has accepted

CR, P. CODE. (1338), S. 134-Non-compliance,

be legally the tender, 11:5 statement can recorded under S. 164 on affirmation. (Grille, C.J. Polices and Parinie, JJ.) RAMBHAROSE Nardadapaasab J. Smeedon, i.L.R. (1944) Nag. 274-212 I.C. 449-16 R. N. 233-45 Cr.L.J. 673=1944 N.L.J. 113=A.1.K. 1944 Nag. 105

## Non-compliance

-Ss. 164 and 364-LVun-compliance-Confession to Magistrate not recorded in writing or in proper form-Admissibility in evidence at trial.

Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of periormance are necessarily forbidden. This rule applies to Ss. 164 and 364 Cr. P. Code, both of This rule which must be looked at and construed together. The Magistrate acting under these sections is not acting as a Court but he is a judicial officer. No other procedure than that laid down with such minute particularity in the sections them-selves is permitted. The accused who was arrested and taken to the Deputy Superintendent of Police, was produced by the latter before the additional District Magistrate. The accused then confessed to the additional District Magistrate that he had participated in a crime. But this confession was not recorded in writing and taken down in the manner required by the Criminal Procedure Code, though he was a Magistrate under the Code and competent to record the confession in proper form.

Held, the confession was not admissible as it was not recorded in proper form if it was to be admissible, it had to be recorded in proper form made as it was to a Magistrate during the course of the investigation and the precautions and formalities required by Ss. 164 and 364 had to be observed. Since they were not complied with it could not be admitted in evidence at the trial. (Davis C. J, and Lobo J.) Shrif Jio v. Emperor. I.L.R. (1943) Kar. 371=213 I.C. 317=16 R.S. 16=45 Cr.L.J. 704=A.I.R. 1944

Sind 113,

S.164 — Non-compliance — Failure to append

memorandum required by-Effect.

Where the memorandum required by S. 164 Cr. P. Code, is not appended to the record of a confession, the confession must be rejected as inadmissible. (Thomas, C.J. and Bennett, J.)
RAM SINGH V. EMPEROR. 205 I.C. 514=15 R.O. 472=1943 O.A. (C.C.) 49=1943 A.W.R. (C.C.) 21=1943 A.Cr.C. 37=1943 O.W.N. 88=44 Cr.L.J. 389 = A.I.R. 1943 Oudh. 269.

-Ss. 164 and 364—Non-compliance—Failure of Magistrate to make memorandum in his own hand-

writing—If renders confession inadmissible.
Under S. 164 read with S. 364, Cr. P. Code, a magistrate recording a confession has to make a memorandum in his own handwriting but the omission to make such a memorandum would not make the confession bad. The defect is cured by sec. 533 (1) Cr.P. Code, when the magistrate is examined in the case. When the magistrate is examined and gives a satisfactory explanation for the omission, the omission to make the memorandum in the magistrate's own handwriting would not make the confession inadmissible in evidence. (Divatia and Lokur, JJ.) EMPEROR

CR. P. CODE. (1898) S. 164-Recording of Confession.

v. CHAVADAPPA. 221 I.C. 85=47 (Bom. L.R. 63 =A.I.R. 1945 Bom. 292.

-S. 164 and Evidence Act, S. 29-Non-compliance with regarding warning to accused-If fatal to the confession.

Although a Magistrate does not comply with the requirements of law as laid down by S. 164 (3); Cr. P. Code, in respect of the warning to be given to the accused, the defect is not fatal in view of S. 29 of the Evidence Act. (Ismail and Hamilton, JJ.) EMPEROR v. NANUA. I.L.R. (1941) All. 280=1941 O.A. (Supp.) 229=193 I.C. 873=1941 O.W.N. 337=1941 A.Cr. C. 91=13 R.A. 463=1941 A.L.W. 241=42 Cr.L.J. 485=1941 A.L.J. 86=1941 A.W.R. (H.C.) 65=A.L R. 1941 All. 145.

-S. 164-Non-compliance-Record not showing warning by Magistrate or that he satisfied himself about voluntariness of confession—Effect.

Where the record of a confessional statement made by an accused does not contain anything to show that the recording Magistrate satisfied himself at the time that it was being made voluntarily or that he addressed any kind of warning or caution to the accused, and the accused, appears to have been in the company of the Sub-Inspector of Police until immediately before he made the statement, the Court ought to question the Magistrate and the Sub-Inspector as to the circumstances under which the statement came to be made and ought not to admit the statement in evidence unless the replies he receives are satisfactory and shows that the state. ment was a voluntary one. (Rowland and Shearer, JJ.) BHOLA GOPE v. EMPEROR. 1981.C. 92=14 R.P. 410=8 B.B. 326=43 Cr.L.J. 301=23 P.L.T. 566= A.I.R. 1942 Pat. 283.

-Ss. 164 and 533—Non-compliance—Omission to take accused's signature to statement-If curable under S. 533. SAMLA HARDEO v. EMPEROR. [see Q. D. 1936—'40 Vol. I, Col. 2562.] I.L.R. (1941) Nag. 104=191 I.C. 300=13 R.N. 196=42 Cr.L.J. 117=A.I.R. 1941 Nag. 17.

## Recording of Confession.

-S. 164—Recording of confession—Proper time for-Duty of police to send accused to Magistrate as soon as he expresses desire to confess-Duty of Magistrate to ascertain and record when accused expressed desire to confess.

Under S. 164, Cr. P. Code, it is necessary and desirable that the accused should be sent to the Magistrate as soon as he expresses his desire to make a confession, and the Magistrate should, at the time of recording his confession, ascertain when the accused first expressed his willingness to confess and to record it in the confession. In all cases where the investigation by the police is either conducted or continued after the accused expresses his desire to confess, and if ultimately, after the investigation is over, the accused does make a confession, there would not be an unreasonable ground for apprehension that the confession was made to fit in with the result of the investigation so that it may be regarded as having been corroborated. For that reason, it is necessary that the accused should be sent to the Magistrate as soon as he expresses his desire to confess, (Divatia and Lokur, //.) Emperor v. Savlimiya and Miyabhai. 46 Bom.L.R. 589 = A.I.R. 1944 Bom. 338.

of confession—Absence of -8.164—Record signature and thumb impression of accused making confession-Magistrate not signing English version-Effect on value of confession-Voluntary nature.

CR. P. CODE. (1898) S. 164-Recording of Con. CR. P. CODE (1898) S. 164.-Statements Under. fession.

A confession recorded by a Magistrate was not signed by the accused who made it, nor was his thumb impression affixed to it. The Magistrate too did not sign the English version of it.

Held, that these circumstances led to an unwholesome suspicion that the confession of the accused was not obtained with that degree of fair play or detached independence which it is the duty of Magistrates to uphold in these cases. No reliance should therefore be placed on the confessions as being voluntarily made within the meaning of S. 164, Cr. P. Code. (Stone, C. J. and Tokur. 1.) EMPEROR W. BHIMAPPA SAIBANNA. 47 Bom.L.R. 648 = A T.R. 1945 Pom. 484.

Ss. 164 and 364—Record of confession—Duty of Magistrate recording-Record of confession on printed form-Undestrability of.

It is very undesirable that confessions should be made on printed forms and that the Magistrate should not be made to express in his own words, exactly why he considers that the confession is being made voluntarily. The use of printed forms results in the all-important portion at the commencement which deals with the voluntary nature of the confession being reduced to a mere formality. For the fair and proper administration of justice, it is essential that Magistrates should remember that it is their hounden duty to be completely and judicially independent and that they should fully satisfy themselves in each case that the confessions which they record are in the fullest sense of the word made voluntarily. (Stone, C.J. and Lokur, J.) EMPEROR v. BHIMAPPA CAIBANNA. 47 Bom.L.R. 648 = A.T.R. 1945 Bom. 484.

-S. 164—Recording of confession—Question as to motive for confession-Duty of Magistrate to put.

Per Meredith, J .- The Magistrate recording a confession should not omit to ask the one simple and obvious but vital question "why are you making this confession, knowing that it may be used against you"? (Manchar Lall and Meredith, 11.) DIKSON MALL v. FMPFROR. 196 LC. 507=14 R.P. 232=23 Pat.L.T 387=43 Cr.L.J. 56=A.I.R. 1942 Pat 90=8 B.R. 49 -8.164—Recording of confession—Questions as to voluntariness.—Duty of Magistrate.

If the accused states in answer to a question put by the Magistrate that the statement is made voluntarily by him, it is not necessary to put any further question. (Verma and Rowland, JJ.) [HIKTU BHOGTA v. EMPEROR. 199 I.C. 307=14 R.P. 585=43 Cr.L.J. 544=23 P.L.T. 763=8 B.R. 542=A.J.R. 1942 Pat. 427.

-S. 164—Recording of confession—Questions to be put as to voluntariness.

No form of questions is prescribed by S. 164 (3), Cr. P. Code, from which the Magistrate must satisfy himself that he believes the confession was made voluntarily. All that the law requires is that the Magistrate should put some questions to the accused so that it may appear satisfactorily that the accused was making a voluntary statement. (Manohar Lall and Rowland, /l.) FM-PFROR v. DUBAL. 21 Pat. 153=43 Cr.L.J. 90=8 B. R. 129=14 R.P. 259=196 I.C. 852=A.I.B. 1942 Pat 113,

-S. 164 (3)—Recording confession—Warning to be given to confessor-Nature of. PERUMAL KUDUM-PAN v. EMPFROR. [see O. D. 1936—'40 Vol. I, Col. 2558.] 191 I.C. 87=18 B.M. 481=42 Cr.L.J. 64. S. 164-Recording of statement under-Inference—Value to be attached to. PARMANAND 7. FMPEROR. [see O. D. 1936—140 Vol. I, Col. 2556.] J.I.R. (1941) Nag. 110 = 42 Cr.I.J. 17.

-S. 164—Recording of statements under—Reflec-

tion on reliability of witness-Procedure when justified. The fact that the police have considered it necessary for the statement of a witness to be recorded under S. 164, Cr. P. Code, only suggests that they do not consider him altogether a reliable witness, that is to say, they apprehend that he may be tampered with. But there is no objection to the procedure being followed in appropriate cases. Where all of the persons accused in the first information report disappeared from the village immediately after the occurrence, and it was, therefore, not improbable that some attempt would be made by one or more of them to tamper with the witnesses while the accused were at large, there can be no objection to the police sending the witnesses to have their statements recorded by the Magistrate under S. 164, Cr. P. Code. (Rennett and Ghulam Hasan, 11.) PARMESHWAR DIN & EMPEROR. 195 I C. 630=1941 O.A. 689= 1941 O.L.R 609=1941 A.W.R. (C.C.) 265=1941 A. T.W. 856=14 R.O. 110=42 Cr L.J. 758=1941 A Cr C. 198=1941 O.W.N. 981=A.I.R. 1941 Oudh 517. Retracted Confession.

S. 164-Retracted confession-Value of.

Courts will exercise a certain amount of cantion in accepting a retracted confession unless it is corroborated by reliable evidence. (Varma and Rowland, II.) IHIKTU RHOGTA v. EMPEROR. 199 I.C. 307=14 R. P. 585=43 Cr.L.J. 544=23 P.L.T. 763=8 B.R. 542 =A.TR. 1942 Pat. 427.

Statement after acceptance of Pardon.

-S. 164-Statement of accused after acceptance of pardon-Record of-Oath, if can be administered. HORI LAL v. EMPEROR. [see O. D. 1936-'40 Vol. I Col. 2559.] I.L.R. (1941) Nag. 372.

-S. 164-Statement of witness contradicting her evidence-Use of-Evidence Act, S. 165 (3).

Where a statement made by a prosecution witness under S. 164, Cr. P. Code contradicts her evidence in Court, the prosecution can only put it in with the permission of the court in order to impeach the credit of their own witness under S. 165(3) of the Evidence Act. It cannot be used as substantive evidence against the accused. (Henderson and Rexhurch, J.J.) EMPFROR 7. SFKENDAR ALI SHAH. 195 I.C. 774=14 R.C. 137=42 Cr.L.J. 781=A.I.R. 1941 Cal. 406.

Statements Under. -S. 164-Statement under - Admissibility-Evidence Act, Ss, 145 and 157.

A statement made under S. 164, Cr. P. Code, is not inadmissible in evidence and may be used to corroborate or contradict a statement made in Court in the manner provided by Ss. 145 and 157 of the Fvidence Act. (Rarlley and Akram. 11.) FMPFROR ". MANIK GAZI, 197 I.C. 815=14 R.C. 400=43 Cr.L.J. 277= 74 C.I.J. 208 = A.J.P. 1942 Cal. 86.

- S. 164-Statement under-Copy of statement not furnished to cross-examining counsel- Puty of Court to grant such a statement.

Where a case has been taken on file and is being tried there ought to be no objection to the granting of a copy of a statement recorded under S. 164 of Cr. P. Code. as it would be necessary for the cross-examination of the witness. As a matter of fact it would be more convenient to the Court itself to grant such copies in advance, as it may avoid the necessity for an adjournment on the ground that the cross-examining crunsel is not posted with facts stated in the statement recorded under S. 164, Cr. P. Code. (Kuptuswami Ayvar, 1) MATFAYYAN, In re. 218 J.C. 104=46 Cr.I.J. 417 =57 I.W. F50 (1)=1944 M.W.N. 686 (1)=A.I.B. 1945 Mad. 85=(1944) 2 M.L.J. 306.

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CR. P. CODE, (1898) S. 164-Statements Under-

\_\_\_\_S. 164-Statements under-Value of.

Statements under S. 164, Cr. P. Code, are not substantive evidence at all. They can be used for the purpose of corroboration and contradiction and when used for purposes of contradiction, they merely destroy the credit of the witness, which is not a way of proving that what the witness eave is true. (Davis, C. J. and O'Sullivan, J) NUR MUHAMMAD v. EMPEROR I.L.R. (1944) Kar. 86=211 I C. 408=16 R.S. 205=45 Cr L.J. 393=A.I R. 1944 Sind 38.

\_\_\_\_\_S. 165- Applicability and object of. See Cr P Code, Ss. 103 AND 165. (1945) 2 M.L.J. 486 (P.C.).

S. 165 (1)—Scope—General search.

The latter provision in S. 165 (1). Cr. P. Code, is clearly intended to restrain a police officer from initiating or conducting anything in the nature of a general search. (Agarwala and Imam. II.) RAM PARVES ANET. EMPEROR 23 Pat 328=215 I.C. 102=11 B.R. 50=17 R.P. 89=45 Cr. L.J. 802=1944 P.W.N. 292=A.I.R. 1944 Pat 228.

S. 165 (3)—Applicability—Search made by subordinate in officer's presence.

S. 165 (3), Cr. P. Code, refers to a case where the officer is himself unable to conduct the search and deputes somehody else to do so. It has no application to a case in which the officer in the process of conducting that search himself has a part of it actually done under his own direction and in his own presence by one of his subordinates. (Young C. J. and Blacker, J.) EMPERGR v. DARSHAN SINGH. LL.R. (1941) Lah 370=196 I.C. 106=14 R.L. 136=42 Cr. L.J. 812=43 P. L.R. 536=A.I.R. 1941 Lah 297.

Scope of search.

It is clear from the concluding words of S. 165. (3), Cr. P. Code, Viz, "and such subordinate officer may thereupon, search for such thing in such place", that the intention of the Legislature is that when a subordinate officer is instructed to carry out a search, which it is not practicable for his superior officer to conduct, he is to search only for the thing which he is instructed to search for and that he is to search for it only in the place specified in his authority. (Agarwala and Imam, JI.) RAM PARVES AHIR v. EMPFROR. 23 Pat 328=715 I C 102=45 Cr L.J. 802=11 B.R 50=17 R.P. 89=1944 P.W.N. 292=A.I.R. 1944 Pat, 228.

S. 165 (3)—Search by subordinate officer without written authority from superior officer—Resistance to sear: h—Offence Penal Code S. 99.

A search conducted by a subordinate police officer without the written authority of his superior officer required under S. 155 (3) Cr. P. Code is without jurisdiction and resistance to such a search is therefore, not an offence. The subordinate police officer in such circumstances cannot be said to be acting in good faith under colour of his office, and S. 99 I. P. Code, has therefore no application to the case. (Acarwola and Imam. JI.) RAM PARVES AHIR v. FMPFROR 23=Pat. 328=215 I.C. 102=45 Cr.L. J. 802=11 B.R. 50=17 R.P. 89=1944 P.W.N. 292=A.J.R. 1944 Pat. 228.

-S. 167-Scote and object.

CR. P. CODE, (1898) S. 172 and 174.

Per Grille, C.I.—Under S. 167 Cr. P. Codea Magistrate does not take cognizance of the case and indeed the Magistrate hefore whom a person is produced and whose further detention is authorized under this section need not be a Magistrate who has iurisdiction to try the case at all. The section has nothing whatever to do with the trial of cases. Its object is to prevent abuses by the police and it is entirely unaffected by the Special Criminal Courts Ordinance (II of 1942). (Grille, C.I. on difference hetween Neoni and Diaby JI.) SITAO IHOUAD DHIMAR v. FMPROR. I.L.R. (1943) Nag. 73—205. IC 161=15 R.N. 187=44 Cr. L.J. 237=6 F.L.J. (H.C.) 53=1943 N.L.J. 16=A.I. R. 1943 Nag. 36.

S. 167—Scope—Production of accused under-If amounts to taking cognizance or initiation of judicial proceedings.

The production of accused persons before a magistrate under S. 167, Cr. P. Code does not amount to taking cognizance or commencement of judicial proceedings. Production under S. 167 need not be before a magistrate having jurisdiction to try the case, and all that can be done under the section is to authorize detention of the accused. That does not amount to taking cognizance of a case or to the institution of judicial proceedings. (Roteland I.) EMPEROR V. SATIWAN MARTO. 23 Pat.L.T. 684=1942 P.W.N. 219.

Ss. 172 and 162—Diary of counter case—If can be used.

S. 172 Cr. P. Code relates to the Police diary made in respect of a case under enquiry or trial by the Court which calls for it. Where the diary relates not to the case which is actually being tried by the court but to the counter case, the section does not in terms apply, but the principles there set out apply. There is no section in the Code which would prevent the Court from looking into the diary of the counter case or from using the diary in the counter case in the way laid down in S. 172 (2); (Khundkar and Sen JI). AHMFD MIA v. EMPEROR. I.L.R. (1944) I Cal. 133 = 215 I.C. 153=46 Cr.L.J. 28=17 R.O. 92=A.I.B. 1944 Cal. 243.

Ss. 172 and 174—Diary—Reference to—Duty of police officer—Court inviting him to refresh his memory by reference to it.

Although an accused is not entitled to call for the police diaries unless a police officer uses them to refresh his memory or the Court uses them for the purpose of contradicting a witness, it is not left to a police officer appearing as witness to decide whether or not he should disclose material fact which might turn the scale in deciding whether an accused person was guilty or in nocent, when he is in a position to clear up a point by reference to the notes mad by him in the diary. Should a police officer refuse to assist the Court in this way he would not only be failing in his duty both as a witness and as an officer of public justice, but would also be liable to exactly the same penalty as any other witness who refuses to give evidence which is within his knowledge and is not affected by any particular claim of privilege. (Young C. J. and Beckett, J) FATNAYA LAI KHAN v. EMPEROR. I.I.R. (1948) Leb. 47(=125 I.C. 87(=14 F.I. 488=48 I.I.R.

CR. P. CODE, (1898) S. 172

680=43 Cr.L.J. 588=A.I.B. 1942 Lah. 89.

\_\_\_\_\_\_ S. 172-Diary-Use of.

The only legitimate purpose for which the police diary may be used is to assist the court which tries the case by suggesting means of further elucidating points which need clearing up, and which are material for the purpose of doing justice between the Crown and the accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact or statement contained in the diary. (Manchar Lall and Meredith, JI.) DIRSON MALL v. EMPEROR. 196 I.C. 597=8 B B. 49=14 R. P. 232=23 P.L.T. 387=43 Cr.L.J. 36=A I.R. 1942 Pat. 90.

Per Khundkar, J—A diary kept under S. 172, Cr. P. Code, cannot in any circumstances be used as evidence of any date, fact, or statement contained therein but it can be used for the purpose of assisting the Court in the enquiry or trial by enabling the Court to discover means for further elucidation of points which need clearing up before justice can be done. Khundkar and Sen JJ.). AHMED MIA v. EMPFROR. 1.L.R. (1944) 1 Cal. 133-215 I.C. 153-46 Cr.L.J. 28-17 R.C. 92-A.I.R. 1944 Cal. 243.

——Ss. 176 and 537—Failure to hold inquiry into cause of death—Irregularity if curable.

The failure of a magistrate to hold an inquiry under S. 176 Cr. P. Code, into the cause of death is curable under S. 537, Cr. P. Code, if it has not occasioned any failure of justice as (e.g.) when there is no corpse on which an inquest could be held. (Sen and Hemeon JI.) GHUDO RAMADHAR v. EMPEROR. I.L.R. (1945) Nag. 315=1945 N.L.J. 134=A.I.R. 1945 Nag. 143.

There is no objection to a magistrate granting copies of statements recorded under S. 176, Cr. P. Code of witnesses who are going to be examined at the preliminary inquiry. (Habbell, J.) VENKATRAMANA RAO In re. 1944 M.N. 687 (1)=57 L.W. 560 (1)=18 E.M. 33=218 I.C. 112=46 Cr L.J. 412=A.I. R. 1945 Mad. 64=(1944) 2 M.L.J. 292.

——Ss. 177 and 179—Jurisdiction—Defination— Defamatory letter sent from A received at B—Jurisdiction of Court at B.

Where a defamatory letter sent from A to B is received at B, there is publication at B, and the Court at B has, therefore, jurisdiction to entertain a complaint of defamation. (O'Sullivan, J.) KUNDANMAL v. EMPEROR. 209 I.C. 234=16 R.S. 89=45 Cr.L.J. 105=A.I.R. 1943 Sind 196.

——S. 177—Jurisdiction—False charge—False allegations against police in petition sent by post—Petition posted at P and received by addressee at V.—False charge—Where made—Place of trial.

The accused was charged with preferring a false or frivolous charge against police officials at Polur on the ground that he sent a petition containing various allegations against the police officials which were subsequently found to be false, to the District Superinterdent of Police. The petition was sent by post, it was posted at Polur and was opened by the District Superintendent at Vellore.

CR. P. CODE, (1898) S. 182

Held, on the question of jurisdiction, that the false or frivolous charge was made at Vellore and not at Polur and the Court having jurisdiction would be the Magistrate at Vellore and not the Magistrate at Polur. (Horwill, J.) ABDUR SHUKUR SAHIB v. EMPEROR. 207 J.C. 543=16 R.M. 162=44 Cr.L.J. 660=1943 M.W.N. 290 (1)=A.I.R. 1948 Mad. 500=(1943) 1 M.L.J. 409.

S. 179, Cr. P. Code, deals with offences which are constituted partly by an act done and partly by consequence which follows. Where the offence of criminal breach of trust is complete in Delhi, the failure of the accused to return the property at Peshawar, or to account for the property, does not constitute any part of the offence. The offence is, therefore, triable only at Delhi. (Almond, J.C.) SULTAN CHAND v. YOGINDRA NATH. 214 I.C. 2°0=45 Cr. L.J. 749=17 R. Pesh. S=A.I.R. 1944 Fesh. 25.

S. 180—Applicability—Abetment of abetment of offence—If offence—Abetment by conspiracy—Contract between every conspirator—Necessity—Penal Code, S. 107, Expls, 4 and 5.

It is not correct to hold that an abetment of an abetment is not itself an offence. The abetment of an abetment of an offence is no more or no less than an abetment of that offence. A person may constitute himself an abettor by the intervention of a third person without any direct communication between himself and the person employed to do the thing; under Expl. 5 to S. 107, I. P. Code, in the case of abetment by conspiracy, it is not necessary that the abettor should concert that offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. There is therefore no reason to exclude the application of S. 180, Cr. P. Code, in such a case. (O'Sullivan. I.) MAHOMED AYUV KHUHRO T. EMPEROR. I.I.R. (1945) Kar. 275.

——S. 181 (2) and 179—Criminal breach of trust—Place of trial—Place where breach of contract or liability to account took place.

The offence of criminal breach of trust cannot be tried at a place where neither the entrustment nor any positive act of conversion of the monies entrusted took place although a breach of contract by non-feasance or a failure to account took place there, as neither of them, however dishonest, is actually and in itself the offence which S. 405, I. P. Code, defines, but merely evidence of that offence. S. 179, Cr. P. Code, applies only to those offences which by their very definition consists of an act and its consequence. It does not apply to criminal breach of trust, as loss to some one forms no part of the statutory definition of that offence. (Lodge, and Blagden JJ.) DAITYARI TRIPATHY v. SUBODH CHANDRA I.L.R. (1942) 2 Cal. 507=15 RC 484=44 Cr.L.J. 132=204 I.C. 26=46 C.W.N 952=A.I.R. 1942 Cal. 575.

\_\_\_\_\_S. 182—Applicability—Conspiracy — Continuing offence.

It cannot be said that conspiracy can never be a continuing offence. In certain circumstances conspiracy might be a continuing offence, and from beginning to end conspiracy is an offence. Each case must be dependent on its own facts. (O'Sulliton. J.) MAPOMED AYUB KHUHRO v. EMPEROR. I.L.R. (1945). Kar. 275.

CR. P. CODE. (1898) S. 182.

S. 182 - Turisdiction—Cheating—Series of acts
—Place where one of cries of act is committed—Prosecution at such place—If lies.

The accused, residing at a place N, sent letters to various merchants of Rombay ordering goods from them and promising to pay their bill on receipt of the goods; when the goods were received by him, he accepted them and absconded without paying. He was prosecuted for cheating under S. 420. T. P. Code, before the Magistrate at N. The accused pleaded that the Magistrate at N had no jurisdiction.

Held, that the posting of the letters by the accused at N was one of the series of acts which went to make up the offence, and the Magistrate at N had therefore jurisdiction under S. 182, Cr. P. Code. (Divatia and Lokur. 11) HOPMASH APPESHIR MAHIDAVAIA. In re. 207 I.C. 613=16 P. B. 52=44 Cr.L J. 664 = 45 Pom L.R. 297=A I.R. 1943 Bom. 183.

——S. 182—Inrisdiction of British Indian Court —Abetment in Native State of offence committed in British India—'Local area'—Meaning of.

Courts in British India have no iurisdiction to try a subject of a Native State for the abetment of an offence which was committed in British India in pursuance of the abetment done by his acts in the Native State.

The words "local area" used in S. 182, Cr. P. Code. only apply to a local area over which the Code applies and not to a local area in a Native State to which the Code has no application (Hemon. I.) HIRALALV. FMPEROR. I.L.R. (1945) Nag. 130=1945 N.L.J. 68.

———S. 182—When comes into operation—Offence of misappropriation or breach of trust—Place of trial.

Where upon the facts alleged it cannot be said definitely where an offence of misappropriation or breach of trust was committed, S. 182 of the Cr. P. Code, is the proper section to be applied and the offence may be inquired into and tried by a Court having jurisdiction over any such local area. (Mullah I.) FAOTUR CHAND D. PRAHAM DATT. 1945 O.W.N (H.C.) 308=1945 A.L.T. 468=1945 A.C.C. 155=1945 A.W.R. (H.C.) 306=1945 A.L.W. 355.

S. 188 and Child Marriage Restraint Act S. 9—Marriage in Native State—Complaint within one year but certificate obtained after one year—Trial. if legal, HARNARAVAN v. GOVINDRAM [100 O. D. 1936-40 Vol. 1. Col. 2574.] I.L R. (1942) Nag. 193.

——Ss 188. and 537—S. 188, if mandatory—Absence of certificate under—If a bar to trial—Curability under S. 537.

The provisions of S. 188 of the Cr. P. Code are mandatory and the absence of the certificate of the Political Agent, required by that section is an absolute bar to the trial of a case to which the provisions of that section apply. The question of certificate goes to the root of the case and S. 537 Cr. P. Code, cannot be used to cure a clear illegality or a clear transgression of the mandatory provisions of law. S. 179 Cr. P. Code, also has no bearing to such cases. (Thomas. C. I.) MAHOMED ZAMAN v. EMPEROR. 20 LUCK. 370=1945 O.A. (C.C.) 74=220 T.C. 38=46 Cr.L.J. 650=1945 O.W. N. 115=1945 A.W.R. (C.C.) 74=1945 A.L.W. (C.C.) 108=A.I.R. 1945 Oudh 231.

S. 190—Aprlicability—Offence under Indian Companies Act—Private person—Locus standi to file complaint—G. O. Nos. 518 of 1916 and 3070 of 1932—Effect of.

CR. P. CODE. (1898) Ss. 190 & 191.

As there are no provisions to the contrary in the Com. panies Act, the taking cognizance of an offence under the Act must be governed, as in the case of an offence under the Penal Code by S. 190, Cr. P. Code, S. 100. Cr. P. Code, contains no restriction with regard to the person who may lav a complaint. It cannot therefore he said that a private person has no locus standi to file a complaint in respect of an offence under the Companies Act. G. O. Nos 518 of 6th June, 1916 and 3070 of 23rd August, 1932, permitting the Registrar of Joint Stock Companies to file complaints, do not restrict the Magistrate in the exercise of his powers under S. 190 Cr. P. Code. There is no legal objection to proceedings being dropped by the Magistrate if he finds that he ought not to have taken cognizance of the offence. (Hornill 7) MUTHIVEFRAN CHETTIAR v. MOT. TAVAN CHPTTIAP 202 T C 28=43 Cr.T. T. 785= 15 R M 470=1942 Comp C. 86=1942 M.W.N. 121=A.I.R. 1942 Mad. 283=(1942) 1 M.L.J. 230.

——S. 190—Complaint—Contents of—If should name accused—Maristrate's power to issue summons against persons not named.

The ordinary rule is that when a Magistrate takes cognizance of an offence he takes cognizance of the case as a whole, and is empowered to summon all persons against whom there appears to be any reason for their prosecution, even though their names are not mentioned for this purpose in the petition of complaint. (Reuben, 1) SIIDHIE RANJAN POV 7 N K MAZIMDAR, 216 I C 312=17 R P. 164=11 B.R. 136=46 Cr.L. I 168=1944 P.W.N. 275= A.I.R. 1944 Pat. 210

Ss. 190 and 191—Police report referring cau as of evagerated assault—Magistrate calling for copy of case diary and proceeding with trial—Conviction under S. 353, I. P. Code—Legality of—Complainant not assions about cast—Relevancy.

The accused slapped the complainant on the face and the medical certificate showed that the complainant received a miner ininvo. The Sub-Inspector of Police, in his report to the Magistrate on the investigation made in the case, stated that the assault was exaggerated, that the complainant was not very anxious about the case, and on that ground and in accordance with the orders of the Inspector of Police he treated the case a mistake of fact. But he did not refer it as a false case. But the Magistrate called for a copy of the case diary and proceeded with the trial after the submission of a charge-sheet and convicted the accused under S. 353, I. P. Code.

Held, in revision, (1) that the story of assault which was only exaggerated still disclosed an offence of assault and the fact that the complainant was not very anxious about the case was not a ground for not taking action. The complainant's indifference was not relevant and the Magistrate could take cognizance of the offence upon the report of the Police; (2) that even if the Magistrate erred in treating the case as non-compoundable, the report having disclosed an offence, the grounds upon which the Magistrate chose to take cognizance could not be questioned after the trial was over, provided there was material upon which he could act; (3) that S. 191. Cr. P. Code, did not strictly apply; that the fact that the Magistrate had to consider whether prime facie a rase had been made out would not disqualify him either in law or in equity from proceeding with the trial; (4) that even if it he true that the offence disclosed was one under S. 332 beyond the cognizance of the trial Magistrate, it was not illegal for the Magistrate CR. P. CODE (1898), Ss. 190, 195 and 476.

to try the accused for a lesser offence, when there was no reason to think that he deliberately framed a charge of a lesser offence, knowing that a more serious offence had been committed in order to clutch at jurisdiction and to try the case himself. (Hormill. J.) ALFRED PAUL, In re. 1943 M W N 802=212 J.C. 77=16 R.M. 571=45 Cr.L.J. 508=A.I.R. 1944 Mad. 166=(1943) 2 M.L.J. 597.

——Ss. 190, 195 and 476—Complaint made by District Magistrate under S. 476 without iuridiction—Offence not coming within S. 195—Jurisdiction of Magistrate.

The fact that an Additional District Magistrate made a complaint in respect of an offence acting under S. 476, Cr. P. Code without jurisdiction, does not affect the jurisdiction of a Magistrate to take cognizance of that offence on such complaint when that offence does not come within the scope of S. 195. Cr. P. Code. (Rlacker. J.) EMPFFOR v. NANAKCHAND. 207 I C 639 = 44 Cr L J. 666 = 16 R.L. 40 = 45 P.L.B. 226 = A.I.B. 1943 Lah. 208.

-S. 190-Cognizance-Meaning of.

The word "cognizance" is used in the Code to indicate the point when a Magistrate or a Judge first takes judicial notice of an offence. It is a different thing from the initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate. Cognizance is taken of case, not of persons, and there seems to be nothing in theory to prevent a Magistrate from taking cognizance of a case even where the offenders are unknown. The fact that a Magistrate has taken cognizance does not necessarily mean that there will be judicial proceedings against any one. Cognizance is something prior to and does not necessarily mean the commencement of judicial proceedings against any one. (Fast Ali. C. J., Manchar Lall and Meredith, 11.) GOPAL MARWARI v. FMPFROR. 22 Pat. 439=209 I.C. 482=16 R.P. 114=1944 P W N. 420=45 Cr.L.J. 177=10 B.R. 193=A.I.R. 1943 Pat 245 (S.B.).

Ss. 190, 191 and 351—Relative applicability of Ss. 190 and 351—Detention of witness and trial under S. 351—Legality—Jurisdiction. MAING THET W. MAING CHIT KYWE. [See O.D. 1936—40. Vol. J. Col. 3331.] 191 J C. 894—13 R.B. 168—42 Cr.L J. 244—A.I.R. 1941 Rang. 30.

——S. 190 (1) (b) and (c)—Pelice report—Meaning—Applicability of Cl. (c) of Sub-S (1) to S. 190—Complaint forwarded to police and prosecution as a result of their investigation—Competency of that same Magistrate trying the case.

'Police report' mentioned in S. 190 (1) (b) of the Cr. P. Code, is not limited to a report mentioned in S. 170 of the Code and the preceding sections. Cl. (1) (c) of S. 190 applies to cases where the party is not prepared to lodge a formal complaint and prosecute the case and the Magistrate chooses to take cognizance of the offence upon the basis of information received by him either directly or through persons other than the complainant or aggrieved party. It has no application to a case where on receiving a letter complaining about the commission of an offerce the Magistrate sends it to the police result of whose investigation the accused are prosecuted. In such a case there is no bar to the same Magistrate trying the case. (Ghulam Hasan I.) LALLU SINGH v. EMPEROR. 208 I.C. 107== 15 R.O. 474=44 Cr.L.J. 492=1943 O.A. (C.C.)

CR. P. CODE (1898), S. 192 (1).

44=1943 A Cr.C. 32=1943 A.W.R. (C.C.) 11=1943 O.W.N. 80=A.I.R. 1943 Oudh 226.

——Ss. 190 (1)\*(b)—Scope—Non-cognizable case—Charge sheet by police efficer before Magistrate - Propriety.

Where in a non-cognizable case, a Sub-Inspector of Police files a charge sheet with regard to an offence under S. 211, I.P. Code, alleging that a false complaint had been sent to him through the Village Magistrate of an offence under the Arms Act, it cannot be said that the filing of the charge sheet is not regular. The filing of the charge sheet is a proper method of bringing the case before the Court under S. 190 Cr. P. Code. (Horwill, J.) Public Prosecutor v. Muniswamy Natou. 201 I C. 517=43 Cr.L.T. 775=15 R.M. 443=1942 M.W.N. 224=55 L.W. 63 (1).

——S. 191—Applicability—Proceedings under Ch. VIII—Regular trials—Distinction.

Weston, J .- S. 191, Cr. P. Code, has ro application to proceedings under Ch. VIII. Cr. P. Code. Although a judicial procedure has to be followed in these proceedings there is an important difference between these proceedings and regular trials as to the manner in which proceed-ings are initiated. While in regular trials an accused has the right to claim not to be tried by the magistrate who takes cognizance under S. 190 (c), Cr.P. Code, a person proceeded against where an order has been made under S. 112, Cr. P. Code, has no such right to demand that further proceedings should be conducted by a magistrate other than the magistrate who passed the initial order, although such a person may apply for transfer under S. 526 Cr. P. Code, if he has any reasonable grounds for thinking that the magistrate is prejudiced against him and that by reason of such prejudice the inquiry by such magistrate would not be fair or impartial. (Loho and Weston, Jl.) FMPFFOR v. RASULPUX, I.L.R. (1942) Kar. 252-205 IC. 322-15 R.S. 136=44 Cr.L. J. 378=A. I.R 1942 Sind. 122.

\_\_\_\_\_S. 192—Ground for transfer—Examination of witnesses by magistrate before notice to accused.

It is not unusual for a transistrate to examine witnesses in a preliminary inquiry without giving notice to the accused, and a transfer of a case by the District Magistrate on that ground is therefore, bad. (Danis, C.I and Weston, J.) FMPFROR v. SITALDAS. I.L.R. (1943) Kar. 13=207 IC, 192=16 R.S. 16=44 Cr.L.J. 612=A.I.R. 1943 Sind 109.

—S. 192 (1)—Cases that can be transferred. HAPIZAR RAHMAN v. AMINAI HOOUE. [vec O. D., 1036—'40 Vol. I Col. 2580.] J.L.R. (1941) I Cal. 67=194 I.C. 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941 Cal. 185.

——S. 192 (1)—Cases transferred after issuing process to one of accused persons—Death of that accused—If terminates proceedings in the case. HAPIZAR RAHMAN v. AMINAL HOOLE. [see O. D. 1936—240 Vol I. Col. 2580.] I.L.R. (1941 1 Cal. 67—194 I.C. 38—13 R.C. 476—42 Cr.L.J. 490—A.I.R. 1941 Cal. 185.

S. 192 (1)—"Iraurry"—If means inquiry under S. 202—Transferee Magistrate—If can return case to

CR.P. CODE, (1898) S. 192 (1)

transferring Magistrate for issue of process. HAFIZAR RAHMAN v. AMINAL HOQUE. [see Q. D. 1936-40 Vol. I, Col. 2591.] I.L.R. (1941) 1 Cal. 67=194 I.C. 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941 Cal. 185.

Case transferred after summoning one of accused persons—Jurisdiction of transferee Magistrate ro summon the others. HAFIZAR RAHMAN 7. AMINAL HOQUE [See Q.D. 1936—'40 Vol. I Col. 2581.] I.L.R. (1941) 1 Cal. 67=194 I.C. 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941 Cal. 185.

S. 192 (1)—Transfer of case—Powers of transferring Magistrate thereafter. HAFIZAR RAHMAN v. AMINAL HOQUE free Q. D. 1936='40 Vol. I. Col. 2581.] I.L.R. (1941) 1 Cal. 67=194 I.C. 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941 Cal. 185.

——S. 192 (1)—Transfer of case—When may be made. HAFIZAR RAHMAN v. AMINAL HOQUE. [see O.D. 1936—'40 Vol. I Col. 2581.] I.L.R. (1941) 1 Cal. 67=194 I C. 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941 Cal. 185.

——S. 192 (1)—Transfer of case—Whole case, if transferred—Piecemeal transfer—Legality. HAFIZAR RAHMAN v. AMINAL HOQUE. [see Q D. 1936-'40 Vol. I, Col. 2581.] I.L.R. (1941) 1 Cal. 67=194 I.C. 38=13 R.C. 476=42 Cr.L.J. 490=A.I.R. 1941. Cal. 185.

Applicability.
Complaint.
Construction
"Court"
"In or in relation to"
"Party"
"Public servant concerned"
"Produced"
Jurisdiction to file Complaint
Procedure.

#### Applicability.

S. 195 (1) (b)—Applicability—Amin making false return execution on process—Offence—Complaint by Court—Necessity—Complaint under S. 167, I.P. Code, —Completency.

An Amin making a false return on an execution process entrusted to him in the course of judicial proceedings commits an offence punishable under S. 193, I. P. Code. A complaint of that offence must be made by the Court under S. 195 (1), Cr. P. Code and no complaint by a private party, is maintainable. Though the act complained of may also fall under S. 167, I.P.Code, a private complainant cannot avoid the provisions of S. 195, Cr. P. Code, by making his complaint for a lesser offence for which a complaint by Court is not necessary. (Bvers. J.) SRINIVASA AYYANGAR v. RAMASAMI AYYANGAR. I.L.R. (1945) Mad. 459=217 I.C. 236=47 Cr.L.J. 259=17 R.M. 290=1944 M.W.N. 684=57 L.W. 465=(1944) 2 M.L.J. 157.

Ss. 195 and 196-A—Applicability—Conspiracy to commit forgery and extortion—Conspiracy to cheat also possible on the facts—Complaint of Court or sanction of Local Government—If dispensed with.

Where the Sub-Divisional Magistrate has found that there was conspiracy to commit forgery and extortion and the subordinate Judge has made a complaint of a

CR. P. CODE, (1898) S. 195-Applicability,

conspiracy to commit forgery and extortion, and the complainant himself complained of forgery and extortion, merely, because it can be said on the facts that the offences of cheating and of conspiracy to cheat may also have been committed, the necessity of a complaint by a Court or the consent of the Local Gove nment, as the case may be, is not dispensed with. (Davis, C. J. and Weston, J.) GOBINDRAM Z. EMPEROR, I.L.R. (1942) Kar. 12 = 200 I.C. 211=14 R.S. 208=43 Cr.L.J. 612=A.I.R. 1942 Sind 62.

——S. 195—Applicability—Defamation by witness in criminal case—Prosecution—Sanction or complaint by Court—Necessity for.

The provisions of S. 195, Cr.P. Code, do not apply to defamation, and a person, who is defamed by a witness when in the witness-box, is at liberty to file a complaint against the defamer under the provisions of I. P. Code. The mere fact that the defamation is committed in or in relation to criminal proceedings in a Court is no reason for requiring the sanction of the Court or for requiring the Court to prefer a complaint. (Leach, C. J. and Chandrasekhara Avyar. J.) NALLAPPA GOUNDAN D. CHINNAMMAL, I.L.R. (1942) Mad. 158=198 I.C. 809=43 Cr.L.J. 441=14 R M. 511=54 L.W. 445=1941 M.W.N. 1076=A.I.R. 1942 Mad. 19=1941 2 M.L.J. 618.

——— S. 195—Applicability—Defamatory allegations in petition to public servant or Court—Complaint of defamation by aggrieved person—If maintainable.

The mere fact thet allegations constituting an offence of defamation are contained in a petition to a public Servant or a Court, is per se no ground for bolding that S. 195. Cr. P. Code, is a bar to the cognizance of the offence. The question whether the facts alleged in a complaint really constitute an offence falling within the provisions of S. 195. Cr. P. Code or not must depend upon the circumstances of each case. But if the facts alleged, prima facic constitute the offence under S. 500, I. P. Code, that offence can be taken cognizance of on a complaint by the aggrieved person. (Phide, I.) CHANAN SINGH v. TARAK SINGH. 199 I C. 543=14 R.L. 428=43 Cr.L.J. 572=44 P.L.R. 7=A.I.R. 1942 Lah, 76.

——S. 195—Applicability—Facts disclosing offence under S. 210, I.P. Code—Other offences merely subsidiary to it.

Where the facts primarily and essentially disclose an offence under S. 210, I. P. Code, and the other offences alleged are merely subsidiary to the main offence the complainant cannot be permitted to evade the provisions of S. 195, Cr. P. Code. (Davis, C. J. and O' Sullivan, J.) TARACHAND WAPHUMAL v. EMPEFOR. 215 I C. 302=17 R.S. 57=46 Cr. L. J. 97=A.I.R. 1944 Sind. 130.

—S. 195 (1) (b)—Applicability—Facts disclosing offence under S. 211, I.P. Code—Charge under S. 182. I.P. code, to evade requirement of S. 195 (b) as to complaint by Court—Permissibility.

It is a well established principle that a prosecution for a lesser offence should not be launched when the facts alleged constitute a graver offence. If a graver offence, under S. 211, I. P. Code is disclosed from the facts stated in a complaint, the condition laid down in S. 195 (1) (b) for taking cognizance of such a case cannot be evaded by electing to name a lesser offence under another section. eis., S. 182, I. P. Code, which

CB. P. CODE, (1898) S. 195-Applicability.

is more general. It would be highly improper to allow such a device to be used to defeat the statutory provisions of S. 195. (Lykur and Weston, 11.) EMPEROR v. BAJAJI APPAJI, 47 Bom.L.R. 664.

—S. 195 (1) (b)—Applicability—False charge to police—Report by police to Magistrate in B form—Order by Magistrate granting B' summary—Prosecution for false charge—Complaint by Court—Necessity—"Proceeding in Court."

Where an alleged false complaint is first made to the Police and then to a Court, a complaint under S. 211, I.P.Code, subsequently filed is a complaint of an offence alleged to have been committed in, or in relation to, a proceeding in Court, and cannot be taken cognizance of except on the complaint of the Court, as required by S. 195 (1) (6), Cr. P. Code. So also, where the Police on investigation, find the complaint false and then send a report to a Magistrate in form B under S. 173 (1), Cr. P. Code, and the Magistrate grants a "B" summary against the complainant the order passed by the Magistrate is not an administrative order, but a judicial order of the Court. A complaint of a false charge under S. 211, I.P. Code is necessary by the Court before cognizance can be taken of the same. (Lokur and Weston. 11.) EMPEROR v. BAJAJI APPAJI. 47 Bom. L.R. 664.

——S. 195(1) (b)—Applicability—False complaint of dacoity—Police referring comblaint—Notice to complainant—Failure to appear before Magistrate—Prosecution under S. 211, I. P. Code—Complaint by Magistrate, if necessary.

Where a complaint of dacoity made by the accused to a village Magistrate is referred as false by the police and the accused does not appear before the Magistrate in answer to a notice issued to him, a prosecution of the accused under S. 211. I. P. Code, is not bad for want of a complaint by the Magistrate. Since there has been no proceeding in any Court no complaint by the Magistrate is necessary. (La\*ihmana Roo I.) PUBLIC PROSECUTOR v. SALMA BEFVI. 195 I C. 233=42 Cr L. J. 640=14 R M. 160=53 L.W. 358=1941 M.W. N. 222=A.I.R. 1941 Mad. 579.

——S. 195 (1) (c)—Applicability—Forged document brought into court—Effect—Private complaints previously instituted—If barred.

Once a forged document is brought into Court, subsequent private complaints are harred by S. 195, Cr. P. Code, even in respect of anterior forgeries—that is, anterior to the litigation. But this does not apply to previously instituted complaints. (Pase. I.) HARIRAM ONKAR v. RADHA. I L.R. (1944) Nag. 238 = 16 R.N. 160 = 45 Cr. L.J. 175 = 210 I.C. 136 = 1943 N.L. J. 456 = A.I.R. 1943 Nag. 327.

Ss. 195 and 476—Applicability—Inquiry under Legal Practitioners' Act against A—Use by A of a receip' found to have been forged by B and attested by C and D—Prosecution—Complaint by Court—Whether necessary.

Where a complaint was that in the course of proceedings under the Legal Practitioners' Act against A, A made use of a receipt which was found to have been forged by B and attested by C and D and also that B, C and D swore to the truth of the document in the proceedings.

Held, that a complaint of the Court was not necessary for prosecuting the accused for offences under

CR. P. CODE, (1898) S. 195-Applicability.

Ss. 403 and 467 of the Penal Code. (Lakehmana Rao, I.) GURUSWAMI CHETTIAR. In re. 193 I.C. 322 = 42 Cr L. J. 468=13 R M. 731=1940 M.W.N. 1270=A.I.R. 1941 Mad. 323=(1940) 2 M.L.J. 1063.

——S. 195 (1) (a) & (b)—Applicability—Offences under Ss. 182 and 211, I. P. Code—False information to Police followed up by comblain' before Magistrate—Complaint under S. 182 by Police officer—If can be taken cognizance of.

If a person not merely gives false information to the Police but also files a complaint making a false charge before a Magistrate after the Police refuse to take any action, the case comes within the purview of S. 211, I.P. Code and not merely that of S. 182, I.P. Code. When there is a specific section dealing with a false charge, that section must be considered to be the one applicable to the circumstances of the case. A complaint under S. 182, I.P. Code, instituted by the Inspector of Police cannot be taken cognizance of, as under S. 195 (1) (8), Cr. P. Code, no Court can take cognizance of an offence falling under S. 211, I.P. Code except on a complaint by the Court concerned. (Bhide, J.) SHAH MOHAMMAD v. FMPRPOR. 195 I.C. 102=14 R.L. 34=42 Cr.L.J. 667=43 P.L.R. 191=A.I.R. 1941 Lah. 216.

S. 195 (1) (a)—Applicability—Offence under S. 182, I. P. Code—Initiation of proceedings—Procedure. TEINARAIN LALL v. EMPEROR. [see Q.D. 1936—40, Vol. I. Col. 3331.] 1941 P.W.N. 9 (1) = 42 Cr.L.J. 57.

S. 195 (1) (a)—Applicability—Offence under S. 186, I. P. Code—Proner procedure to be followed—Complaint by the officer concerned—Appeal, if lies, BHOOPRAM v. EMPEROR. [see Q.D. 1936—40. Vol. I. Col. 3331.] 192 I.C. 860 = 42 Cr L.J. 323 = 13 R.A. 372 = 1941 O.A. (Supp.) 111 = A.I.B. 1941 All. 100.

—S. 195 (1) (a)—Applicability—Offence under S. 186, I. P. Code—Warrant of attachment executed by peon—Latter assaulted by fudgment-debtor—Duty of Court to make complaint—Judgment-debtor subsequently filing application under Bengal Agricultural Debtors? Act—Effect of.

Where a peon to whom a warrant of attachment of movable property of a judgment-debtor issued and signed by a Subordinate Judge was entrusted for execution was assaulted by the judgment-debtor while the warrant was executed,

Meld, that both the Subordinate Judge and the peon were public servants within the meaning of Code and the peon was subordinate to the he was carrying out his order and that it was the duty of the Judge to make a complaint under Code, against the judgment-debtor.

Held, further, that the fact that the debtor had subsequently taken steps under the Fengal Agricultural Debtors Act in respect of his debts made no difference. (Derbyshire, C. J. and Bartley, J.) RAJSHAHI BANK-ING AND TRADING CORPORATION LTD. v. SURENDRA NATH MITRA. I.L.R. (1942) 2 Cal. 108—198 I.C. 617-14 R.C. 499—43 Cr.L.J. 410—A.I.B. 1942 Cal. 434.

Ss. 195 and 476—Applicability — Offences under Ss. 193 and 471, I. P. Code, during proceedings which were ultra vires—Complaint—Legality.

CR. P. CODE, (1898) S. 195.—Applicability.

If during proceedings which are ultra vires and illegal, any offence under S. 193 or S. 471, I. P. Code, is committed, it cannot be said that it was committed in relation to, or by a party to, any 'iudicial proceedings—and a complaint in respect of it is not a valid one. (Ganga Nath. 1.) SUMAT PRASAD v. EMPEROR. I.L.R. 1942 All. 49=198 I.C. 148=14 R.A. 271=43 Cr.L.J. 319=1941 A W.R. (H C.) 351=1941 A.L.W. 998=1941 A Cr.C. 262=1941 A.L.J. 682=A.I.R. 1942 All. 11.

——S. 195 (1) (a)—Applicability—Order under S. 144 by Sub-divisional Magistrate—Disobedience of—Prosecution—Condition precedent to—Complaint by Sub-Divisional Magistrate or Discrict Magistrate—Necessity—Magistrate making order under S. 144—If Court or public servant.

A sub-divisional Magistrate making an order under S. 144. Cr. P. Code, does so as a public servant and not as a Court. Where an order made by a Sub divisional Magistrate under S. 144, is disobeyed or contravened, the only persons on whose complaint a prosecution can be launched under S. 188. J. P. Code, for disobedience of the order are the Suh-divisional Magistrate makes the order and the public servant to whom he is subordinate, namely, the District Magistrate. In the absence of a complaint by the Sub-divisional Magistrate or by the District Magistrate concerned, no prosecution can be started and no Court has jurisdiction to try the accused, for disobedience of the order made under 144. Cr. P. Code. The terms of S. 195 (1) (a) are absolute and admit of no exceptions. (Agarnula, 1) NARSINGH MAHAPATRA T. EMPEROR. 9 Cut.L.T. 95.

Applicability and scope—Person not party to proceedings of Court—Power of Court to start inquiry or make complaint. See CR. P. CODE, S. 476. (1945) P.W.N. 264.

S. 195 (1) (b)—Applicability—Suit for registration of sale deed—Dismissal—Complaint of forgery against writer and attestors not parties to suit—Complaint by Court—Necessity.

A suit for the compulsory registration of a sale deed was dismissed by the Civil Court. The alleged executant of the sale deed then filed a criminal complaint against the writer and attestors of the sale deed who were not parties to the civil suit praying for their prosecution for an offence under S. 476, I. P. Code, on the ground that they committed forgery with the object of grabbing the property to themselves. The plaintiff in the suit was not included in the complaint, but it was stated that the Civil Court was being asked to make a complaint. It was pleaded that S. 195 (1) (b) Cr. P. Code, was a bar to the private complaint, as it disclosed an offence under S. 193, I. P. Code.

Held, that in order to attract the provisions of S. 195 (1) (b) the allegations in the complaint must be looked to; that the allegations in the present complaint did not make out an offence under S. 193, I. P. Code, so as to attract S. 195 (1) (b) and that there did not seem to be any attempt to evade the provisions of S. 195 (1) (b). The private complaint was not therefore barred. (Hapell, J.) VENRATA REDDI. RUGGA REDDI. 221 I.C. 142=(1945) M.W. N.266=A.I.R. 1945 Mad. 345-(1945) 1 M.L.J. 455.

CR. P. CODE, (1898) S. 195-Complaint.

S. 195—"Complaint"—Complaint of theft to Village Magistrate—Report by latter to police and to Sub-Magistrate—Police laying charge under S. 211, I. P. Code—Conviction under S. 182, I. P. Code—Legality—Absence of charge under S. 182, I. P. Code—Effect.

A Village Magistrate to whom the accused gave a complaint of theft sent his usual reports to the police and to the Sub-Magistrate, and the police who took cognizance of the matter reported the case as false, and later filed a charge-sheet against the accused purporting to be under S. 211. I. P. Code. The Sub-Divisional Magistrate who tried the accused found the offence to be one punishable under S. 182. I. P. Code, and convicted the accused. It was contended on behalf of the accused in appeal that the charge sheet by the police did not amount to a valid complaint such as is required by S. 195, Cr. P. Code. This contention was upheld and the accused acquitted.

Held, (1) that the charge-sheet amounted to a valid complaint within the meaning of S. 195, Cr. P. Code, because information given to a Village Magistrate amounts to a complaint to the higher authorities to whom he is bound to pass on the information. (2) that it could not be laid down as a general principle of law that there cannot be a conviction under S. 182, I. P. Code, when there is a complaint under S. 211, I. P. Code so long as there was a complaint setting out all the facts constituting the offence, it did not matter whether the complainant thought the offence to be one under S. 211, or S. 182, I. P. Code. The conviction was not therefore illegal. (Hornill, J) PUBLIC PROSECUTOR n. DEVAMMA 199 I C. 638=14 R.M. 630-43 Cr.L.J. 574=55 L.W. 223 (2)=1942 M.W.N. 217=A.I.R. 1942 Mad. 513=(1942) 1 M.L.J. 382.

-S. 195-'Complaint' if used in technical sense,

The intention of S. 195 of the Cr. P. Code is only that the magistrate should not punish any person except at the instance of the public officer concerned or of his superior and the term 'complaint' in S. 195 (1) (a) is not used in the technical sense in which it is defined in S. 4. (Alloop 1.) EMPEROR v. BARKAT. I L.R. (1943) A. 29=204 I.C. 243=15 R.A. 327=44 Cr.L.J. 165=1942 A.L.J. 608=1942 A.L.W. 581 =1942 A.W.R. (H<sub>8</sub>C.) 346 (1)=1942 A.Cr.C. 199=A.I.R. 1943 All. 6.

——Ss. 195 and 476—Complaint of an opence under Ss. 218 and 194, I. P. Code—Conviction under S. 193, I. P. Code—Legality.

Under S. 195 Cr. P. Code, no Court is in a position to take cognizance of an offence—that is of a particular offence-which has not been specifically pronounced by the Court under S. 476 of the Cr. P. Code, to be one which it is expedient in the interests of justice to bave an enquiry into. Hence when a complaint under S. 476 is made of an offence under Ss. 218 and 194, I. P. Code but the accused is convicted under S. 193, I. P. Code, the conviction could not be sustained. There has been no complaint within the meaning of S. 476, Cr. P. Code. of any offence under S. 193 of the I. P. Code, and therefore the condition of S. 195(b) of the Cr. P. Code, is not complied with. The complaint under S. 476, Cr. P. Code, is a special complaint, which has to comply with a number of strict conditions before it becomes a complaint under that section at all for the purpose of S. 195 (h), Cr. P. Code. Sub-S. (2) of S. 476 only means that where a Magistrate receives a complaint which qualifies CR. P. CODE, (1898) S. 195.—Construction.

under S. 476 (1), he should then proceed from that point onwards as if it was a complaint under S. 200, Cr. P. Code, This cannot alter the tact that the only thing that the Magistrate or any other subsequent Court, can inquire into, is the specific offence which the original complaining Court has said that, in its opinion, it is expedient in the interests of justice to inquire into. (Braund, J.) TASKHIR AHMAD v. EMPEROR. I.L.R. (1945) A. 668=1945 O.W.N. (H.C.) 172=1945 A.Cr.C. 95=1945 A.W.R. (H.C.) 180=1945 A.L.W. 187=A.I.R. 1945 All. 397.

### Construction.

—S. 195 (1) (c)—Construction—'Court'—Chairman of municipality relecting nomination paper and Magistrate hearing appeal therefrom under Bengal Municipal Act—Whether Courts—Prosecution under, S. 471, I. P. Coas for filing forged numination paper—Complaint by either—If necessary.

The Chairman of a Municipality scrutinizing a nomination paper under R, 17 (4) of the Rules under the Bengal Municipal Act and rejecting it, and the District Magistrate who hears an appeal from his decision under R, 20, are not Courts within the meaning of Ss. 195 (1) (c) and 470, Cr. P. Code. Consequently a complaint by either of them is not necessary for a prosecution under S<sub>2</sub> 471, I. P. Code, for filing a forged nomination paper. (Eagley and Sen, J.) BIBHUTI BHUSAN BANERJEE v. DWARIKANATH BHATTACHARJEE, I.L. K. (1944) 1 Cal. 192=207 I.C. 415=16 R.C. 112=44 Cr.L.J. 601=77 C.L.J. 265=47 C.W.N. 676=A.I.R. 1943 Cal. 574.

——S. 195 (1) (b)—Construction—'Court' Fiting false aft acout in Court of Small Causes—Registrar asked to investigate—If 'Court' entitled to file a valid estiminal complaint.

Where the Registrar of the Presidency Small Cause Court under the directions of the Chief Judge made inquiries and satisfied himself that an artifidavit filed by the accused was false and thereupon filed a complaint in the Court of the Chief Presidency Magistrate.

Held, that (1) the filing of the false affidavit was not "something purporting to be done under the Presidency Small Cause Courts Act" and the limitation under S. 97 of the Act of three months from the commission of the offence for a prosecution, did not apply to the case; (2) although the Registrar is a 'Court' tor certain purposes e. g., when trying a suit for a sum of Rs. 20 or less, the Registrar was acting not as a 'Court' but as a ministerial officer in the present case and therefore the complaint was not filed by the proper person and must be returned. (Horwill, J.) JAGANNATHA CHARI. In re. 201 I. C. 437 = 43 Cr. L. J. 738 = 15 R.M. 351 = 55 L.W. 321 = 1942 M.V.N, 126 = A,I.R. 1942 Mad. 326 = (1942) 1 M.L.J. 105.

The Registrar of a Presidency Small Cause Court cannot be deemed to be a "Court" within the meaning of S. 195 (1) ( $\delta$ ), Cr. P. Code, unless he has been in some way or other specially empowered to be a Judge.

The Registrar, taking security, and in order to do so incidentally taking from a party an affidavit, does not act as "a Court"; a complaint by the Registrar in respect of false statements in the affidavit, under Ss. 193 and 199

OR. F. CODE, (1898) S. 195. Construction,

I. P. Code, is not a valid complaint under S. 195, Cr. P. Code. (King, J.) VARADARAMANUJALU NAIDU V. KAUNANOOR NAIDU. I.L.R. (1943) Mad. 600 = 15 R.M. 719 = 44 Cr.L.J. 144 = 204 I.C. 33 = 1942 M.W.N. 748 = 55 L.W. 760 = A.I.R. 1942 Mad. 737 (2) = (1942) 2 M.L.J. 571.

—S. 195 (1) (4)—Construction—'In relation to"—Meaning of—Offence committed in relation to proceedings subsequently instituted in Court—Complaint by Court—Competency. EMPEROR v. NABIBUX KHAIR MAHOMED. [see Q. D. 1930—'40 Voi I. Col. 3332.] 191 I.C. 325—13 R.S. 140—42 Cr.L. J. 141.

——S. 195 (1) (b)—Construction—"In or in relation to a proceeding in Court"—Complaint of of cheating—Accused arrested and released on bait—Police later reporting no offence—Discharge—Prosecution under S. 211—Complaint by magistrate—Necessity.

Where on the complaint of a person charging another with cheating him, the accused is arrested and released on bail but subsequently the police report that there is no case against him and invite the Magistrate to discharge him the Magistrate may either discharge the accused or direct further investigation. In either case the Magistrate takes cognizance of the case. Where the Magistrate acting on the police report discharges the accused the order is a judicial order, and the complainant cannot be prosecuted under S. 211, I. P. Code, without a complaint by the Magistrate, for the alleged false charge is made in or in relation to a proceeding in Court within the meaning of S. 195 (1) (6), Cr. P. Code. (Beaumont, C. J. and Macklin, J.) J. D. BOYWALLA v. SORAB RUSTOMJI. 196 I.C. 104=42 Cr.L.J. 814=14 R.B. 97=43 Bom.L.R. 529=A. I.R. 1941 Bom. 294.

S. 195 (1) (b)—Construction—"In relation to proceedings in any Court"—Meaning of—Complaint under S. 406 to Poisce—Charge said in Court—Discharge of accused—charge under S. 211 against complainant—Complaint by Court—Necessity.

In the case of a charge under S. 211. I. P. Code, in respect of a complaint made to the Assistant Commissioner of Police, which is brought to trial in a Court and results in the discharge of the accused, it must be held that the offence of making a false charge has been committed in relation to proceedings in a Court, and consequently no Court can take cognizance of the case of false charge against the complainant without a complaint from the Court which heard the original complaint and discharged the accused, as required by S. 195 (1) (b), Cr. P. Code. (Happell, J.) ESWARDOSS KALIDAS, In re. 58 L.W. 357=1945 M.W.N. 425=A.I.R. 1945 Mad. 461=(1945) 2 M.L.J. 115.

The Official Assignee, while convening and conducting a meeting of creditors for the consideration of a proposal for a composition or scheme under S. 28 of the Presidency Towns Insolvency Act, discharges a purely

OR. P. CODE, (1898) S. 195-Construction,

adminstrative function, and in accepting or rejecting the proof of dept for the purposes of S. 28 (2) he discharges his function as the chairman of the meeting. He is, therefore, not a Court within the meaning of S. 195 (1) (6), Cr. P. Code. But the proceeding before the official Assignee for a composition or scheme is one in relation to the original insolvency proceeding, which is a proceeding in a Court. It follows, therefore, that an offence under S. 200 read with S. 199, I. P. Code, alleged to have been committed by the insolvent in such a proceeding must be taken as "alteged to have been committed in relation to a proceeding in a Court" within the meaning of S. 195 (1) (b), Cr. P. Code and consequently in the absence of any complaint in writing of the Insolvency Court, the Magistrate is debarred from taking cognizance of the same. (Lodge and Pal, Jf.) KEDAR NATH SEN v. AMULYA KASAN SANYAL. I.L.R. (1942) 1 Cal. 278=198 I.C. 602=14 R.C. 503= 43 Cr.L.J. 402=45 C.W.N. 1124=74 C.L.J. 38 =A.I.R. 1942 Cal. 79.

S. 195 (1) (C)—Construction—"Party"—Guardian of Minor plaintiff—"If party."

A guardian instituting a suit on behalf of a minor is not a "party" within the meaning of S. 195 (1) (c), Cr. P. Code, against whom a complaint can be directed to issue by an order under S. 470 Cr. P. Code, for using a false document in support of the suit claim. It would, however, be open to the Court to proceed against him under S. 193, Cr. P. Code. (Byers J.) RAMAPPA In rc. I.L.R. (1945) Mad. 157=216 I.C. 283=46 Cr.L. J. 161=17 R.M. 272=57 L.W. 454=1944 M.W.N. 597=A.I.R. 1944 Mad. 528=(1944) 2 M.L.J. 141.

S. 195 (1) (a)—Construction—"Public servant concerned"—Suit before Village Court—Application to District Munsif for transfer—Allegations made against President of Village Court—Complaint by latter under S. 182, 1, P. Code—Maintainability—Proper person to complain.

Where a party to a suit in a Village Panchayat Court files a petition for transfer of that case before the District Munsif and in that petition makes certiain allegations against the President of the Village Panchayat Court, the President of the Village Panchayat Court cannot file a complaint against that party under S. 182, I. P. Code, on account of those allegations. The information is not given to the complainant or public servant subordinate to him and an offence under S. 182, I.P. Code, cannot be taken cognizance of except on complaint in writing of the public servant concerned or some other public servant to whom he is subordinate. A complaint of the District Munsif would be necessary for a prosecution for an offence under S. 193- I. P. Code because he is the proper person to whom the allegations are made. (Laksamana Rao, J.) OYYAPPA KONE v. CHIDAMBARAM CHETTIAR. 1941 M.W.N. 523= A.I.R. 1941 Mad. 764,

S. 195 (1) (c)—Construction—"Produced"—

S. 195 (1) (c) Cr. P. Code, does not require the document to be poduced or given in evidence by a party to a proceeding. It may be produced by some one else. "Produced" does not mean produced in evidence. (Davis C. J., and Weston, J.) GOBINDRAM v. EMPEROR. I.L.R. (1942) Kar. 12=200 I.C. 211=14 R.S. 208=43 Cr.L.J. 612=A.I.R. 1942 Sind 62.

CR. P. CODE, (1898) S. 195-Jurisdiction to file Complaint,

# Jurisdiction to file Complaint.

S. 195 (1) (a)—Jurisdiction to file complaint— Execution by amin of decree of Court of District Minists—Obstruction to execution and removal of property attached — Nazrat under Nazar subject to supervision and control of Subordinate Judge of place—Authority to file complaint—District Munsifpower of.

Where a public servant is obstructed in the exercise of his duties he himself or any person to whom he is sub. ordinate can complain. Where the charge is that the accused carried away the property which an amin had attached and in other ways obstructed him in executing a decree of the District Munsif's Court and the Nazarat at the place to which the amin is attached is under the charge and direction of the Nazir, subject to the supervision and control of the Subordordinate Judge of that place, the amin cannot be considered to be a subordinate of the District Mansif so as to entitle the latter to hie a complaint under Ss. 183 and 186, I. P. Code, in respect of the obstruction to the amin and the carrying away of the property attached by him. The complaint can be filed by the amin himselt, or by the Nazir or the Subordinate Judge or any of the superiors of the Subordinate Judge, but not by the District Munsif. (Horwitt, J.) CHINA RANGIA, In 12. 205 L.C. 88=44 Cr.L.J. 326=15 R.M. 845=1942 M.W.N. 819=55 L.W. 745=A.I.R. 1943 Mad. 170=(1942) 2 M.L.J. 615.

It is either the Panchayat Court or the Court of Sessions Judge which can preter a complaint in respect of offences under Ss. 467 and 471, I. P. Code, committed with reference to proceedings before a Panchayat Court. The District Magistrate is not competent to make the complaint in such a case. (Bennett, J.) SHEO NAKAIN v. EMPEROR. 201 I.C. 389=15 R.U. 90 = 1942 O.W.N. 392=1942 A.W.R. (O.C.) 252=1942 A.Or.C. 116=43 Or.L. J. 668=1942 O.A. 273=A.I.B. 1942 Outh 439.

S. 195 (3)—Jurisdiction to prefer complaint— Subordinate Court executing decree—Offence under Ss. 193 and 199, I. P. Code, in course of proceedings.

Where an offence under Ss. 193 and 199 of the Penal Code are alleged to have been committed in the course of execution proceedings in the Court of a Subordinate Judge, the complaint under S. 195 of the Cr. P. Code, should be made by that Court or by the Court of the District Judge to whom the Subordinate judge is subordinate and to whose Court appeals from the Subordinate Judge's Court ordinarily lie within the meaning of S. 195 (3). Where the Subordinate Judge refuses to file a complaint, it is only the District Judge who can in appeal order the filing of a complaint and not the Additional District Judge to whom the appeal may be transferred tor disposal. The Additional District Judge is not competent to hear the appeal which he is not authorised to receive but which is only transferred to him by the District Judge for hearing and disposal. (Agarwala and Sinha, //.) INDERDEO v. EMPEROR. 24 Pat. 1= (1945) P.W.N. 137=A.I.B. 1945 Pat. 322.

S. 195 (3)—Jurisdiction to prefer complaint—Subordinate Court—Village Court under Madras Village Courts Act—If subordinate to District Court or District Munsif's Court, See MADRAS VIL-

CR. P. CODE, (1898) S. 195-Procedure.

LAGE COURTS ACT, Ss. 73 AND 77 (1943) 1 M.L.J. 233.

——Ss. 195 (1) (c) and 476-A—furisdiction to prefer complaint—Subordinate Court—Village Court—Uffence in relation to suit in.

The Madras Village Courts Act (as amended in 1937) specifically provides in S. 77 that the provisions of Ss. 403, 476, 476-A and 476-B of the Cr. P. Code, shall apply to a Village Court. In cases therefore where a Village Court or Panchayat Court has not itself made a complaint or rejected an application under S, 476, Cr. P. Code, in respect of an offence alleged to have been committed in relation to a suit in the Village Court, the Court empowered to exercise the powers conferred by S. 476 as explained in S. 195 (c). Cr. P. Code, is the District Court and not the District Munsiff's Court to which an application would lie under S. 73 of the Madras Village Court's Act. (Happell, J.) CHINNA-SWAMI NAIDU v. RAMASWAMI NAIDU. 201 I.C. 713=15 R.M. 373=55 L.W. 225=1942 M.W.N. 218 =A.I.R. 1942 Mad. 471 = (1942) 1 M.L.J. 436. [on appeal (Leach, C.J. and Laksnmana Rao, J.) RAMA-SWAMI NAIDU v. CHINNASWAMI NAIDU. 209 I.C. 565=16 R.M. 330=56 L.W. 156=1943 M.W.N. 162 =A.I.R. 1943 Mad. 419=(1943) 1 M.L.J. 233.

#### Procedure.

S. (1) (a)—Interference by High Court.

Under S. 195 (5), Cr. P. Code, where a complaint is made under sub-S. (1)(a), that complaint may be withdrawn by any authority to which the public servant who has made it is subordinate. The High Court in such circumstances will not exercise a jurisdiction which shall more properly be exercised by another authority. (Bartley and Lodge, J.). EMPEROR v. RAMJAMAM SINGH. 200 I.C. 16=15 B.C. 63=43 Cr.I.J. 636=74 C.I.J. 580=A.I.R. 1942 Cal. 307.

S. 196-A — Applicability — Charge under S. 120-B, I. P. Code, read with R. 90-B, Defence of India Rules—Sanction for prosecution—Necessity.

An offence under S. 120-B of the Penal Code read with S. 90-B of the Defence of India Rules (Conspiracy to export Gold from British India), is a cognizable offence in respect of which the offender is liable to receive a sentence of five years' rigorous imprisonment. No sanction for prosecution is therefore necessary under S. 196-A, Cr. P. Code. (Kuppuswami Ayyar, J.) LABHAI, Inre. 1945 M.W.N. 557=58 L.W. 429=(1945) 2 M.L.J. 235.

——S. 196-A—Applicability—Conspiracy to commit forgery and extortion—Cognizability—Consent of Local Government—When necessary.

So far as the offence of conspiracy to commit forgery is concerned, in the case of persons other than parties to the proceedings, and, in the case of the offence to commit extortion, in the case of all the accused, including parties to the proceedings, the previous consent of the Local Government under the provisions of S. 196-A Cr. P. C. is required, and if such consent has not been obtained, the Court can not take cognizance of the complaint. So far as the offence of conspiracy to commit forgery is concerned the consent of the Local Government is not necessary by reason of the proviso to S. 196-A in the case of the parties to the proceedings. (Davis, C.J. and Weston, J.) GOBINDRAM v. EMPEROR. I.L.B. (1942) Kar. 12=200 I.C. 211=14 R. S. 208=43 Cr.I.J. 612=A.I.R. 1942 Sind. 69.

CR, P. CODE, (1898) S. 197,

S. 196-A—Applicability—Evidence of conspiracy to commit offence of perjury—Perfury committed in fact in pursuance thereof—Charge under S. 107, I.P. Code alone instead of Charge under S. 120-B—Propriety—Bar of absence of consent under S. 196-A—If arises.

A person abets the doing of a thing who engages with one or more other person of persons in any conspiracy for the doing of that thing if an act or illegal omission takes place. The second clause of S, 107, I. P. Code, read with S. 120-A, I. P. Code, makes it clear that the Crown has a right to file a prosecution under S. 120-B, I.P. Code, whether or not in pursuance of the conspiracy to commit an offence if the offence takes place. If it does take place, the prosecution have the option to treat the person who has conspired with another as an abettor within the meaning of S. 107. Where there is evidence of a conspiracy between several persons to commit perpary by making false allegations in an affidavit, and the offence of perjury is committed in pursuance thereof, there is no bar to the prosecution treating one of the conspirators as an abettor and to prosecute him as such under S. 107, I. P. Code, although a prosecution under S. 120-B, would require previous consent or complaint under S. 196-A, Cr. P. Code. No question of the evasion of the bar of complaint or consent under S. 196-A, Cr. P. Code, would arise in such a case. (Lobo, C. J. and Thadani, J.) AMARLAL v. EMPEROR. I.L.B. (1944) Kar. 411 = 221 I.C. 136 = A.I.B. 1945 Sind. 51.]

——S. 196.A—Applicability—Forgery and abetment of forgery—Allegation that accused conspired and planned to commit offences—Charge of conspiracy under S. 120-B—Necessity—Charge of forgery and abetment—Sufficiency—Sanction of Provincial Government—Necessity. See PENAL CODE, S. 120-B. I.L.R. (1944) Kar. 316.

An act which is the very contrary of the duty of a public servant cannot be said to be done by him in the discharge of his official duties. It is not necessary to attract the operation of S. 197, Cr. P. Code, that the act complained of should actually have been done while the public servant was acting or purporting to act in the discharge of his official duties. What the section requires is that the act shall be alleged to have been so done. (Agarwala and Varma, J.) AFZALUR RAHMAN v. EMPEROR. 22 Pat. 76=A.I.B. 1943 Pat. 229.

——S. 197—Applicability—"Acting or purporting to Act in the discharge of his official duty."—Meaning of.

In order that S. 197, Cr. P. Code, may apply, it is not sufficient merely to establish that the person proceeded against is a public servant, and that while acting as a public servant for taking advantage of his position as a public servant he did certain acts; it must be established that the act complained of is an official act. The act of taking a bribe or illegal gratification on the part of a public servant cannot be said to be an act done in the execution of duty or purporting to be done in the execution of duty and is not an act done in the discharge of official duty. No sanction is therefore necessary under S. 197, Cr. P. Code, for a prosecution in such a case. (Agarwala and Sinha, JJ.) PROVINCE OF BIHAR v. RAMESHWAR. 23 Pat. 738 = 218 I.C. 409 = 18 E.P. 55 = 1945 P.W.N. 207 = 46 Cr.L.J. 499 = 11 B.R. 310 = A.I.R. 1945 Pat. 136.

CR. P. CODE, (1898) S. 197.

S. 197 Applicability—"An authority higher than a Provincial Government"—Meaning of —Prosecution of Goods and Yard Supervisor and Sued Inspector—Sauction—Necessity.

A Goods and Yard Supervisor who held a commission as Second Lieutenant and a Sned Inspector who was a Warrant officer were charged under S. 161 read with S. 34, I. P. Code, and convicted. It was in evidence that they were subordinate to the Chief Transportation Manager and the Chief Commercial Manager who could jointly dismiss them. It was contended that the cases must fail for lack of the necessary sanction under S. 197 Cr. P. Code.

Held, that the accused had failed to establish that they were public servants who could be removed from their office only by some authority higher than a Provincial Government. The suggestion that the officers who could remove the accused from office being officers of the Central Government were "an authority higher than a Provincial Government" could not be accepted. To construe that expression to mean any officer of Central Government would lead to patent absurdities. The expression has reference to the Central Government, the Governor-General and the Secretary of State. The G. H. Q. (whatever that expression might signify) would not come under it. (Spens, C. J. Varada harrar and Muhammad Zafrulla Khan, JJ.) M. L. BANNERJEE v. EMPEROR, (1944) F.L.J. 276=58 L.W. 278= 1945 M. W.N. 113=1945 P.W.N. 163=79 C.L.J. 135 =218 I.C. 396=11 B.R. 352=46 Cr.L.J. 537=18 R. F.O. 4=47 Bom.L.R. 985=A.I.R. 1945 F.C. 14= (1945) 1 M.L.J. 34.

——S. 197 and Police Act (1861), S. 7—Sub-Inspector of Police—Prosecution—Sanction of Provincial Government—Necessity. MaqBOOL HUSAIN v. EMPEROR. [see Q. D. 1936—'40 Vol. I, Col. 2612.] 15 Luck. 740.

The house of the complainant was raided by the Assistant Commissioner of Police under S. 42 or the Madras City Police Act, Instruments of gaming were found, but the complainant escaped. He was, however, arrested later and taken to the police station where, it was alleged, that two Sub-Inspectors under the orders of the Assistant Commissioner beat him The complainant preferred a complaint under Ss. 323 and 352, I.P. Code, read with Ss. 109 and 114, against the Assistant Commissioner and the constables.

Held, that the Assistant Commissioner gave the order to beat while acting or purporting to act in the discharge of his official duty, and as he was not removable from his office save by or with the sanction of the Secretary of State, S. 197, Cr. P. Code, applied and barred the prosecution of that accused without the sanction of the Governor. (Lakshmana Rao, J.) AHMED MOHIDEEN v. YASUF ALI SYED. 197 I.C. 146-43 Cr.L.J. 133-14 B.M. 356 (2)=54 I. W. 737-1941 M.W.N. 809-A.I.B. 1942 Mad. 81 (1)=(1941) 2 M.I.J. 486.

CR. P. CODE.(1893) S. 197,

—S. 197—Applicability — District Local Board under Bombay Local Boards Act—Elected member who is also chairman of works committee—Prosecution for traudalent and disnonest submission of bill for works in name of bogus contractor—Prosecution—Sanction on Local Government—If condition precedent. See Bombay Local Boards Act (AS AMENDED IN 1935) S, 136 (2). 42 Bom.L.B. 1193.

-S. 197—Applicability — Excise Sub-Inspector and Police Sub-Inspector—Prosecution—Sanction.

Where even after the coming into force of the Government of India Act of 1935, the appointing authorities for police and excise officers are, respectively the Deputy Inspector-General of Police and the Excise Commissioner, under the powers delegated to them by the Local Government under S. 241 of the Government of India Act, 1935, such police and excise officers may be dismissed by these authorities, and hence they are not public servants who are "not removable from their office save by or with the sanction of the Local Government" and therefore are not entitled to the protection of S. 197 Cr. P. Code. (Agarwala and Verma, J.) AFZALUR RAHMAN v. EMPEROR. 22 Pat. 70=A.I.B. 1948 Pat. 229.

——S. 197—Applicability — Excise Sub-Inspector and Police Sub-Inspector and Assistant Sub Inspector—Prosecution—Sanction—Necessity.

S. 197, Cr. P. Code, must be interpreted in the light of certain well-known teatures of the administrative system prevailing in India. Otherwise there is the danger of ignoring the policy of the Legislature in limiting the class of omcers entitled to this protection and of making S. 197 available to all public officers. The provisions of Ss. 241 and 240 (2) of the Government of India Act or 1935 should also be understood in the light of such practice. A Sub-Inspector of Police and an Assistant Sub-Inspector of police, who can be dismissed by the Deputy Inspector-General of Police and an Excise Sub-Inspector who can be dismissed by the Excise Commissioner cannot claim the protection of S. 197, Cr. P. Code, and they cannot be said to be public servants who are not removable from their office save by or with the sanction of the Provincial Government, and sanction of the Provincial Government is not therefore essential to the commencement of their prosecution under S. 197. Cr. P. Code. (Gwyer, C. J., Varadacharsar and Ameer Ali, J.) AFZALUR RAHMAN v. EMPEROR. 22 Pat. 349=206 I.O. 232-47 C.W.N. (F.R.) 5=9 B.B. 510 =6 F.L.J. 7=15 R.F.O. 22=24 P.L.T. 109=44 Cr.L.J. 466=1943 P.W.N.147 = L.L.E. (1943) Kar. (F.C.) 2=1945 M.W.N. 515=A.I.B. 1945 F.C. 18= (1943) 2 M.L.J. 62.

—S. 197.— Applicability — Municipal Health Officer—Interference with person tying cow to tree and striking person—Complaint—Sanction of Local Government—Necessity.

A Municipal Health Officer purporting to act in the discharge of his official duties objected to the tying by the complainant of his cow to a tree, and also gave him a smack on the neck; again on account of some words spoken by the complainant, the Health Officer lost his temper and gave him some further blows on the cheeks and on the head. On a complaint against the Health Officer keld, that though it was no part of the duty of the Health Officer to strike the complainant or to commit

CR. P. CODE (1898), S. 197.

any offence he was undoubtedly acting as a public servant when he interfered with the complannant and struck him and therefore the sanction of the Local Government was necessary under S. 174, Cr. P. Code, before the complaint could be filed. (Horwill, J.) RAMACHANDRA RAO v. CHINNAYYA GOUNDAR. 203 I.O. 421=15 R.M. 659=55 I.W. 524=1942 M.W.N. 490=44 Cr.L.J. 13=A.I.R. 1942 Mad. 664 (1)=(1942) 2 M.L.J. 217.

S. 197—Applicability—Port trust Chief store-keeper and assistant superintendent of machinery—Prosecution—Sanction—II necessary.

The port trust estate does not fall within the term "village, town or district" within the meaning of Cl. 10 of S. 21, 1. P. Code. Therefore, the sanction of the Central Government is not necessary for the prosecution of offences committed by the thief. Store-keeper and Assistant Superintendent of machinery for the port trust estate who are entrusted with the keeping, and the expending of property by the port trustees on their behalf upon their estate. (Davis, C. J., and Lobo, J.) S. E. NAYLOR v. EMPEROR. I.L.B. (1941) Kar. 184 = 195 I.C. 358 = 13 K.S. 224=42 Or.L.J. 422= A.I.B. 1941 Sind 30.

S. 197—Applicability—Prosecution of Railway official for offence under S. 161, I. P. Coue, by special Tribural constituted under Ordinance XXIX of 1943—Sanction of Governir-General in Council—If necessary.

The Station-master of a Kailway Station was tried and convicted by the special Tribunal constituted under Ordinance XXIX of 1943 of an offence under S. 101, I. P. Code. On objection being taken to the maintainability of the prosecution in the absence of the sanction of the Governor-General in Council under S. 197, Cr. P. Code

Held, that the objection was without force, S. 197, Cr. P. Code, is not applicable to cases triable under Ordinance XXIX of 1943, S. 6(2) of that ordinance makes the provisions of the Cr. P. Code except S. 196-A and Chapter XXXIII applicable to proceedings of a special Tribunal so far as they are not inconsistent with the ordinance. This must be construed in the light of S. 1 (2) Cr. P. Code and when so construed operates to exclude the applicability of S. 197 to such proceedings. It cannot be said that the express exclusion of S. 190-A furnishes an indication that S. 197 was not intended to be excluded. The express exclusion of S. 190-A was by way of abundant caution and cannot affect the operation of S. 1(2), Cr. P. Code which expressly saves special jurisdiction and powers and special forms of procedure such as have been conferred and prescribed by the ordinance. (Spens, C. J., Varadachariar and Md. Zafrulla Khan, //) HECTOR THOMAS HUNTLEY v. EMPEROR. 23 Pat. 517 = 1944 M.W.N. 430=1944 P.W.N. 265 = 48 C.W.N. (F.R.) 109 = 214 I.C. 199 =I.L.R. (1944) Kar. (F.C.) 189=25 P.L.T. 200= 45 Cr.L.J, 755=17 R.F.C. 20=1944 A.W.R. (F.C.) 26=1944 O.A. (F.C.) 26=11 B.B. 20=1944 A.L.J. 258=(1944) F.L.J. 167=A.I.B. 1944 (F.C.) 66= (1944) 1 M.L.J. 503 (F.C.).

Agarwala, J. (Quaere).—Whether S. 197, Cr. P. Code, applies to, and may be invoked in, a prosecution under the Criminal Law (Amendment) Ordinance, 1943.

CR. P. CODE (1898), S. 197.

Imam, J.—S. 197, Cr. P. Code, is no doubt mandatory and compliance with its provisions is required before any Court can take cognizance of any offence or any proceedings, civil or criminal. But the provisions of S. 197 are inconsistent with Criminal Law (Amendment) Ordinance, 1943, and it would therefore be inconsistent with its provisions to insist that the requirements of S. 197, Cr. P. Code, should be complied with. (Asarwala and Imam, J.) HECTOR HUNTLEY v. EMPEROR. 23 Pat. 457 = 218 I.C. 282 = 18 R.P., 23 = 11 B.R. 283 = 46 Cr. L.J. 438 = A I.R. 1944 Pat. 378.

S. 197 bars a prosecution in respect of an offence and therefore applies when an offence has been committed. That is to say, it applies when the public officer does, something more than his duty-something which is not his duty-provided that he does it while he is acting or purporting to act in the discharge of his official duties. Where a porice officer resented the complainant's insistence on making representations about certain arrested persons and put an end to those insistent representations by an unprovoked and unwarranted assault, there can be no doubt that he was not acting in any private capacity but was acting in the discharge of his official duties, however unjustified his conduct may have been. (Derbyskire, C.J., Knundkar and Lodge JJ.) R. C. POLLARD v. SATYA GOPAL MAZUMDAR. 210 I.C. 337=16 R.C. 448=45 Cr.L.J. 224=A.I.R. 1943 Cal. 594 (S B.).

——S. 197—Applicability—Public servant ceasing to hold office at time of prosecution—Sanction if necessary.

S. 197, Cr. P. Code, affords protection only to a public servant who is still in office at the time when the prosecution is launched but not to one who is not in office at that time but was in office when the offence charged is said to have been committed. Consequently no sanction under the section is necessary for the prosecution of a public servant for an offence committed by him in the discharge of his official duty, if he has ceased to hold office at the time of the prosecution. (Khundkar and Sen, J.). PROSAD CHANDRA BANERIEE v. EMPEROR. I.I.R. (1944) 1 Cal. 113=207 I.C. 393=16 B.C. 62=44 Cr.I.J. 633=47 C.W.N. 694=A.I.R. 1943 Cal. 527.

S. 197—Applicability—Public servant—Prosecution of—Sanction for prosecution—Exercise of his individual judgment by His Excellency the Governor— Nature of proof required.

When once the Secretary to the Government under the orders of His Excellency the Governor certifies that His Excellency has accorded sanction under S. 197 of the Cr. P. Code that is a sufficient proof that the Governor has sanctioned the prosecution in the exercise of his individual judgment as prescribed in that section in the absence of any evidence to the contrary. (Wadsworth and Shahabuddin, J.J.) SWAMINATHAN, In re. 58 L.W. 262—1945 M.W.N. 361 (2)—A.I.R. 1945 Mad. 284 = (1945) 1 M.L.J. 449.

S. 197—Applicability—Railway Station master
—Sanction for prosecution of—Necessity.

S. 197, Cr. P. Code, requires sanction only in the case of a judge or a magistrate or a public servant not removable from his office save or with the sanction of the Local Government or some higher authority. It does not apply to the case of a Railway Station master who

OE. P. CODE (1898), S. 197.

does not tail within any of the above categories. (Agarwata, f.) SARJU PRASAD v. BAIDYANANDAN SINGH. 2224.0.385 = (1945) P.W.N. 327 (1).

Per Lodge, J.—The question whether S. 197 Cr. P. Code is applicable or not must not be decided by reference only to the statements made in the petition of complaint. The court should determine the question on a consideration of the whole evidence and also of facts of which it ought to take judicial notice. (Deroysure, C.J., Khundkar and Lodge, J.) K. C. POLLAKD v. SATYA GOPAL MAZUMDAK. 210 1.0. 337=16 E.C. 448=45 Cr. L.J. 224=A.I.E. 1948 Cal. OB4 (S.B.).

3. 197-Burden of proof-Plea of section in our of trial-Onus.

When an accused person pleads S, 197, Cr. P. Code, as a bar to his trial, it is for nim to show the facts which bring that section into operation; and the piea must be raised at the trial itself, so that the facts necessary for the determination of the plea may be ascertained. (Agarwala and Imam, 1/1) HECTOK HUNTLEY v. EMPEROR. 23 Pat. 457 = 218 1.C. 282 = 18 E.P. 28 = 11 B.E. 283 = 46 Or. I.J. 458 = A.I.E. 1544 rat. 378.

S. 197, 154 and 156—First information report—Case requiring sanction of Local Government—Power of magistrate to cancel report or stop police investigation till sanction is obtained. See Ck. P. CODE, 58, 154, 156 and 197. Li.B. 1944 2 Cal. 183.

S.198—Bigamy by wife—Person entitled to complain.

In a case of bigamy by a wife, the proper person to make a complaint as the person aggrieved within the meaning of S. 198, Cr. P. Code, is the first husband. (Meredith and Brough, Jl.) Bana-Mall Tripathy v. Emperor. 22 Pat. 263=207 L.C. 420=16 R.P. 39=44 Cr.L.J. 590=9 B.R. 425=A.I.R. 1943 Pat. 212.

S. 198—Defamation — Allegations about chastity of wife—Complaint by husband.

A husband is a person aggrieved within the meaning of S. 198, Cr. P. Code when imputations are made upon the chastity of his wife. The court has, therefore, jurisdiction to take cognizance of the offence of defamation on a complaint by the husband. (Henderson. J.) DWIJENDRA NATH v. MOKHAN LAL. 209 I.C. 255=16 R.C. 353=45 Cr.L.J. 123=A.I.R. 1943 Cal. 564.

S. 198—Defamation of pardanashin lady— Husband not taking notice of defamatory statement and not moving—Complaint by servant orally authorised by lady—Validity.

A complaint of defamation in respect of certain defamatory statements about a pardanashin lady was instituted by her servant. It was proved that he had oral authority from the lady to file the complaint, but there was no written authority to file the complaint. The husband of the lady was present at the making of the defamatory statement, but he did not take any serious notice of the statement, nor did he move in the matter.

CR. P. CODE (1898), Ss. 202 and 203.

Held, that the provisions of S. 198, Cr. P. Code had been complied with, and the fact that the husband did not move the court was not a ground for nolding that the leave of the Court was not properly given within the meaning of S. 198, Cr. P. Code. (Manohar Lall and Challery, J.) SHEO KARAN LAL V. BANDI PRASAD. 21 Pat. 778=205 I.C. 531=9 B.R. 230=44 Cr.L.J. 391=15 R.P. 303=A.I.K. 1943 Pat. 117.

S. 198—"Offence"—If includes abetment and attempt.

The word offence in S. 198, Cr. P. Code, includes such minor offences as might fall under that offence, namely, attempts and abetments. (Meredith and Brough, J.) BANAMALI TRIPATHY V. EMPEROR. 22 Pat 263=207 I.C. 420=16 R.P. 39=44 Cr.L.J. 590=9 B.R. 425=A.I.R. 1943 Pat 212.

S. 202—Applicability—Application under S. 488—It complaint—Reference for inquiry to another officer—Competency. See CR. P. Cong, S. 488. 1945 P.W.N 317.

-S. 202-Direction for investigation under-Police papers and report-Kight of accused to inspect and to get copies.

The accused is entitled to have inspection and copies of the police papers forming the inquiry or investigation made by a police officer when so directed by Magistrate under S. 202, Cr. P. Code, as well as of the statements of persons examined and the report of the officer concerned thereon. (Mosely, J.) MAUNG SHEIN v. THE KING. 1941 Rang. L.R. 590=A.I.R. 1942 Rang. 51 (1).

S. 202-Jurisdiction—Case transferred under S. 202—Power of transferee Magistrate to direct inquiry by police.

The question whether a Subordinate Magistrate to whom a case has been transferred under S. 192, Cr. P. Code, by a superior Magistrate has jurisdiction to order an investigation under 5. 202, Cr. P. Code, or not would depend upon when ther the superior Magistrate had or had not passed beyond that stage when he transferred The fact of transfer is itself no inthe case. dication of the stage which the Magistrate taking cognizance had reached, because under S. 200, Cr. P. Code, he can transfer the case even before the sworn statement is taken. The transferring Magistrate's intention has to be judged by the order which he passed. The mere fact of his "taking the case on file" is not sufficient to indicate an intention that no investigation or inquiry under S. 202 was necessary. Where the intention is doubtful, the Subordinate Magistrate has jurisdiction to order an inquiry under S. 202. (Horwill, J.) KASTURI CHAND v. VAIKUNTAM. 201 I.C. 387=15 R.M. 339=43 Cr.L.J. 670=55 L.W. 215=1942 M.W.N. 220=A.I.R. 1942 Mad. 426=(1942) 1 M.L.J. 378.

Ss. 202, and 203—Procedure—Examination of accused and witnesses—Cross-examination of prosecution witness—Legality—Dismissal of complaint—If to be set aside.

Although the practice of examining the accused and the latter's witnesses and letting the prose-

## CB. P. CODE (1898), S. 202.

cution witness be cross-examined by the defence in an inquiry under S. 202, Cr.P. Code, is irregular and ought to be condemned, it is not illegal; and an order dismissing a complaint under S. 203, cannot be set aside in revision on the sole ground that the Magistrate adopted a procedure which has been condemned. (Dhavle, J.) Jinilal Mandal v. Chanderded Prasad. 192 I.C. 830=7 B.R. 420=42 Cr.L.J. 332=13 R.P. 531=1941 P.W.N. 312=A.I.R. 1941 Pat. 419.

S. 202—Scope—If applies to transfer under S. 528. QAMARALI V. TULSI. [see Q.D. 1930—40 Vol. 1, Col. 2018.] I.L.R. (1941) Nag. 320.

——S. 202 (1), Proviso and S. 537—Scope— Omission to record statement of complainant on path—Illegatity.

The proviso to S. 202 (1), Cr. r. Code, positively prohibits the making of direction for an inquiry or investigation through the agency of a Magistrate or a police officer or some other person if the Magistrate has not examined the complainant on oath. Consequently an omission to comply with the proviso amounts to an illegality, and not a mere irregularity covered by S. 537, Cr. P. Code. (Mir Ahmud, J.) JIT SINGH v. AYUB KHAN. 202 I.C. 210=15 R.Pesh. 40=43 Cr.L.J. 803=A.I.R.1942 Pesh. 61.

Ss. 202 and 537—Statement of complainant on oath not taken prior to sending case for investigation—Trust if vittated—Curability under S. 55%.

Where a magistrate does not take the statement of the complainant on oath before sending the case for investigation to the ponce as should be done, that circumstance would not vitiate the trial so long as the accused have not been prejudiced thereby. Further the irregularity is cured by S. 537 (a) Cr. P. Code. (Madeley, J.) DULAN DAYAL SINGH v. EMPEROR. 219 I.C. 304 =46 Cr.L.J. 587=1944 O.A. (H.C.) 188=1944 A.Cr.C. 47=1944 A.W.R. (C.C.) 188=1944 O.W.N. 275=A.i.R. 1945 Oudh 102.

Ss. 203 and 204—Complaint merely stating that certain account books used in Court contained talse entries, without specifying those entries—It discloses any offence—Process, if can be issued. See Cr. P. Code, Ss. 4 (1) (h) AND 204. 45 C.W.N. 1074.

Second complaint if barred.

The fact that a previous complaint was thrown out under S. 203 of the Cr. P. Code, is no bar to the entertainment of a second complaint. But if the filing of a second complaint will amount to an abuse of process of the Court, the complaint ought not to be taken on file. (Kuppuswami Aiyar, J.) KUMARIAH NAICKER v. CHINNA NAICKER. 1945 M.W.N. 783 (1)=(1945) 2 M.L. J. 577.

—S. 203—Dismissal of complaint—Fresh complaint—When may be entertained. Pearey LAL v. EMPEROR. [see Q.D. 1936—'40 Vol. I, Col. 3332.] 13 R.Pesh. 28—42 Cr.L.J. 68.

CR. P. CODE (1898), S. 203.

A second complaint is entertainable although the first complaint on the salue facts has been dismissed. But the order of dismissal will not be set aside when it is not manifestly perverse or foolish or based on a record of evidence which is obviously incomplete. (Mir Annad, J.) ABDUL GHANI v. RUKHAN SHAH. 200 I.C. 60 = 15 R. Pesh. 4=43 Cr. L.J. 611=A.I.R. 1942 Pesh. 24.

The dismissal of a complaint under S. 203, Cr. P. Code, does not but the ning of a tresh complaint on the same facts before another Magistrate. (Nipogi, 1.) NAMDEO v. EMPEROR. I.L.B. (19±0) Nag. 503=216 I.C. 86=17 B.N. 63=46 Cr.L.J. 327=194± N.L.J. 423=A.I.R. 1944 Nag. 327.

——S. 203—Dismissal under—Fresh complaint on same jucts—Complainant, if bound to disclose prior dismissal.

Though the Code nowhere forbids the filing of a second complaint arising out of the same tacts it is the duty of the complainant whose earlier complaint had been dismissed, to inform the Court in which the subsequent complaint is filed that an earlier complaint arising out of the same facts has already been dismissed. (Davies) Hira v. Gogalal. 1941 A.M.L.J. 10.

——Ss. 203 and 436—Powers of Magistrate—Complaint grossly exaggerated—Order of dismissal based on police investigation—Interference in revision.

A Magistrate is entitled to use his powers under S. 203 Cr.P. Code, when he considers that there is a grave and gross exaggeration in the complaint. The words "no sufficient ground" in the section seem to relate proadly speaking, rather to the complaint as laid than to some new complaint which might possibly be evolved if the Magistrate chopped it into pieces and amended it and thus produced a residuum triable by some Court, with lesser jurisdiction, to which it should be sent. The matter of course is one of degree. The results of a police investigation ordered by him may form sufficient ground for him to take such a prima facie view and The Magistrate should however act upon it. in forming his conclusion be sufficiently alert to prevent any police favouritism. It is in the true interests of justice that complaints should not be entertained when allegations considered to be utterly false and liable to lead to perjury are made which may ruin the prosecution case even as regards that part of it which may reasonably be true. Sessions Judges should hesitate to override the Magistrate's discretion under S. 436 Cr. P. Code, unless it is really necessary. (Digby, J.) NARAYAN v. SHANKAR SINGH. I.L.R. (1945) Nag. 486=217, I C. 142=17 R.N. 97=46 Cr.L.J. 195=1944. N.L.J. 403=A.I.R. 1944 Nag. 318.

S. 203—Scope—Mandatory nature of— Duty of Magistrate to record reasons for order of dismissal.

Before a magistrate passes an order dismissing a complaint under S. 203 Cr. P. Code, he is bound to record his reasons for such dismissal. Failure to record reasons is clearly a contravention of

CR. P. CODE (1898), S. 204.

the law, S. 203 is mandatory and the magistrate must make it apparent in his order that he has not omitted to apply his mind to the facts before he mide the order. (17 adia and Sen. 17.) RATANSHAH KAVASJI v. KEKI BEHRAMSHA. I L.R. (1945 Bom. 141:=218 I.C. 257=18 R.B. 21=46 Cr.L. J. 434=46 Bom. L.R. 808=A.I.R. 1945 Bom. 147.

S. 204—Opinion of Magistrate—If should be based on evidence. HAFIZAR RAHMAN v. AMINAL HOQUE. [see Q. D. 1936—'40 Vol. 1, Col. 2022.] I.L.R. (1941) I Cal. 67=194 I.C. 38=13 R.C. 476=42 Or.L.J. 490=A.I.R. 1941 Cal. 185.

S. 204 (3)—Summons ordered—Process fee not paid—Acquittal of accused—Legality.

Where a magistrate had merely directed that summons should issue, and the process toes for the summons had not been paid, the proper procedure for him is to dismiss the complaint under S. 204 (3), Cr. P. Code, and not to acquit the accused. (Edgley and Roxburgh, J.) BIRESWAR BANERJEE v. EMPEROR. 217 I.C. 227=17 R.C. 184=46 Cr. I.J. 253=48 C. W.N. 550=A.I.R. 1944 Cal. 417.

Though the accused are not strictly pardanashin ladies, it does not follow that they should be dragged into Courts of law, when there are grounds for supposing that there is some ulterior motive for causing them so to appear. They should be allowed to appear through their pleaders. (Davies.) Mt. BISMILLAH v. NAZIR. 1944 A.M.I.J. 51 (2).

It is the duty of a committing Magistrate under Cr. P. Code to hear all such evidence which is relevant as may be produced for the prosecution. Committing Magistrates cannot therefore refuse to take evidence tendered unless it is objectionable for some reason or irrelevant. (Davis.) NATHU v. EMPEROR. 1942 A.M.I.J. 63.

S. 208—Defence witnesses not examined—No request by accused—Commitment, If vittated.

All that S. 208, Cr. P. Code, requires is that if the accused wishes to produce evidence, the Magistrate must accord the same. If no such request is made by the accused and on the other hand, when asked to put in a list of defence witnesses, he states that he does not wish to summon any witnesses even in the sessions Court, the commitment is not vitiated by the omission to examine any Defence witnesses. (Bhide, J.) AHMAD DIN v. EMPEROR. 196 I.C. 893=14 R.L. 194=43 Cr.L.J. 104=43 P.L.R. 640=A.I.R. 1941 Lah. 371.

Ss. 208, 209 and 210—Scope—Committal proceedings—Examination of defence witnesses before charge—Permissibility.

Ss. 208, 209 and 210 make it perfectly clear that defence witnesses may be examined in commitment proceedings even before the time comes to frame a charge. (Dkavle, J.) GANGA PRASAD NAEK v. BHAGWAT DEO. 195 I.C. 682=7 B.R. 962=14 R.P. 161=1941 P.W.N. 615=42 Cr.L.J. 767=23 Pat. L.T. 534=A.I.R. 1942 Pat. 38.

S. 208—Scope—Committal proceedings—Failure to examine all prosecution witnesses—If vitiates trial.

OR. P. CODE (1898), S. 209.

As a general rule it is the duty of t put before the committing Magistrate put before the Sessions Court and t witnesses. S. 208, Cr. P. Code, conte prosecution shall place before the ec trate, through the same witnesses the to place before the Sessions Court. B no invariable rule that all the witnesse: Court must be examined in the commi-Court and failure to do so will not a the trial or the committal so as to rend ings liable to be quashed. The fina that of prejudice to the accused, and ii prejudice to the accused, the trial canr bad or illegal, (Davis, C. J. and II MURAD GANJURO v. EMPEROR. L.I 270=195 I.C. 363=14 R.S. 66=42 I.R. 1941 Sind 168.

\_\_\_\_\_Ss. 208 (1), 244 (1) and 252 \_\_\_\_ Hearing' -- Meaning of.

The hearing of a complainant under (1) and 252 (1) and of the parties and P. Code, does not necessarily mean that merely amounts to a granting of aucous the position in every day practice an complainant or a party enters the within nation. (Hemeon, J.) MAHMUDKH I.L.R. (1945) Nag. 419=1945 N.I. 1945 Nag. 127.

——— S. 208 (2)—Case begun as a continued as an inquiry in committal accused to cross-examine prosecution wi

Where a case begun as a warrant car an inquiry prior to commitment the acc S. 208 (2) of the Cr. P. Code, a right the prosecution witnesses. (Thimas, C.). TAHAWAR ALI KHAN v. EMPER L.W. 296=1945 O.A. (C.C.) 248: (C.C.) 248=1945 O.W.N. 331=19=A.I.R. 1946 Oudh 26.

———S. 209—Applicability—Magisti jurisdiction to try case—Order of dist —Proper course.

Once a Magistrate is of opinion that diction to try a case, the proper counsubmit the records to the District Magister to the Court of competent jurisdiction the complaint for presentation to the pris not proper or legal for the Magistrate accused on the ground that he has no just the case. (Lakshmana Kao, J.) N. NARASAMMA. 1941 M.W.N. 765 (2) Mad. 833 (2).

S. 209—Discretion of committin weigh evidence—Limits.

It cannot be said that a committing I discretion to weigh the evidence at all, do so to some extent in order to decide facts case has been made out and wheth is possible. But these are the limits of It is not his duty nor is it necessary for thim to examine the prosecution evidence care, balance the evidence of one we evidence of another, consider the probato a conclusion on doubtful points. He

CR. P. CODE (1898), S. 209.

on a superficial view of alibi evidence to hold that a conviction is not possible. (Rennett, J.) MAHOMED ALIW. EMPEROR. 204 I.C. 594=15 RO. 390=1943 A.Cr C. 24=44 Cr.L.J. 309=1943 O.W N. 33=1943 O.A. (C.C.) 9=A.I.R. 1943 Oudh 233

- S. 209 - Duty of Committing Magistrete in inquiry - Grounds for commitment and for discharge.

It is the duty of a Magistrate making an inquiry under Ch. XVIII of the Cr.P. Code to decide on the materials before him whether or not there are sufficient materials for committing the accused for trial, he is not only entitled but also bound to consider the evidence and weigh it. But he has to do so only for the limited purpose of seeing whether there is a prima facie case and not by way of trying the case. He has to be satisfied before committing the accused that there is a fit case to be tried. If he comes to the conclusion that there is evidence to be weighed, he ought to commit the accused for trial, and he ought not to discharge the accused merely because he thinks that if he were to try the case himself, he would not be prepared to convict the accused on the evidence before him. But if he comes to the conclusion that the evidence for the prosecution is such that no tribunal, whether a Judge or Jury, could be expected to convict the accused, then he ought to discharge the accused. (Dhaule, J.) GANGA PRASAD NARK #. BHAGWAT DEO. 195 I.C. 682=7 B.R. 962=14 R.P. 161=1941 P.W.N. 615=42 Cr.L.J. 767=23 P.L.T. 534=A.I.R. 1942 Pat. 38.

A committing Magistrate is clearly empowered the law to weigh the evidence and to exercise his discretion judicially, and the law plainly contemplates that he should do so. But it is one thing to weigh the evidence with a view to determining whether there are or are not sufficient grounds for commitment under S. 209, Cr. P. Code, and another to balance the evidence, as it is the duty of the Sessions Judge to do, in order to decide upon the guilt of the accused after considering the case as a whole. It is not for the committing Magistrate to usurp the functions of the Sessions Court. If the Magistrate, after weighing the evidence, is satisfied that it is evidence upon which no reasonable Court could convict, it is his duty to discharge the accused; but if it is a case of balancing probabilities, estimating pros and cons, then it is his duty to commit where the evidence, if believed, is sufficient for conviction, even though he may himself not think the evidence sufficient for conviction. In a case where there are a number of accused and the evidence led by the prosecution is practically identical against all, if any of the accused are able to satisfy the Magistrate that the evidence is not at all fit to be believed, as it is open to them to do so, the Magistrate should discharge all the accused and should not take the course of committing some and discharging others. If the Magistrate does not find that the prosecution witnesses cannot be believed and are giving false evidence, he Ses cannot be believed and are giving raise evidence, he should properly commit all the accused. (Meredith, J.)

MOIMUDDIN v. SHEGGOBIND SAHU. 194 I.C. 399

=14 R P. 4=42 Cr L.J. 576=7 B.R. 761=23

Pat L.T. 62=1941 P.W.N. 541=A.I.R. 1941 Pat. 505.

In commitment proceedings what the Magistra's has to see is whether there are sufficient grounds for commitment and not whether there are sufficient grounds or conviction. Where there is a good prima fusionals

CR. P. CODE (1898), S. 215.

for commitment the Magistrate is bound to commit the accused and is not empowered to enter into nice questions of the probabilities of the case and discharge the accused on the ground that in his opinion the evidence was not sufficient to sustain a conviction; while a Magistrate should not be a mere post-office and commit an accused to the Court of Session when there is not even a remote possibility of the case ending in a conviction, he cannot assume the functions of the Sessions Judge and take upon himself the duty of sifting the evidence in cases which are on the border line. (Iphal Ahmad, C. J. and Baipai, J.) BII AS SINGH v. EMPEROR. 202 I.C. 623=15 R.A. 191=1942 A.L. J. 341=1942 A.W.R. (H.C.) 223=1942 A.C.r.C. 128=43 C.r.L.J. 879=1942 A.L.W. 376=A.I.R. 1942 A.II. 334.

S. 209 (1)—Committal—Desirability—Test—Offence, doubtful if under S. 302 or S. 304, I. P. Code—Course to be adobted.

The test which should be applied to decide whether a committal ought or ought not to be made on the facts is this—Assuming that the whole of the evidence telling against accused is true, is there a case which a Judge at a trial could leave to a jury—If there is such a case committal is proper and if there is no evidence to go before a jury then a committal ought not to the made. The question whether an offence falls under S. 302 or S. 304, I. P. Code is as a rule a difficult question which a Magistrate is as a rule not qualified by training or experience to decide, and it should therefore be left to the Sessions Court. (Pollack, J.) HIMLOO v. EMPROR. I.L.R. (1942) Nag. 438=195 I.C. 184=14 R.N. 41=42 Cr.L.J. 689=1941 N.L.J. 309=A,I.R. 1941 Nag. 224.

——S. 213—Grounds for committal—Case triable by magistrate—Committal to sessions as accused wanted it and as case involved complicated question of law—Legality.

A case which can be tried by a Magistrate cannot legally be committed to the Sessions Court on the grounds that the accused wanted the case to be committed to the sessions and that the case involved a complicated question of law. (Lokur and Weston. J.I.) EMPEROR v. KRISHNAJI LANDCE. 47 Rom. I.L.R. 659=A.I.R. 1945 Bem. 493.

S. 215-Applicability-Commitment under S. 446.

S. 446, Cr. P. Code, is a provision which directs a Magistrate to commit an accused person to Sessions in certain circumtances. As it does not lay down a separate procedure for such committal, the Magistrate has to follow the procedure laid down in S. 213. A commitment made by virtue of the power given by S. 446, is therefore, a commitment under S. 213 within the meaning of S. 215, Cr. P. Code. (Blacker J.) BHAGAT RAM v. TAYLOR. 46 P.L R. 178.

S. 215-Applicability-Commitment under S. 446.

The limitation imposed by S. 215 Cr. P. Codedoes not in terms apply to commitments made under S. 446. There is however no reason why the High Court should in the Course of revision go beyond the rule contained in S. 215 when dealing with commitments made under any other provisions of the Code. There would be obvious difficulties.

CR. P. CODE (1898), S. 215.

culties in interfering with any commitment on grounds of pure fact since a discussion of the evidence, if a conviction is not finally quashed, might have a prejudicial effect on the course of the subsequent trial. (Reckett and Marten. II) PHACAT RAM v. P. T. JAMPS. 219 I.C. 464—46 Cr L.J. 648—A.I.R. 1945 Lah. 1.

——S. 215—Committal in charge under S. 75, I. P. Code—Defects in—Sessions Judge, if bound to refer to High Court for quashing committal—Procedure.

It does not necessarily follow that a Sessions Judge should and is bound to refer to the High Court for quashing a commitment because the proper procedure has not been strictly followed. e.g., in cases where there is not on the record proof of previous convictions in a committal on a charge under S. 75, I. P. Code or in a case in which the accused has in fact been questioned about his previous convictions before there is sufficient evidence legally admissible on the record to support the charge. The Sessions Judge may himself correct any irregularity or cure any defect when the trial comes on before him and put matters right. It is only when he cannot put matters right, or when the neglect or carelessness of the committing Magistrate is habitual, that the Sessions Judge may think it proper to refer the case to the High Court for quashing a committal. (Davis, C.I.) Emperor v. Irio ALLAHDITTO I L.R. 1943 Kar. 259=210 I C 449=16 R.S. 153=45 Cr.L.J. 269=A.I.R. 1944 Sind 47.

----S. 215—Ground for quashing commitment— Competency of Magistrate to inflict adequate punishment.

A commitment to a Court of Session made by a competent Magistrate can only be quashed on a point of law. It cannot be quashed in revision on the ground that the committing Magistrate was competent to try the case himself and inflict adequate punishment. The question of adequate sentence cannot be properly decided without going into the evidence and the High Court, sitting as a Court of revision, will not enter into the facts of a particular case. (Bartley and Iodae, IJ.) Dana Mia v. Mamtazal Karim. 197 I C. 113=14. R.C 326=43. Cr L J. 16=45 C.W.N. 383=73 C.L.J. 187=A.I.R. 1941 Cal. 271.

— S. 215—Jurisdiction under—Nature of— Original or appellate—Judge presiding over High Court Criminal Sessions—Power to quash illegal commitment.

When the High Court is called upon to quash a commitment on the ground of an illegality under S. 215, Cr. P. Code, it clearly does not do so in the exercise of its original criminal jurisdiction. It is a power that it exercises in its appellate or revisional jurisdiction. A Judge of the High Court presiding over the High Court Criminal Sessions has no jurisdiction to quash an order of commitment under S. 215 or to consider its legality. (Chagla, J) Empror v. Husein-Alli Vilayatalli. I.L.R. (1942) Bom. 534=201 I.C. 735=15 R.B. 122=43 Cr. L.J. 778=44 Bom. L.R. 433=A.I.R. 1942 Bom. 212.

CR. P. CODE (1898), S. 222 (1).

- S. 215 - Point of low - Absence of evidence sufficient to justify commitment.

The absence of evidence sufficient to justify an order of commitment may be regarded as a legal ground, though it may sometimes he difficult to draw a line between a ground of this kind and a mere weakness of the evidence. The criterion may possibly be that a number of ingredients are generally required to make up an offence and if it appears from the evidence that one of these ingredients is entirely lacking from the prosecution case, this would be a good ground for quashing the commitment. In any case, since it is for the Judge to decide whether there is or is not a case to lay before a Jury, this, in its usually accepted sense, would seem to be a question of law rather than of fact since it is a question for the Judge to decide, whereas the Jury is the sole judge of fact. (Rechett and Marten, 11.)
RHAGAT RAM v. P. T. JAMES. 219 I.C. 464-46 Cr.L J. 648 = A.I R. 1945 Lab. 1.

A commitment is liable to be quashed where the committing Magietrate has failed to comply with the provisions of Ss. 208 and 360. Cr.P. Code., (Honderson, J.) EMPEROR v. UJAGAR SINGE 49 C.W.N. 284.

——Ss. 221 to 223—Framing of charge—Object of—Vague charge—Effect.

The whole object of framing a charge is to enable the accused to concentrate his attention on the case that he has to meet, and if the charge is framed in such a vague manner that the necessary ingredients of the offence with which he is convicted are not brought out in the charge then the charge is defective (Malib. I.) MAKKHAN v. FMPEROR ILR (1945) All 558=220 I.C. 432=1945 A.W. 248=1945 A.W.R. (H.C.) 156=1945 O.W.N. (H.C.) 227=1945 A.Cr. C. 122=A.I.R. 1945 All. 81.

S. 221—Scope—Charge under S. 182. L.P. Code—Conviction under S. 211, I.P. Code—Legality. See Cr. P. Code, S. 195. (1942) 1 M.L.J. 382.

Ss. 221 (7), 225-A and S. 511-Previous convictions-Proof-Proper procedure.

The combined effect of S. 221 (7) and 225-A. Cr.P.Code, is that the accused is to be charged with the substantive offence and at the same time, in anticipation, with the previous convictions. If on that charge being put to him he admits the convictions by pleading guilty to the whole charge there is no necessity for the prosecution to prove those convictions under S. 511, Cr.P.Code. (Monroe, Blacker and Pamlall, JI) ILR. (1943) Lah. 477=211 IC 283=45 Cr.L.I. 364=16 R.L. 211=45 P.L.R. 414=A.I.R. 1944 Lah. 25 (F.B.).

S. 222—Offence under S. 408, I. P. Code—Charge if should give time and item. See Penal Cope, S. 408 and Cr.P. Code, S. 222. 1941 O.W.N. 1208.

of offence and not actual date given—Sufficiency.

If the particulars specified in the charge are reasonably sufficient to give the accused notice CR. P. CODE (1898), Ss 222 (2) and 239.

of the matter with which they are charged, the fact that the charge specifies only the month in which the offence was committed and not the actual date is not an irregularity, and even if it is, it is curable under S. 537 Cr.P. Code. (Meredith and Brough, II.) BANAMATI TRUPATHY ". EMPEROR. 22 Pat. 263=207 I.C. 420=16 R.P. 39=44 Cr.L.J. 590=9 B.R. 425=A.I.R. 1943 Pat. 212.

——Ss. 222 (2) and 239—Charaementioning period and different items defalcated—Gross sum not separately mentioned—Charge, if of one offence—Persons abetting offender in defalcating different items—If can be jointly tried.

A charge under S. 408, I.P.Code. mentioning the period during which the alleged defalcation was made must be deemed to be a charge of one offence within the meaning of S. 222 (2), Cr.P. Code, although it mentions separately the different items defalcated instead of the gross sum. All persons who abetted the principal offender in defalcating the different items can be iointly tried with him under S. 239 (b), Cr.P. Code. Edaley and Roxburgh. II.) RABINDRA NATH MATUMDAR V. PATIYA URBAN CO-OPERATIVE BANK. I.L.R. (1944) 1 Cal 109=216 I.C. 243=17 R C. 153=46 Cr.L. I. 151=A.L.R. 1944 Cal. 388.

----S. 222 (2)-Requirement under-Prosecution if bound to show how 'gross sum' embezzled is arrived at.

All that S. 222 (2), Cr.P.Code, requires is that the total amount which according to the prosecution has been embezzled by the accused may be mentioned in the charge as one lump sum. It cannot be said that the prosecution must show how the 'gross' sum mentioned in the charge was arrived at. (Mulla. I.) EMPFROR v. DAULAT RAM ASTHANA. 1942 A.L.W. 627=1942 A.Cr. C. 208

——Ss. 222 (2) and 234 (1)—Scope—Charge under S. 409 I. P. Code in respect of gross sum made up of three items and three charges under S. 477-A, I.P. Code in respect of 28 entries—Joint trial—Legality—Offences disclose in respect of items covered by series of entries—Conviction without charge—Permissibility.

S. 222(2), Cr. P. Code, refers only to the offence of criminal breach of trust or dishonest misanpropriation of money and not to falsification of accounts. A series of charges under S. 477-A.T.P. Code in respect of twenty eight items of falsification relating to three different registers cannot be permitted to be lumped up together, although committed in the course of one year. The accused was charged under S. 409, I-P. Code with commission of criminal breach of trust in respect of Rs. 76-9-6 including three different sums of Rs. 42, Rs. 31-9-0 and Rs. 3-0-6 each. The prosecution case was that the accused committed a series of falsification of accounts which were made the subject of three charges under S 477-A, I P. Code. and which were alleged to have been committed in order to conceal and cover the criminal breach of trust of Rs. 76-9-6. The prosecution alleged that the criminal breach of trust was committed between 12-4-1938 and 16-1-1039. The three charges under S, 477-A.I.P. Code related to 28

GR. P. GODE (1898), S. 226.

entries, the first charge relating to two entries in respect of Rs. 42 and Rs. 31.9-0, in one book, the 2nd relating to 22 entries in another hook, and the 3rd relating to four entries in another book and covered by four subsidiary headings. The prosecution case was not that the accused set about to defalcate the amount of Rs. 76.9-6 from the very beginning, but that as occasion arose, and opportunities offered themselves he went on defalcating such sums as he could conveniently do without attracting the attention of his superiors, each defalcation thus being a separate offence. It was not the prosecution case that all these series of entries in the accounts were falsified in order to cover up one single defalcation. He was tried for all the charges at one trial

Held, (1) that the joint trial was illegal as there was clear misjoinder of charges, which vitiated the trial; (2) that though it would be permissible to try the accused for one charge under S. 490 T. P. Code, and for three charges under S. 477-A, relating to that charge of misappropriation, it was not legal or permissible to try the accused for one charge under S. 400 and 28 charges under S. 477-A, I. P. Code; (3) that in the absence of evidence of misappropriation of the items specified, the accused was entitled to be acquitted of the charge under S. 409. I. P. Co'e, and the accused could, not be convicted in respect of other itemes disclosed by the evidence as having been misappropriated by the accused as being included in the numerous charges under S. 477-A, I. P. Code, as it would be unfair to convict the accused of the offence of criminal breach of trust with reference to items for which he had never been charged. (Manohar Lal and Meredih. II.) Emperor v. Ramautar I at. 21 Pat. 113=200 I.C. 380=14 R.P. 664=8 B.R. 675=43 Cr. L.J. 625=23 Pat. L.T. 108 A.I.R. 1942 Pat 401.

-----Ss.222 (2) and 234---Scope of.

S. 222 (2) Cr.P. Code refers to criminal breach of trust of money. A charge in which, although the price of the ornaments is mentioned the breach of trust is not said to be with regard to the money but with regard to the ornaments nledged separately on different dates is not contemplated by S. 234 or S. 222 (2) Cr.P.Code. (Varma, I.) RAMDEYAI PRASAD V. SAVED HASAN. 212. I.C. 384=10 B.R. 509=16 R.P. 321=45 Cr. C.L.J. 633=A.I.R. 1944 Pat. 135.

Ss. 225 and 537—Error of date in charae sheet—Absence of prejudice—Conviction if can be quashed.

The mere fact that there was an error of date in the charge sheet is not enough to quash a conviction when the error has not occasioned a failure of justice and the accused had not been prejudiced. (Agarwal, I) BARSATT V. EMPEROR. 200 I.C. 805=15 R.O. 58=1942 A.Cr.C. 110=43 Cr.J., 721=1942 O.W.N. 380=1942 A.W.R. (C.C.) 254=1942 O.A. 275=A.I.R. 1942 Oudh 394.

\_\_\_\_S. 226-Powers of clerk of Crown-With-drawal of charge.

S. 226, Cr. P. Code, gives the widest powers to the clerk of the Crown to revise and re-draft charges with reference to any offence in respect of which the committing Magistrate has framed CR. P. CODE (1898), Ss 227, 236 237 & 423.

a charge. But when the Magistrate comes to the conclusion that on offence has been committed and frames a charge accordingly, it is not open to the clerk of the Crown to withdraw that charge on the ground that there is no evidence to go to the jury and therefore the charge would fail. That is a judicial act which can only be performed by the Court by the procedure laid down in S. 273. Cr. P. Code. (Chagla, J.) FMPEROR 7. HUSEINAILI VILAYA TALLI. I L.R. (1942) Bom. 534=201 I.C. 735=15 R.B. 122=43 Cr.L I. 773=44 Bom. L.R. 433=A.I.R. 1942 Bom. 212.

-Ss. 227, 236, 237 and 423-Power of the High Court to amend a charge in Criminal appeal. The appellant was charged under Ss. 466 and 109 of the Penal Code with the offence of abetting two named persons in forging certain Court records. The evidence on record did not show that the two named persons had committed the offence, but showed that the offence was committed by some person or persons unknown and was abetted by the appellant. On the question whether (a) the Court could alter the charge to abetment of forgery by a person or persons unknown or could convict the accused of such an offence without amending the charge and (b) whether in the circumstances such a charge should have been made.

Held, (a) that S. 423 of the Cr. P. Code and in particular sub. S. (1) (d) gives wide powers of amendment in a criminal appeal and the amendment in question falls within the terms of that section and does not amount to the charging of a fresh offence, (b) that in the circumstances of the case it was proper to make such an amendment, as there was no chance of injustice being done and it did not appear that any fresh case could be made or fresh evidence given on behalf of the person convicted. (I ord Porter TAKURSHAH v. FMPERCR. 70 I.A. 196=23 Pat 88=45 Cr. L J. 126=16. R.P. C. 113=1944 P.W. N. 104=1944 A. Cr. C. 11=77 C.L. J. 500=I L. R. (1944) Kar. (P.C.) 1=46 Bom L. R. 513=1943 A.L. J. 507=209 I.C. 276=56 L. W. 706=48 C.W. N. 90=1943 O.W. N. 538=1944 M.W. N. 23=1944 A.L. W. 42=A.I.R. 1943 (P.C.) 192=(1943) 2 M.L. J. 532 (P.C.).

——S. 227—Scope—Trial on illegal charge framed in contraventian of Code—Subsequent amendment at late stage—Defect not cured—Whole trial—If viitated.

S. 227, Cr.P. Code, does not warrant the striking out of a charge for the purpose of curing an illegality, already committed after the mischief which the legislature intended to guard against had been done; and a trial which has proceeded on an improper charge framed in contravention of the mandatory provisions of the Cr.P. Code, cannot be rendered legal by a subsequent amendment of the charge at a late stage. The appellant and another were originally charged under S. 6 of the Explosive Substances Act with the abetment of three offences punishable under Ss. 3 and 4 (a) of the Act. In the alternative the appellant was charged under S. 4 (b). After the arguments on both sides were heard but before the opinion of the assessors was taken, the charge under S. 6 read with S. 3 and 4 (a) was

CR. P. CODE (1898), S. 233 to 236.

dropped at the request of the Public Prosecutor as against the appellant and his trial was confined to the charge under S. 4 (b) only.

Held, that the whole trial having proceeded on an illegal charge, its amendment at the conclusion of the trial, just before the opinion of the assessors was taken could not cure the defect or make the trial legal. The charges as originally framed was illegal and vitiated the whole trial. (Divosita and Lokur. JJ) FMPEROR v. KESHAVLAL. 46 Bom. L.R. 555=A.I.R. 1944 Bom. 306.

——Ss. 233, 234, 235, 236, 239 and 537—Accused charged with three offences of thett and three offences of dishonest misat propriation in alternative—Joint trial of all six offences—Legali'y.

Where the accused was charged with three offences of theft and three offences of dishonest misappropriation in the alternative and all these six offences were tried at one and the same trial.

Held, that this was not permissible either under the general rule contained in part 1 of S. 233 or under any of the exceptions contained in Ss. 234, 235, 236 and 239, Cr. P. Code and the illegality could not be cured under S. 537 Cr. P. Code. (Lodge and Das. JJ.) BFCHARAM MUKHERJI n. EMPFROR. ILR. (1944) 1 Cal 399 = 213 IC. 401 = 45 Cr.L.J. 666 = 17 R.C. 14=A.I.B. 1944 Cal. 224.

——Ss. 233 and 235 and Penal Code Ss. 409 and 477-A—Charge under Ss. 409 and 477-A—Penal Code in respect of offences committed in different capacities—Legality.

Where a charge under S. 409, I. P. Code, relates to certain acts which an accused is said to have committed in his capacity as chairman of a District Board and a charge under S 477-A relates to an act which he is said to have committed in his capacity as President of the District Board Employee's Thrift Society which is obviously an entirely different capacity, the two charges being distinct cannot he joined together in a single trial. (Mulla, I.) Emperor v. Daulat RAM ASTHANA. 1942 A.L.W. 627=1942 A.Cr.C. 208.

Where on a raid of the house of the accused some charas and opium were recovered and a ioint trial was held in respect of offences under S. 60(a) read with S. 69, of the Excise Act and S. 9 of the Opium Act.

Held:—that as it could not be said that the offence of keeping charas and opium were committed in one series of acts so connected together as to form part of the same transaction the accused committed two disinct offences, not in the same transaction, and hence there should have been separate charges and each charge should have been tried separately. (Agarwal. J.) BANKEY I AI v. EMPEROR. 203 I.C 12=15 R O. 188=1942 A.W.R. (C.C.) 278=1942 O.W.N. 564=1942 A.Cr.C. 179=43 Cr.L.J. 912=1942 O.A. 306=A.I.R. 1942 Oudh 462.

Ss. 233 to 236—Principle of—Exceptions.

(Per Ighal Ahmad C. J.)—The fundamental principle underlying Ss. 233 to 236 Cr. P. Code, is that an accused person can be convicted of a particular offence only if he was charged with the same. Exceptions to this principle are then

CR. P. CODE (1898), S. 233.

empower the trial Court in cases specified therein to convict an accused person with respect to an offence even though he was not charged with the same. (Ighal Ahmad C. J., Ismal, Mulla, Hamilton and Dar, IJ) ZAMIR QASIM v. EMPEROR. I.L.R. (1944) All 403=17 R.A. 75=46 Cr.L. J. 38=1945 A.W.R (H.C.) 101=215 I.C. 213=1944 A.L.J. 203=A.I.R. 1944 All. 137 (F.B.).

S. 233—Scope—Charge under S. 409, I.P. Code, in respect of specific sums—Charge under S. 477-A, in respect of 28 items of falsification— Absence of evidence of misappropriation of items specified-Evidence disclosing misappropriation of other items included in the charges under S. 477-A—Conviction in respect of such items in the absence of charge relating to them—Permissibility. [See CR. P. Code, Ss. 222 (2) and 234 (1). 23 Pat L.T. 108.

S. 233—Scope of—Joinder of charges in respect of three offences under S. 409, I P Code, and three offences under S. 477-A, I.P.Code—Legality. BHUPRAKASH v. EMPEROR. [see Q. D. 1936-40 vol. I, Col. 3333.] I.L.R. (1941) All. 35 = 1941 A.Cr.C. 1.

Ss. 233 and 235—Scope—Two separate-charges under S. 499 I. P. Code and one charge under S. 467. I. P. Code—Plea of guilty on third charge—Trial and conviction in respect of first two jointly—Legality.

The accused was charged with and tried for two offences punishable under S. 499, I. P. Code, and one offence punishable under S. 467 I.P. Code; the accused pleaded guilty to the third charge and the trial was therefore proceeded with only in respect of the charges in respect of the two offences under S. 499, which formed part of the same transaction.

Held, that no illegality was comitted as there were three separate charges and the trial proceeded only in respect of the first two, which could be tried jointly under S. 235, Cr. P. Code. (Horwill, J) Krishnamurthi Ayyar, Inre. KRISHNAMURTHI AYYAR, In re. 1943 M.W.N. 463=(1943) 1 M.L.J. 466.

-Ss. 233 and 222 (2)—Thefts of different things on different dates-Separate charge for each theft-Necessity for.

Thefts of different things on different dates separated by considerable periods should not be treated as one theft on the analogy of successive blows constituting one assault. Each theft is a substantive offence and should be charged separately with reference to particular things alleged to have been stolen. S. 222 (2), Cr. P. Code, does not apply to a charge of theft, and the code as it stands at present does not permit a lumped up or composite charge to be framed in respect of theft. (Lodge and Das, J.) BECHARAM MUKHERJI v. EMPEROR. I.L.R. (1944) 1 Cal. 398 = 213 I.C. 401 = 45 Cr.L.J. 666=17 R.C. 14=A.I.R. 1944 Cal. 224

S. 234—Charges under Ss. 420, 467 and 477-A, I. P. Code—Joint trial—Legality.

Under S. 234, Cr.P. Code, the joinder in one trial of three charges under S. 420, I.P. Code, or three charges under S. 467 I. P. Code or three charges under S. 477-A, I. P. Code, is perfectly legal. But the section does not sanction the

CB. P. CODE (1898), S. 234 & 239.

laid down by Ss. 237 and 238 Cr. P. Code which a charge under S. 467 or a charge under S. 477-A, I.P.Code. (Lodge and Akram II.) Hugh Francis BELLGARD & EMPEROR. I.L.R. (1941) 2 Cal. 319 =45 C.W.N 839=198 I.C. 499=14 R.C. 471=43 Cr.L.J. 389=A.I.R. 1941 Cal. 707.

charges—What is prohibited—Curability under S. 537.

The provisions of S. 239 (d), Cr. P. Code, cannot be combined with those of S. 234 so as to allow of three sets of offences committed in the course of three transactions or six offences in all being charged and tried together. If such an illegality is committed then the trial is bad. S. 537 only deals with mere errors and irregularities in the charge, and not with illegalities such as trials for plurality of offences in a manner not allowed by law. (Mosely, J.) ASTELL v. ENG. TAKE. 1941 Rang. L.R. 559=199 I.C. 27=14 R.R. 237 = 43 Cr.L.J. 448=A.I.R. 1941 Rang.

-Ss. 234 and 235-Joinder of three charges under S. 409, I.P. Code and one charge under S. 477-A, 1. P. Code-Legality.

Where the accused, a money-order clerk in a post office, was placed on his trial upon three charges under S. 409, I. P. Code, on the allegation that on three separate occasions he committed criminal breach of trust with regard to three sums of money handed over to him by different persons for transmission to other people, and in connection with the third charge there was in addition a charge under S. 477-A, I. P. Code, to the effect that he mutilated a money order receipt, and evidence was led in support of all the four charges and the accused was called upon to plead to the charge framed under S 477-A, I. P. Code.

Held, that although the accused was acquitted on the charge under S. 477, I. P. Code, for lack of necessary sanction, he was actually put on trial upon four charges, that the case was therefore excluded from the scope of S. 234. Cr. P. Code, and that consequently the trial was vitiated by misjoinder of charges. (Fartley and Lodge. //.) JOGENDRA CHANDRA GHOSH v. POSTAL DE-PARTMENT OF THE GOVERNMENT OF INDIA. 46. C.W.N. 287.

-Ss. 234 and 235-Joint effect-Joinder of charges arising out of three transactions of same kind carried out within 12 months—Legality.

The joint effect of Ss. 234 and 235, Cr. P. Code. is not to sanction the joinder of all charges arising out of three transactions of the same kind carried out within the space of twelve months and unless it is clearly alleged at the trial that the three transactions were carried out in furtherance of a general conspiracy to commit such offences, their joinder in one trial is not Such one deep the provisions of S. 235. Cr. P. Code. (Lodge and Akram, II.) HUGH FRANCIS BELIGARD v. EMPEROR. I.L.R.(1941)2 Cal. 319=45 C.W N. 839=198. I.C. 499=14. R.C. 471=43. Cr.L.J. 389=A.I.R. 1941 Cal. 707.

Ss. 234 and 239—Scope—Charges under Ss. 380 and 411, I. P. Code—Permissibility—Misjoinder—"Offences of the same kind."

S. 234 read with S. 239, Cr. P. Code, permits of the joinder of more offences than one of the joinder in one trial of a charge under S. 420 with same kind committed within the space of 12

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OB. P. CODE (1898), Ss. 234, to 236 and 239.

months; but offences under Ss. 380 and 411, I. P. Code, are not of the same kind. Therefore the charging of one or more persons of offences under Ss. 380 and 411 would amount to a misjoinder of charges. (Horwill. I.). CHINNAPPA CHETTY v. EMPEROR. 205. I.C. 336=15 R.M. 879=44 Cr.L.J. 413=A.I.R. 1943 Mad. 209=1942 M.W.N 726=(1942) 2 M.L.J. 686.

Ss. 234, 235 236 and 239—Scope—If mutually exclusive.

Ss. 234, 235, 236 and 239, mentioned as exceptions in S. 233, are not mutually exclusive; but can, on the other hand supplement each other. (Divatia and Lobur II.) EMPEROR v. KESHAVLAL. 46 Bom. L.R. 555=AI.R. 1944 Bom 306.

S. 234 (1)—Offences of same kind—Two offences under S. 3 and two under S. 4 (a). Explosive substances Act—Joinder—Legality.

Three offences, one punishable under, S. 3 of the Explosive Substances Act and other two under S. 4 (a) of that Act cannot be said to be of the same kind and therefore cannot be tried at one trial under S. 234 (1) Cr.P. Code. (Divatia and Lobur, II.) EMPFROR v. KESHAVIAL. 46 Bom, L.R. 555=A.I.R. 1944 Bom, 306.

S. 234 (1)—Scope—Single charge under 409, I. P. Code. in respect of gross sum made up of three items—Three charges under S. 477-A, in respect of 28 entries in relation to items misappropriated—Joint trial—Legality. See CR. P. CODE, Ss. 222 (2) AND 234 (1). 23 Pat. L. T. 108.

—S. 235—Acts constituting distinct offences and not forming one transaction or series of acts by same person—Joint trial—Legality.

Acts which are distinct offences and which cannot be said to have been so connected together as to form one transaction and which further cannot be said to have been one series of acts committed by the same person, cannot be tried at one trial under S. 235 (1). Cr. P. Code, (Divatia and Lokur. II.) EMPEROR v. KESHAVLAL. 46 Bom, L.R. 555=A.I.R. 1944 Bom 306.

S. 235—Joinder of charges—Offence of cheating and offence under S. 6, Merchandise Marks Act. A. K. Sen v. Madhu Mongal Das [see O.D. 1936-40. Vol. I Col. 3333.] 192 I.C. 835—13 R.C. 355—42 Cr.L.J. 334.

-S. 235-Same transaction-Test.

To ascertain whether a series of acts would form part of the same transaction the most important point to be considered is whether there was a common purpose and design and continuity of action. Where the common object of an unlawful assembly was to beat and extort money from a person and people from a neighbouring village come to rescue him but were chased back and the tiles in their houses in that village were broken and the people of another village who came to remonstrate against such action were assaulted, such assault was not because they interfered with the extortion and beating but because of their interference with the breaking of the tiles of houses in another village and hence it was a separate transaction and could not be tried jointly with the offence under Ss. 147 and 3R4/511, I.P.Code. (Agarual, I.) Hiralal, v. Emperor. 18 Luck, 403=201 I.C. 737=15 R.O.

CR. P. CODE (1898), S. 235.

114=1942 A.WR. (C.C.) 272=1942 A.Cr.C. 139 =43 Cr.L. J. 776=1942 O.W.N. 427=A.I.R. 1942 Oudh 441.

\_\_\_\_Ss. 235 and 239\_"Same transaction"\_

A mere common purpose does not constitute a "transaction" nor is the mere existence of some general purpose or design sufficient to make all acts done with that object in view parts of the same transaction. (Divatia and Lokur, II.) EMPEROR v. KESHAVLAL. 46 Bom.L.R. 555=A.I.R. 1944 Bom. 306.

#### ---- S. 235-Same transaction-Test.

The principles upon which the joinder of charges are to be determined are not that the occasion upon which the offences are committed are different, but whether there was a continuity and community of purpose. The real and substantial test by which to determine whether several offences are so connected as to form the same transaction depends on whether they are so related to one another in point of purpose or as cause and effect or as principal and subsidiary acts, as to constitute one continuous action. The fact that offences are committed at different times does not necessarily show that they may not he so connected as to fall within S. 235 of the Cr. P. Code. The occasion may be different, but there may be a continuity and a community of nurpose. (Thomas. C. J. and Walford. I.) TAHAWAR ALI KHAN v. EMPEROR. 1945 A.L.W. 296=1945 O.A. (C C.) 248=1945 A.W.R. (C C) 248=1945 A.W.R. (C C) 248=1945 O.W.N.] 331=1945 A.Cr. C. 176=AI. R. 1946 Oudh 26.

S. 235—Same transaction-Test—Charges under Ss. 468 and 408, I. P. Code—Joinder—Legality.

The offence of forging a document for the purpose of cheating cannot be part of the same transaction as the dishonest misappropriation of property entrusted to the alleged forger as a servant. Therefore, the joinder of three charges under S. 468 with a charge under S. 408, I. P. Code, cannot come within S. 235, Cr. P. Code, and is contrary to the direct provisions of S. 233, Cr. P. Code. (Lodge and Pal, 11) JUGOI. KPISHNA DRY SARKAR v. WILCOX I.TD. 199 I.C. 362-14 R.C. 582-43 Cr.L. J. 553-74 C.L. J. 400-A.I.R. 1942 Cal. 237.

To ascetain whether a series of : same transaction it is essential to s linked together to present a contin acts of criminal breach of trust by regarded as connected, or if the acthemselves cannot be regarded clearly there cannot be such con series of acts as a whole as to cons But assuming such connexion betw minal breach of trust on the one ha falsification on the other as to Ci offence in each case, there is no that all these acts constitute a serie together as to form the same trans nexion between the falsification res the criminal breach of trust regar ctvicus. (Bensett and Madeley, v. FMPTROR. 19 I uck. 492=1 A.W.R. (C.C.) 3=1944 A.L. CR. P. CODE (1898), S. 235.

1=1944 O.W.N. 1=16 R O.266=45 Cr.L.J. 538 =1944 O.A. (C.C.) 3=A.I.R. 1944 Oudh, 122,

S. 235-'Same transaction'-Test-Number of falsifications connected with same fraud.

With regard to S. 477-A, I. P. Code, it is generally held now that a number of falsifications can be included in a single charge provided they are connected with the same fraud; that is to say, although it is possible to regard them as separate offences, the law provides that they may also be regarded as one offence. Where fraud of the same kind is alleged to have been perpetrated over a relatively short period, where the same means, falsification of accounts in certain ways, are employed to facilitate or cover up the fraud, and where both the various acts of misappropriation and the various acts of falsification may legally be combined in one charge respectively there is no reason why it should not be held that all these acts constitute a series of acts so connected together as to form the same transaction. (Bennett and Madeley, J.) DERI PRASAD v. FMPEROR. 19
Luck 493=212 I C. 125=1944 A.W.R. (C.C.) 3
=1944 A.L.W. 7=1944 A.Cr. C. 1 = 1944
O.W.N. 1=16 R.O. 266=45 Cr. L. J. 538 = 1944 O.A. (C.C) 3 = A.I.R. 1944 Oudh 122.

-S. 235 (1)—Same transaction—Test—Question of fact.

Whether a series of acts are so connected together as to form the same transaction is purely a question of fact depending on proximity of time and place, continuity of action and unity of purpose and design. (Lodge and Das. 11.) BECHARAM MUKHERJI v. EMPEROR. J.L.R. (1944) 1 Cal. 398=213 I.C. 401=45 Cr.L.J. 666=17 R.C. 14=A.I.R. 1944 Cal. 224.

-S. 235—"Same transaction"—Test — Person having grocery shop keeping opium and gania for illicit sale—Trial for offences under Opium Act and Bihar and Orissa Excise A-t-Tegality.

The question whether the acts are so connected together as to form part of the same transaction has to be decided on the facts of each particular case. The real and substantial test for determination of the question is "continuity of action and purpose." Where a person, who has a grocery shop, keeps the contraband goods, opium and ganja, for purposes of illicit sale, judged by the standard of continuity of action and purpose, the possession of contraband goods for the purpose of illicit sale would be one transaction. Therefore his trial for offences under the Opium Act and the Bihar and Orissa Excise Act is not illegal. (Sinha and Das. 11) DANDAPANI PATRO v. EMPEROR. 1945 P.W.N. 252 =220 I.C. 80=46 Cr.L.J. 652=A.I.R. 1945 Pat. 293.

-S. 235-Same transaction - Test-Three offences of cheating-Advances on misrepresentation-Subsequent advances on same misrepresenta tion-Same transaction.

Where on the strength of a misrepresentation a person obtains an advance of money and on the strength of the same or original misrepresentation he obtains further advances in accordance with the original agreement between parties, the obtaining of the advances forms part of the same transaction and constitutes one transaction and could be charged together under S. 235, Cr. P. Code. (Mosely, J.) ASTEIL v. ENG. TARE, 1941 Rang. L.R. 559=199. I.C. 27=14 R.R. 237=43. Cr.L.J. 448=A.I.R. 1941 Rang. 337.

-S. 235—"Same transaction"—Test—Visit to brothel to commit theft-Accused also commitCR. P. CODE (1898), Ss. 236, 237 and 239.

ting rape on prostitute-Joint trial on two charges —Legality.

In order that a series of acts may constitute the 'same transaction' within the meaning of S. 235, Cr. P. Code, the essential condition is the continuity of action which involves essentially continuity or proximity of time; in other words the series of acts must be so connected together as to form a single and entire transaction. Clearly, therefore, continuity of action or proximity of time is a very essential element in connecting a series of acts so as to form part of the same transaction. Where the accused visited a brothel for the purpose of committing theft and in the course of committing theft from the prostitute also committed rape upon her both the acts must be held to form part of the same transaction and a joint trial on the two charges is not illegal. (Davis, C. I. and Thadani. J.) FAIZ MAHOMED v. EMPEROR. I.L.R. (1945) Kar. 100.

——S. 235—Scope—Charges under Ss. 395, 148 and 460 in respect of same facts—Charges undee Ss. 148 and 460 based on no acts other than those necessary to be proved under S. 460-Distinct charges and trial-If justified. See CR. P. Cope, Ss 297 AND 298. 7 Cut. L.T. 82.

-S. 235 and Penal Code Ss. 124-A and 153-A-Separate trials in respect of same speech for different offences—Necessity Legality. VISHAMBAR DAYAL TRIPATHI v. EMPEROR. [see Q. D. 1936-40. Vol. I, Col. 3333.] 42 Cr. L. J. 40=A.I.R. 1941 Oudh 33.

-S. 236-Alternative charges under Ss. 302 and 201-Propriety-Accused not free from suspicion of being guilty of main offence—Conviction under S. 201, I. P. Code—Legality, NEBTI MANDAL v. EMPEROR. [see Q. D. 1936-40 Vol. I. Col. 2645.] 22 Pat.L.T. 98.

S. 236—Alternative charges of kidnapping

and abduction—Legality of.
In order that S. 236, Cr. P. Code, may apply, there must be a single act or series of acts of a certain nature and, that nature must raise a doubt about which of several offences the facts, which can be proved, will constitute. That doubt may include a doubt as to what exact facts within the ambit of the series of facts postulated can be proved. At the time the charge is framed the prosecution can never know exactly what facts they can succeed in establishing and they are entitled to say that if they prove certain of the alleged facts, then such and such an offence will be committed but that if they prove other of such facts then it would be another offence, and to charge the offence in the alternative.

Where in a case the prosecution is in doubt as to whether they can prove that a girl, who is the victim of an offence, was under sixteen, they are entitled to charge the accused in the alternative of abduction or kidnapping under S. 362 or 361 of the Penal Code. (Beaumont, C. J., Wadia and Sen, JJ.) EMPEROR v. KASAMAILI MIRZALLI, I.L.R. (1942) Bom. 384-199 I.C. 202-14 R.B. 357=43 Cr. L.J. 529=44 Bom. L.R. 27=A.I.R. 1942 Bom. 71 (F.B.).

-Ss. 236, 237 and 239—Charge of murder— Conviction for receiving stolen property-Lega-

lity.
Where an accused person who is tried on a

CR. P. CODE, (1898), Ss. 236 & 237.

offence for want of evidence, though it is proved that he was in possession of and produced the ornaments which were worn by the deceased. shortly after the murder, he may be convicted of the offence of receiving stolen property under S. 411, I.P. Code, when he fails to give a reasonable explanation of his possession. (Beaumont. C. J. and Sen, J.) EMPEROR 21 BHIKHA GOBER. I.L.R. (1944) Bom. 25-210. I.C. 362=16 R.B. 221=45 Cr.L.J. 221=45 Bom.LR. 884=A.I.R. 1943 Bom, 458,

-Ss. 236 and 237—Charae under S. 477-A I.P. Code-Conviction under S. 477-A, read with S. 34, I.P. Code-Legality.

A person who is charged alone with having committed the whole offence under S. 477-A. T.P. Code, may be convicted, though S. 34, I.P. Code, is not specifically mentioned, with having committed one of the acts which make up the offence committed in furtherance of the common intention of himself and his co-actors. (Agarwala and Brough, JJ ) SATYANARAVANA v. EMPEROR. 22 Pat. 681=212 T.C. 298=10 BR. 494=16 R.P. 313= 45 Cr.L.J. 624=25 P.L.T. 57=A.I.R. 1944 Pat. 67.

-Ss. 236 and 237—Conviction reithout charge-Legality.

Under Ss. 236 and 237, Cr.P. Code, a man may be convicted of an offence, though there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. (Agarwala and Brough, JI) SATVA-NARAYANA n. EMPEROR. 22 Pat. 681-212 I C. 298-10 R R. 494-16 R P. 313-45 Cr.L.J. 624 =25 P.LT. 57=A.I.R 1944 Pat 67.

S.236 - Same transaction-Statement under S. 164. Cr. P. Code and contradictory statement at trial-Charge of perjury in the alternative-If justified. Euppror v. Sultansha Sidisha. [see Q. D. 1936-40, Vol. I. Col. 2645.] 13 R.B. 187= justified. 191 I.C. 336=42 Cr.L.J. 155.

-Ss. 236 and 237—Scope and effect.

Ss. 236 and 237 Cr.P.Code, which must be read together make it clear that when there is no difficulty about the facts and it is alleged that the accused had done a single act or series of acts but they are of such a nature that it is doubtful which of several offences the accused has committed on those facts, and he is charged with having committed one of such offences, he may be convicted of a different offence. He may be convicted of the offence which he is shown to have committed, although he was not charged with it. (Malik, J.) MARKHAN v. EMPEROR. I.L. R. (1945) All. 558=220 I.C. 432=1945 A.L.W. 248=1945 A.W.R. (H.C.) 156=1945 O.W.N. (H.C.) 227=1945 A.Cr.C. 122=A.I.R. 1945 All. 81.

-Ss. 237 and 238-Applicability-Charge and conviction under S. 391, J. P. C.—Alteration in appeal to conviction under Ss. 147 and 148, I. P.C.—Legality See CR. P. CODE, S. 423 (1) (b). 1945 P.W.N. 284.

-Ss. 237 and 238-Charge of murder of A -Conviction for attempt to murder B-Legality. A person who is charged under S. 302, I. P. Code, with murder of A. cannot be convicted under S. 307, I. P. Code, for attempting to murder B. (Young, C.J. and Blacker, J.) WAR-

CR. P. CODE, (1898), S 238.

YAM SINGH v. CROWN. I.L.R. (1941) Lah. 423 =195 I.C. 58=14 R.L. 28=42 Cr.L.J. 660=43 P L.R. 159=A.I R. 1941 Lab. 214.

Conviction for abetment—Permissibility.

It is permissible to convict a person charged with a substantive offence for abetment thereof. if the facts justify such a conviction. This is of course subject to the principle that if evidence adduced in support of the charge for the substantive offence does not give notice to the accused of all the facts which constitute abetment, he cannot he convicted of abetment. (Pollock and Robde, 11.) PROVINCIAL GOVERNMENT, C. P. AND PERER C. GOMALI BADRI. I.L.R. (1944) Nag. 589-215 I.C. 265-46 Cr.L. I. 80-17 R.N. 53-1944 N.L. J. 174=A.I.R. 1944 Nag. 192.

-S. 238-Applicability-Conditions-Major and minor offences.

Under S. 238 Cr. P. Code, when an accused is charged with a major offence he can be convicted of a minor offence. But the major and the minor offences must be cognate offences which have the main ingredients in common, and a man charged with one offence which is entirely of a different type from the offence which he is proved to have committed, cannot in the absence of a proper charge be convicted of that offence, merely on the ground that the facts proved constitute a minor offence. For example, a man charged with an offence of murder cannot be convicted for forgery, or misappropriation of funds, or such offences which do not constitute offences against person. (Malik. I.) MAKKHAN n. EMPPROR. I. L. R. (1945) All. 558=220 I.C. 432=1945 AL. W. 248=1945 A.W.R (H.C.) 156=1945 O.W N. (H.C.) 227=1945 A.Cr.C. 122=A I.R. 1945 All.

-S. 238—Charge of causing hurt to police officer -Conviction for obstructing the police officer in the course of his duties-Legality.

Obstructing a police officer in the course of his duties is a lesser offence contained in the more serious offence of causing hurt to such officer and hence a conviction for the lesser offence is legal. (Davies) SHAM LAL v. EMPEROR. 1944 A.M.L.J. 23.

-S. 238-Charge under S. 302/149 I.P. Code-Verdict of guilty under S. 326/149 or 324/149-If can be arcepted.

A charge under S. 302/149, T. P. Code, includes the minor charge under S. 326/149 or S. 324/149. In a trial on a charge under S. 302/149, the Indge can accept a verdict of guilty under S. 326/149 or 324/149. (Rowland and Manchar I.all, 17.) JANAK SINGH v. EMPEROR. 21 Pat 138=197 I.C. 504
=8 B.R 237=43 Cr.L.I 205=14 R.P. 334=23
P.L.T. 707=1942 P.W.N. 119=A.I.R. 1942 Pat. 446.

-S. 238—Charge under S. 395, I. P. Code—Conviction under S. 411, I. P. Code-Iegality.

Under S. 238, Cr. P. Code, a person charged with an offence under S. 395, I. P. Code, can be convicted of the minor offence under S. 411, I. P. Code. (Niyogi and Hemeon, //.) BALIRAM TIKARAM v. EMPEROR. I.L.R. (1945) Nag. 151=218 I.C. 1294 = 46 Cr.L.J. 448=18 R.N. 10=1945 N.L.J. 17=A.I.R. 1948 N.M. 1945 Nag. 1.

OR. P. CODE (1833), S. 233.

S. 239—Applicability—Preliminary inquiry by committing Magistrate—Single inquiry and commitment in respect of several accused not triable lointly—Legality.

S. 239, Cr. P. Code, does not apply to enquiries held by the Magistrates in cases triable by the Court of Session. There is nothing to prevent the committing Magistrate from holding one single inquiry against several accused although they could not be tried jointly consistently with S. 239, Cr. P. Code. Though one order of commitment may be made in respect of several accused, it is competent to the Sessions or trial Court to order separate trials in order to give effect to the provisions of the Code. (Chagla, J.) EMPEROR v. HUSEI-NALLI VILAYATALLI. I.L.R. 1943 Bom. 554=201 I.C. 735=15 R.B. 122=43 Cr.L.J. 773=44 Bom. L.R. 433=A.I.R. 1942 Bom. 212.

S. 239—Applicability—Requisites. BHAGOLE-LAL v. EMPEROR. [see Q. D. 1950'40 Vol. I, Col. 2648.] I.L.R. (1942) Nag. 208.

S. 239 (c)—Joinder of charges—Offences of the same kind—Charges under Ss. 380 and 41i—Legality. See CR. P. Code, Ss. 234 and 239, (1942) 2 M.L.J. 686.

—S. 239—Joinder of charges—Roung to secure release of arrested person—Theth by one rioter—Joinder of charges of theth with other charges—Legality.

In the course of a rioting the object of which was to secure the release of a person who had been arrested by a police constable, one of the rioters committed theft of a purse.

Held, that though theft was not one of the common objects of the unlawful assembly, it certainly was committed during the course of the transaction in which all the other offences were committed, and so the charge of theft could properly be joined with the other charges of rioting and other offences. (Horrentl., J.) MAHOMED MEERA SAHIB v. EMPEROR. 205 I.C. 158=15 R.M. 839=44 Cr.L.J. 272=1942 M.W.N. 723=A.I.R 1943 Mad. 207=(1942) 2 M.L.J. 710.

S. 239 (d) - Joinder of charges under Ss. 211, 323 and 342, I. P. Code-Legality.

Where the offence of making a false charge, of wrongfully confining and of causing injuries to a person are committed in the course of the same transaction a joint trial in respect of the offences under Ss. 211, 323 and 342, I. P. Code, is quite legal. Such a joinder of charges is clearly permitted by S. 239 (4), Cr. P. Code. (Ghulam Hasan, J.) BALAK RAM v. EMPEROR. 196 I.C. 262=1941 O.W.N, 1072=1941 A.Cr.C. 224=1941 O.L.R. 665=14 R.O. 161 = 1941 A.W.R. (C.C.) 298=42 Cr.L.J. 833=1941 O.A. 776=A.I.R. 1942 Oudh 100.

S. 239—Joinder of charges under Ss. 302 and 311 with charges under S. 330, I. P. Code—When justified—Sameness of transaction—Relevant point of time. PARMANAND v. EMPEROR, [see Q. D. 1936-'40 Vol. I, Col. 2658.] I.L.R. (1941) Nag. 110=42 Cr.L. J. 17.

S. 239—Joinder of charges — Validity—If dependent on accusation or on result of trial.

The validity of joinder of charges must be judged on the basis of what appears on the facts of the accusation and is not to be made dependent on the eventual result of the trial. (Niyogi and Hemeon. J.) BALIRAM TIKARAM v. EMPEROR. I.L.R. (1945) Nag. 151=218 I.C. 294=46 Cr.L.J. 448=18 R.N. 10=1945 N.L.J. 17=A·I.R. 1945 Nag. 1.

Ss. 239 and 537 - Joint trial Allegation of conspiracy, if necessary - Identity of purpose on the

CR. P. CODE (1898), S. 239.

part of the accused—Sufficiency—Absence of prejudice—Curability under S. 537.

A conspiracy is not necessary to be specifically alleged in order to permit of a joint trial. It is enough if the allegations made by the complainant indicate an identity of purpose on the part of several accused person. Where the trend of complaint in case of defamation was to show that the accused were acting with one mind in spreading false informations against the wife of the complainant, the accused can be tried jointly. In the absence of prejudice the irregularity, if any, is technical and the case would be covered by S. 537. (Nivogi, J.) GAZIDIN v. KADEDIN. 1942 N.L.J. 336.

——Ss. 239 (b) and 222 (2)—Joint trial—Criminal oreach of trust—Charge mentioning period and different items cetalcated—Persons abetting offender in detalcating different items—It can be jointly tried. See CR. P. CODE, Ss. 222 (2) and 239. 1.L.R. (1944) 1 Cal. 109.

S. 239—Joint trial in respect of large number of counts—Propriety. PATEYYA, In re, [see Q. D. 1936—'40 Voi. 1, Coi. 2055.] 193 L.C. 375=13 R.M. 687=42 Cr.L.J. 414=A.L.R. 1941 Mad. 339.

S. 239—foint trial—Lightey—Manager and accountant—Charge under S. 408, I.P. Code and charges under S. 408/109. I.P. Code.

Where the manager and accountant are said to have jointly misappropriated certain sums of money and a conmunity of design and object is suggested they could both be charged and tried jointly in respect of offences under S. 408 and S. 408/109 I. P. Code. This is permissible under Cis. (a) and (b) of S. 239, Cr. P. Code. (Thomas. C. J.) WAZIR SINGH v. EMPEROR. 17 Luck. 353=197 I.C. 255=14 K.O. 306=43 Cr.L.J. 153=1941 A.W.K. (C.C.) 343=1941 A.Cr.C. 257=1941 O.W.N. 1208=1941 O.A. 918=A.I.K. 1942 Oudn 89.

S. 239 — Joint trial—Legality of—One of accused charged atternatively under S. 236—Alternative charge not including element of the ft, etc.

S. 239 (e), Cr. P. Code, permits the joint trial of an accused person who is charged with an offence in the alternative which is permissible under S. 236, Cr. P. Code, along with another person, although the alternative charge does not include the element of theft, etc. (Young C. J. and Monroe, J.) BANSHI RAM v. EMPEROR. 209 I.C. 117=45 Cr.L.J. 80=16 R.R. 145=45 P.L.R. 235=A.I.R. 1943 Lah. 220.

S. 239 - Junt trial of persons for periury - Legality.

A joint trial of persons charged with having given false evidence for an accused in a case is illegal. The mere fact that they had one common object, i.e. of getting the accused acquitted is insofficient to sustain a charge of conspiracy against them. (Abdur Rahman J.) AGHA ALI AHMAD v. EMPEROR. I.L.R. (1943) Lah. 760=211 I.C. 299=45 Cr.L.J. 371=16 R.L. 227=A.I.R. 1944 Lah. 54.

----S. 239—Joint trial of two sets of accused—Absence of common object or intention—Effect—Conviction—If to be set aside—Presumption of prejudice.

Two sets of accused cut trees in different parts of a forest in the possession of the complainant. Separate charges were framed against each of the two sets of accused, but they were tried jointly at one trial and convicted. It was not found that there was any intention or object common to the two sets of persons cutting trees in the forest.

OB. P. CODE (1898), S. 259.

Held, in revision, that there was misjoinder of parties; and though it could not be said that by such misjoinder, by itself, was a sufficient ground for setting aside the conviction, the Court should ordinarily presume prejudice until it was quite certain that there could have been none. There was always a possibility, when there was a misjoinder of accused, that the Court would be unconsciously prejudiced by evidence which would be irrelevant if the accused were tried separately and therefore the conviction should be set aside if the Court was not quite sure that there was no prejudice, and separate trials should be ordered. (Horwill, J.) MOONGAN v. MIR KOSHAN ALI SAHIB. I.L.R. (1942) Mad. 322=197 I.C. 588=14 R.M. 374=43 Cr.L.J. 215 =54 L.W. 387 (2)=1941 M.W.N. 869=A.I.R 1941 Mad. 910=(1941) 2 M.L.J. 534.

S. 239-Joint trial of several persons for different offences.

The principle contained in S. 235 (1) Cr. P. Code, which applies to the trial of a single person is extended by S. 239 (d) Cr. P. Code, to the trial of several persons jointly. Just as one person can under S. 235 (1) be tried for several distinct offences if they are committed in one series of acts so connected together as to form the same transaction, under S. 239 (d), several persons can be tried for different offences provided these different offences are committed in the course of the same transaction. (Lobo and Weston, JJ.) MOUJALI v. EMPEROR. 195 I.C. 267=14 R.S. 20-42 Cr. L.J. 715=A.I.R. 1941 Sind 121.

S. 239—Joint trial—One accused taking girl to room of another—Kape of girl by latter in room—Former escorting girl back to her house and cheating her of ornaments on way—Joint trial for rage and cheating—Legality.

Where a person takes a girl to the room of another who there commits rape on the girl, and the former then escorts the girl back from the room and to her house and on the way he cheats her of her ornaments, it is impossible to separate the two offences of rape and cheating as they are inextricably mixed up together. The two charges can in such a case be tried together jointly at one trial under S. 239 (a), Cr. P. Code. (Beaumont, C.J., Wadia and Wassoodew, JJ.) EMPEROR v. MAHADEO TATYA. 200 I.C. 261-43 Cr. L.J. 621-15 R.B. 1-44 Bom. L.R. 216-A.I.R. 1942 Bom. 121 (F.B.)

——S. 239—Joint trial—One offence complete before another was committed — Joint trial—Permissibility.

As long as the offences charged are committed in the course of the same transaction it is immaterial that one offence was complete before the other was committed. (Bartley and Lodge, JJ.) KAMALA PRASAD v. EMPEROR. 195 I.C. 12=14 R.C. 37=42 Cr. L.J. 649=A.I.R. 1941 Cal. 315.

----S. 239-Joint trial--When justified.

Under S. 239 (d), Cr. P. Code, joint trial is justified not by the fact that the offences were committed in the course of the same transactions but by the fact that an accusation is made in good faith that the offences were so committed. It the accusation is made in good faith, the fact that it su bequently transpired that the offences were not committed in the course of the same transaction does not render the trial illegal. The corollary to this proposition is that if no

OR. P. CODE (1898), S. 242.

such accusation is made explicitly or implicitly—the mere tact that it subsequently appears that the offences were committed in the course of the same transaction, will not render legal the joint trial. (Lodge and Akrum, JJ.) HUGH FRANCIS BELLGARD v. EMPEROR. I.L.K. (1941) 2 Cal. 319=198. I.C. 499=14 R.C. 471=43 Cr.L.J. 389=45 C.W.N. 839=A.I.R. 1941 Cal. 707.

Ss. 239, 226 and 2/1—Persons accused of same offence commuted to Sessions by separate committed order—Joint trial—Legality.

When some persons accused or an offence are committed to take their trial before a Sessions Court and subsequently some absconding accused charged with having committed the same offence in the course of the same transaction are committed to take their trial before a Sessions Court. a joint trial of the two sets of accused persons 80 separately committed is not illegal and without jurisdiction. This is subject to the proviso that the joint trial has caused no prejudice to the accused and by that both sets of accused persons separately committed were made aware by the committing Magistrate in each case that mose committed had committed the same offence jointly with the others and the evidence recorded in each enquiry discloses that the same offence was committed jointly by them all. (Harries, C. J., Ram Lat and Mahajan, JJ.) SARDARA v. EMPEROR. 222 I.C. 224=A.I.R. 1945 Lah. 286 (F.B).

S. 239—"Same transaction"—Test to decide—Dacoity and murder—Joint trial—Legality.

The determining factor in deciding whether different offences committed by different persons all form part of the "same transaction" is the presence of concert and continuity of action. It several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy, these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it. The accusation made by the prosecution and not the resultof the prosecution has to be looked to. Persons who would be committing murder when dacoits are effecting their escape with the stolen property in order to overcome any resistance in carrying away the stolen property, can be tried along with those who commit the dacoity. It is not the distance nor the proximity of time which is so essential as the continuity of action of purpose. (Meredith and Imam JJ.) HIRDAY v. EMPEROR. 24 Pat. 501=A.I.R, 1946 Pat. 40.

Ss. 242 and 537—Non-compliance with section —Irregularity, when curable.

The primary object of the proceeding prescribed by S. 242, Cr. P. Code, is to determine whether the accused pleads guilty to the charge or demands to be tried. Where the facts of the case are fully set out by the prosecution and the accused is specifically asked to explain them, the failure o comply with the provisions of this section amounts merely to an irregularity which can be cured under S. 537, Cr. P. C. (Almond, J.C.) Dost Mohammad v. Haripur Eazara Municipality. 1931.C. 365=13 R. Pesh. 60=42 Cr.L. J. 420=A.I.R. 1941 Pesh. 9.

S. 242—Scope of Failure to state particulars of offence—Evidence not directed to such particulars—
Effect on trial—Conviction—Sustainability.

CE, P. CODE (1898), S. 244.

S. 242, Cr. P. Code, only dispenses with a formal charge in a summons case, but it does not dispense with the statement of the particulars of the offence for which the accused is to be dealt with. When the particulars of the offence are not so stated, and the evidence too is not directed to any such particulars, the trial is entirely defective and a conviction in such a trial cannot stand. (Dhavie, J.) RAM SAKAL SINGH v. EMPEROR. 197 I.C. 359=8 B.K. 192=43 Cr.L.J. 100=14 R.P. 319=1941 P.W.N. 677=A.I.R. 1942 Pat. 130.

S. 244, Cr P. Code, does not enable an accused person to wait till the case for the prosecution is closed and then to apply for summoning his evidence, S. 244 is intended to supply a procedure for the expeditious trial of a summons case. Under S. 244 (2) a magistrate has discretion to allow an application for summoning evidence, but an application to that effect must be made at the appropriate time and should not be delayed so as to deprive the magistrate of his discretion to grant it. If the application is delayed, the magistrate would be justified in refusing it. (Duvis, C.J. and Thadani, J.) DIECHAND v. EMPEROR. I.L.R. (1945) Kar. 107=A.I.R. 1945 Sind, 231.

S. 244 (1)—'Hearing'—Meaning of. See Cr. P. Code, S. 208 (1). 1945 N.L.J. 122.

S. 245—Applicability—Proceeding under S. 198, Binar and Orissa Municipal Act. See Bihar and Orissa Municipal Act, S. 198, 22 Pat. L.T. 510.

S. 247 and Penai Code, S. 408—Acquittal of accusted charged under S. 408 1. P. C., on complainant's default to appear—Legality—Magistrate's auty in such cases.

A magistrate is not entitled to acquit the accused of a non-compoundable and cognizable offence of criminal breach of trust under 5. 408, 1. P. Code, after framing a charge merely because the complainant did not appear to prosecute the charge. In the trial of warrant cases the burden is upon him to discover from the complainant or otherwise what evidence is available and to see that the evidence is produced and that a proper enquiry is made by him. If the case is compoundable and non-cognizable, it is open to a magistrate to dismiss the complaint if the complainant does not appear before a charge is framed, but once the charge has been framed or if the case is noncompoundable and cognizable, it is the duty of the magistrate in the interests of the general public to see whether an offence has been committed and to punish it if he thinks that the accused is guilty. (Allsop, J.) CHIRANJI LAL v. RAM SWARUP. I.L.K. (1943) All. 31=204 I.C. 268= 44 Cr.L.J. 190=15 R.A. 336=1942 A.L.W. 575 =1942 A.W.R. (H.C.) 336 (1)=1942 A.L.J. 577 =1942 A.Cr.C. 203=A.1.K. 1943 All. 9.

Ss. 247 and 259—Applicability—Charge of summons case and charge of warrant case arising from same transaction—Trial of both as warrant cases—Absence of complainant—Discharge of accused—Effect of—If bar to fresh complaint.

CR. P. CODE (1898), S. 247.

KANJI VIJPAL v. PANDURANG KESHAV. [566 Q. D. 1930-40 Vol. I, Col. 3333.] 191 1.C. 397=13 R.B. 188=42 Cr.L.J. 153.

——S. 247—Applicability—Estate agent filing complaint on behalf of his master and subsequently leaving his services—Master, if could be substituted as complainant.

Where an estate agent files a complaint on behalf of his master, but no power of attorney is filed, and subsequently leaves his master's services, the latter cannot be substituted as the complainant, with the result that S. 247, Cr. F. Code, would apply, (Madeley, J.) Tej Singh v. Kaltoo. 220 l.C. 493=1945 A.L.W. (C.C.) 238=1945 O.W.N. 253=1945 A.Cr.C. 129=1945 A.W. R. (C.C.) 169=1945 O.A. (C.C.) 169.

S. 247—Applicability—Warrant case—Complaint disclosing offence under S. 427, 1. P. Code —Swron statement consistent with complain— Magistrate unable to judge extent of damage caused but taking case under S. 420, 1. P. Code— Adoption of summons procedure—Propriety— Complainant absent—Acquittat of accused—Legality of.

Petitioner filed a complaint against several persons disclosing an offence punishable under S. 427, I. P. Code. The Magistrate recorded his sworn statement. There was nothing in it at variance with the allegations made in the complaint. The Magistrate however, without giving any reasons ordered the complaint to be taken on file under S. 420, I. P. Code, although he was not in a position to judge the extent of the damage caused (which is the only distinction between an offence punishable under S. 420 and one under S. 427), when the accused came before the Court the complainant was absent; and so the Magistrate passed an order under S. 247, Cr. P. Code, acquitting the accused.

Hetd, that the Magistrate in issuing processes and mentioning S. 420, I. P. Code, acted under a misapprehension, and acted without jurisdiction in acquiting the accused under S. 247, Cr. P. Code, which did not apply to warrant cases, (Horwill, J.) Arunachala Reddy v. Sellamuthu Goundan. 201 I.C. 451=15 R.M. 390=1942 M.W.N. 373=55 L.W. 372=43 Cr. J. 760=A.I.R. 1942 Mad. 594=(1942) 1 M.L.J. 594.

proceeding with case—Legality of procedure.

Under S. 247, Cr. P. Code, if the complainant is not present in Court on the date fixed for the hearing of the case the only course which is open to the Magistrate is to acquit the accused or to adjourn the hearing of the case. If the Magistrate proceeds with the hearing and convicts the accused, the procedure is illegal and the conviction is liable to be quashed. (Fazi Ali, I.) Sudhir Kumar Neogi v. Emperor. 23 Pat.L.T. 291—43 Cr.L. J. 27=8 B.R. 33—196 I.C. 548—14 R.P. 214—A.I.R. 1942 Pat. 46.

S. 247—Order of acquitial—Subsequent revival of case—Legality.

Where a Magistrate acquitted the accused under S, 247, Cr. P. Code, owing to the absence

OR. P. CODE (1893), S. 247 & 259

of the complainant on a day fixed for hearing of the case and his successor dismissed an application for its revival on the ground that he had no power to set aside the order of acquittal, the case cannot be revived by another Magistrate on a second application for revival on the ground that the order of acquittal was passed without jurisdiction and therefore a nullity. (Lodge and Roxburgh, J.) NATIONAL IRON AND STEEL Co., LTD. v. ELECTRIC INSPECTOR, BENGAL. I.L.R. (1942) 2 Cal. 403=203 I.C. 256=44 Cr.L.J. 11=15 R.C. 441=46 C.W.N. 847=A.I.R. 1943 Cal. 29.

Ss. 247 and 259—Relative scope and applicability. See Penal Code, S. 500 and Cr. P. Code, Ss. 198, 247, and 259. 1941 Rang.L.R. 224.

-S. 247-Scope and meaning of.

The implication of the words of S. 247, Cr. P. Code, seems to be that in the ordinary course acquittal is compulsory, but if the Magistrate has some special reason for making an exception to the rule, he can do so. (Madeley, J.) TEJ SINGH v. KALOO. 220 I.C. 493=1945 A.L.W. (C.C.) 238=1945 O.W.N. 253=1945 A.Cr.C. 129=1945 A.W.R. (C.C.) 169=1945 O.A. (C.C.) 169.

Ss. 247 and 403—Scope—Summons case— Trial—When begins—Adjourned heuring—Absence of complainani—Acquittal—Effect—Fresh complaint—Bay of.

The trial in a summons case commences with the issue of notice to the accused, and if subsequently at an adjourned hearing, the complainant is absent and the accused is acquitted, the accused is both tried and acquitted for purposes of S. 403, Cr. P. Code. S- 403 would operate as a bar to a further trial on the same charge. A successor of the Magistrate acquitting the accused has no jurisdiction to entertain a second complaint, as that in effect would be to revise or review the order of his predecessor. (Horwill, J.) KUTUMBAYYA v. LAKSHMINARASIMHA RAO. 204. I.C. 273=15 R.M. 735=44 Cr.L.J. 176=55 L.W. 525=1942 M.W.N. 601=A.I.R. 1943 Mad. 6= (1942). 2 M.L.J. 221.

Ss. 250 and 423 (1)(d)—Appellate or revisional Court—If can direct compensation to be paid on acquittal—Such order if incidental to order of acquittal. King v. Maung Khin Maung [see Q. D. 1936-'40 Vol. 1. Col. 2667.] 191 I.C. 694—13 R.R. 155—42 Cr. L.J. 218.

S. 250—Applicability—False and frivolous or vexatious—Meaning.

On a complaint under S. 426 and S. 447, I. P. Code, in respect of cutting of the leaves of trees, it was found that the accused were entitled to the leaves, the complaint was therefore dismissed and compensation was awarded under S. 250, Cr. P. Code.

Held, that the finding that the accused were entitled to the leaves did not make the complaint false and frivolous or vexatious, and the order of compensation was therefore unsustainable. Lakshmana Rao, J.) Venkayya v. Seethayya. 197 I.C. 333=14 R.M. 362=43. Cr.L.J. 156=1941 M.W.N. 669 (2)=A.I.R. 1941 Mad. 884.

CR. P. CODE (1898), S. 250,

S. 250 Cr. P. Code, clearly applies to trial of warrant cases as well as summons cases. (Almond, J. C.) GORAL CHAND  $\sigma$ . SAID ALI. 193 I.C. 468=13 R. Pesh. 59=42 Cr.L. J. 423=A.I.R. 1941 Pesh. 24.

S. 250—Charge by police after investigation—Order of compensation—Suscainability.

In a case charg d by the police after investigation, an order awarding compensation under S. 250, Cr. P. Code, cannot be upheld. (Lakshmana Rao, J.) RAYUDU BAPIAH v. JAKARAYYA. 53 L.W. 63 = 1941 M.W.N. 61.

S. 250—Compensation where falsity of complaint is doubtful, if justified,

Where there are cross cases and the final order in the connected cases shows that there is a clear doubt about the facts an order under S. 250, Cr. P. Code, should not be passed. Such an order could be passed only who there is no doubt about the falsity of the complaint (Bennett, J.) RAIS AHMAD v. EMPEROR. 209 I.C. 319=16 R.O. 125=1943 A.W.R. (C.C.) 148=45 Cr. L.J. 137 = 1943 O.A. (C.C.) 280=1943 A.Cr.C. 131=1943 O.W.N. 431=A.1.R. 1944 Oudh. 25.

S. 250—False complaint—Finding as to—Necessity for. DAROPTI v. PARAS RAM. [see Q. D. 193640 Vol. I, Col. 3334.] 192 I.C. 295—13 R.L. 375—42 Cr.L.J. 266—A.I.R. 1941 Lah. 19.

—S. 250—False compaint in regari to two offensione triabic by a magistrate and the other by the Court of sessions—Competency of magistrate to award compensation.

Where a complaint in regard to two offences, one triable by a magistrate and the other by the court of sessions is found to be false, it is competent to the magistrate to award compensation under S. 250, Cr. P. Code, in respect of the offence triable by him. (Bennett, J.) MOOLCHAND v. EMPEROR. 20 Luck. 48=213 I.C. 415=17 R.O. 20=45 Cr.L. J. 665=1944 A.W.R. (C.C.) 125=1944 A.Cr.C. 33=1944 A.L.W 252=1944 O.A. (C.C.) 126=1944 O.M. (126)=1944 O.W.N. 179=A.I.R. 1944 Oudh 272.

-----S. 250 -Order by Magistrate who has not heard evidence-Legality.

The words 'the Magistrate by whom the case is heard in S. 250, Cr.P. Code, mean the Magistrate by whom the case is decided'. A magistrate deciding the case is not therefore, disqualified from passing an order under the section by reason of the fact that he has not actually heard the evidence. (Blacker, J.) TEJA SINGH. ILARNAM SINGH. 210 I.C. 401=16 R.L. 173=45 Cr.L.J. 265=45 P.L.R. 345=A.I.R. 1944 Lah. 10.

S. 250—Order of compensation—Sustainability
-Conditions—Duty of Magistrate.

S. 250, Cr. P. Code, requires that the should, if he considers a case to be false, frivolous or vexatious, call upon the complainant to show cause why he should not pay compensation. It is necessary under S. 250 (2) that the Magistrate should at least indicate in his judgment that he had asked the complainant the requisite questions and he should set out the explanation which the complainant gave and say whether he thought the explanation satisfactory, and if so, why. If the Magistrate has not completed with these requirements, his order for payment of compensation cannot be sustained. Horwitt, J.) NAMBERUMAL NAIDU v. MUTHU KALATHI MUDALI. 198 I.C. 258=14 R.M. 431=1942 M.W.N. 426 (2)=55 L.W. 756=43 Cr.L.J. 336=A.I.R. 1942 Mad. 241=(1941) 2 M.L.).

CR. P. CODE (1898), S. 252.

S. 252—Applicability—Case started on police challan. HANSRAJ v. EMPEROR. [See Q.D. 1936-'40, Vol. I, Col. 2668.] 191 I.C. 636 = 13 R.N. 212=42 Cr.L.J. 208=I.L.R. (1942) Nag. 333.

S. 252 (1)—'Hearing'—Meaning of. See Cr. P. Code, S. 208 (1). 1945 N.L.J. 122. ——Ss. 252 (2) and 256 (1)—Complainant examining some of witnesses in list and closing case—Right to examine rest after cross-examination of witnesses after charge—Right to examine also witnesses not citéd in list.

Under S. 252 (2), Cr. P. Code, the power of the Magistrate may be exercised from time to time. Where the complainant examined some only of the witnesses cited by him in his list and closed his case it is open to him to apply for the examination of the rest after the witnesses already examined are further cross-examined by the accused after charge. The position is, however, otherwise in respect of new witnesses not cited in the list. They cannot be said to be remaining witnesses under S. 256 (1), Cr. P. Code, and the complainant cannot be allowed to examine them. (Hemeon, J.) ABDUL RAZAK v. HAJI HUSSAIN. 1945 N.L.J. 380=A.I.R. 1945 Nag. 286.

The provisions of S. 252 (2), Cr. P. C., requiring the Magistrate to ascertain the names of all the persons who may be able to give evidence for the prosecution, are mandatory. In cases where the offence is taken cognizance of on a police report, the police in submitting their report under S. 173 of the Code are required by the form which is prescribed in the Punjab province for that report to give a list of all the the witnesses for the prosecution. The mere existence of this list, however, does not relieve the Magistrate of the duty to ascertain the names of the witnesses under S. 252 (2) and he is bound to question the complainant or the officer in charge of the prosecution about the matter. Where before the charge is framed all the witnesses mentioned in the list have been examined and the complainant or the officer in charge of the prosecution makes a statement that he closes his case and has no further witnesses to examine, the Magistrate may treat such statement as tantamount to a statement that there are no other persons acquainted with the facts of the case who may be able to give evidence for the prosecution, and he need not specifically question the complainant or the officer in charge of the prosecution on the matter. (Din Mahomed, Munir and Teja Singh, JJ.) HEMAN RAM v. EMPEROR. 47 P.L.R. 321=A.I.R. 1945 Lah. 201 (F.B.).

——S. 252 (2)—Powers under—If can be exercised only once. HANSRAJ v. EMPEROR. [Q.D. 1936-'40, Vol. I, Col. 2669.] 191 I.C. 636=13 R.N. 212=42 Cr.L.J. 208=I.L.R. (1942) Nag. 333.

S. 253 (1)—Date of discharge—Entry in Magistrate's diary discharging one of the accused. See LIMITATION ACT. ART. 23. (1945) 1 M.L.J. 287.

CR. P. CODE (1898), S. 256.

-S. 253 (2)—Applicability—Test to determine whether charge is "groundless"—Duty of Magistrate—If bound to examine all witness named by complainant.

The application of S. 253 (2), Cr. P. Code, depends upon the evidence already recorded where the Magistrate takes action under that section; the material word is "groundless" and each case must be taken on its own facts. "Groundless" means that there are no grounds for the charge. It is not always necessary to call all the witnesses named by the complainant; but the Magistrate should not come to a conclusion that the charge is groundless unless he has at least ascertained from the complainant what is the nature of the evidence which the other witnesses are going to give. He is to arrive at his conclusion judicially and not capriciously, and no general rule can be laid down as to the amount of evidence to be taken to enable the Magistrate to say that a charge is groundless. (Davis, C.J.) MAHOMED IBRAHIM v. NAUGHTON. I.L.R. (1941) Kar. 345=196 I.C. 755=A.I.R. 1941 Sind 198=43 Cr.L. J. 73=14 R.S. 80.

----S. 253 (2)—Order of discharge—When

may be made.
S. 253 (2), Cr. P. Code, empowers a Magistrate to discharge an accused person only if for reasons to be recorded by such Magistrate he considers the charge to be groundless. The Magistrate has no jurisdiction to pass an order discharging an accused without applying his mind to the evidence before him on the ground that the whereabouts of the accused are not known and it is useless to drag on the case indefinitely. (Lodge and Roxburgh, JJ.) WAHED BUX WAESHI V. FAKHARADDIN PIRACHA. 199 I.C. 435=43 Cr. L. J. 491=14 R. C. 597=A. I.R. 1942 Cal. 428 (2).

Ss. 254 and 537—Committal in disregard of provisions of S. 254—If can affect trial and conviction by Sessions Court—Curability under S. 537.

After framing charges under Ss. 323 and 147 of I. P. Code, the Magistrate without expressing any opinion that the accused could not be adequately punished by him, committed the accused to stand their trial in the Sessions Court. The trial was held by the latter Court and the accused convicted. On a question as to the

legality of the conviction,

Held, that though the commitment might be bad in law and might stand in the way of the Sessions Court taking "cognizance" of the case, it did not affect the jurisdiction of that Court to try the case and that there was no such irregularity as rendered that Court, a Court incompetent in respect of jurisdiction to try that case. It is a case to which S. 537, Cr. P. Code, applied. (Braund, J.) BASDEO v. EMPEROR. I.L.R. (1945) A. 422=1945 A.Cr. C. 84=1945 A.W. R. (H.C.) 142=(1945) A.L.W. 155=1945 O.W.N. (H.C.) 148=A.I.R. 1945 A. 340.

——S. 256 (1)—"Any remaining witnesses— Meaning of—Right of prosecution to examine new witnesses.

The words in S. 256 (1), Cr. P. C., "the evidence of any remaining witnesses for the

## CR. P. CODE (1898), S. 256.

prosecution shall next be taken", do not confer on the prosecution an absolute and unqualified right of examining as many witnesses as it likes after the charge is framed. These words refer to cases where before the stage contemplated by that section the names of the witnesses have been ascertained and only some of those witnesses have been examined. The Magistrate is given the discretion to frame the charge after examining only some of the witnesses mentioned by the prosecution or ascertained by him under S. 252, and where he does so, the prosecution is entitled to examine the remaining witnesses for the prosecution after the witnesses for the prosecution already examined have been further crossexamined under S. 256. But if the Magistrate has examined all the witnesses mentioned by the prosecution and has then framed a charge, no fresh witnesses can be examined by the prose-cution as of right, and the only power left in the Magistrate to examine other witnesses for the prosecution is that given by S. 540, Cr. P. C., under which he has a discretion in the matter. (Din Mahomed, Munir and Teja Singh, Jl.) HEMAN RAM v. EMPEROR. 47 P.L.R. 321= A.I.R. 1945 Lah. 201 (F.B.).

S. 256—'Any remaining witnesses'—
Meaning. Hansraj v. Emperor. [See Q.D. 1936-'40, Vol. I, Col. 2672.] 191 I.C. 636=13
R.N. 212=42 Cr.L.J. 208=I.L.R. (1942)
Nag. 333.

-S. 256—Construction—"Remaining witnesses"-Meaning of-Right of Crown to exa-

mine new witnesses.

The words "remaining witnesses" in S. 256, Cr. P. Code, cannot be construed in the limited sense of "those witnesses who were in the list of witnesses who could have been examined by the prosecution in the first instance, but were not actually examined under S. 252." S. 256 clearly enables the Crown to examine witnesses who had not been examined, or whose names had not been disclosed, before the charge was 'framed. If the accused desires time to enable him to cross-examine witnesses whose names had not been disclosed, it is open to the Magistrate to give time, just as it is open to the Magistrate to give time to the prosecution to enable them to ascertain the antecedents of the witnesses produced by the accused at the trial. (Beaumont, C.J. and Sen, J.) EMPEROR v. NAGINDAS NARATTAMDAS. I.L.R. (1942) Bom. 540=201 I.C. 503=43 Cr.L.J. 761=15 R.B. 109=44 Bom. L.R. 452=A.I.R. 1942 Bom. 214.

-S. 256-List of witnesses-Accused if bound to submit.

It is not obligatory on the accused to submit a list of defence witnesses at the stage of the trial reached under S. 256. (Beaumont, C.J. and Sen, I.) EMPEROR v. NAGINDAS NARATTAMDAS. I.L.R. (1942) Bom. 540=201 I.C. 503=43 Cr.L.J. 761=15 R.B. 109=44 Bom.L.R. 452=A.I.R. 1942 Bom. 214.

-S. 256—Prosecution — When closes— Witness given up by prosecution before framing of charge—If can be examined after charge. See Criminal Trial—Witnesses. (1943) 2 M. L.J. 672.

CR. P. CODE (1898), S. 256.

S. 256—Right of further cross-examination—Enquiry under S. 117. See CR P. Code, Ss. 110, 117 AND 256. 1942 A.L.J. 557.

S. 256—Scope—Non-compliance—If vitiates trial.

Even if there was an omission actually to call upon the accused to enter upon his defence that would not vitiate the trial provided that the accused was not denied an opportunity of stating what his defence was and of examining witnesses in support of it. (Agarwala, I.) Емрекок v. Debi Sah. 210 I.C. 570=16 R.P. 205=10 B.R. 302=45 Cr.L.J. 283=A.I.R. 1943 Pat. 359.

Ss. 256 and 260—Scope of—Offence under S. 504, I. P. Code—Summary trial of— Omission to ask accused whether he wished to

cross-examine-If vitiates trial.

The offence punishable under S. 504, I. P. Code, can be tried by summary procedure, but the rules laid down for the trial of warrant cases must be adopted in the absence of any rules under the summary procedure chapter modifying it. Failure to ask the accused to state at the commencement of the hearing of the case whether he wishes to cross-examine, and if so, which of the prosecution witnesses whose evidence has been taken, is a serious irregularity and the omission is a grave one. (Horwill, J.) Subbiah v. Venkatasubbamma. 203 I.C. 321 =44 Cr.L.J. 10=55 L.W. 421=1942 M.W. N. 437=15 R.M. 660=A.I.R. 1942 Mad. 672=(1942) 2 M.L.J. 101.

-Ss. 256 and 510-Wish to cross-examine chemical examiner-Request when to be made.

If an accused denies or questions the accuracy of a chemical analyser's report, he should do so at the earliest possible moment (i.e.,) when under the provisions of S. 256, Cr. P. Code, he is required to state whether he wishes to crossexamine any of the witnesses for the prosecution whose evidence has been taken and the chemical analyser whose report is admissible under S. 540 is included amongst such witnesses.

(Davics.) EMPEROR v. ZAHOOR ALI. 1940 A.

M.L.J. 98.

S. 256 (1)—Non-compliance with—No objection raised by pleader for accused—Irregularity if caugable.

larity, if curable.

It can not be laid down as a rule of general application that S. 537, Cr. P. Code, has no application in all cases of non-compliance with S. 256 (1), Cr. P. Code. Where the accused is represented by a pleader who raises no objection to the cross-examination of the prosecution witnesses immediately after their evidence-in-chief has been taken, the failure to grant an adjournment as contemplated by S. 256 (1), Cr. P. Code, or to record any reasons in writing for having the witnesses cross-examined forthwith is a mere irregularity curable under S. 537, Cr. P. Code. (Edgley, J.) Sushii Chandra Pramanik v. Emperor. I.L.R. (1943) 2 Cal. 322=217 I.C. 234=46 Cr.L.J. 257=17 R.C. 183=47 C.W.N. 507=A.I.R. 1944 Cal. 319

The stage at which the prosecution witnesses

can be recalled at the instance of the accused

### CR. P. CODE (1898), S. 256.

for cross-examination follows and not precedes the statement of the accused pleading guilty or not guilty. This stage is not reached until the statement of the accused has actually been recorded. Hence it is not open to a magistrate to direct a complainant to bring his witnesses for cross-examination before the statements of the accused pleading guilty or not guilty has been recorded. (Ghulam Hasan, J.) EMPEROR v. RAM CHARAN. 204 I.C. 262=15 R.O. 323=1942 A.W.R. (C.C.) 361=44 Cr.L.J. 174=1942 O.W.N. 786=1942 O.A. 634=A.I. R. 1943 Oudh 157.

a witness for the defence, it is the duty of the Court to secure the attendance of that witness unless the accused decides that he does not want to examine him. The accused cannot be said to have a fair trial if the Magistrate does nothing to assist him except issuing the summons. (Agarwala, J.) PANCHU SWAIN v. EMPEROR. 8 B.R. 402=198 I.C. 256=14 R.P. 454=43 Cr.L.J. 337=7 Cut.L.T. 81=23 P.L.T. 313=A.I.R. 1942 Pat. 185 (1).

-S. 257—Court, if bound to summon\_all witnesses. VISHAMBAR DAYAL TRIPATHI V. EMPEROR. [See Q.D. 1936-'40, Vol. I, Col. 3334.] 42 Cr.L.J. 40=A.I.R. 1941 Oudh 33.

-S. 257—Duty of Court—Refusal to summon defence witnesses-Grounds-Discretion-

Matters to be considered.

Lobo, J.-The refusal to summon a witness called for by an accused person can only be justified on the grounds set out in S. 257, Cr. P. Code, and it is not a sufficient ground to state that a particular witness is not to be summoned because he is an Amil, or because he does not live in the district in which the accused lives or because he is a member of a Legislative Assembly or a Minister who cannot be having any relevant evidence to give. Refusal to summon defence witnesses on such grounds is a serious irregularity.

Weston, J.—The probable irrelevancy of evidence is not of itself enough to justify the conclusion that the purpose of the accused seeking to adduce it is vexation or delay or the defeat of justice. But such purpose must necessarily be inferred from circumstances. The number of witnesses cited, the difficulty and delay involved in securing their attendance, and the materiality of their evidence are all circumstances which may be considered. (Lobo and Weston, J.I.) EMPEROR v. RASULBUX. I.L.R. (1942) Kar. 252 = 205 I.C. 322=15 R.S. 136=44 Cr.L.J. 378 =A.I.R. 1942 Sind 122.

-S. 257—Question of ability of accused to

pay-When relevant.

It is neither for the prosecutor nor the defence counsel to raise the question of the ability or otherwise of the accused to pay the expenses of the witnesses unless an order has been made requiring reasonable expenses to be deposited and the accused thereupon states that he has CR. P. CODE (1898), S. 258.

-S. 257 (1)—Duty of Magistrate—Application by accused for process to witnesses—Rejection on ground that many witnesses have been already examined and that the case would be

prolonged—If justified.
Under S. 257 (1), Cr. P. Code, a Magistrate is not entitled to refuse to call witnesses whom an accused desires to be summoned in his defence because their number is large or the result would be to delay the case. Before a Magistrate refuses to summon a witness he should ascertain from the accused briefly the substance of the witness's evidence or the point which the witness is to be summoned to prove, and then if he comes to the conclusion that a witness is to be summoned for the purpose of vexation or delay or defeating the ends of justice, he is entitled, after giving his grounds in writing, to refuse to issue process. But to reject an application to call witnesses on behalf of an accused merely because enough witnesses have been examined is not in itself a sufficient compliance with S. 257; and although a case may have been already prolonged, the accused is not always responsible for the prolongation of a case. (Davis, C.J. and Lobo, J.) Jumo LAL BAKHSH v. EMPEROR. I.L.R. (1941) Kar. 66=197 I.C. 781=14 R.S. 119=43 Cr. L.J. 265=A.I.R. 1941 Sind 177.

-S. 257 (1)—Recall of prosecution witnesses for cross-examination—Accused, may be allowed.

A challan in the case was placed on 22nd February, 1941 before a Magistrate in camp together with the prosecution witnesses, all of whom were examined. On the following day, the Magistrate directed the release of the ac-cused on bail and fixed 5th March for defence evidence. The accused were only released on 4th March and on the 5th asked for an adjournment in order that the prosecution witnesses might be recalled for cross-examination. The Magistrate rejected this application on the ground that the accused "have had the legal opportunities of cross-examination."

Held, that in the circumstances the

Held, that in the circumstances the accused should be allowed to recall the prosecution witnesses for cross-examination. (Skemp, J.). KARAM DAD v. EMPEROR. 197 I.C. 446=43 Cr.L.J. 170=14 R.L. 249=A.I.R. 1941

Lah. 414.

Ss. 258 (1) and 367 (2) (4)—Mandatory character of S. 258 (1)—Judgment neither acquitting nor convicting one of the accused-

Effect.

Under S. 258 (1), Cr. P. Code, it is imperative that if in any case in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal. The provisions of this section are mandatory. Further Cls. (2) and (4) of S. 367 require that the judgment should state in the case of a conviction, the offence of which the accused is convicted, and in the case of an acquittal, the offence of which the accused is acquitted. Where a judgment does not contain either an order of conviction or acquittal of one of the accused, no money to carry out this order. (Davies.) it amounts to a flagrant disregard of the provi-Abdul Hafeez v. Emperor. 1943 A.M.L.J. 16. sions of Ss. 258 and 367 and is likely to be CR. P. CODE (1898), S. 258.

set aside. (Ghulam Hasan, J.) DIWAN v. RAJA RAM. 194 I.C. 872=1941 O. W. N. 889=14 R.O. 55=1941 O.L.R. 532=1941 A. L.W. 783=42 Cr.L.J. 633=1941 A.W.R. (C.C.) 245=1941 A.Cr.C. 185=1941 O.A. 568=A.I.R. 1941 Oudh 575.

S. 258 (1)—Power of Magistrate—Com-

plainant absent day after framing of charge—Ac-

quittal of accused—Legality.

Where a Magistrate has framed a charge, he cannot dismiss the case for default. Where on the day after the charge is framed, the complainant is absent, and the Magistrate passes an order purporting to be under S. 258 (1), Cr. P. Code, acquitting the accused, the order of acquittal is illegal and must be set aside. (Horwill, J.) VARADARAJULU CHETTY v. JANAKIRAMA CHETTY. 15 R.M. 746=44 Cr.L.J. 171=55 L.W. 240 (1)=203 I.C. 672=1942 M.W.N. 444=A.I.R. 1942 Mad. 552 (1)= (1942) 1 M.L.J. 527.

-S. 259-Acquittal after charge for ab-

sence of complainant-Legality.

An order acquitting an accused person in a warrant case after a charge has been framed for non-appearance of the complainant under S. 259, Cr. P. Code, is illegal and cannot be allowed to stand. S. 259 does not provide for an acquittal in the absence of the complainant but only for his discharge, such discharge, however, can only be made before the framing of charge. After the charge is framed, the absence of the complainant can have no effect, and the Magistrate is bound to proceed with the case and to dispose of it on the merits. (Davis, C. J. and Weston, J.) EMPEROR v. NAZO. I.L.R. (1943) Kar. 103=208 I.C. 256=16 R.S. 76 =44 Cr.L.J. 768=A.I.R. 1943 Sind 148. S. 260—Applicability—Offence under S. 504, I. P. Code—Procedure for trial. See Cr. P. Code, Ss. 256 and 260. (1942) 2 M.L.J. 101.

S. 261 (b)—"Municipal Acts"—Meaning—Bengal Food Adulteration Act—If a Municipal Act. cipal Act.

The intention of the Legislature in referring to Municipal Acts under S. 261 (b), Cr. P. Code, was to provide that offences against Acts such as the Calcutta Municipal Act or the Bengal Municipal Act should be tried by Benches of Magistrates duly empowered, but this provision would not cover an Act of general application like the Bengal Food Adulteration Act.

Even in the case of a summary trial the question of a sentence of imprisonment in default of payment of fine is governed, not by S. 262 (2) but by S. 33, Cr. P. Code. Under S. 33 (1) a Magistrate may award in default of payment of fine such a term of imprisonment as is authorised by S. 65, I. P. C. But as a matter of prudence the magistrate should not ordinarily in default of payment of fine impose a sentence

CR. P. CODE (1898), S. 271.

of imprisonment greater than the sentence of of imprisonment greater than the sentence of substantive imprisonment he can pass under S. 262 (2), Cr. P. C. (Davis, C.J. and Tyabji, J.) GHULAM v. EMPEROR. I.L.R. (1944) Kar. 1=207 I.C. 348=16 R.S. 26=44 Cr. L.J. 637=A.I.R. 1943 Sind 124.

\_\_\_\_\_Ss. 263 and 264—Order of acquittal\_ Duty of Magistrate to give reasons—Omission to

give reasons—If ground for interference.
Ss. 263 and 264, Cr. P. Code, do not require that a Magistrate trying cases summarily should in case of acquittals give reasons for his acquitting the accused. It is only in cases of convictions that reasons have to be given. The fact that no reasons have been given for the acquittal is not a ground for interfering with an order of acquittal in revision or reference. (Davis. C.J. and Weston, J.) EMPEROR v. SUGNOMAL BHOJRAJ. I.L.R. (1941) Kar. 545=199 I.C. 119=14 R.S. 165=43 Cr.L.J. 473=A.I.R. 1942 Sind 52.

-Ss. 263 and 264-"Record"-Bench of Magistrates-Conviction-Appeal-Notes of evidence recorded by bench and complaint—If part of record—If can be looked into by appellate

The record referred to in S. 264, Cr. P. Code. is the record of proceedings in Court, apart from the complaint. But the complaint is part of the records into which an appellate Court dealing with a conviction by a Bench of Magistrates can look. But the notes of evidence recorded by the Bench of Magistrates, unless embodied in the judgment, cannot be said to form part of the record under Ss. 263 and 264 and therefore cannot be looked into by the appellate Court. (Kuppuswami Ayyar, J.) Kampasari v. Puttapa. 212 I.C. 8=16 R.M. 579=45 Cr.L.J. 524= 

ed in full-Exhaustive judgment delivered.

Where the evidence of all the witnesses was recorded in full together with their crors-examination and an exhaustive judgment was delivered, the mere fact that at the top of the record appears a "Form kept under S. 263 of Act X of 1862" cannot be taken to mean that the summary procedure was actually adopted. (Edgley, J.) JAGNARAYAN HALUWAI v. BHATPARA MUNICIPA-LITY. 45 C.W.N. 139.

S. 263 (h) (i)—Summary trial—Judg-

–Legality.

Having regard to the language of S. 271 (2), Cr. P. Code, which leaves a wide discretion to the Court to convict or not to convict an accused on his plea of guilty, it is not illegal for the Court to proceed with the trial of an accused pleading guilty to the charge, without first placing on record its reason for so doing. (Bennett and Ghulam Hasan, JJ.) GOBREY v. EMPEROR. 19 Luck. 276=208 I.C. 397=16 R. CR. P. CODE (1898), S. 271.

O. 87=44 Cr.L.J. 775=1943 O.A. (C.C.) 198=1943 A.W.R. (C.C.) 90=1943 A.Cr. C. 108=1943 O.W.N. 312=A.I.R. 1943 Oudh 409.

-S. 271 (2)—Plea of guilty in murder case-If can be accepted-Practice.

Under S. 271 (2), Cr.P. Code, an accused person may be convicted on his plea of guilty. It is, however, a settled practice not to accept the plea of guilty in a murder case, unless the Court is satisfied that the accused knew exactly what was implied by his plea of guilty and its effect. (Niyogi and Sen, JJ.) VISHWANATH GANPAT v. EMPEROR. I.L.R. (1945) Nag. 492-217 I.C. 370-17 R.N. 117-46 Cr.L.J. 357=1944 N.L.J. 409.

**—S.** 272—Scope—If subject to S. 438. S. 272, Cr. P. Code, must be read subject to the provisions of S. 438. (Wadia and Sen, JJ.) EMPEROR V. ANANT NARAYAN. 221 I.C. 266=47 Bom.L.R. 138=A.I.R. 1945 Bom. 413. —S. 274—Constitution of jury—Objection as to, taken for first time in appeal-Whether can be entertained.

An objection as to the constitution of a jury is not one of mere technicality, but goes to the very foundation of the trial. The High Court will always entertain such an objection raised by a convicted person when it is based on facts regarding which there is no dispute, even if it regarding which there is no dispute, even if it is raised for the first time in appeal and even if it is not taken in the grounds of appeal. (Khundkar and Sen, JJ.) EMPEROR v. KISHORE KHANNA. I.L.R. (1943) 1 Cal. 522=206 I.C. 26=15 R.C. 676=44 Cr.L.J. 483=77 C.L.J. 120=47 C.W.N. 345=A.I.R. 1943 Cal. 515 Cal. 515.

−S. 274-Nine jurors not empanelled-Duty of Judge to note that it was not practicable to obtain more-Proper time for objection to be taken.

It is desirable that where nine jurors are not empanelled on a murder charge the order sheet should show expressly that the Judge considers it not practicable to obtain more but a failure to note this in express terms cannot be fatal to the proceedings. The proper time for objection to be taken that further jurors are available and that it is practicable to obtain nine persons is at the time when the jury is being empanelled. If an appellant desires to make a substantial objection on this ground, his petition should indicate that at least there are materials to substaniate his case that it was so practicable. It is also desirable that the attention of the Court should be drawn to this matter when the application for admission of appeal is moved in order that, if necessary, an explanation may be obtained from the trial judge. (Edgley and Roxburgh, IJ.) Asgar Ali Mandal v. Emperor I.L.R. (1944) 2 Cal. 305=A.I.R. 1945 Cal. 467.
S. 274—Scope—Trial by jury in excess of legal number-Legality.

A trial held before a jury in excess of the legal number is necessarily a nullity because the trial is by a Court not competent to hold it, and a conviction recorded at such a trial is illegal and must be set aside. (Beaumont, C.J. and Rajadhyaksha, J.) EMPEROR v. PANDU KUSHA. CR. P. CODE (1898), S. 284.

210 I.C. 392=16 R.B. 254=45 Cr.L.J. 270 

Where out of the eighteen jurors summoned for the trial, only nine attended and of these two were unable to sit with the result seven persons were empanelled as the Jury for the case as it was not practicable for the Judge to empanel a jury consisting of nine persons,

Held, that the Jury was properly constituted. (Khundhar and Das, JI.) EMPEROR v. KAUSER ALI. 216 I.C. 129=17 R.C. 145=46 Cr.L. J. 131=A.I.R. 1944 Cal. 249.

——Ss. 274 and 537—Trial with seven jurors

—Legality.

In a murder case the Judge under S. 326, Cr. P. Code, has to summon eighteen persons as jurors. On the date of the trial all that he has to do is to draw out of the ballot box one by one the names of the persons so summoned. The Judge is not required before he draws lots to ascrtain how many of the persons summoned to serve as jurors are present. If by drawing the names one by one he is able to empanel a jury of nine then he has done all that the law requires him to do and the jury is properly constituted. It does not matter that only nine persons out of the 18 summoned were present. Where in a murder case the Judge summoned 18 persons as jurors but only nine of them attended and the Judge chose seven jurors by lot and did not attempt to empanel the remaining two although no objection was taken to them,

Held, (i) that the jury was not properly constituted in as much as only seven persons were empanelled to serve on the jury in violation of the proviso to S. 274 (2), Cr. P. Code, when it was practicable for a Judge to empanel a jury of nine; (ii) that the defect was not curable by S. 537, Cr. P. Code, and that the entire trial was vitiated thereby. (Khundkar and Sen, JJ.)
EMPEROR v. KISHORE KHANNA. I.L.R. (1943)
1 Cal. 522=206 I.C. 26=15 R.C. 676=44
Cr.L.J. 483=77 C.L.J. 120=47 C.W.N.
345=A.I.R. 1943 Cal. 515.

-S. 274-Trial with seven jurors-Pre-—— S. 2/4—1 rial with seven jurors—Presumption. Mirza Akbar v. Emperor. [See Q. D. 1936-'40, Vol. I, Col. 3334.] 67 I.A. 336= I.L.R. (1940) Lah. 612=I.L.R. (1940) Kar. (P.C.) 302=1941 O.W.N. 43=43 Bom.L.R. 20=45 C.W.N. 269=43 P.L.R. 69=1941 A.L.W. 48=1941 A.Cr.C. 11=73 C.L.J. 252.

-S. 275-Construction-Finding as to accused being European or Indian subject-What amounts to-Application for trial by majority of European or Indian jurors at trial in Sessions Court—Maintainability—Duty of Magistrate holding enquiry—Cr. P. Code, Ss. 443 and 447.

EMPEROR v. ALERT BARNEY. [Q.D. 1936-'40, Vol. I, Col. 3335.] 191 I.C. 487=13 R.P.: 323=7 B.R. 202=A.I.R. 1941 Pat. 163.

——S. 284—Selection of assessors—Objection by accused—Duty of Court

by accused—Duty of Court.

There is no provision in the Cr. P. Code for an objection as regards the selection of persons to act as assessors, as in the case of jurors. The Court is, therefore, not bound to ask the accused if he has any objection to the selection of the

### CR. P. CODE (1898), S. 284.

persons to act as assessors. The assessors selected should, however, be above suspicion as their opinion is of great value both to the Judge who tries the case and to the appellate Court. If an objection is taken by the accused regarding the selection of any person as assessor, the Court will consider the objection and if valid, will allow it. (Sen, J.) Annubeg Mukimbeg v. Emperor. I.L.R. (1945) Nag. 533=219 I.C. 337=18 R.N. 42=46 Cr.L.J. 601=1944 N.L.J. 396

=A.I.R. 1944 Nag. 320.

S. 284—Trial with three assessors—

Necessity—Discharge of one on the ground of

personal knowledge of relevant facts-Continuation of trial with two—Legality. See CR. P. Code. Ss. 285 (1) and 284. 1942 A.W.R. (H.C.) 3.

S. 285—Absence of one of the assessors

-No indication in the judgment that the judge applied his mind to this question-Trial, if

vitiated.

Where in fact one of the assessors was absent and the trial proceeded in his absence and there is nothing in the judgment of the Sessions Judge to show that he either tried to ascertain whether there was sufficient cause for his absence or took any steps to enforce his attendance, there is material irregularity which vitiates the trial of the accused (Sinha and Bennett, II.)
BADDAN v. EMPEROR. (1945) A.L.W. (H.C.)
394=1945 A.W.R. (H.C.) 367=1945 O.W.
N. (H.C.) 347=1946 A.L.J. 29 (1).

Ss. 285 (1) and 284—Scope and applicability of S. 285 (1)—Discharge of one of the three assessors on ground of personal knowledge of relevant facts—Trial with the aid of remain-

ing two assessors—Legality.

Sub-S. (1) of S. 285, constitutes an exception to S. 284, Cr. P. Code, and is confined in its operation only to cases where the assessor him-self is prevented from attending the trial by reason of infirmity or some other physical disability. It does not contemplate a case where the trial judge himself discharges one of the assessors on the ground that he is disqualified from acting as an assessor because of the knowledge that he has concerning the facts in issue in the case. In view of the provisions of S. 284 it is imperative that a sessions trial must start with three assessors who are qualified to act as such. But when in fact only two were quali-cient to implicate accused-Answers elicited by Court and recorded—If "duly" recorded—Admissibility in evidence at trial. EMPEROR v. Kuppammal. [See Q.D. 1936-'40, Vol. I, Col. 3335.]

195 I.C. 129=14 R.M. 133=42 Cr.L.J. 677

=A.I.R. 1941 Mad. 1.

287—"Duly recorded"—Meaning— Preliminary inquiry-Magistrate questioning ac-

## CR. P. CODE (1898), S. 288.

cused under S. 209-Accused filing written statement—Such statement—If one "duly recorded" Admissibility—Ss. 209 and 342. Krishnan, In re. [See Q.D. 1936-'40, Vol. I, Col. 3335.] 193 I.C. 339=13 R.M. 665=42 Cr.L.J. 402=A.I.R. 1941 Mad. 296.

-S. 288—Applicability—Absent witnesses. S. 288, Cr. P. Code, which empowers the Sessions Judge to transfer to his record statements of witnesses made in the Court of the Committing Magistrate does not apply to absent witnesses, but applies only to those cases where the witnesses are themselves present and have been examined by him. (Din Mohammad and P.L.R. 135=A.I.R. 1944 Lah. 877.

S. 288—Case of murder—Circumstantial evidence—Statement before committing Magis.

trate-Witness not speaking truth before Sessions Judge-Power of Judge to act under S. 288.

In a case of wife murder there was no direct evidence of the offence. The evidence of one witness proved the presence of the accused near where the deceased lady was found and another witness had deposed before the Committing Magistrate that she saw the accused running away immediately after she had heard cries from the deceased and that his clothes were stained with blood. In her evidence before the Sessions Judge however the latter witness denied that she was anywhere near the spot on the date of offence. The Judge held that the said witness was not giving true evidence before him and admitted her evidence before the Committing Magistrate under S. 288, Cr. P. Code.

Held, that there could be no legal objection to the Sections Finder taking action under S. 288.

to the Sessions Judge taking action under S. 288, Cr. P. Code, after he came to the conclusion that the witness was not giving true evidence before him. (King and Habbell, JI.) Shammuga Kone, In re. 203 I.C. 591=15 R.M. 689=44 Cr.L.J. 119=55 L.W. 519=1942 M.W.N. 489=A.I.R. 1942 Mad. 700=(1942) 2 M.I. J. 240 2 M.L.J. 240.

-S. 288—Construction—Evidence given by witness in Committing Magistrate's Court-Use of in preference to evidence in Sessions Court-If justified. Nebti Mandal v. Emperor. [See Q.D. 1936-'40, Vol I, Col. 2688.] 22 Pat.L.T.

288—Construction—"Subject to the provisions of the Indian Evidence Act"-Meaning and effect of.

The words "subject to the provisions of the Indian Evidence Act", in S. 288, Cr. P. Code, cannot be read as referring to the procedure to be adopted by the Sessions Judge in bringing on the record the evidence of the witnesses re-corded in the committing Magistrate's Court, but mean that the law of evidence enacted in the Evidence Act must be complied with They were intended to prevent the admission of irrelevant evidence which might have been inadvertently recorded by the committing Magistrate Evidence which has been wrongly admitted by the committing Magistrate in violation of the provisions of the Evidence Act cannot be transferred to the Sessions record. (Lobo and O'Sullivan, JJ.) RANO v. EMPEROR. I.L.R. CR. P. CODE (1898), S. 288.

(1944) Kar. 75=217 I.C. 393=46 Cr.L.J. 348=A.I.R. 1944 Sind 178.

—S. 288—Deposition before committing Magistrate—Use of, for contradiction—Procedure—Discretion of Judge—Evidence Act, S. 145.

Per Edgley, J.—The application of S. 288, Cr.

P. Code, is "subject to the provisions of the Evidence Act". If a party seeks to contradict the evidence given by a witness before the trial Judge by a portion of his statement made before the committing Magistrate, it can only be done by having recourse to S. 145 of the Evidence Act. The previous statement should be read to the witness or he should be allowed to read it for the purpose of enabling him to explain or reconcile any discrepancy. Further, the application of the provisions of S. 288, Cr. P. Code, is a matter within the discretion of the presiding Judge. It is not a proper exercise of the discretion for the Judge to allow the deposition of a witness before the committing Magistrate to be used as substantive evidence in a case unless the party seeking to do so draws the attention of the witness to any part of the previous statement under the provisions of S. 145 of the Evidence Act with regard to which any discretion may arise or unless the Judge himself puts the necessary questions for the purpose of observing this procedure. (Edgley and Rox-burgh, II.) Heramba Lal Ghosh v. Emperor. 220 I.C. 237=78 C.L.J. 217=A.I.R. 1945 Cal. 159.

-S. 288-Discretion-Statements made in committal Court-When to be admitted as substantive evidence in Sessions Court in preference to evidence given in Sessions Court-Rule.

The question as to whether statements made in the Committing Magistrate's Court should be brought on record under S. 288, Cr. P. Code and be preferred as substantive evidence to statements made by the witnesses in the Sessions Court is a matter of prudence and not of law and when the statements made in the Committing Magistrate's Court appear to reason and experience to be in all probability true and the statements made in the Sessions Court appear to reason and experience to be in all probability untrue, it is not imprudent for the Sessions Judge to rely upon those statements made in the Committing Magistrate's Court, especially when there is corroboration of these statements by previous statements made under S. 164, Cr. P. Code. (Davis, C.J. and Weston, J.) Dodo Bahadur v. Emperor. I.L.R. (1942) Kar. 299=203 I.C. 482=15 R.S. 78=44 Cr.L.J. 73 =A. I. R. 1942 Sind 139.

-S. 288-Discretion under-When may be exercised—Use of previous deposition for contradiction-Need for compliance with S. 145, Evidence Act.

If a witness completely resiles from the evidence which he has given before the committing Magistrate or, if the testimony which he gives at the trial is substantially different from that which he has given on some previous occasion, the Court will be exercising a wise discretion in bringing the previous statement on record under S. 288, Cr. P. Code. But merely because CR. P. CODE (1898), S. 288.

the previous statement contains some stray statements which are contradictory to the present testimony of the witness, it is not permissible to put in the entire previous statement under the section. If a previous statement of a witness is properly brought on record under S. 288, Cr. P. Code, and either of the parties wishes to use any portion of it to contradict the witness, it is incumbent upon that party to observe the provisions of S. 145 of the Evidence Act by drawing the attention of the witness to the contradictory statement in the previous statement for the purpose of explaining the contradiction, in as much as S. 288, Cr.P. Code, expressly states that this section must be treated as subject to the provisions of the Evidence Act. (Edgley and Sen, JJ.) EMPEROR v. RAHENUDDIN MANDAL. I.L.R. (1943) 2 Cal. 381=217 I. C. 158=46 Cr.L.J. 199=17 R.C. 169=A.I.R. 1944 Cal. 323.

—S. 288—Prayer to put in deposition of witness in committing Court made at late stage-

When may be disallowed.

A prayer to put in the deposition of a witness in the committing Court under S. 288, Cr. P. Code, made after the Public Prosecutor has closed his case and on the day following the delivery of a part of the defence argument, is rightly disallowed when there is no cross-examination of the witness as to his having said anything in the committing magistrate's Court contradictory to his evidence in the trial Court and no reason is given why it is necessary to prove his deposition in the trial Court. (Edgley and Roxburgh, JJ.) Asgar Ali Mandal v. Emperor. I.L.R. (1944) 2 Cal. 305=A.I.R. 1945 Cal. 467.

-S. 288-Scope-Witnesses giving evidence before Committing Magistrate as to certain facts -Subsequent change of evidence in Sessions Court-Depositions before Committing Magis-Counted Admissibility at trial. Pachayanna Goundan, In re. [See Q.D., 1936-40, Vol. I, Col. 3336.] I.L.R. (1941) Mad. 172=192 I.C. 299=13 R.M. 551=42 Cr.L.J. 265=A. I.R. 1941 Mad. 258.

S. 288—Statements admitted under—Evidentiary value—If can be corroborated by statements under S. 164, Cr. P. Code.
Statements made in the Committing Magis-

trate's Court, when brought on the record under S. 288, Cr. P. Code, are as much evidence as statements made in the Sessions Court itself, and previous statements under S. 164, Cr. P. Code, made by the witnesses can be used just as much for the purpose of corroborating evidence given in the Committing Magistrate's Court as they can be used for the purpose of corroborating or contradicting evidence given in the Sessions Court. Once the Sessions Judge decides that the statements should be brought on the record as substantive evidence under S. 288, Cr. P. Code then as substantive evidence such statement can be corroborated by previous statements made under S. 164, Cr. P. Code. (Davis, C.J. and Weston, J.) Dodo BAHADUR v. EMPEROR. I.L.R. (1942) Kar. 299=203 I. C.

CR. P. CODE (1898), S. 288.

482=15 R.S. 78=44 Cr.L.J. 73=A. I. R. 1942 Sind 139.

S. 288—Statement of witness before committing Magistrate transferred to Sessions Court-Use of-Such statement, if should specifically put to witness-Evidence Act, Ss. 145

S. 288, Cr. P. Code, makes evidence transferred under that section substantive evidence for all purposes. The discretion is given to the Sessions Judge to transfer the statement made before a committing Magistrate to his own record. Once he has done so, the evidence before the committing Magistrate is as good as that recorded by himself and is useable for all purposes. It is not necessary that the statement should be specifically put to the witness before it could be used in evidence. The words "subject to the provisions of the Indian Evidence Act" appearing in S. 288, Cr. P. Code, cannot be read so as to limit the purpose for which the deposition may be used, and neither S. 145 nor S. 155 of the Evidence Act governs the position. (Blacker and Ram Lall, JJ.) MAHOMED SARWAR v. EMPEROR. I.L.R. (1943) Lah. 397=202 I. C. 340=15 R.L. 119=43 Cr.L.J. 828=44 P.L. R. 269=A.I.R. 1942 Lah. 215.

\_\_\_\_\_S. 288—Transfer of evidence in the Committing Court to the Sessions Court—Value to be attached—Corroboration—Necessity. Par-MANAND v. EMPEROR. [See Q.D., 1936-'40, Vol. I, Col. 2690.] I.L.R. (1941) Nag. 110=42 Cr.L.J. 17.

S. 289—Duty of Judge—Absence of evidence against accused—Duty to direct jury to

return verdict of acquittal.

Under S. 289, Cr. P. Code, in a case tried by the jury, it is well-settled that if the Judge comes to the conclusion that there is no evidence to go to the jury, it is the duty of the Judge to direct the jury that in law they must acquit. There are always cases on the border line and it may be difficult sometimes to say on which side the particular case falls. But the general principle clearly is that it is the function of the jury, in a trial by jury to determine whether the evidence is true and if the Judge thinks that the prosecution evidence, if true, will lead to a conviction, then he is bound to leave the case to the jury. He may think that the prosecution case is inherently improbable, that the evidence is discrepant, and that it is of a class which is generally unreliable, for example, the evidence of discharged servants: but if he thinks that though weak, the evidence, if true, will justify a conviction, he must leave the case to the jury, a conviction, he must leave the case to the jury, cautioning them about the weak points in the evidence. But if the Judge, after the prosecution case is closed, comes to the conclusion that, assuming that the jury believe every word of the prosecution evidence, nevertheless they will not be justified in convicting, then he is bound in law to saw so and to dight the irrest bound. in law to say so and to direct the jury that in law they must bring in a verdict of not guilty, and he ought not in such a case to leave the matter to the jury. (Beaumont, C.J., Broomfield and Wassoodew, JJ.) EMPEROR v. THO-KARSI NARSI. 194 I.C. 5=42 Cr.L.J. 513=

CR. P. CODE (1898), S. 289.

13 R.B. 355=43 Bom.L.R. 238=A. I. R. 1941 Bom. 125 (F.B.).

-S. 289—Duty of Judge—Judge inviting attention of jury to decisions in Law Reports-

It is undesirable and indeed improper for the Judge who is charging a jury to invite their attention to the decisions of cases reported in Law Reports. The jury being laymen are unlikely to understand the import of such decisions in the time available to them and it is no part of their business to do so. They have to take the law 'from the Judge and it is the duty of the Judge to the best of his ability to explain to them what the law in his opinion is. I'f the Judge considers it necessary in the heads of charge to note any case he had in mind in laying down the law, it is desirable that he should make it clear that the jury was not asked To consider it. (Agarwala and Shearer, II.)

JANAK SINGH v. EMPEROR. 203 I.C. 159=9 B.

R. 65=15 R.P. 158=43 Cr.L.J. 915=23 P.

L.T. 699=A.I.R. 1942 Pat. 444.

S. 289—Duty of Judge—No evidence to go to jury-Withdrawal of case from jury-Dis-

cretion—Exercise of.
S. 289, Cr. P. Code, confers in terms a discretion on the Judge, but it is discretion which must be exercised judicially; it is quite clear that where the Judge is satisfied that there is no where the Judge is satisfied that there is he evidence to go to the jury, he must in his discretion withdraw the case from the jury, or, in other words, direct them to return a verdict of not guilty. All questions of law have to be decided by the Judge, and the question whether there is any evidence to go before the jury is a there is any evidence to go before the jury is a question of law. The jury have to decide all questions as to the reliability of the evidence and it is for them to determine which view of the facts is true. The Judge may consider that the evidence led for the prosecution is very weak, that there are discrepancies in it, that it is of a type usually found to be unreliable, and that the story is inherently improbable. All such defects he ought to bring to the notice of the jury, but if the evidence is such that if it is believed by the jury, it must lead to a conviction, then the Judge is bound to leave the question to the jury, because it is for them to decide whether the evidence is to be believed or not. But if the Judge comes to the conclusion that, assuming that the jury believe the whole of the evidence placed before them, in law they cannot convict the accused, then he is bound to hold that there is no evidence to be placed before the jury, and he is bound to direct them in law to return a verdict of not guilty. (Beaumont, C.J., Wadio and Sen, JJ.) EMPEROR v. DAWOOD HASHAM. I.L.R. (1941) Bom. 515=193 I.C. 859=13 R.B. 351=42 Cr.L.J. 470=43 Bom. L. R. 245=A.I.R. 1941 Bom. 123 (F.B.).

——S. 289 (2)—Duty of Judge—Offence not made out on facts found and evidence recorded —Duty to direct jury to return verdict of not guilty—Reference to High Court after perverse verdict of guilty—Propriety.

Where on the evidence recorded and the facts found, the Sessions Judge is of opinion that the essential elements of the offence charged are

#### CR. P. CODE (1898), S. 296.

wanting in the case and that the act of the accused did not constitute any offence, it is the duty of the Judge under S. 289 (2), Cr. P. Code, to direct the jury to return a verdict of not guilty. The Judge ought to tell the jury that even if they believed every word that the prosecution witness said, the accused were not guilty of any offence and therefore they must return a verdict of not guilty. It is not fair or proper for him to charge the jury at length discussing all the elements of the offence, and then to make a reference to the High Court after the jury has returned a perverse verdict of guilty. Such a reference need not be made, for it is the duty of the Judge to find whether the elements of an offence had been made out. (Burn and Happell, JJ.) CHITRAVELU THEVAR, In re. 197 I. C. 71=14 R.M. 325=43 Cr.L.J. 106=54 L. W. 482=1941 M.W.N. 679 (2)=A. I. R. 1941 Mad. 763=(1941) 2 M.L.J. 207. -S. 296-Limits to the complainant's right

to examine witnesses.

It is clear from S. 296, Cr. P. Code that a complainant has a right to examine witnesses only till the accused is called upon to enter upon his defence. Hence he has no right to produce any evidence on the day on which the accused any evidence on the day on which the acceptance had been asked to produce his evidence. (Agarwal, J.) Noor Mohammad v. Imitaz Ahmad. 197 I.C. 839=14 R.O. 363=1942 A.Cr.C. 1=43 Cr.L.J. 280=1941 O.W. N. 1290=1941 A.W.R. (C.C.) 397=1941 O.A. 1008 =A.I.R. 1942 Oudh 130.

S. 296—Proper directions—Charge under S. 366-A, I. P. Code. See Penal Code, S. 366-A. 49 C.W.N. 533.

S. 297—CHARGE TO JURY.

-Advice to jury to give benefit doubt.

-Case depending on circumstantial evidence.

-Charge against several persons.

—Charge open to criticism in some respects.

-Directions as to law.

-Duty of Judge.

-Evidence.

-Kidnapping charge.

-Misdirection.

-Non-direction.

—Proper direction. -Sexual offences.

-S. 297—Charge to jury—Advice to jury to give benefit of doubt to accused-When to be given—Caution given at beginning and not at class of charge—Effect on verdict.

Although it is advisable for the Judge to tell the jury after the whole evidence has been discussed that they should give the benefit of the doubt to the accused, the mere fact that this caution is given at the beginning of the charge and not at the end would not vitiate the verdict of the jury. (Horwill, J.) VRIDICHAND SOWCAR v. EMPEROR. 208 I.C. 265=16 R.N. 243=44 Cr.L.J. 766=1943 M.W.N. 290 (2) = A.I.R. 1943 Mad. 527=(1943) 1 M. L. J. 377.

-S. 297-Charge to jury-Case depending on circumstantial evidence—Absence of motive—Duty of Judge to emphasise. UPENDRA- CR. P. CODE (1898), S. 297.

NATH GHOSE v. EMPEROR. [See Q.D., 1936-'40, Vol. I, Col. 2695.] 192 I.C. 352=13 R. C. 329=42 Cr.L.J. 285.

-S. 297-Charge to jury-Case depending on circumstantial evidence—Proper direction. Mujjaffar Sheikh v. Emperor. [See Q.D., 1936-40, Vol. I, Col. 2695.] 193 I.C. 302=42 Cr.L.J. 385=13 R.C. 391=72 C.L.J. 533= A.I.R. 1941 Cal. 106. ——S. 297—Charge to jury—Case depending

on circumstantial evidence-Proper direction.

In a case where the whole evidence is circumstantial, the jury should be warned that unless they are in a position to say that the circumstances all pointed only to the guilt of the accused and to nothing else and that they are not at all consistent with his innocence, they should not find against the accused. (Akram and Pal, JJ.) EMPEROR v. NAIBULLA. 200 I.C. 604= 15 R.C. 374=75 C.L.J. 10=43 Cr.L.J. 860=46 C.W.N. 108=A.I.R. 1942 Cal. 524.

Charge against severe persons—Duty of Judge to marshal evidence against each accused.

Where several persons are tried together on a charge under S. 401, I. P. Code, and there is a considerable body of evidence it is the duty of the judge to marshal the evidence against each of the accused and should conclude his charge with a summary of the evidence against each accused, so that the jury should be quite clear in their minds what evidence there is against each of the accused. (Horwill, J.)
SUBBARAYA AYYAR v. EMPEROR. 194 I.C. 857
42 Cr.L.J. 631=14 R.M. 138=53 L.W. 567
=1941 M.W.N. 371=A.I.R. 1941 Mad. 658.

-Ss. 297 and 298-Charge to jury-Charge against several persons-Duty of judge to state evidence against each accused in respect of particular counts. Pateyya, In re. [See Q.D. 1936-'40, Vol. I, Col. 2697.] 193 I.C. 375=13 R. M. 687=42 Cr.L.J. 414=A.I.R. 1941 Mad. 339.

Ss. 297 and 298—Charge to jury—Charge against several persons of offences triable by jury and offences triable with aid of assessors—Duty to sum up evidence against each accused-Charges under Ss. 395, 148 and 460, I. P. Code, on same facts-Judge failing to place evidence against each accused or to express definite opinion as to credibility of witness Verdict of guilty—Sustainability.

In the case of a trial before a jury of several accused persons, it is the duty of the Judge to sum up and place before the jury the evidence against each of the individual persons. He must also point out to the jury the defects in the evidence in respect of the individual accused persons. In a trial with jury, the Judge is not a Judge of fact at all, and any observations which he makes as to the credibility of the witnesses are not binding on the jury. But in a trial with the aid of assessors the Judge is a Judge of fact and he is bound to give his opinion on the credibility of witnesses. Where on the same facts, several persons are tried on charges under S. 395 I. P. Code, and also under Ss. 148 and 480, the charges under the latter sections not being based on any acts other than the acts necessary to be

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established by the prosecution for the offence under S. 395, if the Judge does not sum up the evidence against each of the accused and fails to point out the defects in the evidence and also omits to express any definite opinion on the credibility of the witnesses, and the jury return a verdict of guilty under S. 395, and they as assessors also find the accused guilty under Ss. 148 and 460, the verdicts must be considered to be vitiated and the convictions must be set aside. While there should be a retrial under S. 395, I. P. Code, there should be no retrial in respect of the charges under Ss. 148 and 460, because the charges under these latter sections need not be framed at all. (Agarwala and Mcredith, JJ.)
ARJUN PANDA v. EMPEROR. 7 Cut. L. T. 82=
21 Pat. 130=197 I.C. 647=8 B.R. 264=14
R.P. 367=43 Cr.L.J. 230=1942 P.W.N. 124=23 Pat.L.T. 494=A.I.R. 1942 Pat. 199.

-S. 297—Charge to jury—Charge against several persons-Separate dealing with regard to case of each accused-Limits of the rule.

In cases where there are a large number of witnesses against each of the accused it may be advisable to deal with the case of each accused separately as it is likely to cause prejudice to the accused. Where the evidence is common to all the accused and is very brief, it is not necessary for the judge to keep on repeating the same Salv for the judge to keep of repeating the same evidence in the case of each accused. (Thomas, C.J.) Jagannath v. Emperor. 17 Luck. 516 =198 I.C. 714=14 R.O. 449=43 Cr.L.J. 416=1941 O.W.N. 1369=1942 A.Cr.C. 20=1941 A.W.R. (C.C.) 402=1941 O.A. 1018 =A.I.R. 1942 Oudh 221.

-Ss. 297 and 298—Charge to jury— Charge against several persons—Summarising evidence against individual accused before discussing evidence of individual witnesses-Propriety.

Where the Sessions Judge in his charge to the jury summarises the evidence against individual accused before discussing the evidence of individual witnesses, it is a defect in the charge. The jury cannot properly consider the case against individual accused before they have made up their mind about the main features of the occurrence and this they cannot effectively do before they have decided on the extent to which individual witnesses are reliable. In general, therefore, the discussion of individual prosecution witnesses should precede that part of the charge in which the jury is asked to consider the case as against individual accused separately. (Sinha and Beevor, II.) EMPEROR V. RAMSEWAN MISTRI. 23 Pat. 656=218 I.C. 465=18 R.P. 71=11 B.R. 321=46 Cr.L.J. 513=1944 P.W.N. 307=25 P.L.T. 163=A. I.R. 1945 Pat. 109.

-S. 297-Charge to jury-Charge against several persons-Summarising evidence against several persons—summarising evidence against each accused and asking jury if he is falsely implicated. MUJJAFFAR SHAIKH v. EMPEROR. [See Q.D. 1936-'40, Vol. I, Col. 2693.] 193 I.C. 302=42 Cr.L.J. 385=13 R.C. 391=72 C.L. J. 533=A.I.R. 1941 Cal. 106.

S. 297—Charge to jury—Charge open to trivicism in some respects, but fair as a whole

CR. P. CODE (1898), S. 297.

-If ground for reversal of unanimous verdict of jury.

Although a Judge's charge to the jury is open criticism in certain respects, if read as a whole, it is an honest attempt to place before the jury the considerations favouring the prosecution as well as the defence and to ask the jury to choose between them, a unanimous verdict of acquittal ought not to be set aside on that ground, especially when the trial has lasted for length by both sides. (Rowland, J.) BAKHOR GOPE v. ABDUL HALIM. 195 I.C. 107=7 B.R. 875=14 R.P. 84=1941 P.W.N. 255=22 Pat. L.T. 327=A.I.R. 1941 Pat. 362.

DIRECTION AS TO LAW.

-Citation of authority and reading headnotes of reported decisions.

-Failure to give.

-Reading sections of Penal Code

-Setting out law in the abstract. -What the Judge should do.

Although there is no rigid rule of law against the citation of authority by the Judge to the jury, the practice of reading out headnotes or other portions of the report of a case not before them to the members of a jury is a dangerous practice. It is also preferable to avoid the practice of citing recorded authority in support of observations which are the fruit of the experience of Judges in matters of fact and are not ence of judges in matters of fact and are not expressions regarding questions of law. The unnecessary citation of decisions ought to be deprecated. (Rowland, J.) Bakhori Gope v. Abdul. Halim. 195 I.C. 107=7 B.R. 875=14 R.P. 84=1941 P.W.N. 255=22 Pat.L. T. 327=A.I.R. 1941 Pat. 362.

Ss. 297 and 423 (2)—Charge to the jury—Directions as to law—Failure to give—Effect. It is the clear duty of the Judge to explain

It is the clear duty of the Judge to explain the ingredients of the offence with which the accused are charged and to give directions on the law so as to make the law clear in relation to the facts of the case and the evidence adduced. The mere reading of the sections to the jury does not amount to explanation of the law. The omission of the Judge in these matters vitiates the verdict and it should be considered erroneous within the meaning of S. 423 (2), Cr. P. Code. (Ghulam Hasan, J.) ISRAR HUSAIN v. EMPEROR. 17 Luck. 128=195 I.C. 371=1941 O.W.N. 874=14 R.O. 88=1941 O.L.R. 574=1941 A.W.R. (C.C.) 260=42 Cr.L.J. 728=1941 A.Cr.C. 175=1941 O.A. 573=A.I.R. 1941 Oudh 567.

S. 297—Charge to jury—Direction as to large—Reading of sections of Powel Code appli-

law-Reading of sections of Penal Code appli-

cable-Necessity.

There is nothing in the Cr. P. Code, which requires that a Judge in his charge to the jury should read out the sections of the Penal Code which are applicable, though that is usually done and is desirable. S. 297, Cr. P. Code, lays on the Judge the duty of laying down the law by which the jury are to be guided. Merely reading to the jury those sections of the Penal Code CR. P. CODE (1898), S. 297.

which are applicable may not often be helpful to the jury and may in some cases be confusing for them. It is therefore desirable and necessary that the Judge in charging the jury should explain the law on the subject in simple nontechnical language; in doing so it is not necessary that the Judge should refer to those parts of the section which on the facts of the particular case are not applicable at all. (Wadia, Sen and Rajadhyaksha, JJ.) Emperor v. Hasan Abdul Karim. I.L.R. (1945) Bom. 52=217 I.C. 255=17 R.B. 159=46 Cr.L.J. 277=46 Bom.L.R. 566=A.I.R. 1944 Bom. 274 (F.B.).

-S. 297—Charge to the jury—Direction as to law-Setting out law in the abstract-Desirability-Propriety of dealing with law before considering evidence.

Jurymen are not expected to be trained lawyers and even the most brilliant exposition of law in the abstract is of little assistance to them in deciding a criminal case. They need to have the law applied for them to the facts of the case in a concrete form. They cannot be expected to understand and keep in mind a great variety of different legal definitions and sections. Every introduction in a charge to the jury of some provision of law which has no direct application to the facts of the case is very apt to con-fuse them and distract their attention from the comparatively few directions on points of law by which they must really be guided in any individual case. The judge should not deal with the substantive law before considering the evithe substantive law before considering the evidence and directing the jury on the questions of fact to be answered by them. (Sinha and Beevor, JI.) EMPEROR v. RAMSEWAN MISTRI.

23 Pat. 656=218 I.C. 465=18 R.P. 71=11

B.R. 321=46 Cr.L.J. 513=1944 P.W.N.
307=25 P.L.T. 163=A.I.R. 1945 Pat. 109.

S. 297—Charge to jury—Direction as to law What the index should do—Duty to ascerlaw-What the judge should do-Duty to ascertain essential questions of fact.

It is the duty of the judge to apply the law to the facts of the particular case before him. Although it is not the duty of the judge to find the facts, it is his duty to ascertain and to put clearly before the jury what are the essential questions of fact the answers to which will enable them to bring in a verdict in accordance with the law as laid down by the judge. In laying down the law for the guidance of the jury, the judge should direct the jury by telling them what is the legal effect of the various possible answers which they may give to the essential questions of fact. (Sinha and Beevor, JJ.): EMPEROR V. RANSEWAN MISTRI. 23 Pat. 656-218 P. D. 21-11 P. 221 

-Expression of his opinion.

It is difficult to understand why a Judge should take great pains to direct the jury as to the view that they should take about a matter and to tell the jury what his opinion in the matter is and then tell the jury that they should in no way be influenced by what he has expressed. It

CR. P. CODE (1898), S. 297. 

of accused-Counsel for accused not referring to

exception—If absolves Judge from referring to same—Evidence Act, S. 105.
Under S. 105, Evidence Act, the burden of proving the existence of circumstances bringing the case of an accused person on trial, within any exception, is on the accused, and the Court shall presume the absence of such circumstances. This section does not, however, relieve a Judge, even in cases where the accused has not pleaded that his case comes within any particular excep-tion, from pointing out to the jury such facts in the evidence as might justify the jury in taking the view that the case is covered, by one or other exception. But a Judge is not bound in his charge to the jury to explain exceptions which in his opinion are not applicable and for which has foundation to the control of the contr which no foundation whatever is laid in the cross-examination. The fact that counsel for the accused has, for whatever reason, refrained from putting forward the argument that the case of the accused falls within one of the exceptions would not absolve the Judge from the necessity of drawing the attention of the jury to the applicability of the exception, if, in his opinion, applicability of the exception, II, in its opinion, there is anything in the evidence which might attract the application of that exception. (Wadia, Sen and Rajadhyaksha, JJ.) EMPEROR v. HASAN ABDUL KARIM. I.L.R. (1945) Bom. 52=217 I.C. 255=17 R.B. 159=46 Cr.L.J. 277=46 Bom.L.R. 566=A.I.R. 1944 Bom. 274 (F.B.).

S. 297—Charge to jury—Evidence—First information report—Direction as to.

However important the first information report may be, either from the point of view of the prosecution or of the defence, it should not be admitted in evidence or placed before the jury unless it is admissible under one of the provisions of the Evidence Act. If, however, it is admissible, it should be placed before the jury with proper directions. Ordinarily such a report is not substantive evidence, but, if the first in-formant had died before the matter came before the Court, it is admissible under S. 32 (1) of the Evidence Act. In such a case the jury should be informed that the first information report is admissible as a substantive piece of evidence under that provision, and at the same time they should be reminded that the statement in question had not been made on oath nor had it been tested by cross-examination, but that after bearing these points in mind, it would be for the jury to attach to it such weight as they considered necessary. (Edgley and Akram, IJ.) EMPEROR v. MAHOMED SHAIKH. I.L.R. (1942) 2 Cal. 144=205 I.C. 92=15 R.C. 596=44 Cr. L.J. 322=A.I.R. 1943 Cal. 74

S. 297—Charge to jury—Kidnapping and abduction—Verdict under both heads—If can be asked for.

It is a complete misunderstanding of S. 366, is sheer waste of time to tell the jury things I. P. Code, to ask the jury for a verdict under and then to tell them not to take any notice of both heads of kidnapping and of abduction.

CR. P. CODE (1898), S. 297. There cannot be any such verdict. A person kidnaps a woman with the intent or knowledge specified in the section and thereby commits an offence under S. 366, if the evidence establishes that the woman is under 16: if she is not, the offence under the section is abduction. (Bartley

offence under the section is adduction. (Barwy and Sen, JJ.) Krishna Chandra Sarddar v. Emperor. 45 C.W.N. 27.—S. 297—Charge to jury—Kidnapping—Charge under S. 368, I. P. Code, for wrongfully confining kidnapped girl, proper direction. In a trial by jury under S. 368, I. P. Code, on a charge of wrongfully concealing or confining a girl who has been kidnapped, the judge's charge to the jury chall excess the necessity for charge to the jury should stress the necessity for finding as a fact that the accused knew that the girl was under the age of sixteen, and also clearly draw the attention of the jury to the evidence relating thereto. Otherwise the charge will be vitiated by a material non-direction. (Edgley and Roxburgh, J.) NABA KANDU v. EMPFROR. 48 C.W.N. 543. Kumar

-S. 297—Charge to jury—Misdirection-Attack on one party by some members of other —Omission on part of Judge to point out distinction between members who took part in attack and those who did not—Effect. See Penal Code, S. 149. A.I.R. 1942 Pat. 444. -S. 297—Charge to jury—Misdirection— Entry in General Diary made at instance of one of the accused-Reference to it by Judge to show hostility between all the accused and complainant.

Where a Judge in his charge to the jury referred to an entry in a General Diary made at the instance of one of the accused persons as an entry made "at the instance of the accused party", and stated that it was admitted to show that the accused had hostility with the complainant.

Held, per Lodge, J.—That the direction merely contained a slight verbal inaccuracy and in as much as the entry itself was placed before the jury they could not have been misled.

Per Das, J.—That this was a case of using a statement of a co-accused against the other accused, and in as much as enmity was an important part of the prosecution case there was a material misdirection. (Lodge and Das, JJ.)
IBRA AKAKDA v. EMPEROR. 215 I.C. 67=45
Cr.L.J. 771=17 R.C. 53=48 C.W.N. 366
=A.I.R. 1944 Cal. 339.

-Ss. 297 and 298—Charge to jury—Misdirection—Failure to explain ingredients of offence—No indication given as to what jury should do in regard to conflicting statements of hostile witnesses.

Where a Judge merely contents himself with giving the jury the various definitions of the sections relating to the offence charged and does not care to explain the salient ingredients of the offence it amounts to misdirection. It is his duty to call the attention of the jury to the different elements constituting the offence and to deal with the evidence by which it was proposed to make the accused liable under the section charged. Where several prosecution witnesses were treated as hostile and were allowed to be cross-examined and their statements before the committing Magistrate were brought on the record and no indication is given by the Judge CR. P. CODE (1898), S. 297.

to the Jurors in the charge whether they were to ignore their statements altogether or whether they were to believe one or the other statement and if so which, it amounts to a misdirection 

can be used to contradict prosecution evidence.

Where a Judge in his charge to the jury emphasised the value of the first information report as corroborative evidence but failed to mention that it could also be used to contradict the prosecution evidence,

Held, per Lodge, J.—That the omission was of no importance in a case where no question was put to the first informant indicating that the first information report contradicted his evidence in

Per Das, J.—That the omission was a grave error of law but in the circumstances of the case was not sufficient to vitiate the verdict. (Lodge 

Infringement of S. 162.

If a Judge in referring to the evidence of a prosecution witness who has deposed in Court entirely against the prosecution, tells the jury that had his statement to the Investigation Officer not been favourable to the prosecution it is unlikely that he would have been called, he in effect tells the jury what he had previously stated to the Investigating Officer. The summing up in this respect is a bad misdirection infringing the mandatory provisions of Ss. 161 and 162, Cr. P. Code. This misdirection in itself is sufficient to justify setting aside the conviction. (Derbyshire, C.J. and Genile, J.) Sital CHANDRA Dutta v. Emperor. 202 I.C. 153=15 R.C. 308=43 Cr.L.J. 797=46 C.W.N. 775=A.I.

R. 1942 Cal. 495.
S. 297—Charge to jury—Misdirection— Non-examination of witnesses mentioned in first information report—Judge stating that no adverse presumption need be drawn if case loses nothing thereby.

A Judge in his charge to the jury referring to the non-examination of witnesses named in the first information report gave the explanation which had been offered by the prosecution that they were not actually present at the time of the occurrence and that they were also related to the accused party, and explained the law in these words:—"All material witnesses must be examined and if any such is left without any sufficient explanation you may draw a presumption that such witness if produced, would not have supported the prosecution case. If, however, the case loses nothing by his absence no presumption adverse to the prosecution need be

Held, that the inclusion of the last sentence in the explanation when the rest of the explanation was obviously correct and complete, did not CR. P. CODE (1898), S. 297.

amount to a misdirection. (Lodge and Das, JJ.) EMPEROR v. KARAMALI SIKDAR. 77 C.L.J. 451 =218 I.C. 229=18 R.C. 28=46 Cr.L.J. 427 =A.I.R. 1944 Cal. 297.

——S. 297—Charge to jury—Misdirection— Offence under S. 411, I. P. Code—Accused found in possession of stolen property—Direction that burden of proving innocence lies on him.

If in a trial for an offence under S. 411, I. P. Code, the Judge says in explaining the law to the jury that if a person is found in the possession of stolen property under circumstances which point to his having the knowledge that the property is stolen or reason to believe it to be stolen, then the burden of proof that he is inno-cently in possession of it or that he has not got the guilty knowledge rests upon him, it is a clear misdirection. In such circumstances, the jury should be told that they must, in the absence of any reasonable explanation, find the accused guilty but that if an explanation is given and the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the accused is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury, beyond reasonable doubt of the accused's guilt, which onus never changes and always rests on the prosecution. (Bartley and Lodge, II.) FATEH ALI v. EMPEROR. 46 C.W.N. 54.

S. 297—Charge to jury—Misdirection— Offence under S. 412, I. P. Code—Omission to tell jury that they had to be satisfied that accused knew or had reason to believe that possession of property had been transferred by dacoity.

The omission to tell the jury in a trial under

S. 412, I. P. Code, that they had to be satisfied that the accused knew or had reason to believe that possession of the property had been transferred by means of dacoity, is material and is a serious misdirection in the charge. (Lodge and Sen, II.) ADELUDDIN v. EMPEROR. 49 C. W.N. 537=A.I.R. 1945 Cal. 482.

Ss. 297 and 298—Charge to jury—

Misdirection-Omission to stress that prosecution witnesses were interested and exclusion of relevant evidence for accused. Pateyya, In re. [See Q.D., 1936-'40, Vol. I, Col. 2696.] 193 I.C. 375=13 R.M. 687=42 Cr.L.J. 414= A.I.R. 1941 Mad. 339.
——S. 297—Charge to jury—Misdirection—

Question of reasonable doubt—Judge stating that

fury must have reasons for doubt.

A charge to the jury is open to serious objection when it almost assumes that the prosecution case is proved and throws the onus on the accused to establish his innocence, and further, the Judge repeats more than once that the jury must have reasons for their doubts before they can consider that they have a reasonable doubt. Can consider that they have a reasonable double (Henderson and Roxburgh, JJ.) EMPEROR v. SEKANDAR ALI SHAH. 195 I.C. 774=14 R.C. 137=42 Cr.L. J. 781=A.I.R. 1941 Cal. 406.

Ss. 297 and 298—Charge to jury—Nondirection—Failure to warn jury as to necessity for corroboration of opinion of police as to bloodstains.

Where several articles seized by the police as containing human blood are sent to the chemical examiner, but only some were found to contain

CR. P. CODE (1898), S. 297.

blood, the judge, in his charge to the should draw their attention to the fact that all the articles suspected by the police to contain human blood are not found to contain human blood by the chemical examiner. Where judge does not do so and does not warn jury that they should not accept the opinion of the Police Officer that certain articles contained human blood merely because he suspected it, unless that opinion was corroborated by report of the chemical examiner, that amounts to non-direction, and would lead to confusion in the minds of the jury resulting in a perverse verdict. (Harries, C.J. and Manohar Lal, J.) LOKHONO SAHU v. EMPEROR. 21 Pat. 865=206 I.C. 365=15 R.P. 349=9 B.R. 305=44 Cr.L.J. 507 =A.I.R. 1943 Pat. 163.

-S. 297—Charge to jury—Non-direction— Hostile witness.

Where a witness is declared hostile and crossexamined by the prosecution, it is incumbent upon the Judge to emphasise to the jury that they should exercise very considerable amount of caution before relying on the statement of the witness upon whom even the prosecution did not rely to any considerable extent. The absence of any such direction in the charge may prejudice the accused. (Bartley and Mohamad Akram, JJ.) MANIK GAZI v. EMPEROR. 197 I.C. 815 14 R.C. 400=43 Cr.L.J. 277=A.I.R. 1942 Cal. 36.

-S. 297—Charge to jury—Non-direction— If amounts to misdirection.

Mere non-direction is not necessarily misdirection. An accused alleging misdirection show that something wrong was said or something was said which would make wrong that which was left to be understood. Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the prosecution and defence respectively. (Varma and Rowland, JJ.) RAMDEO SINGH v. EMPEROR. 21 Pat. 258=202 I. C. 331=15 R.P. 112=8 B.R. 879=43 Cr.L.J. 817=1943 P.W.N. 89=A.I.R. 1942 Pat. 481.

-Ss. 297 and 423 (2)—Charge to Jury-Non-direction-Interference.

The charge to the jury must be read as a whole, that if upon the general view taken the case has been fairly left to the jury's province and all the important salient points have been brought out, no interference should be made. The principal test which should be applied to determine the character of the charge is whether or not the Judge directed the attention of the jury to the essential points and the charge read as a whole is sound. Mere non-direction unless it amounts to misdirection should never be considered fatal to the charge. Failure to address the jury on every one of the suggestions made the jury on every one of the suggestions made by the defence counsel is not nondirection. (Thomas, C.J.) Jagannath v. Emperor. 17 Luck 516=198 I.C. 714=14 R.O. 449=43 Cr. L. J. 416=1941 O.W.N. 1369=1942 A.Cr.C. 20=1941 A.W.R. (C.C.) 402=1941 O. A. 1018=A.I.R. 1942 Oudh 221.

S. 297—Charge to jury—Non-direction—Offence under S. 368. Penal Code—Failure to

Offence under S. 368, Penal Code-Failure to explain offence.

CR. P. CODE (1898), 297.

Where in the trial of an offence under S. 368, I. P. C., there is nothing in the evidence to indicate that the accused must have known that the girl had been kidnapped, it is the duty of the Judge to put clearly to the jury that an offence under S. 368 consists in something more than the wrongful concealment or confinement of a woman. A failure to do so amounts to a material non-direction in the charge. (Bartley and Lodge, Jf.) Kamala Prasad v. Emperor, 195 I.C. 12=14 R.C. 37=42 Cr.L.J. 649=A.I. R. 1941 Cal. 315.

———Ss. 297 and 298—Charge to jury—Proper direction—Omission of trifle or failure to exhaustively enumerate all points in favour of the

accused—If vitiates charge.

In a jury trial the Judge must present the main case for the prosecution and for the defence fairly for the consideration of the jury. But this does not mean that he must in every particular and in every detail address himself to suggestion put forward by the defence. duty is fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and of the defence respectively. In doing so he is entitled to take into consideration the speeches made upon both sides by the Crown and by the accused's counsel, in considering his presentation of the evidence to the jury. It is for the appellate Court to construe the heads of charge as prepared by the Judge and to see if from such heads the Judge has fairly and properly directed the jury in point of law and whether he has fairly and properly reviewed the evidence in support of the prosecution and of the defence. Where the Judge has taken pains to put fairly to the jury the defence of each of the several accused and the materials on the record bearing on it, a trifling omission or the fact that the enumera-tion of points in favour of the accused is not absolutely exhaustive ought not to be considered as vitiating the charge unless there is some reason to suppose that a different direction might have influenced the result. (Varma and Row-land, IJ.) RAMDEO SINGH v. EMPEROR. 21 Pat. 258=202 I.C. 381=15 R.P. 112=8 B.R. 879 = 43 Cr.L.J. 817=1943 P.W.N. 89=A.I.R. 1942 Pat. 481.

-Ss. 297 and 423 (2)—Charge to jury— Proper direction-Reading out of written charge

—Legality—If a misdirection.
S. 297, Cr. P. Code does not say either that the charge should be reduced to writing or that it should be delivered extempore. The reading out of a written charge therefore does not vio-late any provision of the section, nor does it amount to misdirection. Where the case is long and involved an extempore speech by way of charge to the jury is more likely to be confused and defective than one written out beforehand. A speech extempore is not by virtue of its delivery necessarily more effective than one read out. (Niyogi and Gruer, JJ.) MOTIRAM GANPATKOLI v. EMPEROR. I.L.R. (1942) Nag. 775=203 I.C. 573=15 R.N. 147=44 Cr.L.J. 13=1942 N.L.I. 523=A.I.R. 1942 Nag. 126.

CR. P. CODE (1898), S. 297.

-S. 297-Charge to jury-Proper direction-Reference to standard text-book-Right

of judge.

A Judge trying a case of murder is competent to refer to a standard text-book like Lyon's Medical Jurisprudence when dealing with the question whether the injury was homicidal or suicidal. In doing so he cannot be held to have misdirected the jury. (Bartley and Lodge, IJ.) ABU PRAMANIK v. EMPEROR. 199 I.C. 610=14 R.C. 636=43 Cr.L.J. 565=74 C.L.J. 423= A.I.R. 1942 Cal. 239.

-S. 297—Charge to jury—Proper-dirertion-Reference to works on medical jurispru-

dence-Permissibility.

A Judge may in his charge to the jury refer to works on medical jurisprudence. In fact, such reference is necessary where they have been cited by the medical witness. (Edgley and 

-Retracted confession.

Where the only direct evidence in the case is that of a retracted confession, the Judge should point out to the jury that a retracted confession is not as strong as one which the accused adheres to but that it is open to them if they believed the confession to found a conviction upon it. He should further point out to them the evidence, if any, which affords corroboration of the con-

tion-Retracted confession-Use of, against

maker and co-accused.

A Judge in his charge to the jury should make a clear distinction between a case of a retracted confession as used against the maker and as used against a co-accused. He must state, for instance, that as against the maker, although the maker may be convicted on the confession alone, it is unwise so to convict and that the Jury should only act upon such confession if it is corroborated in material particulars. As regards its use against a co-accused, the proper direction is that its value is practically nil and therefore unless the other evidence against the co-accused is substantially that which will stand on its own legs and justify a conviction, the confession itself should not be in any way used to support the conviction. (Roxburgh, J.) HAI GHARAMI v. EMPEROR. 49 C.W.N. 719.

Ss. 297 and 423 (2)—Charge to jury—Proper direction—Summing up—Scope and object of—Verdict, interference in appeal—

Misdirection and non-direction.

The object of summing up under S. 297, Cr. P. Code, is to place before the jury the facts. and circumstances of the case both for and against the prosecution so as to help them in arriving at a right decision on the points which arise for their consideration. S. 423 (2) of Cr. P. Code, renders the verdict of a jury erroneous when it is due to a misdirection by the Judge. It does not speak of non-direction. It is therefore obvious that mere non-direction unless it amounts to misdirection cannot invalidate the

#### CR. P. CODE (1898), S. 297.

charge. It is no misdirection not to tell the jury everything which might have been told them. Again, there is no misdirection unless the Judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood. Hence non-direction must be of such a nature as would have the positive result of misleading the jury. (Niyogi and Gruer, JJ.) PROVINCIAL GOVERNMENT, C.P. AND BERAR V. RAGHURAM. I.L.R. (1942) Nag. 749=203 I.C. 214=15 R.N. 125=44 Cr. L.J. 18=1942 N.L.J. 491=A.I.R. 1942 Nag. 127.

-S. 297—Charge to jury—Proper direction -Summing up of evidence and statement of law

-What Judge should do.

Under S. 297, Cr. P. Code, the Court's duty is to sum up the evidence for the prosecution and the defence and then lay down the law by which the jury are to be guided. The section nowhere requires that all the arguments addressed by the respective parties should be gone over again. To do so at length is to confuse the jury.
What the jury really require is assistance in applying their minds to the ascertainment of the true state of the facts so far as it can be determined from the evidence. In many cases it will be found a more convenient method to state first to the jury the things which the accused are said to have done, and to tell them in as concrete terms as possible what offences particular alleged acts will constitute in the presence or absence of the particular intetions imputed. The tests for determining the facts are to see not only whether the evidence is consistent but how far it agrees with established and admitted facts and the probabilities of the case. To enable the jury to apply these tests it will assist the jury if the Court presents clearly to them the facts which can be said to be admitted or established and then takes them to the evidence to see how far the case of each party fits in with the probabilities and with those facts. (Rowland, J.)
Bakhori Gope v. Abbul Halim. 195 I.C. 107
=7 B.R. 875=14 R.P. 84=1941 P.W.N. 255
=22 Pat.L.T. 327=A.I.R. 1941 Pat. 362. Ss. 297 and 299—Charge to jury— Proper direction—Witness, if an accomplice— Necessity for corroboration—Proper direction

The question whether a witness is or is not an accomplice is a question for the jury to determine, and it would amount to a misdirection on the part of the judge to say that a witness is not an accomplice. The Judge ought to point out to the jury whether there is any corroborative evidence or not, and, if there is none, he should tell the jury so. (Thomas, C.J.) JAGANNATH v. EMPEROR. 17 Luck. 516=198 I.C. 714=14 R. O. 449=43 Cr.L. J. 416=1941 O.W.N. 1369 = 1942 A.Cr.C. 20=1941 A.W.R. (C.C.) 402=1941 O.A. 1018-A I.P. 1042 Oxydb 221 402=1941 O.A. 1018=A.I.R. 1942 Oudh 221.

Ss. 297 and 298—Charge to jury—
Sexual offence—Charge of rape—Failure of

CR. P. CODE (1898), S. 297. on verdict. See Penal Code, S. 376. 44 Bom. L.R. 216 (F.B.). -S. 297—Charge to jury—Sexual offences

-Proper direction.

In the case of offences of the nature of kidnapping or abduction or sexual offences, the Judge should direct the jury that it is unsafe to convict the accused on the uncorroborated testimony of the prosecutrix but he should tell the jury that in spite of the warning if they are satisfied that she is telling the truth, they are at liberty to convict him. If the Judge tells the jury that the girl is obviously lying and therefore her evidence is defective, this direction is clearly most inadequate. (Bartley and Sen, JJ.) Krishna Chandra Sardar v. Emperor. 45 C. W.N. 27.

-S. 298. -Duty of Judge. -Misdirection. -Non-director.

-S. 298—Duty of judge—Admissibility of confession—Evidence on—Charge to jury-

Propriety.

It is for the judge to decide whether a confession is voluntary or not; it is for him to decide questions of fact which bear on the admissibility of a confession. A judge therefore should not charge the jury with regard to the evidence on the question of the admissibility of a confession. (Horwill, J.) VRIDICHAND SOWCAR v. EMPEROR. 208 I.C. 265=16 R. M. 243=44 Cr.L.J. 766=1943 M.W.N. 290 (2)=A.I.R. 1943 Mad. 527=(1943) 1 M.L. J. 377.

298—Duty of Judge—Charge of dacoity-Omission to tell jury that they must be satisfied of the presence of five persons partici-

pating in offence-Effect.

On a charge of dacoity, the judge should in his charge to the jury point out sufficiently to the jury that they must be satisfied that there were five persons taking part in the dacoity. Even if there is substantial evidence that five persons did participate, the Judge should foresee the possibility that some of the accused may be held by the jury not to be guilty. He should therefore tell the jury that in case they acquitted any of the accused they should again consider whether, in spite of their finding that one or more accused were not guilty there were five persons participating in the offence. The omission to tell the jury so is a defect in the charge; but it is not in itself a ground for setting aside the conviction unless it has led to a wrong verdict. (Horwill, J.) VRIDICHAND SOWCAR V. EMPEROR. 208 I.C. 265=16 R.M. 243=44 Cr. L.J. 766=1943 M.W.N. 290 (2)=A.I.R. 1943 Mad. 527=(1943) 1 M.L.J. 377.

——S. 298—Duty of Judge—Citation of resported cases or text-books—Desirability—Admissibility of evidence—Duty to decide.

It is desirable that the Judge who delivers his

It is desirable that the Judge who delivers his charge to the jury should refrain from citing reported cases or well-known text books to the jury. The jury should be told the law which they must accept as correct from the Judge in a short and concise manner. It is beyond the Judge to tell jury not to act on uncorroborated province of the jury to determine the question evidence of complainant—Non-direction—Effect of the admissibility of the evidence, which CR. P. CODE (1898), S. 298. should be decided by the Judge. The Judge ought not to leave it to the jury to decide an objection as to the admissibility of a piece of evidence. (Harries, C.J. and Manohar Lall, J.)
Lokhono Sahu v. Emperor. 21 Pat. 865=206
I.C. 385=15 R.P. 349=9 B.R. 305=44 Cr.
L.J. 507=A.I.R. 1943 Pat. 163.

S. 298—Duty of Judge—Confession—Voluntariness—Jurisdictions of Judge and jury...
Under S. 298 (1) (c), Cr. P. Code, the Judge should take upon himself for the purpose of admitting a confession into evidence that it was admitting a confession into evidence, that it was voluntarily made while at the same time leaving it to the jury, for the purpose of determining what weight should be given to it, to decide both whether it was true and whether it was voluntary. A sessions Judge trying a case of dacoity with a jury, after satisfying himself that a confession was voluntary before allowing it to go to the jury, in the course of his charge to the jury said: "It is for you to decide whether this

Jury said: "It is for you to decide whether this statement was made voluntarily or not."

Held, that there was no misdirection in the charge to the jury. (Rowland and Shearer, JJ.)

SUKER DUSADH v. EMPEROR. 20 Pat. 547=192

I.C. 888=22 Pat.L.T. 297=7 B.R. 495=42

Cr.L. J. 343=13 R.P. 563=1941 P.W.N. 69

=A.I.R. 1941 Pat. 303.

——S. 298—Duty of Judge—Confession—Voluntary character of—Functions of Judge and

The voluntary character of a confession is a mixed question of law and fact. It is to be decided by the Judge for the admissibility of the confession, and the jury may also consider in determining the weight to be attached to it. It is therefore the duty of the Judge to decide first whether the confession is voluntary or not for the purpose of admitting it in evidence, it is then for the jury to consider whether it is true and for that purpose the jury have to consider how far the confession is voluntary. (Divatia, Lokur and Weston, II.) GOVERNMENT OF BOMEAY V. DASHRATH RAMNIVAS. 220 I.C. 182=47 Bom. L.R. 145=A.I.R. 1945 Bom. 265 (F.B.).

S. 298—Duty of Judge—Evidence of approver—Rule—Duty of Judge to charge jury.
See EVIDENCE ACT, S. 114, ILL. (b). 45 Bom. L.R. 64.

S. 298—Duty of Judge—Explanation of law—Sufficiency—Test to decide—Appellate decide—Appellate Court-If can go behind statement of trial Judge saying that the relevant sections have been explained.

Whether the statement of the law by the Judge in a particular case is adequate or not must depend on the facts of the particular case and the points which arise for determination; the question is whether there has been a danger of

the jury being misled.

Varma, J.—In a case of dacoity where the Judge has explained Ss. 391, 390, 378 and Ss. 22, 23 and 24 the Penal Code, not much is left except explaining the definitions by illustrations. When the Sessions Judge says that he explained the relevant sections to the jury, it would not be proper for the appellate Court to hold that his explanations were erroneous, unless it is defimitely pointed out by the party impeaching the

CR. P. CODE (1898), S. 298. charge. (Varma and Rowland, JJ.) RAMDEO SINGH v. EMPEROR. 21 Pat. 258=202 I.C. 331 =8 B.R. 879=15 R.P. 112=1943 P.W.N. 89=43 Cr.L.J. 817=A.I.R. 1942 Pat. 481.—S. 298 and 299—Misdirection—Corroboration of confession—Statement by Judge that in the component of th circumstances relied on amount to corroboration.

Per Division Bench in Order of Reference. It is for the jury to say whether all or any of the circumstances relied on as corroborating a confession are in fact established, and further whether they sufficiently corroborate the con-fession. If the Judge takes upon himself to say that these circumstances corroborate the confession and that they are established by independent evidence, it would be a grave misdirection. (Harries, C.J., Beckett, Abdur Rahman, Mahajan and Teja Singh, JJ.) ABDUL RAHIM v. EMPEROR I.L.R. (1945) Lah. 290=220 I.C. 467=A. I.R. 1945 Lah. 105 (F.B.).

——Ss. 298 and 299—Misdirection—Judge

asking jury to decide whether private defence arose and whether it was exceeded—Duty of Judge—Statement of general rule of law with out stating particular facts on which application of rule depends—Ambiguous charge—Effect.

It is the duty of the Judge to decide questions of law and the jury to decide questions of fact. The jury have to decide which view of the facts is true and then to return the verdict accordingly. Where after fully stating the facts and giving in detail the versions both of the prose-cution and of the defence, the Judge tells the jury "It is for you to judge whether the accused in the circumstances had the right of private defence, and you have also got to consider whether the right of private defence was exceeded," that is a misdirction, because the Judge in effect leaves to the jury not only decision of the question of fact which arises, but also the question whether in the circumstances of the case the accused were entitled to the right of private defence, which is not correct direction in law. It is also a misdirection for the Judge to tell the jury that "where both parties are determined to fight and go up to the land fully armed in full expectation of an armed conflict in order to have a trial of strength, the right of private defence disappear," without pointing out those particular facts in the case on which the application of the general rule so stated by the Judge depended. If the Judge's charge is so ambiguous that the jury may well be confused as to the real questions which they have to decide, the charge is defective and must lead to miscarriage of justice. (Agarwala and Rowland, II.) JAMADAR SINGH v. EMPEROR. 21 Pat. 854

=205 I.C. 241=15 R.P. 286=9 B.R. 212=
44 Cr.L.J. 356=1943 P.W.N. 83=21 P.L.
T. 105=A.I.R. 1943 Pat. 131.

S. 298—Misdirection—Judge referring to a characteristics.

objections to admissibility of evidence in charge to jury and referring to sections of Evidence Act and to decided cases—Propriety—Misdirec tion.

It is improper for a judge when charging the jury to refer to an objection raised by an accused to the admissibility of a piece of evidence and to give his reasons in the course of his charge why the objection is incorrect by citing

## CR. P. CODE (V OF 1898), S. 298.

case-law or sections of the Evidence Act. Such a procedure is wholly indefensible. Once the evidence has been placed before the jury no further argument is admissible that the evidence is inadmissible. If the evidence was inadmissible independent of the control o sible the judge should refuse to place it before the jury. The stage at which objections ought to be allowed to be raised and decided about the admissibility of any piece of evidence is when the evidence is going to be tendered or given. It only adds to the confusion of the jury when the judge in his charge to the jury deals with this question and refers to sections of the Evidence Act, and amounts to misdirection. (Harries, C.J. and Manohar Lall, J.) LOKHONO SAHU v. EMPEROR. 21 Pat. 865=206 I.C. 365=15 R. P. 349=9 B.R. 305=44 Cr.L.J. 507=A.I.

R. 1943 Pat. 163.
S. 298-Non-direction-Evidence of prosecution witness extraordinary and no better than evidence of accomplice—Failure of judge to warn jury not to accept same unless corrobo-rated in material particulars—Effect.

Where the evidence of a witness for the prosecution appears to be no better than that of an accomplice, such evidence requires corroboration in material particulars; and the judge in his charge to the jury must warn the jury that they should not accept that evidence unless it was corroborated in material particulars, especially when such evidence is extraordinary and unconvincing. Failure on the part of the judge to warn the jury to this effect amounts to non-direction and vitiates the verdict. (Harries, C. J. and Manohar Lall, J.) Lokhono Sahu EMPEROR. 21 Pat. 865=206 I.C. 365=15 R. P. 349=9 B.R. 305=44 Cr.L.J. 507=A.I. R. 1943 Pat. 163.

-Ss. 303 and 304—Scope—Power of Judge to recharge jury and to ask them to re-

consider verdict.

A Sessions Judge is not obliged to accept an absurd verdict, and he can give fresh instructions to the jury and ask them to retire and to reconsider their verdict. (Rowland and Manohar Lall, J.) JANAK SINGH v. EMPEROR. 21 Pat. 138=197 I.C. 504=8 B.R. 237=43 Cr. L. J. 205=14 R.P. 334=23 P.L.T. 707=1942 P.W.N. 119=A.I.R. 1942 Pat. 446.

S. 307—Piècemeal reference—Permissi-

bility.

Under S. 307, Cr. P. Code, a reference need not be made in respect of all the accused persons and of all the charges. But when a reference is made in respect of an accused person the whole case, in so far as the particular accused is concerned, must be left open for the consideration of the High Court on such reference. A reference on some charges after recording an order in respect of other charges against the accused person is not in order. The defect, however, is not fatal, and the High Court can deal considering with the reference on the merits the entire evidence and giving due weight to the The entire evidence and giving due weight to the opinions of the Sessions Judge and the jury. (Edgley and Blank, JJ.) EMPEROR v. MUKTARALI. 217 I.C. 179=17 R.C. 173=46 Cr. L. J. 220 = 77 C.L. J. 414=48 C.W.N. 547=A.I.R. 1944 Cal. 306.

### CR. P. CODE (V OF 1898), S. 307.

-S. 307—Reference—Grounds—Jury finding accused guilty on uncorroborated evidence incombetent

The circumstances under which a Judge may make a reference under S. 307, Cr. P. Code, are these: (i) the Judge must disagree with the verdict of the jurors; (ii) he must be clearly of opinion that it is necessary for the ends of justice to submit the case in respect of the accused to the High Court. If these two factors are in the mind of the Judge when he makes the re-

powers of an appellate Court. It is enjoined, however, to give due regard to the opinion of the Sessions Judge and to the verdict of the jury but there is nothing in the statute which says that no verdict of a jury can be reversed unless it is perverse, unreasonable and wholly against the weight of evidence. (Harries, C.J., Beckett, Abdur Rahman, Mahajan and Teja Singh, JJ.) ABBUL RAHIM v. EMPEROR I. L.R. (1945) Lah. 290=220 I.C. 467=A.I. R. 1945 Lah. 105 (F.B.).

terference with verdict of jury.

The legal powers of the High Court under S. 307, Cr. P. Code, are wide and are controlled by the section itself. The verdict of the jury should not be set aside lightly; even though the High Court in dealing with the case need only regard it as an opinion. Where though the verdict of the jury is unanimous, the High Court is satisfied that the circumstantial evidence against the accused is so strong that there could against the accused as so strong that there could be no reasonable doubt of his guilt in the mind of any one who heard the evidence, it should be set aside. (Misra and Madelly, JJ.) EMPEROR v. Sheo Nandan Mallah. 220 I.C. 447 = 1945 A. Cr. C. 8=1944 O.A. (C.C.) 299 = 1944 A.W.R. (C.C.) 299=A.I.R. 1945 Outh 48 Oudh 48.

\_\_\_\_\_S. 307—Powers of High Court\_Inter-ference—If justified.

Where, on the evidence, it is possible for the jury to take a particular view of the facts, and they unanimously take that view, there is no justification for another tribunal to upset the verdict of the jury, though such tribunal might be inclined to take a different view of the facts, because in cases triable by a jury, the jury in law, is the tribunal of fact. Therefore in a reference under S. 30%, Cr. P. Code, the High Court will not be justified in overruling the unanimous decision of the jury, although the High Court itself might be inclined to take another view. (Agarwala and Jafer Imam, JI.) EMPEROR v. BIFAN GOPE. 25 P.L.T. 141. CR. P. CODE (V OF 1898), S. 307.

S. 307—Powers of High Court—Inter-

ference with verdict of jury—Principles.

In a case submitted to the High Court under S. 307, Cr. P. Code, the High Court is not bound in every case to appreciate the evidence and come to a conclusion independently of the verdict of the jury. Ordinarily the High Court will not interfere with the verdict, unless it is either manifestly wrong, or wholly unreasonable, or definitely contrary to evidence, or not supported by any evidence, or induced by a misdirection or non-direction in the judge's charge to the jury. Under S. 307 (1) when the judge disagrees with the verdict, he can make a reference to the High Court only if he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court. The only question which the High Court will consider itself is whether the judge's view that the verdict of the jury has been perverse or unreasonable or altogether against the weight of the evidence, is justified by the record, and if the High Court comes to the conclusion that it is not, then it will accept the verdict of the jury. It is not the duty of the High Court to try the case de novo; and it is not for the Court to interfere with the verdict of the jury unless it is unreasonable. (Lokur and Weston, II.) Em-PEROR v. SHANKAR GANPAT. 47 Bom. L. R. 654.

Weight to be attached to opinion of jury—Considerations.

Under S. 307 (3), Cr. P. Code, the High Court, when dealing with a reference made to it, is required to give due weight to the opinions of the Sessions Judge making the reference and of the jury. The weight to be given to the opinion of the jurors must depend to a considerable extent on the nature satisfactory or otherwise, of the charge to the jury. (Sinha and Beevor, JI.) EMPEROR v. RAMSEWAN MISTRI.
23 Pat. 656=1944 P.W.N. 307=25 P.L.T.
163=218 I.C. 465=18 R.P. 71=11 B.R. 321
=46 Cr.L.J. 513=A.I.R. 1945 Pat. 109.

S. 308—Judge disagreeing with Jury several times—Order that accused should not be retried—If justified.

There must be a limit to the number of trials which an accused must be called upon to face, and that limit must be determined, assuming a difference of opinion continues to exist, by the Judge appreciating both the strength and the weakness of the system of jury trials, and while not agreeing with, and the law does not require him to agree with, the verdict of a jury he has discharged, deciding not to order a further trial, when the accused have been called upon to face more than one trial and the juries have either been unable to give a verdict with the necessary majority or have given a majority verdict only with which the Judge can not in good conscience agree. S. 308, Cr. P. Code does not require a Judge to agree before he decides that accused persons should not be re-tried. Whatever may be the Judge's opinion of the verdicts of three successive juries, he would be justified on the ground that there had already been three trials, to decide under S. 308 that the accused should not be

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to acquit the accused: he has to make an entry on the charge that the accused should not be re-tried and that entry would operate as an acquittal. It would not be an acquittal; the effect of an acquittal would come by operation of law. (Davis, C.J. and Lobo, J.) EMPEROR v. HUNDRAJ LACHIRAM. I.L.R. (1944) Kar. 239=212 I.C. 79=16 R.S. 233=45 Cr.L.J. 505=A.I.R. 1944 Sind 65.

Ss. 308 and 403—Scope—Charge under S. 302, I. P. Code—Judge directing jury to return verdict of murder, culpable homicide or grievous hurt—Unanimous verdict of not guilty as to murder and culpable homicide and majority verdict of guilty as to grievous hurt of six to three—Retrial on latter charge—Permissibility

three—Retrial on latter charge—Permissibility.

An accused was put up for trial before a Judge of the High Court and Jury on a charge of murder under S. 302, I. P. Code. Having regard to the nature of the medical evidence in the case, the Judge in his charge to the jury directed them to return either a verdict of murder or a verdict of the lesser offences of culpable homicide not amounting to murder or grievous hurt. The jury returned unanimous verdicts of not guilty as to murder and as to culpable homicide, but as regards grievous hurt, they brought in divided verdict of not guilty by six against three. The judge disagreed with the majority verdict as to grievous hurt.

Held: that on the unanimous verdict of the jury, the accused was entitled to be acquitted of the offence of murder with which he was charged, and that order of acquittal must be deemed to include his acquittal for the offence of grievous hurt in spite of the judge's disagreement with the majority verdict of "not guilty" for that offence; (2) that the judge had no power to direct trial of the accused by another jury under S. 308, Cr. P. Code, as his acquittal barred another trial on the same facts, under S. 403 (1). (Divatia, J.) Emperor v. Abdul Wahab Kamruddin. 46 Bom. L.R. 818=A.I.R. 1945 Bom. 110.

S. 309—Duty of Judge in asking assessor's opinion—Conviction of accused on charges other than those with which they had been charged.

Under S. 309, Cr. P. Code, the Judge is bound to ask the assessors to state their opinion on all the charges on which the accused had been tried and if he does that, it is open to him to pronounce his judgment. If the Judge decides to convict the accused under charges other than those with which they had been charged; it would no doubt be better for him to put questions, to them and elicit their opinion, but his not doing so, put at its highest, is a mere irregularity and cannot vitiate the conviction. (Malik, J.) FATTAN v. EMPEROR. I.L.R. (1945) A. 432=218 I.C. 372=18 R. A. 17=1945 A.L.W. 145=46 Cr.L.J. 495=1945 O.W.N. (H.C.) 138=1945 A.Cr. C. 77=1945 A.W.R. (H.C.) 145=1945 A.L.J. 141=A.I.R. 1945 All. 87.

—Ss. 326 and 537—Non-service of summonses on some of jurors—Effect on trial. S. 326, Cr. P. Code, contains no provision to the effect that a fresh summons must issue in the case of any failure to effect service on the

that there had already been three trials, to decide under S. 308 that the accused should not be re-tried. He does not in such circumstances have

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jurors originally summoned. Where eighteen jurors were actually summoned, mere failure to effect service on some of the jurors against whom summonses were issued does not amount to a defect in the procedure sufficient to vitiate the trial. Even if it is a defect in the required procedure, the defect is curable under S. 537, Cr. P. Code. (Edgley and Roxburgh, IJ.) Мана-BIR SINGH v. EMPEROR. I.L.R. (1944) 2 Cal.

-Ss. 326 and 327—Power of Assistant Sessions Judge to issue precept for summoning jurors—Case adjourned to next month—Fresh set of jurors—If to be summoned.

It cannot be said that an Assistant Sessions Judge to whom the Sessions Judge has transferred a case has no power to issue the precept for summoning jurors under S. 326, Cr. P. Code. The Assistant Sessions Judge has cer-tainly the powers conferred on the Court of Session under S. 327. If a set of jurors have been summoned by the Sessions Judge for a whole Session, it is still open to the presiding officer of any of the Courts holding Sessions to summon another set of jurors for a particular trial if it is not convenient or practicable for the trial to be held by jurors of the set summoned by the Sessions Judge under S. 326. It is not, in practice, usual for the Sessions Judge to act under S. 326, summoning a single set of jurors to hear all the cases set down for hearing in a particular Session, but rather to summon one set of jurors for each trial that has to be held, and this is in accordance with and authorised by S. 327. When a case is being adjourned to the next month after the jurors have been summoned, an Assistant Sessions Judge has power under S. 327 to summon a fresh set of jurors, if he thinks fit to do; but it is not imperative, though desirable. The trial cannot be challenged as illegal on the ground that the Assistant Sessions Judge did not summon a fresh set of jurors. (Rowland, J.) Bakhori Gope v. Abbul Halim. 195 I.C. 107=7 B.R. 875=14 R.P. 84=1941 P.W.N. 255=22 Pat.L.T. 327=A.I.R. 1941 Pat. 362.

S. 337—Accomplice—Who is—Arsenic caused to be mixed in food through innocent girl of 13 years—Girl—If accomplice.

An innocent person, e.g., a girl of 13 years, through whom the accused caused arsenic to be mixed in the food of his victim cannot be re-garded as an accomplice and the evidence of such a person cannot be rejected as being that of an accomplice. (Lakshmana Rao, J.) Public

PROSECUTOR v. RAMANATHAN PILLAI. 1941 M.
W.N. 790=A.I.R. 1941 Mad. 832 (1).
S. 337—Procedure—Tender of pardon—
If to be made personally by District Magistrate

Acciptance by accepted William -Acceptance by accused-What constitutes-Right to withdraw tender made and accepted.

It is true that the grant of pardon under S. 337, Cr. P. Code, is conditional on the accused speaking the truth, but breach of this condition may involve a prosecution under S. 339, Cr. P. Code; it does not involve a withdrawal of a pardon already granted by the District Magistrate. It is not necessary that the District Magistrate should himself personally tender Legality.

## CR. P. CODE (V OF 1898), S. 337.

pardon to an accused person; the tender may be in writing. When the accused has accepted the tender, S. 337 comes into operation. The accused need not accept it in writing. If, as a result of the tender, he gives evidence, or even signifies his acceptance by making a statement, it is then not open to the District Magistrate to withdraw the pardon. It is not for the District Magistrate to decide whether the approver who has accepted the tender of pardon has or has not given a true statement. It is for the Public Prosecutor, after the Sessions trial, under S. 339 to give the necessary certificate before the approver can be tried for the offence in respect of which the pardon was tendered. The fact that an accused, soon after the pardon is tendered, breaks a condition on which the tender is made, does not give the District Magistrate the right to withdraw the tender of pardon which has once been made and has been accepted. (Davis, C.J. and O'Sullivan, J.) EMPEROR v. IMAM SHAH. I.L.R. (1944) Kar. 97=217 I.C. 177=17 R.S. 83=46 Cr.L.J. 218=A.I.R. 1944 Sind 184.

S. 337—Scope—Failure to record reasons for tender of pardon-If invalidates lawful

tender.

The fact that the District Magistrate does not record his reasons for tendering a pardon to an accused does not invalidate a lawful tender of pardon. (Davis, C.J. and O'Sullivan, J.) EMPEROR V. IMAM SHAH. I.L.R. (1944) Kar. 97=217 I.C. 177=17 R.S. 83=46 Cr.L.J. 218=A.I.R. 1944 Sind 184.

——S. 337 (2) (a)—Applicability—Special Magistrate under special Criminal Courts Ordinance-Right to continue trial of case after tender of pardon to an accused. See Special CRIMINAL COURTS ORDINANCE. (1944) 2 M.L. J. 156.

S. 337 (2-A)—Person accepting pardon disclaiming knowledge of offence—Effect—Right of accused to trial by Sessions Court or High Court.

In the course of his evidence, the person to whom pardon has been tendered may disclaim any connection with or knowledge of the offence, but this does not mean that the tender of pardon thereby ceases to be effectual. It may be that the witness by his evidence renders himself liable to forfeiture of the pardon and to a subsequent prosecution, but so far as the accused then being tried is concerned, his position and his right to trial by the Sessions Court or by the High Court are not dependent upon the nature of the evidence given by the person who has accepted the pardon. The words of S. 337 (1), Cr. P. Code, are that a pardon is tendered to a person "supposed" to have been directly or indirectly concerned in or privy to the offence, and even if the supposition turns out to be illfounded the operation of other clauses of the section will remain unaffected. (Davis, C.J. and Weston, J.) Dost Mahomed v. Emperor. I.L. R. (1942) Kar. 69=200 I.C. 728=15 R.S.

1=43 Cr.L.J. 707=A.I.R. 1942 Sind 100.

S. 337 (2-A) and (3)—Scope and meaning of—Commitment of approver also for trial—

### CR. P. CODE (V OF 1898), S. 337.

S. 337 (2-A), Cr. P. Code, only means that whenever an approver is examined, the magistrate has no jurisdiction to proceed with the trial but must commit the accused persons on trial to the Court of Session. It does not mean that the approver should be committed to trial along with the accused persons. Hence where an approver is so committed for trial along with the accused it is illegal and in contravention of S. 337 (3) nt is megal and in contravention of S. 53/ (3) and should be quashed. (Ghulam Hasan, J.) EMPEROR v. JOGESHWAR. 204 I.C. 471=15 R. O. 380=1943 A.W.R. (C.C.) 2=1943 O.A. (C.C.) 2 (1)=1943 A.Cr.C. 23=44 Cr.L.J. 279=1942 O.W.N. 811.

(3)—'Custody'—If judicial or −S. 337 police custody.

Speaking generally the word 'custody' in the Cr. P. Code, always means judicial custody, save only where the context clearly indicates either that it is police custody or that the magistrate has been given liberty to decide what the custody shall be. Hence the custody rferred to in S. 337 (3), Cr. P. Code, must be taken to be jail or judicial custody and not police custody and the detention of the approver in police custody is illegal. (Yorke, J.) DAN BAHADUR SINGH v. EMPEROR. I.L.R. (1943) All. 289=205 I.C. 89=15 R.A. 407=1943 A.Cr.C. 62=40 Cr.L.J. 327=1943 A.L.W. 749=1943 A.T. I. 16=1042 A.W.R. (H.C.) 401=A. A.L.J. 16=1942 A.W.R. (H.C.) 401=A. I.R. 1943 All. 93.

-S. 338-Power of Asst. Sessions Judge to

tender pardon.
An Assistant Sessions Judge when conducting a trial by jury, is the Court which has jurisdiction under S. 338, Cr. P. Code, either to tender a pardon or to order the committing Magistrate or the District Magistrate to tender a pardon to an accused person. (Lodge and Roxburgh, JJ.) IJJATULLA AKANDA v. EMPEROR I.L.R. (1944) 1 Cal. 280=219 I.C. 285=18 R.C. 80=46 Cr.L.J. 557=A.I.R. 1945 Cal. 42. —S. 339—Pardon—Breach of conditions-Duty of Court.

When a pardon has been tendered, and the conditions on which it has been tendered have been broken, the matter is one of which the Court of Session should take very serious notice. (Meredith and Shearer, JJ.) NAWAL KISHORE RAI v. EMPEROR. 22 Pat. 27=206 I.C. 109= 15 R.P. 342=44 Cr.L.J. 494=9 B.R. 251= A.I.R. 1943 Pat. 146.

When an approver has been tendered a pardon under S. 337 (1), Cr. P. C., and he has accepted the tender, his statement can be legally re-corded under S. 164 on affirmation. Such a statement will be admissible in evidence against him at a subsequent trial, after forfeiture of the pardon, for an offence in respect of which the pardon was tendered. (Grille, C.J., Pollock and Puranik, JJ.) RAMBHAROSE NARBADAFRASAD v. EMPEROR. I.L.R. (1944) Nag. 274=212 I.C.

CR. P. CODE (V OF 1898), S. 342.

44=16 R.N. 233=1944 N.L.J. 113=45 Cr. L.J. 673=A.I.R. 1944 Nag. 105 (F.B.).

S. 339 (2)—Statement contemplated by Hori Lal v. Emperor. [See Q.D. 1936-40, Vol. I, Col. 2723.] I.L.R. (1941) Nag. 372. 341—Applicability—Condition for—

Accused deaf and dumb by birth-If renders

section applicable.

S. 341, Cr. P. Code, would clearly cover the case of a person who is deaf and dumb, but it cannot be said that because the accused is deaf and dumb by birth. S. 341, Cr. P. Code, neces-sarily applies to his case. Before S. 341 can be made applicable the Court must be satisfied that the accused cannot be made to understand the proceedings. (Davis, C.J. and Weston, J.) Isso GAMAN KHOSO v. EMPEROR. I.L.R. 1943 Kar. 326=209 I.C. 335=16 R.S. 103=45 Cr.L.J. 138=A.I.R. 1943 Sind 237.

S. 341—Powers of High Court—Woman charged with murder-Accused becoming unable to hear towards end of sessions trial—Judge unable to question accused under S. 342, Cr. P. Code-Conviction supported by evidence and confession-Power of High Court to confirm.

The accused, a woman, was charged with murder under S. 302, I. P. Code. Towards the end of the trial the Sessions Judge felt that she was unable to understand the proceedings as she was unable to hear the questions put to her under S. 342. She was represented by a vakil, and she followed the proceedings up to that stage and pleaded that the case was foisted on her. There was strong evidence of her guilt and there was besides a confession of the accused duly recorded on which the Sessions Judge based his conviction.

Held, on reference under S. 341, Cr. P. Code, that no injustice had resulted from the fact that the Sessions Judge felt himself unable to question the accused further with regard to the evidence appearing against her, and therefore the conviction should be confirmed under S. 341, Cr. P. Code. (Lakshmana Rao and Horwill, JJ.) BOYA PALAMMA, In re. 192 I.C. 674=1940 M.W.N. 1269=42 Cr.L.J. 315=13 R.M. 590=52 L.W. 924=A.I.R. 1941 Mad. 225= (1941) 1 M.L.J. 20.

Discretion as to nature of order to be passed.

So far as the trial Court is concerned, S. 341, Cr. P. Code, while it gives the power to convict, does not give the power to pass sentence. The power to pass sentence is given to the High Court. Whether it should pass a sentence of imprisonment, or whether it should order the convicted person to be detained during his Majesty's pleasure, is a matter within the discretion of the High Court. Each case has to be dealt with upon its own merits and circumstances. (Davis, C.J. and Weston, I.) Isso Gaman Khoso v. Emperor. I.L.R. 1943 Kar. 326=209 I.C. 335=16 R.S. 103=45 Cr.L.J. 138=A.I.R. 1943 Sind 237.

——S. 342—Applicability—Additional evidence taken under S. 428. NATHU SINGH V. EMPEROR. [See Q.D. 1936-40, Vol. I, Col. 2725]

CR. P. CODE (V OF 1898), S. 342.

I.L.R. (1942) Nag. 34=A.I.R. 1941 Nag.

-S. 342—Applicability—Summary trial in summons case—Case under S. 22, Cattle Trespass Act. Emperor v. Kondiba Balaji. [See Q.D., 1936-'40, Vol. I, Col. 2725.] 13 R. D. 153=42 Cr.L.J. 71.

-S. 342—Compliance with—Duty Courts.

It is best that Courts should literally comply with the requirements of S. 342, Cr. P. Code, in view of the controversy which remains still in an unsettled state as to whether an incurable illegality results when the provisions of that section are not compelied with. (Pollock and Bobde, JJ.) PROVINCIAL GOVERNMENT, CENTRAL PROVINCES AND BERRA v. GOMAJI BADRI, I.L. R. (1944) Nag. 589=215 I.C. 265=17 R.N. 53=46 Cr.L.J. 80=(1944) N.L.J. 174=A.I. R. 1944 Nag. 192.

-S. 342-Court's power to put questions to accused-Limits-Answer to question improperly put-If can be used against accused-Question properly put and answered-Use of answer against accused though such answer not strictly necessarv.

If there are no circumstances appearing against an accused person in the evidence, then unquestionably the Court should not put to him any questions at all; under S. 342, Cr. P. Code, the Court has to put questions for the purpose of enabling the accused to explain any circumstances appearing in evidence against him. Any statement made by an accused as a result of questions improperly put to him cannot therefore be taken into account against him. If there is a small piece of circumstantial evidence against the accused, that is sufficient to justify the Court in putting questions to the accused, though such circumstantial evidence would not in itself be sufficient to warrant a conviction. If a question is properly put to an accused person and he chooses to make a statement which inculpates himself, there is no reason why his answer should not be taken into account because that answer is not strictly necessary for the explaining away of the circumstances appearing against him. His admission would be evidence against him. (Horwill, J.) SARABHAYYA v. EMPEROR. 206 I.C. 604=16 R.M. 17=44 Cr.L.J. 541 = 56 L.W. 147=1943 M.W.N. 125=A.I.R. 1943 Mad. 408=(1943) 1 M.L.J. 255.

——S. 342—Duty of Court—Accused filing written statement through pleader—Necessity for further questioning.

It is no doubt the duty of a Magistrate under S. 342, Cr. P. Code, to question the accused generally on the case after the close of the prosecution; but where the accused refuses to answer a question, the magistrate is not bound to go on asking questions, especially where the accused through his pleader files a written statement meeting the points of the prosecution. If the accused having heard the prosecution evidence and on being questioned by the Court under S. 342, Cr. P. Code, in general terms indicates his intention of leaving his defence to his legal

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is neither bound nor entitled to question him further. (Agarwala and Brough, JJ.) SATYANARAYANA v. EMPEROR. 22 Pat. 681=212 I.C. 298=16 R.P. 313=25 P.L.T. 57=10 B.R. 494=45 Cr.L.J. 624=A.I.R. 1944 Pat. 67. -S. 342-Duty of Court-Summarising the

whole evidence and asking accused what he has

to say—Propriety of.

The object of questioning an accused by the Court under S. 342, Cr. P. Code, is to give the accused an opportunity of explaining the circumstances that appear against him in the evidence. To summarise the whole evidence at length and then asking the accused what he has to say with regard to it would tend to defeat the object of S. 342 and would also be an abuse of the provisions of S. 342, Cr. P. Code. What the Court ought to do is to draw the attention of the accused to the salient features of the prosecution case that seem to call for an explanation. (Horwill and Bell, JJ.) DURAISWAMI KOUNDAN, In re. 1945 M.W.N. 730 (1)=58 L.W. 586

= (1945) 2 M.L.J. 455.

S. 342—Non-compliance with—Effect—If vitiates trial—S. 537. Emperor v. Kondiba Balaji. [See Q.D. 1936-'40, Vol. I, Col. 2732.] 13 R.B. 153=42 Cr.L.J. 71.

———S. 342—Non-compliance with provisions of—Interference with conviction—When justified. No omission to comply strictly with S. 342 can render a conviction liable to be set aside unless it has in fact occasioned a failure of justice within the meaning of S. 537, Cr. P. Code. Prejudice to accused cannot be presumed. (Bemett, J.) RAM UDIT v. JAGANNATH. 200 I.C. 90=43 Cr.L.J. 503=14 R.O. 597=1942 A.W.R. (C.C.) 204=1942 O. W. N. 303=1942 A.Cr. C. 91=1942 O.A. 216=A. I.R. 1942 Oudh 342.

-S. 342—Omission to examine accused

after charge-Effect on trial.

The omission to examine the accused after the examination of prosecution witness after 'framing of the charge vitiates the trial and convic-The charge vitates in that and converge to the first and convergence in t

after charge—Illegality.

If no prosecution witnesses are either examined or cross-examined after the framing of the charge, the omission to examine the accused again is not illegal. (Bhide, J.) Ghaus Maho-MED v. EMPEROR. 197 I.C. 413=43 Cr.L.J. 165=14 R.L. 250=43 P.L.R. 436=A.I.R. 1941 Lah. 322.
——S. 342—Omission to examine accused

after further examination of prosecution witnesses—Effect on trial and conviction—Defect—

If curable—S. 537.

Where a case, after being heard once, is sent to a Magistrate with higher powers, and the prosecution witnesses are re-summoned and further examined, the accused must be examined again under S. 342, Cr. P. C. Such examination is imperative even though he may have been previously examined after the prosecution adviser by filing a written statement the Court evidence that stood against him at that time.

CR. P. CODE (V OF 1898), S. 342. Omission to examine the accused under S. 342 after the further examination is an illegality which vitiates the trial and conviction. It is not a mere irregularity which can be cured by S. 537.

(Pande, J.) SITARAM GOPE v. EMPEROR. I.C. 388=(1945) P.W.N. 281.

-S. 342—Omission to examination accused after further cross-examination of prosecution witnesses—Effect of.

Where the accused was examined under S. 342, Cr. P. Code, after the witnesses for the prosecution had been examined but was not examined again after some of them were re-called at his request and further cross-examined by him after he had been called on for his defence. Held, that there had been no non-compliance

with the provisions of S. 342, Cr. P. Code. (Edgley, J.) GIRILAL MONDAL v. EMPEROR. 45

C.W.N. 328.
S. 342—Questions to accused—Object of. When the accused is questioned under S. 342, Cr. P. Code, it is generally expedient that he should have his attention drawn to circumstances which appear to strengthen the prosecution case against him, so that he may be expressly given an opportunity of explaining them. (Bennett an opportunity of explaining them. and Ghulam Hasan, JJ.) PARMESHWAR DIN v. EMPEROR. 195 I.C. 630=1941 O.A. 689=1941 O.L.R. 609=1941 A.W.R. (C.C.) 265=1941 A.L.W. 856=14 R.O. 110=42 Cr.L.J. 758=1941 A.Cr.C. 198=1941 O.W.N. 981=

A.I.R. 1941 Oudh 517.
S. 342—Questions to accused—Object of. Under S. 342, Cr. P. Code, the Court is empowered to put such questions to the accused as it considers necessary for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. Where in a prosecution under R. 56 (4) of the Defence of India Rules (1939), there is no evidence whatever regarding the existence of a proper order under the rule, with the contravention of which the accused is charged, the Court would be going beyond its authority if it puts a question to the accused as to whether he "contravened the provisions of R. 56 of the Defence of India Rules by taking part in procession, etc." (Varna and Reuben, J.) Kirti Narain Singh v. Emperor. 23 Pat. 1=215 I.C. 268=17 R. P. 113=46 Cr.L.J. 86=11 B.R. 85=A.I.R. 1944 Pat. 345.

-S. 342-Questions under-Form and pur-

Under S. 342, Cr. P. Code, the questions to the accused should be put intelligently and not merely as a matter of form, so that the object of the Legislature that the accused may have the opportunity of giving such explanations, as The opportunity of giving such explanations, as he may desire, may be fulfilled. (Malk, J.) FATTAN v. EMPEROR. I.L.R. (1945) A. 432 = 218 I.C. 372=18 R.A. 17=1945 A.L.W. 145=46 Cr. L.J. 495=1945 O.W.N. (H.C.) 138=1945 A.Cr. C. 77=1945 A.W.R. (H.C.) 145=1945 A.L.J. 141=A.I.R. 1945 All. 87.

S. 342—Questions under—Form of S. 342, Cr. P. C., does not intend that the Magistrate should question the accused on all points in the prosecution case nor does it permit to previous convictions—Permissibility.

# CR. P. CODE (V OF 1898), S. 342.

The Magistrate is not supposed to review the prosecution case from the beginning to the end and to put one by one the points in the prosecution case to the accused, and to question the accused upon them. The section refers to the Magistrate examining the accused generally upon the case, but this does not mean that the questions should be of a general nature. The questions should refer generally to the case, should relate to particular points in the case. The general question "What have you to say about the prosecution case" does not satisfy the provisions of S. 342 (1), Cr. P. C. (Davis, C.J.) BHAGWAN DAS v. EMPEROR. I. L. R. (1942) Kar. 112=202 I. C. 205=43 Cr. L.J. 799=15 R.S. 33=A.I.R. 1942 Sind 102.

-S. 342—Questions under—Form of The whole object of enacting S 342, Cr. P. C., was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused, so that the case is made out against the accused, so that he may be able to give such explanation as he desires to give. (Malik, J.) Makkhan v. Emperor. I.L.R. (1945) A. 558=220 I.C. 432=1945 A.L.W. 248=1945 A.W.R. (H.C.) 156=1945 O.W.N. (H.C.) 227=1945 A. Cr. C. 122=A.I.R. 1945 All. 81.

-S. 342—Scope—Accused examined after prosecution witnesses' examination in proceedings under Ch. VIII—Filing of written statement by one accused—Others adopting same—Withdrawal of statement and filing of fresh statement reproducing original matter except objectionable mat-

ter-Fresh examination-Necessity for. In proceedings under Ch. VIII, Cr. P. Code, against three accused against whom orders under S. 112, Cr. P. Code, had been passed, the accused were examined under S. 342 after the prosecution examination of the witnesses. The 1st accused put in a written statement and the others merely relied on the written statement filed by the 1st. This written statement was withdrawn the next day as it was objected to by the Public Prosecutor on the ground that it contained scandalous matter, and another written statement signed by the 1st accused alone was substituted, which contained identically the same matter as the first except that the scandalous matter was omitted. It was contended that the accused should have been examined again under S. 342 in respect of the second written statement and that since they were not so examined, the proceedings were irregular.

Held, that the omission to examine the accused again was no doubt a technical defect, but it was difficult to conceive that any possible prejudice had resulted therefrom. Since the second written statement was a reproduction of the original statement with the omission of the objectionable matter, it was certainly not necessary that the magistrate should again examine the accused under S. 342, Cr. P. Code and that the irregularity was very trivial. (Lobo and Weston, II.) EMPEROR v. RASULBUX. I. L. R. (1942) Kar. 252=205 I.C. 322=15 R. S. 136=44 Cr.L.J. 378=A.I.R. 1942 Sind 122.

S. 342—Scope—Examination with regard

### CR. P. CODE (V OF 1898), S. 342.

S. 342, Cr. P. Code, only gives the power of questioning the accused for the express purpose of explaining facts which are already in evidence against him. As facts relating to his previous convictions do not appear in evidence before the charge is framed, there is no legal warrant under S. 342 for the Magistrate to question the accused with regard to them. (Monroe, Blacker and Ram Lall, JJ.) EMPEROR v. DALIP SINGH.
I.L.R. (1943) Lah. 477=45 P.L.R. 414=
211 I.C. 283=43 Cr.L.J. 364=16 R.L. 211
=A.I.R. 1944 Lah. 25 (F.B.).

-S. 342—Scope—Failure to question cused on vital point-Effect-Miscarriage

justice—If curable.

The fact that an accused puts in a written statement does not absolve the Magistrate of the duty imposed upon him by S. 342. S. 342 must operate whether the accused filed a written statement or not and the practice of filing a written statement should not be encouraged, as it tends to defeat the object of the section. Where the Magistrate has omitted to question the accused as required by S. 342 on a crucial point which alone he has been convicted, merely relying upon the omission by the accused of any explanation on that crucial point in his written statement the omission to question the accused on the crucial point under S. 342 amounts to a miscarriage of justice within S. 537. (Davis, C. J.) BHAGWANDAS T. EMPEROR. I.L.R. (1942) Kar. 112=202 I.C. 206=43 Cr.L.J. 799=15 R.S. 33=A.I.R. 1942 Sind 102.

Duty of judge—Putting to accused whole prosecution case without specific or detailed questions

-Sufficiency.

S. 342, Cr. P. Code, is designed to give accused persons an opportunity to explain circumstances appearing against them. Its provisions are mandatory and must be strictly complied with. Where the Court merely puts the whole case for the prosecution and asks him what he has to say, that is not a compliance with the section. The circumstances must be specifically put to the accused and detailed questions must be put to him. When that is not done the trial can only be regarded as incomplete. (Mockett and Shahabuddin, JJ.) SHEKUR, In re. I.L. R. 1944 Mad. 304=211 I.C. 7=16 R.M. 493 =45 Cr.L.J. 282=55 L.W. 546=1943 M.W. N. 582=A.I.R. 1944 Mad. 42=(1943) 2 M. L.J. 389.

-S. 342-Statement made in previous trial

-Admissibility.

A statement made by an accused person under S. 342, Cr. P. Code, in a previous trial can be admitted in evidence in a subsequent trial for the same offence, as the line of defence taken by him in the previous trial is a relevant fact. (Lodge and Pal, II.) AYUB ALI v. EMPEROR.
200 I.C. 328=15 R.C. 64=43 Cr.L.J. 693=
74 C.L.J. 547=A.I.R. 1942 Cal. 277.
S. 342—Statement of accused—Use of—

Statement both exculpatory and inculpatory.

The proposition that the Court is not entitled to reject the exculpatory statement and take the inculpatory statement of the accused into account and that it should be considered as a whole, can

CR. P. CODE (V OF 1898), S. 344.

only apply to cases where there is no other evidence or reliable evidence on the record in order to establish the accused's guilt. If, on the other hand, there is evidence on the record which gives credible account of the happenings or circumstances which prima facie establish his guilt, the accused has got to be called upon to meet the case which must be decided against him, if it is un-rebutted, or remains unproved in cases where the onus has been cast on him by law. (Abdur Rahman and Munir, JJ.) Емı. Ç. 

cused-When may be taken-Failure to record

as question and answer—Defect, if curable.
Under S. 342, Cr. P. C., it is open to a Magistrate to take the statement of the accused at any stage of the proceedings and without a previous warning to him. The failure to record it as a question and answer as required by S. 364 is a defect which is covered by S. 533, Cr. P. C. (Teja Singh and Bhandari, II.) SULTAN v. EMPEROR. 47 P.L.R. 11=A.I.R. 1945 Lah. 91.

-S. 342—Statement under—If can be used

as evidence against accused.

A statement by an accused under S. 342, Cr. P. Code, may be treated as evidence against him. Such a statement has no less probative value than any other "matter including sworn testimony." (Lobo, A.C.J. and Thadam, J.) MAHAMDU v. EMPEROR. I.L.R. (1944) Kar. 444=219 I.C. 419=18 R.S. 50=46 Cr.L.J. 614=A.I.R. 1945 Sind 42.

S. 342—Statement of accused amounting to confession—Sufficiency for conviction.

The words "taken into consideration" in S. 342 (3), Cr. P. C., are very wide. If the accused's statement recorded under S. 342 amounts to a confession of the offence charged or some other offence covered by the charge and it is true and voluntary, it is sufficient for a conviction. It does not stand on any different footing from a confession recorded under the provisions of Confession. (Davis, C. J. and O'Sullivan, J.) VARAND v. EMPEROR. I.L.R. (1944) Kar. 114 =215 I.C. 172=17 R.S. 44=46 Cr.L.J. 19 =A.I.R. 1944 Sind 137.

S. 344—Adjournment at instance absent accused—Order for costs—If can be made.

Under S. 344, Cr. P. Code, the Court has, no doubt, power to pass an order for costs while adjourning a case. But where the accused on whose application the adjournment is granted is himself absent no order for costs can be made, as the Court is bound to adjourn the case and has no power to refuse the adjournment. (Henderson, J.) ICHAB SHEIKH v. KHIRODE KUMAR GHOSH. 48 C.W.N. 684.

S. 344—Adjournment sine die—Legality

of order.

S. 344, Cr. P. Code, does not provide for an indefinite adjournment of a case. An order adjourning a case sine die is, therefore, illegal. (Derbyshire, C.J. and Bartley, J.) EMPEROR V. EBRAHIM. I.L.R. (1941) 2 Cal. 281=45 C.

CR. P. CODE (V OF 1898), S. 344.

W.N. 768=199 I.C. 269=43 Cr.L.J. 539= 14 R.C. 554=A.I.R. 1942 Cal. 219.

-S. 344-Adjournment sine die-Legality -Adjournment granted for giving complainant opportunity to collect evidence—Magistrate directing police investigation—If proper.

There is no warrant in the Cr. P. Code, for

an adjournment of the hearing of a case sine die. It is no doubt open under S. 344, Cr. P. Code, to a Magistrate to adjourn the enquiry to a given date for any reasonable cause which may no doubt cover a case in which he considers that the complainant should be given an opportunity to collect evidence; but under such circumstances it will be for the complainant to take such action and not for the Magistrate to direct the complainant to go to the police or to direct the police to start a separate investigation. An adjournment for such a purpose should however only be sparingly granted, and will not affect the Magistrate's duty to proceed with the hearing according to law, after the adjournment. (Young, C.J. and Sale, J.) Kehr Singh v. Kirral Kaur. I.L.R. (1943) Lah. 726=202 I.C. 609=15 R.L. 154=43 Cr.L.J. 865=44 P.L.R. 401=A.I.R. 1942 Lah. 256.

-S. 344—Adjournment sine die-Legality of order-Request by Prosecuting Inspector for adjournment for obtaining Government orders— Duty of Magistrate.

Per Derbyshire, C.J.-Under S. 344, Cr. P. Code, the Magistrate can adjourn an enquiry or trial until such time as he considers reasonable. He cannot adjourn a case sine die on the request of a Prosecuting Inspector for a definite period of adjournment to enable him to obtain orders from the Government regarding the prosecution of the case.

Henderson, J.—The Magistrate should prosecute the matter further to discover why it is that the police are unwilling to go on with the case. Unless they are able to produce some reasonable excuse he should insist that the trial should go on. (Derbyshire, C.J. and Henderson, J.) EMPEROR v. RAHAMATALI. 45 C.W.N. 819.

-S. 344—Costs of adjournment—Accused's right to-Adjournment necessitated by court's

negligence.

Where an adjournment of a sessions trial is necessitated by the unnecessary delay on the part of the committing Court in sending articles to the Chemical Examiner or the Imperial Serologist, costs may properly be awarded to the accused under S. 344, Cr. P. Code. (Pollock and Puranik, JJ.)' Pandia Dhimar v. Emperor. I.L.R. (1945) Nag. 669=220 I.C. 177=1945 N.L.J. 230=A.I.R. 1945 Nag. 209.

Pendency of civil suit—If ground for staying riminal proceedings-Principle to be followed.

It is of the utmost importance that criminal ases should be brought to a speedy termination nd it is not expedient that criminal proceedings hould be adjourned indefinitely until the deci-ion of a pending Civil suit. The correct prin-iple is that unless the finding of a Civil Court

CR. P. CODE (V OF 1898), S. 345.

case the Magistrate trying the latter case should not exercise his discretion in favour of an adiournmnt of the proceedings pending before him for the purpose of enabling him to have the benefit of the finding of the Civil Court. (Lobo, A.C.J. and Thadam, J.) MANSHARAM v. Emperor I.L.R. (1944) Kar. 392=218 I.C. 280=18 R.S. 10=46 Cr.L.J. 437=A.I.R. 1945 Sind 32.

S. 344—Applicability — Adjournment under S. 526 (8) on accused intimating intention to move for transfer—Power of Magistrate to order payment of costs of the day to prosecution,

Where a party to a criminal proceeding is desirous of moving the High Court for transfer. all that he has to do is to intimate to the Court his intention to move the High Court for transfer. It is the duty of the Court to fix a day within which the applicant will have to move the High Court and also the security which the applicant will have to furnish. On the applicant's compliance, the Court has simply to grant an adjournment; but in doing so the adjournment is granted not under S. 344, Cr. P. Code, but under S. 526 (8) which leaves the Court no option. The Court has no jurisdiction to order payment of costs of the day to the prosecution, Horwill, I.) Venkatarama Chetti, In re.

I.L.R. (1942) Mad. 661=199 I.C. 54=14

R.M. 522=43 Cr.L.J. 454=1942 M.W.N.

384=54 L.W. 632=A.I.R. 1942 Mad. 178= (1941) 2 M.L.J. 854.

\_\_\_\_\_\_S. 344—Powers of magistrate—Stay of trial—Grounds—Pendency of civil suit in superior Court—If sufficient—Order from superior

Court-If necessary.

Under S. 344, Cr. P. Code, a magistrate trying a criminal case has himself jurisdiction to adjourn the trial before him for any reasonable cause; the pendency of a civil suit between the parties, in which an issue is to be tried identical with one arising in the criminal case is a reasonable cause. The fact that the civil suit is pending in the Chief Court does not deprive the magistrate of his power to stay the trial until an order is made for stay by the Chief Court (Weston and Tyabji, JJ.) Moti RAM v. EMPEROR. I.L.R. (1942) Kar. 193=204 I.C. 252=15 R.S. 92=44 Cr.L.J. 167=A.I.R. 1943 Sind 10.

-Ss. 344, 439 and 561-A-Stay under

344—Discretionary—Revision.

Chief Court has power to interfere with an order under S. 344, Cr. P. Code, whether under S. 439 or S. 561-A, Cr. P. Code. The question of stay of proceedings under S. 344 is a matter of discretion and interference might be justified only if it has been exercised unwisely. (Bennet, J.) Shatrunjaya Singh v. Saxena. 18 Luck. 419=204 I.C. 265=15 R.O. 320=44 Cr.L.J. 169=6 F.L.J. (H.C.) 33=1942 O.W.N. 496=1942 O.A. 395=1942 A.W.R. (C.C.) 315=A.I.R. 1943 Oudh 184.

s. 345—Complaint or police report mentioning offence under S. 448 read with S. 117, iple is that unless the finding of a Civil Court under S. 143 ill dispose of that point arising in the criminal and 117, I. P. Code—Order allowing offence under S. 143 and 117, I. P. Code—Order allowing offence CR. P. CODE (1898), S. 345.

to be compounded—Legality—S. 117—If includes S. 143—Complaint—Construction.

It cannot be laid down as a general proposition of law that an offence of abetment under S. 117, I. P. Code, necessarily involves the offence of unlawful assembly under S. 143, I. P. Code. It is not correct to say that because S. 117 applies to the abetment of an offence, an offence under S. 143 necessarily or automatically follows. Nor is the mere mention of certain sections in a police report or a complaint conclusive of the matter, as to what offences are committed. If upon the facts alleged on the first information report, a Magistrate has reason to believe that an offence under S. 143, I. P. Code, has been committed, it matters not what figures or what labels the first information or the complaint attaches to the facts; it is for the Magistrate to decide upon the facts alleged what is the offence alleged and what section of the Penal Code is the appropriate section. It is not for the first informant or the complainant, of a complaint is made to determine the offence or the jurisdiction of the Court. The police report or challan against several persons referred to S. 448 read with S. 117, I. P. Code, but the facts alleged in the first information report disclosed an offence under S. 143, I.P. Code, read with S. 117, I. P. Code, there being allegations of an unlawful assembly having been formed to take unlawful possession of Government property, and jathas being arranged to be sent to make unlawful and unauthorized entry. The Magistrate allowed the offence under S. 448 read with S. 117 to be compounded, but refused to allow the offence under S. 143 read with S. 117 to be compounded as he was of opinion that the facts disclosed also an offence under S. 143, read with S. 117. He also held that S. 117 necessarily included S. 143.

Held, in revision, (1) that the Magistrate was correct in refusing the offence under S. 143 read with S. 117, I. P. Code, to be compounded, as the offence under S. 143 was not compoundable. The offence under S. 143 being an offence which directly affected the public peace and not merely those immediately involved, and the conclusion of a criminal trial concerning such an offence was something more than an agreement between individuals; (2) that the magistrate was not correct in holding that S. 117 necessarily included S. 143, I. P. Code. (Davis, C.J. and Weston, J.) Agha Nazarali Sultan v. Emperor. I.L.R. (1941) Kar. 352=196 I.C. 751=43 Cr.L.J. 68=14 R.S. 83=A.I.R. 1941 Sind 186.

-S. 345—Non-compoundable case—Application to consign based on misconception-Power of Magistrate to revive.

Where owing to a misconception an application is made to consign to the record, a non-compoundable case the Magistrate is entitled to revive it on application by the party misled. (Ghulam Hasan, J.) RAMCHARAN v. EMPEROR. 195 I.C. 488=1941 A.L.W. 769=1941 O.W. N. 869=1941 O.L.R. 591=14 R.O. 98=1941 A.W.R. (C.C.) 243=42 Cr.L.J. 746=1941 A.Cr.C. 182=1941 O.A. 565=A.I.R. 1941 Oudh 510.

-S. 345-Striking on the ear with a knife Q. D. I-114

CR. P. CODE (1898), S. 345.

-Permission to compound should not be granted. Any one who strikes at the ear of another with a knife must in reality be held to be striking at his head as it is not possible during the course of a fight to attempt to strike with safety and accuracy at such a small object as the ear. Courts ought to do all in their power to discourage persons from making use of murderous weapons in such assaults and persons using them should not receive lenient treatment. Such an offence cannot be allowed to be compounded. (Davies.) Lalchand v. Crown. 1945 A.M. L.J. 23.

S. 345 (1)—Applicability and Scope—Several accused including "young person"—Latter considered liable to be dealt with under Madras Children Act—Procedure—Conviction of all and reference of young person alone to superior Magistrate—Propriety.

There is nothing in the Cr. P. Code or in the Madras Children Act which places a case in which there are several accused and one of them witch there are several accessed and one of them is a child or youthful person outside the provisions of S. 349, Cr. P. Code. Three persons, one of whom was a "young person" within the meaning of the Madras Children Act, were accused before a Stationary Sub-Magistrate with an offence punishable under S. 355, I. P. Code. The Magistrate found all the accused guilty and sentenced each of them to a fine of Rs. 40. He considered that the accused who was a "young person" should be dealt with under the Children Act and so referred the case so far as that accused was concerned to the Joint Magistrate. Held, that the case fell under S. 345 (1), Cr. P. Code, and therefore the Sub-Magistrate could not convict any of the accused, but was required to send all the accused to the Joint Magistrate. (Leach, C.J. and Shahabuddin, JJ.) Subbai Goundan In re. I.L.R. (1945) Mad. 594=1945 M.W.N. 182=58 L.W. 96=(1945)

1 M.L.J. 241.
S. 345 (2)—Offence of cheating—Clerk of Court receiving money saying he would bribe judge-Sanction to compound-If can be given.

Where the allegation is that the accused who is a clerk of the Court cheated the complainant by inducing him to pay a sum of money stating that he (accused) would hand it over to the judge in charge of the complainant's case as a bribe, it is a matter of very grave public concern, and sanction should not be accorded by Court to compound the offence. (Bose and Hemeon, JJ.) Provincial Government, C. P. AND BERAR v. BIPIN SINGH. I.L.R. (1945) Nag. 505=221 I.C. 208=1945 N.L.J. 7=A. I.R. 1945 Nag. 104.

-Ss. 345 (2) and 417—Order sanctioning

composition of offence—Appeal, if lies.
Under S. 417, Cr. P. Code, an appeal by the Order St. 417, Ct. r. Code, an appear by the Provincial Government lies from an order according sanction under S. 345 (2), Cr. P. Code, to the compounding of an offence. The force of the words "shall have the effect of an acquittal" in S. 345 (6) is that S. 417 and all other sections relating to appeal are automatically brought into operation. (Recailed Hemography cally brought into operation. (Bose and Hemeon, JJ.) PROVINCIAL GOVERNMENT, C. P. AND BERAR v. Bipin Singh. I.L.R. (1945) Nag. 505=

CR. P. CODE (1898), S. 345.

221 I.C. 208=1945 N.L.J. 7=A.I.R. 1945 Nag. 104.

-S. 345 (5)—Applicability—Offence under S. 345 (1)—Refusal of application to compound on ground of offence falling under S. 345 (2)— Conviction—Appeal — Appellate Court finding offence falling under S. 345 (1) while writing judgment-Power to allow compounding-Proce-

S. 345 (5), Cr. P. Code, applies not only to an offence under Cl. (1) but also to an offence under Cl. (2) of S. 345; the sub-section applies to all offences which may be compounded under the section. Where an application to compound an offence is rejected on the ground that the offence fell under S. 345 (2), and in appeal from conviction the appellate Court, while writing its judgment, finds that the offence is one falling under S. 345 (1), it can consider an application for compounding and then pass an order allowing the offence to be compounded and the consequential order of acquittal. (Davis, C.J. and Weston, J.) AKAN SABZALI v. EMPEROR. I.L. R. (1941) Kar. 429=197 I.C. 868=14 R.S. 129=43 Cr.L.J. 293=A.I.R. 1941 Sind 216. -S. 345 (6)—Applicability—Panchayat— If bound to accept compromise—Bihar and Orissa Village Administration Act, S. 76—Scope—One

party resiling from compromise—Procedure. S. 345 (6) of the Cr. P. Code, does not apply to a Panchayat under the Bihar and Orissa Village Administration Act. There is no provision in the latter Act similar to S. 345 (6). S. 76 of the Act merely enables a panchayat to accept a compromise and decide the case accordingly. But a panchayat is not bound to do so. In a case where one of the parties resiles from the compromise, the panchayat would be exer-cising a wise discretion in not acting on the compromise. (Agarwala, J.), Goni Mahton v. Emperor. 193 I.C. 491=7 B.R. 606=13 R. P. 614=42 Cr.L.J. 434=1940 P.W.N. 973 =A.I.R. 1941 Pat. 169.

S. 345 (6), Penal Code, Ss. 323, 392 and 452—Consignment to record of complaint under Ss. 392 and 452, I. P. Code—Revival—Conviction under S. 323, I. P. Code—Legality.

Where owing to a misconception an application is made to consign to the record a complaint under Ss. 392 and 452, I. P. Code, and it was so consigned but later on revived on the appli-cation of the party misled, it is open to the Court to convict the accused under S. 323, I. P. Code, if the necessary facts are established. (Ghulam Hayan, I.) RAM CHARAN v. EMPEROR. 195 I.C. 488=1941 A.L.W. 769=1941 O.W.N. 869=1941 O.L.R. 591=14 R.O. 98=1941 A.W.R. (C.C.) 243=42 Cr.L.J. 746=1941 A.Cr.C. 182=1941 O.A. 565=A. I.R. 1941 Ough 510 I.R. 1941 Oudh 510.

S. 346—Case submitted under—De novo trial—Duty of Magistrate to hold.

If a case is submitted by a Magistrate to the District Magistrate under S. 346, Cr. P. Code, the District Magistrate or the Magistrate to whom the case has been assigned by him is bound to hold a de novo trial. A conviction may also be committed. S. 347, Cr. P. C., based on evidence partly recorded by the Magistrate—is not controlled or limited by the narrow protrate, who originally tried the case, and partly visions, of S. 254 of the Code. Though ordinates.

CR. P. CODE (1898), S. 345.

recorded by the Magistrate to whom the case was sent for trial under the section is illegal. (Tek Chand, J.) GURA v. EMPEROR. 203 I.C. 178=43 Cr.L.J. 925=44 P.L.R. 455=15 R. L. 185=A.I.R. 1943 Lah. 27.

S. 346 (1)—Applicability—Complaint filed before Magistrate without jurisdiction-Objection -Procedure.

The accused was prosecuted for making a false allegation against a Taluk office clerk that he demanded a bribe. The Collector who was the superior of the clerk ordered the Revenue Divisional Officer to file a complaint against the clerk. During the trial the accused raised two objections; (1) that the Collector should have himself filed the complaint and had no power to delegate his right to the Revenue Divisional Officer, and (2) that the complaint ought to be filed before the Magistrate having jurisdiction at the place where the Collector received the containing the false allegation. The Magistrate forwarded the papers to his immediate superior under S. 364 (1), Cr. P. Code.

Held, that both the objections were correct, but the proper procedure was to return the complaint for presentation to the Magistrate having jurisdiction and not to forward the papers to the Superior Magistrate. (Horwill, J.) District Magistrate of Cuddappah v. Syed About. Kareem. 208 I.C. 400=16 R.M. 257=44 Cr. L.J. 776=1943 M.W.N. 335=A.I.R. 1943 Mad. 526=(1943) 1 M.L.J. 467.

-S. 346 (2)—Superior Magistrate—No power to revise view of referring Magistrate and send case back to him.

A superior Magistrate to whom a case is submitted under S. 346 (1) of the Cr. P. Code, is empowered under S. 346 (2) to—(1) try the case himself, if the offence can be tried by him or (2) refer it to any Magistrate subordinate to him having jurisdiction or (3) commit the accused for trial. He cannot revise the opinion of the subordinate Magistrate who has submitted the case and refer the case back to that very Magistrate. The superior Magistrate acting under S. 346, is not a revising or appellate authority. He must assume the case presented in the report submitted to him as correct for the purpose of dealing with it under S. 346 (2). "Any Magistrate subordinate to him" in S. 346 (2) means a Magistrate other than the one who made the reference or report, and competent to deal with the case as submitted. (Broomfield and Wassoodew, JI.) HAIDARSHA LALSHA v. DHONDU ABAJI. I.L.R. (1942) Bom. 198=199 I.C. 351=14 R.B. 381=43 Cr.L.J. 562=44 Bom. L.R. 53=A.I.R. 1942 Bom. 84.

-Ss. 347 and 288-Commitment to Sessions in warrant case-Magistrate, if required to start proceedings de novo-Statements recorded prior to commitment-If can be used as substantive evidence. FAZAL v. EMPEROR. [See Q.D., 1936-'40, Vol. I, Col. 2739.] 42 Cr.L.J. 29.

-S. 347-Scope-If controlled by S. 254-Case and counter-case—Case committed to Ses-

narily it is desirable that a Magistrate should try a case which he is competent to try and which he can adequately punish, where a case has been rightly committed to the court of session the balance of advantage is in the trial by the Sessions Court of the counter case as well, notwithstanding the fact that it is one which the Magistrate himself is empowered to try and which he can adequately punish. (Davies, C.J.) EMPEROR v. GHULAM HUSSAIN. I.L.R. (1943) Kar. 90=207 I.C. 272=16 R.S. 28=44 Cr. L. J. 631=A.I.R. 1943 Sind 112.

-Ss. 348 and 349—Applicability—Trial of old offender by Sub-Magistrate-Finding of guilty -Magistrate holding that accused deserves heavier punishment than he was competent to award —Proper procedure.

A Sub-Magistrate who tried a case under S. 457, 380 or 411, I. P. Code, and being of opinion that the accused who was guilty under S. 411, I. P. Code, ought to receive a more severe punishment than he was competent to inflict as he was an old offender, submitted the case to the Sub-Divisional Magistrate under S. 349, I. P. Code. The latter acquitted the accused after a perusal of the record.

Held, on a reference by the Sessions Judge, that the Sub-Magistrate should have committed the accused to the Court of Session under S. 348, I. P. Code, and the irregularity could have been cured by the Sub-Divisional Magistrate by a reference to the District Magistrate under R. 97 of the Criminal Rules of Practice. (Lakshmana Rao, J.). SHEIKH MASTAN SAHIB v. EMPEROR. 1941 M.W.N. 524=A.I.R. 1941 Mad. 748.

-Ss. 348 and 349—Joint trial of four accused of whom one was an old offender convicted for an offence under Ch. XVII of the I. P. Code—All found guilty—Magistrate sending papers to sub-Divisional Magistrate under S. 349 as he could not award proper sentence on the old offender—Legality—Proper procedure—Jurisdiction of the sub-Divisional Magistrate to try and acquit all the accused.

Four accused were jointly tried by a sub-Magistrate for offences punishable under S. 380, I. P. Code, so far as accused 1 and 2 were concerned and for offences punishable under Ss. 410 and 411 of the I. P. Code, so far as accused 3 and 4 were concerned in respect of the same articles and found guilty. As the first accused was an old offender who had been convicted for an offence under Ch. XVII of the I. P. Code, the sub-Magistrate sent the papers to the sub-Divisional Magistrate under S. 349, Cr. P. Code, who acquitted all the accused. On an appeal against the acquittal,

Held, that the sub-Divisional Magistrate had no jurisdiction to try the case and acquit the accused inasmuch as the sub-Magistrate ought to have committed the accused to sessions under S. 348 of the Cr. P. Code, if he thought that he could not pass adequate sentence and should not have taken action under S. 349, Cr. P. Code. The sub-Divisional Magistrate could have jurisdiction to acquit the accused only if the papers could have been sent to him under S. 349. (Kuppuswami Aiyar, J.) Public Prosecutor v. CR. P. CODE (1898), S. 349.

SHEIK MASOOM. 1946 M.W.N. 7=(1945) 2

M.L.J. 576.

S. 349—Judgment in case referred under -Contents of-Duty of Magistrate hearing case after reference.

Where a case is referred to a superior Magistrate under S. 349, Cr. P. Code, the case after the reference is a continuation of the original trial, and the Magistrate to whom it has been referred is bound to hear arguments from the pleaders present and to write a judgment, giving his reasons for his order as in an ordinary calenhis reasons for his order as in an ordinary calendar case tried entirely by him. It is not sufficient for him to embody the referring Magistrate's order and to convict the accused. That is not a proper judgment. (Horwill, J.) Pedda Kamei Reddy, In re. 207 I.C. 58=16 R.M. 68=56 L.W. 251=44 Cr.L.J. 573=1943 M.W.N. 148 (2)=A.I.R. 1943 Mad. 345= (1943) 1 M.L.J. 248.

-Ss. 349 (1) and (2)—Sub-Magistrate finding accused guilty and submitting proceedings to Sub-divisional Magistrate on ground that order under S. 106, Cr. P. Code, was necessary— Superior Magistrate—If can say that such order was unnecessary and send case back.

A Sub-Magistrate found an accused guilty of an offence under S. 324, I. P. Code, but as he thought that an order under S. 106, Cr. P. Code, had to be passed against him and he himself had no power to do so, he submitted the proceedings and forwarded the accused to the Sub-divisional Magistrate under S. 349 (1), Cr. P. Code.

Held, that the Sub-divisional Magistrate had no power to send the case back saying that order under S. 106 was unnecessary but was bound to dispose of the case himself under S. 349 (2), Cr. P. Code, though he was not obliged to pass an order under S. 106, Cr. P. Code. (Horwill, J.) Sudalamadakudamban, In re. 199 I.C. 50=14 R.M. 549=55 L.W. 40 (1)=1942 M.W.N. 124 (2)=43 Cr.L.J. 457=A.I.R. 1942 Mad. 281 (2)=(1942) 1 M.L.J. 48.

S. 349 (I-A)—Applicability—Procedure under S. 562—Power of Magistrate to sentence some of the accused and to refer others to superior Magistrate.

There is a fundamental difference between the position of accused persons dealt with under S. 349 and S. 562, Cr. P. Code. Under the former section, the accused are sent by the Court to a superior magistrate with an expression of the Court's opinion that they are guilty and it is then the duty of the superior Magistrate to pass judgment upon them according to law. Under S. 562, the accused persons come before superior Magistrate as convicted persons and he has no other option but to proceed under S. 380 and pass sentences upon them in accordance with his powers. S. 349 (1-A) has no application to the procedure under S. 562. It is therefore open to a Magistrate to sentence some of the accused and refer the remainder of the accused for the application of S. 562, Cr. P. Code. (Byers, J.) PIRAMANAYAGA PANDARAM V. EMPEROR. 206 I. C. 577=16 R.M. 64=44 Cr.L.J. 568=56 L. W. 69=1943 M.W.N. 60 (1)=A.I.R. 1943 Mad. 390=(1943) 1 M.L.J. 126.

-S. 349 (1-A)—Scope—Mandatory—Duty of Magistrate to send all the accused to superior Magistrate—One of two accused a juvenile to be dealt with under Madras Children Act-Magistrate sending latter alone to superior Magistrate and passing sentence on other-Legality.

Where on a trial of two persons on charges under Ss. 454 and 380, I. P. Code, a Sub-Magistrate finds both the accused guilty, but he is not empowered to deal with one of them as he is juvenile who has to be dealt with under S. 5 (1) of the Madras Children Act (IV of 1920), it is his duty to send both the accused to the Sub-Divisional Magistrate under S. 349 (1-A), Cr. P. Code. He has no jurisdiction to send the juvenile offender alone and pass sentence on the other. (Lakshmana Rao, J.) EMPEROR v. Mo-TTAYYAN. 1941 M.W.N. 768.

Option of Magistrate.

A Magistrate to whom an application for a de novo trial is made, may at his option refuse to recommence the trial, and permit the accused under S. 350 (1), proviso, (a) Cr. P. Code, only to resummon and rehear the prosecution witnesses. (Hemeon, J.) MAHMUDKHAN v. EMPEROR. I.L.R. (1945) Nag. 419=1945 N.L. J. 122=A.I.R. 1945 Nag. 127.

-S. 350—Object and scope of—Trial novo by successor—Cross-examination on commission of witness examined on commission in previous proceedings—Propriety. Sukhramdas v. Emperor. [See Q.D., 1936-'40, Vol. I, Col. 3336.] 191 I.C. 127=13 R.S. 128=42 Cr.L.

-S. 350—Passing order or judgment after handing over charge to successor-Pronouncing

of order by successor-Legality.

Where a Magistrate who has heard the case is transferred and hands over charge to successor before passing any order or judgment, he cannot thereafter write the order or judg-ment and have it pronounced by his successor, as he had ceased to have jurisdiction to deal with the case. S. 350 does not authorise the successor in office to pronounce the order passed by his predecessor in office. (Niyogi, J.) EM-PEROR v. PHULCHAND. 1942 N.L.J. 302.

S. 350 (1)—Case re-transferred to ori-

ginal Magistrate-De novo trial-If can be de-

manded.

If a case is re-transferred to the Magistrate who originally heard the case before the second Magistrate recorded any evidence, it is not necessary to grant a de novo trial if demanded by the accused person. (Bhide, J.) Ghaus Maho-MED v. EMPEROR. 197 I.C. 413=14 R.L. 250 =43 Cr.L.J. 165=43 P.L.R. 436=A.I.R. 1941 Lah. 322.

S. 350 (1), proviso and (3)—Applicability—Appeal from conviction—Order for retrial from particular point—Case sent to another magistrate for retrial—Right of accused to claim "de novo" trial.

Where a case is sent from one Magistrate to another for re-trial after reversal of a conviction on appeal, even if it be only from a particular point in the trial, S. 350 (3), Cr. P. Code, would apply and it would be open to the accused

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to ask for a "de novo" trial, and to ask for all witnesses to be re-summoned and re-heard under S. 350 (1), Cr. P. Code. (Davies, C.J. and Lobo, J.) VIROOMAL v. EMPEROR. I.L.R. (1941) Kar. 167=196 I.C. 275=14 R.S. 62 = 42 Cr. L.J. 837=A.I.R. 1941 Sind 144. -S. 350 (1), Proviso (a)-Claim for de novo trial—Order resummoning witnesses—Witnesses not examined in chief—Legality of trial— Acquiescence of accused—Effect. Purushor-TAMRAO v. EMPEROR. [See Q.D., 1936-40, Vol. I, Col. 2745.] I.L.R. (1941) Nag. 496.

-S. 350 (1) and proviso (a)—Construction and relative scope-Re-commencement of trial by magistrate and commencement under proviso re-summoning witnesses—Distinction— Effect on charge already framed.

The effect of an accused person demanding the re-summoning and re-hearing of witnesses under proviso (a) to S. 350 (1), Cr. P. Code, is not the same as where a Magistrate himself re-commences a trial under S. 350 (1). The difference in the wording of sub-S. (1) and the proviso to it leads to the conclusion that when a Magistrate 're-commences' a trial under S. 350 (1), he leaves every thing in the previous trial behind, and the charge framed, if any, in the prior proceedings is annulled. however, he commences proceedings under the proviso (a) to S. 350 (1) and the accused demands all or any of the witnesses to be re-summoned or re-heard, he does not "re-commence" the trial, but continues the trial begun by his predecessor. The charge already framed subsists and is not annulled. (Davies, C.J. and Lobo, J.) PIR MOOSAJAN v. BACHAYO SILU. I.L.R. (1941) Kar. 171=196 I.C. 844=43 Cr.L.J. 82=14 R.S. 87=A.I.R. 1941 Sind 160.

-S. 350, proviso—Construction—"Trial"— When commences in warrant cases-Change of Magistrate after examination of one witness-Right of accused to have witness examined de novo.

The trial in a warrant case commences when the Magistrate takes his seat in Court with the accused in the dock in front of him and not when the Magistrate frames a charge and the accused claims to be tried under S. 256, Cr. P. Code. The accused was charged with criminal misappropriation and the case was inquired into by a Magistrate who heard one witness who gave evidence at considerable extent. Then the case was transferred to another Magistrate who continued the inquiry. The accused desired that the witness already examined should be re-called and his evidence taken de novo before the new Magistrate.

Held, that the accused was entitled under the proviso to S. 350, Cr. P. Code, to ask that the evidence should be heard de novo before the new Magistrate framed a charge. (Beaumont, CJ. and Rajadhyaksha, J.) EMPEROR v. RAMCHANDRA NARHAR. 210 I.C. 516=45 Cr.L.J. 287 =16 R.B. 282=45 Bom.L.R. 962=A.I.R. 1944 Bom. 14.

S. 350 (1), proviso (a)—Demand for the power trial—If must be combiled with

de novo trial-If must be complied with. The right conferred by proviso (a) to S. 350 (1), Cr. P. Code, is a valuable one and is as DE (1898), S. 350.

is the right to be heard in one's and the right to cross-examine. an of course waive the right if he he does not want to waive it, then that the witnesses be re-summoned That is the force of the word ose, J.) NATHU BALAJEE v. EM-Nag. 605=1945 N.L. R. 1945 Nag. 207.

(1), proviso (a)—"Re-heard"—

"re-heard" in proviso (a) to S. P. Code, means that the witnesses ard afresh from the start (i.e.) be examined afresh in chief and mined, if the accused so desire. ugh merely to allow them to be l. (Bose, J.) NATHU BALAJEE v. .R. (1945) Nag. 605=1945 N. .I.R. 1945 Nag. 207.

(1), proviso (a)—'Re-heard'—

re-heard' in proviso (a) to S. 350 Code, relates to witnesses and they t on the same footing as complaines. "Re-heard" means that the to be fully heard again from the .) to be examined-in-chief before ion and re-examination. Further ion or a reading of or a summary IS evidence will not do. (Hemeon, KHAN v. EMPEROR. I. L. R. 419=1945 N.L.J. 122=A.I.R.

(1), proviso (a)-Right of acd recalling witnesses but not denine all-Discretion of Magistrate

othing in S. 350, Cr. P. Code. s a Magistrate from exercising his examining all the witnesses again, recalled e the accused who has cised his right under proviso (a) hough the accused who has re-nesses has a right to say that no s should be examined, that right s should be examined, that light a limitation, namely, the privilege rate under S. 350 (1) to examine ses. (Horwill, J.) PALAYAN, In (1942) Mad. 410=197 I.C. 583 73=43 Cr.L.J. 218=54 L. W. W.N. 1077=A.I.R. 1941 Mad. M.L.J. 401.

(1), proviso (a)—Waiver of right nts to.

request made by the accused for al under S. 350 (1), proviso (a), the Magistrate, instead of hearing airesh from the start, allowed the to "further cross-examine" them, ed thereupon applied for revision while further cross-examining the he extent allowed by it. this did not amount to a waiver of the accused. (Bose, J.) NATHU EMPEROR. I.L.R. (1945) Nag. L.J. 201=A.I.R. 1945 Nag. CR. P. CODE (1898), S. 356.

S. 350 (3)—Applicability—Sessions Judge acting under S. 123 (3).

Weston, J.—S. 350 (3), Cr. P. Code, does not apply to a case where a Sessions Judge acts under S. 123 (3). (Lobo and Weston, II.) EMPEROR v. RASULBUX. I.L.R. (1942) Kar. 252 = 205 I.C. 322=15 R.S. 136=44 Cr.L.J. 378=A.I.R. 1942 Sind 122.

-S. 350-A-Scope of-Conviction by Bench of two Magistrates one of whom had not heard the case throughout-Legality.

The legality of a conviction by a Bench of two Magistrates of whom one had not heard the case throughout, cannot be questioned later on where the accused when asked whether they wanted a de novo trial had replied that they did not want it. (Allsop, J.) HAR NARAIN v. EMPEROR. I.L.R. (1943) All. 23=204 I.C. 323=15 R. A. 337=44 Cr.L.J. 203=1942 A.L.W. 546=1942 A.W.R. (H.C.) 325 (1)=1940 A.L. J. 609=1942 A.Cr.C. 184=A.I.R. 1943 All. 20.

S. 351—Scope—If subject to S. 193— Sessions trial—Person present in Court against whom no proceedings have been taken or inquiry held-Addition as co-accused in trial-Jurisdic-

tion of Sessions Judge to direct.
S. 351, Cr. P. Code, must be read subject to S. 193 Cr. P. Code. A Sessions Judge holding a trial has consequently no jurisdiction to join or add as a co-accused in the trial before him a person present in Court but against whom no proceedings had hitherto been taken when no inquiry of any sort had been held by a magistrate into charges against him. The cognizance taken by a Court of Session is, as shown by S. 193, not merely cognizance of the offence, but is restricted to the "accused" in respect of whom an order of commitment has been made by a competent magistrate. (Davis, C.J. and Weston, J.) Mir Fateh Khan v. Emperor. I.L.R. (1942) Kar. 323=204 I.C. 31=15 R.S. 89=44 Cr.L.J. 137=A.I.R. 1942 Sind 161.

-S. 356-Record of deposition in Sessions Court-Procedure.

The record of the deposition of each witness in the Sessions Court must be a faithful record of what the witness states in that Court and it is improper while so recording the deposition to base it on the deposition as recorded by the committing Court. The statements of the witness should be taken down in full as he deposes and not compressed. The purpose of the cross-examination is defeated when a Judge records the answers of a witness to several questions in a single statement. (Sen, J.) ANNUBEG MUKIM-BEG V. EMPEROR. I.L.R. (1945) Nag. 533=

18 R.N. 42=219 I.C. 337=46 Cr.L.J. 601=

1944 N.L.J. 395=A.I.R. 1944 Nag. 320.

S. 356 (2) and 357—Evidence recorded translation—Neces-

sity for.
S. 356 (2) is governed by S. 357, Cr. P. Code.
Under the proviso to S. 357 and in virtue of orders issued by the Provincial Government in Bengal all evidence in whatever language it is given is to be recordd in the English language. Therefore, if a witness happens to depose in English, there is no occasion to call in aid the

provisions of sub-S. (2) of S. 356 to justify recording that evidence in English and hence the requirement of that sub-section of an authenticated transaction of such evidence in Bengali cannot operate. (Lodge and Roxburgh, JJ.) Nabi RASOOL v. EMPEROR. I.L.R. (1942) 2 Cal. 136=205 I.C. 459=15 R.C. 660=44 Cr.L.J. 386=A.I.R. 1943 Cal. 32.

-S. 357—Notification dated 26th January, 1937-Evidence taken down in shorthand-Transcript alone signed by Judge-Irregularity-

If vitiates trial.

Under the N.-W. F. P. Government Notifica-tion issued under S. 357, Cr. P. Code, on 26th January, 1937, the evidence is to be taken down in English by the Sessions Judge with his own hand in the presence of the accused or it is to be taken down from his dictation in open Court in the presence of the accused. It is to be signed by him and is to form part of the record. When the latter procedure is to be adopted the Sessions Judge has to record the reasons for his inability to take down the evidence with his own hand. Where, therefore, the evidence which was taken down in open Court is a shorthand note of what the witnesses stated, which has not been signed by the Judge and does not form part of the record, and what has been signed by the Judge and forms part of the record is a transcript of what was taken down in open Court, and no reasons have been recorded by the Judge as to why he was unable to take the evidence down in his own hand, the procedure is open to the gravest objection, and the irregularity is so vital as to vitiate the trial. (Almond, J.C. and Mir Ahmad, J.) SALIM BUX MAHOMED v. EMPEROR. 205 I.C. 134=15 R. Pesh 89=44 Cr.L.J. 329 =A.I.R. Pesh. 21.

——Ss. 357 to 360—Recording of questions disallowed—Duty of Magistrate. DEWAN SINGH MAFTOM v. EMPEROR. [See Q.D. 1936-'40, Vol. I, Col. 2749.] 192 I.C. 347=13 R.L. 380 = 42 Cr.L.J. 284.

S. 360—Deposition not read over to retrieve and the second of the second over to retrieve and the second over to retrieve and the second over the se

witness-Effect-Prosecution for perjury-Ex-

pėdiency.

The omission to read over the deposition to the witness is not a mere irregularity but it renders the record inadmissible in proof of the deposition, and it would be judicially inexpedient to prosecute the witness for perjury. (Niyogi, J.) HARIRAM v. EMPEROR. I.L.R. (1945)

Nag. 788=1945 N.L.J. 551.

S. 362—Scope of—If curtailed or restricted by S. 278, Companies Act—Offences under latter Act punishable with fine and imprisonment

-Summary trial-Legality.

The powers given to Presidency Magistrates under S. 362, Cr. P. Code, cannot be deemed to have been abrogated by S. 278 of the Companies Act, which is a special Act. The latter section must be regarded as an enabling rather than a restrictive section. In any case of an offence. magistrate may therefore try the case summarily unless he imposes an appealable sentence. (Macklin, Sen and Lokur, JI.) SHAMDASANI v. H. P. Mody. I.L.R. (1944) Bom. 382=212

CR. P. CODE (1898), S. 367.

I.C. 409=1944 Comp. C. 67=45 Cr.L.J. 631=46 Bom.L.R. 204=A.I.R. 1944 Bom. 129 (F.B.)

-S. 364—Construction and scope—If to be read with S. 164-Confession not recorded in proper form in writing-Admissibility. See CR. P. Code, Ss. 164 and 364. I.L.R. (1943) Kar.

-Ss. 366, 367 and 537-Sentence passed

without recording judgment-Legality.

Under Ss. 366 and 367, Cr. P. Code, the Court must record a proper judgment and date and sign it at the time of pronouncing it and passing the sentence. It is consequently illegal for a Magistrate to pass a sentence without recording a judgment. S. 537, Cr. P. Code, however, applies to such a case and if the accused had the Magistrate, he may be taken to have admitted that there had been no prejudice to him. (Bhide, J.) Gulla v. Emperor. 200 I.C. 106=14 R. L. 465=43 Cr.L.J. 619=44 P.L.R. 38=A.I. R. 1942 Lah. 100.

-Ss. 367 and 424-Contents of appellate

judgment.

A judgment of an appellate Court setting out the case of the accused and the prosecution and then dealing with the evidence of both sides, is then dealing with the evidence of both sides, is a legal judgment. (Agarwal, J.) DEBI DAYAL V. EMPEROR. 201 I.C. 791=15 R.O. 110=1942 A.W.R. (C.C.) 286=1942 A.Cr.C. 143=43 Cr.L.J. 781=1942 O.A. 332=1942 O.W.N. 440=A.I.R. 1942 Oudh 444.

judgment.

An appellate judgment in which there is no statement of the points for decision, no detailed scrutiny of the prosecution evidence and no discussion of the defence evidence, does not fulfil the requiremnts of S. 367 read with S. 424, Cr. P. C. (Hemeon, J.) MAHOMED HUSSAIN v. EMPEROR. I.L.R. (1945) Nag. 441=219 I.C. 320=18 R.N. 40=46 Cr.L.J. 595=1945 N. L.J. 87=A.I.R. 1945 Nag. 116.

-Ss. 367 and 424—Contents of appellate

judgment.

A judgment of an appellate Court which merely states that it agrees with the view of the trial Court and says nothing about the nature of the occurrence or about the prosecution case, and deals with the case for the defence only by seeking to answer in a somewhat desultory and disjoined manner the arguments of the defence pleaders, is not in accordance with law.

Per Sen, J.-S. 537, Cr. P. Code, can have no application to a judgment of this description, as it is not a case of an error in a judgment but a case of there being no proper judgment at all (Khundkar and Sen, JJ.) IBRAHIM BANDUKCHI T. EMPEROR. I.L.R. (1943) 1 Cal. 423=209
I.C. 105=16 R.C. 320=45 Cr.L.J. 71=47
C.W.N. 332=A.I.R. 1943 Cal. 465.
Ss. 367 and 424—Contents of appellate

iudament.

It is the duty of an appellate Magistrate to state in his judgment the points for determination, to give his determination regarding those points and his reasons therefor. No useful purpose is served by his merely saying that the prosecution case has been proved. (Sen, I.) RAJANI KUMAR v. EMPEROR. 45 C.W.N. 794.

S. 367—Contents of judgment—Duty of Court-Judge merely accepting opinion of asses-

sors and giving no reasons-Sufficiency.

A judge trying a criminal should give a proper judgment satisfying the requirements of S. 367, Cr. P. Code. He must give reasons for his conclusions. It is not sufficient for him to merely say that he accepts the unanimous opinion of the assessors. (Harries, C.J. and Manohar Lall, J.) LOKHONO SAHU v. EMPEROR. 21 Pat. 865=206 I.C. 365=15 R.P. 349=9 B.R. 305=44 Cr. L.J. 507=A.I.R. 1943 Pat. 163.

S. 367—Contents of judgment—Evidence

if must be set out.

Judgments ought to set out what the evidence is and not merely the conclusion of the Court. 

above 16 years age convicted of murder-If ground for not passing sentence of death. See CRIMINAL TRIAL—SENTENCE. (1942) 2 M.L.J. 312.

-S. 367—Remarks on evidence of public servant appearing as witness-Propriety.

A judge should be careful before he makes remarks which gravely affect the honesty, reputation and good name of a witness before it, nonetheless so when that witness is involved in the case in his official capacity and in the course of the discharge of official duties. It is not fair to make such remarks mainly upon conjectures or surmises. (Davis, C. J. and O'Sullivan, J.) GHUMMANSAL v. EMPEROR. I. L. R. (1944) Kar. 252=215 I.C. 283=17 R.S. 53=46 Cr. L.J. 88=A.I.R. 1944 Sind 133.

-S. 367—Scope—Non-compliance—Effect—

Duty of appellate Court

Disregard of the provisions of S. 367, Cr. P. Code, is a grave irregularity although it is doubt-'ful whether such disregard is a mere irregularity and not an illegality. It is even more essential that an appellate Court should give reasons for its orders than that the trial Court should do so. The High Court acting in revision from an order made in an appeal has to be satisfied that the appeal was properly disposed of as well as heard. (Horvill, J.) Appadu, In re. 204 I.C. 369=15 R.M. 786=44 Cr. L.J. 287=55 L.W. 720=1942 M.W.N. 818 (1)=A.I.R. 1943 Mad. 66=(1942) 2 M.L.J. 580.

——Ss. 367 and 369—Slip in pronouncing judgment—Power of Magistrate to correct.

A pronouncement that is not in accord with the signed judgment is not pronouncement of the judgment and has no validity; consequently a Magistrate who makes a slip in pronouncing 

-Counsel also absent-Dismissal of appeal without giving reasons—Legality. See Cr. P. Code, S. 424. (1942) 2 M.L.J. 579.

CR. P. CODE (1898), S. 369.

(2) — Punishment — Conviction 367 -S. under Motor Vehicles Act-Fines amounting to Rs. 45-Order of disqualification for holding driving license—If punishment—Appeal. See Motor Vehicles Act, S. 17. (1944) 2 M.L. J. 152.

S. 367 (3)—Judgment of conviction in the

alternative—When may be passed.
Under S. 367 (3), Cr. P. Code, a judgment of conviction can be passed in the alternative on separate or alternative charges framed S. 236, Cr. P. Code or that might have been framed under that section. (Roxburgh, J.) Mok-TARALI v. EMPEROR. 49 C.W.N. 392=A.I.R. 1945 Cal. 421.

S. 367 (5)—Award of lesser penalty— Duty of Court to give proper reasons. MIANJI KHAN v. EMPEROR. [See Q.D., 1936-'40, Vol. I, Col. 3337.] 192 I.C. 179=13 R. Pesh. 35 =42 Cr.L.J. 254.

S. 369—Bench Court—Power to review

or rectify errors in judgment-Illegal disposal of case by Bench of Magistrates-Subsequent re-

view and re-hearing-Legality.

A Bench Court has no power to correct errors in its judgments or to review its own illegal orders. Such power vests only in the High Court. Three Bench Magistrates sat to consider a case. At a later hearing of the case a fourth. Magistrate also joined. At the final hearing there were only three Magistrates present, of whom two had sat throughout. As the complainant was absent, the case was dismissed under S. 247, Cr. P. Code. Later the Magistrates realised that they had passed an illegal order, as the Magistrate who did not sit at the first hearing had no power to participate in the disposal of the case, and they proceeded to rectify it by hearing the case once again.

Held, that the re-hearing and trial were illegal and the proceedings must be quashed. (Horwill, J.) NARAYANASWAMI v. NARAYYA. 198 I.C. 515=14 R.M. 491=55 L.W. 30 (2)=43 Cr. L.J. 401=1942 M.W.N. 428=A.I.R. 1942

Mad. 240=(1941) 2 M.L.J. 1049.
S. 369—High Court—Power to recall judgment delivered but not signed and sealed. When a judgment is delivered by the High Court, but it is not signed or sealed, and it is discovered that a document relied on in the judgment is inaccurate, the High Court is competent, until the judgment is signed and sealed, to recall the judgment and rehear the case, and pass a fresh judgment which is proper on the facts of the case, despite the pronouncement of The earlier judgment. (Agarwala and Imam, II.) Mohan Singh v. Emperor. 23 Pat. 28 =215 I.C. 121=1944 P.W.N. 53=A.I.R. 1944 Pat. 209=17 R.P. 108=11 B.R. 59=

46 Cr.L.J. 30. -Ss. 369 and 424-Power of Court to re-

view its previous order.

The effect of S. 424 read with S. 369, Cr. P. Code, is that the Court becomes functus officio after pronouncing its judgment and it has no power to revise or review its previous order. If it does so, the subsequent order is clearly ultra vires and therefore illegal. (Misra, J.) Ma-HOMED MUSTAQIM v. SUKRAJ. 220 I.C. 430=

46 Cr.L.J. 684=1944 A.W.R. (C.C.) 256=1944 O.A. (C.C.) 256=A.I.R. 1945 Oudh

S. 370 (1)—Scope—Duty of Magistrates under—Conviction—Judgment merely saying that prosecution witnesses are believed-If

judgment.

Although when there are no defences it would be sufficient if the Magistrates say that they believe the prosecution witnesses, when there is defence evidence which is inconsistent with the prosecution story, some brief reasons should also be given why the defence evidence should be discredited. (Horwill, J.) DAKSHINAMURTHI, In re. 202 I.C. 603=15 R.M. 535=43 Cr.L.J. 859=55 L.W. 467=1942 M.W.N.441= A.I.R. 1942 Mad. 603=(1942) 2 M.L.J. 146.

S. 374—Procedure—Submission of proceedings by Sessions Court if condition precedent to confirmation of death sentence by High Court -Sessions Court omitting to send death sentence for confirmation—Power of High Court to call for the case—Cr. P. Code, S. 439.

S. 374, Cr. P. Code, does not make it a condition precedent to the confirmation of a death sentence that the proceedings shall be submitted by the Court of Session. If it should be brought to the notice of the High Court that the Sessions Judge had omitted to send the death sentence to that Court for confirmation, the High Court should in the exercise of its powers of revision call for the case and deal with it according to law. (Davis, C.J., Lobo and O'Sullivan, JJ.) PARCHO KEWAIRAM v. EMPEROR. 212 I. C. 352=16 R.S. 260=45 Cr.L.J. 598=A.I. R. 1944 Sind 83 (F.B.).

-Ss. 375 and 428—Reference and appeal— Letter of reference mentioning valuable materials not put in evidence-Power of High Court

Where in a case in which there is a reference under S. 374, Cr. P. Code, and also an appeal by the accused the Sessions Judge in his letter of reference brings to the notice of the High Court that certain valuable materials which could and should have been put in evidence in favour of the accused were not so put, the High Court can make full use of such materials for the purpose of doing justice as a Court of re-ference under S. 375 and as an appellate Court under S. 428, Cr. P. Code. (Khundkar and Sen, JJ.) EMPEROR v. LAL MIA. I. L. R. (1943) 1 Cal. 543=208 I.C. 206=16 R.C. 339=47 C.W.N. 336=45 Cr.L.J. 99=A.I.R. 1943 Cal. 521.

Ss. 376 and 423—Power of High Court— Appeal by accused successful—Retrial, if should

be directed.

Obiter .- The power conferred on the Court on a reference under S. 374, Cr. P. Code, to convict the accused on its own appreciation of facts, is subject to the result of the appeal, if any, filed by the accused under S. 418, Cr. P. Code. If in the appeal the accused makes out his grounds of appeal and thus succeeds in having the conviction set aside, there will be nothing before the High Court for confirmation under S. 376 (a). An order of re-trial by the jury would be the only course left to the High Court

CR. P. CODE (1898), S. 397.

on such an occasion, if it does not acquit or discharge the accused. (Akram and Pal, JI)
EMPEROR v. NAIBULLA. 202 I.C. 604=15 R.
C. 374=43 Cr.L.J. 860=75 C.L.J. 10=46
C.W.N. 108=A.I.R. 1942 Cal. 524.

Ss. 376 and 449—Power of High Court —Inadmissible evidence admitted before jury—High Court, if bound to order retrial—Evidence Act, S. 167. See Cr. P. Code, Ss. 449 and 3%.

A.I.R. 1945 Lah. 105.

S. 380—Applicability—Police Patel act.

ing under S. 14, Bombay Village Police Act-If "Criminal Court"—Right of accused to appear by pleader in proceeding before Patel. See Bombay VILLAGE Police Act, S. 14. 44 Bom. L.R. 442.

-S. 380-Scope of inquiry-Nature of additional evidence-Power to set aside conviction recorded by referring Magistrate.

Where an accused person comes before a Magistate under S 380, Cr. P. Code, he can be treated only as a convicted person and the Ma gistrate is not empowered to set aside the conviction already recorded by the Magistrate who refers the case. The kind of inquiry or nature of additional evidence contemplated by S. 380 is clearly such inquiry or evidence as may assist the Magistrate to whom the accused has been forwarded to exercise his discretion properly under S. 562, Cr. P. Code. (Happell, I.)
DORAISWAMI NAIDU, In re. 1945 M.W.N. 105
=58 L.W. 75 (2)=A.I.R. 1945 Mad. 302=
(1945) 1 M.L.J. 178.

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Sub-divisional Magistrate-Duty of latter-Reference to District Magistrate or High Court-

Competency. Malla Gowda v. Emperor. [See Q.D., 1936-40, Vol. I, Col. 2757.] 191 I.C. 149=13 R.M. 485=42 Cr.L.J. 89.

——Ss. 386 (1) (b) and (c)—Scope—li controls, S. 70, I. P. Code—Warrant under S. 386 (1) (b)—Limitation against immovable property—I imitation. See Privat Code S. 70 48 perty-Limitation. See Penal Code, S. 70. 43 Bom.L.R. 122.

–S. 397—Imprisonment in default of fine -Order for concurrent sentence running with substantive sentence of imprisonment—Legality.

Under S. 397, Cr. P. Code, a Magistrate can direct substantive sentences of imprisonment passed in two different cases to run concurrently. But there is no provision of law enabling a Court to direct a sentence of imprisonment in default of payment of fine to run concurrently with a substantive sentence of imprisonment passed for a different offence either at the same trial or at different trials. (Bhide, J.) EMPEROR v. HAPI. 195 I.C. 3=14 R.L. 26=42 Cr.L.J. 642= 43 P.L.R. 163=A.I.R. 1941 Lah. 209.

——Ss. 397 and 35—Sentences of imprisonment in default of fines—If can be concurrent —Separate trials—Penal Code, S. 64. EMPEROR v. CHANAN SINGH. [See Q.D., 1936-'40, Vol. I, Col. 2761.] 42 Cr.L.J. 33.

S. 397—Separate sentences on two commissions.

victions to run consecutively—Setting aside of first conviction and sentence—Effect—Second sentence—Date of commencement—Date of conviction or date of reversal of first conviction— Bombay Jail Manual, R. 392.

Prima facie R. 392 of the Bombay Jail Manual is invalid. It is not the function of the jail authorities to determine the length of a sentence passed upon a prisoner. Where a person has been convicted of two offences and given separate sentences on each, the second to commence on the expiration of the first, and the first of those convictions is subsequently set aside, with the result that there is no sentence of that Court, the necessary result is that the second sentence of the Court which is upheld will commence from the date when that sentence was imposed, i.e., from the date of the conviction, and not from the date on which the first sentence was set aside. (Beaumont, C.J. and Wassoodew, J.) EMPEROR v. BABIBAI. I.L.R. 1943 Bom. 82=15 R.B. 289=44 Cr.L.J. 130=204 I.C. 23=44 Bom.L.R. 807=A.I.R. 1942 Bom. 342.

-S. 397 and provisos 1 and 2—Applicability-Accused undergoing imprisonment for theft-Order for imprisonment under S. 120 for failure to give security under S. 118-Separate sentence under Criminal Tribes Act—How to run. See Cr. P. Code, Ss. 118, 120 AND 123. I.L.R. (1941) Kar. 63.

-S. 397, proviso (2)—Applicability—Imprisonment under Ss. 21 and 24, Sind Frontier Regulation.

S. 397, proviso (2), Cr. P. C., would apply to cases where imprisonment has been imposed under Ss. 21 and 24, Sind Frontier Regulations. (Davis, C.J. and Lobo, J.) EMPEROR v. MAHOMED HASSAN ALLAHDAD. I.L.R. (1941) Kar. 161=192 I.C. 865=42 Cr.L.J. 342=13 R.S. 221=A.I.R. 1941 Sind 29.

-S. 397, Second Proviso-Scope-Order directing substantive sentence of imprisonment to take effect after sentence under S. 123-Legality.

An order directing a substantive sentence of imprisonment to take effect on the expiry of the period of imprisonment imposed under S. 123, Cr. P. Code, is illegal. The substantive sentence must take effect from the date on which it is pronounced. (Burn, J.) Kora Vathan, In re. 197 I.C. 867=14 R.M. 404=43 Cr. L.J. 303=1941 M.W.N. 1031=(1941) 2 M. L.J. 694.

-S. 403-Acquittal in trial for attempt to murder-Subsequent trial for murder-If barred —Iudgment in prior trial—Relevancy in second —Evidence of identity of accused in first trial— Admissibility in second—Evidence Act, Ss. 40 to

Where an accused is charged with murder and also some other offence, such as an attempt to murder, the proper procedure is to proceed in the first instance with the trial on the charge of murder and not to proceed with the other charge unless and until the accused is acquitted of murder. If he is tried first on the other charge of attempt to murder and acquitted, then tried for murder, the judgment acquitting him in the first trial would not be relevant at the subsequent trial under Ss. 40 to 44 of the Evidence Act. Whether having been prosecuted charge by Special Court constituted under Special

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once on a certain set of facts, a man can be prosecuted again, depends entirely on whether, at the earlier trial, he was in jeopardy of being convicted of the offence for which he is tried or sought to be tried at the later trial. If he was not, the subsequent trial may proceed, and any evidence admissible in law to support the charge may be led even if that identical evidence had been led at the earlier trial. When the attack which formed the subject of the first trial was quite clearly part of the res gestae, evidence as to the identity of the accused would be admissible at the second trial. There is no authority for the proposition that when a man has been tried for one offence committed in the course of a particular transaction and acquitted, and is then tried for another offence committed in the course of it, any material part of the transaction must, on that account, be kept back from the jury. Such a course would be certain to result in miscarriage of justice. (Shearer and Reuben, JJ.) ALI RAZA v. EMPEROR. 23 Pat. 95=215 I.C. 112=17 R.P. 92=11 B.R. 55=45 Cr. L.J. 809=1944 P.W.N. 115=A.I.R. 1944 Pat. 247.

-S. 403—Applicability—Acquittal by Court with wrong number of jurors—Trial—If nullity
—Retrial on same facts—Bar of—"Court"—If includes jury.

The applicants and others were tried for certain offence including an offence under S. 436, I. P. Code, in the Court of a Sessions Judge with a Jury. The Judge, under an erroneous view that the Penalties Enhancement Ordinance of 1942 applied to the case, empanelled a jury of nine persons under S. 274, Cr. P. Code. Some of the accused were acquitted and others convicted. Some of the accused appealed to the High Court, which found that the enhancement of Penalties Ordinance did not apply and that therefore the jury should have consisted only of 5 and not 9 persons as required by the Government notification. It was held that the trial was a nullity, as the Court had no jurisdiction to try the case, and the conviction was set aside. applicants, three of them, were some of those who had been acquitted, against whom there was no appeal and the 4th applicant was one of the persons convicted at the trial but who had not appealed. Thereafter the Government directed that all the accused including the applicants should be tried by the Sessions Court with a proper jury. The applicants pleaded S. 403 (1) in bar of the re-trial.

Held, that the Court which tried the earlier case had jurisdiction to try it, and the fact that case had jurisdiction to try it, and the fact that a wrong number of jurors were empanelled did not render the trial void or a nullity, being a mere irregularity. S. 403, therefore, applied and barred a second trial. "Court" in S. 403 (1) does not include the jury. (Wadia and Sen, IJ.) EMPEROR v. VITHAL TUKARAM. I.L.R. (1945) Bom. 196=218 I.C. 499=18 R.B. 69=46 Cr.L.J. 520=46 Bom.L.R. 860=A.I. R. 1945 Bom. 183.

Criminal Courts Ordinance (1942)-If bar to

fresh trial—Lawful Court.
Since the Special Criminal Courts Ordinance
(II of 1942) has been held to be a valid enactment, persons who have been acquitted or discharged in a trial by a special Court under that Ordinance, must be held to have been acquitted Ordinance, must be need to have been acquitted or discharged by a lawful Court. Hence a second trial is barred under S. 403, Cr. P. Code, on the principle of autrefois acquit. (Leach, C.J. and Shahabuddin, J.) SESHU IYER, In re. 221 I.C. 242=1945 M.W.N. 185 (1)=1945 F.L.J. 104=A.I.R. 1945 Mad. 355=(1945) 1 M.L.J. 274.

S. 403 — Applicability — Acquittal by Special Judge under Special Criminal Courts Ordinance (1942)—Bar of fresh trial. See Special Criminal Courts (Repeal) Ordinance, 1943, S. 3. I.L.R. (1944) Kar. 430.

-S. 403-Applicability-Managing director of company-Prosecution for criminal breach of trust and under Companies Act-Trial on former charge alone—Latter charge reserved for separate trial—Acquittal—Subsequent trial on charge under Companies Act—If barred—General Clauses Act, S. 26—Cr. P. Code, S. 403 (5).

The petitioner, the managing director of a company, drew three sums of money on different dates for purposes not mentioned in the Articles of Association, was prosecuted for criminal breach of trust under the Penal Code and for an offence under S. 282-A of the Companies Act. The prosecution was split up, and the petitioner was tried only on the charge of criminal breach of trust, the other charge under S. 282-A, Companies Act, being reserved for a separate trial. He was acquitted of the charge of criminal breach of trust at the trial. Subsequently he was prosecuted under S. 282-A, Companies Act. It was pleaded that S. 403, Cr. P. Code,

was a bar to his trial.

Held, that S. 403 (5), which was the saving clause in respect of prosecutions falling under S. 26 of the General Clauses Act, excluded the application of S. 403, Cr. P. Code, and the second trial was therefore not barred as S. 26, General Clauses Act, clearly contemplated the possibility of two separate prosecutions in respect of two different Acts though the accused could be puni-Shed only once. (Kuppuswami Ayyar, J.)
PRABHU. In re. 217 I.C. 138=17 R.M. 280
=46 Cr.L.J. 194=57 L.W. 127=1944 M.W.
N. 195=A.I.R. 1944 Mad. 369 (2)=(1944)

1 M.L.J. 120.

-S. 403-Applicability-Principle of autrefois acquit in the interests of justice when plea

is technically not available.

The accused, an officiating kulkarni in a village, was found to have misappropriated certain amounts of Government money and to have forged two receipts in respect of the amounts. He was prosecuted under Ss. 409 and 466, I. P. Code, in respect of two items of money and tried by a Sessions Judge and jury on the first charge and with assessors on the second charge. He was acquitted of the charges on the unanimous verdict of the jury and on the unanimous opinion of the assessors with which the Judge agreed. The accused was next prosecuted under l

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S. 409 on another complaint in respect of a third sum of money alleged to have been misappropriated during the same period as the first two items. The accused pleaded S. 403 in bar of the trial. The accused had made good all the amounts.

Held, that though the plea of autrefois acquit was not technically available to the accused, the principle of it was available in the interests of justice and that it was extremely undesirable that the accused, who could have been tried for all the offences should have to undergo a second trial. (Wadia and Scn, J.I.) EMPEROR v. ANANT NARAYAN. 221 I.C. 266=47 Bom.L.R. 138 =A.I.R. 1945 Bom. 413.

–S. 403—Applicability—Prosecution on three specific acts of misappropriation-Acquittal -Subsequent prosecution in respect of other

and distinct acts of misappropriation—If barred,
Where in a case of criminal misappropriation, the prosecution without having recourse to S. 222 (2), Cr. P. Code, decides to prosecute the accused in respect of three separate and specific acts of misappropriation the acquittal of the accused in such a case does not in any way bar his prosecution again in respect of other specific and distinct acts of misappropriation. There is clearly no hardship in such a case so as to justify the High Court in exercising its powers to stop the trial on that ground. (Shearer, J.) MAYADHAR SWAIN v. NETRANANDA. 197 I.C. 832=14 R.P. 375=8 B.R. 308=43 Cr.L.J. 286=7 Cut.L.T. 64=1941 P.W.N. 425=A.I.R. 1941 Pat. 606.

-S. 403—Applicability—Security proceedings.

S. 403, Cr. P. Code, which embodies the principle of autrefois acquit, does not apply to proceedings for taking security either under S. 107 or 110, as there is no conviction of any offence. (Blacker and Ram Lall, II.) Subeg Singer v. EMPEROR I.L.R. (1943) Lah. 365=199 I.C. 532=14 R.L. 431=43 Cr.L.J. 564=44 P.L. R. 71=A.I.R. 1942 Lah. 84.

S. 403—Applicability—"Trial and acquit-

tal"-What amount to-Summons case-Absence of complainant at adjourned hearing-Acquittal -Effect of-Bar of fresh complaint and trial See Cr. P. Code, Ss. 247 AND 403. (1942) 2 M. M.J. 221.

403—Applicability — "Trial"—Exami –S. nation of one prosecution witness-Leave granted to withdraw case and accused acquitted—Fresh trial of accused on same charge—Legality:

A trial in fact starts when a prosecution witness is examined. If after such examination of one prosecution witness, leave is granted to the prosecution to withdraw the case and the accused is acquitted, it must be held to be an acquittal after trial. S. 403, Cr. P. Code, would apply and bar a second trial of the accused on the same charge. (Agarwala, I.) NARSINGH MAHAPATRA v. EMPEROR. 9 Cut.L.T. 95. —S. 403—Conviction under S. 420, I.P. Code. —If bars trial under S. 409, I. P. Code.

The conviction of a person under S. 420, I. P. Code, does not bar second trial for an offence under S. 409, I. P. Code, where the offence of embezzlement is quite distinct from the offence

under S. 420 and where the accused could not have been tried in the former trial for that offence. (Agarwal, J.) RAMNATH DAVE v. EMPEROR. 18 Luck. 408=1943 Comp. C. 111 202 I.C. 382=15 R.O. 123=1942 O.W.N. 485=1942 A.W.R. (C.C.) 295=1942 A.Cr. C. 151=43 Cr.L.J. 830=1942 O.A. 341= A.I.R. 1942 Oudh 473

-Ss. 403 and 258—Cross-cases—Order of acquittal in one on conviction in the other—Conviction set aside on appeal-Further trial of ac-

cused in former case-If barred.

A Magistrate before whom two cross-cases were pending, recorded evidence in one of them and convicted the accused in that case, and then in view of the judgment passed in that case acquitted the accused in the other under S. 258, Cr. P. Code. On appeal, the conviction was set aside and the Magistrate thereupon revived the second case holding that in his former order the wording "acquitted" meant only discharged under S. 259, Cr. P. Code.

Held, that the order of acquittal was passed by a Court of competent jurisdiction even though it was passed after an irregular procedure, and as such that order could not be set aside by the Magistrate who passed it, nor could it be treated by him as a nullity nor as an order different from the one which he had passed, and that S. 403, Cr. P. Code, was a bar to a further trial of the accused in the second case on the same facts. (Lodge and Roxburgh, JJ.) NAWABALI HAZI v. KHATUN BIBI. 46 C.W.N. 1027.

S. 403—Scope—Charge of cheating under S. 420, I. P. Code—Acquittal—If bar to prosecution under S. 120-B on charge of conspiracy to

commit series of acts of cheating.

S. 403, Cr. P. Code, protects a person who has once been tried and acquitted of an offence from liability to be tried again for the same offence or on the same facts but sub-S. (2), of S. 403, provides that a person acquitted of any offence may afterwards be tried for any distinct offence for which a separate charge might have been made against him on the former trial under S. 235 (1). An acquittal of an offence under S. 420, I. P. Code, for a particular overt act of cheating A, cannot be a bar to the prosecution of the acquitted person on a charge of conspiracy, under S. 120-B, I. P. Code, to commit a series of acts of cheating or on a charge that he in pursuance of such a conspiracy had successfully cheated B, or had unsuccessfully attempted to cheat C. Though overt acts may properly be looked at as evidence of the existence of a concerted intention, and in many cases it is only by means of overt acts that the existence of the conspiracy can be made out, yet the criminality of the conspiracy is independent of the criminality of the overt act. (Rowland and Manohar Lal, II.) EMPEROR v. GOURISHANKAR BOHIDAR. 196 I.C. 604=14 R.P. 236=20 Pat.L.T. 825=8 B.R. 54=43 Cr.L.J. 44=A.I.R. 1942 Pat. 58.

-S. 403 (1)—Applicability—Charge under S. 302, I. P. Code—Acquittal—Further trial under S. 326, I. P. Code-Bar of.

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the charge of murder, but the Jury by 5 to 4 found him guilty of causing grievous hurt under S. 326, Penal Code. The Judge ordered a retrial. At the retrial, a preliminary objection was raised under S. 403 (1), Cr. P. Code to the retrial.

Held, that it was quite clear on the facts of the case that the language of S. 403 (1), Cr. P. Code, should be deemed to apply to the case, however anomalous it might seem that the accused should be protected from further trial for an offence of which, according to an opinion of 5 out of 9 jurymen, he was actually proved guilty; it was therefore not open to the Court to try the accused upon the charge under S. 326, 1. P. Code. (King, J.) Rex v. Arumugam.
212 I.C. 97=16 R.M. 577=45 Cr. L. J. 518=
56 L.W. 499=1943 M.W.N. 578=A.I.R.
1943 Mad. 737=(1943) 2 M.L.J. 297.

S. 403 (1)—Applicability—Trial on charge of murder—Direction by Judge to jury to return verdict as to murder or culpable homicide or grievous hurt-Unanimous verdict of not guilty on murder and culpable homicide but divided verdict of guilty by six to three on grievous hurt—Judge disagreeing with latter verdict

—Power to direct re-trial by another jury—
Acquittal verdict on charge of murder—If bars
trial for grievous hurt. See Cr. P. Code, Ss. 308 AND 403. 46 Bom.L.R. 818.

-S. 403 (1)-Scope-Charge and conviction under Ss. 147 and 148, I. P. Code-Appeal-Conviction set aside—Remand for fresh trial on charges under Ss. 323 and 325, I. P. Code—

Legality—Bar of.

Where a Sessions Judge in appeal from convictions under Ss. 147 and 148, I. P. Code, sets aside the conviction on the ground that there was no proof of more than three persons having taken part in the transaction, he has no juris-diction to remand the case for fresh disposal on the ground that in his opinion offences under Ss. 323 and 324 have been committed, though no charges had been framed in that respect. Charges in respect of such offences could have been framed in the trial on charges under Ss. 147 and 148, and to try the accused on charges under Ss. 323 and 325 would amount to trial on the Same facts, which is barred by S. 403 (1), Cr. P. Code. (Happell, J.) SINNA RANGA BOYAN, In re. 1945 M.W.N. 428 (1)=58 L.W. 337 = A.I.R. 1945 Mad. 472=(1945) (2) M.L.J.

S. 403 (1)—Scope—Charge under S. 465, I. P. Code—Withdrawal and acquittal—Subsequent proseuction on same facts under S. 196, I. P. Code—Sustainability.

Where a person is charged under S. 465, I. P. Code, in respect of certain account books produced in income-tax proceedings and acquitted owing to the withdrawal of the charge by the Public Prosecutor, he cannot be charged or pro-secuted under S. 196, I. P. Code, on the same facts and for the same offence, so long as the order of acquittal stands. S. 403 (1), Cr. P. Code, bars the subsequent prosecution under S. 196, I. P. Code. The fact that the Court in the previous case did not proceed to investigate A person charged with murder was tried in the previous case did not proceed to investigate the High Court Sessions and was acquitted of the facts before acquitting the accused makes no CR. P. CODE (1898), S. 403. difference. (Manohar Lall, J.) MALKHORI v. EMPEROR. 195 I.C. 698=14 R.P. 164=1941 I.T.R. 209=42 Cr.L.J. 774=7 B.R. 965= 22 Pat.L.T. 255=1941 P.W.N. 170=A.I.R. 1941 Pat. 442.

-S. 403 (2)—Applicability—Offence under Abkari Act and under Police Act-Charge and acquittal under former Act—Subsequent conviction and sentence for offence under latter—If barred—"Loitering"—Meaning.

The accused, who had twelve previous convictions, came to a place in a taxi at about 4-15 A.M., on a certain day, got down from the taxi, and was about to pick up some tins of illicit liquor lying on the road. He was, however, arrested by the police and was charged with being in possession of illicit liquor under the Bombay Abkari Act; he was finally acquitted of the charge. While this trial was pending by most charge. While this trial was pending he was re-arrested and charged with "loitering" under S. 112 (d) of the City of Bombay Police Act. After his acquittal in the Abkari case he was convicted and sentenced under S. 112 (d) of the Police Act. The accused pleaded S. 403, Cr. P. Code, as a bar to the second trial.

Held, (1) that the case came under S. 403 (2), Cr. P. Code, that S. 235 (1) applied and therefore it was open to the prosecution to charge the accused with one of the offences and subsequently to charge him with another, although both of them formed part of one and the same transaction and therefore the second trial was not bar-red: (2) that "loitering" in S. 112 (d), City of Bombay Police Act, implied lingering or hang-ing about on a road and that the accused was doing only some quick action rather than loitering, and therefore he could not be convicted under S. 112 (d), City of Bombay Police Act. (Divatia and Lokur, II.) EMPEROR v. IBRAHIM IBOO. 217 I.C. 235=17 R.B. 158=46 Cr.L. J. 258=46 Bom.L.R. 564=A.I.R. 1945 Bom. 65.

-S. 403 (4)—"Comepetent to try"—Meaning of.

The words "competent to try" in S. 403 (4), Cr. P. Code, must be interpreted to mean that in order to obtain the advantage of S. 403 the accused must show that the former Court was in a position, had it so chosen, to try and acquit or convict the accused of the offence subsequently charged. The words are equivalent in a legal sense "to have tried and acquitted or convicted," and refer narrowly to the legal position of the Court at the time of the former trial in rela-tion to the particular offence committed by the accused and not broadly to the jurisdiction of the Court with regard to the class of offence in general. (Meredith, J.) SATRUGHANA BEHERA Z. EMPEROR. 10 Cut.L.T. 55=A.I.R. 1944 Pat. 328.

S. 403 (4)—Conviction by magistrate under S. 323, I. P. C.—If bars order for trial under S. 302, I. P. C.
S. 403 (4), Cr. P. C. and Illustration (g)

make it abundantly clear that a conviction under S. 323, I. P. C., by a Magistrate does not debar the Court from ordering a trial of the accused under S. 302, I. P. C., an offence which is exclusively triable by a Court of Session. (Almond, J.C. and Mir Ahmad, J.) KHURSHED v. CR. P. CODE (1898), S. 407.

EMPEROR. 210 I.C. 10=16 R. Pesh. 55=45 Cr.L.J. 167=A.I.R. 1943 Pesh. 89. S. 404—Scope—Order under S. 491—Ap. peal—Competency—Government of India Act, S. 205—Effect of—English law—Distinction See GOVERNMENT OF INDIA ACT (1935), S. 404, (1945) 2 M.L.J. 325 (P.C.).

-Ss. 407, 408 and 413—Applicability Trial by Magistrate with second class powers-Subsequent conferment of first class powers— Conviction—Sentence of fine of Rs. 40—Appeal—

Competency and forum.

The accused was tried for offences under Ss. 323, 504 and 448, I. P. Code, by a Magistrate who at the beginning of the trial was invested with second class powers. Towards the end of the trial he was invested with first class powers. After this one defence witness, was cross examined, the Magistrate inspected the scene of offence and he heard arguments and pronounced judgment imposing a fine of Rs. 40 on the accused. The accused presented an appeal to the District Magistrate who held that an appeal lay to him under S. 407. The Sessions Judge, holding that no appeal lay to the District Magistrate referred the case to the High Court.

Held, that as the Magistrate imposed a fine of Rs. 40 only, the case was covered by S. 413, Cr. P. Code, and no appeal lay to the District Magis-

trate or at all.

Obiter: (1) that for the purposes of Ss. 407 and 408, Cr. P. Code, the judgment is a part of and 408, Cr. F. Code, the judgment is a part of the trial and the forum of appeal must be determined by the status of the Court at the time of the conviction; (2) that the appeal provided any appeal lay, would lie to the Sessions Court. (Broomfield and Lokur, JJ.) EMPEROR v. KISAN SAKHARAM. 206 I.C. 75=15 R.B. 388=44 Cr. L.J. 481=45 Bom.L.R. 74=A.I.R. 1943 Bom. 94.

——Ss. 407 and 413—Applicability—Trial— If includes judgment—Trial commenced by Ma-gistrate with second class powers—Magistrate invested with first class powers before judgment -Sentence of fine of Rs. 20-Right of appeal.

The petitioners were charged under S. 379, I. P. Code and the trial opened before a Magistrate with second class powers on 11th March, 1941 and after subsequent hearings and conclusion of arguments was adjourned to 27th June, 1941. On 10th May, 1941, the Magistrate was invested with first class powers. On 27th June, 1941, the Magistrate delivered judgment convicting the accused and ordering them to pay a fine of Rs. 20 each. The District Magistrate before whom an appeal was preferred took the view that as the Magistrate was invested with first class powers before he delivered judgment the forum of appeal was the Court of Session and not the Court of the District Magistrate. The Sessions Judge held that as the sentence of fine was one of Rs. 20 only, no appeal lay.

Held, (1) that the judgment was no part of the trial, and the trial must therefore be considered to have been held by a Magistrate of the second class for purposes of S. 407, Cr. P. Code; (2) (2) that although the trial must be taken to have been held by a Magistrate of the second class, the sentence was passed by a Magistrate

of the first clas, and being a sentence of Rs. 20 only, no appeal lay in view of S. 413, Cr. P. Code. (Agarwala, J.) Deonandan Mahton v. CHALITAR MAHTON. 197 I.C. 87=14 R.P. 270 =8 B.R. 150=43 Cr.L.J. 7=22 Pat.L.T. 963=A.I.R. 1942 Pat. 107\_

Ss. 407 and 408—Trial—If includes judgment. See Cr. P. Code, Ss. 407, 408 and 413. 45 Bom.L.R. 74.

class Magistrate-Jurisdiction of later to hear

appeal.

An appeal lies against a sentence imposed under S. 480, Cr. P. Code, only under S. 486 (1) and not under S. 407, Cr. P. Code, as S. 407 applies only to persons convicted on a trial held by a Magistrate. Where such an under S. 486 (1) has been filed before the District Magistrate, it cannot as in the case of appeals under S. 407 (1) be directed to be heard by any Magistrate of the first class subordinate by any Magistrate of the first class subordinate to him. S. 407 (2) cannot properly be applied to an appeal under S. 486 (1), Cr. P. Code. (Horwill, J.) D. K. Reddy, In re. I. L. R. (1942) Mad. 181=198 I.C. 549=14 R. M. 484=43 Cr.L.J. 397=1941 M.W.N. 1073 (1)=54 L.W. 633=A.I.R. 1942 Mad. 181= (1941) 2 M I. J. 852 (1941) 2 M.L.J. 852.

408—"Trial"—Applicability, if tricted to trial with aid of assessors only.

'Trial' as used in S. 408, Cr. P. Code, applies to a trial either with the assessors or with the aid of a jury and is not restricted to a trial with the aid of assessors only. (Ghulam Hasan, J.) BHAGWANTA v. SARJOO. 207 I.C. 427=16 R.O. 44=1943 O.A. (C.C.) 135=1943 O.W.N. 207=1943 A.W.R. (C.C.) 52=1943 A.Cr.C. 84=44 Cr.L.J. 604=A.I.R. 1943 Oudh 322.

-S. 411-A-Appeal under-Scope Powers of High Court-Principles to be observed in interfering with verdict of jury.

Under S. 411-A, Cr. P. Code, an appeal lies on a matter of fact as well as on a matter of law. The general considerations on which the appellate Court has to act under S. 411-A are practically the same as those under S. 307, Cr. P. Code. It is the settled practice to give due weight to the verdict of the jury and to limit its interference to cases where the verdict appears to be manifestly wrong or unreasonable. This practice should be followed with greater reason in the case of verdicts of juries in the High Court itself. (Divatia, Lokur and Weston, JJ.) Government of Bombay v. Inchya Fernandez. 220 I.C. 1=46 Cr.L.J. 635=47 Bom.L.R. 363=A.I.R. 1945 Bom. 277 (F.B.).

411-A (as amended in 1943)-Scope, if retrospective—Conviction at High Court

Sessions trial prior to coming into operation of section—Right of appeal.

S. 411-A, Cr. P. Code, which was introduced by the Amending Act XXVI of 1943, is not retrospective and a person convicted on a trial held by a High Court in exercise of its original jurisdiction, prior to the coming into force of the Amending Act cannot take advantage of

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the provisions of S. 411-A. The Amending Act cannot be regarded as dealing with mere matters of procedure. It creates a new right of appeal which did not previously exist, and the new right of appeal conferred by it cannot be regarded as a mere matter of procedure, but is a substantive right. (IVadia and Weston, II.) EM-PEROR v. HASAN ABDUL KARIM. I.L.R. (1945) Bom. 17=17 R.B. 122=46 Cr.L.J. 328=215 I.C. 59=46 Bom.L.R. 470=A.I.R. 1944 Bom. 252.

-S. 412—Applicability—Conditions.

In order to make S. 412 applicable the accused must have been convicted on his plea of guilty in exercise of the discretion of the Magistrate under S. 255 (2) of the Code. (Rowland, J.) KRISHNA CHANDRA SINHA v. EMPEROR. 208 I.C. 639=16 R.P. 87=44 Cr.L.J. 801=10 B.R. 60=A.I.R. 1943 Pat. 313.

S. 412—Plea of guilty obtained by tric-kery—Effect of—Affidavit by accused—Value of. Under S. 412, Cr. P. Code, an accused person is entitled to satisfy the Court that there was in fact no plea of guilty. A plea of guilty obtained by trickery is not a plea of guilty within the meaning of the Code. If, therefore, an accused person who is prosecuted under the Salt Act pleads guilty on being told by the officers of the Salt Department that he would be very leniently dealt with and the salt would be returned to him if he pleads guilty, but he is convicted under the Act and the salt is ordered to be confiscated, he is not precluded under S. 412, Cr. P. Code, from asking for any relief except the reduction of the sentence and the setting aside of the order of confiscation. Statements made by the accused in an affidavit can be taken into consideration by Court, although they will not lead to his prosecution, if 'false. (Henderson, J.) PRAFULLA KUMAR RAY v. EMPEROR. son, J.) Prafulla Kumar Ray v. Emperor. I.L.R. (1943) 1 Cal. 540=212 I.C. 102=16 R.C. 587=45 Cr.L.J. 517=A.I.R. 1944 Cal. 120.

-S. 412-Scope-Conviction on plea of accused by second class magistrate—Appeal, S. 412, Cr. P. Code does not provide that there should be no appeal generally when the accused has been convicted on his own plea in a second class Magistrate's Court. (Rowland, J.) Mahomed v. Emperor. 209 I.C. 632=16 R.P. 169=45 Cr.L.J. 166=10 B.R. 179=9 Cut.L.T. 19=A.I.R. 1945 Pat. 380.

S. 412—Scope—If restricts powers of High Court under S. 439. See Cr. P. Cope, S. 439. A.I.R. 1943 Pat. 313.

S. 413—Applicability—Conviction by

Magistrate having first class powers at time of conviction—Fine of Rs. 40—Appeal—Competency. Sce Cr. P. Code, Ss. 407, 408 and 413. Bom. L. R. 74.

-S. 413—Applicability—Trial commenced by Magistrate of second class—Subsequent investment of first class powers—Sentence of fine of Rs. 20—Appeal—If lies. See Cr. P. Code, Ss. 407 and 413. 22 Pat. L. T. 963.

S. 413—Sentence of fine not exceeding the Magistrate invested.

Rs. 50—Sentence passed by Magistrate invested with first class powers only after conclusion of evidence but before sentence-Appeal, if lies.

BEJOY KUMAR KUNDU v. SITA NATH KUNDU. [See Q.D., 1936-'40, Vol. I, Col. 2772.] 191 I.C. 154=42 Cr.L.J. 87=13 R.C. 221. -S. 415—Applicability—Three fines under

three separate sections of the Indian Penal Code.

Different sentences of fine under different sections of the Penal Code do not amount to a sentence under S. 415, Cr. P. Code, by which two or more punishments were combined so as to give a right of appeal under that section. (Allsop, J.) Lalji v. Emperor. I. L. R. (1942) All. 947=204 I.C. 310=15 R.A. 331 = 44 Cr.L.J. 189=1942 A.L.W. 554=1942 A.W.R. (H.C.) 322=1942 A.L.J. 607= 1942 A. Cr. C. 188=A.I.R. 1943 All. 18.

-S. 415—Construction—"Two or more of

the punishments"—Meaning of—Punishments of the same kind—If included.

The words "two or more of the punishments" in S. 415, Cr. P. Code, include only punishments of different kinds enumerated in S. 53, I. P. Code and do not include punishments of the same kind. What the legislature intended was that an appeal should be allowed to be brought against any sentence by which two or more punishments stated in S. 413 or S. 414 are combined. S. 415 only refers to a combination of the two particular punishments mentioned in Ss. 413 and 414, viz., imprisonment and fine. (Manohar Lall and Chatterji, JJ.) DARGAHI v. EMPEROR. 21 Pat. 753=205 I.C. 440=15 R.P. 291=9 B.R. 234 =44 Cr.L.J. 401=A.I.R. 1943 Pat. 122.

-S. 415—Interpretation. Provincial Gov-ERNMENT, C. P. AND BERAR v. BHIVRAM. [See Q.D. 1936-'40, Vol. I, Col. 2773.] I.L.R. (1942) Nag. 143.

S. 415—Interpretation — Applicability— "Any two or more punishments therein mentioned"—Meaning.

In view of the history of Ss. 413 and 414, Cr. P. Code, as they originally stood before the amendments made in them in 1923, it is plain that the phrase "any two or more of the punishments therein mentioned" in S. 415 rfers to two or more of the punishments of different kinds. S. 415 has no application in a case in which two appealable sentences of fine have been passed and the aggregate of fine does not exceed Rs. 50. (Ganga Nath, J.) Gorakh Prasad v. Emperor. 200 I.C. 768=15 R.A. 44=1942 A.W.R. (H.C.) 125=1942 A.Cr.C. 105=43 Cr.L.J. 716=1942 A.L.J. 295=1942 A.L.W. 295= A.I.R. 1942 All. 336.

Although a High Court can interfere in a case of acquittal even upon the facts and no limitation should be placed upon the power expressly conferred in the Code, there are certain considerations which must be weighed with and influence any consideration of the question; for instance, the appellate Court must give proper weight and consideration to the views of the trial Magistrate, as to the credibility of the witnesses. The appellate Court must bear in mind that the presumption of innocence in favour of the accused is not weakened by the fact that he has been once acquitted and also that the accused is entitled to the benefit of any reasonable doubt,

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and the appellate Court must be slow to disturb the finding of fact by a Magistrate who had the advantage of seeing the witnesses. (Davis, C.J.) and Lobo, J.) EMPEROR v. PRIESTLY. 220 I.C. 452=A.I.R. 1944 Sind 124.

—S. 417—Acquittal — Appeal against— Powers of High Court to review evidence and to

set aside acquittal.

In an appeal from acquittal under S. 417, Cr. P. Code, the High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. The Privy Council will always assume that the High Court (or any Court) has followed the proper practice unless something appears which proves the contrary. (Lord Thankerton.) NUR MAHOMED V. EMPEROR. 221 I.C. 56=58 L.W. 481=1945 P. W.N. 405=(1945) M.W.N. 560 (1)=50 C. W.N. 1=A I.R. 1945 P.C. 151=(1945) 2 M.L.J. 362 (P.C.).

—S. 417—Acquittal—Appeal —Interference -Prosecution evidence weak-Acquittal without proper decision on question arising in case-If to 

417-Acquittal-Appeal-Interference by High Court—Principles. See Madras District Municipalities Act, S. 182. (1942) I

M.L.J. 586.

S. 417—Acquittal—Appeal—Witness not allowed to be examined by trial Court—Order for retrial—Appellate Court if to be satisfied that evidence of excluded witness would result

in conviction-Evidence Act, S. 167.

It is not necessary before ordering retrial in an appeal against an acquittal in a criminal case where evidence of a witness has been improperly excluded by the trial Court, that the appellate Court should be satisfied that the admission of the wrongly excluded witness would result in a conviction. In the case of a document it is possible for the appellate Court to judge what effect, if any, the admission or rejection of that document would have on the trial of the case, but one cannot often estimate the effect of the admission of oral evidence. It is difficult to apply S. 167, Evidence Act, to a witness who has not been allowed to be examined by the trial Court as the Court can have no idea as to what that witness is going to say. (Horwill, J.) Crown Prosecutor, Madras v. Ramanjulu Naidu. 211 I.C. 471=16 R.M. 552=45 Cr. L.J. 401=57 L.W. 175=1944 M.W.N. 31 = A.I.R. 1944 Mad. 169=(1943) 2 M.L.J. 672.

—S. 417—Acquittal—Interference—Grounds -Magistrate misappreciating and misinterpreting or failing to understand evidence-If justifies

interference. Where the Magistrate or Court trying the case has entirely misappreciated the position and misinterpreted or failed to understand the evidence in the case in respect of a particular aspect of the case relating to a specific charge, the High Court will interfere with and set aside an order of acquittal. (Lobo and Tyabji, JI.) EMPEROR

v. PINILADHO SHAH. I.L.R. (1941) Kar. 532=199 I.C. 78=14 R.S. 160=43 Cr.L.J. 458=A.I.R. 1942 Sind 33.

-S. 417-Acquittal under S. 345-Appeal

against-Maintainability.

The presentation of an appeal under S. 417, Cr. P. Code, against an order of acquittal passed under S. 345, Cr. P. Code, after permitting compounding is a procedure without precedent; and such an appeal cannot be entertained in the absence of proof of illegality on the part of the Magistrate in accepting the compromise which was within his sole discretion to allow or refuse or in the absence of proof of the grossest misuse of his discretion by the Magistrate. (Rowland and Manohar Lal, JJ.) EMPEROR v. GOURISHANKAR BOHIDAR. 196 I.C. 604=43 

cused—Notice served only on some—Piece-meal hearing of appeal—Permissibility.

Where in an appeal filed against several accused the notices of appeal are served only on some of them, it is not merely permissible but desirable to hear the appeal in respect of those accused only upon whom the notices have been served. (Lodge and Roxburgh, JJ.) Superintendent and Remembrancer of Legal Affairs. Bengal v. Golak Tikadar. I.L.R. (1943) 1 Cal. 181=215 I.C. 175=76 C.L.J. 415.

S. 417—Applicability—Partial acquittal. Per Igbal Ahmad, C.J.—S. 417, Cr. P. C., is applicable not only to the case of a complete but also of a partial acquittal. (Iqbal Ahmad, C.J., Ismail, Mulla, Hamilton and Day, JJ.) ZAMIR QASIM v. EMPEROR. I.L.R. (1944) A. 403=17 R.A. 75=46 Cr.L.J. 38=1945 A.W.R. (H.C.) 101=215 I.C. 213=1944 A.L.J. 203=A.I.R. 1944 All. 137 (F.B.).

Ss. 366 and 302, I. P. Code—Trial by jury for S. 366 and with assessors for S. 302-Jury's verdict unanimous-Accused if can attack, in the absence of misdirection, facts about kindapping in appeal against the charge of murder—Murder Trial—Ambiguity in procedure—Benefit to accused. Moujilal v. Emperor. [See Q.D. 1936-740, Vol. I, Col. 3337.] I.L.R. (1941) Nag. 157=191 I.C. 371=13 R.N. 200=42 Cr.L.J. 154=A.I.R. 1941 Nag. 94.

Powers of High Court. by jury—Appeal—

It is not open to the High Court in an appeal against a conviction on a verdict of the jury to consider whether it would on the same evidence, have convicted any one of the accused. (Horwill, J.) VRIDICHAND SOWCAR v. EMPEROR. 208 I.C. 265=16 R.M. 243=44 Cr.L.J. 766=1943 M. W.N. 290 (2)=A.I.R. 1943 Mad. 527=(1943) 1 M.L.J. 377.

S. 418—Grounds open in appeal under.

An appeal against a conviction in a trial by jury must rest only on legal grounds. Mere statements in the grounds of appeal that the charge to the jury is full of misdirections and non-directions and that the verdict of the jury is perverse, are not sufficient to clearly fore-shadow the point of attack against the charge

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to the Jury, which the grounds should indicate. (Sinha, J.) GHULAM HUSAIN v. KING EMPEROR. I.L.R. (1945) A. 127=220 I.C. 411 = 46 Cr.L.J. 687=1945 A.W.R. (H.C.) 19 = 1945 A.Cr.C. 23=1945 A.L.J. 43=1945 A.L.W. 3=1945 O.W.N. (H.C.) 3=A.I.R. 1945 A. 182.

S. 418—Jurisdiction—Trial by Judge exercising Sessions jurisdiction-Appeal to Chief

Court-Competency.

It is as from a Sessions Court to a High Court that appeals lie from a trial by a Judge exercis-ing the sessions jurisdiction of the Chief Court to the Chief Court exercising High Court jurisdiction. (Davis, C.J. and Lobo, J.) EMPEROR v. HUNDRAJ LACHIRAM. I.L.R. (1944) Kar. 239=212 I.C. 79=16 R.S. 233=45 Cr.L.J. 505=A.I.R. 1944 Sind 65.

-Ss. 419, 420, 421 and 561-A—Summary dismissal of jail appeal under S. 421—Subsequent re-presented appeal under S. 419—Maintainability—High Court if can review its own judgment. Jodha v. Emperor. [See Q.D. 1936-'40, Vol. I, Col. 2780.] 15 Luck. 662.

Ss. 419, 421 and 369—Jail appeal—Summary

dismissal—Effect—Subsequent appeal through counsel—Maintainability. RAJ KUMARI v. EMPEROR. [See Q.D. 1936-'40, Vol. I, Col. 2783.] 15 Luck. 703.

-Ss. 421 to 423—Withdrawal of appeal—

Power of Court or appellant.

Once an appeal has been lodged and admitted it is not in the power of any Court nor in the it is not in the power of any Court nor in the power of the appellant to allow the appeal to be withdrawn. The Court is bound once the appeal is admitted to proceed under S. 421 or under Ss. 422 and 423, Cr. P. Code, to decide the appeal on the merits. (Dalip Singh, Bhide and Ram Lall, JI.) EMPEROR v. GHULAM MAHOMED. I.L.R. (1942) Lah. 241=203 I.C. 501=15 R.L. 222=44 Cr.L.J. 14=A. I.R. 1942 Lah. 296 (F.B.).

S. 422—Abbeal against conviction—

S. 422—Appeal against conviction— Absence of notice to complainant to whom compensation out of the fine was ordered under S. 545, Cr. P. Code—No ground for interference

in revision.

Where an appeal against a conviction has been fairly heard after notice to the Crown and after hearing the Public Prosecutor and a proper judgment has been written, it would be grossly unfair to require an accused who had been acquitted to go through a fresh ordeal because the appellate Judge had heard only the Public Prosecutor-which is all that is required under S. 422 of the Cr. P. Code, and not the complainant's vakil also. There is no irregularity much less illegality-in not giving notice of such appeal to the complainant merely because he was awarded compensation under S. 545, Cr. P. Code. (Horwill, J.) Mariasoosai v. Arokkiam. 2011 I.C. 521=15 R.M. 357=43 Cr.L.J. 743= 1942 M.W.N. 125=55 L.W. 176 (2)=A.I. R. 1942 Mad. 465=(1942) 1 M.L.J. 108. —S. 422—Notice to complainant—Neces-

sity-Conviction-Compensation given to complainant-Appeal-Complainant not given full opportunity—If ground for setting aside acquittal made on appeal.

Although it is not necessary under S. 422, Cr. P. Code, to give notice to a complainant even though the complainant has been awarded compensation, it is a salutary practice to do so, because the Crown might not choose to oppose the appeal. Where the complainant is served with notice, he should be given a reasonable opportunity to engage a vakil and that vakil also should be given reasonable time to prepare his case. But the failure to give a full opportunity to the complainant and his vakil would not of itself be a ground for interfering with and setting aside an acquittal order made in appeal because an acquittal cannot be lightly interfered with. (Horwill, I.) RANGA KONAR v. PAKKIRI VATTACHI. 208 I.C. 460=16 R.M. 258=44 Cr.L.J. 788=56 L.W. 338=1943 M.W.N. 336=A.I.R. 1943 Mad.565=(1943) 1 M.L.

-S. 422—Scope—Appeal from conviction— Disposal on same day without notice to Crown-

Order of acquittal-Legality.

An order of acquittal in a criminal appeal from a conviction passed on the same day on which the appeal is filed and without notice to the officer appointed by the Provincial Government under S. 422, Cr. P. Code, is illegal and cannot be sustained. (*Lakshmana Rao*, *J.*) Public Prosecutor v. Karuppa Kone. 201 I.C. 515=15 R.M. 469=43 Cr.L.J. 768=55 L.W. 170 (1)=1942 M.W.N. 128 (1)=A.I.R. 1942 Mad. 356 Mad. 356.

-Ss. 422 and 423—Scope—Appeal from conviction-Complainant's advocate-Right of to

appear and to argue—Discretion of Court.
There is no provision in the Cr. P. Code for appearance or argument by the complainant's advocate in an appeal from a conviction even in a non-cognizable case, e.g., defamation case, in addition to, or in substitution for, appearance or argument by the Public Prosecutor. S. 423, Cr. P. Code, makes no provision for hearing the advocate for the complainant; nor does S. 422 make any provision for notice of an appeal to be given to the advocate for the complainant. It may be said that Ss. 422 and 423 are not exhaustive, and therefore in private prosecu-tions the Court may, if it thinks fit to do so, allow the complainant to appear by an advocate and hear his advocate. (Davis, C.J.) Pestonji C. Tarapore v. Emperor. I.L.R. (1941) Kar. 451=198 I.C. 281=14 R.S. 139=43 Cr. L. J. 345=A.I.R. 1942 Sind 5.

**-S. 422**—Scope — Non-compliance—Notice not sent to Crown-Acquittal-Revision at ins-

tance of complainant—Interference.
Under the mandatory provisions of S. 422, Cr. P. Code, notice must go to the Crown in an appeal from a conviction. But the omission to issue notice to the Crown is no ground for interference with the appellate order at the instance of the complainant when the Crown supports the order of acquittal passed in appeal. (Horwill, J.) Sundararamier v. Chinnapalani Amba-LAM. 208 I.C. 482=16 R.M. 264=1943 M.W.N. 227=56 L.W. 259=44 Cr.L.J. 794 =A.I.R. 1943 Mad. 566=(1943) 1 M.L.J. 351.

CR. P. CODE (1898), S. 423.

-S. 423-Appeal against conviction-Correctness of trial Court's judgment-Burden of proof.

Per Sen, J.—In a criminal appeal against a conviction it is for the Crown to establish that the judgment of the trial Court is right. As the presumption of the innocence of the accused the presumption of the innocence of the accused still persists, the appellate Court has to satisfy itself that the judgment of the trial Court is right. (Khundkar and Sen, JJ.) IBRAHIM BANDUKCHI v. EMPEROR. I.L.R. (1943) 1 Cal. 423=209 I.C. 105=16 R.C. 320=45 Cr.L.J. 71=47 C.W.N. 332=A.I.R. 1943 Cal. 465. -S. 423-Appeal-Disposal without hearing

any party-Legality.

Against a conviction in a case of rioting, some accused preferred an appeal, which, after notice, was posted for hearing on 1st November, 1939, On that date the other accused also preferred an appeal which was admitted and clubbed along with the other appeal. The Magistrate refused the request of the advocate for adjournment and closed the appeal and later on pronounced orders acquitting the accused.

 $\hat{H}eld$ , in revision, that the appeals having been closed without any hearing the orders disposing of the appeals could not be sustained. (Lakshmana Rao, J.) NILAKANTA IYER v. PICHAIKARAN. 1941 M.W.N. 670=A.I.R. 1941 Mad. 802.

-Ss. 423 and 514—Appeal from order under S. 514-Power of appellate Court to

raise amount of security forfeited.

Under S. 423, Cr. P. C., in an appeal from an order under S. 514 the appellate Court has power to alter or reverse the order. The word "alter" does not imply the power only to reduce the amount of security forfeited. The appellate Court has jurisdiction to raise the amount of the security forfeited. (Almond, J.C.) GUL ZAMAN v. EMPEROR. 205 I.C. 325=15 R. Pesh. 95=44 Cr.L.J. 381=A.I.R. 1943 Pesh. 6.

s. 423—'Appellate Court'—If restricted to High Court only.

The expression 'Appellate Court' in S. 423, Cr. P. Code cannot be restricted to mean the High Court only because where the sentence passed by an Assistant Sessions Judge is only three years an appeal will lie to the Sessions Judge, whose powers to dispose of the appeal must be found within the four corners of S. 423. Cr. P. Code. (Ghulam Hasan, J.) BHAGWANTA V. SARJOO. 207 I.C. 427=16 R.C. 44=1943 O.A. (C.C.) 135=1943 O.W.N. 207=1943 A.W.R. (C.C.) 52=1943 A.Cr. 84=44 Cr. L.J. 604=A.I.R. 1943 Oudh 322.

423 (1) (b)—Enhancement—What

may amount to.

It can be stated as a general proposition, that to impose a substantial fine in place of a sentence of imprisonment and increase of sentence of imprisonment in default in payment of fine does amount to an enhancement of the sentence. But the question depends on the facts of each case. (Thomas, C.J.). GANGA V. EMPEROR. 18 Luck. 252=200 I.C. 809=15 R.O. 47=1942 O.W. N. 376=1942 A.W.R. (C.C.) 249=1940 A.

Cr.C. 112=43 Cr.L.J. 719=1942 O.A. 270

=A.I.R. 1942 Oudh 399 (1).

S. 423—Powers of appellate Court—Alteration of conviction under S. 304, I. P. Code into one under S. 302, I. P. Code-Permissibility.

An appellate Court cannot alter a conviction under S. 304, I. P. C., into one under S. 302, I. P. C., although on the finding of the lower Court the accused should have been convicted under that section, as a conviction under S. 304, I. P. C., is tantamount to an acquittal of the offence under S. 302, I. P. Code. (Almond, J.C. and Mir Almad, J.) SHER ALI v. EMPEROR. 201 I.C. 705=15 R. Pesh. 29=43 Cr.L.J. 766=A.I.R. 1942 Pesh. 51.

-Ss. 423 (1) (b) and 439-Powers of appellate Court-Alteration of conviction under S. 304 to one under S. 302, I. P. C. and enhance-

ment of sentence. In an appeal from a conviction by a convict who had been charged under S. 302, but convicted under S. 304, I. P. C., the High Court is competent to alter the conviction from one under S. 30! to one under S. 302, I. P. C., and then in the exercise of the powers conferred by S. 439 (1), Cr. P. Code, to enhance the sentence 439 (1), Cr. P. Code, to enhance the sentence to one of death or transportation for life as the merits of the case may require. (Dalip Singh, Ram Lall and Sale, JJ.) BAWA SINGH v. EMPEROR. I.L.R. (1942) Lah. 129=197 I. C. 669=14 R.L. 273=43 Cr.L.J. 235=44 P.L. R. 59=A.I.R. 1941 Lah. 465 (F.B.).

S. 423—Powers of appellate Court—Alteration of conviction—Conviction under S. 323, I. P. Code—Alteration into one under S. 323|114

—Legality.

The appellate Court cannot change a conviction under S. 323, I. P. Code, into one under S. 323 read with S. 114, I. P. Code, when there was no charge under this section framed against the accused. (Varma, J.) Janak Singh v. Emperor. 195 I.C. 843=7 B.R. 979=14 R. P. 178=42 Cr.L. J. 790=22 P.L.T. 943= A.I.R. 1941 Pat. 623.

—S. 423—Power of appellate Court—Alteration of finding of acquittal into one of con-

A Court of appeal is empowered under S. 423 (1) (b) (2) of the Cr. P. Code to alter a finding of acquittal into one of conviction. (Iqbal Almad, C.J., Ismail, and Dar, IJ., Mulla and Hamilton, IJ., dissenting.) EMPEROR v. ZAMIR QASIM. I.L.R. (1944) A. 403=17 R.A. 75=46 Cr.L.J. 38=1945 A.W.R. (H.C.) 101=215 I.C. 213=1944 A.L.J. 203=A. I. R. 1944 All. 137 (F.B.).

—S. 423 (1) (b)—Powers of appellate Court—Conviction under S. 391, I. P. C.—Alteration to one under Ss. 147 and 148—Legality—"May alter the finding"—Construction—Cr. P. C., Ss. 237 and 238—Applicability of—S. 535.

It is not competent to an appellate Court to alter a conviction under S. 391, I.P.C., into one under Ss. 147 and 148, I. P. C. The appellate Court cannot have larger powers than the trial Court. The particulars necessary for proving a charge

CR. P. CODE (1898), S. 423.

Cr. P. C., would not apply to such a case. Nor would Ss. 237 and 238, Cr. P. C., apply to the

The words "may alter the finding" in S. 423 (1) (b), Cr. P. C., are no doubt very general, but must be construed in harmony with other provisions of the Code and not as overriding them. (Das, J.) BIJO GOPE v. EMPEROR. (1945) P. W. N. 284=A.I.R. 1945 Pat. 376.

-S. 423—Powers of appellate Court— Finding of acquittal—If can be altered into one

of conviction.

An appellate Court has power to alter a finding of acquittal to a conviction, either on point of law or a point of fact, where the ac-

ordering a commitment, to lay down what the advocates of the parties may or may not do at the trial. So far as the trial Judge is concerned, he would be guided at the trial by the procedure prescribed by the Code, unfettered in his discretion by anything by way of observations contained in the committal order. (Davis, C.J., and Thadam, I.) SANMUKH SINGH v. EMPEROR. I.L.R. (1945) Kar. 109=221 I.C. 31=A.I. R. 1945 Sind 125.

S. 423—Powers of appellate Court— Order for re-trial on ground of defect in charge —Considerations—Finding as to failure of justice

-Neccssity.

An appellate Court has undoubtedly power to order a re-trial under Ss. 423 and 232, Cr. P. Code, on the ground of there being a defect in the charge, but before ordering a re-trial, the appellate Court must come to a clear finding as to whether the error or defect in charge had misled the accused in his defence or occasioned Misset the accessed in his deterries of decasioner a failure of justice, in view of the wording of Ss. 531 and 232. (Fasl Ali, I.) BHOLA NATH MITRA v. JITENDRA NATH MUKHERJI. 197 I.C. 213=14 R.P. 295=8 B.R. 171=43 Cr.L.J. 134=1941 P.W.N. 657=A.I.R. 1942 Pat.

\_\_\_\_S. 423 (1) (b)—Power of appellate. Court—Order for retrial from particular stage

of trial—Legality.

A Sessions Judge hearing an appeal from a conviction and ordering a re-trial on the ground that the magistrate failed to question the accused on the evidence of the prosecution witnesses, can order a re-trial from the stage at which the illegality crept in, i.e., from the stage at which the examination of the accused is taken. The words in S. 423 (1) (b), Cr. P. Code, authorizing an appellate Court to order a re-trial are The particulars necessary for proving a charge under S. 391, I. P. C. are different from the particulars necessary for proving a charge under Ss. 147 and 148, I. P. C. The principle of S. 535,

J.) VIROOMAL v. EMPEROR. I. L. R. (1941) Kar. 167=196 I.C. 275=14 R.S. 62=42 Cr. L.J. 837=A.I.R. 1941 Sind 144.

S. 423 (2)—Powers of appellate Court— Order for retrial—If obligatory on reversal of

verdict.

S. 423 (2), Cr. P. Code does not lay down that if the appellate Court chooses to reverse the verdict of the jury it must of necessity direct a new trial. (Ghulam Hasan, J.) BHAG-WANTA v. SARJOO. 207 I.C. 427=16 R.C. 44 =1943 O.A. (C.C.) 135=1943 O.W.N. 207 =1943 A.W.R. (C.C.) 52=1943 A. Cr. C. 84=44 Cr.L.J. 604=A.I.R. 1943 Oudh 322.

——Ss. 423 and 107—Power of appellate Court—Order for retrial on allowing appeal in case under S. 107—Competency.

An appellate Court has no power to order retrial while allowing an appeal in a case under EMPEROR. 201 I.C. 60=15 R.O. 61=1942 O. W.N. 387=1942 A.W.R. (C.C.) 251=1942 A. Cr. C. 112 (2)=43 Cr.L.J. 729=1942 O.A. 272=A.I.R. 1942 Oudh 416.

-S. 423—Powers of appellate Power to alter conviction under wrong section to

one under proper section.

Where the evidence establishes facts constituting an offence under S. 477-A read with S. 34. I. P. Code, but the trial Court records a conviction under a wrong section, it is open to the appellate Court to alter that conviction into one under the correct section under which the accused ought properly to have been convicted. (Agarwala and Brough, JJ.) SATYANARAYANA v. EMPEROR. 22 Pat. 681=212 I.C. 298=16 R. P. 313=25 P.L.T. 57=10 B.R. 494=45 Cr. L.J. 624=A.I.R. 1944 Pat. 67.

Court—Power to commit accused to Sessions Court without repealing inquiry or writing com-

mittal order.

An appellate Court under S. 423 (1) (b) has power to commit the accused for trial to the Court of Session, without repeating the inquiry or writing a long committal order when the alleged facts are set out clearly in the judgment of the trying Magistrate and the evidence is very fully upon the record. (Davis, C.J.) Mansha Ram Gian Chand v. Emperor. 193 I.C. 454=13 R.S. 231=42 Cr. L. J. 460=A. I. R. 1941 Sind 36.

S. 423—Powers of appellate Court— Transforming conviction under S. 147 and S. 325 read with S. 149, I. P. Code, into one under S. 325 read with S. 34, I. P. Code.

An appellate Court is competent to transform a conviction for an offence under S. 147 and S. 325 read with S. 149, I. P. Code, into a conviction for an offence under S. 325 read with S. 34, I. P. Code, though the latter is not mentioned

CR. P. CODE (1898), S. 423.

exhaustive and that the powers of the appellate Courts in dealing with criminal appeals are coextensive with, and controlled by, the provisions of the section. (Iqbal Ahmad, C.J., Ismail, Mulla, Hamilton and Dar, JJ.) ZAMIR QASIM V. EMPEROR. I.L.R. (1944) A. 403=17 R. A. 75=46 Cr.L.J. 38=1945 A.W.R. (H. C.) 101=215 I.C. 213=1944 A.L.J. 203=A.I.R. 1944 All. 137.

-S. 423 (1) (c) and (d)—Security proceedings-De novo enquiry-If can be ordered. The Legislature could never have intended that a person, who was being proceeded against under S. 107 or 110, Cr. P. Code, should get off scot free merely on account of some error of procedure by the Magistrate. If in the case of a person, who prima facie ought to be bound over the order has to be reversed on account of an illegality in the proceedings, the appellate Court has to apply its mind to the question whether there should be a de novo enquiry or not, and then pass an order incidental to its order reversing the order for security directing either there should be a de novo enquiry, or, if the matter had become stale or for any other reason, that there should not be a de novo enquiry. (Blacker and Ram Lall, JJ.) Subec Singh v. Emperor I.L.R. (1943) Lah. 365=199 I.C. 532=14 R.L. 431=43 Cr.L.J. 564=44 P.L.R. 71=

R.L. 431=43 Cr.L.J. 504-44 F.L.N. 11-A.I.R. 1942 Lah. 84.
——S. 423 (1)—Scope—Mandatory character of—Appeal—Records destroyed by fire after trial and pending appeal—Procedure—Re-trial.
S. 423 (1), Cr. P. Code, is mandatory and in the appealate Court to obtain

it is obligatory on the appellate Court to obtain and examine the records at the time of the hearing. Where the records are not available, e.g., when they have been destroyed by fire after trial and pending appeal, the only course open is to order a re-trial. (Byers, J.) Sevugaperumal v. Emperor. 207 I. C. 60=16 R. M. 81=44 Cr.L.J. 611=56 L.W. 76=1943 M.W.N. 72 (2)=A.I.R. 1943 Mad. 391 (2)=(1943) 1 M.J. T. 120 M.L.J. 129.

S. 423—Trial by jury—Appeal from conviction—High Court holding that there has not been legal trial-Power to order that there

should not be fresh trial.

Where on an appeal from a conviction at a trial by jury, the High Court holds that there has been misjoinder of charges and as such there has not been a legal trial, it is not entitled to order that there shall not be a fresh trial unless it is prepared to quash the commitment under S. 215, Cr. P. Code. (Lodge and Akram, JJ.) Hugh Francis Bellgard v. Emperor. I.L.R. (1941) 2 Cal. 319=198 I.C. 499=14 R.C. 471=43 Cr.L.J. 389=45 C.W.N. 839=A.I.R. 1941 Cal. 707.

-Ss. 423 (2) and 537 (d)-Misdirection

-Interference-When not justified.

I. P. Code, though the latter is not mentioned in the charge. (Bennett, I.) BHUREY SINGH v. If a Court after considering the evidence finds EMPEROR. 222 I.C. 332=1945 A. Cr. C. 152 = 1945 A.W.R. (H.C.) 274=1945 A.L.W. (H.C.) 340=1945 O.W.N. (H.C.) 293= (H.C.) 340=1945 O.W.N. (H.C.) 293= (H.C.) 359=A.I.R. 1946 A. 7.

S. 423—Scope.

Rest Igbal Ahmad, C.J.—It cannot be disputed that S. 423, Cr. P. Code is self-contained and Nag. 324.

-S. 423 (2)—Misdirection—Reading out of written charge if amounts to. See CR. P. CODE, Ss. 297 AND 423 (2). 1942 N.L.J. 523. ——Ss. 424 and 367—Appellate Court— Duty in regard to hearing—Judgment—Contents. It is the duty of the appellate Court to examine the record and to dispose of the appeal on merits and this duty is cast upon the Court of appeal notwithstanding that the appellant does not appear. Where the appellate Court is not a High Court, S. 424 read with S. 367 of the Cr. P. Code, renders it necessary that the appellate judgment should embody inter alia the point or points for determination, the decision thereon and the reasons therefor. (Misra, J.) Maho-MED MUSTAQIM v. SUKHRAJ. 220 I.C. 430= 46 Cr.L.J. 684=1944 A.W.R. (C.C.) 256= 1944 O.A. (C.C.) 256=A.I.R. 1945 Oudh 52.

-S. 424—Duty of Court in disposing of appeal-Reasons for conclusion-If to be given- $\hat{S}$ . 367 (1).

Where notice has gone to the Public Prosecutor in an appeal from a conviction and the accused who have been released on bail pending appeal are absent the appellate Court in dismissing the appeal must give reasons for the conclusion it comes to. A judgment dismissing the appeal reciting that the accused and their counsel are absent and that the Court has carefully perused the case record and does not find any grounds to interfere with the conviction is not a proper judgment under S. 367 (1), Cr. P. Code and cannot be upheld. Such a judgment would be enough if the disposal were one in limine under S. 421, Cr. P. Code. (Horwill, J.) CHINNATHAMBI, In re. 204 I.C. 298=15 R. M. 751=44 Cr.L.J. 185=55 L.W. 712 (1) =1942 M.W.N. 746=A.I.R. 1943 Mad. 9= (1942) 2 M.L.J. 579.

-S. 424—Strictures in judgment against

Magistrate—Propriety.

It is undesirable and improper for one Judge or Magistrate to criticise another in his judgment in unrestrained language. It is unfair to the Magistrate concerned as a public indictment of this sort tends to make his position as a Magistrate difficult and must affect adversely his ability to perform his magisterial duties. It also lowers the administration of justice in the eyes of the public. If there is any serious cause for complaint the matter should be taken up privately with the District Magistrate. (Pollock, J.) GANAPATI SITARAM v. TANSINGH SITARAM. I.L.R. (1944) Nag. 176=215 I.C. 57=17 R.N. 37=45 Cr.L.J. 766=1944 N.L.J. 93 =A.I.R. 1944 Nag. 136.

-S. 428—Additional evidence—Power of appellate Court-Re-trial-If to be ordered on

ground of additional evidence being necessary.

An appellate Court under S. 428, Cr. P. Code, has power to take, or direct the taking of, additional evidence, such as the evidence of a handwriting expert, if it thinks that such additional evidence is necessary. It is not necessary for

CR. P. CODE (1898), S. 435.

295=8 B.R. 171=43 Cr.L.J. 134=1941 P. W.N. 657=A.I.R. 1942 Pat. 143.

S. 428—Remand for fresh evidence in an appeal against security order under S. 110, Cr. P. Code—Propriety.

Where in a case under S. 110, Cr. P. Code, the Sessions Judge in appeal not being quite convinced by the prosecution evidence, remands the case and orders the taking of fresh evidence as he thought it necessary to have it on record, and for which he has recorded reasons, the order though rather unusual is not necessarily illegal or improper. There is no hard and fast rule to minoper: There is no half and last the to fetter the discretion of the appellate Court. (Madeley, J.) BABU v. EMPEROR. 214 I.C. 123=45 Cr.L.J. 730=17 R.O. 29=1944 A. W.R. (C.C.) 175=1944 O.A. (C.C.) 175=1944 O.W.N. 239=A.I.R. 1944 Oudh 243.

-S. 429-Reference to third judge-Scope of-Judges differing only as regards one of the

accused.

The case to be laid before a third judge under S. 429, Cr. P. Code, is the complete case in so far as the two judges who first heard the appeal have differed as regards a particular accused but not the case of the other accused as to whom not the case of the other accused as to whom they did not differ. (Collister and Plowden, JJ.) Subedar Singh 7. Emperor. I.L.R. (1943) A. 82=208 I.C. 262=16 R.A. 77=1943 A.L.J. 172=44 Cr.L.J. 765=1943 A.L.W. 270=1943 O.W.N. (H.C.) 172=1943 A.W. R. (H.C.) 110=1943 O.A. (H.C.) 110=1943 A.Cr.C. 65 (2)=A.I.R. 1943 A. 272 (F.B.) (F.B.).

-S. 432-Jurisdiction of High Court to direct Magistrate to make reference.

The High Court has no jurisdiction to direct

a Magistrate to state a case under S. 432, Cr. P. Code, if in his discretion he does not desire to do so, and in any case the High Court will not direct him to state a case after he has recorded an order of acquittal, although it thinks that there is a serious question of law which requires to be considered. (Beaumont, C.J. Lokur and Rajadhyaksha, JJ.) SHAMDASANI v. CENTRAL BANK OF INDIA LTD. (No. 1). I.L.R. (1944) Bom. 302=212 I.C. 396=16 R.B. 358=45 Cr.L.J. 612=46 Bom.L.R. 70=1944 Comp. Comp. C. 38=A.I.R. 1944 Bom. 107 (F.B.).

-Ss. 435 and 439—Acquittal—Interference— Private complaint-Conviction-Appeal-Notice not sent to Crown—Accused acquittal—Revision by complainant—Interference. See Cr. P. Code, S. 422. (1943) 1 M.L.J. 351.

-Ss. 435 and 439-Administrative order-District Magistrate directing subordinate Magis-

trates not to allow unauthorised persons to practice as legal practitioners—Revision.

An order of a District Magistrate directing subordinate Magistrates not to allow certain unauthorized persons to practice as legal practithe Court to direct a retrial on that ground. tioners in their Court is one passed in the exercise of his administrative magisterial functions NATH MUKHEKJEA. 197 I.C. 213=14 R.P. and is not revisable under Ss. 435 and 439, Cr.

P. Code. (Byers, I.) NARASIMHAMURTHI PATNAIK 7. EMPEROR. 207 I.C. 623=16 R.M. 161=1943 M.W.N. 223=56 L.W. 256=44 Cr.L.J. 662=A.I.R. 1943 Mad. 470=(1943) 1 M.L.J. 382.

-Ss. 435 and 439-Court subordinate to High Court-Bihar and Orissa Municipal Act, S. 198-Magistrate acting under-If acts judici-

ally—Orders—If open to revision.

The function that a Magistrate discharges under S. 198, Bihar and Orissa Municipal Act, is discharged in the course of his judicial duty, and is not a function that can be assigned to any one but a Magistrate. He functions as a Criminal Court and is therefore an inferior Criminal Court and his order is therefore subject to revision by the High Court under Ss. 435 and 439, Cr. P. Code. (Dhavle, I.) CHARMAN, BIHAR MUNICIPALITY v. RAMNANDI KUER. 197 I.C. 74=14 R.P. 266=8 B.R. 145=43 Cr. L.J. 110=1941 P.W.N. 459=22 Pat.L.T. 510=A.I.R. 1941 Pat. 548.

-S. 435-Duty of applicant to be ready with case and documents-Adjournment to enable documents to be sent for-Practice. Muk-UND MARTU v. EMPEROR. [See Q.D. 1936-'40, Vol. I, Col. 2797.] 42 Cr.L.J. 52.

Ss. 435 and 439—Duty of Court—Conviction and sentence for act which is no offence at the time-Interference in revision-Point not raised at trial or on appeal-If ground for non-

interference.

Where it is brought to the notice of a Court having revisional jurisdiction that a person has been convicted and sentenced for doing an act which at the time was not an offence, it is the duty of the Court to interfere and set aside the conviction and sentence. The fact that the point, viz., that the act alleged was not an offence at the time, was not raised in the lower Courts, is no ground for not interfering in revision. (Happell, J.) Kunhi Pakki, In re. 209 I.C. 12=16 R.M. 286=45 Cr.L.J. 74=1943 M.W.N. 343=A.I.R. 1943 Mad. 587=(1943) 1 M.L. J. 468.

-Ss. 435 and 439-Enhancement-Princi-

ples governing.

The fact that the sentence passed is a very lenient one is not a sufficient ground on which the Court will exercise its powers to enhance the sentence. Generally speaking, a sentence will not be enhanced in revision unless it is such a manifestly inadequate punishment for the offence committed as to amount to a miscarriage of justice. (Roberts, C.J. and Dunkley, J.) HLA SAN v. THE KING. 1941 Rang.L.R. 595=199 I.C. 147=14 R.R. 269=43 Cr.L.J. 525=A.I.R. 1942 Rang. 49.

-S. 435—"Inferior Criminal Court'-Panchayat under Bihar and Orissa Village Administration Act—Order passed by—Revision-

High Court's power.

A panchayat constituted under the Bihar and of revising calls for the exercise of powers and in the exercise of its criminal jurisdiction, it is an inferior Criminal Court for purposes of S. 435, Cr. P. Code, and its orders are therefore revisable by the High Court under S. 435 Cr. P. Code. Ss. 53 (2) (b) and 57 (2) of the control contains or discioses. The operation of revising calls for the exercise of powers. (Khundkar, Lodge, Sen, Roxburgh and Akrom, JJ.) MAHABIR SINGH v. EMPEROR. I.L.R. (1944) 2 Cal. 1=211 I.C. 177=45 Cr.J.J. 309=16 R.C. 495=48 C.W.N. 113=A.I.R. 1944 Cal. 17 (F.B.).

CR. P. CODE (1898), S. 435.

Bihar and Orissa Village Administration Act are a clear indication that a panchayat is a Court. (Agarwala, J.) Goni Mahton v. Emperor. 193 I.C. 491=7 B.R. 606=13 R.P. 614=42 Cr.L.J. 434=1940 P.W.N. 973=A.I.R. 1941 Pat. 169.

S. 435—Inferior Criminal Court—Sub-divisional Magistrate holding inquiry into case of torture by police officer—If subordinate to Additional District Magistrate—Power of latter

to revise order on inquiry.

A Sub-Divisional Magistrate holding an in-quiry under Police Order No. 157 into a case of torture or other offence by a police officer and examining witnesses on oath is holding a judicial proceeding as defined in S. 4 (m), Cr. P. Code, and is a Criminal Court inferior to the Additional District Magistrate. Therefore under S. 435, Cr. P. Code, the Additional District Magistrate has jurisdiction to revise the order passed by the Sub-Divisional Magistrate on such Inquiry. (Kuppuswami Ayyar, J.) Veerappa, In re. 210 I.C. 321=16 R.M. 450=45 Cr. L.J. 212=56 L.W. 437=1943 M.W.N. 706 (1)=A.I.R. 1944 Mad. 37=(1943) 2 M.L.J. 182.

Ss. 435 and 439—Interference—Contravention of S. 530 (p), Cr. P. Code—When justifies interference. See Cr. P. Code, S. 530 (p). (1941) 2 M.L.J. 420.

S. 435—Jurisdiction of District Magis

trate-Order under S. 145 by Subordinate Magistrate—Power of District Magistrate to set aside—Procedure. Luti Singh v. Ram Kirit Singh [See Q.D. 1936-'40, Vol. I, Col. 3338.] 192 I.C. 784=7 B.R. 492=42 Cr.L.J. 340=13 R.P. 569=A.I.R. 1941 Pat. 105.

-Ss. 435 and 439-Limitation.

Where a criminal revision petition has been admitted the question of limitation is not of much importance there being no limitation fixed by statute for a criminal revision. (Varna, I.)
LALO MAHTO v. EMPEROR. 199 I.C. 218=14
R.P. 577=22 Pat.L.T. 976=1942 P.W.N.
13=8 B.R. 534=43 Cr.L.J. 537=A.I.R. 1942 Pat. 150.

Ss. 435 and 439—Limitation—Revision application.

Once a revision petition has been admitted by the High Court, it has to be considered on its merits, and a plea of limitation does not prevail, especially when there is no period prescribed by the statute for such an application. (Pandy, I.)
BIBI ZAINALE v. ANWAR KHAN. 1945 P.W.N. 317.

S. 435—Object of calling for record. Per Khundkar, J.—Obviously the record is not to be called for merely to satisfy the Court's curiosity, but it is to be called for in order that the Court may, after examination, take measures to correct by revision what may be incorrect, illegal or improper in some thing or things which the record contains or discloses. The operation

-Ss. 435 and 439—Objection as to forum after admission of revision and sending for records—Maintainability.

Once an application for revision has been admitted and the record called for an objection that the application should have been made to Sessions Judge in the first instance should ne sessions judge in the first instance should not be entertained. (Agarwal, J.) SURAJBALI v. EMPEROR. 201 I.C. 466=15 R.O. 103=1942 O.A. 303=1942 O.W.N. 425=1942 A. W.R. (C.C.) 275=1942 A.Cr.C. 134=43 Cr.L.J. 739=A.I.R. 1942 Oudh 438.

Ss. 435 and 439—Power of Court—Irrecultarity in Activity of Court—Irre-

gularity in petition of revision—Affidavit sworn to by accused—If bar to maintainability of peti-

tion or to interference.

The mere fact that a criminal revision petition is not in order is no ground for rejecting it on the ground that the affidavit in support of it is sworn to by the accused himself in contravention of the rules. Once the case has come before the High Court, the Court has power to deal with the matter under Ss. 435 and 439, Cr. P. Code. (Varma, J.) Lalo Mahro v. Emperor. 199 I.C. 218=14 R.P. 577=22 Pat. L.T. 976=1942 P.W.N. 13=8 B.R. 534=43 Cr.L.J. 537=A.I.R. 1942 Pat. 150.

S. 435—Powers of District Magistrate— Calling for pending proceedings—Order for, signed by some body for District Magistrate—

Under S. 435 the District Magistrate undoubtedly has power to call for the records of proceedings before any Magistrate of the District, even when those proceedings are pending; but it is the District Magistrate who has that power, and an order signed by another person for the District Magistrate, calling for a proceeding, is an order without authority. (Dunkley, J.) King v. Maung Po Thaing, 1941 Rang, L.R. 82=194 I.C. 370=13 R.R. 306=42 Cr. L.J. 573=A.I.R. 1941 Rang, 114.

——Ss. 435 and 436—Powers of District Magistrate—Case submitted under S. 346 (1)— Power to revise opinion of referring Magistrate.

Although a District Magistrate has powers of revision under Ss. 435 and 436, Cr. P. Code, those powers can only be exercised for the limited purpose indicated in those sections. Except for that special purpose, he has no power to revise the opinion of a subordinate Magistrate in a case reported to him under S. 346 (1), Cr. P. Code. (Broomfield and Wassoodew, JJ.) HAIDARSHA LALSHA v. DHONDU ABAJI. I.L.R. (1942) Bom. 198=199 I.C. 351=14 R.B. 381 =43 Cr.L.J. 562=44 Bom.L.R. 53=A.I.R. 1942 Bom. 84.

Ss. 435 and 439—Powers of High Court. The High Court possesses a general power of superintendence over the actions of Courts subordinate to it. On its administrative side the power is known as the power of superintendence. On the judicial side it is known as the duty of revision. The High Court can at any stage of its own motion if it so desires, and certainly when illegalities or irregularities resulting in injustice are brought to its notice, call for the records and examine them. This right of the High Court is as much a part of the adminis- have taken into consideration inadmissible evi-

CR. P. CODE (1898), S. 435.

tration of justice as its duty to hear appeals and revisions and interlocutory applications. So also its right to exercise its powers of administrative superintendence. (Bose and Sen, JJ.) SAOJI v. N. S. JATAR. I.L.R. (1945) Nag. 74=1945 N.L.J. 30=A.I.R. 1945 Nag. 33=1945 F. L.J. 73.

-Ss. 435, 439 and 491—Powers of High Court-Conviction and sentence by special Court under Special Criminal Courts Ordinance.

The High Court cannot revise an order of conviction or sentence passed by the Special Magistrates appointed under the Special Criminal Courts Ordinance II of 1942 under Ss. 435 and 439, Cr. P. C., because this power of revision can be exercised only as against orders passed by Magistrates exercising jurisdiction under the Cr. P. Code. As the Special Magistrates de-rived their jurisdiction from the Ordinance, they cannot be properly described as "Inferior Criminal Courts" and the High Court cannot revise their order. It does not however necessarily follow from this that the High Court is entirely powerless in the matter. Under S. 491, Cr. P. Code, the High Court may direct that a person illegally or improperly detained in public private custody within the limits of its appellate criminal jurisdiction be set at liberty. It is obvious that if the ordinance under which the petitioners were tried was not applicable to their cases, then their trial was no trial at all in the eye of law and they cannot be detained in a prison, because they should be deemed to have been committed to prison without trial and because the Magistrates who have sentenced them to imprisonment had no power to send them to prison. (Harries, C.J., Fazi Ali and Varma, JJ.) BAN-WARI GOPE v. EMPEROR. 22 Pat. 175=204 I.C. 451=15 R.P. 226=9 B.R. 154=24 P.L.T. 50=44 Cr.L.J. 273=1942 P.W.N. 226=A. I.R. 1943 Pat. 18 (F.B.).

-S. 435 (as amended in 1923)-Powers of High Court—Revision against order under S. 145—Power to bring on record legal representatives of deceased party-Inherent powers-

S. 561-A

The High Court in dealing with revision applications against orders under S. 145, Cr. P. Court (as amended in 1923) have the wide powers of an appellate Court instead of the restricted powers conferred under S. 15 of the Charter Act, under which revision petitions had to be filed prior to 1923, as S. 435, Cr. P. Code, did not apply to proceedings under Chapter XII of the Act prior to 1923 when the Code was amended. S. 561-A, enacted in 1923, also gives very wide additional powers to the High Court. As the law now stands, the High Court has ample powers in revision against orders under S. 145, Cr. P. Code, to bring legal representatives on record if the ends of justice require it. (Horwill, J.) SURYANARAYANA RAJU v. VISWANAPAYANA, U. 199 I.C. 320=14 R.M. 615=1942 M.W.N. 38=43 Cr.L.J. 487=A.I.R. 1942 Mad. 249=(1941) 2 M.L.J. 1047.

Ss. 435 and 439—Questions of fact—

Power to go into evidence.

When a revisional Court holds that in deciding on the guilt of the applicant, the lower Courts

dence, it is plainly incumbent on the revisional Court to satisfy itself that the remaining evidence, which the lower Courts could properly dence, which the lower courts could properly take into consideration, is sufficient to establish as against the applicant, proof of his guilt beyond reasonable doubt. (Roberts, C.J. and Dunkley, J.) A. H. GHANDHI v. THE KING. 1941 Rang. L. R. 566=198 I. C. 455=14 R. R. 210=43 Cr. L. J. 373=A.I. R. 1941 Rang. 324.

S. 435—Revision against acquittal on the motion of private party—Interference by High Court—Circumstances Court-Circumstances.

A revision at the instance of a private person against an order of acquittal is an extraordinary remedy. The High Court will not be prepared to interefere unless there are exceptional circumstances compelling it to do so, as for example where the Magistrate does not appear to have exercised an impartial judicial mind in considering evidence or has entirely left evidence out of consideration or has relied upon evidence not on the record. (Agarwal, J.) Noor Mo-HAMMAD V. IMTIAZ AHMAD. 197 I.C. 839=14 R.O. 363=1942 A.Cr.C. 1=43 Cr.L.J. 280 =1941 O.W.N. 1290=1941 A.W.R. (C.C.) 397=1941 O.A. 1008=A.I.R. 1942 Oudh 130.

Ss. 435 and 439—Revision against original orders of Magistrates.

It is a rule of the Nagpur High Court not to interfere with an original order of a Magistrate unless there has been an application to the District Magistrate or the Sessions Judge to refer the case to this Court. (Pollock. J.) YESHthe case to this Court. (Pollock, J.) YESH-WANT RAO v. EMPEROR. 1941 N.L.J. 619.

S. 435—Revision—Finding of fact—Competency of High Court to dissent—Grounds.

It is open to the High Court in Revision, to dissent from a finding of fact which is either perverse or has been arrived at contrary to well established principles of law. (Sinha, I.) Krishna Dayal v. Emperor. (1945) A.W.R. (H.C.) 298 (2).

—Ss. 435 and 439—Subject-matter of revision—"Finding" "sentence," "order," and "proceedings"—Meaning of.
Per Khundkar, I.—"Finding" in S. 435, Cr. P. C. includes a conviction or an acquittal. The word "sentence" means a direction by which a punishment is prescribed and meted out to a person who has been convicted of an offence. "Order" covers commands or directions that something shall be done discontinued or suffersomething shall be done, discontinued or suffered, but it does not include "sentence" and "finding." The word "proceedings" is obviously wider than the expression "judicial proceedings." It covers everything done and recorded by an inferior criminal Court acting as a Court. But it means everything of this kind which is not a finding, sentence or order. Therefore the words "finding," "sentence," "order," "proceeding," cover everything which may be remedied in revision. (Khundkar, Lodge, Sen, Roxburgh and Akram, JJ.) Mahabir Singh v. Emperor. I. L.R. (1944) 2 Cal. 1=211 I.C. 177=45 Cr. L.J. 309=16 R.C. 495=48 C.W.N. 113=A. I.R. 1944 Cal. 17 (F.B.).

-S. 435 (4)—Sub-Divisional Magistrate— Power to stay proceedings of Panchayat Court

## CR. P. CODE (1898), S. 436.

under Bihar and Orissa Village Administration

Act, Ss. 53 (2) (b) and 77.

Under S. 435 of the Cr. P. Code, a Sub-Divisional Magistrate has power to call for the panchayat under the Bihar and Orissa Village Administration Act within his jurisdiction; but his power is limited under S. 435 (4), Cr. P. Code, to forwarding the record to the District Magistrate. There is no power in the Sub-Divisional Magistrate either under S. 435, Cr. P. Code, or under the Village Administration Act to order stay of proceedings before a panchayat and if he makes a stay order it is without jurisdiction. Even under S. 53 (2) of the Village Administration Act, his only power of interference is to transfer the case; while under S. 77, the power to cancel an order of conviction or compensation comes into operation only after a conviction is recorded. (Agarwala, J.)
Goni Mahton v. Emperor. 193 I.C. 491=7
B.R. 606=13 R.P. 614=42 Cr.L.J. 434= 1940 P.W.N. 973=A.I.R. 1941 Pat. 169. -S. 436-Additional District Magistrate-Jurisdiction to quash charge framed by Stationary Sub-Magistrate.

An additional District Magistrate has no jurisdiction to quash a charge framed by a Stationary Sub-Magistrate under S. 436, Cr. P. Code, (Lakshmana Rao, J.) PANNALAL MARWARI V. KRISHNASWAMI PILLAL. 1941 M.W.N. 677= 54 L.W. 391 (2)=A.I R. 1941 Mad. 804.

Ss. 436 and 119—Order of discharge under S. 119—Further enquiry if can be ordered. It is now well settled that the District Magistrate has got no authority to order a further enquiry under S. 436, Cr. P. Code, in a case which does not relate to the commission of an offence. Where a person has been discharged under S. 119, Cr.P.C., an order of the District Judge directing further enquiry under S. 436 against him, is ultra vires. (Mir Ahmad, I.)
MAHOMED AMIR v. EMPEROR. 216 I.C. 265=
17 R. Pesh. 17=46 Cr.L.J. 156=A.I.R. 1944 Pesh. 48 (2).

-S. 436-Powers of District Magistrate-Complaint by Sub-Magistrate under S. 188, I. P. Code, for disobedience of order under S. 144, Cr. P. Code—Order by Joint Magistrate direct-ing withdrawal of complaint as order disobeyed

was without jurisdiction—Jurisdiction of District Magistrate to set aside—Proper course.

A Sub-Magistrate filed a complaint against the petitioners under S. 188, I. P. Code, on the ground that they had disobeyed an order passed to him they had disobeyed an order passed to him they had disobeyed an order passed to him they had disobeyed as order passed. by him under S. 144, Cr. P. Code, which order it was found was passed not so much to prevent a breach of the peace as to preserve the evidence which might be required in a suit to be filed by certain ryots with regard to a tank and channels and embankment. The Joint Magistrate to whom appeals lay from the Sub-Magistrate held that the order under S. 144, Cr. P. Code, was without invidition and the control of the control without jurisdiction and ab initio void under S. 530 (1), Cr. P. Code, and directed the complaint to be withdrawn. In revision against this order, the District Magistrate set aside the order of the Joint Magistrate and directed the complaint to be proceeded with.

Held, that the District Magistrate had no jurisdiction under S. 436, Cr. P. Code, to set aside the order of the Joint Magistrate, and all he could do was to send up the papers to the High Court for orders under S. 438, Cr. P. Code, in case he considered the order to be incorrect; (2) that the order of the Joint Magistrate directing withdrawal of the complaint could not be said to be an order of discharge and the District Magistrate could not therefore himself set it aside; (3) that since the order of the Sub-Magistrate under S. 144, Cr. P. Code, was found to be ultra vires and without jurisdiction, the Joint Magistrate was not wrong in passing the order which he did. (Kuppuswami Ayyar, J.) VIJAYARANGA REDDIAR v. MUTHUSWAMI REDDIAR. 218 I.C. 109=18 R.M. 18=46 Cr. L.J. 421=1944 M.W.N. 600=57 L.W. 515 =A.I.R. 1945 Mad. 58=(1944) 2 M. L. J. 208.

-Ss. 436 and 437—Powers of Sessions Judge-Committal to sessions on certain charge -Order by Sessions Judge directing magistrate to hold further inquiry to see whether charges of a more serious nature can be framed-Legality.

A Sessions Judge is competent to direct further inquiry into the case, under S. 436, Cr. P. Code, and to order the commitment to sessions under S. 437, of a person who has been discharged. But there is no provision of law which would enable him to take cognizance of a case himself or to direct a magistrate to take cognizance of an offence. Where a magistrate has ordered the committal of the accused to the sessions court on certain charges, a Sessions Judge has no power to direct, that magistrate to hold a further inquiry and consider whether there are or are not grounds for inquiring into a charge against the accused of a more serious nature. (Happell, J.) KANDIMALLA THIRUPELU, In re. 1945 M.W.N. 427=58 L.W. 319=A.I.R. 1945 Mad. 424=(1945) 2 M.L.J. 88.

S. 436—Power of Sessions Judge—Petition of the state of the serious of t

tion of protest to Magistrate before receipt of police report—If "complaint"—Order "file" on such petition-Competence of Sessions Judge to direct further inquiry. Samu Khan v. Gaya Prasad. [See Q.D., 1936-'40, Vol. I, Col. 3338.] 193 I.C. 255=7 B.R. 519=42 Cr.L.J. 358= 13 R.P. 574=A.I.R. 1941 Pat. 144.

S. 436—Scope—Further inquiry—When to be ordered—Application actuated by ulterior motives and made after great delay and not in good faith—Order for further inquiry—Propriety.
S. 436, Cr. P. Code, contemplates that an

applicant who asks for further inquiry acts in good faith, desiring to challenge the order of discharge as such, is not guilty of gross delay and has no ulterior purpose in his application. Where the applicant who is only a name lender has clearly been guilty of gross delay and the real purpose of the application is found to be to enable the District Magistrate to snatch at jurisdiction which he did not possess and interfere in proceedings under S. 476, Cr. P. Code, against certain influential persons, an order directing further inquiry in such a case is improper and must be set aside in revision. (Davis C.J. and Weston, J.) JAM NABI BAKHSH v. '

CR. P. CODE (1898), S. 437. EMPEROR. I.L.R. (1943) Kar. 105=208 I.C. 35=16 R.S. 68=44 Cr.L.J. 728=A. I. R. 1943 Sind 149.

-S. 436—Scope—Order for further inquiry by Sessions Judge-Direction to Magistrate frame charge under specified section and to dispose of the case—Legality of. SIDDA REDDI v. VENKATAGIRIANNA. [See Q.D., 1936-'40, Vol. I, Col. 2805:] 42 Cr.L.J. 102=13 R.M. 523 (2)=A.I.R. 1941 Mad. 65.

S. 437—Implied order of discharge—Power of Sessions Judge to order commitment. An order of a magistrate convicting under S. 323|34, I. P. C., an accused who is sent up for trial under S. 302|34, I. P. C., amounts to an order of discharge under S. 302|34, I. P. C. An additional Sessions Judge is therefore competent, to set aside that order and direct the commitment of the accused under S. 437, Cr. P. C. (Almond, J.C. and Mir Ahmad, J.) Khurshitov. Emperor. 210 I.C. 10=16 R. Pesh. 55=45 Cr.L.J. 167=A.I.R. 1943 Pesh. 89.

S. 437—"Improperly discharged"—Macistants of Jan.

gistrate finding no offence made out under S. 307, I. P. Code, and framing charges under Ss. 147, 323 and 325, I. P. Code—Additional District Magistrate directing committal to sessions under S. 307 and other sections—Legality.

A magistrate after inquiring into a charge sheet filed by the Police under Ch. XVIII, Cr. P. Code, and hearing the prosecution evidence and arguments of both parties, found that no case had been made of any offence under S. 307, Cr. P. Code, framed charges against the accused under Ss. 147, 323 and 325, I. P. Code, and converted the case to a calendar case triable by himself. In revision the Additional District Magistrate directed the committal of the accused to the court of session under S. 307 as well as under the order sections.

Held, that the accused having been in effect discharged so far as the charge under S. 307, I. P. Code, was concerned, the Additional District Magistrate was competent to set aside the 

S. 437, Cr. P. Code, contemplates a case in which there has already been a completed inquiry under the provisions of Ch. XVIII followed by an order of discharge in a case triable exclusively by the Court of Sessions. the accused is charged with offences under Ss. 377|511 and 323, I. P. Code and during its pendency an application is made for their commitment on charges under Ss. 367 and 307, I. P. Code, it is not open to the Sessions Judge acting under S. 437, Cr. P. Code to direct such commitment. Such an order way registry is justice. mitment. Such an order may possibly be justified when a Magistrate has tried out a case and has allowed the accused all the privileges which are common to a full trial in a warrant case and to a full inquiry under Ch. XVIII, but it is certainly not justifiable when the trial in respect

of the other charges had been adjourned for

further cross-examination of the prosecution witnesses. (Yorke, J.) NASIMULLAH PEROR. 194 I.C. 214=1941 A.Cr.C PEROR. 194 I.C. 214=1941 A.Cr.C. 117=13 R.O. 572=1941 O.L.R. 432=42 Cr.L.J. 536 =1941 A.W.R. (C.C.) 159=1941 O.W.N. 634=1941 O.A. 405=1941 A.L.W. 503=A. I.R. 1941 Oudh 409.

-S. 438—Acquittal—Interference—Charge under S. 420 and 467, I.P. Code—Acquittal under former and conviction under latter—Appeal by accused against conviction
—Power of appellate Court to consider facts in appeal irrespective of fact of acquittal under S. 420.

The accused was charged of forgery under S. 467 I.P. Code, and of cheating under S. 420, I. P. Code, on the allegation that he forged a signature on a money order form, and by impersonating the true owner, cheated. The Assistant Sessions Judge acquitted the accused of cheating but convicted him of forgery. The accused appealed to the Sessions Judge, who considered the acquittal under S. 420 inconsistent with the conviction under S. 467.

Held, on a reference to the High Court, that though the acquittal under S. 420, I.P. Code, might act as a plea in bar to further trial on cheating, it would not in the least act as a plea in bar with regard to the facts in so far as they were relevant in considering the charge of forgery; therefore the Sessions Judge in appeal could come to his conclusion with regard to the appeal against the conviction under S. 467 quite untramelled by the fact that the acquittal under S. 420 stood on the record.

Held, further, that the High Court would not as a rule interfere with acquittals in revision. (Mockett, 7.) RANGARAO, In re. 220 I. C 370=1945 M. W.N. 185 (2)=58 L.W. 118=A.I.R. 1945 Mad. 240=(1945) 1 M.L.J. 183.

-Ss. 438 and 439—Acquittal—Interference-Summary trial—Magistrate not giving reasons for acquittal—If justifies interference. See Cr. P. Code, Ss. 263 And 264. I.L.R. (1941) Kar. 545.

S. 438—Criminal circulars—Cir. No. 38, R. 7

—Reference—Explanation from inferior Court—Necessity

to call for.

It is necessary that the Court before making a reference under S. 438, Cr. P. Code, should call for an explanation from the inferior Court with regard to the points on which it proposes to make the reference, as required by R. 7 in Circular No. 38 of the Criminal Circulars of the Judicial Commissioner. (Niyogi, J.)
HARBHAJAN SINGH v. EMPEROR. I.L.R. (1942)
Nag. 494=43 Cr.L.J. 323=198 I.C. 228=14 R.
N. 215=1941 N.L.J. 573=A.I.R. 1942 Nag. 28. -Ss. 438 and 439—Enhancement of sentence-Charge and conviction under S. 193, I.P. Code, in the alternative for making contradictory statements under S. 164, Cr. P. Code, in the Sessions trial—Absence of proof as to which statement was false—Enhancement of sentence—Propriety. Emperor v. Sultansha. Smisha. [See Q.D. 1936-40, Vol. I, Col. 2810.], 13 R.B. 187=191 I.C. 336=42 Cr.L.J. 155.

-S. 438—Interference with acquittal on reference Competency-Grounds.

Where an order of acquittal is in clear defiance of the provisions of law and has resulted in manifest injustice to the complainant, it could be interfered with on a reference made upon the complainant's applicaon a reference hade upon the companant's application for revision. (Ghulam Hasan, J.) EMPEROR v. RAM CHARAN. 204 I.C. 262=15 R.O. 323=1942 O.W.N. 786=1942 O.A. 634=1942 A.W.R. (C.C.) 361=44 Cr.L.J. 174=A.I.R. 1943 Oudh 157

## CR. P. CODE (1898), S. 438

S. 438—Interlocutory order—Reference to High Court.

Where a District Magistrate in revision considers that an order passed by the trial Magistrate is improper and the case of the accused is prejudiced thereby an order by him refusing to refer the matter to the High Court on the ground that the order is interlocutory and the accused would have his remedy after the disposal of the case, is not justified. J.) ABDUL RAZAK v. HAJI HUSSAIN. 1945 N.L.J. 880=A.I.R. 1945 Nag. 286.

-S. 438—Reference for enhancement of sentence by District Magistrate—Competency.

The High Court can accept a refrerence from the District Magistrate direct, for the enhancement of sentence. It is clearly permissible under the Cr. P. Code. (Pollock, J.) EMPEROR v. Aziz. 1941 N.L.J.

S. 438—Reference pending appeal —If competent. The Deputy Commissioner cannot make a reference to the High Court while the appeal filed by the accused remains undisposed of before him. (Manohar Lall and Meredith, JJ.) EMPEROR v. KUMHRA MUNDA. 196 I.C. 402=14 R.P. 197=8 B.R. 23=42 Cr.L.J. 862=A.I.R. 1942 Pat. 64.

-Ss. 438 and 439 (2)—Reference to High Court -Notice to accused—Necessity.

There is no provision in law for the issue of a notice to the accused before a reference is made to the High Court by either District Magistrate or Sessions Judge. The accused cannot be prejudiced because before the final orders are passed on the reference the High Court is bound to give him notice under the provisions of RAM DEO. 201 I.C. 506=15 R.O. 109=1942 O. A. 309=1942 O.W.N. 432=1942 A.W.R. (C.C.) 285=1942 A.Cr.C. 14(=43 Cr.L.J. 763=A.I.R. 1942 Oudh 443.

———Ss. 438 and 439—Scope—Magistrate accepting final report of case that no case is made out—Subsequent receipt of report-Police and Government order from Court Inspector—Order calling for charge-sheet—If justified— Order transferring case for trial to subordinate Magistrate -Proceedings-If to be quashed-Judicial or administrative

A Magistrate is under the law competent to reconsider a matter, notwithstanding a previous order by him or his predecessor accepting a final report by the Police investigating officer that no case was made out. But he can only do so on proper grounds and proper materials which would justifify action to be taken. It is his duty as a judicial officer to form his own views on proper materials instead of merely carrying out the views of government or executive officers in his judicial work as a Magistrate. He must in other words, apply his judicial mind before putting a person on his trial. Where, after a magistrate has passed orders accepting the final report of the Police Officer, he receives a report from Inspector of Police through the the Court Sub-Inspector, and a government order, on which such report is made, to the effect that the case should be tried and decided by the Court, the Magistrate should not merely on the basis of the government order and the Inspector's Report call for charge-sheet in the case, without reference to any other matters. He must apply his mind not merely to carrying out the views of the government as he takes them to be, but must consider whether there are any proper materials for putting the accused on trial. If the order calling for a charge-sheet is dictated by nothing more or better than what has been taken

to be the government order, his order must be set aside in revision. Interference in revision cannot be refused on the ground that the government order on the subject is an executive and not a judicial order. It is the order of the Magistrate calling for a chargesheet tht has to be revised and not the government order. The Magistrate in calling for a charge-sheet takes judicial action. and if he, without proper materials, calls for a charge-sheet, and after receipt of the charge-sheet, transfers the case for trial to a subordinate Magistrate, he has undoubtedly taken judicial action, and the order being open to scrutiny by Courts of Revision under Ss. 435 and 439, Cr.P. Code, must be quashed.

Quaere: Whether the order of a Magistrate (empowered to take cognizance of police reports) calling for a charge-sheet is a judicial or an administrative order? (*Dhavle*, J.) N.L. Carrick v. Emperor. 194 I.C. 94=13 R.P. 662=42 Cr.L. J. 504=7 B R. 681=1941 P.W.N. 328=22 P.L.T. 348=

A.I R. 1941 Pat. 395.

- -S. 439—Revision.
- -Acquittal-Interference. -Alteration of Conviction.
- $-\mathbf{A}_{\mathsf{pplicability}}$
- -Competency of revision.
- -Confirmation of death sentence. —Delay in applying for revision.
- -Discretion
- -Duty of High Court.
- -Enhancement of sentence.
- Error if law—Interference.
- —Finding of fact—Interference.
- —Forum for revision.
- —Interference. -Irregularity.
- -Jurisdiction of High Court.
- -New plea.
- -Powers of High Court. -Quashing proceedings
- -Question of fact-See Finding of fact.
- -Scope
- Time limit.
- —S. 495 (5)—Bar under.

#### Acquittal.

-S. 439-Acquittal-Interference. CHANDRIKA Prasad v. Mahomed Jafar. [See Q.D., 1936-40, Vol. I, Col. 2812.]. A.I.R 1941 Oudh 7.

S. 439—Acquittal—Interference—All the accused

persons not parties to revision-Power to set aside acquittal

as against accused not parties.

Under S. 439 (2), Cr. P. Code, no order can be passed to the prejudice of an accused unless he has had an opportunity of being heard either personally or by a pleader in his own defence. In an application for revision against an order of acquittal, if the High Court decides to set aside the order of acquittal, it can so set aside the order only in respect of the accused persons who are actually parties to the revision application. So far as the accused persons who are not parties to the revision are concerned, the High Court cannot set aside the order of acquittal, and the acquittal of such persons cannot be touched. (Dhwhe, J.) RAMLAKHAN DHOBI v. RACHHEY KALWAR. 194 I.C. 660=14 R.P. 16=7 B R. 814=42 Cr.L.J. 622=22 Pat. L.T. 237=1941 P.W.N. 253=A.I.R. 1941 Pat. 287.

S. 439—Acquittal—Interference—Appreciation of evidence.

It is not the practice of the chief Court to interfere with acquittals in petty cases of ordinary marpit, in

#### CR. P. CODE (1898), S. 439.

which no difficult question of law is involved, on the mere ground that the appellate Court has taken a view of the evidence different from that taken by the trial Court. (*Thomas*, 7.) Manadeo v. Ram Kuber. 209 I.C. 114=16 R.O. 101=1943 O.W.N. 319=1943 A.W.R. (C C) 88=1943 O.A. (C C.) 196=1943 A.Cr.C. 126=45 Cr.L.J. 75=A.I.R. 1943 Oudh 451.

-S. 439—Acquittal—Interference—Grounds.

The High Court always acts with great reluctance in allowing a petition for revision against an order of acquittal, and only when it is shown that such interference is essential to avoid or remedy a clear failure of justice. (Rowland, J.) Bakhori Gope v. Abdul Halim. 195 I C. 107=7 B R. 875=14 R.P. 84= 1941 P W.N. 255=22 Pat.L.T. 327=A I.R. ABDUL 1941 Pat. 362.

S. 439—Acquittal—Interference—Grounds.

Where a Magistrate's judgment of acquittal is summary and shows that he has not examined the complainant's case with that care and thoroughness which the nature of the allegations and circumstances of the case demanded, it cannot be allowed to stand. Where there has been a failure of justice the complainant is entitled to have his complaint properly investi-gated. The Chief Court of Oudh will interfere in exceptional circumstances in revision against an order of acquittal where there has been a miscarriage of of acquittal where there has been a miscarriage of justice. (Ghulam Hasan, J.) RANSOM v. TRILOR NATH. 17 Luck. 663=199 I.C. 757=14 R.O. 530=1942 A.Cr.C. 82=43 Cr.L.J. 578=1942 A.W.R. (C.C.) 112=1942 O.W.N. 161=1942 O.A. 91=A I.R. 1942 Oudh 318.

S. 439—Acquittal—Interference—Grounds—Appellate order acquitting accurage without considering and are

late order acquitting accusea without considering evidence

on record-Sustainability.

The High Court will interfere in revision with an acquittal by an appellate Court where the appellate Court has not directed its mind to the evidence and the circumstances on the record in a manner consonant with the proper exercise of discretion and has rejected the oral evidence on the ground that the 

Discretion of Court.

Under S. 439 (4), Cr.P. Code, the High Court cannot convert a finding of acquittal into one of conviction but it can order the accused to be retried by a Court of competent jurisdiction subordinate to it. In considering the question whether such a retrial should or should not be ordered, the discretion of the Court is legally unlimited. In actual fact, however, the Court seldom exercises this discretion and an order of acquittal will not as a rule be interfered with merely because the High Court disagrees with the finding of the Magistrate. It is only when the record is incomplete or there is a flaw in jurisdiction or where the finding is manisfestly wrong or perverse that the High Court will interfere in such cases. Where the evidence has been mis-stated, it is much the same position as if the Judge, who combines the functions of a judge and jury, had misdirected himself as to what the evidence was in the particular case. It will be open for the High Court, however, to consider whether in spite of the misdirection, any finding other than one of acquittal would have been come to in the circumstances of the particular case and the High Court would not order a retrial unless it came clearly to the conclusion that but' or the misdirection the Court might have or should a ave come to a different

finding to what it actually did. (Dalip Singh, Ram Lall and Sale, 7.7.) PARTAP SINGH v. HARNAM SINGH. I.L.R. (1942) Lah. 125=199 I C. 49=14 R.L. 380=43 Cr.L.J. 453=44 P.L.R. 29=A.I.R. 1942 Lah. 70 (F.B.).

-S. 439—Acquittal—Interference—Powers of High Court.

The High Court does not readily entertain a revision application against an order of acquittal; under S. 439, Cr. P. Code, the Court cannot turn an order of acquittal into an order of conviction; secondly, if an order of acquittal seems open to criticism, it is for Government to appeal. (Beaumont, C.J., Lokur and Rajadhyaksha, JJ.) SHAMADASANI v. CENTRAL BANK OF INDIA, LTD. (No. 1) I.L.R. (1944) Bom. 302=212 I.C. 396=16 R B. 358=45 Cr.L.J. 612=46 Bom.L.R. 70=1944 Comp.C. 38=A.I.R. 1944 Bom. 107  $(\mathbf{F}.\mathbf{B}.)$ 

S. 439—Acquittal—Interference—Power of High Court.

It is not open to the High Court in revision to convert a finding of acquittal into one of conviction and in the event of a complete acquittal the only remedy is an appeal against the acquittal by the Crown. (Sale, J.) GHULAM JILANI v. EMPEROR. 197 I.C. 116=14 R L. 203=43 Cr. L. J. 113=43 P.L.R. 707= A I.R. 1941 Lah. 425.

S. 439—Acquittal—Interference—Principles.
RAM LAL v. RAM PIARE. [See Q. D. 1936-40, Vol. I, Col. 3338.]. 191 I.C. 538=12 R O. 285=1941
A.W.R. (C.C.) 9=42 Cr.L.J. 190=A.I.R. 1941 Oudh 182.

-S. 439—Acquittal—Interference—Principles.

The Court sitting in revision has merely to see whether the case as laid by the prosecution was properly tried or not. An order of acquittal has to be judged in the light of the case as presented by the complainant for trial in the original Court and not on the consideration of hypothetical case, that is a case which could have been but was not raised in that Court. (Niyogi, J.) Notified Area Committee, Kota v. Gokul Bhai. 1942 N.L.J. 329.

-S. 439—Acquittal—Interference—Principles.

It is well-settled that the High Court will not interfere with an acquittal in revision at the instance of a private prosecutor unless interference is urgently demanded in the interests of public justice. Even in such cases the High Court will be slow to interfere, because it is always open to an aggrieved complainant to move the authorities for an appeal against the acquittal by Government. The High Court will decline to consider whether the judgment sought to be revised is right or wrong on the merits. (Meredith 7.) BHAGIRATHI PANDA v. NIDHI PANDA. 10 Cut. L.T. 50.

-Ss. 439 and 417—Acquittal—No appeal by Government-Interference.

Per Iqual Ahmed, C.J.—It is well-settled that, even in the absence of an appeal by the Provincial Government it is open to the High Court under S. Abmed, C.J. and Irmail, Mulla, Hamilton, and Dar, JJ.)

ZAMIR QASIM v. EMPEROR. I.L R. (1944). A. 403

=17 R.A. 75=215 I.C. 213=1944 A.L.J. 203=
46 Cr L J. 38=1945 A.W.R. (H.C.) 101= A.I.R. 1944 All. 137 (F.B).

S. 439—Acquittal—No appeal by Government-

Interference.

Though there is no legal bar to the High Court interfering in revision in proper cases with an order of acquittal when there is no appeal by Government,

## CR. P. CODE (1898), S. 439.

it will not ordinarily do so. (Agarwal, J.) EMPEROR v. RAM DEO. 201 I.C. 546=15 R.O. 199=1942 O.A. 309=1942 O.W.N. 432=1942 A.W.R. (CC) 285=1942 A.Cr.C. 140=43 Cr.L.J. 763 =A.I.R. 1942 Oudh 443.

- S. 439—Acquittal—No appeal by Government—

Interference.

The High Court will not set aside an order of acquittal in revision unless there are exceptional circumstances that would justify a second trial. The provision in Cr.P. Code, giving the Provincial Government the right to appeal against an acquittal is deliberately confined to the Provincial Government in order to prevent personal vincictiveness from seeking to call in question a judgment of acquittal by way of appeal, and it is clearly the intention of the legislature that there should not ordinarily be interference, except in cases where there has been a miscarriage of justice so serious that Provincial Government considers that there ought to be an appeal. In an appeal by the Provincial Government it is open to the High Court to convert an order of acquittal into one of conviction, but the High Court will be very reluctant to interfere the ringin court will be very relation to microir in revision where that is not possible and the only course is to order a re-trial. (Pollock, J.) Ganpart SITARAM v. TANSINGH SITARAM. I.L.R. (1944) Nag. 176=215 I C. 507=17 R.N. 37=45 Cr.L.J. 766=1944 N.L.J. 93=A.I.R. 1944 Nag. 136.

-S. 439—Acquittal—No appeal by Government— Interference.

The fact that there is no Government appeal against an order of acquittal does not debar the High Court from using its revisional powers under S. 439, Cr.P. Code. As a Court of revision, the High Court has every power to set aside the order of acquittal and order a retrial. (Young, C.J. and Blacker, J.) WARYAMS SINGH v. CROWN. I.L R. (1941) Lah. 423=195 I.C. 58=14 R L. 28=42 Cr L. J. 560=43 P.L.R. 159=A.I.R. 1941 Lah. 214.

S. 439—Acquittal—Revision against by private party-Interference by High Court-Rule-Exception-

Defamation cases.

As a general rule it is not expedient for the High Court to interfere in revision at the instance of a private person with an order of acquittal and the High Court will decline to interfere unless interference is urgently demanded in the interest of public justice. Defamation cases perhaps form an exception to this general rule, but in such cases which from their very nature affect private parties and not the public Government would usually be unwilling to interfere. (Broomfeld and Divatia, 37.) VINAYAK ATMARAM v. SHANTARAM JANARDAN. 197 I.C. 502=14 R.B. 230=43 Cr. L.J. 174=43 Bom.L.R. 737=A.I.R. 1941 Bom.

S. 439—Acquittal—Revision against by private

prosecutor to vindicate position-Propriety.

The High Court as a rule is reluctant to interfere with an order of acquittal save in certain well-defined exceptions. The power of revision in the case of acquittals should be most sparingly exercised and only in cases where it is urgently demanded in the interest of public justice. The High Court will not interfere in a case where the revision application is made to vindicate the position of a private prosecutor, even though there may be an error of law, where there is at the highest only a mere technical offence committed. (Manohar Lall and Meredith, 77.) CANTONMENT BOARD OF DINAPUR v. DWARKA PROSAD. 21 Pat. 102=22 Pat.L.T. 803=1941 P.W.N. 596.

#### Alteration of Conviction.

S. 439—Alteration of conviction—Power of High Court. JOYRAM RAKSHIT V. ANNADA PROSAD KUNDU. [See Q.D., 1936-40, Vol. I, Col. 2816.] 193 I.C. 288=42 Cr.L.J. 383=13 R.C. 394=A.I.R. 1941 Cal. 90.

-S. 439—Alteration of finding and sentence—Powers

of High Court.

A Court of Revision has the power of the Court of appeal to "alter the finding maintaining the sentences, or with or without altering the finding, reduce the sentence," and therefore to pass sentences under Ss. 143 and 144, I.P. Code, while setting aside the convictions under Ss. 295 and 379, I.P.C., provided the sentences do not exceed those passed by the lower Appellate Court. (Dhavle, J.) BECHAN JHA v. EMPEROR. 7 B.R. 735=194 I.C. 476=14 R.P. 1 =1941 P.W.N. 462=42 Cr.L.J. 579=23 Pat. L.T. 81=A.I.R. 1941 Pat. 492.

### Applicability,

-S. 439—Applicability—Order under S. 476 by Civil Court-Revision-If governed by S. 115, C.P. Code-Nature of proceedings. See C.P, Code, S. 115. I.L.R. (1941) Kar. 422.

#### Competency of Revision.

-Ss. 439 and 514-Competencey of revision-Forfeiture of security bond after reference of case to council of elders-Frontier Crimes Regulation, Ss. 10 and 20.

Even if a security bond be taken by the Deputy Commissioner at the time he is sitting as a District Magistrate under the Cr.P. Code, once he has referred the case to a council of elders under S. 10 o the Frontier Crimes Regulation, that bond comes within the mischief of S. 20 and if it has to be forfeited it is that section which gierns the matter, and he can only act as a Deputy Commissioner under the Regulation. Any order of forfeiture made by him is, therefore, revisable only by the Commissioner, and a revision petition to the High Court is incompetent. The fact that he signed the order as District Magistrate Ine fact that he signed the order as District Magistrate is irrelevant. (Rlacker, J.) Nur Mohammad v. Emperor. 215 I.C. 160=17 R.L. 120=46 Cr.L. J. 16=46 P.L.R. 23=A.I.R. 1944 Lah. 396.

——Ss. 439 and 476-B—Competency of revision—Revenue Court's order under S. 476-B.

The proceedings before a Revenue Court on appeal under S. 476-B, Cr.P. Code, are not proceedings before an 'inferior Criminal Court' though the appeal itself is under the provisions of the Cr.P. Code. Hence an order of such a Court is not subject to revision by the High Court under Ss. 435 and 439, Cr.P. Code. (Agarwal and Maddley, JJ.) Jane Bahadur Singh v. Emperor. 19 Luck, 245=208 I.C. 247=16 R.O. 79=1943 A. Cr.C. 71=44 Cr.L. J. 757=1943 O. A. (C.C. 106=1943 A.W.R. (C.C.) 41=1943 O.W.N. 176=A.I.R. 1944 Oudh 23

## Confirmation of death sentence.

-S. 439—Confirmation of death sentence Power to call up case for confirmation. See CR.P. Code, S. 374. A.I.R. 1944 Sind 83 (F.B.).

#### Delay.

-S. 439—Delay in application for revision—If

ground for non-interference.

According to the rules of the Court, ordinarily, so far as the Government is concerned, the time limit

#### CR. P. CODE (1898), S. 439.

ground of delay. (Davis, C.7. and Tychji, J.) EM-PEROR v.SHEROO. 195 I.C. 14=14 R.S. 4=42 Cr.L.J. 645=A.I.R. 1941 Sind 97.

#### Discretion.

—S. 439—Discretion—Proceedings under S. 147 -Order dropping proceedings with taking evidence on untenable ground-Interference in revision. See CR.P. CODE, St. 144, 145 AND 147. 1941 P.W.N. 188.

#### Duty of High Court.

-S.439—Duty of High Court—Propriety of conviction and sentence-Accused not contesting.

It is the duty of the High Court to see, in any case which may be brought to its notice, that the conviction is in accordance with law, and the sentence not excessive, even though the accused does not contest its propriety. (Skemp, 7.) MIAN IFTIKAR-UD-DIN v. EMPEROR. 196 I.C. 485=14 R.L. 157=42 Cr.L. J. 890=43 P.L.R. 378=A.I.R. 1941 Lah. 324.

## Enhancement.

-S. 439-Enhancement of sentence-Accused showing cause against conviction—Duty of High Court to examine evidence. Joyram Rakshit v. Annada Prosad Kundu. [See Q.D., 1936-40, Vol. I, Col. 2820.] 193 I.C. 288=13 R.C. 394=42 Cr.L.J. 383=A.I.R. 1941 Cal. 90.

-S.439—Enhancement—Application by private complainant—Interference—Principles. Shankar v. Rama. [See Q.D., 1936-40, Vol. I, Col. 2820.]. I.L. R. (1942) Nag. 277.

-S. 439—Enhancement by High Court—Application by complainant—Principles. BHAGOLELAL v. EMPEROR. [See Q.D. 1936-40, Vol. I, Col. 2821.] I.L.R. (1942) Nag. 208.

-Ss. 439, 369 and 430—Enhancement—Competency of revision for-Jail appeal of accused already dismissed.

Though an appeal by the accused from Jail has been dismissed by a single Judge, nevertheless a revision for the enhancement of the sentence would lie. S. 369, Cr.P. Code, is no bar to the exercise of the power of enhancement by the High Court as that section must be read subject to the provisions of S. 430, Cr.P. Code, the exception to which covers the power of enhance. ment. (Ganga Nath and Yorke, JJ.) EMPEROR v. Debi Charan. I.L.R. (1942) All. 892=15 R.A. 187=202 I.C. 586=1942 A.W.R. (H.C.) 293=1942 A.L.W. 505=1942 A.Cr.C. 161=43 Cr.L. J. 867=1942 A.L.J. 376=A.I.R. 1942 Ali. 339.

-S. 439—Enhancement of sentence—Delay in filing application—Effect.

The fact that the application for enhancement of sentence was filed very late (e.g.) when the sentence of the accused was about to expire does not sentence of the accused was about to expire does not constitute an insuperable bar to the enhancement of the sentence. (Thomas, C.J. ama Ghulam Hasan, J.)

EMPEROR v. RACHUBAR SINGH. (1945) O.W. N. 55

=(1945) O.A. (C.C.) 40=1945 A.L.W. (C.C.)

55=1945 A.W.R. (C.C.) 40=221 I.C. 42=1946
Oudh (Rul.) 8=47 Cr.L.J. 2=A.I.R. 1945 Oudh 215.

S. 439—Enhancement of sentence—Jury trial— Cases where death sentence is and is not involved Powers of

High Court.
Per Lodge, Roxburgh and Akram, 77.—In cases where the death sentence is not involved, the Court of revision is not authorised to alter or reverse the for revision application is six months. But where an verdict of a jury unless it is of opinion that such improper order of a lower Court would allow an verdict is erroneous owing to a misdirection by Judge accused to escape trial, an application by Government or to a misunderstanding on the part of the jury of for revision of that order will not be rejected on the the law as laid down by him. But in cases where the:

death sentence is the proper sentence if the accused is guilty, the Court of revision, on a rule to enhance the sentence, has all the powers that it would have if the appropriate sentence had been passed by the Sessions Court and a reference made under S. 374, Cr.P. Code.

Per Rhundkar, J.—In a case in which an accused person has been called upon to show cause why his sentence should not be enhanced to a capital sentence in accordance with the procedure laid down in S. 439, Cr.P. Code, such person has not the right to contend that the verdict of the jury was based upon an erroneous view of the evidence and the facts of the case.

Per Sen, J.-When a peson convicted of murder and sentenced to transportation for life shows cause against his conviction by taking advantage of the provisions of S. 439 (6), Gr.P. Code, he may demand that the verdict of the jury be altered, reversed or set aside on the ground that it is wrong on facts even though there has been no misdirection by the Judge or misunderstanding by the jury of the law as laid down by the Judge or any other error of law. A convicted person would have this right not only in Cases of murder but in every case. (Rhundkar, Lodge, Sen, Roxburgh and Akram, 77.) MAHABIR SINGH v. EMPEROR. I.L.R. (1944) 2 Cal. 1=211 I.C. 177 = 16 R.C. 495=45 Cr.L.J. 309=48 C.W.N. 113 **A.I.R.** 1944 Cal. 17 (F.B.).

-S. 439—Enhancement of sentence—Practice. Mianji Khan v, Emperor. [See Q.D., 1936-40, Vol. I, Col. 3338.] 192 I.C. 179=13 R. Pesh. 35=42 Cr.L.J. 254.

S. 439—Enhancement of sentence—Principles.

The High Court does not interfere in revision unless the sentence is manifestly inadequate. It is also slow to interfere when the convict has already been discharged from jail—though this is not an insuperable obstacle. (Bhide, J.) EMPEROR v. KHURSHID AHMAD MINTO. 44 P.L.R. 167.

-S. 439—Enhancement—Propriety—Application by

private party.

The Court should generally be loath to enhance sentences on the application of a private complainant although there might be cases in which a complainant or some other person might bring some matter to the notice of the Court and the Court would come to the conclusion that the interests of justice generally would be served by an enhancement. (Allsop and Bripai, 33.) NASIR KHAN v. EMPEROR. I.L.R. (1941) A. 465=195 I.C. 720=14 R.A. 116=1941 A.Cr.C. 148=1941 O.W.N. 839=42 Cr.L.J. 779=1941 O.A. (Supp.) 510=1941 A.L.W. 683=1941 A. W.R. (H.C.) 215=1941 A.L.J. 342=A.I.R. 1941 All. 309.

-S. 439 (6)—Enhancement—Revision against order of conviction dismissed in limine—Notice to enhance sentence-Right of convicted person to show cause against conviction.

Where a convicted person is called upon to show cause why his sentence should not be enhanced he is entitled to show cause against his conviction, notwithstanding the fact that his petition for revision of the order by which he was convicted has already been dismissed in limine under S. 435. [10 Lah. 241, over-ruled.] (Blacker, Ram Lall and Mahajan, 37.) and Mahajan, 33.) 219 I.C. 294=18 R. EMPEROR v. ATTA MAHOMED. 219 I.C. 294=18 R. L. 52=46 Cr.L.J. 566=A.I.R. 1945 Lah. 130 (S.B.).

-S. 439—Enhancement—Sentence wholly served— Powers of High Court.

The High Court should always be reluctant to structure the sentences of persons who do not them-

## CR. P. CODE (1898), S. 439.

selves institute the proceedings which bring their cases to its notice and especially reluctant to enhance the sentences of such persons when they have almost completed the term for which they have been committed. (Sharpe and Blagden, 77.) MA TIN TIN v. MAUNG AYE. 1941 Rang.L.R. 65=195 I.C. 190=14 R.R. 24=42 Cr.L.J. 690=A.I.R. 1941 Rang. 135.

#### Error of Law.

-S. 439—Error of law—Interference. Where there has been a clear error in law resulting in a sentence of imprisonment, the High Court should

interfere in revision. (Davis, C.J. and Tyabji, J.)
BHAIRO MUZID v. EMPEROR. I.L.R. (1941) Kar. BHAIRO MUZID v. EMPEROR. I.L.R. (1941) Kar. 324=194 I.C. 759=14 R.S. 1=42 Cr.L.J. 623= A.I.R. 1941 Sind 82.

## Finding of fact.

-S. 439-Finding of fact-Interference.

According to its well-established practice, the High Court in the exercise of its revisional jurisdiction, usually accepts the findings on questions of fact recorded by a subordinate tribunal, unless the finding is manifestly perverse or patently erroneous. The revisional powers of the High Court are no doubt wide. but they are discretionary and must be exercised not as a matter of course but only where it is demanded as a finater of course but only where it is demanded in the interest of public justice. (Iqbal Ahmed, C.J., Allsop and Dar, JJ.) Shivkali Goswam v. Emperor. I.L.R. (1944) All. 758=216 I.C. 100=17 R.A. 109=46 Cr. L.J. 122=(1944) A.L.J. 19=1944 A.L.W. 514=1944 A.W.R. (H.C.) 273=1944 O.W.N. (H.C.) 271=1944 O.A. (H.C.) 273=A.I.R. 1944 All. 257 (F.B.).

-8. 439—Findings of fact—Interference—Powers of High Court.

The High Court in a revision application must take the facts as found by the lower Court. The High Court cannot, unless there is something very wrong indeed, interfere with findings of fact in revision. (Dxis, C.J. and O'Sullivan, J.) CHIMANDAS I. EMPEROR. I.L.R. (1944) K ir. 246=:118 I.C. 15=18 R.S. 1=46 Cr L.J. 369=A.I.R. 1944 Sind 222.

—S. 439—Findings of fact—Interference—When justified.

The Chief Court does not interfere in revision with findings of fact except in exceptional cases such as where the lower Courts have approached the case from a wrong point of view and the evidence produced has not received due consideration, where the findings of fact are not based on evidence on the record and is proved to be wrong from the record itself, where the judgment of the lower Court is palpably wrong, where there has been a miscarriage of justice or where the case appears to be doubtful against the accused and the benefit of doubt has not been given. (Agarwal, 7.) RAM NATH DAVE v. EMPEROR. 18 Luck 408= 202 I C 382=15 R O. 123= EMPEROR. 1942 O. W N. 485=1942 A.W.R. (C.C.) 295= 1942 A. Cr. C. 151=43 Cr. L. J. 830=1942 O. A.341=1943 Comp. C. 111=A.I.R. 1942 Oudh

-S. 439—Finding of fact—Whether evidence is to be believed or not-Interference in revision.

The question whether evidence is or is not worthy of credit is a question of fact and is not a ground of interference in revision. (Manohar I.all, and Meredith, JJ.) LAKHAN SINGH v. EMPEROR. 20 Pat. 898—199
1. 332—8 BR. 589—43 Cr. L. I. 570—A.I.R.

—942 Pat. 183.

#### Forum

S. 439 and High Court Rules, Ch. IV, R. 15 (CP)—Forum for revision—Revision of order of Criminal Court of appeal—High Court, if can be moved

According to R. 15 of Ch. IV of the High Court Rules an application for revision of an order passed by a Criminal Court of appeal may be made direct to the High Court and the applicant need not first apply to the Sessions Court. (Pollock and Gruer, J.7.)
NATHURAM GOTIRAM v. EMPEROR. I.L.R. (1941)
Nag. 606=196 I.C. 546=1941 N L J. 438=43
Cr. L.J. 24=14 R.N. 124=A.I.R. 1941 Nag.

-S 439—Forum for revision—Practice of Chief Court-Application to Sessions Juage prior to coming up

to the Chief Court-Necessity.

It is the uniform practice of the Chief Court of Oudh to refuse to entertain an application in revision against the appellate order of a District Magistrate, where the applicant has not gone in revision to the Court of Session in the first instance. (Thomas, C.J.)
DEBI SINGH v. EMPEROR. 193 I.C. 47=13 R.O.
438=1941 A.W.R. (C.C.) 78=1941 O.L.R. 250
=42 Cr.L.J. 349=1941 O.A. 150=1941 A. Cr.C.
81 (2)=1941 O.W.N. 193 (2)=A.I.R. 1941 Oudh 268.

#### Interference.

-S. 439 -Interference-Discretionary order-Order refusing bail-Practice.

According to the usual practice the High Court will not interfere with the discretion of the lower Courts in matters of bail when such discretion has been judicially exercised. (Broomfield and Wassoodew, JJ.) Suraj-LAL HARILAL MAJUMDAR, In re. I.L.R. (1943) Bom 167=205 I.C. 602=15 R.B. 382=44 Cr.L. J. 399=45 Bom. L.R. 72=A.I.R. 1943 Bom. 82. CR. P. Code, Ss. 202 AND 203. 7 B.R. 420.
——S. 439—Interference—Order of—Commitment by

Sessions Judge-Revision-Interference by High Court.

Where a Court of Session considers that an accused person has been improperly discharged and orders a commitment, the High Court will be most unwilling to interfere in revision and will require strong grounds before setting aside such an order. (Bennett, 7.) MAHOMED ALI v. EMPEROR. 204 I.C. 594=15 R.O. 390=1943 O.W.N. 33=1943 O.A. (C.C.) 9= 1943 A.Cr. C. 24=44 Cr. L.J. 309=A.I.R. 1943 Oudh 233.

Ss. 439 and 528 (2)—Interference—Order of transfer-Interference-Order passed by District Magistrate

suo motu-Accused's counsel not heara.

The High Court will not interfere in revision with an order of transfer passed by a District Magistrate suo motu under S. 528 (2), Cr.P. Code, giving good reasons, although such an order was passed without Solis, authough such an order was passed without hearing the accused's counsel. (Digby, J.) Abdus Subhan v. Gajanan. I.L.R. (1943) Nag. 637=207 I. C. 431=16 R.N. 46=44 Cr.L. J. 645=1943 N.L.J. 269=A.I.R. 1943 Nag. 236.

——Ss. 439 and 528 (2)—Interference—Order of transfer made by District Magistrate—Interference—Power of High Court

of High Court.

The High Court has power to interfere in revision with an order of transfer passed by a District Magistrate under S. 528 (2), Cr.P. Code. But under the rules of the High Court, it will not entertain an application for revision of an original order by a Magistrate unless it was made first to the Sessions Judge. (Digby, J.)

CR. P. CODE (1898), S. 439.

ABDUS SUBHAN v. GAJANAN. I.L R. (1943) Nag, 637=207 I.C. 431=16 R.N. 46=44 Cr. L.J. 643=1943 N.L.J., 269=A.I.R. 1943 Nag, 236.

-Ss. 439 and 476—Interference—Order of Revenue

Court under S. 476—If revisable under S. 439. S. 439, Cr.P. Code, cannot be divorced from the preceding sections particularly S. 435. This group of sections authorises the specified superior Court to send for the records of the Criminal Court only and consequently the words 'any proceeding' occurring in S. 439 must be confined to proceedings before any inferior Criminal Court. Hence an order passed by a Revenue Court under S. 476, Cr.P. Code, directing the trial of a person for an offence committed in the course of proceedings before it cannot be revised under S. 439. Cr.P. Code, by the High Court. (Ni) ogi, GANPATAPPA v. SHANKARAYA. 1942 N.L.J. 242.

——S. 439—Interference—Order under S. 476—Powers of High Court to interfere—If limited by S. 476-B—Order

for proper inquiry—If can be made.
S. 476-B, Cr.P. Code, is not exhaustive and the High Court's powers in revision are not limited by the powers cf appeal conferred by S. 476-B. Under S. 439, Cr. P. Code, read with S. 423 (1) (c) and (d), the High Court has power to set aside the order of the lower Court has power to set as the order of the order order, direct proper inquiry to be made. (Davis, C.J. and Weston, J.) Valiram Lilaram v. Gobindram. I L.R. (1941) Kar. 422=197 I.C. 774=14 R.S. 120=43 Cr.L. J. 259=A.I.R. 1941 Sind 217.

-S. 439-Interference-Order under S. 494-Revision application by witness-Maintainability. FAKIR CHAND RAM KRISHIN v. MURAD UMAR. [See Q.D., 1936-40, Vol. I, Col. 3338]. I.L.R. (1941) Kar. 32=13 R.S. 163=191 I.C.440=42 Cr. L.J.

S. 439—Interference—Oraer under Sind Frontier Regulation-Power to set aisde.

The chief Court of Sind has jurisdiction in revision to set aside an order of the Sessions Judge purporting to be passed under S. 13 (2) of the Sind Frontier Regulation, but which was in law not passed under that section at all. (Davis, C.J. and Tyabii, J.) EMPEROR v. SHERO. I.L.R. (1942) Kar. 246—195 I.C. 14=14 R.S. 4=42 Cr.L.J. 645=A.I.R. 1941

-Ss. 439 and 435—Interference—Pending case.

Sind 97.

There is no doubt that the High Court has power to interfere in revision with a pending case. S. 439, Cr.P. Code, gives wide powers of control over the proceedings of the inferior Courts, but that is an extraordinary power, which by its very nature, imposes grave responsibility on the High Court of exercising it with due circumspection, to avert miscarriage or promote the ends of justice. That is a residuary power which being of a discretionary character is incapable of precise and rigid definition. But the revisional authority extensive as it is, rarely travels beyond the region of law or procedure to correct errors in decision on the facts. When its exercise is called for in a pending case, S. 439, Cr.P. Code, must be read in conjunction with S. 435, Cr.P. Code. In a pending case no question as to the correctness or propriety of a finding can arise; consequently the superior Court can examine the proceedings of the inferior Court only to satisfy itself as to their regularity. They would not be regular if the facts sought to be proved do not constitute an offence. Continuation of such proceedings would therefore manifestly be but an abuse of the process of Court and harassment of the accused on trial. In such circumstances considerations of justice themselvis dictate the termination of proceedings. When

however the facts alleged and sought to be proved do constitute an offence and the decision turns on the credibility of witnesses and inferences to be drawn after a close and critical examination of documentary evidence, interference by the High Court would amount to an improper and illegitimate use of its revisional authority. (Niyogi, J.) HARBHAJAN SINGH v. EMPEROR. I.L.R. (1942) Nag 494 = 43 Cr.L. J. 323=198 I.C. 228=1941 N.L.J. 573 = 14 R.N. 215=A.I.R. 1942 Nag. 38.

\_\_\_\_\_S. 439—Interference—Proceedings under S. 144-Revision.

The opinion of a District Magistrate, expressed in an order under S. 144, Cr.P. Code, although entitled to great weight, is not absolute and cannot interfere with the right of the High Court under the revisional sections of the Code to interfere with such orders or set them aside. (Young, C.J., Bhide and Munir, JJ.) P.T. CHANDRA, EDITOR, 'TTIBUNE' v. EMPEROR. L.L.R. (1942) Lah. 510=201 I.C. 572=15 R.L. 65=43 Cr. L.J. 747=44 P.L.R. 297=A.I.R. 1942 Lah. 171 (F.B.).

S. 439—Interference—Proceedings under S. 144—Revision.

It cannot be doubted at least after the amendment in 1923 of S. 435, Cr. P. Code, by which sub-S. (3) of that section has been omitted, that the High Court has revisional juris liction also in cases disposed of under S. 144, Cr. P. Code, Although the Magistrate is responsible for the peace of his district, the High Court has a duty to see whether this responsibility has been properly discharged in any particular instance. (Akram and Pal, JJ.) RASHID ALLIDINA v. JIWANDAS KHEMII. I.L.R. (1942 1 Cal. 488=204 I.C. 370=15 R.C. 539=44 Cr. L. J. 288=46 C.W.N. 136=A.I.R. 1943 Cal. 35.

#### Irregularity.

———S. 439—Irregularity—Manner of constituting jury —Irregularity in—If ground for interference—Jury summoned and empandled according to law—Effect.

Where the procedure in summoning and empanelling a jury has been in accordance with the statute, the manner in which the jury are constituted will not obviously be a ground for interference in revision on the ground of any irregularity. (Rowland, J.) BAKHORI GOPE v. ABDUL HALIM. 195 I.C. 107=14 R.P. 84=7 B.R. 875=1941 P.W.N. 255=22 P. L.T. 327=A.I.R. 1941 Pat. 362.

## Jurisd ction.

———S. 439—Jurisdiction of High Court—Acquittal
—No appeal or revision—Application by witness to
expunge remarks against him from judgment of trial
Court—Jurisdiction of High Court. See Government
OF INDIA ACT, S. 224. 194 I.C. 248.

OF INDIA ACT, S. 224. 194 I.C. 248.

——S. 439—Juris liction of High Court—"Court Subordinate to High Court"—Commissioner of Police—Order of externment under S. 27, City of Bombay Police Act—Revision. See BOMBAY CITY POLICE ACT (1902 AS AMENDED IN 1938), S. 27. 43 Bom. L.R. 702.

— S. 439—Jurisdiction of High Court — Sessions trial for off mce under S. 366, I. P. Code—Order for stay by Sessions Judge under S. 13 (2) of Sind Frontier Regulations—Legality and propriety—If falls under S. 17 of the Regulations—Revision by High Court—Jurisdiction—Sind Frontier Regulations, Ss. 8 and 13.

It cannot be said that an order staying proceedings under S. 13 of the Sind Frontier Regulations is an order which by necessary implication falls within the provitions of S. 17 of the Regulation, and that therefore it

## CR. P. CODE (1898), S. 439.

cannot be revised by the High Court under S. 439, Cr. P. Code. S. 13 of the Regulations must be read with and in the light of S. 8. S. 8 is a governing section so far as Ss. 12 and 13 are concerned. An offence under S. 366, I.P. Code, does not fall under S. 8 of the Regulations and is not an offence which can be tried by a Council of. Elders, and a Sessions Judge has therefore no jurisdiction to pass an order of stay under S. 13 (2) in respect of such an offence. If he passes such an order, it is an unlawful and improper order, but it is still an order passed by him in a trial held under the Cr.P. Code and his order therefore falls within the scope of the revisional powers of the High Court under S. 439, read with S. 423 (1) (c), Cr.P. Code. The High Court has therefore jurisdiction to set aside in revision the order of the Sessions Judge purporting to be passed under S. 13 (2) of the Regulations, but which in law is not passed under that section at all. (Davis, C. J. and Tyabji, J.) EMPEROR v. SHER MAHOMED ALI. I.L R. (1942) Kar. 246= 195 I.C. 14=14 R.S. 4=42 Cr. L.J. 645=A.I.R. 1941 Sind 97.

S. 439—Jurisdiction—Revision preferred direct to High Court and not through lower Court—If incompetent—Objection as to departure from practice after admission of

application—Sustainability.

The High Court has jurisdiction to deal with a revision application presented to it and admitted by it, notwithstanding that it was presented directly to the High Court instead of through the lower Courts in the form of a reference by the lower Courts, contrary to rules of procedure. That is not a fatal objection. Once the application has been admitted and the records called for the objection on that score should not be entertained. (Dhawle, 7.) Prasad Gareer v. Msr. Kesarr. 192 I.C. 893=13 R.P. 567=7 B. R. 501=22 Pat. L. T. 273=42Cr. L. J. 347=1941 P.W.N. 94=A.I.R. 1941 Pat 444.

------S. 439—Jurisdiction to interfere—Grounds for exercise of discretion.

The revisional jurisdiction of the High Court is exercised at its discretion, and only for the purpose of relieving persons who have not had a fair trial, or whose convictions have been arrived at by non-observance of material provisions of the law, or by such misdirection as must have ocasioned a failure of justice. (Agarwala and Meredith, 37.) PRAHLAD RAI v. EMPEROR. 1945 P.W.N. 121.

## New plea.

S. 439—New plea—Point of law—Legality of order under S. 145 (1)—If can be raised for the first time in High Court in revision from order declaring party to be entitled to possession. See Cr.P. Code, S. 145 (1). 24 P.L.T. 326.

#### Powers of High Court.

S. 439—Powers of High Court—If restricted by S. 412.

The powers of the High Court in dealing with a revision application are as ample as if an appeal on the merits had been entertainable by the Sessions Judge and had been dismissed. Although in a case of conviction based on a plea of guilty the powers of an appellate Court are restricted by S. 412, Cr.P. Code, the powers of the High Court in revision are not similarly restricted. (Rowland, J.) Krishna Chandra Sinha v. Emperor. 208 I.C. 632=16 R. P.87=10 P.R. 60=44 Cr.L.J. 801=A.I.R. 1943 Pat. 313.

S. 439—Powers of High Court—Sessions Judge wrongly dismissing appeal on ground of limitation—High Court, if can consider appeal on merits.

Where the Sessions Judge was wrong in dismissing the appeal on the ground of limitation, the High Court should not in revision consider the appeal on its merits, but should send the case back to the Sessions Judge to hear and decide the appeal on its merits. (Davis, C.J., Lobo and Weston, JJ.) NAWAB JAM KHAMBHUKHAN v. EMPEROR. 204 I.C. 415=19 R. S. 107=44 Cr.L.J. 293=A.I.R. 1943 Sind 39 (F.B.)

-S. 439—Powers of High Court—Setting aside

conviction and sentence-Grounds for.

Although the High Court in the exercise of its revisional powers can set aside a conviction and sentence, it will not do so unless the record shows that the evidence is not capable of sustaining the conviction and sentence. (Leach, C. J. and Krishnaswami Ayyangar, J.) RAJA RAO, In re. 57 L.W. 509=1944 M.W.N. 555=A.I.R. 1945 Mad. 111=(1944) 2 M.L.J. 183.

-S. 439—Powers of High Court—Setting aside conviction of non-appealing accused—Order for his re-trial—

ocedure. 
Where one of several accused persons was convicted of the offence of conspiracy to murder while the others were convicted of murder, as well as of comspiracy to murder and the latter alone preferred appeals to the High Court which set aside their convictions on all the charges and ordered their re-trial.

Heid, that the High Court should also set aside the conviction of the non-appealing accused in exercise of its revisional powers and that if it was of opinion that he should be retried along with the other appellants it should, having regard to S. 439 (5), Cr.P. Gode, direct that a rule should be issued upon him and upon the Crown to show cause why his conviction and sentence should not be set aside and why he should not be retried. (Sharpe and Chakravarthi, JJ.) ABDUL KADAR v. EMPEROR. 50 C.W.N. 88. -Ss. 439 and 522—Power of High Court to reverse

order under S. 522.

The High Court has power as a Court of revision under S. 439, read with S. 423 (1) (d), Cr.P. Code, to reverse an order passed under S. 522 by a magistrate. (Waliullah, J.) MALKHAN SINGH v. EMPEROR. I.L. R. (1945) All. 282=221 I.C. 141=1945 A.L.W. 116=1945 O.W.N. (H.C.) 109=1945 A.L. J. 233 = 1945 A.C. C. 69=1945 A.W.R. (H.C.) 68 (1) =A.I.R. 1945 A11, 226.

-S. 439—Power to stay proceedings in subordinate Criminal Courts-Who can exercise.

There is no provision of the Cr.P. Code authorising the District Magistrate to stay proceedings in a criminal Court subordinate to him, and it is only the High Court which has power to do so, that power being conferred by S. 439 of the Code and S. 85 (1), Government of Burma Act. When a case is once made over for disposal to a subordinate Magistrate, the District Magistrate is not competent to pass any order relating to it other than an order such as might be made by him under Chap. 32, Cr.P. Code, i.e. Ss. 435, 436 and 437. (Dunkley, 7.) King v. Maung Po Thaing. 1941 Rang. L.R. 82=194 I.C. 370=13 R.R. 306=42 Cr.L.J. 573=A.I.R. 1941 Rang. 114.

## Quashing Proceedings.

-S. 439—Quashing proceedings.

Proceedings are only quashed when no offence whatever is disclosed or when the prosecution is bound, on the face of it, to fail, or for some other cause equally powerful. They cannot be quashed before a complainant who has disclosed a prima facie case in

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his complaint has had an opportunity of placing the material on which he bases his complaint before the Court. (Bose, J.) Hariram Onkar v. Radha. I.L. R. (1944) Nag. 238=16 R.N. 163=45 Cr.L.J. 175=210 I.C. 136=1943 N.L.J. 456=A.I.R. 1943 Nag. 327.

-S. 439—Quashing proceedings—Principles govern:

The High Court will interfere to quash proceedings only in exceptional cases such as where a person is being harassed by an illegal prosecution; where there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress where the evidence on record for the prosecution clearly does not justify a charge of any offence, or where the trial is on the face of it an abuse of the process of Court. Where a question of territorial jurisdiction arises during the pendency of a case it must be decided by the High Court. (Mosely, J.) H.G. SHERAZEE v. THE KING. 1941 Rang.L.R. 599=199 I.C. 473=14 R.R. 273=43 Cr.L.J. 492=A.I.R. 1942 Rang. 48.

-S. 439—Quashing proceedings—Revision—Practice. There is, in the anxiety shown to quash proceedings at the earliest possible stage, a tendency to bring revision applications for that purpose before the High Court before the facts have been fully ascertained. It is not the practice of the Allahabad High Court to

take evidence in revision applications and in many cases it is desirable that the trial should proceed and the question of law involved be dealt with in the regular way in the first instance as part of the trial.

Lat v. EMPEROR. I.L.R. (1942) All. 344=199
I.C. 507=14 R.A. 389=43 Cr.L.J. 490=1942
O.A. (Supp.) 92=1942 A.Cr.C. 60=1942 A.L.

J 85=1942 A.L.W. 79=1942 A.W.R. (H.C.) 42=A.I.R. 1942 All, 148 (F.B.).

-S. 439—Quashing proceedings—Summons case wrongly tried as warrant case-Dilatory trial-No suitable evidence by prosecution-Error discovered towards end of trial—Retrial ordered—Quashing. D. Mody v. Emperor. [St. Q.D., 1936-40, Vol. I, Col. 3339.] 192 I.C. 268=13 R.C. 311=42 Cr. Col. 3339.] L.J. 264.

-S. 439—Quashing proceedings—Third complaint

after dismissul of two similar complrints.

The fact that a person has been harassed already by two similar complaints, both of which have been dismissed or himself discharged, is ample ground for quashing a third complaint made on the same facts. (Young, C.7.) FAOIR CHAND v. KARAM CHAND. 200 I.C. 446=15 R.L. 1=43 Cr.L. J. 632=44 P.L. R. 104=A.I.R. 1942 Lah. 122.

#### Scope.

-S. 439-Scope-Duty of Court to give reasons for order.

Ch. XXXII of the Cr.P. Code governing references and revisions says nothing about the giving of reasons for any order passed, and it must be taken that the Legislature did not intend to make it obligatory on Courts of revision and reference to give reasons for their orders. Nevertheless it is, as a rule, desirable that reasons should be given so that in exercising its revisional jurisdiction the High Court might know what was in the mind of the lower revisional Court when that Court passed its order. (Hornill, J.) Venka-TAPPA J. LATCHANNA. 203 I.C. 205=15 R.M. 664 =55 L.W. 424=1942 M.W.N. 438=44 Cr.L.J. 70=A.I.R. 1942 Mad. 653=(1942) 2 M.L.J.

-S. 439—Scope—Revision against framing of charge

Sufficiency of evidence, if can be gone into.

Where a revision is preferred against the framing of a charge after the examination of some only of the P. Ws., the High Court would be extremely reluctant at that stage to enter into the merits of the evidence produced in the case to find out whether it is sufficient and reliable to support the charge. It is an undesirable procedure. (Mulla, J.) Emperor v. Daulat Ram Asthana. 1942 A.L.W. 627=1942 A.Cr.C. 208. -Ss. 439 and 145—Scope—Revision against order under S. 145—Evidence if can by gone into. See Ci. P. Code, Ss. 145 and 439. A.I.R. 1942 Pat. 489.

### Time Limit.

-S. 439-Time limit fixed by the Nagpur High Court—If inflexible—Time spent in moving District Magistrate to prefer appeal—If can be deducted— Proper procedure to be followed. NATHU KAMJI v. JAGANNATH. [See Q.D., 1936-40, Vol. I, Col. 2834.]. I.L.R. (1942) Nag. 255.

#### Bar under S. 439 (5)

-S. 439 (5)—Bar under—Exercise of power by

Sessions Judge.

Though sub-S. (5) of S. 439, Cr.P. Code, refers only to the High Court's power of revision it does not mean that a Sessions Judge has no discretion to reject a revision application where an appeal lies and no appeal is brought. He has a discretion to treat is as an appeal and if he refuses to treat it as such and dismisses it as barred by sub-sec. (5) of S. 439, he cannot be said to be acting wrongly. (Bennett, 7.) Goggy v. EMPEROR, 220 I.C. 490=1944 O.W.N. 299=1944 A. Cr.C. 58=1944 A.W.R. (C.C.) 207=1944 O.A. (C.C.) 207=A.I.R. 1945 Oudh 20. -S. 439 (5)—Bar under—Failure to appeal under

S. 476 B—Objection as to jurisdiction to entertain complaint

if can be raised in revision after conviction.

According to S. 439 (5) Cr.P. Code, where an appeal lies and no appeal is brought, no proceedings by way of revision could be entertained at the instance of the party who could have appealed. Hence where there has been no appeal under S. 476-B, objection that the Court had no jurisdiction to entertain the complaint could not be raised in revision against the Conviction. (Bennett, J.) Sheo Narain v. Emperor. 201 I.C. 389=15 R.O. 90=1942 O.W.N. 392=1942 A.W.R. (C.C.) 252=1942 A.Cr.C. 116=43 Cr.L.J. 668=1942 O.A. 273=A.I.R. 1942 Oudh 439.

———S.439 (5)—Bar under—Revision petition by accused who has not appealed—If barred.

Under S. 439 (5), Cr.P. Code, no proceedings by way of revision can be entertained at the instance of an accused who had a right of appeal but has not appealed. (Bartley and Lodge, JJ.) All Hossain v. Emperor. I.L.R. (1941) 1 Cal. 417.

S. 443—Order accepting claim of accused—Revision.

Although an order of a trial Magistrate accepting the claim made by an accused person under S. 443, Cr. P. Code, and committing the accused for trial by the Sessions Court is not appealable and cannot be set aside by the Sessions Judge himself, there is nothing to prevent him from reporting the case for revision to the High Court for the commitment being quashed, if he considers it to be illegal. (Bhide, 7.) EMPEROR v. L. Gulati. 202 I.C. 759=46 P.L.R. 127=15 R.L. 168=43 Cr.L.J. 901=A.I.R. 1943 Lah. 8. S. 443 (1) (a) and (b)—Applicability—Complaint equinst Indian British subject under order of Court on application made by European British subject.

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A complaint under Ss. 193 and 406, I.P. Code, against an Indian British subject made under an order of Court as a result of an application filed by an European British subject does not come within the purview of cl. (a) of S. 443 (1) Cr.P. Code, but falls within cl. (b) of that sub-section. (Bhide, 7) EMPEROR v. C.L. GULATI. 202 I.C. 759=46 P.L. R. 127=15 R.L. 168=43 Cr.L.J. 901=A.I.R. 1943 Lah. 8.

\_S.446\_Commitment under—Revision—Interference in. See Cr.P. Code, S. 215. A.I.R. 1945 Lah. 1

Ss. 449 and 376—Power of High Court—Inadmissible evidence admitted in jury trial-High Court, if bound to order retrial-Evidence Act, S. 167.

Where inadmissible evidence has been admitted in a jury trial, in a murder reference and appeal under S. 449, Cr.P. Code, the High Court may, after excluding such evidence, maintain a conviction, provided the admissible evidence remaining clearly establishes the guilt of the accused. (Harries, C.J., Becket, Abdur Rahman, Mahajan and Teja Singh, JJ.) Abdur Rahman, Emperor. I.L.R. (1945) Lah. 290=220 I.C. 467=A.I.R. 1945 Lah. 105 (F.B.)

Ss. 449 and 537—Appeal by accused—Power of High Court—Misairection and non-direction of jury—High Court, if bound to order retrial.

The High Court, in an appeal by an accused person under S. 449, Cr.P. Code, can, where there has been a serious misdirection or non-direction of a jury, consider the evidence and maintain the conviction if the evidence clearly establishes the guilt of the accused. It is not bound to order a retrial. (Harries, C.J.. Beckett, Abdur Rahman, Mahajan and Teja Singh, JJ.) ABDUL RAHIM v. EMPEOR. I.L.R. (1945) Lah. 290=220 I.C. 467=A.I.R. 1945 Lah. 105 (F.B.)

Ss. 469 and 470—Lunatic accused—Procedure

-Examination by medical officer—When required. S. 469, Cr.P. Code, read with S. 470, provides that the Magistrate shall acquit the accused where he is satisfied from the evidence given before him that the accused was at the time of the commission of the crime, by reason of unsoundness of mind, incapable of knowing the nature of the Act, or that it was wrong or contrary to law. It is only in proceedings where an enquiry is made as to whether the accused is of unsound mind at the time of the trial, and therefore, incapable of making his defence, that the law makes it requisite for the accused to be examined by a medical officer. (Mosely, J.) King v. Kala Nyo. 1941 Rang.L.R. 544=197 I.C. 654=14 R.R. 151=43 Cr.L.J. 228=A.I.R. 1941 Rang. 352.

-Ss. 471 and 423-Order of detention after acquit-

tal by appellate Court—Nature of.

S. 471, Cr. P. Code, in terms gives power to the Court trying the accused to pass an order of detention of a lunatic after his acquittal. But such orders by an appellate Court are consequential orders within the meaning of S. 423 (b). (Mosely, J.) KING J. KALA NYO. 1941 Rang L.R 544=197 I.C. 654 KING D. =14 R R. 151=43 Cr.L.J. 228=A.I.R. 1941 Rang. 352
S. 471 (1)—Acquittal of accused based on insants

Power of Court to release him.

When an accused person is acquitted on the ground of insanity, the Court is bound under S. 471 (1), Cr.P. Code, to order him to be detained in safe custody and report the matter to the Provincial Government, It has no power to release him on the ground that he appeared to be safe at the time of his trial or leave him in the custody of his relations. The privilege

of deciding whether the accused shall be released or nor lies with the Provincial Government and not with the Court. There is, however, nothing to prevent the Court from stating in its report that it will be safe to release him subject to certain safeguards. (Bose, J.) Provincial Government, C. P. and Berar v. Krishna Gopaia Marathi, I.L.R. (1945) Nag. 551=220 I.C. 372=1944 N.L.J. 527=A.I.R. 1945 Nag. 77.

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—Applicability.
—Application dismissed for default.

Application not made immediately.

Application under.

Contempt of Court.
Costs of proceedings for sanction.
Court"

-Duty of Court.
-Expediency of prosecution.
-"In relation to"

-Jurisdiction.

—Nature of application.

Notice to party.

Order based on opinion of appellate Court.

Powers of Civil Court.

—Power to detain person in custody or grant bail.

-Preliminary enquiry—Absence of.

Refusal to posecute.

-Scope.

S. 476—Applicability—Departmental inquiry by Judge of Court—Order for complaint against witnesses for giving false evidence—Legality. Anyla-NAPPA v. EMPEROR. [See Q.D., 1936-40, Vol. I, Col. 2840.] 191 I.C. 761=13 R.M. 520=42 Cr.L.J. 224 224.

S. 476—Applicability—Person not party to proceedings—Proceedings against—Legality—Crown not party to proceedings—Application by Public Prosecutor to proceed against strangers involved in offence—Competency—Locus Standi—Procedure.

Courts, whether trial Courts or superior Courts, exercising the powers conferred by S. 476, Cr. P. Code, can only take action against persons who are parties to the proceedings before them. They have no jurisdiction to make complaints against persons who are not parties to the suit or proceedings before them though such persons may happen to be concerned in the offence. Nor has the Public Prosecutor any locus standi to apply to the Court to proceed against other persons concerned when the crown is not a party to the proceedings. If, after the complaint is made under S. 476, the magistrate taking cognizance of the offence, finds that other persons than those complained against are involved in the offence, he is entitled to proceed against such other persons under the power conferred upon him by the Code. (Lobo, C.J. and Tyabji, J.) MAHOMED DAUD SULLEMAN v. EMPEROR. I.L.R. (1944) Kar. 300—217 I.C. 139—17 R.S. 81—46 Cr.L.J. 192—A.I.R. 1945 Sind I.

81=46 Cr.L.J. 192=A.I.R. 1945 Sind 1.
——(as amended in 1923), S. 476—Applicability—Person not party to proceeding in Court—Proceedings against—Powers of court to start.

S. 195 and S. 476, Cr.P. Code, as amended in 1923, must be read together. S. 476 only operates to remove the bar created by S. 195 (1) (b) and (c). S. 476 has no application when there is no bar created by S. 105 (1) (b) and (c). Nordoes S. 476 apply to effecte of the control of the co S. 195 (1) (b) and (c). Nor does S. 476 apply to offences referred to in S. 195 (1) (a). S. 195 creates no bar in respect of offences committed by a person not a party to any proceeding in Court. In such a case S. 476 | 395.

#### CR. P. CODE (1898), S. 476.

has no application. The Court is not therefore competent to start a proceeding under S. 476, against a person not a party to the proceedings. (Chatter);, and Das, 7;.) Матник v. Prтамвак. 24 Pat. 174 = 221 I.C. 471=12 В.R. 136=1945 P.W.N. 254 = A.I.R. 1945 P.et. 362.

S. 476-Applicability — Summons S. 476—Applicability—Summons case.

EMPEROR v. RAM LAL ANAND. [See Q. D., 1936-40,
Vol. I, Col. 2840.] I.L.R. (1941) Lah. 145.

Ss. 476, 476-A and 476-B—Application dismissed for default—Remedy—Proper Procedure—When appeal under S. 476-B can be filed.

If the original Court records a finding and makes a

complaint or refuses to make a complaint under S. 476, Cr.P. Code, an appeal lies under S. 476-B; a dismissal in default does not amount to a refusal to make a complaint. If there is such a dismissal, the Court concerned under S. 476-A on application or on its own motion may make a complaint or refuse to make it, in which case an appeal lies to the High Court if the order is made by a Sessions Court. A dismissal in default under S. 476-A does not amount to a refusal and in the event of such dismissal by a Sessions Court, an application in revision lies to the High Court. An appeal under S. 476-B can only be filed, therefore, from an order containing a complaint or from an order refusing to make a complaint giving reasons (i.e.) Figure 19 Hard 19 Figure 1

-S. 476—Application dismissed for default Second application—If can be made. Jawala Parshad v. Ram Parshad. [See Q. D., 1936-40, Vol. I, Col. 3340.] 192 I.C. 863=13 R.L. 423=42 Cr. L.J. 324.

S. 476—Application not made immediately—If

may be entertained. Jawala Parshad v. Ram Parshad. [See Q.D. 1936-40, Vol. I, Col. 3339.] 192 I.C. 863=13 R.L. 423=42 Cr.L J. 324.

-S. 476—Application under—Procedure to be followed

The first thing to consider when an application is made under S. 476, Cr. P. Code, is whether the circumstances are such as to warrant a finding that it is expedient in the interests of justice that the matter should be enquired into by a Magistrate. If so, a finding is recorded and a complaint made. If, before recording the finding it is desired to make a prelimirecording the finding, it is desired to make a prelimimary enquiry, then a preliminary enquiry is first made and the form which that enquiry should take is a matter for the Judge to decide. But the procedure of mechanically "issuing notice to show cause" is quite unwarranted. (Digby, J.) THUNNUDEO RACHUDEO. I.L.R. (1945) Rachyl v. Baladeo Rachudeo. I.L.R. (1945) Nag. 438=220 I.C. 446=46 Cr.L.J. 766=1944 N.L.J. 421=A.I.R. 1944 Nag. 359.

-Ss. 476 and 482—Contempt of Court—Power at to proceed under S. 476. EMPEROR v. RAM of Court to proceed under S. 476. EMPEROR v. RAM LAL ANAND. [See Q.D. 1936-40, Vol. I, Col. 2854.] I.L.R. (1941) Lah. 145.

S. 476-Costs in proceedings for sanction-Com-

petency of Court to award.

Costs in respect to twarts.

Costs in respect of proceedings for sanction to prosecute cannot be awarded though taken in a Civil Court. (Bennett, J.) JARBANDHAN v. EMPEROR. 1945 A. L. J. 536=1945 A.W.R. (H.C.) 368=1945 O.W.N. (H.C.) 348=1945 A.L.W. (H.C.)

-S. 476—Civil Court—Special Judge acting under U.P. Encumbered Estates Act, if included. MAHOMED MEHDI V. RAMJI LAL. [See Q.D. 1936-40, Vol. I, Col. 3339.] 16 Luck. 237—191 I.C. 146—13 R.O. 218—1941 A.W.R. (C.C.) 8—42 Cr. L.J. 85—A I.R. 1941 Ou th 48.

S. 476—"Court"—District Magistrate acting

sunder S. 8 (2), Sind Frontier Regulation-Status of.

There is no reason for holding that the hearing of evidence is an essential preliminary before a Magistrate can be held to be acting as a Court. Although a District Magistrate acting under S. 8 (2), Sind Frontier Regulation, does not act upon evidence which he himself has heard, he is a Court within the meaning of S. 476, Cr.P. Code. (Davis, C.J. and Weston, J. KARAMDIN v. EMPEROR. I.L.R. (1942) Kar. 66=200 I.C 630=15 R.S. 2=43 Cr.L.J. 705=A.I.R. 1942 Sind 75.

Special Criminal Court'—Special Judge appointed under Special Criminal Courts Ordinance—Territorial juris-

diction of such Judge.

A special Judge appointed by the Provincial Government in exercise of the powers conferred by S.4 of the Special Criminal Courts Ordinance II of 1942, is not a mere persona designata but a Court, and is entitled to file a complaint under S. 476, Cr.P. Code. Where the notification appointing him directs that he should hold the sitting of his Court at the headquarters of the revenue district within the limits of which the area of his jurisdiction is included, he acquires the character of a Court only when he holds his sitting at the place prescribed in the notification. A complaint filed by him while sitting at any other place, is without jurisdiction. (Niyogi, 7.) HARIRAM v. EMPEROR. I.L.R. (1945) Nag. 788=1945 N.L.J. 551.

S. 476—Duty of Court—Dismissal of application.

cation for non-apprearance of applicant-Propriety. Jawala Parshad v. Ram Parshad. [See Q.D., 1936-40, Vol. I, Col. 3339.] 192 I.C. 863=13 R.L. 423=42 Cr.L. J. 324.

S. 476—Duty of Court—Inquiry under—Considerations for Court—Duty to proceed against all who are found involved in offence made out besides persons

complained against in application.

A complaint to be made in the interests of justice on an inquiry under S. 476, Cr.P. Code, does not rest only upon private individuals, and the fact that a private party chooses to proceed only against some of the offenders, is no ground for the Court abstaining from action against others found to be concerned in the offence. The Court has its duty; in an inquiry under the section the Court should consider primarily the interests of justice, and can of its own motion inquire and should not rest content with placing reponsbility on a private person. The Court should probe into the matter to the bottom and should make a complaint not only against those awho are made parties to the application before it but also against those against whom the Court considers a prima facie case has been made out. It is for the Court to take action against all, whom it has reason to believe were involed in the offences. (Davis, C.J. and Weston, 7.) VALIRAM LILARAM 7. GOBINDRAM. I.L.R. (1941) Kar. 422=197 I.C. 774=14 R S. 120=43 Cr.L.J. 259=A.I.R. 1941 Sind 217.

S. 476—Duty of Court—Order for prosecution for perjury on basis of con radictory statements made by witness—Duty to specify assignments of perjury.

It is usual, as it is very desirable in case of perjury by contradictory statements, for the prosecuting Court not to leave the matter at large, but to specify the assignments of perjury, so that the Magistrate who

CR. P. CODE (1898), S, 476.

deals with the case will know precisely what it is for which the accused is proceeded against. (Dhavle, J.) SUBA SINGH v. EMPEROR. 193 I.C. 569-313 R.P. 612=7 B R. 563=22 P.L.T. 775=42 Cr.L.J. 446=1940 P.W.N. 1012=A.I.R. 1941 Pat. 165. S. 476—Expediency of prosecution—Complainant failing to prove case—Effect—Order for prosecution under S. 211, I.P. Code—If justified.

See Penal Code, S. 211. 7 B.R. 420.

S. 476—Expediency of prosecution—Considerations.

Before a Court can start the machinery contemplated by S. 476, Cr.P. Code, against a private individual. he must be clearly told that his prosecution is in the interests of Justice. Till this condition is fulfilled there can be no foundation for such a proceeding. Nor should sanction be granted or prosecution directed unless there is a reasonable probability of conviction, thirds there is a reasonable probability of conviction.

(Waliullah and Sinha, JJ.) LIAQAT HUSAIN v. VINAY
PRAKASH. 1945 A.L.W 327=1945 A.L.J. 456=
1945 A.Cr.C. 141=1945 O.W.N. (H.C.) 280=
1945 A.W.R. (H.C.) 272.

S. 476—Expediency of prosecution—Contradictory
statements by witness under S. 164, Cr.P. Code, and later

in committing Mugistrate's Court-Alternative charge of perjury-Sanction for prosecution-Duty of Court.

Before the Court orders a prosecution under S. 476, Cr.P. Code, it has to be satisfied that it is expedient in the interests of justice that there should be a prosecution. Where sanction is sought to prosecute a witness for perjury for making a statement under S. 164, Cr. P. Code, and a contradictory statement afterwards in the committing Magistrates Court, the Court must first make up its mind whether it was the statement under S. 164, Cr.P. Code, or the statement subsequently made in Court which is false. If the statement made in Court is false, it is in the interests of justice that there should be a prosecution. But there can be no prosecution where the Court is satisfied that it is the earlier statement under S. 164, Cr.P. Code, which is false or where the Court is unable to determine which of the two statements is false. (Beaumont, C.J. and Sen, J.) EMPEROR v. NINGAPA RAMAPPA. I.L.R. (1942) Bom. 26=197 I.C. 416=14 R.B. 228=43 Cr.L.J. 167=43 Bom.L. R. 864=A.I.R. 1941 Bom. 408.

trial—Order for prosecution under S. 193, I.P. Code—When justified—Considerations—Duty of Court.

The fact that a witness appears to have made contradictory statements at two different stages of a case, e.g., in the commitment proceedings and in the sessions trial, is not by itself always sufficient to justify his prosecution for perjury under S. 193, I.P. Code. Such contradictions may arise from carelessness or from exaggeration due to the inability of ignorant witnesses to keep apart what they really saw from what they have since been hearing from others about the occurrence or from other causes. The fact that the evidence in question is given in cases of a grave nature is not of itself a sole ground for launching a prosecution. On the other hand the fact that the evidence is given in a case of a grave nature should only make the Court the more careful to weigh all the circumstances before embarking on a prosecution for perjury on the basis of contradictions. It is in the interest of the Crown as well as in the interests of justice that prosecution witnesses should be free to tell the truth to the Court of session irrespective of whatever evidence they may have given in the Court of the committing magistrate, What the Court should consider is the character of the contradictions. If the contradictions are far

from material and are not irreconcilable, Court would be better advised in refraining from prosecuting the witness on the basis of the contradictions. Where, however, the contradiction is not a case of correcting a misstatement previously made through inadvertence and reverting to the truth, but is a case of conscious improvement on what the witness had really seen, and doing so without any excuse, a prosecution would be justified. (Dhavle, J.)
SUBA SINGH v. EMPEROR. 193 I.C. 569=13 R.P.
612=7 B.R. 563=22 Pat.L.T. 775=42 Cr.L.J. 446=1940 P.W.N. 1012=A.I.R. 1941 Pat. 165.

——S. 475—Expediency of prosecution—Duty of Court—Scope of inquiry—Civil matter—Notice—If to go to Public Prosecutor or Government pleader.

In sactioning a prosecution for offences committed against public justice, the Court should consider not only whether there is a prima facie case, but also whether it is in the public interests to allow criminal proceedings to be instituted. Though it may be a civil matter, owing to the nature of the proceedings, it is desirable that in appals in such matters, notice should go to the Public Proescutor rather than to the Government pleader. (Mockett, J.) Kuppuswamy Chettiar v. Subbaraya Chettiar. 196 I.C. 128=14 R.M. 276=1941 M.W.N. 376=53 L.W. 677=42 Cr. L.J. 817=A.I.R. 1941 Mad. 574=(1941) 1 M. L.J. 611.

-S. 476—Expediency of prosecution—False statements made in family dispute.

The circumstance that false statements were made in a family dispute is not a sufficient reason for refraining from action by prosecution under S. 476, Cr.P. Code, against those who made those false statements. If in fact the false statements have been made from motives not in themselves evil, the trying Magistrate may take that circumstance into account when awarding punishment. (Davis, C.J. and Weston, J.)
DIPOMAL MURIJMAL v. EMPEROR. I.L.R. (1942)
Kar. 64=15 R.S. 5=200 I.C. 81;=43 Cr.L.J.
720=A.I.R. 1942 Sind 93.

S. 476—Expediency of prosecution—Legal practitioner—Case against, based on circumstantial evidence.

Where a case against a legal practitioner is dependent on circumstantial evidence, the Court will be reluctant to cause him to be placed upon his trial under S. 476, Cr.P. Code, for a criminal offence arising out of something purported to be done in the course of his professional duties, unless the inferences to be drawn against him are such as to amount to a virtual certainty of guilt. (O'Sullivan, J.) GANWAR v. EMPEROR. I.L.R. (1944) Kar. 133=217 I.C. 182=17 R.S. 85=46 Cr.L.J. 223=A.I.R. 1944 Sind 155.

-S. 476—Expediency of prosecution—Magistrate to whom complaint is made—Power to send back proceedings to complaining Magistrate for making further inquiries-Procedure.

It is the Court which considers the question whether it shall lay a complaint or not that has to be satisfied whether it is expedient in the interests of justice that an inquiry should be made; and S. 476 (1) gives to that Magistrate complete discretion whether to conduct the preliminary inquiry or not. When once the complaint is sent to the Magistrate having jurisdiction, he must proceed under S. 476 (2) which says that he shall proceed thereupon according to law as if upon complaint made under S. 200. It is not for the Magistrate to whom the complaint is made to consider whether it is in the interests of justice to make a complaint and such Magistrate

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has no jurisdiction to send back the proceedings to the Magistrate making the complaint to make further inquiries. (Horwill, J.) RATHNASWAMY PILLAI.
v. RAJARATNAM PILLAI. I.L.R. (1943) Mad.
303=204 I.C. 289=15 R.M. 732=44 Cr.L.J.
177=55 L.W. 591=1942 M.W.N. 594=A.I.R. 1943 Mad. 50=(1942) 2 M.L.J. 381.

-----S. 476—Expediency of prosecution—Motive of party moving for prosecution—Relevancy—Duty of Court to hold inquiry.

What the Court has to consider when an application is made to it by a party praying that a complaint may be filed by the Court against another party under Ss. 193 and 471, I.P. Code, is not the motive of the party who makes the application, but whether it is in the interests of justice that a prosecution should take place. Whenever a private party applies to the Court to prosecute his opponent, it may be safely premised that there is malice behind the application and the fact that the applicant is actuated by malice should not be made a ground for dismissing the application. If it is found as a fact that the party sought to be proceeded against has brought into existence certain documents for the purpose of inducing the Court to set aside a decree which had been obtained after a full hearing, that is certainly a case which requires further investigation and the Court is bound to proceed under S. 476, Cr.P. Code. (Agarwala, J.) JANAK-DULARI KUER v. PABITRI PRASAD SAHI. 1943 P.W. N. 139.

----S.476-Expediency of prosecution-Witness making false statement not calculated to receive credence but with a view to appropriate to himself credibility as witness.

Where in a petty case a person examined as a witness makes a false statement with a view to appropriate to himself certain amount of credibility, and such a statement is only one of the type of routine statements made by almost every witness, not calculated to receive any credence, it is not expedient to order a prosecution on the basis of such a statement. It cannot be said that the interest of justice would be advanced by prosecuting the person making such a statement. (Sinha, J.) BATAKRISHNA PAL v. EMPEROR. 221 I.C. 407=26 P.L.T. 216=12 B.R. 131=11 Cut.L.T. 22=A.I.R. 1945 Pat. 295.

-S. 476-" In relation to"-Warrant entrusted to constable for execution-Constable reporting at thana that arrested person was rescued-Police not submitting chargesheet against rescuers—Case by one of them against constable under S. 211, I. P. Code—Complaint, if necessory.

A constable who was entrusted with the execution of a warrant issued by a trying Magistrate gave information at the thana that certain persons had rescued the arrested person and committed an offence under S. 225-B, I. P. Code. No charge-sheet was submitted against them by the police as after investigation they came to the conclusion that the case was a doubtful one. One of those accused persons instituted a case under S. 211, I. P. Code, against the. constable.

Held, that as the offence was committed in a transaction which arose out of the execution of the warrant, it was impossible to say that the offence was not committed in relation to those proceedings, and that, therefore, the Magistrate had no jurisdiction to take cognizance of the case without a complaint under S. 476, Cr. P. Code. (Henderson and Sen. J.J.) GANGA PRASAD SINGH v. EMPEROR. 194 I.C. 829=14 R.C. 53=42 Cr. L. J. 626=45 C.W,N. 195=A.I.R. 1941 Cal. 263.

--S. 476—Jurisdiction—Offence committed before Special Judge-Jurisdiction of Sessions Judge to order prosecution after abolition of Special Court—Sessions Court—If same Court as or successor to Court of Special Judge.

A Special Judge functioning under the Special Criminal Courts Ordinance is not the same Court as the Court of the Sessions Judge for purposes of S. 476, Cr. P. Code. After the repeal of Ordinance (II of 1942), Special Judges ceased to exist, and the Legislature did not make any provision in the Special Criminal Courts (Repeal) Ordinance, 1943, to the effect that the Sessions Judge could be deemed to be a successor-in-office to the Court of the Special Judge. Hence the Sessions Judge has no jurisdiction under S. 476, Cr. P. Code, to direct the filing of a complaint against a person in respect of an offence alleged to have been committed before the Court of the Special Judge. (Agarwala and Sinha, JJ.) SHREE-KANT PATHAK v. EMPEROR. 23 Pat. 701=219 I.C. 385=18 R.P. 129=46 Cr L.J. 605=11 B.R. 402=A.I.R. 1945 Pat. 64.

Ss. 476 and 476-B—Jurisdiction—Use of forged document in review case transferred from Court of Subordinate Judge to that of Additional District Judge—Jurisdiction of District Judge to make complaint.

A suit instituted by the petitioner was heard and

dismissed by C, an Additional Subordinate Judge. The petitioner then applied for review of the decree and notice was issued under order 47, R. 4, C. P. C. by C, while still an Additional Subordinate Judge. But before the review application was heard, C was appointed Additional District Judge, and the review case was thereupon transferred to his file as Additional District Judge. Certain documents alleged to have been forged were filed in that review case by a witness cited by the petitioner, and C ordered them to be kept with the record. Subsequently the application for review was dismissed and an appeal filed against the original decree to the High Court was also dismissed. An application was thereafter filed under S. 476, Cr. P. Code, in the Court of the Additional Subordinate Judge for a complaint to be made against the petitioner which was refused. But on appeal under S. 476-B, the District Judge directed a complaint to be made.

Held, that as the review case was pending in the Court of the Additional District Judge from before the date when the documents were used and remained in his file from then onwards until the review case was disposed of, the Court of the Additional District Judge was the proper Court to make a complaint under S. 476, Cr. P. Code, and that neither the Court of the Subordinate Judge nor that of the District Judge had jurisdiction to pass an order under that section. (Iodge and Akram, 37.) HARI DAS SHAHA v. DULAL CHANDRA. I.L.R. (1942) 2 Cal. 456= 205 I.C. 155=15 R.C. 597=44 Cr.L.J. 332=A. I.R. 1943 Cal. 103.

-S. 476—Nature of application—S. 250, if appli-

An application under S. 476, Cr. P. Code, is not a complaint, but is merely an application that a complaint be made. Therefore, S. 250, Cr. P. Code, has no applicability. (Blacker, J.). ABDUL HAMD v. AHAD SHAH. 202 I.C. 724=44 P.L.R. 510= 43 Cr.L.J. 904=15 R.L. 170=A.I.R. 1943 Lah. 26.

-Ss. 476. 476-A and 476-B-Nature of proceedings under—Civil Court acting under—If becomes a Criminal Court-Appeal, revision, law governing.

CR. P. CODE (1898), S. 476.

effect of the operation of these sections to warrant the view that a Civil or Revenue Court acting under S. 476 or S. 476-A or 476-B is thereby altered into a Criminal Court for purposes connected with such proceeding. Where a Civil or Revenue Court decides to institute or withhold a prosecution the appeal is to the Civil or the Revenue Court, as the case may be, and the revision, if any, therefrom to the High Court is also on the Civil Side under S. 115, C. P. Code and not under S. 439, Cr. P. Code. (My Bu and Ba U, JJ.) DAW SAW KHIN v. KO SHEWE HPAR. 1941 Rang.L.R. 90=195 I.C. 444=14 R.R. 49=42 Cr.L.J. 735=A.I.R. 1941 Rang.

-S. 476—Notice to party—Desirability.

Though notice does not seem to be insisted upon by the plain terms of S. 476, Cr. P. Gode, it is nevertheless highly desirable that such notice should be given (Waliullah and Sinha, JT.) LIAQAT HUSAIN V. VINAY PRAKASH. (1945) A.L.W. 327=1945 A.C.C. 141=1945 O.W.N (H.C.) 280=1945 A.L.J. 456=1945 A.W.R. (H.C.) 272.

-S. 476—Order under, based on the opinion of the appellate Court-Validity.

Where a suit decreed by the trial Court was dismissed on appeal and the defendant applies to the trial Court for an order under S. 476, it is incumbent on the trial Court to judge the truth or falsity of the evidence uninfluenced by the opinion of the appellate Court, as the Court which makes the complaint should bring its own independent judgment to bear upon the facts of the case. (Niyogi, J.) Asgarali Mulla Ibrahimjee v. Emperor. I.L.R. (1942) Nag. 695=201 I C. 170=15 R.N. 45=43 Cr.L. J. 649=1942 N.L.J. 257=A.I.R. 1942 Nag. 80.

-Ss. 476 and 94—Powers of Civil Court considering application under S. 476 —Recourse to S. 94, if permitted.

A Civil Court does not cease to be a Civil Court when it is considering an application made to it under S. 476, Cr. P. Code. Hence it cannot have recourse to S. 94, Cr. P. Code, in such proceedings and the parties should not be compelled against their will to submit to examination or to produce documents. (Gruer, J.) BISHAMBARDAS v. MUKTA KALKA. I.L.R. (1942) Nag. 667=200 I.C. 68=14 R.N. 317=1942 N.L.J. 188=A.I.R. 1942 Nag. 73.

-S. 476-Power of Court to detain person concerned in custody or grant him bail-When accrues.

The power to detain the person concerned in custody or to put him on bail under S. 476, Cr. P. Code, by the complainant Court only accrues to the Court when it has recorded its finding and decided to make a complaint and not earlier. If he is detained in custody at an earlier stage, an order directing him to be released may be made under S. 491, Ct. P. Code. (Blacker, 7.) MAHOMED KHAN v. EMPEROR. 215 I.C. 58=45 Cr. L. J. 768=17 R.L. 87=46 P. L.R. 188=A.I.R. 1944 Lah. 328.

--- S 476-Preliminary enquiry-Absence of-Legal-

ity of proceedings.
Under S. 476, Cr. P. Code, the Court need not order a preliminary enquiry if it does not think it necessary to do so. Froceedings under that section without such enquiry are not, therefore, illegal. (Young, C.J. and Sale, J.) MAHOMED TAHIR b. EMPEROR. I.L.R (1940) Lah. 669=193 I.C. 170=13 R.L. 443=42 Cr.L.J. 351=1941 Comp. C. 201-A I.P. 1941 Lab. 52 201=A.I.R. 1941 Lah. 52.

There is nothing in the words of Ss. 195, 476,

Ss. 476 and 476-B—Refusal to prosecute—

176-A or 476-B, Cr. P. Code, or in the combined Interference by High Court if and when justified.

119=16 R.S. 82=45 Cr.L.J. 76=A.I.R. 1943 Sind 157

-S. 476-B—Construction—Appeal against "complaint"—Appeal filed along with certified copy of order finding that complaint should be made—If proper and valid—Certified copy of complaint not filed—Summary dismissal

of appeal-If justified.

S. 476-B no doubt, contemplates an appeal against the complaint which is directed to be filed. But the section is not happily worded, because it is clear that an appeal must be in reality against the order finding that a complaint should be made and net against the complaint itself; it will be only in the said order that reasons for the making of the complaint would be given. S. 419, Cr. P. Code, only refers to copies of judgment, or order appealed against, and a complaint cannot be said to be a judgment or order. A complaint under S. 476 follows as the result of the order. An appeal under S. 476-B, generally speaking, must, in the nature of the proceedings, lie not against the complaint, but against the order finding that a complaint should be made. While an appellate Court dealing with an appeal under S. 476-B, Cr. P. Code, might say that it is desirable that a copy of the complaint also should be before it and not merely a copy of the order, or might even direct a certified copy of the complaint to be produced before it would deal with the appeal; it is not justified in dismissing an appeal summarily on the ground that only a copy of the order, and not a copy of the complaint, has been filed along with the appeal, without giving appellant an opportunity to produce a copy of the complaint. According to the proper construction of S. 476 B, an appeal against the complaint itself necessarily includes an appeal against the order finding that a complaint should be made—the order and the complaint made in pursuance thereof being for the purpose of appeal, part of one and the same thing. (Davis, C.J. and Weston, J.) CHABALDAS v. EMPEROR. I.L.R. (1942) Kar. 371=206 I.C. 437=15 R.S. 177=44 Cr.L.J 521=A.I.R. 1943 Sind 96.

S. 476-B-Costs-Power of Court to award. Proceedings under S. 476, Cr. P. Code, and the connected sections, whether they originate in a Civil or Criminal or Revenue Court, are criminal proceedings. Consequently, a Court acting under S. 476-B has no jurisdiction to award costs. (Blacker, J.).

ABDUL HAMID V. AHMAD SHAH. 202 I.C. 724=44

P.L.R. 510=43 Cr.L.J. 904=15 R.L. 170=

A.I.R. 1943 Lah. 25.

-S 476-B—Discretion of appellate Court—Exercise

of-Interference in revision by High Court.

In an appeal under S. 476-B, Cr. P. Code, the Court has a discretion to allow or reject the appeal, to file a complaint where the lower Court has refused to do so, to withdraw a complaint where the lower Court has directed a complaint to be filed. The High Court, sitting in revision, will not ordinarily interfere with the discretion so exercised by the appellate Court unless the High Court is satisfied that the discretion has not been judicially exercised. (Lobo course of execution proceedings-Appeal-Forum-District Judge transferring appeal for disposal to Additional District Judge—Complaint by latter—Competency. See Cz. P. Code, S. 195 (3). (1945) P.W.N. 137.

CR. P. CODE (1898), S. 476-B.

-S. 476-B-Order dismissing application in default-Appealability. JAWALA PARSHAD v. RAW PARSHAD. [See Q.D. 1936-40, Vol. I, Col. 3, 192 I.C. 863=13 R.L. 423=42 Cr L.J. 324. -S. 476-B-Order of Munsiff in U. P. under

S. 476-Forum of appeal.

Ordinarily, in the U.P. under S. 21 (2) of Bengal Agra and Assam Civil Courts Act, appeals from the judgments of Munsiffs lie to the Court of the District Judge. Hence an appeal under S. 476-B, Cr. P. Code, against an order of a Munsiff under S. 476 lies only to District Judge's Court to which the Court of the Munsiff is subordinate. A civil Judge cannot entertain such an appeal even though such appeals are filed before him by virtue of a local order. (Yorke, 7.) RAGHUNATH TEWARI v. RAM PALAK SINGH. 1943 A.L.W. 488=1943 A.Cr.C. 128.

-S. 476-B-Order of Revenue Court under-If revisable under S. 439, Cr. P. Code, or S. 115, C. P. Code, See (1) C. P. Code, S. 115 AND CR. P. CODE, S. 476-B AND (2) Cr. P. CODE, Ss. 439 AND 476-B. 1943 O.W.N. 176.

S. 476-B—Order of Sub-Judge in proceedings under Guardians and Wards Act—Appeal—Forum.

An appeal from an order made by a Subordinate Judge under S. 476, Cr. P. Code, arising from proceedings under the Guardians and Wards Act, lies to the District Court and not to the Chief Court, Although appeals under S. 47 of that Act from orders passed by him lie not to the District Court but to the Chief Court, the Court to which appeals ordinarily lie from appealable decrees passed by him is not the Chief Court, but the District Court. (Davies, C.J. and Weston, J.) DIPOMAL MURJIMAL v. EMPEROR. I.L., R (1942) Kar. 64=200 I.C. 814=15 R.S. 5=43 Cr.L.J. 720=A.I.R. 1942 Sind 98.

S. 476 B-Powers of appellate Court-Jurisdiction to remand case lirecting Court of first instance to file

complaint.

S. 476-B, Cr. P. Code, in express terms empowers the appellate Court either to direct withdrawal of the complaint (which has been made by the lower Court under S. 476) or to make a complaint which the lower Court might have made under that section (where the lower Court has refused or omitted to do so.) Reading Ss. 476 and 476-B, together it is evident that the law requires the Court deciding to lay a complaint to make the complaint itself. Hence in an appeal under S. 476-B, Cr. P. Code, the appellate Court has no jurisdiction to remand the case directing the Court of first instance to file a complaint, but must do so itself. (Mya Bu, J.) BABU RAMNIRANJAN A. MUK NATH SINGH. 1941 Rang LR. 764=199 I.C. 613=14 R.R. 274=43 Cr.L.J. 569=A.I.R. 1942 Rang. 64 (1) S. 476-B-Power of appellate Court to take evi-

An appellate Court in dealing with an appeal under S. 476-B, Cr. P. Code, can take evidence if it wishes to. (Digby, 7.) Thunnudeo Raghyi v. Baladeo Raghydfo. I.L.R. (1945) Nag. 438= 220 I.C. 446=46 Cr.L.J. 766=1944 N.L.J. 421 A.I.R 1944 Nag. 359.

-Ss. 476 B and 195 (1) (a) and (3)-Refusal to make complaint in respect of offence under S. 182,

I. P. Code-Appeal-Forum.

Where a Magistrate refuses to make a complaint in respect of an offence under S. 182, I. P. Code, an appeal from that order lies to the District Magistrate and not to the Sessions Judge. (Agarwal, 3). Chandrakumar Dikshit v. Ramesh Chandra. 196 I.C. 664=1941 A.W.R. (C.C.) 313=1941 A.Cr. CR. P. CODE (1898), S. 476-B.

C. 241=1941 O.L.R. 734=1941 O.W.N. 1130=1941 O.A. 822=14 R.O. 250=43 Cr.L.J. 50=A. I.R. 1942 Oudh 50.

-S. 476-B—Right of appeal—Court issuing notice to witness suo motu-Order subsequently declining to take action—If appealable.

If a Magistrate in calling on a witness to show cause why he should not be prosecuted for perjury, acts suo motu and not on an application made by a party, the latter has no right of appeal against the order of the Magistrate subsequently declining to take action against the witness under S. 476-B, Cr. P. Code. (Shearer, J.) Stra Ram v. Brij Behari. 195 I.C. 580=7 B.R. 944=14 R.P. 149=1941 P.W.N. 623=23 Pat.L.T. 210=42 Cr.L J. 757 =A I.R. 1941 Pat. 591.

-S. 476 B—Scope—If exhaustive—Revision against order under S. 476—Powers of High Court. See Cr. P. Code, S. 439. I.L.R. (1941) Kar. 422.

-S. 476-B-Subordinate Court-Order for prosecution by single Judge of High Court hearing civil revision petition from decree in Small Cause suit—Appeal to Division Bench—Competency—Letters Patent (Madras) Cl. 15— Provincial Small Cause Courts Act, S. 25-Powers of High Court.

In an application under S. 25 of the Provincial Small Cause Courts Act to revise a decree dismissing a suit, a single Judge of the High Court who heard the application, took a different view of the evidence, and held that a receipt which the lower Court found to be genuine, was a forgery, and granted an application under S. 476. Cr.P. Code, directing the prosecution of a party. The latter appealed under Cl. 15 of the Letters Patent.

Held, (1) that the order was a "judgment" within the meaning of Cl. 15 of the Letters Patent and was appealable and the single judge who passed the order constituted the subordinate Court referred to in S. 476 B, Cr. P. Code, and the appeal lay to the Division Bench; (2) that under S. 25 of the Provincial Small Cause Courts Act, the High Court had no power to review evidence as a Court of appeal, and the single judge had therefore no right to interfere with the finding of the trial Court as to the genuineness of the receipt and the order for prosecution based on such interference was therefore unsustainable. (Leach, C. J. and Lakshman Rao, J.) Doratswami Nadar n. Sivanupandia Nadar. I.L.R. (1944) Mad. 643=212 I.C. 39=16 R.M. 562=1944 M. W.N. 26=57 L.W. 168=45 Cr.L.J. 464=A.I. R. 1944 Mac. 181=11943 2 M.L. J. 668.

-S. 480—Procedure—Offence under S. 228, I.P. Code—Magistrate hearing evidence and postponing sentence to subservent day -Legality.

The power given to a Court under S. 480, Cr.P. Code, is a special power to deal with a case of insult offered to the Court in its presence. The Court is not bound to hear any evidence. It can rely on its own opinion of what happened, and can detain the offender in custody, take congnizance of the offence and sentence the offender. But all this must be done before the rising of the Court, i.e., on the same day. There is no power in the Magistrate to hear the evidence and postpone sentence until a later day. He acts illegally if he acts upon a subsequent day. (Beaumont, C. J. and Sen, J.) EMPEROR V. SHANKAR KRISHNAJI. 201 I.C. 606=15 R.B. 120=43 Cr. L.J 769=44 Bom.L.R. 439=A.I.R. 1942 Bom. 206 (1).

-Ss. 486 and 413-Sentence of fine not exceeding Rs. 50 by First Class Magistrate under S. 480-Appeal.

CR. P. CODE (1898), \$ 488.

The provisions of S. 413, Cr.P. Code, apply to an appeal provided for under S. 486 (1), Cr.P. Code, in view of the provisions of sub-S. (2) of the latter section. Consequently, a person sentenced by a first class Magistrate under S. 480, Cr.P. Code, to pay a fine not exceeding rupees fifty has no right of appeal. (Edgley and Roxburgh, JJ.) BAWANI MOHAN JOARDAR v. EMPEROR. I.L.R. 1944) 1 Cal. 31 = 215 I.C. 132=17 R.C. 94=46 Cr.L.J. 17=A. I.R. 1944 Cal. 382.

S. 488- Maintenance. Abandoned mistress. Amount of maintenance. Burden of proof.

Child.

Compromise as to maintenance. Date from which maintenance to be awarded.

Enforcement of order.

Jurisdiction.

Just cause. Marumakkathayee wife.

Neglect or refusal to maintain.

Offer to maintain.

Order directing husband to provide house.

Order for maintenance of wife.

Parties.

Power of Magistrate.

Procedure.

Property set apart for maintenance.

Wife s application for maintenance. Wife's claim for maintenance, S. 488 (3)—"Sufficient cause"

S. 488 (4)—Applicability "Sufficient reason'

S. 488 (5)—Cancellation of order. S. 488 (6)—Scope.

S. 488 (7)—Costs of revision application.

# Abandoned mistress.

-S. 488—Abandoned mistress—Order for maintenance-Legality.

S. 488, Cr.P. Code, only applies to an abandoned wife and not an abandoned mistress who is not a lawfully wedded wife; no order for maintenance can therefore be passed in her favour under S. 488, however faithful she may have been to the person from whom maintenance is claimed and however badly she may have been treated by him. (Davis C.J. and Weston, J.) EMPEROR v. GANESHIBAI. 1.L.R. (1943) Kar. 102=208 I.C. 439=16 R S. 78=44 Cr.L. J. 787=A.I.R. 1943 Sind 156.

### Amount of maintenance.

———S. 488—Amount of maintenance—Expenses of medical attention to invalid wife—Award of.

In the case of wife who is an invalid and requires medical attention, the expense of a reasonable amount of medical attention appropriate to her status in life are within the meaning of the word "maintenance" national definition of the word maintenance as used in S. 488, Cr. P. Code. (Byers, J.) Ramanathan Chettian v. Alemelu Achi. 206 I.C. 462=16 R.M. 1=56 L.W. 157=1943 M.W. N. 150=44 Cr.L.J. 522=A.I.R. 1943 Mad. 342=(1943). 1 M.L.J. 230.

S. 488—Amount of maintenance—Wife, if entitled to the state of the s

to allowance greater than her needs for food, clothes and

Whatever may be the rights of a wife under the ance under the summary procedure provided for under S. 488, Cr.P. Code, greater than her bare needs

for food, clothes and lodging. (Blacker, J.) MAHO-MED ALI v. Mr. SAKENA BEGUM. 45 Cr.L.J. 254 =211 I.C. 77=16 R.L. 193=A.I.R. 1944 Lah. 392.

#### Burden of proof.

———S. 488—Burden of proof—Claim by mother of illegitimate child against pulative father—Onus of proof of parentage—Statement of mother—Value of, without corroboration.

In a claim by a woman for maintenance of an illegitimate child against its putative father, it is not for the opposite party to prove that he was not the father of the illegitimate child. It is for the applicant to show that the child was the child of the opposite party against whom the claim is made, before the latter can be called upon to disprove it. It is prima facie improper to accept without corroboration the mere statement on oath of the mother who asserts that the respondent to whom she is not married is the father of her child. (Dhaule, J.) Prasad Gared v. Mst. Kesari. 192 I.C. 893=7 B.R. 501=42 Cr.L.J. KESARI. 192 I.C. 893=7 B.R. 501=42 Cr.L.J. T. 273=A.I.R. 1941 Pat. 444.

#### Child,

———S. 488—Child—Right to maintenance—Amount
—If to cover cost of education—Bare maintenance—If
sufficient.

Maintenance under S. 488, Cr.P. Code, does not mean a bare maintenance, but also includes the cost of education of a child. The amount paid by a father to his child under the section should cover at least the cost of education sufficient for the child, so soon as he is old enough to earn his living and to maintain himself. (Davis, C.J. and Weston, J.) Terchand J. Kalavantibal. I.L.R. (1941) Kar. 417=197 I.C. 849=14 R.S. 130=43 Cr.L.J. 290=A.I.R. 1941 Sind 214.

S. 488—Child—Right to maintenance—Burden of proof—Finding of neglect or refusal to maintain—Necessity.

Under S. 488, Cr.P. Code, a Magistrate has no jurisdiction to pass an order against a father for maintenance of his children unless neglect or refusal to maintain his children is brought home to him, and unless the Magistrate finds such neglect or refusal on the evidence. (Dhaule, J.) Prasad Gareri v. Msr. Kesari. 192 I.C. 893=22 Pat L.T. 273=7 B R. 501=42 Cr.L. J. 347=13 R.P. 567=1941 P. W.N. 94=A.I.R. 1941 Pat. 444.

\_\_\_\_\_\_S. 488—Child—Right to mainteance—Child living with unchaste wife—Right to order for maintenance.

A wife living an adulterous life would not be entitled to maintenance from her husband under S. 488, Cr.P. Gode, but a child living with the wife, admitted to be the child by the husband, cannot be denied maintenance and the wife though leading an unchaste life, would be entitled to the costs of maintenace of the child living with her till the husband in due process of law is able to obtain custody of his child. (Ruppuswami Ayyar, J.) MUNIAMMAL v. VENKATARAMANA CHARI. I.L.R. (1944) Mad. 382=210 I.C 375=16 R.M. 467 (1)=45 Cr.L. J. 266=56 L.W. 496 (2)=1943 M.W.N. 584=A.I.R. 1943 Mad. 768 =(1943) 2 M.L.J. 318.

S. 488—Child—Right to maintenance—Husband wife living apart—Children living with wife—Father declining to maintain them when living with wife and offering to maintain them, if they live with him or under his care—Power to make order.

Where a husband and wife are living apart and the hildren are in fact living with the wife, the magistrate

CR. P. CODE (1898), S. 488.

has power under S. 488, Cr.P. Code, to make an order for the mainteance of the children, although the father only refuses to maintain them whilst they are with the wife and offers to maintain them if they live with him or with somebody of whom he approves. The object of S. 488, Cr.P. Code, is to avoid vagrancy by providing that a magistrate may up to a limited extent see that a wife and children are maintained by a husband or father able to maintain them. The magistrate must, however, take the facts as he finds them. If in fact the children are living with the wife and if in fact the father is refusing or neglecting to maintian them where they are living, the magistrate has jurisdiction to make an order. If the father's case is that the children ought not to be living with the wife, but ought to be living with him or under his direction. he must take proper proceedings in the Civil Court to get the children removed from the custody of the wife. The fact that such proceedings may involve expense which a father is unable or unwilling to bear cannot deprive the magistrate of the right to exercise his powers under S. 488. (Beaumont, C, J. and Sen, J.)
EBRAHM MAHOMED v. KHURSHEDBAI EBRAHM.
195 I.C. 232=42 Cr.L. J. 639=14 R.B. 30=43
Bom.L.R. 515=A.I.R. 1941 Bom. 267.

———S. 488—Chitd—Right to maintenance—Husband and wife living apart—Wife retaining custody of child—Application for maintenance from husband—Competency—Prea that father is entitled to custody of child—If open.

Where a husband and wife have separated under an agreement by which the husband gives the wife land yielding income for her mainteance and undertakes to maintain their child, as long as the child remains with the mother, the latter is entitled to receive from the husband sufficient funds to maintain the child and to institute proceedings under S. 488, Cr. P. Code, against the husband for that purpose. It would be improper for the Court to refuse maintenance for the child merely because it is of opinion that the mother has no right to the custody of the child. It is for the husband (father) to institute proceedings to obtain custody of the child if he has a right to it. (Horwill, J.) KRISHTAPPA V. PREMALEELAMANI. 203 I.C. 615=1942 M.W.N. 582=44 Cr.L.J. 125=15 R.M. 691=55 L.W. 568=A.I.R. 1942 Mad. 705=(1943) 1 M.L.J. 120.

S. 488—Child—Right to maintenance—Major child—"Inability to maintain himself"—Burden of proof. Mahomed Yar v. Ali Mahomed. [See Q.D. 1936-40, Vol. I, Col. 3340] 193 I.C. 548=14 R. L. 463=42 Cr.L.J. 439=A.I.R. 1941 Lah 92.

———S. 488—Child—Right to maintenance—Major child unable to maintain himself or herself.

If a child is unable to maintain himself or herself, though not a minor, there is a right of maintenance under S. 488, Cr.P. Code. The age of the child is immaterial. The section does not limit the right of maintenance to minors. (Lakshmana Rao, J.) KANNIAH NAIDU V. RAJAMMAL. 196 I.C. 16=1941 M.W. N. 479 (1)=42 Cr.L.J. 838=14 R.M. 360=A.I. R. 1941 Mad. 685.

———S. 438—Child—Right to maintenance—Major child unable to maintain itself.

There is no justification for holding that S. 488, Cr. P. Code, is confined to children who are under the age of minority. The word "child" is used with reference to parentage that is to the father, and there is no qualification as to age. The only qualification is that the child must be unable to maintain itself. (Beaumont, C. J. and Wassoodew, J.) Shaikh Ahmed Shaikh Mahomed v. Bai Fatma. I.L.R. (1943) Bom

38=205 I.C. 157=15 R B. 348=44 Cr.L.J. 334 =44 Bom.L.R. 919=A.I.R. 1943 Bom. 48.

### Compromise.

S. 488—Compromise as to maintenance-Limits to the power of Court to pass or enforce order. Ma Khin Yi v. Edward Khin Maung. [See Q D. 1936-40, Vol. I, Col. 2862]. 192 I.C. 640=13 R. R. 194=42 Cr.L.J. 312=A.I.R. 1941 Rang. 46.

-S. 488—Compromise between parties —Procedure. A criminal Court is not a Court which can enforce a compromise of a civil nature which is made by parties appearing before it. When a compromise is made by the parties to an application under S. 488, Cr.P. Code, then that compromise can only be enforced by a civil Court and the correct procedure for the Magistrate is on the making of the compromise to dismiss the application for maintenance on the basis that the busband no longer refuses to maintain the wife. (Almond, J.C.) SHAHBAZ v. MT. AMIRZADGAI. A.I. R. 1945 Pesh. 20. A.I.

S. 488—Compromise—Order based on—Enforcement.

Per Bartley, J.—An order lawfully made by a Magistrate under S. 488, Cr. P. Code, whether on compromise or otherwise, must be deemed to be enforceable in the manner provided by sub-S. (3) of that section. (Derhyshire, C.J. and Bartley, J.) DEBJANI BISWAS v. RASIK LAL. 196 I.C. 527=14 R. C. 259=42 Cr. L.J. 894=45 C.W.N. 765=A.I.R. 1941 Cal. 558.

S. 488—Compromise petition—Proper form of order. Per Derbyshire, C. 7.—If the parties to a proceeding under S. 488, Cr. P. Code, present a petition of compromise by which they agree to the payment of a certain sum of money for mainteance and pray for an order in terms thereof, the proper procedure for the Magistrate to adopt is to make an order in these words :- "Petition of compromise filed. Order in terms of compromise." Then the provisions of S. 488 (3), Cr.P. Code can be invoked in order to secure the carrying out of what the parties had agreed to. (Derbyshire, C.J. and Bartley, J.)
Debjani Biswas v. Rasik Lal. 196 I.С. 527=14
R.С. 259=42 Cr.L.J. 894=45 C.W.N. 765=A.
I.R. 1941 Cal. 558.

Date from which Maintenance to be awarded. -S. 488-Date from which maintenance to be awarded—Opposite party behaving badly. Hemibat v. Kundibat. [See Q.D. 1936-40, Vol. I, Col. 3340.] I.L.R. (1941) Kar. 58=192 I.C. 340=13 R.S. 188=42 Cr.L. J. 278.

#### Enforcement of order.

-S. 488—Enforcement of order—Death of husband -Wife, if can recover arrears from his estate.

An order under S. 488, Cr.P. Code, abates when the husband dies and a wife whose maintenance has been fixed under that section cannot recover her arrears from the estate of her deceased husband. (Almond, J.C. and Mir Ahmad, J.) Harr singh v. Gulab Devi. 211 I.C. 425=16 R. Pesh. 72=45 Cr.L.J. 399=A.I.R. 1944 Pesh. 6.

Ss. 488 and 386—Enforcement of order—Order attaching immoveable property—Legality.

An order attaching immoveable property in proceedings under S. 488, Cr. P. Code, is illegal. The amount due in such cases can be realized in the same manner as fines and S. 386, Cr.P. Code, shows that if immoveable property is to be attached, the warrant of sale has to be sent to the Collector. (Bhide, J.) LABH SINGH v. Mr. PUNJAB KAUR. 14 R. C. 179=43 Cr.L.J. 61=196 I.C. 691=A.I.R. 1941 Lah. 360.

CR. P. CODE (1898), S. 488.

-Ss. 488 (3) and 490—Enforcement of order-Proper procedure—Proper term of imprisonement—Costs recovery-Procedure.

Where after an order for the payment of maintenance has been made if it is not complied with or if there is a refusal to pay it, the Magistrate cannot straightaway order the defaulter to be committed to jail. The first thing that must be done is to issue a distress warrant and it is only for the whole or part of each month's allowance that reamins unpaid after the execution of the warrant that imprisonment may be awarded. A man cannot be sentenced to imprisonment a second time for default in respect of the same identical arrears. The only method provided for the recovery of costs awarded is by distress warrant. An application for enforcement or execution may be made to any Magistrate in a place where the person against whom the order is made is. It is not necessary that the Magistrate should be of the categories mentioned in S. 488 or have the powers prescribed therein. (Mosely, 7.)
MAUNG TUN ZAN v. MA MYAING. 196 I.C. 563=
1941 Rang.L.R. 403=14 R.R. 93=43 Cr. L. J. 30=A.I.R. 1941 Rang. 247.

Jurisdiction. ——S. 488—Jurisdiction—General rule—Casual visit, if can confer jurisdiction on the Court of the place.

The general rule as to jurisdiction in regard to applications under S. 488, Cr.P. Code, is, that such an application can only be entertained at the place where husband and wife last resided together and this rule has been modified to the extent that it has been held possible for a husband to have more than one residence for the purposes of S. 488. But a casual visit by the husband to a place cannot confer jurisdiction on the Court of that place to entertain such an application. (Grille, J.) EMPEROR v. SHAMBAL, I.L.R. (1941) Nag. 262=192 I.C. 5=42 Cr.L.J. 647=14 R.N. 33=1941 N.L.J. 199=A.I.R.

1941 Nag. 175.

S. 488 (8)—Jurisdiction—Person employed in one place paying causal visit to another place and staying there during visit—If "resides" at latter place.

Where a person employed in Bangalore in the Mysore State pays a casual visit to Trichinopoly in British India in order to see his relatives there and intends to go to Bangalore again, it cannot be said that he "resides" at Trichinopoly during his stay there for purposes of S. 488 (8), Cr.P. Code. His residence for purposes of S. 488 (8) is Bangalore and not Trichinopoly. Hence a Magsitrate at Trichinonot frictiniopoly. Hence a magnitude at frictiniopoly has no jurisdiction to entertain a petition by his wife for maintenance under S. 488, Cr.P. Code. Meaning of "Reside" explained. (Horvill, J.) BALAKRISHNA NAIDU v. SAKUNTALA BAI. 208 I.C. 192=16 R.M. 225=44 Cr.L.J. 741=55 L.W. 306=1942 M.W.N., 369=A.I.R. 1942 Mad. 666

=(1942) 2 M.L.J. 134.

—S. 488 (8)—Jurisdiction—"Where he last resided with his wife"—Interpretation. Charan Das v. Surasti Bai. [See Q.D. 1936-40, Vol. I, Col. 2875]. I.L.R. (1940) Lah. 755=191 I.C. 203 = 13 R.L. 287=42 Cr.L.J. 105.

S. 488—"Just cause"—Wife suffereing from

common and curable disease. Hembai v. Kundi-Bai. [See Q.D. 1936-40, Vol. I, Col. 3340.]. I.L.R. (1941) Kar. 58=192 I.C. 340=13 R.S. 188=42 Cr.L.J. 278.

-S. 488 — Marumakkathayee wife — Application against husband for mainteance of herself and child— Marriage before Marumakkathayam Act not dissolved— If legal—Right to maintenance.

B. T. L. B.

When there is a legal marriage between marumakkathyees which was not dissolved before the Marumakkathyam Act came into force, that must be deemed to be a legal marriage. If in such a case it is found that the income of the tavazhi properties of the wife is very little, her infant son as well as herself are entitled to maintenance from the (Lakshmana Rao, J.) LAKSHMI AMMA v. KRISHNA KURUP. 1941 M.W.N. 674=54 L.W. 387 (1)=A.I.R. 1941 Mad. 940 (2)=(1941) 2 M. L. J. 254.

S. 488—Neglect or refusal to maintain—Need for

proof.

An order under S. 488 (1), Cr.P. Code, cannot be made unless it is proved that the husband neglects or refuses to maintain his wife or child as the case may be. A wife refusing without any sufficient reason to live with her husband is not at all entitled to receive any allowance under this section. (Din Mahomed and Blacker, 77.) ROSHAN BANO v. AZIM. 205 I. C. 637=15 R.L. 301=44 Cr.L.J. 425=45 P.L. ROSHAN BANO v. AZIM. R. 18=A.I.R. 1943 Lah. 59.

-S. 488-Neglect or refusal to maintain-Wife leaving husband owing to want of cordiality with husband's parents-Husband taking second wife after waiting for several years and after refusal of wife to join him-Right of wife to

maintenance.

Where there has been no cruelty or neglect on the part of a husband towards his wife, and the wife leaves her husband's house not because of any ill-treatment by the husband but owing to of any ill-treatment by the first wife refused to take her back. The mere fact that the husband want of the property of the pr for several years and after the first wife refused (Kuppuswami Ayyar, J.) PULLAMMA v. THATA-LINGAM. 217 I.C. 135=17 R.M. 292=46 Cr.L. J. 248=1944 M.W.N. 598=57 L.W. 492=A.I. R. 1945 Mad. 44=(1944) 2 M.L.J. 223.

S. 488 — Offer to maintain — Husband having venereal disease—Wife living away—Application for maintenance—Husband offering to take wife and to live with her—If ground for

refusing maintenance.

It is cruel on the part of a husband who has venereal lisease to insist upon his wife sharing bed with him, and a petition by her for maintenance against her husband from whom she is living apart cannot be dismissed on the ground that she refuses the husband's offer to take her and to live with her. She has sufficient justifica-tion for refusing to live with her husband who has venereal disease. (Kuppuswami Ayyar, I.) SEILAMMAI, In re. 209 I C. 423=16 R.M. 372 =56 L.W. 413 (1)=1943 M.W.N. 632=45 Cr. L.J. 91=A.I.R. 1943 Mad. 647=(1943) 2 M.L.

S. 488 – Offer to maintain wife—Order for maintenance—If proper.

Where a wife expressed her willingness to live with her husband in her application for maintenance and the husband offers to keep her with him, but the wife at that stage refuses to live with him an order for maintenance is not justified.

(Gille, J.) EMPEROR v. SHAMBAL I.L.R. CR. P. CODE (1898), S. 488.

(1941) Nag. 262=195 I.C. 5=42 Cr L.J 647= 14 R.N. 33=1941 N.L.J. 199=A.I.R. 1941 Nag.

-S. 488-Order directing husband to provide house-Legality.

The only order that can be made by a Magistrate under S. 488 (1), Cr. P. Code, is the fixing of a cash maintenance for the wife or child as the case may be and no other order. The Magistrate is not empowered to order the husband to provide a house for his wife. (Din Mahomed and Blacker, JJ.) ROSHAN BANO v. AZIM 205 IC. 637=15 R.L. 301=44 Cr.L.J. 425=45 P.LR. 18=A.I.R. 1943 Lah, 59.

S. 488-Order for maintenance of wife-Parties living together subsequently-Effect-Orders-If inoperative.

Where, subsequent to the passing of an order for maintenance in favour of the wife against the husband, the husband and wife happen to live together as husband and wife, the order must be regarded as having become inffective and inoperative. In such a case the question whether in fact they lived as husband and wife after the order for maintenance should be considered and decided. (Kuppuswami Ayyar, J.) MUNUSWAME PULLAT O, DORAIKANNU AMMAL. 58 LW 570= PILLAI v. DORAIKANNU AMMAL. 58 LW 1945 M.W.N. 691=(1945) 2 M.L.J. 408.

-S. 488—I'arties—Claim by wife—Husband member of joint Hindu family—Husband's father—If can be made party. Hemibar v. Kundibar, [See Q. D. 1936-40, Vol. I, Col. 3341.] I.L.R. (1941) Kar. 58=192 I.C. 340=13 R.S. 188=42 Cr.L.J. 278.

-S. 488-Power of Magistrate-If discretionary-Nature and object of remedy under section-Substantial issues of civil law raised between parties-Private income of wife sufficient to keep her from starvation-Order granting

her maintenance-Legality.

The power of a Magistrate to make an order under S. 488, Cr.P.Code, is discretionary and the Magistrate is not bound to make an order in favour of the wife under the first sub-section, even if the husband could not establish any of the defences indicated by the fourth sub-section. S. 488 provides only a speedy remedy against starvation for a deserted wife or child, and it is only a summary procedure which does not cover entirely the same ground as the civil liability of a husband or father under his personal lawto maintain his wife or child and when substantial issues of civil law are raised between the parties their remedy lies only in the Civil Courts. A magistrate will, therefore, be making a wrong and improper use of his discretion if he passes an order for maintenance in favour of a wife some what lightly deciding a question of the personal law of the parties, when the wife has a private income of her own which is, though far from princely sufficient to keep her from starvation. (Blacker, J.) MAHOMED ALL v. MT. SAKINA BEGAM. 211 I.C. 77=45 Cr.L.J. 254=16 R.L. 193=A.I.R. 1944 Lah. 392.

-S. 488-Procedure-Jurisdiction of Magistrate—Order directing attachment of movables of husband's joint Hindu family—Legality. HEMIBAI v. KUNDIBAI. [See Q. D 19:6-40, Vol. I. Col. 3341.] I.L.R. (1941) Kar. 58=192 I.G. 340=13 R.S. 188=42 Cr.L.J. 278.

officer for inquiry — Legality—Application for maintenance—If complaint—Cr. P. Code, S. 202. S. 488, Cr. P. Code, contemplates that the

S. 488, Cr. P. Code, contemplates that the enquiry should be made by the Magistrate himself in whose Court the application is made, and that function cannot be delegated to another officer. An application under the section is not a complaint within the meaning of S. 202, and therefore it cannot be properly be referred to another officer for inquiry under S. 202. The procedure for dealing with an application under S. 488 is laid down in that section itself. (Pandey, J.) Bibi Zainab v. Anwar Khan. 1945 P.W. N. 317.

——S. 488 (3)—Procedure—Single application in respect of several months' arrears—Imprisonment, for what period can be awarded.

When a wife applies to enforce a maintenance order and in a single application includes arrears which cover several months, the Magistrate has power to sentence the defaulter to more than one month's imprisonment. He may sentence the defaulter to one month's imprisonment for each full month's arrears of maintenance and to a further month for any broken period over and above that completed number of month's arrears which falls short of another complete month. (Sharpe and Blagden, J.) MA TIN TIN v. MAUNG AYE. 1941 Rang. L. R. 65=195 I.C. 190 = 14 R.R. 24=42 Cr.L.J. 690=A.I.R. 1941 Rang. 135.

Ss. 488 and 489—Property set apart by arrangement, for maintenance—Jurisdictian of Court to pass orders under Ss. 488 and 489 in

such cases.

Where a person by private arrangement makes over certain property for the maintenance of his wife and daughter, there is no refusal to maintain and so no order could be passed under S. 488, Cr. P. Code. In such case an order under S. 489 increasing the allowance cannot be passed because the original allowance was not granted by Court under S. 488 but by private arrangement and S. 489 can have no application. (Pollock, J.) KESHEORAO v. KUMARI MALTIBAI. 1941 N.L.J. 622.

——S. 488—Wife's application for maintenance —Dismissal on ground of husband's indebtedness

-Legality.

The indebtedness of a husband is not a ground for dismissing a petition by his wife for maintenance under S. 488, Cr. P. Code. (Lakshmana Rao, J.) Valliammai Ammal v. Dharmalinga Muthirian. 1941 M.W.N. 658=54 L.W. 386=A.I.R. 1941 Mad. 762 (2).

—S. 488—Wife's claim for maintenance— Allegation that husband abandoned her—Proof of chastity from date of abandonment—Neces-

sity.

In an application for maintenance by a wife under S. 488, Cr. P. Code, on the ground that her husband had abandoned her, it is not necessary for the applicant (wife) to prove that she had remained chaste from the date when the respondent abandoned her. (Horwill, J.) VISALAKSHMI AMMAL v. NAGAPPA CHETTIAR. 207 I. C. 430=16 R.M. 134=1943 M.W.N. 314 (2)=44 Cr.L.J. 642=A.I.R. 1943 Mad, 509=(1943) 1 M.L.J. 485.

### CR. P. CODE (1898), S. 488.

—S. 488—Wife's claim—Husband member of joint Hindu family—Order—Form of—If can be against family. Hemibal v. Kundibal. [See Q. D. 1936-40, Vol. 1, Col. 3341.] I.L.R. (1941) Kar. 58=192 I.C. 340=13 R.S. 188=42 Cr.L. I. 278.

S. 488 (3)—"Sufficient cause"—Adjudication as insolvent. See RADHARANI DASSI v. MATI LAL SEN. [See Q.D. 19:6-40, Vol. I, Col. 2873] I.L.R. (1940) Z Cal. 525=192 I.C. 185

=13 R.C. 305=42 Cr.L.J. 250.

S. 488 (3)—Sufficient cause—Adjudication in insolvency—Effect of. EMPEROR v. MAHOMED HUSSAIN. [See Q.D. 1936 40, Vol. I, (oi. 2873.] 191 I.C. 198—13 R.B. 156—42 Cr.L. J. 101.

— S. 488 (3) and 489—"Sufficient cause"— Marriage of daughter for whose maintenance order has been made—If valid defence to application for enforcement of order—Separate appli-

cation-Necessity.

It is open to a person against whom an order for maintenance has been made in favour of his daughter to set up the marriage of that daughter as a "sufficient cause" within the meaning of S. 488 (3), Cr. P. Code, for failure to comply with the order, as a valid defence to an application for enforcement of the order of maintenance. It is not necessary that he should file a separate application under S. 489, Cr. P. Code. (Byres, J.) Suryanarayana v. Sundaramma. I.L.R. (1944) Mad. 69=206 I.C. 598=16 R.M. 16=44 Cr.L.J. 540=56 L.W. 106=1943 M.W. N. 127=A.I.R. 1943 Mad. 416=(1943) 1 M.L. J. 179.

The proviso to sub-S. (3) of S. 488, Cr. P. Code, is a proviso to that sub-section only and is not a proviso to sub-S. (1) (Blacker, J.) RAM SINGH v. RAM BAI. 208 I.C. 629=16 R.L. 101=44 Cr. L. J. 802=45 P. L.R. 218=A.I.R. 1943 Lah. 223.

S. 488 (4)—Applicability—Helpless wife ill-treated by husband—Submission to amount agreed upon by Panchayat—If living separately by mutual consent—Right to order.

It cannot be said that where a woman, who is helpless and has been ill-treated by her husband, has to submit, or thinks she has to submit, to a sum agreed upon by her Panchayat, she is living separately by mutual consent within the meaning of S. 488 (4), Cr. P. Code. (Davis, C. J. and Weston. J.) TEKCHAND v. KALAVANTEAI. I.L. R. (1941) Kar. 417=197 I.C. 849=14 R.S. 130=43 Cr.L.J. 290=A.I.R. 1941 Sind 214.

----S. 488 (4)—"Sufficient reason"—Burden of proof—Duty of Court.

It is not stated in S. 488 (4), Cr. P. Code, on whom lies the burden of proving whether the reasons for the wife refusing to live with her husband are sufficient or not. However, on general principles where the Court has found a prima facie case of neglect by the husband to maintain the wife, if an order is not to be passed on account of this sub-section, it is for the husband to show that the sub-section is applicable and that either the wife is guilty of adultery or that she is unreasonably refusing to live with him, or that they are living separately by mutual consent. The words "without any sufficient reason" in S. 488 (4), Cr. P. Code, are objective and not subjective. The wife's main-

tenance cannot be refused merely because on account of her poverty of expression or her failure to understand her own motives she is unable to analyse and state fully her reasons for refusing to go back to her husband. It is for the Court to examine the circumstances and see if those circumstances are or are not sufficient to justify the wife's refusal to accept the husband's offer. (Blacker, J.) RAM SINGH v. RAM BAL 208 I.C. 629=16 R.L. 101=44 Cr.L. J. 802=45 P.L.R. 218=A.I.R. 1943 Lah. 223.

-S. 488 (5)—Cancellation—Effect—Order for maintenance in favour of wife-Cancellation on ground of wife living in adultery-Retro-

spective effect.

There is no justification for the view that an order for maintenance is to be treated as a good and executable order until it is cancelled or set aside. Where an order for maintenance in favour of a wife is cancelled under S. 488 (5), Cr. P. Code, on the ground that the wife was living in adultery, such cancellation has the effect of extinguishing the wife's right not only in regard to future maintenance but also as regards the arrears of maintenance accrued due in the past. A magistrate cancelling the order cannot make an order for payment to the wife of the make an order 101 payment to the date of cancellation. (Broomfield and Wassoodew, JJ.) Sancaula Gillappa v. Gillappa Karlyeppa. I.L.R. GAVVA GULAPPA v. GULAPPA KARIYEPPA. I.L.R. (1942) Bom. 776=202 I.C. 328=15 R.B. 161=43 Cr.L.J. 826=44 Bom.L.R. 614=A.I.R. 1942 Bom. 258.

-S. 488 (6) - Scope - Non-compliance-

Effect on order for maintenance.

The direction in Cl. (6) of S. 488, Cr. P. Code, is peremptory; and if the evidence on which an order under S. 488, Cr. P. Code, against the husband or the father is made, has not been taken in the presence of the husband or the father, as the case may be, and if his personal attendance has not been dispensed with, the order is illegal as it contravenes S. 488 (6) and must be set aside. (Davis, C.J. and Weston, J.) RUPCHAND ISSARDAS v. EMPEROR. I.L.R. (1941) Kar. 415=199 I.C. 367=14 R.S. 186=43 Cr.L.J. 551=A.I R. 1942 Sind 32.

-Ss. 488 (7), 439—Costs of revision appli-

cation.

S. 488 (7), Cr. P. Code, gives the High Court power to make such order as to costs as it considers just while dealing with an application under S. 488 in revision. (Sharpe and Blagden, JJ.) MA TIN TIN v. MAUNG AYE. 1941 Rang. L.R. 65=195 I.C. 190=14 R.R. 24=42 Cr.L.J. 690=A.I.R. 1941 Rang. 135.

-Ss. 489 (2) and 488—Civil suit subsequent to order under S. 488—Decree—Subsequent procedure. U. Arzeina v. Ma Kyin Shwe. [See Q. D. 1936-'40. Vol. I, Col. 3341.] 192 I.C. 439 =13 R.R. 180.

-S. 489 (2)—Construction—Discretion of Magistrate—Order by Civil Court for restitution of conjugal rights in favour of husband—If ipso facto cancellation of order of maintenance of wife.

It cannot be held that the effect of an order of a Civil Court granting restitution of conjugal rights to a husband would automatically put an obtained by the wife under S. 488, Cr. P. Code.

# CR. P. CODE (1898), S. 491.

The Magistrate is not absolutely bound to cancel the order for maintenance under S. 489 (2), on the application of the husband because a Civil Court has made an order for restitution of conjugal rights. The Magistrate has a discretion which must be exercised judicially. He is entitled. ed, and indeed bound, to satisfy himself that the applicant is bona fide prepared to give effect to order of the Civil Court and that he is prepared to offer his wife a house which she ought to accept. The mere fact that the Civil Court is satisfied on that point does not justify the Magistrate in surrendering his judgment. He must be satisfied. (Beaumont, C.J. and Rajahdhyaksha, J.) FAKRUDDIN SHAMSUDDIN v. BAI JENAB. 210 I.C. 478=45 Cr.L.J. 271=16 R.B. 253=45 Bom. L.R. 897=A.I.R. 1944 Bom. 11.

-S. 491. Appeal.

Application under.

Competent Court.

Conviction by Court-martial.

Costs.

Detention under Defence Rules.

Detenue released.

Discretion to order production of order of detention.

Jurisdiction of High Court. Nature of Proceedings. Power of High Court.

Right of detenue to be released. Scope.

S. 491—Appeal—Order of discharge or directing discharge upon application for writ of habeas corpus—Appeal to Federal Court and to Privy Council—Competency—English law—

Government of India Act (1935), S. 205.

The right of appeal given by S 19 of English Judicature Act (1873) does not include an appeal against an order of discharge made upon a writ of habeas corpus. The position under the Cr. P. Code, is the same. There is no provision in the Code for an appeal from an order under S. 491, Cr. P. Code, there being no conviction or acquittal. But under the special terms of S. 205, Government of India Act, an appeal would lie to the Federal Court and to the Privy Council from an order of the Federal Court. S. 205 provides an exception referred to in S. 404, Cr. P. Code. (Lord Thankerton.) F.M.PEROR V. SIENATE BANERJI. 221 I.C. 243=1945 F.L. J. 222=50 C.W.N. 25=12 B.R. 142=1945 P.W.N. 498= 1945 M.W.N. 546=A.I.R. 1945 P.C. 156= (1945) 2 M.L.J. 325 (P.C.).

-S. 491—Application on behalf of detenue

under R. 129 of D. O. I. Rules—Affidavit on behalf of Crown—Necessity for.

If an issue of fact is raised in an application under S. 491, Cr. P. Code, on behalf of a person detained under R. 129 of the Defence of India Rules, then an affidavit in reply refuting the facts or explaining them away by the Crown is necessary; otherwise the truth of the facts alleged will normally be accepted. (Din Mahomed and Teja Singh, JJ.) BESHESHER DAYAL v. EMPEROR. 221 I.C. 577=47 P.L.R. 416=A.I.R. 1946 Lah. 36.

-S. 491—Application under—Forcible removal of Greek seaman for repatriation to Eqypt. (Derbyshire, C.J. and Lodge, J.) LEO ZEPANTIS

v. Emperor. See 211 I.C. 373=16 R.C. 651=45 Cr.L J. 380=A.I.R. 1944 Cal. 76.

—S. 491—Application under—Maintainability—Arrest under S 42 of the Frontier Crimes Regulation. See Frontier Crimes Regulation, See Frontier Crimes Regulation, Ss. 60 and 40 and Cr. P. Code, S. 491. A.I.R. 1945 Pesh. 12.

-S. 491—Application by detenus from jail—

Impropriety of withholding them.

Petitions under S 491, Cr. P. Code, addressed to the High Court should be forwarded for disposal without delay. A petition may appear to be frivolous or may appear to afford no ground whatever for the release of the detained person, but it is only the High Court which can decide such matters. Persons unreasonably withholding such petitions will be rendering them-selves liable to proceedings for interfering with the due course of justice. (Harries, C.J., Blacker and Munir, JJ.) BALDEV MITTER v. EMPEROR. 213 I.C. 327=17 R.L. 55=1944 F.L.J. 149= 45 Cr.L. J. 711=A.I.R. 1944 Lah. 142 (F.B.).

-S. 491—Application defective in form— Rejection if can be left to Provincial Government. It is undesirable that the question of rejecting a petition under S. 491, Cr. P. Code, addressed to the High Court on the ground of alleged defects in its form should be left to any authority other than the High Court. (Agarwala, Meredith and Sinha, JJ.) BASANTA CHANDRA GHOSH v. EMPEROR. 23 Pat. 968=A.I.R. 1945 Pat. 44 (F.B.).

S. 491—Application under by person handed over to military under S. 549—Military authorities releasing him on bail before hearing of application

-Application, if becomes infructuous.

A person was handed over to the military under S. 549, Cr. P. Code, without any requisition of the military authorities under sub-S. (2) and without the Magistrate's order stating the offence as contemplated in sub-S. (1) of that section. He made an application under S. 491, Cr. P. Code, for directions of the nature of habeas corpus. But before the application was heard, the military authorities released him on bail having decided that he will be tried by the ordinary Criminal Court.

Held, that the application became infructuous. (Roxburgh and Ormond, JJ.) AMARENDRA CHANDRA CHAKRAVARTY v. GARRISON ENGINEER, 926 INDIAN WORKS SECTION. 221 I.C. 241—79 C.L.J. 213—A.I.R. 1945 Cal. 340.

S. 491 — Applications under— Duty of officials to forward without delay. See Contempt—Contempt of Court. A.I.R. 1944 Lah. 196 (S.B.).

-S. 491 —Application under-Jurisdiction— Original confinement within Jurisdiction-Subse-

quent removal to place outside the jurisdiction. Under S. 491. Cr. P. Code, the persons concerned must be within the limits of the appellate Criminal Jurisdication of the Court. Hence, where the persons concerned though arrested and at first confined within these limits are subsequently removed to places outside these limits, the Court has no jurisdiction to entertain an application under S. 491 in regard to them. (Thomas, C.J. and Bennett, JJ.) VISHAMBHAR DAYAL TRI-PATHI U. P. GOVERNMENT. 20 Luck. 338=218 I.C. 135=46 Cr. L. J. 419=18 R.O 9=1944 O. W.N. 415=1944 A.W.R. (C.C.) 274 (1)=1944 CR. P. CODE (1898), S. 491.

A.L.W. 546=1944 O.A. (C.C.) 274 (1)=A.I.R. 1945 Oudh 117.

S. 491—Conviction and sentence by competent Court—Power of High Court to review.

Under S. 491, Cr. P. Code, the High Court has

no jurisdiction to review a conviction and sentence passed by a Court of competent jurisdiction. (Pollock and Bobde, JJ.) DATTATRAYA VISHNU v. EMPEROR. I.L R. (1944) Nag. 728=219 I.C. 346=46 Cr.L.J. 598=18 R.N. 41=1944 F.L.J. 190=1944 N.L.J. 280=A.I.R. 1944 Nag.

S. 491—Conviction by Court-martial— Sufficiency of evidence—Power of High Court to consider.

The members of a Court-martial are the sole Judges of both law and fact. Whether there is evidence to sustain conviction is a question of law and the High Court cannot, therefore, go into the question of sufficiency of the evidence in proceedings under S. 491, Cr. P. Code. It would of course be different if the Court-martial convicted an accused person without hearing any evidence at all. (Harries, C.J., Abdur Rohman and Mahajan, JJ.) SARDAR JIT SINGH v. IMPERATOR. I.L.R. (1945) Lah. 419=47 P.L.R.

423 (F.B.).

-S. 491—Costs—Power to award. Per Agarwala, J:—The High Court has no power to grant the costs of an application under S. 491, Cr. P. Code. (Agarwala, Meredith and Sinha, JJ.) BASANTA CHANDRA GHOSH v. EMPEROR. 23 Pat. 968=A.I.R. 1945 Pat. 44 (F.B.). -S. 491-Detention under Defence of India Rules—Duty of Crown to place facts before. Court.

In cases where the liability of the subject is at stake, the High Court has a right to expect that the Crown will place all the facts before it frankly, or at any rate so much of the facts as will, without disclosing secret information, enable the Court 10 reach a conclusion on the issues raised. (Bose and Sen, JJ.) VIMLABAI DESHPANDE V EMPEROR. I.L.R. (1945) Nag. 6=

A TR 1945 Nag. 8 A.I.R. 1945 Nag. 8.

-S. 491—Detention under Defence of India Rules-Issue of fact-Affidavit by Crown-Desi-

When no issue of fact requiring an answer is raised in an application under S. 491, Cr. P. C., it is not necessary for the Crown to file an affidavit in the first instance, though it is always wise to do so. But if an issue of fact is raised in the application then an affidavit in reply refuting the facts, or explaining them away, is always necessary, and should be filed along with the return so as to obviate unnecessary delay. Otherwise the truth of the facts alleged will normally be accepted. (Bose and Sen, JJ.) VIMLABAI DESHPANDE v. EMPEROR. I.L.R. (1945) Nag. 6=A.I.R. 1945 Nag. 8.

-S. 491—Detenue released—Court, if can go into merits of detention.

After a detenue is released the High Court cannot go into the merits of his arrest and detention under S. 491, Cr. P. C. (Harries, C.J., Abdul Rashid and Abdur Rahman, JJ.) Homi RustomJi v. Sub-Inspector, Baig. 217 I.C. 78=17 R.L. 219=46 Cr.L.J. 174=AI.R. 1944 Lah. 196 (S.B.).

-S. 491-Direction of Court-Order on Crown to produce order of detention-Duty of

When the High Court calls upon the Crown to produce an order of detention, it is the duty of the Crown to produce the order or take the consequences. It is no part of the Court's duty to run from office to office and from one subordinate official to another seeking for something which will justify it in keeping a man in jail. The High Court will not act on copies, still less on uncertified copies. The original order of detention must be produced before it. (Bose and Sen, IJ.) GOKUL CHAND v. EMPEROR. I.L.R. (1945) Nag. 731=1945 N L.J. 206=A.I.R. 1945 Nag 203.

-S. 492—Jurisdiction—Detention under R. 26, Defence of India Rules-Writ of habeas corpus—Jurisdiction to issue—Power to go behind reasons for detention—Power to challenge bona

fides of Government.

There is no doubt that the High Court has jurisdiction under S. 491, Cr. P. Code, to require a person detained under the Defence of India Rules to be brought before it with a view to satisfying itself that the detention is legal. But it is not open to the High Court, or any other Court, to go hehind the reasons given by Government for the detention. It is not open to the Court to inquire into the reasons which induced the Government to think that the arrested person was likely to act in the manner specified in the rule. Therefore, normally if a man is detained under R. 26 of the Defence of India Rules, it is useless for the Court to make an order under S. 491, Cr. P. Code for his production in Court. It is, however, open to a person detained under the rule to challenge the bona fides of Govern-ment, and to show that Government were not really of the opinion stated in their order, but were induced by some different reason to detain the detenue But the Court will normally require definite evidence that a charge of lack of bona fides can be preferred against Government in the matter. The Court will not normally make an order under S. 491, Cr. P. Code, unless there is evidence before it to suggest that the order of Government under R. 26 of the Defence of India Rules was not made bona fide. (Beaumont, C.J. and Weston, J.) MANUBHAI BHIKABHAI In re. I.L.R (1943) Bom 433=206 I.C. 450=16 R.B. 51=44 Cr L J. 661=45 Bom.L.R. 316=A.I.R. 1943 Bom. 194.

-S. 491—Jurisdiction of High Court—When barred by order under R. 26, Defence of India

Rules-Burden of proof.

Before the jurisdiction of the High Court under S. 491, Cr. P. Code, can be barred by rea-son of an order under R. 26 of the Defence of India Rules, it must be first proved by the Crown that there was an order of Government passed under R. 26 of the Defence of India Rules; and secondly the Crown must show that Government was satisfied that an order under that rule was necessary with a view to preventing the particular person in question from acting in any of the ways specified in the rule. It is not necessary for the Crown to show that the Governor had actually Revor, JJ.) Kali Prasad Upadhya v. Ementertain applications under that section. If, however, after entertaining an application under

CR. P. CODE (1898), S. 491.

1945 P.W.N. 169=11 B.R. 295=46 Cr.L.J. 460 =A.I R. 1945 Pat. 59.

-S. 491-Nature of proceeding-Civil or Criminal.

Per Mitter, J .- A habeas corpus proceeding (a proceeding under S. 491, Cr. P. Code is of the same nature) is in essence a civil proceeding, for it is concerned with the private right of a citizen, namely, the right of personal liberty. (Derbyshire, C.J., Mitter and Khundkar JJ.) NIHA-RENDU | )UTTA MAZUMDAR, In re. I.L.R. (1944) 1 Cal 489=47 C.W.N. 854=A.I.R. 1945 Cal. 107 (S.B.)

-S. 491-Power of High Court-Detention beyond its appellate criminal jurisdiction.

The High Court can pass orders under S. 491, Cr P. Code, only if the person in whose favour the order is passed is illegally detained within the limits of its appellate criminal jurisdiction. (Puranik and Hemeon, JJ.) V. M. SARANGAPANI V. EMPEROR. I.L.R. (1945) Nag. 862=1945 N. L.J. 573=A.I.R. 1946 Nag. 20.

-S. 491-Powers of High Court-Detention under R. 129 of Defence of India Rules.

The power of the High Court to issue a direction under S. 491, Cr. P. Code, has not been taken away in regard to persons detained under R. 129, Defence of India Rules. If an issue of want of good faith is raised, the High Court is entitled to enquire into the allegations made. Further in a matter under R 129 as contrasted with R. 26 of the Defence of India Rules, the High Court can and must enquire into the reasonableness of the suspicion which justifies the detention, the burden being on the Crown. (Bose and Sen, II.) VIMLABAT DESHPANDE V. EMPEROR. (1945) Nag. 6=A.I.R. 1945 Nag. 8.

S. 491—Powers of High Court—If barred by S. 26, Special Criminal Courts' Ordiance. See Special Criminal Courts' Ordinance, S. 26

\_\_\_\_S. 491—Powers of High Court—Person detained under R. 26, Defence of India Rules— Copy of order not supplied to detenue—If justifies High Court in issuing rule—Original order—Duty of Crown to exhibit. See Defence of India Rules, R. 26 (1) (b). 23 Pat. 252.

-S. 491—Powers of High Court—Delention

under Defence of India Act.
The jurisdiction vested by S. 491 (b), Cr. P. Code. can be exercised only if the High Court is satisfied that the detention is illegal or improper. In the consideration of this question all that the Court has to see is whether or not the detention is in conformity with the dictates of law, but it is not within the province of the Court to embark on an inquiry as to whether the enactment under which a person is detained is a proper and well advised legislation. It is, however, clear that, in cases in which, even though the forms of law have been observed, the detention constitutes a clear fraud on an enactment or amounts to an abuse of the powers given to the executive by the Legislature, it is the duty of the Court to step in and to order that the person detained be set at liberty. Neither S. 16 of Defence of India Act nor R. 26 of the Defence of India Rules nullifies the jurisdiction created by S. 491, Cr. P. Code. That jurisdiction remains intact and the High

that section, it transpires that the detention is not illegal or improper, the application will fail on the merits The High Court cannot act as a Court of appeal from the discretionary order passed by the Commissioner under R. 26 of the Defence of India Rules and inquire into the grounds which led the Commissioner to pass that order. (Iqbal Ahmad, C.J., Verma and Yorke, JJ.) HARISH CHANDRA V. EMPEROR. I.L.R. (1943) All. 773=208 I C. 194=16 R A. 70=44 Cr.L.J 722=1943 O.W.N. (H.C.) 238=1943 O.A. (H.C.) 135=1943 A.L.W. 395=1943 A.L.J. 336=1943 A.Cr. C. 91=1943 A.W.R. (H.C.) 135=A.I.R. 1943 All. 277 (F.B.).

\_\_\_\_S. 491—Powers of High Court—Detention

under Defence of India Act.

The rights conferred by S. 491, Cr. P. Code, subsist, and will continue to subsist until either the section is expressly, or by neces-sary and express implication, abrogated, or the rights are expressly taken away. The Defence of India Act and the rules made thereunder do not render this section nugatory. Although the Defence of India Act is a war measure some limit must be placed upon claims to the arbitrary exercise of absolute power in matters connected with the restraint of a man's liberty, and unless such powers are unmistakably conferred either expressly or by necessary implica-tion, they must be taken, at the very least, to be subject to the right of a person detained to come before the High Court under S. 491 and complain of that detention and demand that he be either dealt with according to law or be set at liberty. This is particularly so when the very arbitrary powers are exercisable not only by the Provincial Government or by some responsible Minister of Member of Council, or Adviser, but by any District Magistrate and even by certain Sub-Divisional Magistrates. (Pollock Bose, JJ.) PRABHAKAR KESHEO TARE v. EMPEROR. ILR. (1943) Nag. 154-205 I.C. 5= 15 R.N. 178=44 Cr.L.J. 345=1943 N.L.J. 1= A.I.R. 1943 Nag. 26.

\_\_\_\_\_S. 491—Power of High Court apart from section.

Per Niyogi and Digby, JJ.—The High Court has no power to issue a writ of hibeas corpus apart from and independent of S. 491, Cr. P. C. (Grille, C.J. on difference between Niyogi and Digby, JJ.) SITAO JHOLIA DHIMAR v. EMPEROR. I.L.R. (1943) Nag 73=205 IC. 161=15 R N. 187=44 Cr.L.J. 257=6 F.L.J. (H.C.) 53=1943 N.L.J. 16=A.I.R. 1943 Nag. 36.

Habeas Corpus proceedings.

The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings, cannot be invoked in habeas corpus proceedings. If at any time before the Court directs the release of the detenue, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. (Spens, C.J., Varadachariar and Zafrulla Khan, JJ.) BASANTA CHANDRA GHOSE v. EMPEROR. (1945) F.C.R. 81=24 Pat. 187=1L. R (1945) Kar. (F.C.) 13=219 I.C 287=18 R. F.C. 6=47 P.L.R. 90=47 Bom.L.R. 396=80 C.

CR. P. CODE (1898), S. 494.

L J 1=1945 M.W.N. 445=46 Cr L.J. 559= 1945 P.W.N. 101=49 C.W.N. (FR.) 56= (1945) F.L.J. 40=A.I.R. 1945 F.C. 18=(1945) 1 M.L.J. 365.

S. 491—Scope—Conviction and sentence by Special Court under Special Criminal Courts' Ordinance—Powers of High Court. See Cr. P. Code, Ss. 435, 439 AND 491. A.I.R. 1943 Pat. 18

S. 491 (b)—Scope—Illegally detained—Case taken cognizance of before Special Criminal Court's Ordinance—Trial under ordinance—Conviction—Legality—Release of convicted persons—Power of High Court. See Special Criminal Courts Ordinance (II of 1942). 9 Cut.L.T. 35.

——S. 491 (1) (e)—Scope—Accused wrongly tried by special Court when he ought to have been tried by ordinary Court—Effect—Application to High Court—Proper order.

An application under S. 491, Cr. P. Code, is a proceeding to determine the right of a subject, on whose behalf the application is made, to his personal liberty. Where an accused who ought to have been tried by an ordinary Criminal Court is tried and convicted without jurisdiction by a special Court, his detention in jail as a convict is improper and indeed illegal. But it does not necessarily follow that he is entitled to be set at liberty, when there is a charge against him to which he has no answer. Since he has been wrongly tried in one Court when he ought to have been tried by another Court, it must be held that there has been no trial at all, and he must be remanded to be tried by the proper ordinary Court under the powers given under S. 491 (1) (e), Cr. P. Code. (Meredith and Shearer, JJ.) SUKHDEO CHOWDHURY V. EMPEROR. 208 I.C. 322 P.L.T. 85=A.I.R. 1943 Pat. 288.

——Ss. 494 and 435—Application to trial Magistrate to recommend withdrawal of case to District Magistrate—Refusal by Magistrate—Revision.

An accused put in an application in the Court of the trial Magistrate asking him, to recommend to the District Magistrate that the case against him may be withdrawn. The Magistrate wrote an order that it was not for him to decide whether the case should be prosecuted or not, and that the accused could apply either to the District Magistrate or to the High Court. On this the accused filed a revision petition before the Session Judge.

Held, that the revision petition was not competent, and that even if it was, there was no ground for revising the order, as the order which the Magistrate was asked to make, and refused to make, was one which he had no legal power to make at all and his refusing to make it was therefore clearly correct. (Blacker, J.) CHAMAN LAL v. EMPEROR. 46 P.L.R. 120=16 R.L. 165=45 Cr.L.J. 162=209 I.C. 598=A.I.R. 1945 Lah. 304.

——S. 494—District Magistrate authorising withdrawal of case pending before Subordinate Magistrate.

Zafrulla Khan. JJ.) BASANTA CHANDRA GHOSE v. It is improper for a District Magistrate to EMPEROR. (1945) F.C.R. 81=24 Pat. 187=I.L. authorise the withdrawal of a case pending before R (1945) Kar. (F.C.) 13=219 I.C 287=18 R. a Subordinate Magistrate. (Davis, C.J. and F.C. 6=47 P.L.R. 90=47 Bom.L.R. 396=80 C. Weston, J.) EMPEROR v. MILANMAL HARDASMAL.

208 I.C. 533=16 R.S. 79=44 Cr.L.J. 795= A.I.R. 1943 Sind 161.

S. 494—Duty of Court — Withdrawal—

Reasons—Necessity to give. Under S. 44, Cr. P. Code, a Magistrate must give reasons for permitting the withdrawal of a case. Phrases like "in the administration of justice," and "grounds of public policy" are high sounding and meaningless, and are not good and proper reasons. (Davis, C.J. and Weston, J.) EMPEROR v. MILANMAL HARDASMAL. 208 I.C. 538=16 R.S. 79=44 Cr.L.J. 795=A.I.R. 1943 Sind 161.

-S. 494—Duty of Magistrate—Permission to Public Prosecutor to withdraw from prosecution —Reasons for granting—If to be recorded.

The language of S. 494, Cr. P. Code, does not require the Magistrate to record reasons for permitting a Public Prosecutor to withdraw from a prosecution. The words "Any Public Prosecutor may withdraw," clearly imply that the prosecution referred to must be one which is already being conducted by the Public Prosecutor and unless the Public Prosecutor is already in charge of the prosecution, he cannot withdraw from it. (Wadia and Sen, JJ.) RATANSHAH KAVASJI v. KEKI BUHRAMSHA. I.L.R. (1945) Bom. 141= 218 I.C. 257=18 R.B. 21=46 Cr.L.J. 434=46 Bom. L.R. 808=A.I.R. 1945 Bom. 147.

-S. 494—Duty of Magistrate to exercise cendent judgment. FAKIR CHAND RAM independent judgment. KRISHIN v. MURAD UMAR. [See Q. D. 1936-40, Vol. I, Col. 3342] I.L.R. (1941) Kar. 32=13 R.S. 163=191 I.C. 440=42 Cr.L.J. 182.

·S. 494—Extraneous reasons—If proper. FAKIR CHAND RAM KRISHIN v. MURAD UMAR. [See Q. D. 193: '40, Vol. I, Col. 3342.] I.L.R. (1941) Kar. 32=13 R.S. 163=191 I.C. 440=42 Cr.L.J. 182.
S. 494—Ground for withdrawal—Admis-

sion of guilt.

If a man admit his guilt he ought to be convicted and punished after trial. It is not a ground for allowing the withdrawal of the prosecution against him. (Bose, J.) RAMSARAN v. EMPEROR, I L.R. (1945) Nag. 515=220 I.C. 319=18 R. N. 65=46 Cr.L.J. 731=1944 N.L.J. 515=A.I. R. 1945 Nag. 72.

-Ss. 494 and 337 (1)—Offences coverrd by S. 337 (1)—Consent for withdrawal—If may be

given.

In a case of offences covered by S. 337 (1), Cr. P. Code, it would be a wrong exercise of discretion to consent under S. 494, Cr. P. Code, to the withdrawal of the prosecution against one of the accused persons with a view to his being examined as a witness against the others. S. 337 (1) is meant to be used as the normal procedure in all cases where it applies, and even if an alternative procedure is permissible, exceptionally strong reasons must be disclosed for resorting to it. (Bose, J.) RAMSARAN v. EMPEROR. I.L.R. (1945) Nag. 515=220 I.C. 319=18 R.N. 65=46 Cr L J. 731=1944 N.L.J. 515=A.I.R. 1945

-S. 494—Public Prosecutor — Duty of -Showing of instructions of District Magistrate to Subordinate Magistrate-Propriety

It is improper for the Public Prosecutor to show the instructions of the District Magistrate for the withdrawal of a case to his Subordinate

CR. P. CODE (1898), S. 495,

Magistrate and thereby bring improper pressur to bear upon him to permit the withdrawa (Davis, C.J. and Weston, J.) EMPEROR v. MILAN MAL HARDASMAL. 208 I.C. 533=16 R.S. 79=44 Cr.L J. 795=A.I.R. 1943 Sind 161.

S. 494—Reasons for permitting withdrawa -Duty of Court to record. FAKIR CHAND RAD KRISHIN v. MURAD UMAR. [See Q. D. 1936-40 Vol. I, Col. 3342.] I.L.R. (1941) Kar. 32=11 R.S. 163=191 I.C. 440=42 Cr.L.J. 182.

-S. 494-Scope-Charge of serious offence -Order permitting withdrawal without record ing evidence as to facts capable of proof-

Propriety.

A false attempt to have a relation confined in a mental hospital or to have him deprived of the control of his property, by making false allegations that a person is a lunatic in order that action under the Lunacy Act may be taken against him, is an offence which cannot be looked on with tolerance. When the facts in such a case are capable of proof, it is grossly improper to order withdrawal of a prosecution for such an offence on mere surmises without evidence being recorded as to the facts. (Davis, C.J. and Weston J.) EMPEROR v. GUHRAM GUL MARO-MED. I L.R. (1943) Kar. 100=210 I.C. 14=16 RS. 145=45 Cr.L.J. 169=A.I.R. 1943 Sind 162.

S. 494-Withdrawal of case-Grounds for Absence of evidence-"Public policy."

Where it is quite clear a case must fail because there is no evidence on which it can succeed, that may be a good ground for withdrawal from the prosecution and the Public Prosecutor can say so and it will not be necessary to invoke the lose and specious term 'public policy' which is an im-proper reason for the withdrawal of any case. Ordinarily, however, it should be left to the trial Magistrate in his free and judicial discretion to dismiss a complaint. (Davis, C.J. and Weston, J.) EMPEROR v. SITALDAS. I.L.R. (1943) Kar. 13=207 I.C. 192=16 R.S. 16=44 Cr.L.J. 612. =A.I.R. 1943 Sind 109.

-S. 495-Duty of Magistrate-Application for permission—Proper authority to deal with— Engagement of Advocate privately engaged by complainant - Propriety. AHMED MAHOMED Ismail v. Emperor. [See Q. D. 1936-'40, Vol. I, Col. 3342]. 191 I.C. 378=13 R.S. 156=42 Cr. L.J. 158.

S. 495 (1) and (4)—Applicability—Case under S. 110—Police officer inquiring into case— Application for permission to conduct case before Magistrate on behalf of prosecution-Propriety of. EMPEROR v. ANANDYA SAMBHYA. [See Q. D. 19'6'40, Vol. I, Col. 3342.] 13 R.B. 194=191 I.C. 334=42 Cr.L.J. 150.

-S. 495 (4)—Applicability—Security proceedings

S. 495 (4), Cr. P. Code, does not in terms apply to proceedings under Chap. VIII. It may be that by analogy it is not desirable that a police officer should conduct a case under Chap. VIII if he has taken part in the investigation, and if he should apply for permission under sub-S. (1) to do so, such permission may very properly be refused. But there is no provision of law which prevents a Magistrate from granting such permission. (Davis, C.J. and Weston, J.) EMPEROR v. MANICK. I.L.R. (1943) Kar. 22=203 I.C.

90=15 RS. 72=44 Cr.L.J. 44=A.I.R. 1943 Sind 54.

-S. 496—Applicability and scope—Power to grant bail to person convicted of an offence or against whom order under S. 118 has been passed.

S. 496, Cr. P. Code, can have no application once a person has been convicted of a substantive offence or has been ordered under S. 118, Cr. P. Code, to furnish security. It can apply during the pendency of criminal proceedings whether in regard to an offence or under Ch. VIII of the Cr. P. Code. It only covers the case of accused persons and not persons who have been convicted of an offence. (Lobo and Weston, JJ.) EMPEROR v. RASULBUX. I.L.R. (1942) Kar. 278=205 I.C. 322=44 Cr.L.J. 378=15 R.S. 136 =A.I.R. 1942 Sind 132.

-Ss. 496 and 497—Applicability—Offences under Defence of India Act and Rules—Right of accused to be released on bail. See Defence OF INDIA ACT, R. 130-A (b). (1941) 2 M.L.J. 1014.

-S. 495-Bail-Cancellation - Non-bailable offence—Accused tampering with prosecution witnesses—Power of District Magistrate.

In the case of a non-bailable offence, bail is merely a concession which can be withdrawn, if abused. Bail may, therefore, be cancelled on the ground that the accused is tampering with the prosecution witnesses. But it is not for the District Magistrate either to grant or cancel bail but for the Magistrate seised of the case. (Blacker, J.) PRITAM SINGH v. RAGH SHARAN. (Blacker, J.) PRITAM SINGH v. RAGH SHARAN. 212 I.C. 135=16 R.L. 261=45 Cr.L.J. 548=46 P.L.R. 31=A.I.R 1944 Lah. 95

-S. 496—Bail— Emergency legislation— Principles.

The fact that the offence is one under emergency legislation will not alter the recognised principles on which laws are enforced in Courts. The considerations which are material for granting or refusing bail are the nature of the accusation, the nature of the evidence, the severity of the punishment which conviction will entail and the character, means and standing of the accused. (Niyogi, J.) INGLEY v. EMPEROR. I.L.R. (1944) Nag. 813=217 I.C. 207=17 R.N. 106=46 Cr.L. J. 247=1944 N.L.J. 75=A.I.R. 1944 Nag. 149.

-Ss. 496 and 497—Bail pending investigation-Materials which Court has to take note of -Test of admissibility in evidence, if relevant at that stage.

Where bail is sought pending investigation the Court has to make use of the materials before it as it then is and not as it will appear after evidence has been taken in Court. At that stage any objections as to the admissibility of the Any objections as to the admissionity of the evidence before the Court would be premature. (Madeley, J.) EMPEROR v. B. B. SINGH. 208 I. C. 293=16 R.O. 84=44 Cr.L. J. 770=1943 A. W.R. (C C.) 72=1943 A.Cr.C. 103=1943 O.A. (C.C.) 176=1943 A.L.W. 417=1943 O.W.N. 234=A.I.R. 1943 Oudh 419

-Ss. 496 to 502 and 426—Bail to convicted person-Power of High Court to grant-Special leave to appeal obtained by him from Privy Council.

Chap. 39 of Cr. P. Code (which consists of Ss. 496 to 502 inclusive) together with S. 426 is, CR. P. CODE (1898), S. 497.

haustive statement of the powers of a High-Court in India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail. The scheme of Chap. 39 is that Ss. 496 and 497 provide for the granting of bailto accused persons before trial, and the other sections of the chapter deal with matters ancillary or subsidiary to that provision. The only provision in the Code which refers to the grant of bail to a convicted person is S. 426. The High Court has no power to grant bail to a convicted person, and the fact that he has obtained special leave from His Majesty in Council to appeal from his conviction or sentence makes no difference in this regard. (Lord Russel of Killowen) LALA JAI-PAM DAS v EMPEROR. 72 I A 120=ILR. RAM DAS v. EMPEROR, 72 I A 120=I LR. (1945) Lah. 57=220 I.C 91=18 R.P.C. 47=49 C.W.N. 477=1945 M.W.N. 366=58 L.W 343 =47 Bom L.R. 634=1945 N.L.J. 425=1945 A. L.J. 340=11 B.R. 493=26 P.L.T. 217=46 Cr. L.J. 662=A.I.R. 1945 P.C. 94=(1945) 2 M.L. J. 40 (P.C.).

-S. 496—Charge-sheet for bailable offences -Bail granted with condition-Validity.

The accused who were charge-sheeted by the police under Ss. 147, 148, 447, 324 and 323. Indian Penal Code, applied for bail and the Magistrate granted bail under S. 496, Cr. P. Code, subject to a condition that " they will not enter on the disputed land till the disposal of the case."

Held, that as the offences with which the accused were charged were bailable offences with regard to which the Magistrate had no discretion in the matter of granting bail, the extraneous condition imposed by the Magistrate in granting bail was not authorised by law, and should therefore be deleted. (Horwill, I.) APPALA KONDA, In re. 204 I.C. 88=15 R M. 776=44 Cr.L.J. 202=55 L W. 693 (2)=1942 M.W.N. 749 (2) =A.I.R. 1942 Mad. 740=(1942) 2 M.L.J. 553. S. 496-Power of Magistrate to demand cash deposit.

A magistrate is not authorised to demand a a cash deposit as a condition to the release of the accused on bail. (Agarwala and Brough, JJ.)
RAJBALLAM SINGH v. EMPEROR. 22 Pat. 726=
1943 P.W.N. 252=24 P.L.T. 229=211 I.C. 240
=10 BR. 347=16 RP. 237=45 Cr.L.J. 340 =A.I.R. 1943 Pat. 375.

S. 496—Scope—If abrogated by R. 130-A. Defence of India Rules. See Defence of India Rules, R. 130-A. 45 Bom. L.R. 72.

-S. 497—Bailbond— Cancellation—Accused setting up alibi-If sufficient ground.

The fact that the accused who has been enlarged on bail has filed a petition setting up an alibi in defence, is not such a conduct on his part as would make it necessary to cancel his bail bond. (Varma, J.) Kunja Bihari (Handra v. Emperor. 196 I.C. 476=14 R.P 210=42 Cr.L. J. 882=8 B.R. 29=A I.R. 1942 Pat. 52 (1).

-S. 497—Discretion—District Magistrate forwarding application to subordinate Magistrate -Endorsement of his inclination or disinclination -Propriety.

The discretion to be exercised under S. 497, Cr, P. C. by Magistrates is a judicial discretion Ss. 496 to 502 inclusive) together with S. 426 is, according to law. It is improper for a District and was intended to contain, a complete and ex- Magistrate who forwards an application for bail CR. P. CODE (1898), S. 497,

to a subordinate magistrate to indicate his inclination or his disinclination to the granting of bail to the applicant. (Davis, C.J. and Tyabji, J.) EMPEROR v. ABUBAKAR. I.L.R. (1941) Kar. 281= 195 I.C. 178=14 R.S. 16=42 Cr.L.J. 703=A.I. R. 1941 Sind 83.

-S. 497-Order granting bail made without

jurisdiction-Duty of Magistrate.

The proper thing for a magistrate to do, when it is clear that the order of bail he has passed is without jurisdiction, is to commit the accused forthwith to custody. There is no room for his passing an interim order allowing the accused to remain on bail till a final order cancelling his bail is passed. (Davis, C. J. and Tyabji, J.) EMPEROR v. ABUBAKAR. I.L.R. (1941) Kar. 281=195 I C. 178=14 R.S. 16=42 Cr.L.J. 703=A.I.R. 1941 Sind 83.

-S. 497—Scope—Grant of bail in anticipation to persons not arrested or detained-If justified.

S. 497, Cr. P. C. does not authorize and was not intended to authorize the grant by anticipation of bail to persons who are not arrested or detained. (Davis, C.J. and Tyabji, J.) EMPEROR V. ABUBAKAR. I.L.R. (1941) Kar. 281=195 I.C. 178=14 R.S. 16=42 Cr.L.J. 703=A.I.R. 1941 Sind 83.

-S. 497 (5)—Applicability—Bail granted under S. 498—Order for arrest—Power of High Court—S. 561-A—Jurisdiction of High Court.

Although S. 497 (5), Cr. P. Code, can have no application to the case of an accused person who has been released on bail under S. 498, Cr. P. Code, the High Court has, in special cases and under special cricumstances, adequate jurisdiction under S. 561-A, Cr. P. Code, to continue or to discontinue an order granting bail which enures for a limited period only, viz., pending investigation. Two accused persons were arrested by the police in connection with the death of a person who was alleged to have been murdered by two other persons in pursuance of a conspiracy to which the two accused were parties. Their application for bail was rejected by the Commissioner of Police, Madras, in his capacity as a Presidency Magistrate, but on an application to the Vacation Judge of the High Court, they were enlarged on bail pending the investigation of the case against them, on condition that they each executed a bond for Rs. 10,000, with two sureties each for Rs. 10,000, and they were directed immediately to leave Madras and not to visit or remain in Madras until the commencement of the trial of the case. Subsequently after the charge-sheet was filed, the Crown applied to the High Court for cancellation of the bail granted to the accused and for their re-arrest, and it was alleged that apart from the material available at the time when they were arrested and released on bail, there was further evidence con-necting them with the offence. It was objected on behalf of the accused that S. 497 (5), Cr. P. Code did not apply to the case of the accused who were released on bail under S. 498, Cr. P. \*Code, and that the bail granted could not be cancelled.

Held, that though different considerations might arise if the order granting bail was without

CR. P. CODE (1898), S. 499.

cancel the bail on the presentation of the chargesheet, and that in the circumstances of the case the High Court had adequate jurisdiction under S. 561-A, Cr. P. Code, to order the re-arrest of the accused and to order them to be committed to custody. (Byers. J.) CROWN PROSECUTOR, MADRAS v. N. S. KRISHNAN, 221 I C. 178=58 L.W. 131=1945 M.W.N. 435=A.I.R. 1945 Mad. 250=(1945) 1 M.L.J. 187.

-S. 497 (5) - Cancellation of bail-Grounds, Where since the granting of bail, fresh materials implicating the accused are discovered and there are grounds for believing that the accused was using his liberty for the purpose of causing the disappearance of witnesses and otherwise the disappearance of witheses and otherwise tampering with the evidence the bail can be cancelled. (Madeley, J.) EMPEROR v. B B. SINGH, 208 I. C. 293=16 R.O. 84=44 Cr. L. J. 770=1943 A.W.R. (C.C.) 72=1943 A.Cr. C. 103=1943 O. A. (C.C.) 176=1943 A.L.W. 417=1943 J.W.N. 224-A. I. B. 1042 Ord. 410 234-A.I.R. 1943 Oudh 419.

S. 498—Scope—Powers to grant bail—If restricted by S. 123 (2)—Person against whom order has been made under S. 118-Application for bail when case comes before Sessions Judge under S. 123-Powers of Sessions Judge to grant

The provisions of S. 498, Cr. P. Code, regarding admission to bail are very wide and S. 123 (2), Cr. P. Code, contains nothing which can be interpreted as controlling the very wide provisions of S. 498. A Sessions Judge acting under S. 123, Cr. P. Code, has therefore power to grant bail to a person against whom an order under S. 118, Cr. P. Code, has been made in a proceeding laid before him. The fact that the grant of bail to such a person would in some cases result in rendering the order under S. 118 nugatory by reason of the fact that the order would lapse by efflux of time by the time the order is dealt with by the Sessions Judge under S. 123 (2) when it is placed before him is no ground for holding that bail cannot be granted under S. 498. A Sessions Judge acting under S. 123 (2), Cr. P. Code. has jurisdiction to direct that the imprisonment should run from the date of his order and not from the date of the Magistrate's order which comes before him under S. 123 (2). (Lobo and Weston, JJ.) F.MPEROR v. RASULBUX. I L.R. (1942) Kar. 278=205 I.C. 322=44 Cr.L.J. 378 =15 R.S. 136=A.I.R 1942 Sind 132.

-Ss. 499 and 514 -Liability of surety-Extent of-Accused leaving Court house for prayers with permission of Court and absconding.

The liability of a surety must continue so long as the surety has not been discharged or the bail bond cancelled and the accused taken into the custody of the Court, and the accused will be taken in the custody of the Court only when his bail bond is cancelled. An accused does not cease to be on bail and his surety does not cease to be liable for his attendance merely because during the course of the day on which the surety produced the accused in Court, the Court give the accused permission to leave the Court house for a temporary purpose, (e.g), to say his prayers, when the surety has undertaken to produce the accused before Court on a fixed date and thereafter as directed by Court. If, therefore, the any qualifications in the present case there was accused absconds after leaving the Court house with the Court's permission the bond of the

surety is forfeited under S. 514, Cr. P. Code, although there are mitigating circumstances whereby the penalty can be reduced to something nominal. (Davis, C.J. and Lobo, J.) MURANALI v. EMPEROR. I.L.R. (1941) Kar. 164=13 R.S. 223=193 I.C. 471=42 Cr.L.J. 427=A.I.R. 1941 Sind 31.

S. 499—Person admitted to bail required to

appear before police—Legality. Under S. 499, Cr. P. Code, a Magistrate admitting an accused person to bail before the completion of the investigation is competent to require him to appear before the Police when needed. The generality of the words "shall attend at the time and place mentioned in the bond" in sub-S. (1) of that section is not affected by sub-S. (2) which is not exhaustive of the places to attend which an accused person may be bound but is merely inclusive of the places specifically mentioned therein. (Mahomed Munir, J) Kimat Rai Sanwal Singh v. Emperor. 221 I.C. 350=47 P.L.R. 199=A.I.R. 1945 Lah. 215.

-Ss. 499 and 514—Scope and nature of the liability of an executant of a security bond— Failure of accused to sign bond—If affects ques-

tion of forfeiture.

It is clear from the terms of S. 499, Cr. P Code, and the form of bail and security bond given in the schedule of forms that the surety does not guarantee the payment of any sum of money by the person accused who is released on bail but only guarantees the attendance of that person. He is a surety for attendance and not a surety for payment of money. His contract and the contract of the person released on bail are independent of each other. The surety promises to pay a certain sum if the person accused does not appear at some time and place as required by law. If that person does not appear the money is forfeited. There is no question of the surety making efforts to secure the attendance of the person accused. His is a simple contract to pay if a certain event does not occur and he must pay when it does not occur. The fact that person released had not signed the surety bond could not affect the question of forfeiture of the bond. (Allsop and Malik, JI.) ABDUL AZIZ v. EMPEROR. 1945 O.W.N. (H.C.) 310=1945 A.L. J. 467 (2)=(1945) A.W.R. (H.C.) 307=1945 A.L.W. 357=1945 A. Cr.C. 157=A.I.R. 1946 All. 116.

S. 507 (2)—Deposition of witness on commission in previous proceedings—Admissibility in de novo trial by successor. Sukhramdas v. Emperor. [See Q. D. 19'6-'40 Vol. I, Col. 3343.] 191 I.C. 127=13 R.S. 128=42 Cr.L.J. 80.

—S. 509—Deposition of medical witness in regard to non-medical matters—Transfer to Session record—Leagling.

sions record—Legality.

S. 509, Cr. P. Code, in authorising the transfer of the deposition of a medical witness before the Committing Magistrate to the Sessions record, does not permit the transfer of that portion of his testimony which relates to matters other than medical. If the prosecution seeks to rely on the deposition of a medical witness in regard to such non-medical matters, the witness should in this respect be treated as an ordinary lay witness and subject in respect of his testimony on non-

## CR. P. CODE (1898), S. 512.

which require the witness to be examined at the Sessions trial unless his statement can be dispensed with under S. 33 of the Evidence Act. (Tek Chand and Sale, JJ.) NAND SINGH v. EMPEROR 206 I C. 417=15 R L. 332=44 Cr. L J. 518=45 P.L.R. 129=A.I.R. 1943 Lah.

-S. 509 (1)—Scope of—If applies to evidence tendered by one who happens to be a doctor—Dying declaration recorded by a doctor
—Proof—Necessity. Waris Khan v. Emperor.
[See Q. D. 1936-'40, Vol. I, Col. 2892.] 193 I.C.
770=13 R.O. 513=42 Cr.L.J. 483=1941 O L. R. 333.

-S. 510—Chemical Analyser—Examination

in support of report—Desirability.

Where the guilt or innocence of the accused in a criminal case turns entirely on the result of chemical analysis as to the presence of certain ingredients in the articles before the Court, it is desirable that the Chemical Analyser should be examined in support of his report and the accused given an opportunity of cross-examining him. (Wadia and Weston, JJ.) Empfror v. Behram Sheriar Irani. 216 I.C. 288=17 R.B. 148=46 Cr.L.J. 162=46 Bom.L.R. 481=A.I.R. 1944 Bom. 321.

-S. 510-Chemical Analyser-Report-Use of-Without calling officer as witness-Evidenti-

ary value.

Under S. 510, Cr. P. Code, the report of the Chemical Analyser may be used in evidence with-out the officer being called as a witness. It is obvious however, that the weight to be attached to such a report must depend to a considerable extent on the reasons which the Chemical Analyser gives for the conclusion which he has arrived at, and in some cases where the matter to be reported on is the presence of certain substances in the article submitted for examination much would turn on the quantity of the incriminating substance found in the article. If the report of Analyser alone is to be considered sufficient, it should contain all the information which that officer himself would have been able to furnish if he had been examined as a witness. (Wadia and Weston, JI.) EMPEROR V. BEHRAM SHERIAR IRANI. 216 I.C. 288=17 R.B. 148=46 Cr.L.J. 162=46 Bom.L.R. 481=A.I.R. 1944 Bom. 321.

——S. 510—Report of Municipal analyst—Admissibility in evidence in case of adulteration under S. 272, I.P. Code.

A report by a Municipal analyst does not fall under S. 510, Cr. P. Code, and cannot be used as evidence in case of adulteration under S. 272, I. P. Code, unless the analyst who made the report is called as a witness to prove that the contents of his report were true. (Beaumont, C.J. and Rajadhvaksha, J.) EMPEROR V. SULEMAN SHAMJI. 209 I.C. 515=16 R.B. 160=45 Cr L.J. 92=45 Bom.L.R. 895=A.I.R. 1943 Bom. 445.

——S. 511—Proof of previous conviction— Proper procedure. See Cr. P. Code, S. 221 (7) AND ALSO PENAL CODE, S. 75. I.L.R. 1943 Lah. 477 (F.B.).

-S. 512—Admissibility of depositions recor-

ded-Burden of proof.

The burden is on the Crown to show that the witnesses whose depositions are recorded under S. 512, Cr. P. Code, are either dead or cannot be medical matters to the ordinary rules of evidence | procured without an amount of delay, expense or

# CR. P. CODE (1898), S. 512.

inconvenience which, under the circumstances of the case, would be unreasonable. It is no sufficient compliance with the section for a witness to come forward and say that the whereabouts of these persons are not known. The Crown must disclose what steps have been taken to ascertain where they are. (Niyogi and Bose, JJ.) MANBODH PACHKAND v. EMPEROR. I.L.R. (1944) Nag. 511=1944 N.L.J. 247=A.I.R. 1944 Nag.

-S. 512-Finding as to absconding of accus-

sed-Nccessity for recording.

A Magistrate recording evidence under S. 512, Cr. P. Code, must record a finding that the accused has absconded and that there is no immediate prospect of his arrest. The mere fact that he records the evidence is not sufficient to justify an inference that he is satisfied that the accused is absconding although there is evidence before him sufficient to reach such a conclusion. No doubt the section does not say anything in express terms about the necessity for recording such a finding but such a requirement is implicit in the words "if it is proved" which occur at the beginning of the section. The word "if" is con-ditional and signifies that a condition precedent has to be fulfilled before the evidence can be recorded. That condition is "proof" that the accused has absconded and that there is no immediate prospect of arresting him. The proof must clearly be adduced before the Court examines the witnesses and it is no use adducing proof subsequent to such examination. Therefore unless the proof is adduced before the Magistrate examining the witnesses and he is satisfied as to this proof he has no power to examine them under the section. It is necessary that there should be material in the order to show that the Magistrate had these matters in mind, that he considered and reached the required conclusion. Otherwise there is no other way in which a subsequent tribunal can determine the matter of admissibility of the evidence recorded by him. [6 I ah. 489 and 41 All. 60, dissented from.] (Niyogi and Bose, JJ.) MANBODH PACHKAND v. EMPEROR I.L.R. (1944) Nag. 511 = 1944 N.L.J. 247=A.I.R. 1944 Nag. 274.

-S. 512—Record of statement—Sufficiency of evidence as to absconding-If can be question-

ed by accused.

The condition precedent to the recording of a statement under S. 512 is that the Magistrate who records such a statement should be satisfied on some evidence led before him that the accused person is absconding. If he is so satisfied on evidence recorded by him the sufficiency of the evidence satisfying him cannot be agitated or unstituded when the accused of the satisfying him cannot be agitated or the satisfying him cannot be agitated by the satisfying him canno questioned when the accused person is later brought to trial or at a later stage when the accused person after trial is convicted and ar appeal preferred from the order of conviction. (Bhide and Ram Lall, IJ.) KARAM SINGH JAWAHAR SINGH v. EMPEROR. 197 I.C. 108=43 Cr.L. J. 8=14 R.L. 200=43 P.L.R. 641=A.I.R. 1941 Lah. 361.

-S. 514—Applicability—Bond under S. 20, Sind Frontier Regulation-Forfeiture-Procedure. See SIND FRONTIER REGULATION, Ss. 20 AND 23. I.L.R. (1943) Kar. 517.

CR, P. CODE (1898), S. 514.

-Ss. 514 and 499-Bond only by surety-No bond by accused—Bond, if valid.

Though S. 499, Cr. P. Code, clearly contemplates

two bonds, one by the accused and the other by the surety where in fact only one bond is executed by the surety, alone, and there is no bond executed by the accused, that circumstance cannot in any way affect the liability of the surety who has undertaken to produce the accused. The bond is not invalid for the reason that there was no similar bond executed by the accused. (Malik, J.) Nesar Ahmad v. Emperor. I.L.R. (1945) A. 639=221 I.C. 544=1945 A.W.R. (H.C. 176)=1945 A.L.J. 476=A.I. R, 1945 A. 389.

-S. 514—Bond under S. 109—Forfeiture for breath

-Time for starting proceedings.

A Magistrate who convicts a person of an offence involving the forfeiture of the security bond executed by that person under S. 109, Cr. P. Code, can subsequently take action against that person by forfeiting the security bond. (Almond, J.C. and Mir Ahmad, 7.) UMAR BAKSH MUSA KHAN v. EMPEROR, 197 I.C 66=14 R. Pesh. 44=43 Cr.L.J. 109= A.I.R. 1941 Pesh. 78.

-S. 514-Bond to appear in particular Court-Transfer of case to another Court—Failure to appear in latter Court—Bond if can be forfeited.

The accused gave a bond to the Court of the Chief Presidency Magistrate, Bombay, binding himself to attend in the Court on a particular date and to continue so to attend until otherwise directed by the Court. He did attend on that date and on other dates also. The case was subsequently transferred to the Court of the 8th Presidency Magistrate. He attended in the latter Court for some days, but later

failed to appear.

Held, (1) that the accused did not break the condition of the bond. All that he had undertaken was only to attend and to continue to attend the Court of the Chief Presidency Magistrate, although that Court might direct him to cease to attend that Court, it could not direct him to attend some other Court which he had not undertaken to attend. The accused, in failing to attend the Court of the 8th Presidency Magistrate could not therefore be said to have committed a breach of the bond; (2) that it was the Court of the Chief Presidency Magistrate that must be satisfied before the bond could be forfeited under S. 514, Cr. P. Code, and that the Court of the 8th Presidency Magistrate had no jurisdiction to forfeit the bond. (Beaumont, C.J. and Weston, J.) EMPEROR v. BALLABHDAS MOTIRAM GUPTA. 207 I.C. 22=16 R.B. 1=44 Cr.L. J. 549=45 Bom.L.R. 314=A.I. R. 1943 Bom. 178.

-S. 514-Bond to produce accused when required Forfeiture without notice to surety—Whether justified.

Where the bond executed by a surety was for the production of the accused in Court whenever called upon to do so, it cannot be said that the surety failed to perform the conditions of the bond in the absence of any notice calling upon him to produce the accused. Consequently there will be no justification for forfeiture of the bond under S. 514, Cr. P. Code, in the absence of such notice. (Lodge and Blagden, 33) MANINDRA KUMAR MAJUMDAR v. EMPERCR. I.L.R. (1942) 2 Cal. 482=207 I.C. 196=16 R.C. 38= 44 Cr.L.J. 615=A.I.R. 1943 Cal. 236.

S 514—Breach of bond—Bond under S. 107—Commission of offence under S. 396, I. P. Code.

An offence under S. 396, I. P. Code, involves a breach of the peace, particularly when fire-arms are

used. Therefore, the commission of such an offence by a person who has executed a bond under S. 107, Cr. P. Code, warrants the forfeiture of that bond. (Almond, J.C.) Sher Mahomed v. Emperor. 195 I.C. 588=14 R. Pesh. 19=42 Cr.L.J. 754=A.I. R. 1941 Pesh. 63.

-Ss. 514 and 537—Failure to record grounds of

proof-If and when curable.

Where a Magistrate though he satisfied himself by sending for the relevant records and perusing them, did not record the grounds of proof that a security bond had been forfeited, and the person who gave the security is not thereby prejudiced, the defect in the procedure is merely an irregularity of the kind referred to in S. 537, Cr. P. Code. The Magistrate cannot be said to have acted without jurisdiction, merely because he failed to record the reasons for holding that there was a forfeiture. (Bennett, 7.) PADAM SINGH v. EMPEROR. 16 Luck 646=193 I.C. 627= 13 RO. 492=1941 A.L.W. 271=1941 A. Cr. C. 87=1941 O.L.R. 303=42 Cr.L.J. 457=1941 O. W.N. 357=1941 O.A. 277=1941 A.WR. (Rev.) 219=A I R. 1941 Oudh 321.

-S. 514—Forfeiture of bail bond—Reduction of

amount-Circumstances.

Where owing to non-appearance of the accused on the day fixed, the bail bond of the sureties was forfeited but subsequent thereto, the sureties arrested the accused and produced them before the Magistrate concerned and the sureties were poor servants, the amount to be forfeited could be reduced. (Ghulam Hasan, J.) IMAM BEG v. EMPEROR. 197 I.C. 225=1941 A.Cr. C. 305=43 Cr.L.J. 135=14 R.O, 305=1941 O.L.R. 857=1941 O.A. 941=1941, A.W.R. (C.C.) 362=1941 O.W.N. 1225=A.I.R. 1942 Oudh 112.

-S. 514—Forfeiture of bond—Evidence taken behind

back of person in question—Value of.
Under S. 514, Cr. P. Code, in evidence taken behind the back of a person whose bond is alleged to have been forfeited, is quite worthless. (Henderson, 7.) Annada Charan Chakrabarti v. Emperor. I.L.R. (1942) 2 Cal. 475=207 I.C. 265=16 R.C. 65=44 Cr.L.J. 630=A.I.R. 1943 Cal. 251.

-S. 514-Forfeiture of bond-Proceedings, when

to be started.

The mere fact that no immediate action under S. 514, Cr. P. Code, is taken against a person under recognizances to keep the peace or against his surety, on the conviction of the former of an offence involving a breach of the peace, is no bar to such action being taken at a future date. Nor is it necessary that such proceedings should have been started before the Expiry of the period for which the bond is given.

(Bennett, 7.) PADAM SINGH v. EMPEROR. 16 Luck.

646=193 I.C 627=13 R.O. 492=1941 A.L.W.

271=1941 A. Cr.C. 87=1941 O.L.R. 303=42

Cr.L.J. 457=1941 O.W.N. 357=1941 O.A. 277 =1941 A.W.R. (Rev.) 219=A.I.R. 1941 Oudh 321,

S. 514—Forfeiture of bond taken under S. 107

-Magistrate competent to take proceedings.

A person bound down under S. 107, Cr. P. Code, would be taken to have broken the terms of the bond only if he commits a breach of the peace at the place where it was apprehended he would do so, while the man from whom a security has been taken under S. 110, Cr. P. Code, would be so liable wherever he commits the offence. It follows that no Magistrate other than the one who has bound down a person under S. 107, Cr. P. Code, can ever have

CR. P. CODE (1898), S. 514.

Cr. P. Code, against him and his sureties. Ahmad, 3.). ABDUL RASHID v. EMPEROR. 206 I. C. 330=15 R. Pesh.. 110=44 Cr. L.J. 478=A I. R. 1943 Pesh. 41.
S. 514—Forfeiture of several bonds—Separate

proceedings-If necessary.

Where several bonds are alleged to have been forfeited, separate proceedings under S. 514, Cr. P. Gode must be taken in respect of them. It has to be established separately that each particular bond has been forfeited and evidence with regard to one bond cannot be used with regard to another. (Henderosn, 7.)
Annada Charan Chakrabarti v. Emperor. I.L.
R. (1942) 2 Cal. 475=207 I.C. 265=16 R.C. 65 =44 Cr.L.J. 630=A.I.R. 1943 Cal. 251.

-Ss. 514 and 496-Forfeiture of surety bond -Legality-No recognizance taken from accused. INDAR v. EMPEROR. [See Q.D., 1936-40, Vol. I, Col. 2897.] I.L.R. (1941) Lah. 519.

-S. 514 and U. P. Encum. Estates Act, S. 4—Forfeiture—Surety being applicant under Encumbered Estates Act—If saves forfeiture.

The fact of a surety having applied under the U. P. Encumbered Estates Act does not protect him against a forfeiture of his bond on that ground. (Bennett, 7.)
PADAM SINGH v. EMPEROR. 16 Luck. 646=193 I.C. 627=13 R.O. 492=1941 A.L.W. 271=1941 A. Cr.C. 87=1941 O.L.R. 303=42 Cr.L.J. 457=1941 O.W.N. 357=1941 O.A. 277=1941 A.W. R. (Rev.) 219=A.I.R. 1941 Oudh 321.

———S. 514—Notice to show cause without recording order of forfeiture—Irregularity—Revision.

The usual practice of Magistrates is, in order to save time, without formally recording an order that the bond has been forfeited, to call upon the person affected to show cause. Such an irregularity will not, however, call for interference in revision. (Henderson, Annada Charan Charrabarti v. Emperor. L.R. (1942) 2 Cal. 475=207 I.C. 265=16 R.C. 65=44 Cr.L.J. 630=A.I.R. 1943 Cal. 251.

-S. 514—Surety for accused—Accused joining

army and absent-Liability of surety.

Where an accused person absents himself by joining the army, in the absence of any compulsory military service, there is no distinction between joining the army and going away beyond the jurisdiction of the Court and merely absconding in the ordinary way. Joining the army being an entirely voluntary act of the accused, the surety cannot escape liability for the accused's absence on that score. (Byers, 7.) BAJEE SAHIB In re. 208 I.C. 320=16 R.M. 261=1943 M.W.N. 339=56 L.W. 328=44 Cr. L.J. 780=A.I R. 1943 Mad. 519=(1943) 1 M. L.J. 446.

-S. 514—Surety for missing accused—Right to

adjournment for showing cause.

Under S. 514, Cr. P. Code, the surety for missing accused is not entitled to an adjournment for the purpose of showing cause why the penalty should not be paid. He is only entitled to be given an opportunity of showing cause. (Byers, J.) BAJEE SAHIB, In re. 208 I.C. 320=16 R M. 261=1943 M.W. N. 339=56 L.W. 328=44 Cr.L.J. 780=A.I.R. 1943 Mad. 519=(1943) 1 M.L.J. 446.

-S. 514 (1)—Non-compliance with—Irregulatiy.

The failure of the Magistrate to comply with the provisions of S. 514 (1), Cr.P. Code, does not deprive him of jurisdiction to pass an order forfeiting a surety bond. This is an irregularity in procedure which is cured by S. 537, Cr.P. Code. Unless, therefore, there the jurisdiction to take proceedings under S. 514, has been prejudice to the accused the proceedings

should not be set aside. (Almond, J.C.) Gul Zaman J. Emperor. 205 I.C. 325=15 R. Pesh. 95 =44 Cr.L.J. 381=A.I.R. 1943 Pesh. 6.
—S. 514 (2)—Scope —Nature of bond contemplated

by and remedy in case of forfeiture of the bond. Cl. (2) of S. 514, Cr.P. Code, makes it clear that what the law contemplates is a personal bond on behalf of the surety and when the bond is forfeited and the penalty is not paid, the court may proceed to recover the amount by issuing a warrant for attachment and sale of the moveable property belonging to the surety-But, if security of immoveable property is given, it has to be registered under S. 17 of the Registration Act and if it is unregistered it is invalid. (Malik, 7.) NESAR AHMAD v. EMPEROR. I L.R. (1945) A. 639=221 I. C. 544=1945 AWR. (H.C.) 176=1945 A.L.J. 476=A.I.R. 1945 A. 389.

-S. 514 (7) —Applicability—Security given under S. 117.

S. 514 (7), Cr.P. Code, permits production of a certified copy of a judgment in certain security proceedings, but these do not include proceedings in which security was given during an enquiry under S. 117, Cr. P. Code. In the latter case, therefore, a copy of the earlier judgment will not be sufficient evidence by itself in proof of forfeiture against a surety. (Beckett, J.) Sajjan Singh v. Emperor. 199 I.C. 93=14 R.L. 382=43 Cr.L.J. 467=43 P.L.R. 711=A.I.R. 1942 Lah. 78.

S. 515—Power of Dstrict Magistrate—Order raising

amount of security to be forfeited—Legality.
Under S. 515, Cr.P. Code, the District Magistrate can pass any order which the original Magistrate himself might have passed. He can therefore revise the order of the original Court so as to raise the amount of security to be forfeited. (Almond, J.C.) Sher Mahomed v. Emperor. 195 I.C. 588=14 R. Pesh. 19=42 Cr.L.J. 754=A.I.R. 1941 Pesh. 63.

—S. 516-A—Applicability—furisdiction of Magistrate—Complaint of criminal breach of trust sent to police for investigation—Property in hands of accused—Ex parte order for handing over possession to complainant—Legality.

Before an order under S. 516-A, Cr.P. Code, can be made, three conditions must be fulfilled: (1) the Magistrate must have reason to suppose that an offence has been committed; (2) that the property in question must be produced before the Court; and (3) that there must be an inquiry or trial pending at the time. Where on a complaint being made of a criminal breach of trust in respect of certain property in the hands of the accused, the Magistrate sends the complaint to the police for investigation under S. 202, Cr.P. Code, it cannot be said that an offence appears to him at that stage to have been committed, so as to justify an ex parte order directing possession of the property to be handed over to the complainant under S. 516-A. Such an order is also illegal on the ground that the property is not produced before the Court, as the power of a Criminal Court to make orders under S. 516-A, is limited to property which is produced before it. An investigation by the police under S. 202, Cr.P. Code, is not an inquiry within the meaning of the Code, and since at that stage there is no inquiry or trial pending, the order is also illegal on that ground. Such an ex parts order at that stage is therefore unwarranted and illegal. (Broomfield and Wassoodev, JJ.) RAMCHETISING ARJUNSINGH v. DEOJI KALYANJ. 198 I.C. 426=14 R.B. 320=43 Bom. L.R. 967=43 Cr.L.J. 362= A.I.R. 1942 Bom. 42.

CR. P. CODE (1898), S. 517.

—S. 517—Applicability.

S. 517, Cr.P. Code, is inapplicable to a case where S. 517, Gall. Code, is imappressed to a case where there is neither an inquiry nor a trial in any criminal Court. (Lobo, J.) SULLEMAN HAFI ELLIAS 7. EMPEROR. I.L R. (1942) Kar. 72=202 I.C. 220 = 15 R.S. 37=43 Cr.L.J. 804=A.I.R. 1942 Sind 89

S. 517—Applicability—Case under Defence of India Rules, R. 81 (4). See Defence of India Rules, R. 81 (4). 46 Bom.L R. 449.

S. 517—Applicability—Case under Defence

of India Rules—Section—If abrogated or limited by R. 81 (4), Rules. See Defence of India Rules (AS AMENDED IN 1943), R. 81 (4). 46 Bom L. R. 529

(F.B.).
S 517—Applicability—Conviction under R. 90 (3),

Parles—Power to confiscate small coins

found in possession of accused.

On a conviction under R. 90 (3) of the Defence of India Rules, the Court has power to make an order confiscating the small coins in respect of the possession of which he is convicted. The power of confiscation given by S. 517, Cr.P. Code, is unaffected by R. 90 (3) of the Defence of India Rules. (Lokur and Weston. jj.) Emperor v. Nanabhai Nagindas. 47 Bom.
 L.R. 644=A.I.R. 1946 Bom 36.

——S. 517—Applicability—Conciction under R. 90 (3), Defence of India Rules—Confiscation order—Legality, The offence of hoarding small coins punishable

under R. 90 (3) of the Defence of India Rules is an offence to which S. 517, Cr. P. Code, applies. Hence a Magistrate can, on conviction of an accused under R. 90 (3), Defence of Inida Rules, order confiscation of the coins in respect of which he is convicted. (Kuppuswami Ayyar, J.) NARASIMHA CHETTIAR, In n. 212 I.C. 3=16 R.M. 580=45 Cr.L.J. 525=1943 M.W.N. 716 (1)=56 L.W. 646=A,I.R. 1944 Mad. 125=(1943) 2 M.L.J. 500.

-S 517—Applicability—Offences under Defence of India Rules, R. 90 (2) (a) and (e)—Power of Court

to confiscate coins.

The Court convicting an accused person under R. 90 (2) (e) and R. 121 read with R. 90 (2) (a) of the Defence of India Rules, has power to order confiscation of coins under S. 517, Cr.P. Code. The fact that the coins were illegally seized is immaterial. S. 517, Cr.P. Code, applies to the special offences created by the Defence of India Rules. R. 124 does not oust that section and sub-rule (3) of that rule only applies when the special powers conferred by Sub-R. (1) have been resorted to. (Base, J.) BHIMJI RAMJI v. EMPEROR. I.L.R. (1945) Nag. 413=218 I.C. 12=46 Cr.L. J. 366=1944 N.L.J. 417=A.I.R. 1944 Nag. 366.

-S. 517-Applicability-Forfeiture-Power of Court

to order.

S. 517, Cr.P. Code, is not a penal provision and should not be applied so as to enable it to pass an order of forfeiture in a trial for contravention of an order under the Defence of India Rules, when the order contravened does not provide for any for feiture. 

property on information—Seizure not reported to Magistrate
No chalan sent up—Order of Magistrate delivering property to person from whom it was seized, on his application Validity of order.

Under S. 517, Cr.P. Code, no doubt, a Magistrate has the power to restore property to the possession of any party, but this is only at the conclusion of the

# CR. P. CODE (1898), S. 517.

inquiry or trial that has been held relating to the offence with which the property is concerned. When there has been no such inquiry or trial in the case, section cannot come into operation. the police, acting on some information, recovered from the petitioner's possession a horse and when the petitioner approached the magistrate, the latter passed an order handing over the horse to him on his furnishing security and no chalan was sent up by the police in the case, the order of the magistrate is not one passed under S. 517, Cr.P. Code, though it could be considered to be one under S. 523, Cr.P. Code. Even so it is not free from defect, because from a strict reading of S. 523, that order should be passed not on the application of the party, but on a report by the police. The absence of such report, when it has not occasioned any failure of justice, is no ground for interference in revision with that order. (Blacker, J.) GHULAM ALI v. EMPEROR. 221 I.C. 34 =A.I.R. 1945 Lab. 47.

S. 517—Applicability—Prosecution for offence under R. 81 (4), Defence of India Rules—Power of Court to pass order of confiscation. See Defence of India Rules, R. 81 (4). (1944) 2 M.L.J. 229.

——Ss. 517 and 162—Confession made by accused to police during investigation—If can be used—Evidence Act,

S. 25.
There is no ban either in S. 25 of Evidence Act, or in S. 162 of Cr. P. Code, to a confession of an accused person made to a police-officer during the course of invstigation being used for the purpose of S. 517, Cr. P. Code, to determine firstly, whether the property is property regarding which an offence appears to have been committed, and, secondly, for determining the person to whose custody it should be delivered. The fact that the magistrate has not recorded this evidence separately after the trial is over, but has put it on the record of the substantive trial, is for the purposes of S. 517, Cr. P. Code, at most an irregularity curable under S. 537, Cr.P. Code. (Blacker, J.)
POHLU v. EMPEROR. 209 I.C. 546=45 Cr.L.J.
153=16 R.L. 158=45 P.L.R. 391=A.I.R. 1943 Lah. 312.

-S. 517-Construction and scope-What can be confiscated under.

The provisions of S. 517 (1), Cr.P. Code, contemplate something more than the subject-matter of an offence; the sub-section does not speak of anything which is the subject-matter of an offence, but anything regarding which an offence appeared to have been committed. (Davis, C.J. and O' Sullivan, J.)
MEHROMAL v. EMPEROR. I.L.R. (1944) Kar 142
=215 I.C. 274=17 R.S. 51=46 Cr.L.J. 92=A.I R. 1944 Sind 207.

Sessions Judge.—If lies.

There is no ad hoc right of appeal or revision to the Sessions Judge against an order passed by a Magistrate under S. 517, Cr.P. Code. All that the Sessions Judge can do is to substitute his own order for that passed by the trial Court, if the substantive case comes before him as a Court of appeal, or a Court of revision. All that he can do in the case of an order which comes to his notice otherwise is to report it to the High Court for revision. (Blacker, J.) GHULAM AVI v. EMPEROR. 221 I.C. 34=A.I.R. 1945 Lah. 47.

Ss. 517 and 520—Order under S. 517 by first class Magistrate-Appealability-Forum.

Where an order under S. 517, Cr. P. Code, is passed by a first class Magistrate who acquitted the accused in the case, an appeal lies against such order, to the

CR. P. CODE (1898). S. 520.

I.L.R. (1941) All. 168=193 I.C. 817=13 R.A. 462=1941 O.W N. 137=42 Cr.L.J. 469=1941 A.Cr.C. 85=1941 O.A. (Supp.) 281=1941 A.L. W. 169=1941 A.W.R. (H.C.) 7=1941 A.L.J. 53 =A.I.R. 1941 All. 143.

-S. 517-Scope-Conviction in respect of hides carried by accused in cart under S. 65, Madras City Police Act—No charge in respect of cart—Confiscation of cart— Legality.

Accused was charged under S. 65, Madras City Police Act, in respect of some hides which he was found carrying in a cart and for possession of which he could give no satisfactory explanation. The Magistrate, while convicting the accused ordered not only the hides but also the cart to be confiscated.

Held, the offence being only in respect of the hides and there being no offence alleged or charged in respect of the cart, there was no justification for the order of confiscation in respect of the cart. (Kuppuswami Ayyar, 7.) ABDUL AZEEZ In re. 212 I.C. 101 =16 R.M. 576=45 Cr.L.J. 516=1943 M.W.N. 714=56 L.W. 647=A.I.R. 1944 Mad. 59= (1943) 2 M.L.J. 447.

S. 517—Scope—If subject to or superseded by R. 90-B (6)—Defence of India Rules—Jurisdiction of Court to make order as to disposal of money seized under R. 90-B (4) of the Defence of India Rules. See Defence of India Rules, R. 90-B (4) AND (6). 43 Bom.L.R. 872.

S. 517—Scope of—Rights to the return of property

-Test-Possession or ownership-Property recovered from

bona fide pledges—Pledger acquitted on charge of theft.
S. 517, Cr. P. Code, authorises the Court to return the articles concerned whether or not an offence is committed in respect thereof to the person claiming to be entitled to possession. The expression "person claiming to be entitled to possession" is important. It does not mean the owner. Ownership involves a question of title, whereas possession does not. Hence where the articles were recovered from a bona fide pledgee, his possession being under a contract must be regarded as legal possession and if the contract is valid it must be assumed that he would be the person entitled to possession thereof as against the other party to the contract. (Niyogi, J.) BUDHULAL HARNARAYAN v. SUKHMAN. I.L.R. (1942) Nag. 769=200 I.C. 347=43 Cr.L. J. 698=15 R.N. 12=1942 N.L. J. 240=A.I.R. 1942 Nag 82.

-S. 520-"Court of appeal or revision"-Meaning

of.

The Court of appeal or revision referred to in S.

Court which ordinarily is 520, Cr. P. Code, is the Court which ordinarily is the Court of appeal or revision, as the case may be, to which the Court passing the order as to the disposal of the property is, as such, ordinarily subordinate, when the order which is challenged is the order as to the property alone. If the principal order is challenged, the Court of appeal or revision would be the Court before which the appeal or revision application against the principal order has been made. (Davies, C.J. and Weston, J.) FATIMA v. SAIN BAKHSH. I.L. R. (1941) Kar. 442=198 I.C. 493=14 R.S. 147 =43 Cr.L.J. 386=A.I.R. 1942 Sind 1.

-Ss. 520—Powers of High Court—Order under S. 517 carried out by Magistrate.

The words of S. 520, Cr. P. Code, are very wide and confer extensive powers on the High Court. The fact that the order under S. 517 has been carried out by the Magistrates cannot preclude the High Court from exercising the powers conferred upon it by S. 520, nor is it necessary that the order of the Magis-Sessions Judge. (Hamilton, J.) RAM DIHAL v. BADRI, trates should have been stayed before the High Court

CR. P. CODE (1898), S. 521. could exercise its jurisdiction in either setting aside the order or passing such further order as it thought fit. (Ghulam Hisan, J.) DOST MAHOMED v. EMPEROR. 220 I.C. 437=46 Cr.L.J. 756=1944 O.A. (C.C.) 223 (2)=1944 A.W.R. (C.C.) 223 (2)=A.I.R. 1944 Oudh 310.

-S. 521-Complaint under S. 501, I. P. Code in respect of defamatory passages in book—Order for destruction of entire book—Propriety—Proper order. Sumitramma v. Krishnamurthi Sastri. 

I. P. Code.

Where a person is convicted of criminal trespass, which does not necessarily imply criminal force, an order under S. 522, Gr. P. Code, cannot be passed because the section is not applicable to such a case. The offence in the case of a person against whom 1 ne offence in the case of a person against wholm S. 522 is applied, must be attended by criminal force. (Mathur, J.) JAMUNA DAS r. EMPEROR. I.L.R. (1944) All. 754=217 I.C. 170=17 R.A. 128=46 Cr.L.J. 211=1944 A.W.R. (H.C.) 280=1944 A. L.J. 432=1944 A.L.W. 547=1944 O.A. (H.C.) 280=A.I.R. 1945 All. 26.
——S. 522—Applicability—"Criminal force"—Mean-

ing-Force used not against person but against property

Order for restoration-If can be made.

The expression "criminal force" in S. 522, Cr. P. Code, does not embrace all kinds of physical violence on persons or inanimate objects, but refers only to criminal force in the limited sense in which it is defined in the Penal Code and S. 522 applies only to criminal force used against the person. No order for restoration of possession can therefore be made under S. 522, when the force attending the dispossession complained of was used not against the person dispossessed but against the property in his ne person dispossessed but against the property in his absence. (Byers, J.) Aswatha Narayana Gupta. n. Munteppa. I.L.R. (1943) Mad. 900=208 I.C. 279=16 R.M. 248=44 Cr. L.J. 769=1943 M, W.N. 130=56 L.W. 67=A.I.R. 1943 Mad. 257 =(1943) 1 M.L.J. 160.

-S. 522-Competency of revisional Court to pass an order under, after one month after the conviction.

Where a Magistrate fails to pass an order under S. 522, Cr. P. Code, within one month of the date of the conviction, it is nevertheless competent to the revisional Court to pass such an order when the matter comes up before it. (Davies, J.) DINA v. DEO KARAN. 1945 A.M.L.J. 9.

——S. 522—Complaint of Criminal trespass by Zanindaas agent—Finding that Zanindar has been dispossessed by force—Order directing delivery of possession to him interested of the complaints.

instead of to complainant-Legality

Where on a complaint by a Zamindar's agent, the accused is convicted of the offence of criminal trespass and the finding is that the Zamindar was dispossessed of the land by show of force, an order directing delivery of possession to the Zamindar, instead of to the complainant, is rightly made. (Kuppuswami Ayyar, 7.) NARAYANA v. MADAR KHAN. 1944 M.W.N. 436=A.I.R. 1944 Mad. 473=(1944) 2 M.L.J. 380.

522-Duty of Criminal Court-Property taken by violence under colour of civil claim-Duty to

order restoration.

Where property is taken by violence by one person from another person under colour of a civil claim, the Criminal Court should ordinarily order the property so taken by violence to be returned to the is alleged or suspected to have been stolen or is found person from whom it has been taken; otherwise under circumstances which create suspicion of the Criminal Courts would be encouraging persons to commission of any offence. The police started

CR. P. CODE (1898), S. 523.

take the law into their own hands, break into other persons' houses and take property therefrom under colour of a right which in fact they may not possess. (Horwill, J.) NALLUSWAMI REDDI v. NALLAMMAI. 206 I.C. 591=16 R.M. 39=56 L.W. 254=44 Cr. L.J. 554=1943 M.W.N. 163=A.I.R. 1943 Mad. 392=(1943) 1 M.L.J. 277.

-S. 522 - Force - Meaning of. SINGH v. PANNA LAL. [See Q.D., 1936-40, Vol. I, Col. 3343.] I.L.R. (1941) Lah. 512=191 I.C. 373=

13 R.L. 322=42 Cr.L.J. 160.

S. 522—'Force'—Meaning of KALA DIN v. EMPEROR. [See Q.D. 1936-40, Vol. I, Col. 3344] 192 I.C. 282=13 R. Pesh. 41=42 Cr.L.J. 272

-S. 522-Issue of notice, if condition precedent to

passing order under.

It cannot be said that it is absolutely necessary to issue notice before passing an order under S. 522; Cr. P. Code, and if no substantial injustice has been done, an order without issue of the notice may not v. Ram Charan. I.L.R. (1943) All. 33—204 I.C. 183—15 R.A. 326—44 Cr.L.J. 164—1942 A.L.Y. 587—1942 A.W.R. (H.C.) 339—1942 A.L.W. 551—1942 A. Cr. C. 189—A.I.R. 1943 All. 7.

-S. 522-Order under on conviction-Setting aside of conviction on appeal—Restoration of possession to accused. Where possession of a house is given to a complainant under S. 522, Cr. P. Code, on the conviction of the accused under S. 448, Cr. P. Code, if the conviction is set aside in appeal the house must be restored to the possession of the accused irrespective of the question of any equities. (Waliullah, J.) MALHAN SINGE v. EMPEROR. I.L.R. (1945) All. 282=221 I.C. 141=1945 A.W.R. (H.C.) 68 (1)=1945 A.L.W. 116=1945 O.W.N. (H.C.) 109=1945 A.L.J. 233 =1945 A. Cr.C. 69=A.I.R. 1945 All. 226.

-S. 522—Revision—Order for possession—Power of High Court to make when no revision pending against

conviction.

Where an application for an order for possession is made to the trying magistrate under S. 52 2 (1), Cr. P. Code, not at the hearing but more than one month after the conviction, and is dismissed on the ground of want of jurisdiction in that it was not made within one month from the date of conviction, the order is clearly right because at the expiration of a month the Magistrate is functus officio. The High Court, however, in revision against the order of the Magistrate dismissing the application under S. 522 (1) can make an order for possession under S. 522 (3) although there is no revision application before the High Court against the conviction itself. (Beaumont, C.J. and Wadia, J.) SAVLARAM SADOBA v. DNYANESHWAR VISHNU. I.L.R. (1942) Bom. 249 = 200 I.C. 724=14 R.B. 39=43 Cr. L.J. 708=44 Bom.L.R. 246=A.I.R. 1942 Bom. 148.

S. 522 (3)—Scope—Order under S. 522—Right of appeal—If conferred, Mahomed Sharts v. DIWAN SINCH. [See Q.D., 1936-40, Vol. I, Col. 2906.] I L.R. (1941) Lah. 377=43 P L.R 534. as one under S. 461, I. P. Code—Subsequent filing of referred charge sheet as offence turned out to be one under S. 403, I. P. Code—Order as to disposal of property— Discretion of Magistrate.

523, Cr.P. Code, empowers a Magistrate to pass orders with regard to the disposal of property which

### CR. P. CODE (1898), S. 523.

investigation into a case in respect of certain cattle as an offence falling under S. 411, I. P. Code. Under receipt of some information they came to the conclusion that the offence did not fall under S. 411, but under S. 403, I. P. Code. Since the offence was not cognizable the police sent a referred charge sheet to that effect. The Magistrate agreed and ordered the cattle the subject-matter of the complaint to be returned to the complainant.

Held, on a reference that the Magistrate had a discretion to make the order under S. 523, Cr. P. Code, and it could not be said that the discretion was not exercised judicially. (Horwill, J.) TIMMA REDDI v. RAMI REDDI. 195 I.C. 228=14 R.M. 162= 1941 A. Cr. C. 107=1941 O.A. (Supp.) 603=42 Cr. L. J. 635=1941 M.W.N. 224=53 L.W. 394= A.I.R. 1941 Mad. 416=(1941) 1 M.L.J 421.

-S. 523—Order under—If can be reviewed.

A magistrate has no power to review an order previously passed by him under S. 523, Cr. P. Code. (Blacker, J.) GHULAM ALI v. EMPEROR. 221 I.C. 34=A.I.R. 1945 Lah 47

——Ss. 523 and 524—Order under S. 523—Appeal or revision to Sessions Judge—If competent.

There is no right of appeal or revision to the Sessions Judge from an order passed by a Magistrate under S. 523, Cr. P. Code, directing the restoration of property to the person from whom it was recovered by the police. S. 524, Cr. P. Code, is inapplicable to the case. (Blacker, J.) GHULAM ALI v. EMPEROR. 221 I.C. 34=A.I.R. 1945 Lah. 47.

-S. 523—Procedure—Duty of Magistrate—Charge of theft—Accused denying charge and pleading that property was foisted on them—Acquittal—Order for return of property

to accused-Legality.

Under S. 523, Cr. P. Code, the Magistrate is bound to order the property to be given to the person entitled to possession; it is his duty under the section to make an inquiry as to the person entitled to possession and to order possession to be given to him. If he is unable after inquiry to satisfy himself as to the person entitled to possession, he should under S. 523 (2) issue a proclamation before passing final orders. Where the accused charged with theft plead that they have committed no theft, and that the property alleged to be stolen was foisted on them and the Magistrate accepts this defence and acquits the accused doubting whether any theft has been committed, he should not order the property to be returned to the accused. Such an order is clearly wrong and illegal. (Horwill, 7.) Chinnavadu, In re. 204 I.C 37=15 R.M. 733=44 Cr.L.J. 168=55 L.W. 713=1942 M.W. N. 727=A.I.R. 1942 Mad. 726 (1)=(1943) 2 M.L.J. 575.

-S. 523—Procedure—Independent inquiry—If essensial before making order.

Under S. 523 (2), Cr. P. Code, it is not incumbent on a magistrate to make an enquiry before passing an order as to the person entitled to possession of the Such an order can be passed on the property. materials available before him, without any independent enquiry regarding the ownership of the property. The section provides for an enquiry only in the case where the person entitled to possession is unknown. (Lobo, J.) Suleman Haji Ellias v. Emperor. I. L.R. (1942) Kar. 72=202 I.C. 220=15 R.S. 37 =43 Cr.L.J. 804=A.I.R. 1942 Sind 89.

-S. 523-Property seized during investigation of a crime—To whom to be restored—Seizure from pawnee
—No offence against pawner proved—Order for return to
complainant against pawner—If justified. CR. P. CODE (1898), S. 526.

The property seized during the investigation of a crime should except in exceptional cases be restored to the person from whose possession it was taken. Where certain ornaments are seized from the pawnee during the investigation into a complaint by a third person against pawner in respect of those ornaments, when no offence against the pawner is proved, the ornaments should be returned to the pawnee and not to the complainant against the pawner. (Agarwal, 7.) BABU RAM v. EMPEROR. 17 Luck. 430=197 I.C. 404=1941 O.W N. 1304=1941 A.W.R. (C.C.) 395=1941 O.A. 1000=1942 A. Cr.C. 10=14 R.O. 323=1941 O.L.R. 897=43 Cr. L.J. 164= A.I R. 1942 Oudh 128.

-S. 523—Scope—Property seized under S. 51—

Disposal of-Duty of Magistrate.

The disposal of property seized by the Police under S. 51 of the Cr. P. Code, cannot be indefinitely postponed; and when the person from whom it has been seized applies for the restoration thereof, the Magistrate must deal with the application under S. 523, Cr. P. Code. (Lakshmana Rao, J.) SHROFF BODANNA v. EMPEROR. 1941 M.W.N. 1039=198 I.C. 671 =43 Cr.L J 536=14 R.M. 590=A.I.R. 1942 Mad. 319 (1).

-S. 526—Transfer.

Application by complainant. Costs.

Grounds for transfer...

Scope.

Stay order on application for transfer.  ${f T}$ ransfer.

S. 526 (4)—Object of.

S. 526 (8)-Adjournment or applying for transfer,

S. 526 (8)—Nature of provisions. S. 526 (8)—"Subsequent intimation."

S. 526 (9)—Discretion of Sessions Judge.

Application by complainant,

by complainant—Crown -S. 526—Application

opposing application—Case, if can be transferred. The Court can in a proper case exercise its power of transfer at the instance of a private complainant, although the Crown opposes the complainant's application for transfer. (Skemp, 7.) GHULAM RASULV. EMPEROR. 196 I.C. 467=14 R.L. 160=42 Cr. L.J. 880=43 P.L.R. 354=A.I.R. 1941 Lah. 299. S. 526-Application by complainant-Duty of Court.

An application for transfer by a complainan should be scanned more narrowly than that of an accused person. An accused person apprehends conviction and a complainant that his enemy will go free. (Skemp, J.) GHULAM RASUL v. EMPEROR. 196 I.C. 467=14 R.L., 160=42 Cr.L.J. 880=43 P L.R. 354=A.I.R. 1941 Lah. 299.

### Costs.

-S. 526—Costs—Adjournment of case to enable accused to move for transfer-Power to order payment of costs of day to prosecution. Code, S. 344. (1941) 2 M.L.J. 854.

# Grounds for transfer.

-S. 526—Grounds for transfer—Apprehension of accused-Court remarking that 'defence counsel is fishing out a case.

If in the course of a trial the Court remarks a number of times that the counsel for the accused is "fishing out a case," the use of that expression is likely to create an apprehension in the mind of the accused

# CR. P. CODE (1898), S. 526.

that he will not have a fair and impartial trial as the Court has made up its mind that he has no defence and that he is trying to find one. (Sen, J.) ANNUBEG MUKIMBEC v. EMPEROR. I.L.R. (1945) Nag. 533=219 I.C. 377=18 R.N. 42=46 Cr.L.J. 601 =1944 N.L.J. 396=A.I.R. 1944 Nag. 820.

S. 526—Grounds for transfer—Apprehension of accused—Cancellation of bail during trial—Allegation that magistrate cancelled bail for refusal of accused to purchase War Fund Flags—Sufficiency.

The accused were being tried before a Magistrate and were on bail. When the prosecution evidence was almost complete the Magistrates cancelled their bail. The accused thereupon moved for a transfer of the case on the ground that the real reason why their bail was cancelled was because they refused to subscribe money for the purchase of War Fund Flags

when asked to do so by the magistrate.

Held, whether the accused were or were not justified in believing that the reason for cancellation of their bail was their refusal to purchase War Fund Flags, and whether it be true or not, it must be considered that they had grounds for apprehension that it was their refusal to purchase those flags that led the magistrate to cancel their bail and therefore there magistrate to cancer their ban and therefore there were sufficient grounds for transferring the case. (Agarwala, J.) Thakur Singh v. Ishwar Singh. 205 I.C. 576=15 R.P. 308=9 B.R. 247=44 Cr.L.J. 420=23 Pat.L.T. 715=A.I.R. 1943 Pat. 143.

-S. 526—Grounds for transfer—Accused preferring case to be tried by particular Judge or Court—If ground for transfer to that Judge or Court.

The Criminal Procedure Code does not contem-

plate the transfer of a case for trial by a particular Judge specified by the accused. The fact that the accused prefers to have his case tried by particular Judge or tribunal is no ground for transfer of the case from the Court or tribunal in seisin of the case to any other Court or tribunal, when there are no reasonable grounds for the accused or any one else to believe that a fair or impartial trial cannot be had in the Court in which the case is pending. (O'Sullivan, J.) MAHO-MED AYUB KHUHRO v. EMPEROR. I.L.R. (1945) Kar. 275=A.I R. 1946 Sind 1.

S. 526—Grounds for transfer—Apprehension of accused—Magistrate filing written statement without even

reading it.

The fact that the Magistrate filed without even reading a written statement in which the accused made serious complaints against him as well as disclosed prima facie a good defence, may reasonably occasion apprehension in the mind of the accused. (Toung, C.J.) FAQUIR CHAND v. KARAM CHAND. 200 I.C. 446=15 R.L. 1=43 Cr.L.J. 632=44 P.L.R. 104=A.I.R. 1942 Lah, 122.

-S. 526-Grounds for transfer-Apprehension of accused—Remarks by Magistrate during examination of pro-secution witnesses adverse to accused—Magistrate insisting on stamped petition for each objection on behalf of accused

to statements of witnesses-Effect.

A Magistrate has to be very cautious in making remarks or observations during the course of a trial, lest a particular observation should raise a reasonable apprehension in the mind of the accused that he would not get a fair trial in his Court. If a Magistrate during the examination of the prosecution witness makes a remark that the witnesses who did not support the prosecution case have been won over by the accused and that their evidence would not affect the merits of the case is calculated to and must necessarily raise in the mind of the accused a reasonable apprehension

# CR. P. CODE (1898), S. 526.

that he would not get a fair trial. Further, where the Magistrate does not allow the pleader for the accused to raise objections orally to certain statements by witness and insists on a stamped petition being filed for every objection raised on behalf of the accused, the cumulative effect is to create in the mind of the accused an apprehension that he would not get a fair and impartial trial, and in such a case there are sufficient grounds for ordering a transfer of the case, (Varma, J.) Munar Pandey v. Emperor. 196 I. C. 582=8 B.R. 47=14 R.P. 246=43 Cr.L.J. 48 =A.I.R. 1942 Pat. 77.

S. 526—Grounds for transfer—Apprehension of accused-Sub-divisional Magistrate trying case of black marketing and violating regulations—Sub-divisional Magistrate as officer interested in eliminating black-marketing and

enforcing regulations—Transfer of case—Desirability.

A Sub-divisional Magistrate who is a very keen officer determined to do all he can to see that Government Regulations and local schemes inaugurated by him are enforced and that black-marketing is prevented within his jurisdiction is quite an unsuitable person to try persons accused of black-marketing and violating the regulations for the enforcement of which he is responsible. He may be quite impartial in trying such cases, but as he is plainly interested in the success of the prosecution and his duty compels him to be so, it is impossible for the accused to regard him as an impartial judge or contemplate trial by him with equanimity and when further there is evidence of considerable feeling between the Sub-divisional Magistrate in his executive capacity as sub-divisional officer and the accused or the employers of the accused, the case is a fit one for transfer and the High Court will not hesitate to order a transfer in such circumstances. The Evils of the system whereby executive and judicial functions are combined in the same officer, commented upon. (Meredith, Deonandan Singh v. Emperor. (1944) P.W.N.

-S. 526—Ground for transfer—Apprehension of conviction.

An accused is only entitled to transfer if he has a reasonable apprehension of an unfair trial. The fact that he has an apprehension of being convicted is no reason for a transfer. (Skemp, J.) Chunt Lal. v. EMPEROR. 196 I.C. 816=43 Cr.L.J. 71=14 R.L. 191=43 P.L.R. 639=A I.R. 1941 Lah. 367.

—S. 526—Grounds for transfer—Apprehension of prejudice-Magistrate threatening defence witness with prosecution for negligence and issuing warrant of arrest b defence witness after application for stay for purpose of applying for transfer—If ground for transfer.

Where a magistrate issues a warrant of arrest for a

defence witness without complying with the requirements of S. 70, Cr. P. Code, at a time when the accused intends to apply to the High Court for a transfer of the case from the file of that Magistrate, and threatens to prosecute a witness for the defence for negligencewhich he has no power to do—his acts are not only very ill-advised, but also well-calculated to cause an apprehension in the mind of the accused that the magistrate was prejudiced against him. Such acts in fact go far to suggest that the Magistrate is in that condition. That would be good ground for a transfer of the case. (Dhavle, J.) CHANDER KUER F. EMPEROR. 191 I.C. 193=13 R.P. 314=42 Cr.L.J. 103=7 B.R. 166=A.I R. 1941 Pat. 206.

-S. 526—Ground for transfer—Apprehension—Trial of Government servant pending before subordinate Magistrate -Undue interference by District Magistrate.

DE (1898), S. 526.

ring a petition for transfer, the susceptibipetitioner have to be looked to and if he e apprehension that he will not get a fair should be transferred even if the High sfied that in fact there is no sufficient nk that the trial Court will be biased against him. This principle is based on ation that if the petitioner really and inks, even though he is wrong in his he dice are loaded against him, it must n in the conduct of his case. If a District btains the transfer of a Government ist whom a criminal charge is pending ordinate Magistrate and also endeavours spended, his action is most improper and nd would afford a sufficient ground for a e case even though he has acted with the in what he believed to be the interests d administration of his district. (Blacker, SINGH v. RAGHBIR SHARAN. 212 I. R L. 261=45 Cr.L.J. 548=46 P.L R. 1944 Lah. 95.

6—Grounds for transfer—Cross-complaints—Dismissal of one—Application for transfer be allowed.

e of two cross-complaints is dismissed Cr. P. Code, it cannot be said that the apprehension that he will not get a partial trial in the cross-complaint rising on the same facts is unreasonable. The desirable that the case against him saferred to another Magistrate. (Laksh.) Sadasiva Goundan v. Emperor. May 1. 844 (2)=198 I.C 16 (2)=14 R. Cr.L J. 340=A.I.R. 1942 Mad 69. Ground for transfer—Failure to note allowed. Dewan Singh Maftoon v. ee Q.D. 1936-40, Vol. I, Col. 2918.] = 13 R.L. 380=42 Cr.L.J. 284.

—Ground for transfer—Jury trial—Judge ral times and ordering re-trials—Transfer ury district—If justified.

f trial by jury is in India not a common is not a right inherent in man or derived il social contract, but in Karachi it is now ht and is no longer dependent upon the remment under S. 269, Cr. P. Code. a jury or rather three juries came to sions on facts with which a Judge canwhich in his order directing yet another se regards as involving a serious misice, is not of itself a sufficient ground for accused of the right to a trial by a jury. ilure of one jury or even more than one one particular case, to observe with ath of office or sufficiently to appreciate orthy of the high privilege and great of their office as members of a jury is ound for doing so great a violence to f trial by jury which the transfer of the achi to a non-jury district would neces-

The Chief Court would not do so no other way to resolve the deadlock nued difference of opinion between a mustinvolve. (Davies, C.J. and Lobo, v. Hundraj Lachiram. I.L.R. (1944) 2 I C 79=16 R.S. 233=45 Cr.L.J. 1944 Sind 65.

-Ground for transfer-Hostility-Magisainant taking opposite sides in election. t the Honorary Magistrate trying a case CR. P. CODE (1898), S. 526.

owns land in the village of which the complainant is a lambardar and they took opposite sides in a recent election is a good ground for transfer of the case. (Skemp, J.) GHULAM RASUL v. EMPEROR. 196 I. C. 467=14 R.L. 160=42 Cr.L J. 880=43 P.L. R. 354=AI.R. 1941 Lah. 299.

S. 526—Grounds for transfer—Judge disagreeing with jury several times on re-trials—If justifies transfer of case to non-jury district. See CR. P. Code, Ss. 308 and 526. A.I.R. 1944 Sind 65.

S. 526—Grounds for transfer—Magistrate appreciating witness in former trial in particular manner in prior trial and convicting—If ground for transfer of subsequent case against other accused in which witness is same.

It does not follow that because the evidence of a particular witness has been appreciated in a particular manner in one case, it will necessarily be treated in the same way, or regarded in the same light, in a separate trial, and with regard to accused persons who were never before the Court in the previous case; and because the accused in the first trial have been convicted, it is unreasonable to suggest that the accused in the second or later trial will not obtain a fair trial in the same Court. This circumstance affords no sufficient ground for transfer under S. 526, Cr. P. Code. (O'Sullivan J.) Mahomed Ayub Khuhho v. Emperor. I.L.R. (1945) Kar. 275—AI.R., 1946 Sind 1.

S. 526—Grounds of transfer—Magistrate examining accused before ciose of prosecution case and admitting inadmissible evidence—If entitles accused to claim transfer.

Neither the fact that a Magistrate has examined

Neither the fact that a Magistrate has examined the accused exhaustively under S. 342, Cr. P. Code, before the prosecution case was closed nor the fact that he has allowed certain pieces of inadmissible evidence to be brought on the record, would by itself show that there was any bias or prejudice in the mind of the Magistrate so as to entitle the accused to claim a transfer under S. 526, Cr. P. Code. (Varma, J.) MUNAR PANDEY v. EMPEROR. 196 I.C 582=8 B. R. 47=14 R.P. 246=43 Cr.L.J. 48=A.I.R. 1942 Pat. 77.

Where a Magistrate refuses to summon certain witnesses and rejects an application to examine them under S. 540, Cr. P. Code, but examines one of them at the instance of the police prosecutor and refuses an adjournment of the case to enable the accused to apply for transfer but later on grants it on its being pointed out by the counsel for the opposite party that such action was likely to cause a complaint against his conduct, it is a case where there are sufficient grounds for transferring the case to another Magistrate. (Ghulam Hasan, J.) Shiva Prasad Sharma v. Emperor. 209 I.C. 535-=16 R.O. 135=1943 A. Cr. C. 121=45 Cr. L. J. 89=1943 A.W.R. (C. C.) 96=1943 O.W.N. 359=1943 O.M. (C.C.) 228=A.I.R. 1943 Oudh 437.

It cannot be accepted as a general principle that no Magistrate subordinate to the District Magistrate can deal with a case in which the District Magistrate has sanctioned the prosecution. It will not therefore be right for the High Court to transfer a case from a Magistrate to the Sessions Court on the ground merely that the Magistrate in question is subordinate to the District Magistrate who sanctioned the prosecution. But if there are reasons for thinking that in fact a particular Magistrate was likely to be influenced by

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the opinion of the District Magistrate, the High Court will not hesitate to transfer the case to the Sessions Court. (Beaumont, C.J. and Macklin, J.) EMPEROR v. SORABJI RUSTOMJI. 197 I.C. 733=14 R B. 259=43 Cr.L.J. 262=43 Bom.L.R. 518= A.I.R. 1941 Bom. 336.

-S. 526-Grounds for transfer-Magistrate trying case subordinate to sub-divisional magistrate taking cognisance -Expression of opinion in order taking cognisance

The High Court will not hesitate to transfer a case from a Magistrate who may be called upon in the course of the trial to differ from the views expressed by his superior (sub-divisional magistrate) in his order taking cognisance of the case, with regard to the guilt of the accused. (Minedith, J.) RAMESHWAR LAL v. EMPEROR. (1945) P.W.N. 133.

-S. 526-Grounds for transfer-Police officers of District being witnesses. DEWAN SINGH MAFTOON 7. EMPEROR. [See Q.D. 1936-40, Vol. I, Col. 2922.] 192 I C. 347=13 R.L. 380=42 Cr.L. J. 284.

-S. 526-Grounds for transfer-Prominent person

appearing as witness in case.

The fact that an M.L.A. or a prominent person is appearing as a witness in a case and the Magistrate would find it difficult to reject his evidence, is no 

also revenue officer subordinate to Mamlatdar on whose

inquiry and report case is instituted.

Where an application is made for transfer of a criminal case on the ground that the trial Magistrate who as a revenue officer is subordinate to a Mamlat lar on whose enquiry and report the case has been instituted, the High Court as a rule will transfer the case. The High Court will not hesitate to transfer a case from a Magistrate who may be called upon in the course of the trial to differ from the views expressed by his revenue superior and who will be very reluctant to make any hostile criticism on an officer on whose favour he is dependent as a revenue officer. (Beaumont, C. J. and Wassoodew, J.) EMPEROR v. ADAMBHAI ABDULLABAHAI. 203 I.C. 257=44 Cr.L. J. 71=15 R.B. 523=44 Bom.L.R. 763=A.I.R. 1942 Bom. 316.

#### Scope.

-S. 526—Scope—Application for transfer—Considerations for High Court-Cumulative effect of incidents

or observations to be considered.

In an application for transfer of a case under S. 526, Cr.P. Code, the High Court has to see whether or not particular observations made by the Magistrate or acts done by him during the trial will raise a reasonable apprehension in the mind of the accused that he would not get a fair trial in that Court. Though some of the incidents alleged may not deserve notice, if a serious incident is alleged and is not denied by the Magistrate, the High Court will consider what the cumulative effect of all that has happened is likely to be in the mind of the accused. (Varma, J.) Munar Pandey v. EMPEROR. 196 I.C. 582=8 B.R. 47=14 R.P. 246 =43 Cr.L.J. 48=A.I.R. 1942 Pat. 77.

#### Stay.

-S. 526—Stay order on application for transfer— When takes effect.

An order by the High Court staying further proceedings in the lower Court on an application for transfer under S. 526, Cr.P. Code, can only be deemed to take effect when it is communicated to the lower

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Court concerned. (Blacker, Ram Lall and Sale, 33.) Mahmood Hussain v. Emperor. I.L.R. (1943) Lah. 331=201 I.C. 242=16 R.L. 53=44 Cr.L.J. 751=45 P.L.R. 176=A.I.R. 1943 Lah. 191 (F.B.).

# Transfer.

-S. 526-Transfer-Considerations-Question as to admissibility or cogency of evidence to be led-Relevancy of.

Questions as to the admissibility or cogency of the evidence to be led, or any part of the evidence, of any of the witnesses in the case, are clearly matters for the trial Court to be dealt with at the trial, and are not relevant in an application for transfer under S. 526, Cr. P. Code. (O'Sullivan, J.) MAHOMED AYUB KHUHRO v. EMPEROR. I.L.R. (1945) Kar. 275=A.I.R. 1946 Sind 1.

-Ss. 526 and 528—Transfer—Notice—Necessity-Magistrate party to prior decision on similar point-If a

disqualification to hear similar point.

It is improper to transfer a case without giving notice to the accused. The mere fact that a Court had decided a particular point in one way on a previous occasion is no reason for holding him to be unfit to decide it on a subsequent occasion. Questions of fact have always to be decided on the facts of each case. (Pollock, J.) Yeshwant Rao v. Emperor, 1941 N.L. J. 619.

\_\_\_\_\_S. 526— Transfer— Notice— Transfer at the instance of some of the accused without notice to the others

-Legality.

The transfer of a criminal case on the application of some of the accused without notice to the other accused person is not illegal. (Horwill, J.) Kumaraswam Kalinga Rayar v. Emperor. 197 I.C. 799=14 R. M. 393=43 Cr.L.J. 278=1941 M.W.N. 1027= A.I.R. 1942 Mad. 221 (1).

S. 526—Transfer—Principles.

In dealing with an application for transfer, there are certain well-established principles. (1) One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security. (2) The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. (3) It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly seem to be done. (4) Nothing is to be done which creates even a suspicion that there has been an improper ANNUBEG MUKIMBEG V. EMPEROR. I.L.R. (1945)
Nag. 533—219 I C. 337—18 R.N. 42—46 Cr.L.
I. 601—1944 N.T. 7 J. 601=1944 N.L.J. 396=A.I.R. 1944 Nag. 320.

-Ss. 526 and 528—Transfer of case from file of Additional Sessions Judge-Applicant, if must first move

District Magistrate.

An application for a transfer of a case from the file of an Additional Sessions Judge may be made direct to the High Court without first moving the District Magistrate. Neither the District Magistrate nor the Sessions Judge has any power under S. 528, Cr.P. Code, to transfer a case from the file of an Additional Sessions Judge to the file of another Judge. (Sen, J.)
ANNUBEG MUKIMBEG v. EMPEROR. I.L.R. (1945)
Nag. 533=219 I.C. 337=18 R.N. 42=46 Cr.L.
J. 601=1944 N.L.J. 396=A.I.R. 1944 Nag. 320.

——Ss. 526 (4) and 539-A—Object of.
Ss. 526 (4) and 539-A, Cr.P. Code, require the filing of affidavits and one of the purposes of these

## CR. P. CODE (1898), S. 526.

provisions is to discourage the making of false and scandalous statements. (O'Sullivan, J.) GANWAR v. EMPEROR. I.L.R. (1944) KPT. 133=217 I.C. 182=17 R.S. 85=46 Cr.L.J. 223=A.I.R. 1944 Sind 155.

—S. 526 (8)—Adjournment for applying for transfer—Duty of accused—Extension of time—If can be granted.

Where an accused person desires an adjournment under S. 526 (8), Cr.P. Code, it is necessary for him not only to intimate his intention to apply to the High Court, but to comply with his undertaking to do so within a reasonable time fixed by the trial Court. He cannot ask for an extension of the time allowed on the ground that he moved the District Magistrate in the first instance and intended to move the High Court in case the District Magistrate refused his application. (Bennett. J.) Janu v. Emperor. 19 Luck. 294=208 I C. 534=16 R.O. 91=44 Cr.L. J. 797=1943 O.W.N. 315=1943 A.W.R. (C.C. 89=1943 A. Cr.C. 116=1943 O.A. (C.C.) 197=A.I.R. 1944 Oudh 7.

——S. 526 (8)—Adjournment of case—Duty of Magistrate.

Obiter: Sub-S. (8) to S. 526, Cr.P. Code, enjoins two things upon the Magistrate: first that he shall fix a "reasonable" time in which the party is to make an application under the section, and secondly that he shall adjourn the hearing for a time "sufficient" not only for the application to be made but also for an order to be obtained on it. It is difficult to construe "reasonable" and "sufficient" as merely synonymous. It is probable that the correct view is that the Magistrate having once adjourned under this provision should continue to adjourn either until the date for making the application has passed and no application has been made, or, if an application has been made, until an order has been obtained upon it. He cannot constitute himself a Judge of how long it ought to take the High Court to pass orders after having been moved. No doubt he may fix a date soon after the expiry of the period fixed for making the application in order to ascertain whether an application has been made. If he finds that it has been made, he would be bound to go on adjourning the case until he received such orders as permitted him to continue. The above remarks apply only to a case of a first application. In a subsequent application, the Magistrate is not bound to adjourn. He has full jurisdiction to proceed until such time as he is ordered by competent authority to stop. (Blacker, Ram Lall and Sale, JJ.)
MAHOMED HUSSAIN v. EMPEROR. I.L.R. (1943
Lah. 331=208 I.C. 242=16 R.L. 53=44 Cr.L.J. 751=45 P.L.R. 176=A.I.R. 1943 Lah. 191 (F.B.).

S. 526 (8)—Adjournment under—Sending of application to District Magistrate and consequent stay, if amounts to.

Where on an appliction for stay under S. 526 (8), the Magistrate sends the application to the District Magistrate and the proceedings are thereby stayed it does not amount to an adjournment under that subsection. (Agarwat, 7.) BHAGWAT v. EMPEROR. 203 I.C. 524=1942 O.W N. 448=1942 A.W.R. (C. C) 290=1942 A. Cr.C. 148=1942 O.A. 337=44 Cr.L.J. 97=15 R.O. 226=A.I.R. 1942 Oudh 429.

S. 526 (8)—Nature of provisions of—Effect of

The provisions of S. 526 (8) of the Cr.P. Code are mandatory and hence if they are infringed the whole trial becomes illegal. (Agarwal, J.) BHAGWAT v.

CR. P. CODE (1898), S. 528.

EMPEROR. 203 I.C. 524=1942 O.W.N. 448=1942 A.W.R. (C.C.) 290=1942 A.Cr.C. 148=1942 O.A. 337=15 R.O. 226=44 Cr.L.J. 97=A.I.R. 1942 Oudh 429.

—S. 526 (8), Proviso—'Subsequent intimation'— Meaning—Rejection of prior application to the trying Magistrate to transfer—Subsequent application for stay, intimating intention to apply for transfer—Rejection, if justifiable.

The 'subsequent intimation' referred to in the proviso to S. 526 (8), Cr. P. Code, could only mean that referred to in the sub-section itself, that is an intimation to the Court that the applicant intends to make an application under the section. Hence where an application was made to the trying Magistrate himself to transfer the case as he was likely to be cited as a witness and that was rejected, and a subsequent application was made for stay intimating an intention to apply to the Chief Court for transfer, its rejection under S. 526 (8), proviso will not be justified. (Agarwal, J.) BHAGWAT v. EMPEROR. 203 I C 524=1942 O. W.N. 448=1942 A. R. C.C.) 290=1942 A. Cr. C. 148=1942 O.A. 337=15 R.O. 226=44 Cr.L.J. 97=A.I.R. 1942 Oudh 429.

S. 526 (9)—Discretion of Sessions Judge—Refusal of adjournment to enable accused to apply for transfer—

Wrong refusal-If illegality-S. 537 -If cures irregularity. The question whether a person notifying his intention of making an application for transfer under S. 526, Cr.P. Code, has had a reasonable opportunity of making such an application must have reference to the ground on which it is sought to make the application. Where on the accused's objection to the reception of the evidence of a witness under S. 33 of the Evidence Act being overruled, he intimates to the Court that he intends to apply for a transfer of the cases and asks for an adjournment, but the sessions judge refuses to adjourn the trial on the ground that the accused has already had a reasonable opportunity of making the application and had failed without sufficient cause to take advantage of it, the refusal to adjourn is clearly wrong, because the accused cannot have made the application for transfer earlier. But such refusal is only an irregularity and does not vitiate the proceedings if it does not result in a failure of justice. A judge presiding in a Court of session had a discretion in the matter of adjournment under Cl. 9 of S. 526. He is empowered to refuse an adjournment and therefore it cannot be contended that by forming a wrong opinion he in any way infringes a mandatory provision of the Code and commits an error which cannot be cured under S. 537, Cr. P. Code. When such refusal does not in fact occasion a failure of justice, the irregularity is cured and the trial cannot be held to be vitiated, (Lakshmana Rao and Happell, 77.) Pakira Pujari, In re. 211 I.C. 350=16 R.M. 539=45 Cr.L.J. 368=1943 M.W.N. 706 (2)=56 L.W. 640=A. I.R. 1944 Mad. 78=(1943) 2 M L.J. 524.

An order of transfer made by a District Magistrate under S. 528, Cr.P. Code, without notice to the complainant, is not illegal, when he has given reasons for the transfer, which are both adequate and proper. (Hemeon, J.) Baliram v. Daulat Singh. I.L.R. (1944) Nag. 836=1944 N.L.J. 508=220 I.C. 77—46 Cr.L.J. 654=18 R.N. 62=A.I.R. 1945 Nag. 56.

Mere failure or omission to give notice—If affects transfer.

Mere failure or omission to give notice to the opposite party will not make an order of transfer illegal and would be no ground to set it aside. It is a mere

irregularity. There is nothing in the section itself which makes it obligatory on the District Magistrate to give notice to the opposite party. (Bennett, \*\*EMANA v. DULARY. 193 I.C. 681=13 R.O. 510

=42 Cr.L.J. 478=1941 O.W.N. 590=1941 A.

W.R. (C.C.) 148=1941 A.L.W. 435=1941 O.

A 379=1941 A. Cr.C. 109=1941 O.L.R. 364=

A I.R. 1041 O...db 2006 A.I.R. 1941 Oudh 388,

Ss. 528 and 17—District Magistrate, powers of

Setting aside transfer by Sub-divisional Magistrate.
Under S. 17, Gr. P. Gode, all magistrates appointed under Ss. 12, 13 and 14 are made subordinate to the District Magistrate. Hence a District Magistrate has the power to set aside an order of a Sub-divisional Magistrate transferring a case and transfer that case to some other Court. (Bennett, J.) KHEMANA v. DULARY. 193 I.C. 681=13 R O. 510=1941 A. Cr.C. 109=1941 O.L.R. 364=42 Cr.L.J. 478= 1941 O.W.N. 590=1941 A.W.R. (C.C.) 148= 1941 A.L.W. 435=1941 O.A. 379=A.I.R. 1941 Oudh 388.

-S. 528 (2)—District Magistrate—Powers of transfer-Sub-Magistrate having no jurisdiction to try case before him - Procedure-Jurisdiction to decide whether case is triable by Magistrate-Transfer by District Magis-

trate or High Court-Legality.

Neither the District Magistrate nor the High Court ought to transfer a case where the Subordinate Magistrate has no jurisdiction; the proper tribunal to decide whether the case is one within his jurisdiction and whether or not he should continue the trial is the Subordinate Magistrate himself and not the District Magistrate or the High Court. It is open to him to try an accused for an offence less than that revealed in the complaint although it would ordinarily be improper for him to do so. If he has no jurisdiction he should return the complaint for presentation to proper Court. (Hyrwill, f.) CHELLAPPA CHETTIAR, In re. 203 I.C. 620=1942 M.W.N. 593=55 L. W. 549=15 R.M. 690=44 Cr.L.J. 122=A.I.R. 1942 Mad. 715=(1942) 2 M.L.J 308.

-S. 528—Withdrawal of case—Power of District Magistrate.

S. 528, Cr. P. Code, should be used in the furtherance of the interests of justice according to law and not in the frustration of it. If a District Magistrate withdraws from a trying Magistrate a case, in which the trying Magistrate is exercising his judicial discretion, on the ground that the result is not, or may not be, the result that he wishes and sends it to another Magistrate for the express purpose of getting the result he desires, then it is not justice according to law. (Derbyshire, C. J. and Lodge, J.) RAJENDRA NATH SOM v. DWIJAPADA SAMANTA. 217 I.C. 71=17 R. C. 165=46 Cr. L. J. 169=48 C.W.N. 580=A.I. R. 1944 Cal. 411.

wrongly given under S. 197—Applicability—Sanction of Magistrate otherwise competent to try case. Pearey Lal v. Emperor. [See Q.D. 1936-40, Vol. I, Col. 3344.] 13 R. Pesh. 28=42 Cr.L. J. 68.
——S. 529 (f)—Applicability—Order under S.133 (1)-Person showing cause-Subsequent transfer of case to second class magistrate—Effect on proceedings -Irregularity-If cured. See CR. P. Code, S. 133 (1).

(1945) P. N.N. 151.
S. 530—Applicability—Proceedings under Ordi-

nance (II of 1942).
S. 530, Gr. P. Code, is in no way inconsistent with the provisions of Ordinance (II of 1942) and its enforced. The failure of the magistrate to determine operation is therefore preserved by S. 27 thereof. the question of jurisdiction is not a mere irregularity

CR. P. CODE (1898), S. 531.

(Fazl Ali, C.J., Manohar Lal and Meredith, JJ.) GOPAL Marwari v. Emperor. 22 Pat. 433 = 209 I.C. 482 = 16 R.P. 114 = 1944 P.W.N 420 = 10 B.R. 193 =45 Cr L.J. 177=A.I.R. 1943 Pat. 245 (S.B.). -Ss. 530, 531 and 537-Scope-Trial of offence

under S. 220, Penal Code, by Magistrate-Illegality-If

The trial by a magistrate of an offence under S. 220, I. P. Code, which he has no jurisdiction to try, is not such an irregularity as is referred to in S. 531 or S. 537, Cr. P. Code, but is an illegality comparable to those rregularities under S. 530, Cr. P. Code, which make proceedings void. (Davis, C.J.) MANSHARAM GIAN CHAND v. EMPEROR. 193 I.C. 454=13 R S. 231= 42 Cr.L.J. 460=A.I.R. 1941 Sind 36.

S. 530 (p)—Scope—Omission to object to jurisdiction—If waiver and if confers jurisdiction.
Under S. 530, Cr. P. Code, if a magistrate not

empowered in law to try an offence tries an offender in respect of such offence, the trial is void; and an omission to raise a question of jurisdiction in the trial Court does not amount to waiver or confer jurisdiction on the magistrate. (Rowland,  $\tilde{\jmath}$ .) Maho-MED v. EMPEROR. 16 R.P. 169=45 Cr.L.J. 166= 209 I.C. 639=10 B.R. 179=9 Cut L.T. 19=A. I.R. 1943 Pat. 330.

S. 530 (p)—Scope of—Trial for offence less serious than one committed—Effect—Interference by High

The effect of S. 530 (p), Cr. P. Code, is that if a Magistrate tries an offender for an offence beyond his jurisdiction his proceedings shall be void. If the Magistrate entirely overlooks some fact which would carry the offence beyond his jurisdiction and tries the accused for a lesser offence, he cannot be held to have acted without jurisdiction. The question whether he has or has not deliberately overlooked the circumstances is one of fact. If, on the other hand, he does not overlook the circumstance, but after his attention has been drawn to it, he deliberately ignores it, his proceedings would be improper and the High Court will interfere in revision. If the Magistrate really believes that the whole body of facts revealed to him constituted an offence triable by him, and he has in fact jurisdiction to try that offence, his proceedings are not improper and the High Court will not interfere. (Horwill, J.) PERIANNA MUDALI v. EMPEROR. 198 I.C 428=14 R.M 454 =43 Cr.L.J. 361=54 L.W. 738=1941 M.W.N 811=A I.R. 1942 Mad. 31=(1941) 2 M.L.J.

S. 531—Applicability—Jurisdiction exercisable only by foreign Court—Wrongful exercise by Court in British India—If curable.

S. 531, Cr. P. Code, applies only to inquiries in British India and cures lack of jurisdiction in respect of such inquiries. But it does not condone the wrongful exercise of jurisdiction by a British Indian Court when only a foreign Court has jurisdiction in the matter. (Horwill, f.) BALAKRISHNA NAIDU 7. SAKUNTALA BAI. 208 I.C. 192=16 R. M. 225=44 Cr. L. J. 741=55 L. W. 306=1942 M. W. N. 306 =A.I.R. 1942 Mad 666=(1942) 2 M.L.J. 134.

5 531—Jurisdiction—Plea raised in trial Couribut not determined—Irregularity, if curable.

When the question of jurisdiction has been raised before the trial Management before the trial Magistrate, it is his duty to determine the point, otherwise the provisions as regards jurisdiction given in the Cr. P. Code, would never be enforced. The failure of the magistrate to determine

# CR. P. CODE (1898), S. 533.

which can be cured under S. 531, Cr. P. Code. (Almond, J.C.) Sultan Chand v. Yogindra Nath. 214 I C. 230=45 Cr.L.J. 749=17 R. Pesh. 8= A.I.R. 1944 Pesh. 25.

-S. 533--Confessional statement not properly recorded—Certificate that confession was voluntary-Tecorded—Certificate that contession was voluntary—Magistrate's evidence—Admissibility. Baliram Singh v. Emperor. [See Q.D. 1936-40, Vol. I, Col. 2934.] I.L.R. (1941) Nag 506.

S. 537—Applicability—Committal in disregard of provisions of S. 254—Trial and conviction—Legality. See Cr. P. Code, Ss. 254 and 537.

1945 A.L.W. 155.

S. 537—Applicability—Conditions.

The question whether the error, omission of

The question whether the error, omission, or irregularity in the charge has or has not ended in a failure of justice is a question of fact and it will depend on the facts of each case. S. 537, Cr. P. Code, is only applicable to a case where the attention of the accused is specifically drawn in the charge to the acts which he is alleged to have committed and he is specifically questioned about those acts. (Malik, J.)
Маккнам v. Емрегов. I.L.R. (1945) All. 558—
220 I.C 432=1946 A (Rul.) 9=1945 A.L W.
248=1945 A.W.R. (H.C.) 156=1945 O.W.N.
(H.C.) 227=1945 A. Cr. C. 122=46 Cr. L. J. 750 =A.I.R. 1945 All. 81.

-S. 537-Applicability-Failure to record grounds of proof of forfeiture under S. 514. CR. P. CODE, Ss. 514 AND 537. =1941 A W.R (Rev.) 219. 1941 O.W.N. 357

-S 537—Complaint under S. 195—Absence of—

Defect, if curable.

S. 537, Cr. P. Code, does not cure cases of want of or irregularity in any complaint required by S. 195, Cr. P. Code. Where in a proceeding instituted on a police report the accused was convicted under S. 353, I. P. Code, the Appellate Court cannot alter the conviction to one under S. 186, I. P. Code, in the absence of a previous complaint in writing of the public servant concerned or some other public servant to whom he was subordinate, and the defect cannot be cured by S. 537, Cr. P. Code. (Bartley and Edgley, 77.) MONMATHA KOLEY v. EMPEROR. 45 C.W.N. 580. -S. 537—Connected cases—Recording of defence evidence in one-Curability.

Where it was at the request of the accused themselves that the defence evidence in the case was recorded in only one of the connected cases and was read in all of them, no miscarriage of justice could have occurred and S. 537, Cr. P. Code, is a clear bar to the quashing of proceedings on such a ground. (Davies.) JHANTA LAL v. EMPEROR. 1941 A.M.L. J. 96.

S. 537—Gurability under—Absence of sanction under S. 188, Cr. P. Code. See Cr. P. Code, Ss. 188, 179 AND 537. A.I.R. 1945 Oudh 231.

S. 537—Gurability under—Expunging of

remarks from judgment by Sessions Judge. See CR. P. Code, Ss. 561-A and 537. 1941 Rang. L.R. 566.

S. 537—Curability under—Failure to take statement of accused on oath prior to sending case for investigation. See CR. P. CODE, Ss. 202 AND 537. 1944 O.W N. 275.

—S. 537—Curability under—Limits—Misjoinder of

charges.

In the case of a misjoinder of persons contrary to S. 239 (e), Cr. P. Code, though it is an illegality and not a mere irregularity, it is yet curable by S. 537, if it has not in fact occasioned injustice. Hence not a mere irregularity, it is yet curable by S. 537, condoned under Sec. 537, Cr. P. Code. (Divatia and Lokur, JJ.) EMPEROR v. KESHAVLAL. 46 Bom.L. where two distinct offences committed on two different R. 555=A.I.R. 1944 Bom. 306.

# CR. P. CODE (1898), S. 537.

dates in which two different charges have been framed are tried together, it is not fatal to the proceedings when there has been no prejudice to the accused.. (Thomas, C.J.) Asharri Lalv. Emperor. 213 I.C. 373=17 R.O. 15=45 Cr.L. J. 719=1944 O.W. N. 190=1944 O.A. (C.C.) 137=1944 A. Cr.C. 39=1944 A.W.R. (C.C.) 137=A.I.R. 1944 Oudh 239.

S. 537—Curability under—Scope of See CR. P. CODE, Ss. 234, 239 (d) AND 537. 1941

Rang.L.R 559.

S 537—Irregularities—Interference in revision— Grounds.

The provisions of S. 537, Cr. P. Code, are mandatory and the High Court could not interfere without finding that there had been a substantial error of justice due to the irregularities in the course of the trial. It was never the intention of the legislature that persons who committed offences should escape punishment merely on technical grounds which did not affect the substantial justice of a case. (Allsop, J.) Ganshiam Das v. Emperor. 1941 A.W.R. (H. C.) 134=1941 A. Cr C. 105=1941 O.A. (Supp.) 244=1941 A.L.J. 229=1941 O.W.N. 546 (1)= 1941 A.L.W. 397 (1).

-S. 537—Sanction under S. 197 wrongly given -Magistrate otherwise competent to try case specially appointed—Proceedings, if vitiated. Pearly Lal. v. Emperor. [See Q.D. 1936-40, Vol. I, Col. 3344.] 13 R. Pesh. 28=42 Cr.L.J. 68.

-S. 537—Scope—Case under S. 133 (1)—Conditional order to show cause-Transfer of case to second class magistrate after cause is shown-If vitiates proceedings—Irregularity—If cured. See CR. P. Code, S. 133 (1). (1945) P.W.N. 151.

-S. 537—Scope—Contravention of S. 233—Effect

on trial-Defect, if curable.

The effect of a joint trial in contravention of the provisions of S. 233, Cr. P. Code, is to vitiate the trial, and it is not a question of an irregularity which can be cured under S. 537, Cr. P. Code. (Meredith and Sinha, J.J.) CHINTAMAN v. EMPEROR. 24 Pat. 303=221 I.C. 312=12 B.R. 117=26 P.L. T. 293=1945 P.W.N. 335=A.I.R. 1945 Pat.

S. 537—Scope—Contravention of S. 526 (8)
—Effect—If cured. See Cr. P. Code, S. 526 (9).
(1943) 2 M.L.J. 524.
——S. 537—Scope—Mistake in charge—Effect on

A mistake in the charge does not afford a ground for setting aside a conviction when no prejudice has been caused to the accused thereby. (Agarwala and Verma, 77.) AFZALUR RAHMAN v. EMPEROR. 22 Pat. 76=A.I.R. 1943 Pat. 229.

S. 537—Scope—Non-compliance with S. 342, Cr. P. Code—Effect of. See Cr. P. Code, S. 342. A.I.R. 1942 Sind 102.

-S. 537—Scope—Trial of offence under S. 220, I. P. Code, by Magistrate-Illegality-If curable. See Cr. P. Code, Ss. 530, 531 AND 537. A.I.R. 1941 Sind 36.

Ss. 234 to 236 and 239—Legality—Defect if curable.

A charge framed in contravention of the mandatory provisions of Ss. 233, 234, 235, 236 and 239, is illega and though no failure of justice may have been thereby occasioned, the defect is not one which can be

# CR. P. CODE (1898), S. 539-A.

S. 539-A-Applicability-Accused person. S. 539-A, Cr. P. Code, applies to an accused. It applies to any person who chooses to make allegations against a public servant and in support of those allegations swears an affidavit. If an accused person chooses to come within the scope of this section and swears an affidavit on false facts he would be liable to punishment which can be inflicted upon ordinary persons who swear such false affidavits. (Bajpai, J.) MAHTAB SINGH v. EMPEROR. I.L.R. (1941) All. 635=14 R.A. 174=196 I.C. 480=42 Cr.L.J. 883=1941 A. Cr.C. 192=1941 A.L.W. 802= 1941 A.W.R. (H.C.) 247=1941 O.A. (Supp.) 600=1941 A.L.J. 374=A.I.R. 1941 All. 337.

Ss. 526 (4) AND 539-A. A.I.R. 1944 Sind 155.

S. 540—Discretion and powers of Court under.

The wording of S. 540, Cr. P. Code, is extremely wide, and enables a Magistrate at any stage of any proceeding to examine any person as a witness; and where it is essential for the just decision of the case, he is bound to do so. S. 540 is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. (Horwill, 7.) NARAYANAN NAMBIAR, In re. I.L.R. (1942) Mad. 494—43 Cr.L.J. 557=14 R.M. 591=199 I.C. 406—1941 M.W.N. 1032=54 L.W. 556=A.I.R. 1942 Mad. 223=(1941) 2 M.L.J. 787.

S. 540—Discretion of Court—Right of prosecution to summon fresh witnesses in Sessions Court for first time-Witnesses sought being accomplices-Duty of Court. NARAYANA REDDI, In rc. [See Q. D. 1936-40, Vol. I, Col. 3344.] 193 I.C. 342=13 R.M. 673=42 Cr.L.J. 404=A.I.R. 1941 Mad.

-Ss. 540 and 342 (1)—Examination of Court witness at the end of the case—Accused, if should be once again examined under S. 342 (1). Benn Madho v. Emperor. [See Q.D. 1936-40, Vol. I, Col. 2944.] 16 Luck. 353—A.I.R. 1941 Oudh 20.

-S. 540—Powers of Court under.

The powers of Court is neither circumscribed nor fettered in any way to arrive at the truth in a criminal trial. S. 540, Cr. P. Code, gives ample powers to the Court to examine any person as a witness, whose evidence appears to it essential to the just decision of the case. A witness though he had turned hostile in the committing Court, must be made to be present in the Sessions Court, so that he can be examined under S. 540, if the prosecution fail to examine him. There 5. 540, It the prosecution tail to examine thin. I here is no reason why such a witness should not be tendered for cross-examination. (Thomas, C.J. and Ghulam Hasan, J.) SARFARAZ ALI v. EMPEROR. 17 Luck. 20=196 I.C. 319=14 R.O. 157=1941 A.Cr.C. 214=42 Cr.L.J. 845=1941 O.L.R. 670=1941 A. W.R. (C.C.) 303=1941 O.A. 782=1941 O.W. N. 1034=A.I.R. 1941 Oudh 599.

-S. 540-Powers under discretionary. The powers under S. 540, Cr. P. Code, are discretionary and Court cannot be forced to exercise Noor Mohamad v. Imtiaz Ahmad. 197 I.C. 839=43 Cr.L.J. 280=14 R.O. 363=1942 A.Cr. C. 1:=1941 O.A. 1008=1941 O.W.N. 1290=1941 A.W.R. (C.C.) 397=A.I.R. 1942 Oudh **1**30.

-S. 540—Scope and applicability. Hansraj v. Emperor. [See Q.D. 1936-40, Vol. I, Col. 2943.]

CR. P. CODE (1898), S. 544.

I.L.R. (1942) Nag. 333=191 I.C. 636=13 R.N. 212=42 Cr.L.J. 208.
S. 540—Scope—Appellate magistrate—Power to

examine trial magistrate to ascertain what transpired at trial or to enquire what procedure was followed.

S. 540, Cr. P. Code, gives very wide powers to all Courts at any stage in any proceeding to examine witnesses if such evidence appears necessary for a just decision of the case. An appellate magistrate is therefore entitled to ascertain what transpired in the trial Court by calling for a report or otherwise. There is nothing wrong in an appellate magistrate summoning the trial magistrate as a witness in the appeal and enquiring of him what procedure had been RAMAYYA, In re. 203 I.C. 461=44 Cr.L.J. 5=
1942 M.W.N. 581=55 L.W. 517=15 R.M. 658
=A.I.R. 1942 Mad. 668=(1942) 2 M.L.J. 278. -S. 540-A-Trial in accused's absence-Examination of pleader for accused under S. 342-Permissibility.

S. 540-A, Cr. P. Code, permits a Magistrate in special cases to proceed with a trial in the absence of the accused. But it does not permit the trial to proceed without the presence of the accused at stages where under the law the presence of the accused is imperative. One of these stages is when the accused is required to be examined under S. 342, Cr. P. Code, the Court cannot examine the pleader of the accused in his place under that section. (Lodge and Sen, JJ.)
ADELUDDIN v. EMPEROR. 49 C.W.N. 537=A.I.R. 1945 Cal. 482.

-S. 542-Applicability-Statements recorded by

police in the course of investigations.

Weston, J.—S. 548, Cr. P. Code, has no application to police statements recorded in the course of an investigation, and does not operate to exclude them. (Lobo and Weston, JJ.) EMPEROR D. RASULBUX. I. L.R. (1942) Kar. 252=205 I.C. 322=15 R.S. 136=44 Cr.L.J. 378=A.I.R. 1942 Sind 122.

-Ss. 544 and 257 (3)—Expenses of defence witnesses-Power of Magistrate to order payment by Government.

Lahore High Court Rules and Orders.

Under S. 257 (2), Cr. P. Code, the magistrate may require the accused to deposit in Court the reasonable expenses of any defence witness whose attendance is to be enforced through the Court. On the other hand, under S. 544, Cr. P. Code, the Magistrate may order payment on the part of Government of the reasonable expenses of any witness attending a trial, subject to any rules which may be framed by the Provincial Government. Rule i of the Rules lays down four classes of cases in which the payment of such expenses is authorised. Briefly, there are (1) Cases which are brought in the public interest, (2) non-bailable cases, (3) cognizable cases and (4) cases in which Court witnesses are called: Even in these cases, the Court has merely a discretion to pay the expenses of the witnesses, and will ordinarily do so, but is not bound to do so in every instance. The mere fact that the Courts are given an authority and a discretion in certain cases, clearly implies that the Courts are not authorised to make payments in other cases. Hence the payment of the expenses of the defence witnesses in any class of case which is not covered by rule I is no longer within the discretion of the Criminal Courts. (Beckett and Bhandari, Jf.) Merana v. Godfert. 219 I.C. 342=18R.L. 63=46 Cr.L., J. 596=A.I.R. 1945 Lah. 63.

Courts are empowered to order that the reasonable

expenses incurred by persons summoned to produce

documents, should be reimbursed to them. (Davies.) RAJA KALYAN SINGH v. ALI MAHOMED. 1941 A.

M.L.J. 16.
S. 545—Absence of notice of appeal against conviction to complainant awarded compensation-No ground for interference in revision with order on such appeal. See Cr. P. Code, S. 422. (1942) 1

M.L.J. 108.

S. 545—Case in which compensation is awarded under-Appeal or revision-Notice to party awarded com.

pensation-Necessity-Rule-Practice.

Where a person, whether the complainant or some one else, has been awarded compensation under S. 545, Cr. P. Code, he ought to be served with notice of an appeal or revision application which may result in the order of compensation being set aside. If he appears it will be in the discretion of the Court to hear his advocate or to decline to do so. But if he is served with notice, he can, at any rate, see that his view is placed before the Court by the advocate appearing for the Government. (Beaumont, C.J. and Sen, J.) EMPEROR v. CHUNILAL BHAGWANJI. I.L.R. (1942) Bom. 530=201 I.C. 710=15 R.B. 106=43 Cr.L.J. 765=44 Bom.L.R. 438=A.I.R. 1942 Bom. 205 (1).

-S. 545 (1)—Grant of reward out of fine—Legality. Rewards are not mentioned in S. 545 (1), Cr. P. Code, which provides for cases where money recovered as fine may legally be granted to other persons. Hence the grant of reward out of fine is illegal. (Davies.) CHAND MAL v. CROWN. 1945 A.M.L.J.

Ss. 548 and 554—Discretion of Court to allow inspection of record—Proper exercise of—Right of parties to inspect record to decide whether certified copy is necessary

—Bombay High Court Criminal Circular No. 160-A.

There is a common law right of inspection of public documents by a person interested in the document so far as may be necessary for the protection of such interest. There is no doubt that except as controlled by any rule made by the High Court under S. 554, Cr. P. Code, a Magistrate or a Judge of a subordinate Criminal Court has a discretion to allow inspection of the record of his Court, but such discretion has to be exercised judicially. In exercising his discretion a Magistrate or Judge would be bound to have regard to the terms of S. 548, Cr. P. Code, which gives a right to a party to have copies of certain specified parts of the record and it would be difficult, and generally improper for him to refuse inspection of any document of which a party is entitled to a certified copy under that section. The right to a certified copy pre-supposes a right of inspection. To require a party to take certified copies of all documents on the record in order to determine of which documents he really requires copies would involve unnecessary expense and trouble. Therefore, prima facie under S. 548, a party would have an implied right to ask the presiding Magistrate or Judge to allow him inspection of the record referred to in the Bombay High Court Circular No. 160-A section. (1934), is not exclusive and does not deprive the Court of the right which it previously enjoyed, and exercised in practice of granting inspection of the whole record to a party properly entitled thereto. Where a Magistrate discharges the accused, the complainant is clearly entitled under S. 548, Cr. P. Code, as a person affected by the order of discharge, to require certified copies of the orders, depositions and other parts of the record. It is altogether unreasonable to insist that he must take certified copies in order to determine whether he really wants such

CR. P. CODE (1898), S. 552.

copies. The more rational and proper course is to allow him to inspect the documents in order to make up his mind whether he wants to have certified copies or not. (Beaumont, C.J. and Sen, J.) PARASURAM DETARAM v. HUGH GOLDING COCKE. I.L R. (1942) Bom. 71=198 I.C. 114=14 R.B. 283=43 Cr. L.J. 306=43 Bom. L.R. 961=A.I R. 1942 Bom.

-S. 549—Rules, framed under by Government of India, 1935—Accused subject to military, naval or airforce law—Trial by magistrate under Cr. P. Code—Procedure

-Courses open to magistrate.

Under Rr. 1 and 2 of the rules framed by the Government of India in 1935 under S. 549, Cr. P. Code, there are two courses open to a Magistrate trying an accused subject to military, naval or air force law for an offence under the Cr. P. Code. (1) The magistrate has to come to the opinion that he should proceed with the trial without being moved thereto by competent authority, and if he comes to that opinion he must record his reasons for arriving at such conclusion. But before he proceeds to try the accused, he must give notice to the commanding officer of the accused and wait for five days from the date of service of such notice. Or (2) if moved by competent military, naval or air force authorities, he may proceed to try the accused. (Wadia and Sen, JJ.)

EMPEROR v. JERRY D'SENA. I.L.R. (1945) Bom.

149=215 I.C. 296=17 R.B. 128=46 Cr.L.J. 99

=46 Bom. L.R. 597=A.I.R. 1944 Bom. 271.

S. 549—Scope—Non-compliance with—Effect on

trial and conviction.

By reason of S. 549, Cr. P. Code, when a person is brought before a magistrate and charged with an offence for which he is liable, to be tried either by a Court to which the Code applies, or by Court-martial, the magistrate shall have regard to the rules made under S. 549, in that behalf and shall, in proper cases, deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment corps ship or detachment to which he belongs, or to the commanding officer of the nearest naval or air force station as the case may be, for the purpose of being tried by Court-martial. attention of the magistrate is not drawn to S. 549, and he therefore fails to act in accordance therewith, the trial and conviction are illegal and must be set May Stollery Mundy, In re. 221 I.C. 487=58 L.W. 208=1945 M.W.N. 262=A.I.R. 1945 Mad. 289=(1945) | M.L.J. 388.

-S. 550—Applicability—Offences created by Defence

of India Rules.

S. 550, Cr. P. Code, speaks of "any offence" and so is wide enough to cover offences created by the Defence of India Rules. (Bose, J.) Bhimji Ramji v. Emperor. I.L.R. (1945) Nag. 413=218 I C 12=46 Cr.L.J. 366=1944 N.L.J. 417=A.I.R. 1944 Nag 366.

S. 552—Jurisdiction—Order for production of girl not below 16 years of age—If can be passed.

An order for production of a female child under An order for production of a female child meter S. 552, Gr. P. Code, can only be passed if the girl is under 16 years of age. (Horwill, J.) Parambath Kanaran v. Vasudevan. 195 I.C. 177=14 R.M. 146=42 Cr.L.J. 688=(1941) M.W.N. 448=A.I. R. 1941 Mad. 625=(1941) 1 M.L. J. 828.

S. 552—Order under—Grounds for—Allegation of matricing in comblaint—Sufficience.

marriage in complaint -Sufficiency.

Where a complainant alleges that a girl was legally married to him and that she was taken away by her parents to their house against the girl's wishes with the

intention of getting her married to some one else, the magistrate should not make an order for production of the girl against the parents unless he has something more substantial before him about the alleged marriage than the complainant's statement. (Horwill, J.) PARAMBATH KANARAN v. VASUDEVAN. 195 I.C. 177=14 R.M. 146=42 Cr L.J. 688= (1941) M.W.N. 448=A.I.R. 1941 Mad. 625= (1941) 1 M.L.J 828.

S 554—Scope—Inspection of record—Right of parties—Discretion of Court—Principles guiding exercise of. See CR. P. CODE, Ss. 548 and 554. 43 Bom L.R 961.

——S 556—Applicability—Order for prosecution by District Munsiff—Appeal against order dismissed by District Judge-Trial before same District Judge as Sessions Judge

If barred.
The accused who was the defendant in a suit for rent was called upon by the District Munsiff who tried the suit under S. 476, Cr. P. Code, to show cause why he should not be prosecuted for forgery in respect of a receipt filed by him in the suit, and after inquiring into the matter ordered a complaint to be filed against the accused. The accused preferred an appeal under S. 476-B, Cr. P. Code, to the District Judge who dismissed the appeal, holding that the Munsiff was justified in filing District complaint. The accused was put up for trial before the Sessions Judge who happened to be the same District Judge who dismissed the accused's appeal under S. 476-B, Cr. P. Code. The accused in his appeal from his conviction after trial pleaded that the Sessions Judge was precluded from trying the case judgments-Power of-Exercise by one not authorisedby reason of S. 556, Cr. P. Code.

Held, that only if the District Judge had himself filed the complaint, or had ordered the district munsiff to lay a complaint under S. 476-B in an appeal from an order of the District Munsiff declining to lay a complaint, the District Judge would have been directly hit by S. 556, Cr. P. Code, but in the present case he would not be said to be have been a party to the proceedings or to be personally interested in the result, so as to preclude him from trying the case as Sessions Judge. (Horwill, J.) Kunhamad v. Emperor. 205 I.C. 384=15 R.M. 880=44 Cr.L. J. 404=(1942) M.W.N. 484=55 L.W. 536=A. IR. 1942 Mad. 753=(1943) 1 M.L.J. 482

-S 556-Magistrate acting in his magisterial capacity in connection with case-If debarred from taking com-

mittal proceedings.

There is nothing in S. 556, Cr. P. Code, which should debar a trying Magistrate from taking committal proceedings in a case in connexion with which he has acted in his magisterial capacity, to wit, he has either recorded the statement of the accused or conducted an identification parade, or recorded a dying declaration, or done some other such thing. It is, however, highly undesirable that the Magistrate who takes any such steps should himself preside over the committal proceedings. (Mir Ahmad, J.C. and Mahomed Ibrahim, J.) GHULAM RASUL v. EMPEROR. 219 I.C 317=18 R. Pesh. 14=46 Cr.L. J. 585= A.I.R. 1945 Pesh 1.

-S. 556-Previous official contact with accused-

If a disqualification.

The fact that a Judge had an official contact with the accused several years ago does not disqualify him from hearing a revision petition (fled by him. (Derbyshire, C. J., Rhundkar and Lodge, J.J.) R. C. POLLA-RD v. SATYAGOPAL MAZUMDAR. 210 I.C. 337=16 R.C. 448=45 Cr.L.J. 224=A.I.R 1943 Cal. 594 (S.B.),

### CR. P. CODE (1898), S. 561-A.

-S. 556-Trial by Excise officer of case in which accused has been prosecuted by him Legality.

A District Excise officer cannot try a case when he himself has directed that the accused in that case should be prosecuted. It is incumbent upon him to obtain the previous permission of the Court to which an appeal lies from his Court before he tries the case. His failure to do so, vitiates the trial. (Mir Ahmad, J.C.)
ISHAR DASS v. EMPEROR. 216 I.C. 309=17 R
Pesh. 22=46 Cr.L.J. 173=A.I.R. 1944 Pesh. 47.

-S. 561 (a)—Power to expunge remarks from judg. ment of lower Courts.

High Courts have power to expunge or delete remarks from a judgment of a Court subordinate to it where it is found that the said remarks are irrelevant, unfounded and contrary to principles of natural justice. (Vyas.) Surya Nand v. Emperor. 1945 A.M.L. J. 77

-Ss 561-A and 443-Accused taking advantage of procedure under Chap. 33-If can subsequently waive

privelege.

An accused person is not entitled under all circumstances to demand that, when an advantage thought likely to accrue to him by reason of the delay in the procedure under Chap. 33 does not eventualize, he should then be permitted to have the forum of his trial changed back to the Court of a Magistrate. (Davies, C.J. and Weston, J.) SAKINA n. EMPEROR, I.L.R. (1943) Kar. 1=207 I.C. 235=16 R.S. 30=44 Cr.L.J. 586=A.I.R. 1943 Sind 123. -Ss. 561-A and 537-Expunging remarks from

Not curable.

The High Courts have no doubt the power under S. 561-A, Cr. P. Code, to order expunction of remarks from judgments of lower Courts, but only when the passage objected to amounts to 'an abuse of the process of Court' and never when it is relevant to the points at issue before the Court. The jurisdiction is of an extraordinary nature and has to be exercised with great care and caution. A Sessions Judge has never possessed any such authority. If he does exercise it, it is not curable under S. 537. It is clearly an assumption of authority which is not conferred on the Sessions Judge by Cr. P. Code and therefore is an illegality, and the irrebuttable presumption arises that the accused must have been prejudiced thereby. (Roberts, C.J. and Dunkley, J.) A. H. GHANDHI v. THE KING. 1941 Rang. L.R. 566= 198 I.C. 455=14 R.R. 210=43 Cr.L.J. 373= AIR. 1941 Rang. 324.

S. 561-A—Expunging remarks in judgment of subordinate Court—Powers of High Court.

There is no doubt that in a proper case the High Court has power to expunge a part of a judgment of a Court subordinate to it, but it will only take such action when the words objected to are not relevant to the case and are of a scandalous or very improper nature. The High Court must carefully guard against doing anything which might tend to restrict the free expression of judicial opinion on a matter before a Sessions Judge. A Judge should confine himself to the case before him and not indulge in homilies which are liable to be misunderstood and which may land the administration in general in an awkward situation. It may be that an observation or remark may well not have been made, but if it is not out of place, the High Court will not expunge the same. (Leach, C.J. and Lakshmana Rao, J.)
PUBLIC PROSECUTOR, In re. I.L.R. (1944) Mad.
614=214 I.C. 334=17 R.M. 139=45 Cr.L.J. 98), S. 561-A.

1. 132=57 L.W. 112=A.I.R. 944) 1 M.L.J. 153.

chunging passages from judgment

Cr. P. Code, the High Court sages from the judgment of the so doing it is necessary to mutito touch the fabric of the judglefamatory remarks complained detached from the judgment, eparable and irrelevant, then it r expunction will not affect the it as a whole and will not affect e lower Court and action under be appropriately and lawfully ks complained of are not irrelee from the judgment as a whole hole should be considered, and e in such a case is for a Court the parties relating to the case hen with the case as a whole in the defamatory remarks if it in exercise of its powers under read with S. 423 (d) or read with (Davies, C. J. and O' Sullivan, J.)
ROR. I.L R. (1944) Kar. 252
R.S. 53=46 Cr.L.J. 88=

33.

'mproper passages in Magistrate's by High Court. vill on the recommendation of a

runge from the judgment of a which are either quite improper tra judicial information which t of the evidence on the record. EMPEROR v. Brij Lal. 202 I. J. 808 = 15 R.L. 117=44 P.L. 12 Lah. 232.

herent powers—Expunging of—Deist witness.

561-A, Cr. P. Code, is directly stion the inherent powers s, over and above the statutory other provisions of the Cr. P. inherent powers of the highest is to prevent grave injustice and to a person who, though not a ess, been called before the Court nich he cannot disobey and who 1 made the subject of defan atory strate or Judge, which remarks istified from the record and the ierefore, must involve the abuse

To expunge any such pasasges person aggrieved is "otherwise f justice" within the meaning of de and once it is considered that this power it must be conceded ssary ancillary power to call for ts inherent powers may be exerdifference whether the Court instance of the person aggrieved. O'Sullivan, J.) GHUMANMAL v. (1944) Kar. 252=215 I.C. 283 2r.L.J. 88=A.I.R. 1944 Sind

therent powers—Expunging of ress from judgment of trial Court Court on application by witness under appeal or revision. See CR. P. CODE (1898), S. 561-A.

-S. 561-A (as amended in 1923)—Inherent powers—Revision against order under S. 145—High Court's powers to bring on record legal representatives. See CR. P. Code, S. 435. (1941) 2 M.L.J. 1047.

-S 561-A-Jurisdiction of High Court-Power to cancel bail granted to accused and to order re-arrest. See CR. P. CODE, S. 497 (5). (1945) 1 M.L.J. 187.

S 561-A—Power of High Court to quash police investigation.

The High Court has no power under S. 561-A, Cr. P. Code, to quash an investigation undertaken by the police in pursuance of information disclosing a cognisable offence. The police have under Ss. 154 and 156, Cr. P. Code, a statutory right to investigate and 156, Cr. P. Code, a statutory right to investigate a cognisable offence without requiring the sanction of the Clourt. (Lord Porter). EMPEROR v. KHIWAJA NAZIR AHMED. 71 I.A. 203=I.L.R. (1945) Lah. 1=I.L.R. (1945) Kar. (P.C.) 89=217 I.C. 1=17 R P.C. 51=(1945) O.A. (P.C.) 21=1945 F.L.J. 48=1945 P.WN. 127=11 B R. 180=47 Bom. L R. 245=26 P.L.T. 56=46 Cr.L J. 413=80 C.L.J. 19=1945 A L.W. 288=1945 O.W. N. 258=1945 A.W.R. (P.C.) 21=1945 A.Cr.C. 134=1945 M.W.N. 49=1945 A.L.J. 47=58 L. W. 57=49 C.W.N. 191=A.I.R. 1945 P.C. 18= (1945) 1 M.L.J. 86 (P.C.). (1945) 1 M.L.J. 86 (P.C.).

-S. 561-A—Quashing of proceedings—Acquittal of accused on some charges—His further prosecution on other charges on identical evidence—Absence of powers of Court.

Where an accused has been acquitted on some charges and the validity of the acquittal has not been questioned by the Crown by appeal or otherwise, the further prosecution of the accused on other charges on identical evidence which has failed in the earlier case, amounts to an abuse of the process of the Court, and the High Court can under S. 561-A, Cr. P. Code, make an order quashing the proceedings. (Blacker, J.) Chaman Lal v. Emperor. 209 J.C. 598=46 P.L.R. 120=16 R.L. 145=45 Cr.L.J. 162= make an order quashing the proceedings. A.I.R. 1943 Lah. 304.

-S.  ${f 561} ext{-}{f A}$ —Quashing proceedings—Prosecution case disclosing no offence.

If the prosecution case discloses no offence at all against the accused, the proceedings can be quashed on a petition by him under S. 561-A, Cr. P. Code. (Bhide, J.) Heywood v. Emperor. 200 I.C. 629=15 R.L. 10=43 Cr L.J. 703=44 P.L.R. 112= A.I.R. 1942 Lah. 134.

-S. 561-A-Return of books illegally scized by

police—Power of High Court to order.

The High Court is competent to direct the return of the books illegally seized by the police. The language of S. 561-A, Cr. P. Code, is wide enough to cover the exercise of this authority. (Din Mahomed and Blacker, 37.) Durga Das v. Emperor. I.L.R. (1943) Lah. 805=204 I.C. 535=15 R.L. 266=44 Cr.L.J. 301=44 P.L.R. 549=A.I.R. 1943 Lah. 28.

-S. 561-A-Scope-If gives increased powers to

High Court. S. 561-A, Cr. P. Code, gives no new powers to the High Court. It only provides that those which it already inherently possesses should be preserved. Already inherently possesses should be preserved. (Lord Porter.) EMPEROR v. KHWAJA NAZIR AHMED. 71 I A 203=I.L.R. (1945) Lah. 1=I L.R. (1945) Kar. (P.C.) 89=217 I.C. 1=17 R P.C 51=(1945) O.A. (P.C.) 21=1945 F.L.J. 48=1945 P.W N. 127=11 B.R. 180=47 Bom. L.R. 245=26 P.L.T. 56=46 Cr.L.J. 413=80 C.L.J. 19-1045 A.I. W. 288-1045 O.W. 258-1045 MA ACT, S. 24. 194 I.C. 248. | 19=1945 A.L.W. 288=1945 O.W.N. 258=1945

CR. P. CODE (1898), S. 561-A.

A W.R. (P C.) 21=1945 A.Cr.C. 134=1945 M.W.N. 49=1945 A.L.J. 47=58 L.W. 57=49 C.W.N 191=A I.R. 1945 P.C. 18=(1945) 1 M. L.J. 86 (P.C.).

——S. 561-A—Scope and applicability—Matter under Press (Emergency Powers) Act—Inherent powers, if can be invoked.

S. 561-A, Cr. P. Code, confers no fresh or new or additional powers on the High Court. It merely states that the existing powers are not circumscribed by anything in Cr. P. Code, except in so far as the sections expressly dealing with them do so. Inherent powers cannot be invoked where the legislature expressly deals with the matter. In the case of matters coming under the Fress (Emergency Powers) Act, the legislature has expressly dealt with certain matters and no section conferring inherent powers can be invoked in the face of that. (Bose, J.) DESHPANDE v. EMPEROR. I.L.R. (1942) Nag. 107=191 I.C. 206=13 R.N. 193=42 Cr. L. J. 108=1941 N.L. J. 44=A.I.R. 1941 Nag. 97.

——S. 562—Applicability—Accused who had already undergone two periods in Borstal School—If can be dealt with under section.

S. 562, Cr. P. Code, can be applied only to first offenders; and an accused who had already spent two periods in a Borstal School cannot be dealt with under the section. EMPEROR P. SHEIKH MAHABOOB. 201 I.C. 524=15 R M. 438=1942 M.W.N. 377 (2)=55 L W. 355=43 Cr.L.J. 772=A.I.R. 1942

Mad. 532 (1).

S. 562—Applicability and scope—Offence committed deliberatety by experienced police officers—Proper

sentence—Release under S. 562—Propriety of.

S. 562, Cr. P. Code, is intended to be used to prevent young persons from being committed to jail, where they may associate with hardened criminals who may lead them further along the path of crime and to help even men of more mature years who for the first time may have committed crimes through ignorance or inadvertence or the bad influence of others or who, being ignorant and misguided, having been led away from the path of rectitude by some superior whom they dare not disobey, and who, but for such lapses, might be expected to make good citizens. The section is not intended to be applied to experienced men of the world such as police officers, who deliberately flout the law and commit offences which they know are strongly condemned by their superior officers but which they persist in doing in order that it may not be said of them that they have not been able to detect a petty crime. Such persons are not to be released under S. 562, Cr. P. Code. (Horwill, 7.) Trius v. Emperor. 197 I C. 81=43 Cr. L. J. 3=14 R. M. 327=54 L.W. 81=1941 M.W.N. 505=A.I.R. 1941 Mad. 720.

S. 562—Applicability—Conviction of person over 21 years under S. 454, I. P. Code—Order under S. 562,

Cr. P. Code-Propriety and legality of.

If S. 562, Cr. P. Code, is to be applied to persons over 21 years of age it must be only in relation to offences that are punishable with sentences not exceeding 7 years. Since an offence punishable under S. 454, I. P. Code, is punishable with ten years' rigorous imprisonment, a person convicted under S. 454, I. P. Code, should not be released under S. 562, Cr. P. Code. (Horwill, J.) VARADARJA PADAYACHI, Inre. 208 I.C. 308=16 R.M. 288=44 Cr.L.J. 774=1943 M.W.N. 340=A.I.R. 1943 Mad. 521=(1943) 1 M.L.J. 481.

CR. P. CODE (1898), S. 562.

-S. 562-Applicability-Conviction under S. 304. I. P. Code-Order under S. 562, Cr. P. Code-Propriety. S. 562, Cr. P. Cede, is ordinarily intended for persons led astray for the first time by force of circumstances or by bad company or evil influence. It is very inappropriate and is rarely applied to an offence punishable under S. 304, I. P. Code, especially where the accused shows no regret at all for the act committed. The deceased, a girl of about 16 or 17 years of age, had been talking to a cousin of hers in the village on several occasions and on that account people had been gossiping about her. The third accused, her sister's husband, reported this to her mother the first accused. The first accused, and the second accused, the sister of the deceased, dragged the deceased towards an empty house intending to shut her up there for the night. When the deceased resisted, the first accused took up a heavy piece of wood and struck the deceased a blow on the head which caused the deceased to fall to the ground at once. She appeared to be dead and on the advice of the third accused who just then came in, the deceased was hung up to a beam of the house to make it appear that she had committed suicide. Within a short time the girl was cremated, it being given out that she had committed suicide. It was impossible to know precisely the proximate cause of death as there was no post mortem. The first accused was convicted under S. 304 (2), I. P. Code, but instead of sentencing her to imprisonment, the Sessions Judge treated her as a first offender and bound her over under S. 562, Cr. P. Code.

Held, in revision, that the first accused was guilty at least of an offence punishable under S. 304, I. P. Code, and though the application of S. 562, Cr. P. Code, was not illegal in the case of an offence punishable under S. 304 (2), I. P. Code, the order in this case was very inappropriate and should not be allowed

to stand.

Held further, that though the first accused deserved heavier sentence, in view of her being an old woman a sentence of five years' rigorous imprisonment would be sufficient. (Horwill, J.) Public Prosecutor v. Madathi. 201 I.C. 444=15 R.M. 341=55 L. W. 71=1942 M W.N 169=43 Cr.L.J. 671=A.I.R. 1942 Mad. 415 (2)=(1942) 1 M.L.J. 224.

\_\_\_\_S 562—Applicability—Conviction under S. 326, I. P. Code.

S. 562, Cr. P. Code, cannot be applied to a conviction for an offence under S. 326, I. P. Code. (Kuppuswami Ayyar, J.) Velappan, In re. 209 I.C. 303=16 R.M. 334=1943 M.W.N. 585=56 L. W. 436=45 Cr.L.J. 143=A.I.R. 1943 Mad. 681 = (1943) 2 M.L.J. 176.

S. 562—Applicability—Offence punishable under S. 409, I. P. Code.
The offence punishable under S. 409, I. P. Code

The offence punishable under S. 409, I. P. Code is one punishable with transportation for life and hence, on a conviction under that section, the accused could not be dealt with under S. 562, Cr. P. Code. (Kuppusvami Ayyar, J.) Public Prosecutor 7. Paneswara Rao. 1946 M.W.N. 85 (2)=(1945) 2. ML.J. 575.

S. 562—Applicability—Principles to be borne in mind—First offender—Desirability of avoiding imprisonment of

It is desirable to avoid sending a first offender to prison for an offence which is not of a serious character, and thereby running the risk of turning him into a regular criminal. In applying the provisions of

# CR. P. CODE (1898), S. 562.

S. 562, Cr. P. Code, it is better to err (if one must) on the side of liberality. (Beaumont, C. J. and Sen, J.)
EMPEROR v. MAHOMED HANIF. 201 I.C. 651=15
R.B. 108=43 Cr.L.J. 754=44 Bom. L.R. 456=

A.I.R. 1942 Born. 215.

S. 562—Discretion of Court.
S. 562, Cr. P. Code, must be applied with discretion. Where the accused who is convicted of cattlelifting had acted in the manner of a practised thief, he should not be dealt with under this section. (Davies, C.J. and Tyabji, J.) EMPEROR v. AHMED HAJI SIDIK. 194 I.C. 883=14 R.S. 13=42 Cr.L.J. 630=A. I.R. 1941 Sind 109.

-S. 562—Offence under S.411, I. P. Code—Accused,

if can be let off with warning.

An accused who is convicted under S. 411 I. P. Code, cannot be let off, with a warning under S. 562, Cr. P. Code, as that offence is punishable with more than two years' rigorous imprisonment. (Bhide, J.) EMPEROR v. NATHA SINGH. 44 P.L.R. 67.

-Ss. 562 and 349-Relative scope and opera-

tion of. See Cr. P. Code, S. 349 (1-A). (1943) 1
M.L J. 126.
S. 562 (1), proviso—Applicability—Duty of magistrate to whom reference is made-Power to set aside conviction.

S. 562, Cr. P. Code applies only to convicted per sons. Under the proviso to S. 562 (1), the magistrate to whom the reference is made has to proceed in the manner provided in S. 380. He has no power to set aside the conviction and acquit the accused. Horwill, J.) Venkitaswami Naicken v. Emperor. 203 I.C. 500=15 R.M. 670=44 Cr.L.J. 91=55 L.W. 757 (2)=(1942) M.W.N. 491=A.I.R. 1942 Mad. 657 (1)=(1942) 2 M.L.J. 277.

—S. 562 (1), proviso—Applicability—Subsequent addition of S. 562 (I-A) if affects its applicability to cases coming wider it.

coming under it.

Although the proviso under S. 562, Cr. P. Code, comes in the middle of the section, it clearly refers to the whole of the section and not to a part of it only. The mere fact that S. 562 (I-A) is a subsequent addition cannot affect the fact that it is part of the section and accordingly the proviso will apply to the provisions for this new addition also. The result is that in cases governed by S. 562 (I-A) it is the duty of a second or third class Magistrate to forward the papers to the authority mentioned in the proviso if he considers that action under that section is necessary. (Davies.) MALA v. KUNUPA. 1943 A.M.L. J. 2.

-S. 562 (1-A)—Power to release after admonicion—If exercisable by all magistrates. King v. Maung Thein Aung. [See Q. D. 1936-40, Vol. I, Col. 2954.] 191 I.C. 712—13 R.R. 157—42 Cr. L.J. 220.

S. 565—Applicability—Order under, if can be passed where accused is sentenced to whipping. be passed where accused is sentenced to whipping.

King v. BA KyAW. [See Q D. 1936-'40, Vol. I,

Col. 2955.] 191 I.C. 117=42 Cr.L.J. 81.

Sch. III, para. 4, item 1—Scope—Second class magistrate being Sub-Divisional Officer—If has enlarged powers of first class magistrate.

Schedule III, para. 4, item 1 of the Cr. P. Code certainly confers on a Sub-Divisional Magistrate all the powers of a magistrate of the first plans. Put

the powers of a magistrate of the first class. But there is nothing in the list of powers to enlarge the powers of a second class magistrate in respect of the trial of offences, even though such second class magistrate happens to be a Sub-Divisional Magistrate or officer. (Rowland, J.) MAHOMED v. EMPEROR. 209 I.C. 639=10 B.R. 179=9 Cut. L.

# CRIMINAL TRIAL.

T. 19=16 R.P. 169=45 Cr.L.J. 166=A.I.R. 1943 Pat. 380.

Criminal Trial.

Abatement.

Absence of Provision. Absconding of Accused.

Subsequent to Occurrence.

Accomplice.

Accused's Silence.

Acquittal.

Alternative Charge.

Alternative Pleas. Amicus Curiae.

Appeal.

Appeal to Privy Council.

Approver.

Arguments. Bail. See Cr. P. Code, S. 496.

Benefit of Doubt.

Burden of Proof.

Charges.

Charge to Jury.

See Cr. P. Code, S. 297. Civil Dispute filed as Criminal Case.

Committal. Complaint.

Confession.

Conviction.

Counter and Connected Cases.

Court room.

Cross Case.

Delay in Prosecution.

Documents in Court.

Duty of Court. Duty of Prosecution.

Evidence.

First Information Report.

Government and Magistrate.

Identification.

Ignorance of Law.

Intuction. Investigation.

Joinder of Charges.

Joint Trial.

Judgment.

Jurisdiction.

Jury Trial. See Trial by Jury.

Local Inspection.

Motive.

Murder Trial.

Negligence.

New Plea.

Offence by Servant.

Plea of guilty under misapprehension. Plea of private defence. Powers of Court.

Practice.

Private Defence. Privy Council.

Procedure.

Prosecution.

Public Prosecutor.

Punishment.

Review.

Revision.

Rewards.

Right of Accused.

Right of Appeal. Sentence.

Stages in the Commission of an Offence. Stay.

Summary Trial. Sworn Statement.

Taking Cognizance.

Transfer. See Cr. P. Code, S. 522. Trial by Jury.

Trial-When Commences.

Witness.

Abatement—Death of complainant—Effect. There can be no abatement in a criminal case by reason of the death of the complainant. There is nothing in the Cr. P. Code, to warrant the view that there is abatement of a criminal proceeding on the death of the complainant. (Chatterji, J.) PANCHU SWAIN v. EMPEROR. 211 I.C. 200=16 R.P. 236=10 B.R. 361= 45 Cr.L.J. 331=9 Cut.L.T. 39=A.I.R. 1943 Pat. 379.

-Absence of provision on a particular matter—Procedure to be followed. Hansraj v. Emperor. [See Q.D. 1936-'40, Vol. I, Col. 2957.] I.L.R. (1942) Nag. 333=191 I.C. 636=13

R.N. 212=42 Cr.L.J. 208.

-Absconding of accused subsequent to occurrence-Absence of explanation-Effect.

Where the accused disappear after the alleged occurrence and no plausible explanation is given for the disappearance, the failure to put for-ward an explanation is to be regarded as a point in favour of the prosecution. ((Bennett and in favour of the prosecution. (Abunta this fact that is a favour of the prosecution. (Abunta first first favour of the prosecution. (C.C.) 2 Emperor. 195 I.C. 630=1941 O.A. 689=1941 O.L.R. 609=1941 A.W.R. (C.C.) 265=1941 A.L.W. 856=14 R.O. 110=42 Cr.L.J. 758=1941 A.Cr.C. 198=1941 O.W.N. 981 =A.I.R. 1941 Oudh 517.

-Accomplice—Accessory after the fact-Evidence of-Value of-Corroboration-Necessity.

Whether or not an accessory after the fact is an accomplice, it is unsafe to rely on the testimony of such a person unless it is corroborated in material particulars. (Venkataramana Rao, C.J. and Paramasiviah, J.) Papiah v. Government of Mysore. 49 Mys. H.C.R. 444.

-Accomplice — Corroboration — Nature— Value.

It cannot be said that where some detail was already known to the police evidence of the accomplice cannot be considered to corroborate the confession. Only, corroborative evidence about particulars not already known to the Police and which are discovered in consequence of information given by the accomplice is of greater value than corroborative evidence about matters known to the police before any information is received from an accomplice. (Zia-ul-Hasan and Bennett, JJ.) SHYAMKUMAR SINGH v. EMPEROR. 191 I.C. 466=13 R.O. 248=1941 O.W.N. 133=42 Cr.L.J. 165=1941 A.Cr.C. 21=1941 A.W.R. (C.C.) 59=1941 A.L.W. 107=1941 O.A. 55=A.I.R. 1941 Oudh 130=1940 O.L.R. 734.

-Accomplice-Evidence of-Corroboration Retracted confession of accused—If corrobo-ration of evidence of accomplice. See CRIMINAL

# CRIMINAL TRIAL.

-Accused - Silence of-Effect-Presumb. tion, if any, arises.

The silence of an accused may, with all the other circumstances of the case, be taken into account in a proper case; but, even then, only if it is clearly borne in mind that an accused person always has a right to remain silent if he wishes. The silence of an accused must never be allowed to any degree to become a substitute for proof by the prosecution of its case. No presumption arises ipso facto from the silence prestimption arises 1930 Jacco from the silence of an accused person. (Braund, J.) Ghuna v. Emperor. I.L.R. (1941) All. 912=198 I.C. 452=14 R.A. 292=43 Cr.L.J. 380=1941 A. Cr.C. 300=1941 A.W.R. (H.C.) 358=1941 A.L.W. 1070=A.I.R. 1942 All. 47.

Acquittal—Failure to examine witnesses before acquittal—Legality.

It is illegal for a Magistrate to acquit the accused without hearing the complainant's evidence. (Horwill, J.) Subbler v. Larshmana Iyer. 201 I.C. 701=15 R.M. 426=55 L.W. 232=1942 M.W.N. 296=1942 Comp. C. 166=43 Cr.L.J. 770=A.I.R. 1942 Mad. 452 (1)=(1942) 1 M.L.J. 520.

Appeal from acquittal—Alternative case—If open.

An alternative charge against an accused has to be raised in the trial Court; an appeal from an acquittal is not the proper time and place for raising an alternative case which should have been raised in the lower Court. (Davies C.J. and Weston, J.) EMPEROR v. CHIMANDAS DHANOMAL, I.L.R. (1943) Kar. 3=207 I.C. 446=16 R.S. 33=44 Cr.L.J. 607=A.I.R. 1943 Sind 130.

-Alternative pleas—Permissibility,

There is no rule of law which forbids alternative pleas in a criminal case. (Sinha, J.) Krishna Dayal v. Emperor. 1945 A.W.R. (H.C.) 298 (2).

-Alternative pleas—Permissibility.

It is open to an accused to raise different and inconsistent pleas. An accused who is charged with the offence of defamation under S. 499, I. P. Code, in respect of a newspaper article, may therefore plead that the article complained of is not defamatory because it bears a different significance or meaning from the one attributed to it by the complainant; and alternatively he can plead that if it is defamatory, it is an honest expression of opinion made in good faith and for the good of the public. (Kuppuswami Ayyar, J.) BALASUBRAMANIA MUDALIAR v. RAJA-GOPALACHARIAR. 215 I.C. 254-17 R. M. 168-46 Cr.L.J. 71=1944 M.W.N. 322=A.I.R. 1944 Mad. 484.

-Amicus curiae—Rape case—Duty of Court

to appoint practitioner to defend.
In cases of rape, the Sessions Judges should appoint a member of the Bar as amicus curius to defend the accused. (Mockett, J.) KARICHI-APPA GOUNDAN, In re. 199 I.C. 742=14 R.M. 667=43 Cr. L. J. 576=A.I.R. 1942 Mad. 285.

—Amicus curiae—Preparation of case.

In cases where pauper briefs at Government expense are allowed to be given, arrangements TRIAL—Confession. I.L.R. (1943) Kar. 285. should be made well in advance to enable counsel to prepare the cases. (Rachhpal Sinah C.J. and

Masud Hasan, J.) MASSU v. STATE. 44 P.L. R. J. & K. 11.

-Appeal-Appeal against acquittal-Burden

of proof.

In an appeal against an acquittal Government is not entitled to the benefit of any reasonable doubt of the guilt of the accused. (Davis, C.J. and O'Sullivan, J.) EMPEROR v. KAKU MASH-GHUL. I.L.R. (1944) Kar. 123=212 I.C. 467=45 Cr.L.J. 650=17 R.S. 1=A.I.R. 1944 Sind 33.

-Appeal-Appeal against sentence-Powers of the lower appellate Court to enhance it.

It is a recognized principle in appeals against punishment that a subordinate appellate Court can pass any order in respect of the appeal before it except one to enhance the punishment. (Sathe, S.M. and Ross, A.M.) BRIJ BHUSHAN LAL v. SARKAR KAISAR HIND BAHADUR. 1944 R.D. 387=1944 A.W.R. (Rev.) 208.

Appeal—Appreciation of evidence by trial

Court—Interference by appellate Court.

The High Court in a Criminal Appeal, will not lightly interfere with the appreciation of evidence by the trial Court which has the advantage of seeing the witness and observing their demeanour. (Lobo, A.C.J. and Thadani, J.) MAHAMDU v. EMPEROR. I.L.R. (1944) Kar. 444=219 I.C. 419=18 R.S. 50=46 Cr.L.J. 614=A.I.R. 1945 Sind 42.

Appeal—Disposal in the absence of counsel assigned by Government on behalf of accused

person who was poor-Propriety.

Just as a conviction following a trial cannot stand if there has been a refusal to hear counsel for the accused, so an appeal cannot stand where there has been a refusal to adjourn the appeal in which of right to be the accused appellant as a poor person was entitled as of right to be heard by a counsel assigned to him by heard by a counsel assigned to him Government who was unable withthe default on his part to reach the Court in time to conduct the appeal. (Viscount Maugham.) GALOS HIRAD v. THE KING. COUNT MAUGRAM.) GALOS HIRAD V. THE KING. 216 I.C. 19=17 R.P.C. 35=46 Cr.L.J. 105=1944 O.A. (P.C.) 48=1944 A.L.J. 392=57 L.W. 523=1944 M.W.N. 680=1944 A.W.R. (P.C.) 48=A.I.R. 1944 P.C. 93=(1944) 2 M.L.J. 252 (P.C.).

Principles

Principles

Principles. Interference in appeal with sentences by way of enhancement of sentence is not justifiable except when a judge has gravely erred in the exercise of his discretion or has obviously failed to appreciate the nature and gravity of the crime committed. Such interference is not justifiable merely because one Judge's view of what is the correct sentence may differ from another's. (King and Shahabuddin, JJ.) RAMARATNAM v. EMPEROR. 220 I.C. 129=46 Cr.L.J. 667=1944 M.W.N. 57=57 L.W. 100=A.I.R. 1944 Mad. 302=(1944) 1 M.L.J. 91.

-Appeal to Privy Council. See Privy COUNCIL.

——Appeal to Privy Council. See Privy conviction — Corroboration — Necessity—Nature to Privy Council. See Privy and extent of corroboration required.

An approver is generally regarded as a person l

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of little moral worth who is purchasing his own freedom at the expense of others, and though in law the accused can be convicted upon the uncorroborated evidence of the approver it is only prudent that the evidence of the approver should be corroborated. The corroboration should be with regard to the actual factum of the crime and also the identity of the accused. The corroboration required, however, is to be such as tends to convict the accused with the crime and need not be of such a nature that by itself it should be sufficient proof connecting the accused with the crime. The corroborative evidence may be circumstantial, but if it points clearly to the accused, it can be safely acted upon and made the basis of the conviction. The amount of corroborative evidence varies with the facts and circumstances of each particular case. But much or little the purpose of corroborative evidence is to satisfy the Court that the approver, when he implicates a particular individual, does so truly. (Davis, C. J. and O'Sullivan, J.) GOPALDAS v. EMPEROR. I.L.R. (1944) Kar. 456=221 I.C. 358=A.I.R. 1945 Sind 132. -Approver-Verification proceedings-Lega-

lity-Value. Verification proceedings are not illegal and may afford some test of the truth of the approver's statement. They are in any case a test of the approver's memory. A verification report made by the Magistrate so 'iar as the confessional statement of an accused is concerned, cannot be said to be inadmissible when the Magisnot be said to be inadmissible when the Magistrate himself is examined as a witness in the case. (Zia-ul-Hasan and Bennett, JJ.) SHYAM KUMAR SINGH v. EMPEROR. 191 I.C. 466=13 R.O. 248=1941 O.W.N. 133=42 Cr.L.J. 165=1941 A.Cr.C. 21=1941 A.W.R. (C. C.) 59=1941 A.L.W. 107=1940 O.L.R. 734=1941 O.A. 65=A.I.R. 1941 Oudh 130.

Arguments—Magistrate fixing brief period for defence arguments—Arguments therewood was

for defence arguments-Arguments thereupon not advanced by defence—Legality of trial—Hearing of arguments in appellate Court—If rectifies

Where the trial Magistrate arbitrarily fixed a brief period for the defence to complete its arguments and refused to extend that period and the defence thereupon did not advance any argument, there was no proper trial of the case in the Magistrate's Court, and consequently the conviction of the accused cannot be justified. The fact that arguments were heard in the Court of Appeal is not sufficient to rectify this error.

(Lodge and Pal, JI.). KALIPADA KUMAR v. EMPEROR. 45 C.W.N. 1045.

Bail. See CR. P. Code. S. 496.

Benefit of doubt—Facts casting suspicion.

on accused and evidence not conclusive-If justifies conviction. RAMI REDDI, In re. [See Q.D. 1936-'40, Vol. I, Col. 2961.] 195 I.C. 53=14 R. M. 116=42 Cr.L.J. 654=A.I.R. 1941 Mad. 238.

Benefit of doubt—Rule as to—When applicable.

Where guilt of an accused person is doubtful he must be given the benefit of that doubt and acquitted. But the doubt must be such as a reasonable mind entertains and must not be the

doubt of a weak and vacillating mind hesitating or shirking to take a decision because there is an infinitesimal possibility of its being mistaken. Where the evidence against the accused person, is only circumstantial, the evidence must be incompatible with the innocence of the accused and incapable of any other reasonable hypothesis than that of his guilt. (Munir, J.) SHER MAHOMED v. EMPEROR. 218 I.C. 145=18 R.L. 8=46 Cr. L.J. 407=A.I.R. 1945 Lah. 27.

-Burden of proof—Charge under S. 411, I. P. Code—Accused found in possession property recently stolen—Presumption—Onus of proof—If shifted on to accused. See Evidence Act, S. 114, Ill. (A). 23 Pat.L.T. 18.

Burden of proof—Conspiracy charge—Presumption from possession of stolen goods.

Presumption from possession of stolen goods. See Evidence Act, S. 114, Ill. (A). I.L.R. (1944) 1 Cal. 595.

Burden of proof—Duty of prosecution. No burden is cast on an accused person proving that no offence or crime has been committed. The onus is always on the prosecution to prove affirmatively the case alleged by them. (Manohar Lall and Brough, JJ.) GADAI SAHU v. EMPEROR. 22 Pat. 423=24 P.L.T. 387=9 Cut.L.T. 51=211 I.C. 115=16 R.P. 215=10 B.R. 342=45 Cr.L.J. 301=A. I. R. 1943 Pat. 361.

Burden of proof—Duty of prosecution—Prosecution never to be supported by inadmissi-

ble evidence.

A prosecution case should never be supported by evidence which is patently inadmissible. (Mockett and Shahabuddin, JJ.) Subbanna, In re. 217 I.C. 157=17 R.M. 295=46 Cr. L. J. 249=57 L.W. 323=A.I.R. 1944 Mad. 388=

249=57 L. W. 323-2...
(1944) 1 M.L.J. 431.

Burden of proof—Duty of prosecution to prove all essentials—Accused if bound to point out omissions—Filling gaps in prosecution evidence of the process of th

dence in appeal-Permissibility.

The onus of proving all the essentials necessary to establish the guilt of the accused person is on the prosecution. If they do not adduce the necessary evidence the prosecution must fail. It is not for the defence to point out the omission to the prosecution and no argument against the accused can be based on the fact that the the accused can be based on the fact that the defence failed to say anything about the omission of necessary evidence on the side of the prosecution. Nor should the Crown be allowed to fill in gaps in its evidence at the appellate stage. (Verma and Reuben, JJ.) Kirti Narain Singh v. Emperor. 23 Pat. 1=215 I.C. 268 =17 R.P. 113=46 Cr.L.J. 86=11 B.R. 85 =A.I.R. 1944 Pat. 345.

—Burden of proof—Duty of prosecution to prove guilt of accused beyond reasonable doubt. Reghunath Gope v. Emperor. [See Q. D. 1936-'40, Vol. I, Col. 3345.] 191 I.C. 702=13 R.P. 388=7 B.R. 241=1941 P.W.N. 433=42 Cr.L.J. 215=A.I.R. 1941 Pat. 175.

—Burden of proof—Guilt of accused. Per Allsop, J.—There is no justification for saving that in India the burden of proving the guilt of an accused person is upon the prosecution. The true proposition is that the

guilt of an accused person is upon the prosecution. The true proposition is that the burden of proving the facts which would justify the conviction of the accused in the absence of any other

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facts entitling the accused exception or proviso is upor the burden of proving the e or circumstances which w cused to claim the benefit o or proviso is upon the accu C.J., Collister, Allsop, Bajj and Mulla, JJ.) PARBHOO 2 (1941) All. 843=197 I.C. =43 Cr.L.J. 177=1941 A. =1941 A.L.W. 1037=194 1941 O.A. (Supp.) 885 619=A.I.R. 1941 All. 40 and on defence—Degree of

Fundamental distinction. There is a subtle but fur between the degree of certai where the burden of provin prosecution and those where is on the accused. When issue is on the prosecution proved beyond a reasonable ( ever, the burden of an issue he is not required to prove it doubt or in default to incur it is sufficient if he succeeds facie case, for then the burcissue is shifted to the pro still to discharge its original: never shifts (i.e.) that of whole case, guilt beyond a r upon a review of all the evi left in doubt whether the cir the case of the accused with tion exist or not, the acc acquittal. The test is not w has proved beyond all reason comes within the exception bu able doubt is thrown on the g (Young, C.J. and Mahomed I)
DIN v. EMPEROR. 205 I.C.
=44 P.L.R. 554=44 Cr.] 1943 Lah. 56.

Burden of proof—Pr See Evidence Act, Ss. 105 A1 81.

Burden of proof—Pro establish guilt of accused—O to explain why their names a ground for conviction.

Where the prosecution evide largely false and riddled witl tradictions, it is not for the why they should have been the prosecution fails to establ accused, it is not for the Co prosecution case on the ground explanation why anybody shot false case against the acci Varadachariar and Zafrullah Dusadh v. Emperor. I.L.I 300=6 F.L.J. 187=1944 A. =211 I.C. 556=16 R.F.C. 413=10 B.R. 444=78 C.L.J. TIS-10 B.R. 444=78 C.L.] =I.L.R. (1944) Kar. (F.C. (F.C.) 43=1944 O.A. (F.C.) W.N. 13=(1944) M.W.N. F.C. 1=(1944) 1 M.L.J.

-Burden of proof—Prosecution failing to prove case-Conviction of accused on ground of accused having injury on person caused in fight principles of criminal —Propriety—Cardinal

are cardinal principles of criminal There justice which must be borne in mind by a Criminal Court, namely that the prosecution must prove its case, and secondly, that there is no burden of proof on the accused. Where the prosecution has failed to prove its case, there is nothing for the accused to answer; and the only proper course to be adopted, is to acquit the accused. To convict the accused in such a case merely because the accused had some injuries on their persons caused to them in a fight is practically to cast upon the accused the burden of proving how these injuries were caused and thus proving their innocence; such a course offends against these two cardinal principles of criminal justice. (Davis, C.J. and Lobo, J.)
KASSIM HAJI KHAN v. EMPEROR. I.L.R.
(1943) Kar. 294=212 I.C. 109=16 R.S. 256
=45 Cr.L.J. 526=A.I.R. 1944 Sind 94. Burden of proof—Right of private defence—Deceased heating accused with stick and preparing to strike again-Accused taking out knife and stabbing deceased—Presumption of exercise of private defence—Offence—If murder. See Penal Code, S. 302. (1942) 1 M.L.J.

Burden of proof-Right of private de-

fence—Onus.

The onus of proving right of private defence as a defence to a charge of murder is on the accused. (Davis, C.J. and Tyabji, J.) MOTIRAM v. EMPEROR. 195 I.C. 833=14 R.S. 47=42 Cr.L.J. 786=A.I.R. 1941 Sind 117.

-Charges - Consolidation-Legality-Complaints of offence committed on fifteen occasions -Evidence recorded and judgment given in one only—Consequential orders in the rest—Legality of—Consent of accused—If cures illegality.

In the case of a series of complaints of an offence alleged to have been committed on fifteen occasions, it is not permissible for the trying Magistrate to hear the evidence and write a judgment in one of the cases and then proceed to pass merely consequential orders in the other cases. Criminal cases cannot, like civil suits, be consolidated and tried together on the same evidence except within the limits as to the joinder of charges laid down in the Cr. P. Code. It would be permissible for the Magistrate to try the charges in groups of three. The procedure of hearing the evidence in one case only is illegal, and the illegality is not cured by the fact that the accused or his pleader consents to the procedure. The conviction in all the cases in which no evidence is recorded is illegal and must be set aside. (Broomfield and Wassoodew, J.) Emperor v. Champaklal Chunilal. 194 I.C. 345=13 R. B. 370=42 Cr.L.J. 571=43 Bom.L.R. 110 =A.I.R. 1941 Bom. 156.

-Charge-Framing of-Framing charge of less serious offence to acquire jurisdiction-Power

of Court.

A Court is not entitled to omit framing a

### CRIMINAL TRIAL.

a charge of a less serious offence in order to acquire jurisdiction; and if it frames the less serious charge, instead of the more serious one, through a misapprehension of the evidence, it fails to exercise a proper discretion in the matter. (Lodge and Roxburgh, JJ.) IJJATULLA AKANDA v. EMPEROR. I.L.R. (1944) 1 Cal. 280=219 I.C. 285=18 R.C. 80=46 Cr.L.J. 557=A. I.R. 1945 Cal. 42.

Charge—Practice—Charge under Ss. 34 and 149, I. P. Code—Omission to charge each accused with particular acts committed by him-

If fatal.
In cases of rioting and murder under S. 149 and S. 34, I. P. Code, it is usual to charge the accused individually also for the acts alleged to have been committed by them. This would draw the attention of the accused in particular to the acts which they are said to have committed. When this is not done, the accused may have cause for arguing that when the main charge of rioting and acting in concert in pursuance of a common intention has failed, they should not be convicted for the particular acts committed by them. But when the omission to do so has caused no miscarriage of justice, and the accused have known exactly what acts they are alleged to have done, exactly what acts they are alleged to have done, the conviction cannot be set aside. (Horwill, I.) VENKATA REDDI V. EMPEROR. 196 I.C. 28=14 R.M. 242=42 Cr.L.J. 798=53 L.W. 556=1941 M.W.N. 374=A.F.R. 1941 Mad. 598.

—Charge—Trial for offence under S. 396, I. P. Code—Charge and conviction under S. 147 and S. 395—Relevancy of and necessity for.

The offence under S. 396, I. P. Code, necessarily involves unlawful assembly and rioting. In a trial in a charge of that offence it is un-

In a trial in a charge of that offence, it is unnecessary for the trying judge to complicate the case with questions of unlawful assembly and rioting. The offence under S. 396, I. P. Code, is the principal offence and the most serious offence; convictions of rioting under S. 147 and of dacoity under S. 395, being convictions of lesser offences, are of no real importance in such a case. (Davis, C.J. and Lobo, J.) Sharif Jeo v. Emperor I.L.R. (1943) Kar. 371=213 I.C. 317=16 R.S. 16=45 Cr.L.J. 704=A. I.R. 1944 Sind 113.

-Charge to the jury. See Cr. P. CODE. S. 297.

-Civil dispute filed as a Criminal case-Liability to quashing.

Where the criminal case filed against the accused is found to be in reality not a criminal case at all but a civil dispute over the existence of a water spout, the criminal proceedings are to 

com plaint.

Where the question involved is whether certain orders for commodities placed by the complainant and his relations are to be treated as one order or are to be treated as separate orders it is essentially a question for the Civil Court to decide the dispute being of a civil nature, and cannot form the subject of a criminal complaint. (Iqbal A Court is not entitled to omit framing a Ahmad, C.J.) SHIAM LAL GORI v. EMPEROR. charge of a more serious offence and to frame I.L.R. (1944) A. 532=1944 O.A. (H.C.)

CRIMINAL TRIAL. 182=1944 A.Cr.C. (1)=1944 A.L.J. 350= 1944 A.W.R. (H.C.) 182.

——Committal — Legality — Conviction for theft—Subsequent committal to sessions on the ground of accused being an old offender is irre-

gular.

Where an accused is charged with theft and a sub-magistrate tries him as in a warrant case and finds him guilty and convicts him, it is thereafter irregular to commit him to the sessions on the ground that he was an old offender. It is open to the Sub-Magistrate in such a case to send the papers to a first class Magistrate for passing on enhanced sentence. (Kuppuswami Ayyar, I.) Sanghi Valan, In re. 216 I.C. 81=46 Cr. L. J. 36=1944 M.W. N. 491 (1)=A.I.R. 1944 Mad. 498=(1944) 2 M.L. J. 40.—Complaint—Competency of magistrate to file apart from S. 476, Cr. P. Code—Magistrate inquiring on papers sent to him under Police Standing Order No. 157—Jurisdiction to file complaint of offence which he finds made out. See Cr. P. Code, S. 476. (1945) 2 M.L. J. 125.—Complaint for offence triable under warrant procedure—Complainant absent on day fixed for return of notice—Dismissal of complaint—Fresh complaint—Sustainability.

The petitioner filed a complaint before the Sub-Magistrate charging the accused with certain offences for which the accused could be tried only under the warrant procedure. Notice was ordered to the accused and the case was posted to a certain date for the appearance of the accused. On that day the petitioner was absent and the Magistrate exercised his jurisdiction under S. 259, Cr. P. Code, and discharged the accused. The petitioner thereupon filed another complaint but the Magistrate refused to accept the same, one of the reasons given being that it would be tantamount to a review application, which the Magistrate had no jurisdiction

to grant,

Held, in revision, that the Magistrate was bound to entertain the second complaint as the accused had only been discharged and the previous complaint had not been disposed of on the merits. (Horwill, J.) ACHANNA KAMTHI, In re. 205 I.C. 145=15 R.M. 847=44 Cr.L.J. 831=55 L.W. 690=1942 M.W.N. 758 (1)=A.I.R. 1943 Mad. 178=(1942) 2 M.L.J. 554.

Complaint or police report—Construction
—Sections mentioned in—If conclusive—Duty of
Magistrate to ascertain offence from facts. See
CR. P. Cope, S. 345. I.L.R. (1941) Kar. 352.
—Complaint—Part of offence omitted—
Comitted part rendering complaint of Civil Court
necessary—Jurisdiction of Magistrate—Offence
under S. 206, Penal Code—Procedure.

The complainant stated that he had filed a suit in the Civil Court against the first accused with respect to his land, that he had filed an application in the suit for attachment of the standing crops on the land and for distraint of the first accused's cattle and that the petitioner, joining with the first accused, had removed the harvested crops and the cattle to his own field and claimed them as his with the object of preventing the receiver appointed by the Civil Court from taking possession of the property. The petitioner con-

#### CRIMINAL TRIAL.

tended that the offence said to be committed was one punishable under S. 206, I. P. Code, which required a complaint by the Civil Court.

Held, that the Magistrate had no jurisdiction to entertain the case in the absence of a complaint from the Civil Court. When the offence complained of has relation to a Civil Court and is intended to render fruitless the proceedings of the Court it is against public policy that a Magistrate should take cognizance of the case which the Legislature clearly intended should be taken cognizance of only on the motion of the Civil Court concerned. It is not open to the Magistrate in such a case to entertain the complaint which for purposes of giving jurisdiction ignores part of the offence. (Horwill, J.) Palantswami Gounder v. Bagavathi Gounder 203 I.C. 670=15 R.M. 708=44 Cr.L.J. 129=55 L.W. 518=1942 M.W.N. 492=A.I.R. 1942 Mad. 675 (1)=(1942) 2 M.L.J. 246.

——Confession—Acceptance—Limits.

It cannot be said that a confession must be accepted as a whole. A confession must be accepted in its entirety so far as it affects the person making it. That is to say, anything which he puts forward in his confession by way of mitigation must be accepted, however improbable it may appear. (Waliullah and Bennett, II.) MANOHAR v. EMPEROR. 1945 A.W.R. (H. C.) 291=A.I.R. 1946 A. 15.

Confession — Admissibility—Consideration for Court—Free and voluntary nature of confession—Prosecution, if bound to prove—All parts of confession, if to be given equal weight EMPEROR v. BHAGWANDAS BISESAR. [See Q.D. 1936-'40, Vol. I, Col. 3345.] I.L.R. (1941) Bom. 27=13 R.B. 277=192 I.C. 671=A.I. R. 1941 Bom. 50.

——Confession — Antecedent circumstances— Reference to—Value.

Where there is no room for any doubt as to the genuineness of the confession arising from the procedure followed or from its contents the antecedent circumstances may be of material assistance in determining whether the confession should be believed. They may afford substantial support for the belief that it is true, or on the other hand they may be of such nature as to suggest a doubt. (Waliullah and Bennett, JI.) MANOHAR v. EMPEROR. 1945 A.W.R. (H.C.) 291=A.I.R. 1946 A. 15.

———Confession—Confession of murder in presence dying victim—Admissibility where accused refuses to confess before Magistrate.

refuses to confess before Magistrate.

A man labouring under great emotion may confess, but when time has passed, discretion may cause him not to confess. But that is no reason for rejecting the confession of his crime made by him in the presence of his dying victim. (Davies, C.J. and Weston, J.) Ghulam Manomed v. Emperor. I.L.R. (1943) Kar. 25=206 I.C. 493=16 R.S. 1=44 Cr.L.J. 530=A.I.R. 1943 Sind 114.

——Confession—Confession not recorded in writing—Admissibility. See Cr. P. Code, Ss 164 AND 364. I.L.R. (1943) Kar. 371.
——Confession—Retracted confession—Adwriting—Admissibility. See Cr. P. Code, Ss. 164 co-accused. Emperor v. Bhagwandas Bisesar.

[See Q.B. 1936-'40, Vol. I, Col. 3345.] I.L.R. (1941) Bom. 27=13 R.B. 277=192 I.C. 671 =A.I.R. 1941 Bom. 50.

confession—Value -Confession—Retracted of—Corroboration—Necessity—Evidence of accomplice—If corroboration of confession—Accomplice's evidence, if corroborated by retracted

confession of accused. A retracted confession should ordinarily be corroborated before it can be relied on. An accused, it is true, can be convicted on his retracted confession alone, but prudence ordinarily requires corroboration of such a confession before sufficient reliance can be placed upon it to justify a conviction for murder and death sentence which ordinarily follows. But the evidence of an accomplice cannot be taken as corroboration of a retracted confession. The evidence of an accomplice must itself, according to the rule of prudence, be corroborated both as to the factum of the crime and as to the identity of the criminal. The implication by the accused of himself in a confession long ago retracted is scarcely such corroboration of the evidence of his own identity as is sufficient to corroborate the evidence of identity by his accomplice and to satisfy the rule of prudence. (Davis, C.J. and Lobo, J.) Miral Islam v. Emperor. I.L.R. (1943) Kar. 285 = 209 I.C. 242=16 R.S. 90=45 Cr.L.J. 118 =A.I.R. 1943 Sind 166.

——Confession—Retracted confession—Value of—Conviction—If can be based on.

There is no absolute rule of law that a re-

tracted confession cannot be acted upon unless there is material corroboration, if it is found to be voluntary. But as a rule of prudence it is regarded not safe to base a conviction solely on a retracted confession unless there are circumstances which leave no doubt that is voluntary and true. (Stone, C.J. and Lokur, J.) EMPEROR v. BHIMAPPA SAIBANNA. 222 I.C. 143= 47 Bom.L.R. 648=A.I.R. 1945 Bom. 484.

of—Retraction—If ground for doubting truth of confession-Duty of Judge to tell jury of retraction.

The fact that a confession is retracted is no reason for doubting the truth of the confession made before the magistrate under S. 164, Cr. P. Code. But it is desirable that a Judge should tell the jury that the confession was retracted, although no conclusion could be drawn from Sowcar v. Emperor. 208 I.C. 265=16 R.M. 243=44 Cr.L.J. 766=1943 M.W.N. 290 (2) =A.I.R. 1943 Mad. 527=(1943) 1 M.L.J. 377.

-Confession-Statements made under 164, Cr. P. Code, not being full confessions-Self-exculpatory statements—If inadmissible evidence-Admissibility and use of as admissions against interest. See EVIDENCE ACT, Ss. 18 TO 21. I.L.R. (1941) Kar. 257.

-Confession-Value of-If to be accepted in entirety.

If a confession is the only evidence in the case it must be accepted in its entirety. But where

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there is other evidence also the Court will test the truth or falsity of that confession by that evidence and will use its discretion and will accept that part of the confession which appears to be true and reject that part which it believes to be false. However where an exculpatory part of a confession is entirely fantastic or impossi-O'Sullivan, J.) VARAND v. EMPEROR, I.L.R. (1944) Kar. 114=215 I.C. 172=17 R.S. 44 =46 Cr.L.J. 19=A.I.R. 1944 Sind 137.

Confession—Value—Only one arrested out of seventeen implicated by confession- Per-

sons mentioned in first information report, not included—Inference.

It is a very fair inference to draw that, where a confessing accused has named 17 or 18 people of whom it was worthwhile for the police to arrest only one, there is something very wrong with the confession. It is absolutely worthless as against any one but the person who confessed. At the same time, it should be said that the absence from the confession of the names persons who had been denounced in the first information report, is strong evidence that the confession was at any rate not secured by pressure from the police. (Braund, J.) GHURA v. EMPEROR. I.L.R. (1941) All. 912=198 I. C. 452=14 R.A. 292=1941 A.W.R. (H. C.) 358=1941 A.L.W. 1070=43 Cr.L.J. 380= 1941 A.Cr.C. 300=A.I.R. 1942 All. 47.

-Confession-Voluntary character of-Burden of proof-Presumption of voluntary nature -When arises.

When the procedure laid down by S. 164, Cr. P. Code, has been strictly followed in the recording of a confession, and the Magistrate in accordance with S. 164 has to the best of his ability satisfied himself that the statement made to him is voluntarily made without any influence of fear or hope, that is strong evidence to support a finding that the confession is voluntary.

Quaere: Whether the burden lies on the proor on the accused to prove that a confession is voluntary, or on the accused to prove the contrary. (Rowland and Shearer, JJ.) Suker Dusadh v. Emperor. 20 Pat. 547=192 I.C. 888=13 R.P. 563=7 B.R. 495=42 Cr.L.J. 343=22 Pat. L.T. 297=1941 P.W.N. 69=A.I.R. 1941 Pat. 303. secution to prove that a confession is voluntary,

-Confession-Voluntary character-Statement obtained as a result of persistent questioning by police-Value of-Propriety of persistent questioning of accused.

It is highly improper for the police to persistently question an accused person in custody or to press him to make statements. Such procedure is to be condemned. Persistent questioning may negative the impression that a statement is voluntary, and it would be extremely rous to attach any importance to a statement made in those circumstances. (Burn and Mockett, IJ.) PUBLIC PROSECUTOR v. MUNIGAM. I. L.R. (1941) Mad. 503=195 I.C. 76=14 R. M. 126=1940 M.W.N. 1272=42 Cr.L.J. 664 =52 L.W. 942=A.I.R. 1941 Mad. 359= (1941) 1 M.L.J. 227.

-Confession-Weight to be attached to-Duty of Judge to warn jury in murder trial.

It is the duty of the Judge to warn the jury that it would be dangerous in the extreme to act on a confession put into the mouth of the accused by a witness who has a strong motive for implicating some one else in the offence or crime. The jury must further be warned that confessions are not always true and that they must be checked, more particularly in a murder case, in the light of the whole evidence on the record in order to see if they carry conviction. (Sir John Beaumont.) HAROLD WHITE v. KING. (1945) M.W.N. 560 (2)=58 L.W. 523=1945 A.L. J. 511=A.I.R. 1945 P.C. 181 (P.C.).

-Confession-What amounts to. A confession must relate to the particular crime with which the accused is charged; any admission which is not connected with any of ingredients of the offence charged cannot amount to a confession. (Divatia and Rajadh-yaksha, JJ.), EMPEROR v. GOMA RAMA. I.L.R. (1945) Bom. 278=219 I.C. 250=18 R. B. 101=46 Bom.L.R. 811=46 Cr.L.J. A.I.R. 1945 Bom. 152. 541 =

-Confession-Whole of it when should be

accepted and when need not be.

If any part of a confession is relied upon by a Court and there is no evidence to disprove another part of it the whole confession must be accepted by the Court, but this is not the case where part of it is proved to be false by other evidence. The Court is not forced to disregard a confession altogether because it is not correct in every particular. (Ismail and Hamilton, II.) EMPEROR v. NANUA. I.L.R. (1941) All. 280 =193 I.C. 873=13 R.A. 463=42 Cr.L.J. 485=1941 O.A. (Supp.) 229=1941 O.W.N. 337=1941 A.Cr.C. 91=1941 A.L.W. 241= 1941 A.L.J. 86=1941 A.W.R. (H.C.) 65= A.I.R. 1941 All. 145.

-Conviction-Abetment-Acquittal of principal accused-If ground for not punishing for

It does not follow that because the principal accused is acquitted no person can be punished for abetment. (Horwill, J.) SARABHAYYA v. EMPEROR. 206 I.C. 604=16 R.M. 17=(1943) M.W.N. 125=56 L.W. 147=44 Cr.L.J. 541=A.I.R. 1943 Mad. 408=(1943) 1 M.L.

——Conviction—Basing of, on accused's state-ment alone—Propriety and legality—Duty of

Court.

A conviction based solely upon the statement made by an accused person should not be allowed to stand unless there are very strong circumstances and each case must depend upon its own circumstances. Where there is no sufficient evidence for conviction or from vagueness of the prosecution evidence the Court is not prepared to act on it, it should not be open to the Court to supplement the prosecution evidence by selecting out of the statement of the accused person passages, which might corroborate the prosecution evidence and to reject those passages which go to exonerate the accused person. Due consideration must be given to every part of the state-ment but the Court must exercise its judgment and common sense in accepting or rejecting any portion of the statement. (Thomas, C.J.) PHIL-LIPS v. EMPEROR. 17 Luck. 646=201 I.C. 381 CRIMINAL TRIAL.

=15 R.O. 92=1942 A.Cr.C. 87=43 Cr.L.J. 657=1942 A.W.R. (C.C.) 106=1942 O. A. 85=1942 O.W.N. 144=A.I.R. 1942 Oudh Oudh

-Conviction—Basis—Evidence of approver supported by evidence of accused against whom case was withdrawn-Sufficiency-Corroboration A conviction based on the evidence of one ap-

prover supported by that of another approver or person in the position of an approver, or an accused person against whom the case has been withdrawn, is not illegal. (Byers, J.) RAMA-BRAHMAM, In re. 218 I. C. 24=18 R.M. 2= 46 Cr. L. J. 377=1944 M.W.N. 747=1944 F.L.J. 241=57 L.W. 461=A. I. R. 1944 Mad. 503=(1944) 2 M.J. 156.

Conviction—Basis of—Accused pleading most available—Convictions on strength of live and properties.

not guilty—Conviction on strength of his own statement—Legality—Duty of prosecution to

prove case.

An accused who pleads not guilty ought not to be convicted on the strength of his own statement. The prosecution must prove their case. (Beaumont, C.J. and Macklin, J.) EMPEROR v. MAVJI NANJI. 196 I.C. 526=14 R.B. 131= 42 Cr.L.J. 893=43 Bom.L.R. 629=A.I.R. 1941 Bom. 325.

-Conviction—Basis of—Admission by co-

accused—Sufficiency.

Where the only evidence against an accused person is the admission of a co-accused which is an exculpatory statement, it cannot be taken into account against the accused when there is no other positive evidence and he cannot be convicted on the admission of the co-accused. (Horwill, J.) MAKKY MOITHU v. EMPEROR. 206 I.C. 25=15 R.M. 926=44 Cr.L.J. 482 = 56 L.W. 74=1943 M.W.N. 62=A.I.R. 1943 Mad. 278=(1943) 1 M.L.J. 154.

-Conviction-Basis of-Circumstantial evidence-One man killed and several others injured in fight-Inference of deliberate fight between

parties—Permissibility.

A conviction must be based upon evidence. If there is no evidence, it is not proper even to put an accused person on his defence. If there is no reliable oral evidence in the case, it is only possible to convict if there is circumstantial evidence pointing clearly to the guilt of any individual. The fact that a man has been found dead and that several others have been found injured, cannot give rise only to the inference that there was a deliberate fight between the parties. One side or the other might will be the aggressor; and one side or the other might well have a right of self defence. (Young, C.J. and Skemp, J.) Gullab v. Emperor. 196 I.C. 390=14 R.L. 155=42 Cr.L.J. 861=43 P.L. R. 144=A.I.R. 1941 Lah. 333.

Conviction—Basis of—Dying declaration—Sufficiency without corresponding. See Fundament

Sufficiency without corroboration. See EVIDENCE ACT, S. 32 (1). I.L.R. (1942) Kar. 587.

Conviction—Basis of—Evidence of witness

expunged from record as that of incompetent witness—Conviction based on—Sustainability.
Where the trial Court once decides, rightly or

wrongly, that a particular witness was not a competent witness, and on that ground expunges from the record all that the witness had said and stops the pleader for the defence from

cross-examining the witness, it is not open to the trial Court or to the appellate Court to rely on the evidence of such witness and to base a conviction on such evidence. A conviction based on such evidence is unsustainable. (Varma and Shearer, JJ.) RAMPADARATH SINGH v. EM-PEROR. 20 Pat. 339=196 I.C. 478=14 R.P. 201=1941 P.W.N. 413=8 B.R. 30=42 Cr. L.J. 878=A.I.R. 1941 Pat. 513.

-Conviction—Basis of—Isolated evidence

of unreliable witness.

In the absence of satisfactory corroboration by independent evidence, no conviction should be based on the evidence of a witness who has been found to be unscrupulous and unreliable and the major portion of whose statement has been found to be false. (Abdul Qayoom, C.J.) Fazlu v. State. 43 P.L.R. J. & K. 30.

——Conviction — Basis of Suspicion—Suffi-ciency—Accused proved to be in company of deceased shortly before murder-Accused offering explanation consistent with innocence-Benefit of

doubt.

Though a statement made by the accused and the evidence in the case may arouse suspicion against him, they cannot be made the basis of a conviction for murder when they do not raise an irresistible presumption of guilt. Where the accused's own statement and the evidence in the case are to the effect that the accused was in the company of the deceased shortly before the murder, but the accused offers an explanation which may be true and which makes it far from true that he is guilty of murder, there is necessarily an element of doubt to the benefit of which the accused is always entitled and he must therefore be acquitted of murder. (Burn and Mockett, JJ.) Public Prosecutor v. Munigam. I.L.R. (1941) Mad. 503=195 I.C. 76=14 R.M. 126=1940 M.W.N. 1272=42 Cr.L. J. 664=52 L. W. 942=A.I.R. 1941 Mad. 359=(1941) 1 M. L.J. 227.

A voluntary and genuine confession is legal and sufficient proof of guilt; there is no rule of law that an accused person cannot be convicted on a confession made and subsequently retracted without independent corroborative evidence. (Rowland and Shearer, JJ.) Suker Dusadh v. Emperor. 20 Pat. 547=192 I.C. 888=13 R. P. 563=7 B.R. 495=42 Cr.L.J. 343=22 Pat.L.T. 297=1941 P.W.N. 69=A.I.R. 1941 Pat. 303.

-Conviction — Circumstantial evidence--Sufficiency-Inference of guilt-When to be deduced.

In cases where there is no direct evidence of a crime and the whole evidence is circumstantial, to deduce an inference of guilt from such evidence, the incriminating facts found must be such as to be incompatible with the innocence of the accused and incapable of explanation on any reasonable hypothesis other than the guilt of the accused. (Venkataramana Rao, C.J. and Paramasiviah, J.) PAPIAH v. GOVERNMENT OF MYSORE 49 Mys.H.C.R. 444.

Conviction of accused on his own state-

ment-Duty of Court.

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Ordinarily the conviction of an accused based solely upon his statement would be allowed to stand only if there were very strong circum-stances to warrant such a course. Each case must stand on its own circumstances, and, where otherwise there is no sufficient evidence for conviction, a Court of law should not supplement the prosecution evidence by selecting out of the statements of the accused passages which might indicate the guilt of the accused and to reject those which go to exonerate him. (Misra and Koul, JI.) Puttu v. Emperor. 219 I.C. 486 = 18 R.O. 83=46 Cr.L.J. 629=1945 O. W.N. 44=1945 A.L.W. (C.C.) 44=1945 A. W.R. (C.C.) 23=1945 O.A. (C.C.) 23= A.I.R. 1945 Oudh 235.

-Conviction-Previous conviction-When ot be acted upon-Proof or admission by accused-

Necessity.

A Magistrate can act on previous convictions only if they have been proved or if the accused has admitted them. Mere assertion by the prosecution is not sufficient. (Horwill, J.)
GOVINDAN, In re. 203 I.C. 433=15 R.M. 668
=44 Cr.L.J. 85=55 L.W. 530=1942 M.W.
N. 590=A.I.R. 1942 Mad. 669=(1942) 2 M.L.J. 280.

—Conviction — Suspicion — Sufficiency – Charge of murder—Aconite poisoning—Interval between taking of food containing poison and appearance of symptoms—Effect—Doubt—Con-

viction-If justified.

Although there is room for suspicion against an accused person charged with murder, it would not be safe to convict the accused in the absenc of reliable evidence. In cases of aconite poisoning, the symptoms of numbness of the tongue and so forth in the mouth of the victim come on very quickly, within three to five minutes. Where therefore the evidence is to the effect there was a longer interval between the taking of the food alleged to contain aconite and the appearance of these symptoms, there are elements of reasonable doubt in the case. The accused cannot therefore be safely convicted of murder. (Burn and Mockett, JJ.) EMPEROR v. NAGAMMA. 1942 M.W.N. 173.

-Counter and connected case-Use of evidence in one, in the other—Legality—If curable under S. 537, Cr. P. Code. Beni Madho v. Emperor. [See Q.D., 1936-'40, Vol. I, Col. 2966.] 16 Luck. 353=A.I.R. 1941 Oudh 20.

–Counter-cases—Trial — Procedure—Trial by same judge one after another in quick suc-

cession-Desirability of.

In the case of a case and counter-case arising out of the same facts, e.g., a fight between two rival factions in a single riot, the normal and the most desirable procedure is that both the cases should be tried by the same judge though with different assessors or juries. The first case should be tried to a conclusion and the verdict of the jury or the opinion of the assessors taken. But the judge should postpone judgment in that case till he has heard second case to a conclusion and he should then pronounce judgments separately in each He is bound to confine his judgment in each case to the evidence had in that particular case and

is not at liberty to use the evidence in one case for the purpose of the judgment in the other case and to allow his findings in one case to be influenced in any manner to the prejudice of the accused by the views which he may have formed in the other case. It is obviously necessary that he should try the two cases in quick succession one after the other. If in any particular case the judge feels any difficulty about trying both cases, it is open to him to have the second case transferred. No hard and fast rule can be laid down. (Wadia and Lokur, JJ.) EMPEROR v. BANAPPA KALLAPPA. I.L.R. (1944) Bom. 344 =213 I.C. 213=45 Cr.L.J. 701=17 R. B. 44=46 Bom.L.R. 166=A.I.R. 1944 Bom. 146.

-Court room—Public place.

A Court room is a public place and unless the proceedings are held in camera or the Court for some other valid reason issues a prohibition before hand, any person can enter it without any permit and remain there so long as he does not misbehave. (Din Mahomed, J.) HAKUMAT RAI v. EMPEROR. I.L.R. (1943) Lah. 791= 204 I.C. 299=15 R.L. 254=44 Cr.L.J. 181 =44 P.L.R. 511=A.I.R. 1943 Lah. 14.

Cross cases—Hearing by same assessors and decision by same judgment—Legality. KHAIR MAHOMED v. EMPEROR. [Sec Q.D., 1936-'40, Vol. I, Col. 3346.] I.L.R. (1941) Lah. 66 =191 I.C. 332=13 R.L. 316=42 Cr. L. J.

-Cross cases-Use of evidence in the one in the other-Trial, if and when vitiated.

In cross cases unless the accused has been prejudiced by reason of the evidence in the one case being acted upon in the other, the trial would not be set aside. (Agarwal, J.) DEBI DAYAL v. EMPEROR. 201 I.C. 791=15 R. O. 110=1942 O.A. 332=1942 O.W.N. 440=1942 A.W.R. (C.C.) 286=1942 A.Cr.C. 143=43 Cr.L.J. 781=A.I.R. 1942 Oudh 444.

-Delay in prosecution-Effect.

Though a belated prosecution may certainly require an explanation, the delay, as such, cannot raise a presumption as against the prosecution although the accused is entitled to say that in construing the evidence, presumptions are permissible to fill in, in his favour, the details obliterated by time. (Sinha, J.) KRISHNA DAYAL v. EMPEROR. 1945 A.W.R. (H.C.) 298 (2).

Documents in Court—Right of accused to have inspection—Circumstances when inspection may be permitted.

There is no provision either in the Cr. P. Code or in the rules made by the High Court as regards the right of inspection by an accused person of the records in the custody of the Court in which he is being tried. If there are docu-ments relied upon by an accused either for dislodging the prosecution case or for building up his own case, he will have to take out a summons for them. If the object of the inspection is merely to fish for information, it is not a thing to be permitted. If documents are in the custom of the tody of private individuals he can claim no right to look into them unless he takes out a summons for them and gets them into Court. If

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they are not produced, the prop is to move the Court to issue under S. 96 of the Cr. P. Coc the Court that they are esser cause the documents are in Co give him a right which he woul documents were in private cus ments have been summoned fo titled to obtain permission of t mine them. In respect of doc moned he will not be entitled ### The state of t 1944 Mad. 419=(1944) 1 M.

-Duty of Court—Case ba stantial cvidence-Accused failin nation of facts appearing again. Court to consider all probable as planations—Court if bound to in on behalf of accused.

In a case of circumstantial en duty of a Criminal Court to co ble explanations of the evidenc if, upon a reasonable and probab the evidence before it, the accu innocent, then the Court should the ground that the evidence such as is only reasonably corguilt. The accused must be give the doubt. The Court will take tion the fact that the accused w explanation of facts appearing in him, particularly when the accus terate, ignorant and ill-advised. Court will not, therefore, find t the prosecution is proved beyo doubt. If despite what the acc what he does not say, the Court i that upon the evidence there is a probable explanation of the facts sistent with the innocence of th Court in a case based upon cirdence, will give the accused the 1 and will acquit him. But that that the Court must invent all nations on behalf of the accused duty of the Court to invent such (Davies, C.J. and Lobo, J.) SHA PEROR. I.L.R. (1943) Kar. 3: 317=16 R.S. 16=45 Cr.L.J. 1944 Sind 113.

——Duty of Court—Contradict in Sessions Court by prosecution v Where the pleader for the acc his duty by not cross-examining regard to the previous contradict which he had made in the comm becomes the bounden duty of the to examine such witness further his previous statements and to brit ments on to the record of the (Roberts, C.J. and Dunkley, J.) ]
THE KING. 195 I.C. 71=14 R.F.
L.J. 661=A.I.R. 1941 Rang.

-Duty of Court-Criminal c accused in regard to civil dispute.

Where it is clear that the complaint was merely to bring pressure to bear upon the accused, a woman, and that the real matter in issue was a civil dispute in regard to the ownership of certain jewels, the Court should dismiss the complaint. (Davies.) Godawari v. Mukandi Lal. 1945 A.M.L.J. 11.

Duty of Courts—Defence of prisoners at

Crown's expense—Selection of lawyers.

Those whose duty it is to select lawyers to defend at the expense of the Crown should not treat the selection as a matter of patronage for the benefit of the lawyer so appointed. The selection should be made from among men of marked ability. It frequently happens that the persons actually appointed do their work very badly and conspicuous opportunities for cross-examination and obvious arguments are entirely ignored. In such circumstances trial Judge should remember that he has the duty not only to the prosecution but to the defence. He has the police diary in front of him and should use his greater experience to crossexamine the witnesses when he sees that the defence lawyer is incompetent. He should not do this unnecessarily but only when it is desirable in the interest of justice. (Manohar Lall and Meredith, JJ.) DIKSON MALI v. EMPEROR. 196 I.C. 597=23 Pat.L.T. 387=43 Cr.L.J. 36=8 B.R. 49=A.I.R. 1942 Pat. 90.

-Duty of Court-Dropping of proceedings on ground of party subscribing to war fund-

Legality.

Where a proceeding is discontinued not for lack of merit but because a party eventually agreed to make a donation to some fund, the order dropping the proceeding is illegal and must be set aside. (Agarwala, J.) Jadunandan Lal v. Rampeyare Sao. 200 I.C. 301=8 B. R. 659=14 R.P. 663=43 Cr.L.J. 633=23 Pat. L.T. 40=A.I.R. 1942 Pat. 337 (1).

——Duty of Court—Failure of prosecution to

produce material evidence.

It is the duty of the prosecution to produce all the necessary evidence to prove its case be-fore the Court. Where it fails to produce any evidence in regard to a material and vital 'fact before the close of its case, it is the duty of the Court to dismiss the case straightaway on the representation of the defence that there is no case to answer. Subsequent evidence should not be permitted to be adduced in such cases. (Davies.) EMPEROR v. PANNA. 1945 A.M.L.

-Duty of Courts-Interference by Minister in trial of case by Magistrates-Order for retrial.

It is a very serious matter at all times for the course of justice to be interfered with or 'for even an attempt to be made to interfere with the course of justice. It is very serious indeed when such an attempt is made by the Chief Minister of the Province great power and in-fluence. Where there has been such interference a re-trial must be ordered.

If interference is attempted in the trial cases it is the duty of the Court trying the case to resist such interference and to inform the High Court at once so that the High Court may deal with such matter. (Derbyshire, C.J., sideration the absence of witnesses whose testi-

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Khundkar and Lodge, II.) R. C. POLLARD v.
SATYAGOPAL MAZUMDAR. 210 I.C. 337=16 R.
C. 448=45 Cr.L.J. 224=A.I.R. 1943 Cal. 594 (S.B.).

-Duty of Court—Liberty of individual— Duty to protect-Accused not claiming protection.

The Courts are bound to protect the liberty of the individual, and even where the accused person does not claim their protection and shows himself ready to be sent to jail, whether from political or economical motives, it is nevertheless the duty of the Courts to sift the evidence for the prosecution and to consider the case. (Skemp, J.) MIAN IFTIKAR-UD-DIN v. EMPEROR. 196 I. C. 485=14 R.L. 157=42 Cr.L.J. 890=43 P. L.R. 378=A.I.R. 1941 Lah. 324. ——Duty of Court—Magistrate asking accus-

ed to subscribe money for purchase of War

Fund Flags-Propriety.

It is extremely improper for a magistrate trying a case to ask the accused in the case to subscribe to funds for public charitable or any other purpose such as the purchase of War Fund Flags, as such action is liable to be misunderstood by persons who are standing their trial before him. (Agarwala, J.) THAKUR SINGH v. ISH-WAR SINGH. 205 I.C. 576=15 R.P. 308=9 B.R. 247=44 Cr.L.J. 420=23 Pat.L.T. 715 =A.I.R. 1943 Pat. 143.

\_\_\_\_\_Duty of Court—Trial by Jury—Jury acting as assessors also—Duty to place evidence

under various headings.

It is the duty of the judge when placing the evidence before the jury who are also to act assessors in respect of certain charges against assessors in respect of certain charges against the accused, under various headings, in a difficult case. (Harries, C.J. and Manohar Lall, J.) LOKHONO SAHU v. EMPEROR. 21 Pat. 865=206 I.C. 365=15 R.P. 349=9 R.R. 305=44 Cr.L.J. 507=A.I.R. 1943 Pat. 163.

—Duty of Magistrate—Duty to prepare record in legible handwriting.

It is the duty of Magistrates to prepare the record in a clear and legible handwriting. (Abdul. Qayoom, C.J.) GHULAM MOHAMMAD v. STATE 43 P.L.R.J. & K. 72.

——Duty of Magistrate—Extra-judicial in-

formation—If can be utilised.

A Magistrate while sitting as a judge should not base his decision on matters which come to his knowledge extra-judicially. A statement to him in the absence of the parties and not subjected to the test of cross examination cannot be depended upon for the simple reason that its truth cannot be guaranteed. (Din Mohammad, J.) EMPEROR v. BRIJ LAL. 202 I.C. 292=15 R.L. 117=43 Cr.L.J. 808=44 P.L.R. 409=A.I.R. 1942 Lah. 232.

-Duty of the prosecution-Calling in of all Crown witnesses.

It is no doubt very important that, as a general rule, all Crown witnesses should be called to testify at the hearing of a prosecution, but important as it is, there is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desires to prove. Ultimately it is a matter for the discretion of counsel for the prosecution and though a Court ought, and no doubt still, take into con-

mony would be expected; it must judge the evidence as a whole, and arrive at its conclusion accordingly taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be levelled at the absence of possible witnesses. (Lord Porter.) MALAK KHAN v. EMPEROR. 222 I.C. 273=1945 M. W.N. 778=59 L.W. 9=50 C.W.N. 145=1946 A.L.J. 29 (2)=A.I.R. 1946 P.C. 16=(1945) 2 M.L.J. 486 (P.C.).

-Duty of prosecution-Examination of eyewitnesses.

It is wrong on the part of the prose-cution to withhold any eye-witnesses who could give information to the Court Court about the offence, even though they might not be useful to the prosecution. It is their duty to place before the Court all the material available which would enable the Court to arrive at a correct conclusion in deciding the guilt or innocence of an accused person. (Mir Ahmad, J.C., and Ibrahim, J.) SAID AHMAD V. EMPEROR. 217 I.C. 136=46 Cr.L.J. 190=17 R. Pesh. 25=A.I.R. 1944 Pesh. 36 (2).

-Duty of prosecution-If bound to examine

all possible witnesses.

It is not the imperative duty of the prosecutor to put in the witness-box all the possible witnesses of a crime, failing which an inference adverse to the prosecution must necessarily be drawn. It is a matter dependent on the particular circumstances of each case. A prosecution is not bound to call witnesses irrespective of considerations of number and of reliability, though witnesses essential to the unfolding of the narrative on which the prosecution is based must of course be called. It is not for the prosecutor to discharge the functions both of prosecution and of defence. It is not the duty of the prosecution to go out of its way to preserve to the accused the right of reply by putting into the witness box persons who are not material witnesses for the prosecution but would, in substance if not in form, be witnesses for the defence. (Varma and Rozuland, JJ.) RAMPEO SINGH v. EMPEROR. 21 Pat. 258=202 I.C. 331=15 R.P. 112=8 B.R. 879=1943 P.W. N. 89=43 Cr.L.J. 817=A.I.R. 1942 Pat. 481.

-Duty of prosecution—Murder Order in which witnesses should be examined.

In the case of a murder trial, the Public Prosecutor should, as far as possible, examine his witnesses so as to bring out the facts in their logical sequence, and particularly the expert witness, such as the medical witness, ought not to be examined at an early stage of the trial, when it is impossible to realize on what points their opinion is necessary. (Roberts, C. J. and Dunkley, J.) SHWE PRU v. THE KING. 1941 Rang. L.R. 346=197 I.C. 350=43 Cr. L. J. 157=14 R.R. 113=A.I.R. 1941 Rang. 209.

Duty of prosecution—Particulars of acts done and law intringed—Necessita. done and law infringed-Necessity.

When a person is charged with a criminal offence he must be told with particularity not only the act he is alleged to have committed which is said to constitute it but also what is the law which he is said to have infriged. (Roberts,

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C.J.) S. K. ROY v. THE KING. 1941 Rang. L.R. 26=192 I.C. 770=13 R.R. 235=42 Cr. L.J. 335=A.I.R. 1941 Rang. 1.

Duty of prosecution—Production of all

available evidence-Hostile witness.

All the witnesses essential to the unfolding of the narrative on which the prosecution is based. must be called by the prosecution, whether in the result the effect of their testimony is for or against the prosecution. The fact that a witness turned hostile in the committing Court is no reason for withholding his evidence from the Sessions Court. All the witnesses in the list submitted by the committing Magistrate should be examined in the Sessions Court. (Thomas, C.J. and Ghulam Hasan, J.) SARFARAZ ALI v. C.J. and Gracian Flason, J.J. Sarraraz Ali v. Emperor. 17 Luck. 20=1941 O.L.R. 670=196 I.C. 319=14 R.O. 157=1941 A.Cr.C. 214=1941 O.L.R. 670=1941 A.W.R. (C. C.) 303=42 Cr.L.J. 845=1941 O.A. 782=1941 O.W.N. 1034=A.I.R. 1941 Oudh 599.

—Duty of prosecution—Production of eyewitnesses.

The mere possibility or even probability of the story of the eye-witnesses being untrue in some respects is not sufficient justification for withholding them. The prosecution is not acting right in withholding their evidence and producing other witnesses, neither named in the first information report, nor produced before the investigating officer at the earliest opportunity. (Bennett and Madeley, J.J.) EMPEROR v. GAVADIN. 17 Luck. 150=196 I.C. 244=14 R.O. 147=42 Cr.L.J. 828=1941 A.W.R. (C.C.) 284=1941 A.Cr.C. 210=1941 O.L.R. 657=1941 O.A. 732=1941 O.W.N. 1017=A.I.R. 1942 Outh 45 1942 Oudh 45.

Duty of prosecution—Statement made by accused in his favour.

Since it is the duty of the prosecution to bring out any evidence which may assist in arriving at a true decision, a statement made by the accused almost immediately after the occurrence which may to some extent tell in his favour should be brought by them on the record as a relevant fact. (Young, C.J. and Beckett, J.) HASIL v. EMPEROR. 198 I.C. 441=14 R.L. 339=43 Cr. L.J. 370=I.L.R. (1943) Lah. 77=43 P.L. R. 672=A.I.R. 1942 Lah. 37.

—Duty of prosecution—Witness—Duty to call—Witness who will not speak the truth— Procedure to be adopted-Tendering for cross-

examination—Propriety.

It is the duty of the prosecution in a criminal case to be always perfectly fair. It is obviously not the function of the Crown to procure the conviction of an innocent person. But the Crown is not bound to call before the Court a witness who, it believes, is not going to speak the truth. If the Crown informs the accused of the name of the witness and produces him in Court, it can then leave it to the accused to call him or not as he thinks fit. If the witness is called, the Crown can cross-examine him. It is not proper to tender him for cross-examination. (Beaumont, C.J., Wadia and Sen, JJ.) EMPEROR v. KASAMALLI. I.L.R. (1942) Bom. 384=199 I.C. 202=14 R.B. 357=43 Cr.L.J. 529=44 Bom.L.R. 27=A.I.R. 1942 Bom. 71 (F.B.).

-Evidence. See (1) Evidence (ii) Evi-DENCE ACT.

-Evidence—Admission of all available documents-Necessity-Reason for the rule.

Every document, particularly in a criminal trial, must be admitted in evidence to throw light on the obscure corners of the case. The light should always be welcome unless its entry in the Court is shut out for very special reasons, because "the object of a trial in every case is to ascertain the truth in respect of the charge made". (Sinha, J.) KRISHNA DAYAL v. EMPEROR. 1945 A.W.R. (H.C.) 298 (2).

Evidence—Circumstantial evidence—Con-

viction, when can be based on.

In cases dependent on circumstantial evidence, it is a fundamental principle that in order to justify any inference of guilt the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than of his guilt. (Ranjitmal and Sukhdconarain, IJ.) SARKAR v. LAL SINGH. 1944 M.L.R. 39 (Cr.).

"In criminal cases the onus of proving the general issue never shifts." The prosecution must, even though there may be some lacuna in the defence, not strictly consistent with the innocence of the accused, still prove his guilt beyond all reasonable doubt. The burden is not laid on the prisoner to prove his innocence. (Sinha and Bennett, JJ.) RAM KALA v. EMPEROR. 1945 A.W.R. (H.C.) 287=1945 A.L.W. 381 (2)=1945 O.W.N. (H.C.) 334 (2)=1945 A.Cr.C. 170 (2).

-Evidence-Track evidence whether alone can be basis of conviction.

It is not possible to base a conviction merely on track evidence when the main evidence has been shown to be extremely unsatisfactory (Ranjitmal and Sukhdeonaram, JJ.) SARKAR v. LAL SINGH. 1944 M.L.R. 39 (Cr.).

Evidence—Use in appeal of evidence in respect of one offence of which the accused is acquitted as corroborative evidence of the guilt of the same accused in respect of another offence with which also he was charged and convicted-Legality.

Six persons were charged jointly under Ss. 302, 325, 149, I. P. Code and two of them, the appellant and another, were charged in addition with the offence of robbery under S. 392, I. P. Code. While all were convicted under Ss. 302, 325, 149, I. P. Code, the appellant and the other were acquitted of the charge of robbery with which also they had been charged. On appeal the High Court acting on the entire evidence acquitted five of the accused and confirmed the conviction as against the appellant alone. On a question as to the legality of the use of evidence relating to robbery as corroborative evidence of his guilt,

Held, that even if the trial Court had disbelieved the whole evidence in regard to robbery, its finding would not prevent the High Court from weighing its value and if they accepted its substantial truth from taking it into consideration in determining whether another crime had been committed or not. The acquittal no doubt

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would have entitled the appellant to plead autrefois acquit if again charged with the same crime; namely, robbery, but it would not prevent a civil action being brought against him for the return of the things stolen or for their value upon the same evidence. It could not be objected to as evidence in another case, criminal or civil, though its weight would be diminished. Its use for the purpose of corroboration of the testimony given in the charge of murder was in no way precluded even though no appeal was taken against the dismissal of the charge of robbery (Lord Porter.) MALAK KHAN v. EMPEROR. 222 I.C. 273=1945 M.W.N. 778=59 L.W. 9=50 C.W.N. 145=1946 A.L.J. 29 (2)=A.I.R. 1946 P.C. 16=(1945) 2 M.L.J. 486 (P.C.).

-Evidence-Value of statement retracted in cross-examination.

The evidence of a witness who retracted hisstatement in the cross-examination cannot be relied upon for convicting an accused unless there are very strong reasons to suppose that the second statement in the cross-examination is absolutely false. (Ranjimal and Sukhdeonarain, JJ.) SARKAR v. LAL SINGH. 1944 M. L.R. 39 (Cr.).

——Evidence — Witness—Discrepancies and exaggerations in statements—Evidence whether to be discarded.

Even if there are discrepancies and exaggerations in the statements of witnesses their testimony is not to be wholly discarded on that ground. The Courts should give proper consideration to their evidence as a whole. (Ranjit-mal and Sukhdeonarain, JJ.) GIRDHARI v. SAR-KAR. 1944 M.L.R. 24 (Cr.).

-First information report—Persons named in-If alone to be proceeded against.

Where proceedings are taken on the basis of a first information report, the action taken need not be confined to persons named in the first information or charged with taking a direct part in an occurence. (Dhavle, J.) N. L. CARRICK v. EMPEROR 194 I.C. 94=13 R.P. 662=42: Cr.L.J. 504=7 B.R. 681=1941 P. W. N. 328=22 Pat.L.T. 348=A.I.R. 1941 Pat. 395.

-First information report-Right of accused to copy—Charge of rape—Examination of complainant—Accused's counsel requesting for copy of first information—Duty of Court grant.

In a case of rape, the accused should in fairness be supplied with a copy of the first information report when the complainant gives her request for the accused or his counsel makes a request for the same. (Beaumont, C.J., Wadia and Wassoodew, JJ.) Emperor v. Mahadeo Tatya. 200 I.C. 261=15 R.B. 1=43 Cr. L.J. 621=44 Bom.L.R. 216=A.I.R. 1942 Bom. 121 (F.B.).

-Government and District Magistrates-Suggestions regarding pending prosecutions-Private letters to District Magistrate from Government departments-Propriety-Proper course to follow.

If Government desire to put in a request to a Magistrate trying a case, the proper course is to do so directly through the Public Prosecutor. If the Government department wishes to ascertain what the legal position with regard to S. 197, Cr. P. Code is, it should allow the case to go forward and have it decided according to law, and not ask for a long adjournment. If the Government wish to give permission for the prosecution to go on, they can give it at once through the Public Prosecutor. If they wish to stop the prosecution, they can instruct the Public Prosecutor to apply in open Court for its withdrawal. It is wrong for Government department to suggest to the District Magistrate by private letters what he and the trying Magistrate should do in regard to cases under trial. An attempt by private letters to hold up the prosecution so that eventually it may be dropped is not consistent with the oaths of office which Governor and his Ministers have taken. It is also not consistent with the duties of Secretaries of Government Departments who are officers subordinate to the Governor for the purpose exercising the executive authority of the Province, to take part in such attempts. (Derbyshire, C.J. and Lodge, J.) HATEMALI v. EMPEROR. 215 I.C. 312=17 R.C. 112=46 Cr.L.J. 100=48 C.W.N. 574=A.I.R. 1944 Cal. 407.

-Identification—Number of persons to

mixed up with the suspect.

The law, no doubt, does not lay down number of under-trials to be mixed with a prisoner, but every effort should be made to minimise the possibility of a chance identification which in the first instance can be done by mixing as many under-trials as possible with the suspect. In the circumstances of the case the mixing of three accused with ten under-trials was held to be not proper as the proportion was too small. (Thomas, C.J.) MANOHAR v. EMPEROR. 1944 A.W.R. (C.C.) 257=1944 O.A. (C.C.) 257=A.I.R. 1945 Oudh 149.

-Identification-Officer conducting identification—Putting mark on suspects—Pro-

priety of.

The practice of putting a mark or stamp on a suspect by the officer conducting a test identification parade ought to be deprecated and should not be resorted to. (Meredith and Shearer, II.) PESH MAHOMED v. EMPEROR. 201 I. C. 486=15 R.P. 62=23 Pat.L.T. 185=8 B. R. 795=43 Cr.L.J. 742=A.I.R. 1942 Pat. 319.

-Identification-Proper proportion of undertrial prisoners to the accused.

Where the proportion of other under-trial prisoners to the accused is less than three to one, identifications have little value because there is an appreciable risk of persons being implicated purely by chance. But identifications cannot be ruled out as of no value on that account. (Thomas, C.J. and Bennett, J.) RAM SINGH v. EMPEROR. 205 I.C. 514=15 R.O. 472=44 Cr.L. J. 389=1943 O.A. (C.C.) 49=1943 A.W. R. (C.C.) 21=1943 A.Cr.C. 37=1943 O.W. N. 88=A.I.R. 1943 Oudh 269. -Identification of articles—Articles identi-

fied being of common use without special features!

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and such as can be found in the market-Value of identification—Sufficiency for conviction.

Where in a case of theft or receipt of stolen

property the things said to have been identified are of common use, without any special features about them and such articles are not difficult to be found in the market it cannot be said that an identification of such articles is satisfactory and cannot be taken as sufficient evidence for a conviction. (Varma and Imam, JJ.) SANTA v. EMPEROR. 219 I.C. 391=46 Cr.L. J. 613=11 B.R. 408=18 R.P. 148=10 Cut. L.T. 87=A.I.R. 1945 Pat. 161.

-Identification of articles—Possibility of witness having had a chance of seeing the articles to be mixed-Effect.

Where it is not impossible that the identifying witnesses may have had a chance of seeing the articles to be mixed with the recovered or suspected articles prior to the actual identification proceedings, the proceedings are not genuine and quite useless. (Misra and Madeley, JJ.) Jan-God Singh v. Emperor. 213 I.C. 163-45 Cr. L.J. 689=17 R.O. 8=1944 O.A. (C. C.) 141=1944 A. Cr.C. 37=1944 A.W.R. (C. C.) 141=1944 O.W.N. 207=A.I.R. 1945 Oudh 164.

-Identification parade-Application by accused for holding of-When should be granted.

If an accused person is already well-known to the witnesses, an identification parade would, of course, be only a waste of time. If, however, the witnesses claim to have known the accused previously, while the accused himself denies this, the claim made by the witnesses cannot be used as a reason for refusing to allow their claim to be put to the only practical test. Even if the denial of the accused is false, no harm is done, and the value of the evidence given by the witnesses may be increased. It is true that it is by no means uncommon for persons who have been absconding for a long time to claim an identification parade in the hope that their appearance may have changed sufficiently for them to escape recognition. Even so, this is not in itself a good ground for refusing to allow any sort of test to be carried out. It may be that the witnesses may not be able to identify a person whom they know by sight owing to some change of appearance or even to weakness of memory, but this is only one of the facts along with many others, such as the length of time that has elapsed, which will have to be taken witnesses are telling the truth or not. (Beckett and Teja Singh, JJ.) SAJJAN SINGH v. EMPEROR. 219 I.C. 259=18 R.L. 50=46 Cr.L. J. 550=A.I.R. 1945 Lah. 48.

-Identification parade—Duty of Court— Accused disputing ability of prosecution witnesses to identify him.

Whenever an accused person disputes the ability of the prosecution witnesses to identify him, the Court should direct an identification parade to be held save in the most exceptional circumstances. (Blacker, J.) AMAR SINGH v. EMPEROR. 208 I.C. 231=46 P.L.R. 81=45

Cr.L.J. 89=16 R.L. 122=A.I.R. 1943 Lah. 303.

Identification parade—Witness seeing accused before parade-Identification and evidence

of—Value of.

The fact that the witnesses saw the accused persons before the test identification parade makes their identification worthless, even for corroboration. (Harries, C.J. and Manohar Lall, J.) BESANGI KUI v. EMPEROR. 199 I.C. 317 = 14 R.P. 588=8 B.R. 539=43 Cr.L.J. 549 = 23 Pat.L.T. 131=A.I.R. 1942 Pat. 321.

-Identification proceedings-Duty of Magistrateconducting-Recording of objections-Avoiding of delay.

It is the duty of the Magistrate conducting identification proceedings to make a note of every objection which is made by an accused during the proceedings so that the Court which has to judge the value of the identification evidence may take into consideration the objections and in the light of those objections, may appreciate the evidence of identification. It is not desirable to delay identification proceedings because a delay may affect the ability of a witness To identify an accused. (Ganga Nath and Yorke, JJ.) EMPEROR v. Debi Charan. I.L.R. (1942) All. 892=15 R.A. 187=202 I.C. 586=1942 A.W.R. (H.C.) 293=1942 A.L.W. 505=1942 A.Cr.C. 161=43 Cr.L.J. 867=1942 A.L.J. 376=A.I.R. 1942 All. 339.

——Identification proceedings—Test identifi-cation held at police station—Propriety of.

The practice of holding test identifications at a police station where the police officers are in a position to advise the officer holding the test identification ought to be deprecated. (Varma and Imam, JI.) Nari Santa v. Emperor. 219 I.C. 391=46 Cr.L.J. 613=11 B.R. 408=18 R.P. 148=10 Cut.L.T. 87=A.I.R. 1945 Pat. 161.

-Identification—Value of evidence  $a_{\mathcal{S}}$  to. Though evidence of identification is a weak sort of evidence it cannot be said that it should not be acceptd unless it is corroborated by other evidence because it is not by itself an unsafe basis for conviction. (Agarwal, J.) EMPEROR v. JAI RAM. 203 I.C. 248=15 R.O. 225=1942 A.Cr.C. 190=44 Cr.L.J. 12=1942 O.W.N. 606=1942 A.W.R. (C.C.) 337=1942 O.A. 494=A.I.R. 1943 Oudh 16.

-Ignorance of law-Not a valid defence. Ignorance of law is no excuse for any breach thereof, and once a law has been brought upon the Statute Book and has been duly promulgated and duly brought into force, all subjects of the State are bound by it and their ignorance cannot be pleaded as good defence. (Davies, C.J. and O'Sullivan, J.) Emperor v. Manghumal Tekumal. I.L.R. (1944) Kar. 107=A.I.R. 1944 Sind 142.

–Intention – Relevancy–Murder charge– Inference of intention from acts.

There is no reason why in a murder case as in other cases, a man's intention should not be inferred from his acts. (Davis, C.J. and Tyabji, J.) MOTIRAM v. EMPEROR. 195 I.C. 833=14 R.S. 47=42 Cr.L.J. 786=A.I.R. 1941 Sind 117.

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-Investigation-Getting statements repeated before witnesses—Propriety. Bharosa Ram-DAYAL v. EMPEROR. [See Q.D. 1936-'40, Vol. I, Col. 3347.] 193 I.C. 6=13 R.N. 318=42 Cr. L.J. 390=A.I.R. 1941 Nag. 86.

Investigation—Sending of exhibits to Chemical Examiner—Duty of police.

The police should be careful when sending exhibits to the Chemical Examiner to mark each one in such a way that its identity can be fixed and safeguarded throughout, and to specify the origin and ownership of each in the covering letter to the Chemical Examiner. Care should also be taken to see that the evidence tendered in Court establishes beyond doubt the origin and ownership of each exhibit sent for examination. (Din Mohammad and Sale, JI.) KALA v. EM-PEROR. 213 I.C. 355=45 Cr.L. J. 680=17 R. L. 67=46 P.L.R. 69=A.I.R. 1944 Lah. 206.

-Joinder of charges-Murder case-Charge of misappropriation of articles of deceased-Propriety.

In a case of murder, it is an unusual and undesirable procedure to charge the accused with misappropriation of the articles of the deceased. (Burn and Mockett, JJ.) YERRANNA, In re. 193 I.C. 465=13 R.M. 694=42 Cr.L.J. 424 =52 L.W. 898=1940 M.W.N. 1238=A.I.R. 1941 Mad. 306.

-Joint trial-When to be held-Two sets of persons having rival claims or cases-Joint trial—Legality.

An accused person is ordinarily entitled to be tried separately, and only when he and other persons have combined to commit an offence or to produce a situation for which they may be held liable at law can he and the other persons be tried together. But two sets of people who have rival claims or cases cannot be tried to-gether. To hold a joint trial and to disallow separate trials of the different sets is to offend against a well-settled and elementary principle of legal procedure. (Shearer, J.) KHETRAMOHAN Das v. EMPEROR. 211 I.C. 103 (1)=16 R.P. 248=10 B.R. 336=45 Cr.L.J. 308=9 Cut. L.T. 15=A.I.R. 1943 Pat. 376.

-Judgment—Bench of magistrates—Case heard by-Order by one or more without all members participating in discussion leading to order—Legality.

Where a case is heard in a Bench of magistrates, all the magistrates constituting the Bench must discuss the matter and arrive at their conclusion before an order of conviction or acquittal can be properly passed. Although by a majority they may convict or acquit, a discussion between all of them is essential before any valid order can be passed. When there has been no such discussion, an order by one or more of them without all of them participating in the discuswithout an of them participating in the discussions leading to the order is vitiated and illegal. (Harries, C.J.) Berhampore Municipality v Adam Haji Ahmad. 209 I.C. 271=16 R.P. 109=45 Cr.L.J. 88=10 B.R. 138=9 Cut.L. T. 8=A.I.R. 1943 Pat. 381.

-Judgment-Criticisms of conduct of persons who are not witnesses—Duty of Magistrate.

A Magistrate is fully justified in making criticisms in his judgment, of matters relevant to the conduct and merits of the case and of persons who are witnesses, but he should conpersons who are witnesses, but he should confine his criticisms to matters that are strictly relevant to the issue involved. But he should avoid criticisms of conduct of persons who are not witnesses. (Din Mohammad and Sale, JJ.) EMPEROR v. MAHOMED HASSAN. 209 I.C. 468 =46 P.L.R. 334=16 R.L. 154=45 Cr.L.J. 149=A.I.R. 1943 Lah. 298.

Jurisdiction—Appeal from conviction on prosecution sanctioned by Sub-Collector—Jurisdiction of Sub-Collector as Joint Magistrate to hear and decide appeal. Ponnuswamy Pillai v. Emperor. [Sec Q.D., 1936-'40, Vol. I, Col. 3013.] 13 R.M. 525=42 Cr.L.J. 55.

-Jurisdiction—Charge of murder—Transfer to Assistant Sessions Judge for trial-Property-Duty of Sessions Judge to examine committal order—Duty of Judge not empowered to return case to transferring authority.

Sessions Judges and District Magistrates must hear in mind that cases of murder punishable under S. 302, I. P. Code, should never be transferred to an Assistant Sessions Judge or to a Magistrate specially empowered under S. 30, Cr. P. Code, for trial. The law prescribes only two possible punishments for murder-death or transportation for life. It is the duty of Sessions Judge to examine every commitment order bearing this in mind, and if there is any possibility that murder has been committed, he must either try the case himself or send it to an additional Sessions Judge, if one is available and not transfer it to an Assistant Sessions Judge. Should a Court, not empowered to impose the legal sentence, find that a case of this type has been inadvertently transferred to it, it should not proceed to trial, but should return the case at once to the transferring authority for necessary orders. (Manohar Lall and Meredith, II.) BHOLA BIND v. EMPEROR. 22 Pat. 607=211 I. C. 532=10 B.R. 388=45 Cr.L.J. 409=16 R.P. 242=A.I.R. 1944 Pat. 92.

-Jurisdiction—Charge under S. 406, I. P. Code—Accused arrested illegally outside jurisdiction and brought up—Release on bail—Subsequent appearance of accused—Jurisdiction of duent appearance of accused—jurisdiction of Magistrate—If affected by illegality of arrest. Subramania Chetti v. Emperor. [See Q.D., 1936-'40, Vol. I, Col. 3347.] 192 I.C. 684=13 R.M. 586=1940 M.W.N. 1271=42 Cr. L.J. 320 (1)=A.I.R. 1941 Mad. 181.

-Jurisdiction-Failure to object at earlv stage.

A Court does not get a jurisdiction which it does not possess merely because objection to it is taken by the accused at a late stage only. (Davis, C.J.) Mansharam Gianchand v. Emperor. 193 I.C. 454=13 R.S. 231=42 Cr. L.J. 460=A.I.R. 1941 Sind 36.

knowledge required in its trial, shall be tried | Oudh 266.

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by a Sessions Court, a first class Magistrate. however proper be his motives, should not him. self remove that case from the Court of Session, and try it himself by merely altering the numbers of the sections, for after all, the numbers of the sections are mere labels, and what is to be looked at is the allegation of facts. (Davis, C.J.) MANSHARAM GIANCHAND v. EMPEROR. 193 I.C. 454=13 R.S. 231=42 Cr. L.J. 460=A.I.R. 1941 Sind 36.

Jurisdiction—Plea barof-Illegal arrest in foreign territory-Subsequent extradition and surrender by the foreign Court-Legality of trial and conviction, if affected.

Though the procedure taken to bring an accused within the jurisdiction of the country in which he had committed an offence may be irregular and improper, if he is there, and if he had committed the offence with which he is charged. it is no answer to the offence that he had been brought irregularly within the jurisdiction of that country. By an agreement between the British Government and the State of Jind, the former was given full and exhaustive power and jurisdiction of every kind over the lands in the State of Jind which were occupied by the Southern Punjab Railway. A subject of Jind was arrested by the British Indian Police outside the limits of the lands so ceded, in respect of a murder alleged to have been committed by him in a train of the said Railway while running through the State of Jind. He was sub-sequently extradited and handed over to the authority of the British Indian District Judge who had jurisdiction in respect of the offence and was convicted. On a contention that the arrest of the accused was illegal and that the illegality of the arrest vitiated the whole sub-

sequent proceedings.

Held, negativing such a contention, that assuming that the arrest was open to objection as an infringement of the sovereign of Jind, the validity of the trial and the conviction of the accused was not affected by any irregularity in his arrest. When the accused was presented for trial at the Court which tried him, he had been validly surrendered in that Court by the Jind authorities and so far as that Court was concerned everything was regular and in order. (Lord Macmillan.) PRABHU v. EMPEROR. 71
I.A. 75=215 I.C. 63=57 L.W. 408=1944 cerned everything was regular and in order. (Lord Macmillan.) PRABHU v. EMPEROR. 71 I.A. 75=215 I.C. 63=57 L.W. 408=1944 O.A. (P.C.) 38=11 B.R. 94=46 Cr.L.J. 119=17 R.P.C. 44=I.L.R. (1944) Kar. (P.C.) 269=1944 F.L.J. 187=1944 M. W. N. 502=1944 A.L.J. 385=46 Bom.L.R. 838=1944 A.W.R. (P.C.) 38=48 C.W.N. 493=A.I.R. 1944 P.C. 73=(1944) 1 M.L.J. 520 (P.C.) (P.C.).

-Jurisdiction-Plea of illegal arrest in

foreign country—Availability.

Where a man is in the country and is charged with an offence it will not avail him to say that he was brought there illegally from a foreign Jurisdiction—Offence under S. 220, Penal country. (Thomas, C.J. and Kaul, J.) JATEN Code—Alteration of section into S. 347 and trial by Magistrate—Legality.

Where the Legislature has provided that an offence because of its gravity or because of the knowledge required in its trial shall he tried Country. (Thomas, C.J. and Kaul, J.) JATEN V. Hon. Sir Iobal Ahmad. 20 Luck. 442=1945 O.W.N. 169=1945 A.L.W. (C.C.) 162=1945 O.A. (C.C.) 153=1945 A.Cr.C. 90=1945 O.A. (C.C.) 153=1945 A.Cr.C. 90=1945 O.A. (C.C.) 153=A. I. R. 1945

Jurisdiction—Trial by Magistrate of case triable exclusively by Court of Session—Charge under serious offence left out and trial held under minor charges—Acquittal—Legality.

A case exclusively triable by a Court of Session cannot be brought within the jurisdiction of a Magistrate by leaving out the more serious charges and confining the trial to the minor charges only. If the Magistrate tries the case on the minor charges leaving out the more serious charge, and passes an order of acquittal, it is without jurisdiction and must be set aside, for if the more serious charge exclusively triable by the Court of Session were framed, it would not be open to pass any order of acquittal at all in the case. 22 persons were sent up by the police on a charge of rioting in the course of which grievous hurt was caused to two persons and death to a third. The Sub-Divisional Magistrate framed charges under Ss. 147 and 325 read with S. 149, I. P. Code, against all of them and also framed an additional charge under S. 435, I. P. Code, against one of them. He did not, however, frame charge under S. 302 or even under S. 304, read with S. 149, I. P. Code, on the ground that the accused who had struck the fatal blow and killed the deceased was absconding. He tried the accused and acquitted them holding that no clear case been made out.

Held, that the absence of the accused who dealt the fatal blow causing death was no justification for his failure to frame a charge against the accused under S. 302, I. P. Code, or at least under S. 304 read with S. 149, and trying the case himself; and the order of acquittal was therefore without jurisdiction and liable to be set aside. (Dhavle, J.) RAMLAKHAN DHOBI v. RACHHEY KALWAR. 194 I. C. 660=7 B. R. 814=14 R.P. 16=42 Cr.L.J. 622=22 Pat.L.T. 237=1941 P.W.N. 253=A.I.R. 1941 Pat. 287.

——Local inspection—Power of Magistrate to inspect locality and to use results thereof.

A Magistrate does not act beyond his powers when he inspects a locality for the purpose of understanding the evidence in the case before him and using the result of such examination as it is well established that local inspection is really meant for the purpose of understanding the evidence in the case. (Varma, J.) Lalo Mahto v. Emperor. 199 I.C. 218=14 R.P. 577=1942 P.W.N. 13=8 B.R. 534=43 Cr.L.J. 537=22 Pat.L.T. 976=A.I.R. 1942 Pat. 150.

-----Motive—Basis of conviction.

It is very dangerous to convict a man merely because of the motive. At best, it raises a very strong suspicion that he committed the crime but suspicion cannot take the place of positive proof. (Teja Singh and Amar Nath Bhandari, JJ.) PAKHAR SINGH v. EMPEROR. 46 P.L.R. 283.

The evidence of motive for a murder would not take the place of evidence of identification, nor would it afford corroboration of a confession. (The evidence of motive is not direct but indirect evidence, and can be regarded only as

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one of the factors to corroborate the other direct evidence or very strong circumstantial evidence in the case. (Divatia and Lokur, JJ.) EMPEROR v. SAVLIMIYA MIVABHAI. 46 Bom.L.R. 589=A.I.R. 1944 Bom. 338.

Murder trial—Open murder in the morning in crowded village—Failure of accused to produce evidence as to manner of death of deceased and as to their own innocence—If

matters for consideration.

Though it is quite true that it is not for the accused in a murder case to prove how the deceased was murdered yet where the accused are not able to produce any evidence as to how an open murder in the morning in a crowded village took place, and how they were quite innocent of it, these are matters which can be taken into consideration. (Agarwal and Madeley, JJ.) Sheo Prasad v. Emperor. 17 Luck. 376=197 I.C. 701=43 Cr.L.J. 243=14 R.O. 353=1941 A.Cr.C. 306=1941 O.A. 943=1941 A.W.R. (C.C.) 354=1941 O.W.N. 1246=A. I.R. 1942 Oudh 193.

——Negligence — Doctor—Criminal responsibility.

A doctor is not criminally responsible for a patient's death unless his negligence or incompetence passed beyond a mere matter of compensation and showed such disregard for life and safety as to amount to a crime against the State. Merely because too strong a mixture was once dispensed and a number of persons were made gravely ill, a criminal degree of negligence could not be said to have been proved. Where however the charge is that he injected the right quantity off too strong a preparation, such evidence is admissible as tending to show, from the effect produced, the strength of the mixture in the bottle and to rebut the defence of idiosyncracy of the deceased in relation to the drug. (Lord Porter.) John Oni Akerele v. The King. (1943) A.C. 255=112 L.J. (P.C.) 26=207 I.C. 107=16 R.P.C. 7=44 Cr.L.J. 569=1943 A.L.J. 427=1943 P.W.N. 155=57 L.W. 269=1943 O.A. (P.C.) 48=A.I. R. 1943 P.C. 72.

Negligence—Principle of res ipsa loquitur—Applicability. See PENAL CODE, S. 304-A. 1945 N.L.J. 300.

——New plea—Point Coming to notice of judge at time of judgment—Reliance on—Propriety.

It is dangerous for a judge to rely for the first time upon a point which comes to his notice only at the time of judgment, and which has not been made the subject of question or argument in the hearing of the case before him. (Davies, C.J. and O'Sullivan, J.) EMPEROR v. KAKU MASHGHUL. I.L.R. (1944) Kar. 123=212 I.C. 467=45 Cr.L.J. 650=17 R.S. 1=A.I. R. 1944 Sind 33.

----Offence by servant-Liability of master under general law and under special statute.

It is a general proposition of law that the master is not liable for the criminal Acts of his servants not done at his instigation. The reason for the rule is that it is a general principle of criminal law that there must be some blameworthy condition of mind or mens rea—there may be negligence, malice, guilty knowledge or

the like. There is another well known principle that there is no vicarious liability in criminal law; the condition of mind of the servant is not to be imputed to the master. These general principles apply to all offences though it is in the power of the Legislature to enact that a man may be convicted and punished although there was no blameworthy condition of the mind. But this exception would have to be made convincingly from the language of the statute. This would depend primarily upon the language of the statute, the words used, then its scope and its object. (Malik, J.) HARISH CHANDRA BAGLA v. EMPEROR. I.L.R. (1945) A. 540= 219 I.C. 87=18 R.A. 32=46 Cr.L.J. 472= 1045 A. W. P. (H.C.) 160-1045 A. 1945 A.W.R. (H.C.) 160=1945 A.L.J. 151 =A.I.R. 1945 All. 90.

——Plea of guilty under misapprehension—Conviction—Sustainability.

Where an accused admits the offence charged under a misapprehension, his conviction must be set aside and a retrial has to be held. (Lakshmana Rao, J.) PATTABIRAMA IYER v. EMPEROR. 196 I.C. 553=43 Cr. L.J. 58=14 R.M. 319 (2)=53 L.W. 714 (1)=1941 M.W.N. 447= A.I.R. 1941 Mad. 679.

——Powers of Court—Accused pleading guilty— Entry of plea of not guilty—Permissibility— South African practice.

South African practice permits a Court to enter a plea of not guilty on behalf of a native or other ignorant person pleading guilty, if it considers that he does not properly understand the effect of that plea or if he seems to have matter of exculpation that he wishes to allege. (Sir Philip Macdonell.) FAKISANDHLA NKAMBULE v. THE KING. 191 I.C. 4=13 R.P.C. 106=7 B.R. 203=42 Cr.L.J. 13=1941 P.W. N. 11=1941 M.W.N. 228 (P.C.)=1940 O. L.R. 697.

Practice—Holding Court at particular place—Issue of general notice, whether sufficient.

The mere issuing of a general notice is not sufficient in law to fix the parties with the knowledge of the fact that their cases will be taken up and disposed of at a particular place. (Nawalkishore, C.J.) Talka v. Banna. 1943 M.L.R. 68 (Cr.).

-Practice-Power of attorncy not bearing signature of accused-If can be cured.

The absence of the signature of the accused in the power of attorney filed by his counsel in the appellate Court is a mere slip and only an irregularity, such as could be cured by taking his signature subsequently. (Madeley, J.) ABDUL JABBAR v. EMPEROR. 1943 A.W.R. (C.C.) 184' (1)=1943 A.Cr.C. 141 (1)=1943 O.A. (C.C.) 316 (1)=1943 O.W.N. 479 (1)=211 I.C. 92=45 C·L J. 286=16 R.O. 216=A. I.R. 1944 Oudh 84.

-Private defence-Plea of-Failure of accused to state in his report to police-If bars him

from raising it in the trial.

The omission of the accused to state the plea of self-defence in the report made by him to the police cannot bar him from putting forth such a plea at the trial. Whether such a plea is true or not depends upon the evidence produced

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v. EMPEROR. 198 I.C. 819=14 R.O. 465= 1942 A.Cr.C. 14=1942 A.W.R. (C.C.) 1= 43 Cr.L.J. 436=1941 O.W.N. 1331=1941 O.A. 1043=A.I.R. 1942 Oudh 147.

-Plea of-Private defence-Police constable on guard duty at magazine—Right to shoot person not answering challenge—Causing death— Offence—Plea of private defence of property— Sustainability. See Penal Code, Ss. 97, 99, 103 AND 105. 23 Pat. 908.

-Private defence-Question as to-When arises-Parties wishing to decide dispute by

force.

No question of private defence can arise in a case where neither party wishes to go to Court and each wishes to decide their dispute by force. (Davies, C.J. and Weston, J.) Budho Mazar v, Emperor. I.L.R. (1943) Kar. 112=208 I.C. 258=16 R.S. 71=44 Cr.L.J. 761=A.I.R. 1943 Sind 152.

——Privy Council. See Privy Council.
——Procedure—Appeal—Disposal on date of presentation in spite of request for time— Legality.

Where a criminal appeal is presented and the advocate for the appellant requests for time to obtain the necessary records, it should not be disposed of on the same day of presentation. (Lakshmana Rao, J.) Ponnuswami Redding. In re. 194 I.C. 256=13 R.M. 774=42 Cr. L.J. 551=53 L.W. 75 (1)=1941 M.W.N. 64 (1)=A.I.R. 1941 Mad. 604.

Procedure—Case disclosing offences tri-able by Second Class Magistrate—Conversion into preliminary register case on ground of its being counter to preliminary register case—Legality. Oonna Mudali v. Emperor. [See Q.D. 1936-'40, Vol. I, Col. 3020.] 191 I.C. 156 = 13 R.M. 491=42 Cr.L.J. 86.

-Procedure-Charge of murder and charge of attempt to murder-Separate trials-Proper procedure-Trial on charge of attempt to murder before trial on charge of murder—Propriety.

See Cr.P.C. S. 403. (1944) P.W.N. 115.

Procedure—Complaint disclosing offence

under Copyright Act—Dismissal on ground of dispute being of civil nature—Legality.

Where a complaint about infringement of a copyright discloses an offence under Ss. 7 and 8 of the Copyright Act, the complaint cannot be dismissed on the ground that the dispute is of a civil nature. (Lakshmana Rao, J.) SHARMA v. DHARMA RAO. 1941 M.W.N. 871=A.I.R. 1942 Mad. 124.

-Procedure - Eye-witness-Tendering of for cross-examination without examining-in-chief -Legality. See Evidence Act, S. 138. 43 Bom. L.R. 946.

-Procedure-Magistrate having no jurisdiction to try case—Procedure—Order of discharge—Legality. See Cr. P. Code, S. 209. 1941 M.W.N. 765 (2).

-Procedure-Misjoinder of accused-Effect on conviction—Prejudice to accused—Presumption of. See Cr. P. Code, S. 239. (1941) 2 M. L.J. 534.

-Procedure-Process issued against accused by one Magistrate-Rescission by anotherin the case. (Ghulam Hasan, J.) NISAR HUSAIN | Propriety—Proper procedure—Discharge of ac-

cused and issue of fresh process in respect of offence alleged to have been committed.

One magistrate cannot of course rescind the process issued by another magistrate but he can discharge the accused under S. 253, Cr. P. Code, of the alleged offence in respect of which process was issued, and can take cognizance of any offence alleged to have been committed by the accused and issue fresh process in respect of such offence. (Lobo, A.C.J. and Thadani, J.)
AMARIAL v. EMPEROR. I.L.R. (1944) Kar.
411=221 I.C. 136=1946 S. (Rul) 21=47 Cr.
L.J. 84=A.I.R. 1945 Sind 51.

-Procedure-Request made by Government to Magistrate—Sending instructions through his superior officers-Practice condemned.

If the Government desire to put in a petition or request to a Magistrate, they can do so directly through the Public Prosecutor who is the proper officer to put the matter before him. The practice of sending instructions from the Government through the District Magistrate and the Sub-Divisional Officer to the Public Prosecutor and having those instructions reported to the Court of the trying Magistrate who is sub-ordinate to the District Magistrate and the Sub-Divisional Officer is open to the gravest objection. It is not a procedure contemplated by Cr. P. Code and those who issue instructions in that way, those who forward those instructions, and those who obey them do not act according to law. (*Derbyshire*, *C.J. and Bartley*, *J.*) EMPEROR v. EBRAHIM. I.L.R. (1941) 2 Cal. 281=45 C.W.N. 768=199 I.C. 269=14 R. C. 554=43 Cr.L.J. 539=A.I.R. 1942 Cal. 219.

-Procedure-Search list-Failure to exhibit-Witness giving evidence of and Judge discussing contents in judgment—Propriety—Proper procedure to be followed. See Mysore Cr. P. Code, S. 103. 46 Mys. H. C. R. 18.

Prosecution—If can be based on contract not enforceable in Civil Court. EMPEROR v. RAGHUNATH. [See Q.D., 1936-'40, Vol. Col. 3023.] 16 Luck. 194=A.I.R. Oudh 3.

-Public Prosecutor—Duty to put Court all that can be said in support of charge.

Although a Public Prosecutor is expected to be fair to an accused person and not to press for a conviction of a graver offence if he thinks a lesser offence has been committed, it is his duty to put before the Court all that can be said in support of the charge and he should not state that a lesser offence has been committed when a graver one is in fact committed. (Horwill, J.) KARUPPAYYA THEVAR v. EMPE-ROR. 1941 M.W.N. 1025=199 I.C. 133=14 R. M. 565=43 Cr. L. J. 521=A. I. R. 1942 Mad. 227=(1941) 2 M L. J. 999. ——Punishment. See CRIMINAL TRIAL—SEN-

TENCE

-Review-Subordinate Courts-Power to review judgment or order.

No Court subordinate to the High Court has any inherent jurisdiction to review its own judgment, save in a few circumstances, such where there has been an abuse of process

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Court, fraud played upon the Court or where petty clerical errors or mistakes have been made. (Horwill, J.) Nalluswami Reddi v. Nallammal. 206 I.C. 591=16 R.M. 39=1943 M. W.N. 163=56 L.W. 254=44 Cr.L.J. 554=A.I.R. 1943 Mad. 392=(1943) 1 M.L.J.

-Revision—Application by convicted son-Affidavits-Statement that petitioners in jail when in fact they are not-Propiety of

bractice.

Although it may be the practice to draw up an affidavit and swear to it stating that the accused preferring a criminal revision against a conviction are in jail in anticipation of their surrendering, it is unjustifiable for any one to make affidavits before the Commissioner for oaths stating what in fact is not true, though it may be anticipated that it will be true in a day or two's time when the affidavits are to be used. (Agarwala, J.) EMPEROR v. JIT NARAIN SINGH. (1943) P.W.N. 54.

-Revision—Conviction with imprisonment— Application in revision—Maintainability by accused who has not surrendered—Patna High

Court—Practice.

It is a well established practice of the Patna High Court not to entertain an application in criminal revision against an order of conviction in which a sentence of imprisonment has been passed until the convicted persons have surrendered to serve out their sentences. (Agarwala, J.) Emperor v. Jit Narain Singh. 1943 P. W.N. 54.

–Revision–High Court-Interference-Grounds—Practice—Criminal Law Amendment Ordinance (1943), S. 8.

It is the practice of the High Court not to interfere with the decision of a Subordinate Court in the exercise of revisional jurisdiction, unless through some defect in procedure the accused person has been deprived of the right of a fair trial, or the decision of the Court is vitiated by reason of some mistake of law. (Agarwala and Imam, JJ.) HUNTLEY v. EMPEROR. 23 Pat. 457=218 I.C. 282=18 R.P. 28=11 B.R. 283=46 Cr.L.J. 438=A.I.R. 1944 Pat. 878.

-Rewards-Distribution-Proper time and propriety.

The distribution of rewards to police and other witnesses if made before the decision of the case is calculated to prejudicially affect the fair trial of the case against the accused. It may also lead of the case against the actived. It may also lead to large body of otherwise good evidence being eliminated from consideration. (Thomas, C.J. and Ghulam Hasan, J.) EMPEROR v. GAYA PRASAD. 194 I.C. 557=1941 O.W.N. 852=14 R. O. 26=1941 A.Cr.C. 153=1941 A.L.W. 752=42 Cr.L.J. 595=1941 A.W.R. (C.C.) 211=1941 O.A. 545=1941 O.L.R. 493=A.I.R. 1941 O.U.B. 487 Oudh 487.

Right of accused—Right to defend—Allegation that he is tampering with prosecution witnesses.

Under the law of England and of India every man is presumed to be innocent until he is proved guilty and, therefore, he has the fullest right to defend himself. No part of this right can be

taken away from him either because he is a Government servant or because allegations have been made that he is tampering with the prosecution witnesses. (Blacker, J.) PRITAM SINGH v. RAGHBIR SHARAN. 212 I.C. 135=16 R.L. 261=45 Cr.L.J. 548=46 P.L.R. 31=A. I. R. 1944 Lah. 95.

Right of appeal and trial by jury-Sub-

stantive rights.

Per Niyogi and Digby, JJ.—The right of accused in criminal cases to have trial by jury or to apply for bail or transfer of the case and also to approach the superior Courts in revision or appeal are substantive rights and not mere matters of procedure. (Grille, C.J., on difference between Niyogi and Digby, JJ.) Sitao JHOLIA DHIMAR v. EMPEROR. I.L.R. (1943) Nag. 73=205 I.C. 161=15 R.N. 187=44 Cr. L.J. 237=6 F.L.J. (H.C.) 53=1943 N.L. J. 16=A.I.R. 1943 Nag. 36.

The age of the accused—Relevancy.

The age of the accused as a factor for imposing a light sentence is only relevant when he is very young or very old. (Beaumont, C.J. and Sen, I.) EMPEROR v. ISHWARLAL CHHAGANLAL.

196 I.C. 442=14 R.B. 129=42 Cr.L.J. 869

=43 Bom.L.R. 511=A.I.R. 1941 Bom. 310.

Sentence—Award of—Principle underlying—Commission of offence by more than one —Each if can be punished to the maximum ex-

tent prescribed.

The general principle in criminal cases is quite clear that every offence for which a punishment is provided is a several offence and every person who participates in that offence is punishable to the extent of the maximum penalty provided by the law, irrespective of the fact whether any person joins with him in committing the offence is or is not punished separately. (Mulla, J.) SAT NARAIN v. EMPEROR. I.L.R. (1942) All. 933=15 R.A. 324=44 Cr.L.J. 141=204 I.C. 129=1942 A. Cr. C. 191=1942 A.W.R. (H.C.) 310=1942 Å.L.W. 557=1942 A.L.J. 568=A.I.R. 1942 All. 440.

----Sentence—Award of—Principles to be

borne in mind by Court.

Criminal Courts, while awarding sentences, should be cautious in making the sentences proportionate to the nature of the offences committed and should not award sentences which may seem to be of a vindictive nature. An unnecessarily severe sentence is apt to defeat the object for which it is passed. The sections of the statute prescribing sentences give the limit to which a sentence can be passed, but that does not mean that the maximum sentence should be awarded in each case. The extent of the sentence has to be judged upon the circumstances of each case. (Varma and Shearer, JJ.) JAINARAIN SAH v. EMPEROR. 22 Pat. 600=211 I. C. 219=45 Cr. L. J. 332=10 B.R. 358=16 R. P. 235=25 P.L.T. 12=A.I.R. 1944 Pat. 16.

Sentence—Charges under Ss. 302 and 201, I. P. Code—Conviction—Sentence of death—Separate sentence under S. 201—Propriety. See Penal Code, S. 302. 1941 M.W.N. 874.

Sentence—Consideration in awarding—

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Period during which accused was in custody-

Among the factors taken into account by the Court in imposing punishment on conviction, the period of time during which the accused may have remained in custody is a matter to which the Court always pays some regard. (Beaumont, C.J. and Sen, J.) EMPEROR v. ISHVARLAL CHHAGANLAL 196 I.C. 442=14 R.B. 129=42 Cr. L. J. 869=43 Bom. L.R. 511=A.I.R. 1941 Bom. 310.

Sentence—Conspiracy to murder by per-

sons of education and position.

Severe sentences are justified in a case where a young woman has been the victim of a conspiracy to murder her, pursued relentlessly for more than two years by persons of education and position. Their education and position do not constitute a reason for treating them leniently: rather the reverse. (Zia-ul-Hasan and Bennett, JI.) SHYAM KUMAR SINGH V. EMPEROR. 191 I.C. 466=1941 O.W.N. 133=42 Cr.L.J. 165=1941 A.Cr.C. 21=1941 A.W.R. (C.C.) 59 = 13 R.O. 248=1941 A.L.W. 107=1941 O.A. 65=1940 O.L.R. 734=A.I.R. 1941 Oudh 130.

——Sentence—Continuing offence—Infliction of recurring fine till the ceasing of—Legality.

The infliction of a recurring fine of a certain amount per day until it was certified that the continuing offence of which the accused was convicted had ceased, is illegal in law. (Davies.) GANPAT RAM v. CROWN. 1944 A.M.L.J. 45.

——Sentence—Discretion—Interference by appellate Court.

It must be remembered that the Court on whom is imposed the duty of determining the sentence in a criminal case is in the first instance, the trial Court which knows local conditions, and an appellate Court ought not to interfere with the sentence unless it thinks that the trial Court has proceeded on some wrong basis. (Beaumont, C.J. and Weston, J.) EMPEROR v. KAMAL DATTATRAYA. 208 I.C. 455=16 R.B. 93=45 Bom.L.R. 581=44 Cr.L.J. 786=A. I.R. 1943 Bom. 304.

Sentence—Enhancement—Breach of trust

by man of position.

Where a man of some position and family as Secretary of a Co-operative Society, committed criminal breach of trust and the offence had been aggravated by his subsequent conduct a fine of Rs. 175, was an inadequate punishment and such sentence should be enhanced. (Davis, C.J. and Lobo, J.) EMPEROR v. HAJI AHMED DITAL KKAN. 208 I.C. 540=16 R.S. 80=44 Cr.L.J. 798=A.I.R. 1943 Sind 164.

Sentence—Fine, in addition to a long term of substantive imprisonment—Undesirability.

It is not proper in the case of a poor peasant, to add to a very long term of substantive imprisonment a fine which there is no reasonable prospect of the accused man paying and for default in paying which he will have to undergo a yet further term of imprisonment. It becomes all the more undesirable to impose such a fine where the term of imprisonment to be undergone in default will bring the aggregate sentence of imprisonment to more than the maximum term

of imprisonment sanctioned by the particular section under which he is convicted. (Braund, J.) EMPEROR v. MEHDI ALI. I.L.R. (1941) All. 608=195 I.C. 599=1941 O.A. (Supp.) 564=1941 A.L.J. 395=1941 A.L.W. 660=14 R.A. 77=1941 A.Cr.C. 146=42 Cr.L.J. 755=1941 A.W.R. (H.C.) 238=4 T.P. 755=1941 A.W.R. (H.C.) 238=A. I. R. 1941 All. 310.

Sentence—First offender—Short term imprisonment—Propriety of Emperor v. Achar Hamzo. [See O.D., 1936-'40, Vol. I, Col. 3347.] 193 I.C. 341=13 R.S. 222=42 Cr. L.J. 403=A.I.R. 1941 Sind 48.

-Sentence-Imprisonment in default of fine-Direction to run concurrently with substantive sentence of imprisonment for another offence

tried in same case—Legality.

for directing imprisonment in default of fine to run concurrently with a substantive sentence of imprisonment awarded for any other offence tried in the same case. (Kuppuswami Ayyar, J.) Public Prosecutor v. Venkayya. 215 I. C. 39=45 Cr.L.J. 770=1944 M.W.N. 294=57 L.W. 274=17 R.M. 151=A.I.R. 1944 Mad. 448=(1944) 1 M.L.J. 395.

-Sentence—Imprisonment risina

Court-Legality and propriety of.

Even in cases where the alternative of a fine is not permissible by law, it is objectionable to sentence persons to imprisonment till the rising of the Court, because it is not a form of im-prisonment recognised by law, and it is used to circumvent the provisions of law that require a sentence of imprisonment in jail for a particular term. Where the law permits of a sentence of fine as an alternative, there is no need for a sentence of imprisonment at all if it is thought that the offence does not merit it. (Horwill, J.) RAMALINGAYYA, In re. I.L.R. 1943 Mad. 230=15 R.M. 707=44 Cr.L.J. 139=204 I.C. 65=55 L.W. 587=1942 M.W. N. 592=A.I.R. 1942 Mad. 723=(1942) 2 M.L.J. 357 [Overruled by (1945) 1 M.L.J. 180.]

Sentence—Imprisonment till the rising of the Court-Legality-Power of Court to pass. A sentence of imprisonment till the rising of the Court is not illegal or objectionable unless the punishment section fixes a minimum, the Court has full discretion to pass a sentence of imprisonment for any period less than the maximum, for instance, for five minutes if this would fit the offence. A direction by the Court that a person shall be confined in the Court premises till the Court rises constitutes imprisonment within the meaning of the Penal Code and the Cr. P. Code. A sentence of imprisonment until the rising of the Court should only be imposed in very exceptional cases, but where the facts Marant it, the Court has power to pass it. (Leach, C.J. and Lakshmana Rao, J.) MUTHU NADAR, In re, I.L.R. (1945) Mad. 529=221 I.C. 133=1946 Mad. (Rul.) 25=1945 M.W. N. 181=47 Cr.L.J. 50=58 L.W. 77=A.I. R. 1945 Mad. 313=(1945) 1 M.L.J. 180. -Sentence — Mitigation — Conviction

young person below 18 for murder-Proper sentence.

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the punishment in murder cases, but in the case of a young murderer below 18 years, it is very rarely that he is sentenced to death. (Burn and Mockett, JJ.) Public Prosecutor v. Venkata-Subramanyam. I.L.R. (1941) Mad. 428=192 I.C. 579=1941 M.W.N. 58=13 R.M. 585= 42 Cr.L.J. 311=52 L.W. 949=A.I.R. 1941 Mad. 358=(1941) 1 M.L.J. 34. ——Sentence — Mitigation—Grounds for— Youthful offender—Fine—If inappropriate. Mere youth is not a sufficient excuse for in-fullying in political activities which are made

dulging in political activities which are made offences punishable under the Defence of India Rules, but at the same time, in imposing sentence the Court should not ignore the youth of the offender. A fine in such cases is not inappropriate on the ground that the fine will have to be paid by the accused's parent who may not have connived at the offence. Parents may reasonably be expected to restrain the activities of their children when those activities conflict with the law. The effect of imposing a fine is to give the parent the option of keeping the child out of jail by a moderate payment. (Beaumont, C.J. and Weston, J.) EMPEROR v. KAMAL DATTATRAYA. 208 I.C. 455=16 R.B. 93=45 Bom.L.R. 581 1943 Bom. 304. 581=44 Cr.L.J. 786=A.I.R.

-Sentence — Mitigation of —Murder—Conviction of person instigating the murder-Actual murderer getting off wholly free-If ground for

mitigating sentence.

The fact that a person who instigated another to commit a murder is in danger of being hanged while the person who did the actual murder gets off wholly free is not by itself a reason for mitigating the punishment of the instigator who is convicted. (Burn and Mockett, JJ.) Public Prosecutor v. Venkatasuramanyam. I.L.R. (1941) Mad. 428=192 I.C. 579=1941 M.W. N. 58=13 R.M. 585=42 Cr.L.J. 311=52 L. W. 949=A.I.R. 1941 Mad. 358-(1941) 1. 949=A.I.R. 1941 Mad. 358=(1941) 1 M.L.J. 34.

-Sentence — Murder—Normal sentence-Duty of Court—Madras Children Act, S. 22— Scope and effect of—Accused of or above 16 years—Proper sentence of murder—Cr. P. years—Proper Code, S. 367.

There is no doubt that the normal sentence on a conviction for murder, is death and under S. 367, Cr. P. Code, if the Court imposes any other sentence it has to give reasons for not passing a sentence of death. S. 22 of the Madras Children Act provides that no "child" or "young Children Act provides that no "child" or "young person" (that is, a person under 14 or one who is 14 but under 16 years of age) shall be sentenced to death. There is no provision of law that a sentence of dooth children to the sentence of the that a sentence of death shall not be passed on a person of or above 16, but not more than 18 years of age. A sentence of death cannot be commuted in the absence of mitigating circumstances purely on the ground of the young age of the accused. To do so would be to extend the Children Act beyond the age contemplated by the Legislature. The prerogative of mercy lies with the Provincial Government and it is for the Legislature to amend the Children Act if it thinks fit so as to fix the age below which a oung person below 18 for murder—Proper sentence of death shall not be passed at a higher nutence.

Sentence of death shall not be passed at a higher level. (Mockett and Happell, JI.) RAMUDU, In Youth by itself is not a reason for mitigating re. I.L.R. (1943) Mad. 148=204 I.C. 545

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=15 R.M. 790=44 Cr.L.J. 299=1942 M.W. N. 584=55 L.W. 552=A.I.R. 1943 Mad. 69=(1942) 2 M.L.J. 312.

-Sentence-Murder-Youth of accused-If ground for not awarding death sentence. CHENNA REDDI, In re. [Sec Q.D. 1936-'40, Vol. I, Col. 3028.] 194 I.C. 527=42 Cr.L.J. 582=14 R.M. 18=52 L.W. 981.

Sentence—Offence not involving moral turpitude but deliberate and intentional—Sentence of fine—Propriety.

Where a person is charged under the Defence Rules for a prejudicial act in making a speech when such offence involves no moral turpitude but is deliberate and intentional, a sentence of fine is a particularly suitable punishment for an offender who can pay. (Skemp, J.) MIAN IFTIKHAR-UD-DIN v. EMPEROR. 196 I.C. 485=14 R.L. 157=42 Cr.L.J. 890=43 P.L.R. 378=A.I.R. 1941 Lah. 324.

Scattace—Offence under Defence of India Rules-Considerations in awarding sentence.

Acts which are made punishable under the Defence of India Rules are so made punishable for the protection of the public, and it is manifestly necessary in imposing sentences to bear in mind that fact in the case of an accused con-Weston, I.) EMPFEOR v. KAMAL DATTATRAYA.
208 I.C. 455=16 R.B. 93=45 Bom.L.R. 581
=44 Cr.L.J. 786=A.I.R. 1943 Bom. 304.

Sentences — Police Officers committing offences. Parmanand v. Emperor. [Sec Q.D. 1936-'40, Vol. I, Col. 3032.] I.L.R. (1941) Nag. 110=42 Cr.L.J. 17.

-Sentence-Police officer found guilty of

extortion-Deterrent sentence.

When a police officer who is a public servant whose duty it is to help the helpless people of the village and protect them from oppression, instead of doing which adopts the role of an mstead or doing which adopts the role of an oppressor and is found guilty of extortion under S. 383, I. P. Code, a deterrent sentence will serve as an example to others. (Thomas, C.J.) JAGDISH NARAIN v. EMPEROR. 1941 A.W.R. (C.C.) 358=1941 O.A. 947=1941 O.W.N. 1255=1941 O.L.R. 871=197 I.C. 277=1941 A.Cr.C. 315=43 Cr.L.J. 139=14 R.O. 208=A I R. 1942 Ordh 163 298=A.I.R. 1942 Oudh 163.
——Sentence—Principles to be observed in

imposing when there are alternative sentences for

an offence.

If there are two alternative sentences, a Court should take into consideration all the circumstances of the case and award the sentence which seems to it, in view of those circumstances, the more fitting. The fact that a murder was unpremeditated and that the act was committed in sudden anger are circumstances which will justify the award of the lesser sentence of transportation for life. (Horwill and Bell, JJ.) CHENCHU RAMAYYA, In re. 1945 M.W.N. 732=(1945) 2 M.L.J. 547.

-Sentence-Principles to be taken into account by Criminal Court-Discretion of trial Court-First offender and old offender-Conside-

The determination of the sentence to be passed on an accused person who is convicted of an

### CRIMINAL TRIAL.

offence by a Criminal Court is within certain limits, within the discretion of the trial Court. and it is in many cases one of the most delicate matters with which Criminal Courts have to deal. While it is desirable to avoid sending a first offender to prison, where a man has shown from his past actions that he intends to adopt a criminal career, the Court should bear in mind, first, that it is necessary to pass a sentence upon the accused which will make him realize that a life of crime becomes increasingly hard and does not pay; secondly, that the sentence should serve as a warning to others who may be thinking of adopting a criminal career; and thirdly that the public must be protected against people who. show they are going to ignore the rules framed for the protection of society. In the case of old offenders the sentence cannot be determined by any rule of thumb. In each case the circumstances have to be considered. The number of past convictions, the interval of time which has elapsed between one conviction and another and especially since the last conviction, and of course. the nature of the offences previously proved are all matters to be looked at. (Beaumont, C.J. and Scn, J.) EMPEROR v. MAHOMED HANIF. 201 I.C. 651=15 R.B. 108=43 Cr.L.J. 754=44 Bom.L.R. 456=A.I.R. 1942 Bom. 215.

Sentence — Reduction—Grounds—Conviction under S. 307, I.P. Code—Accused and victim making up quarrel and living amicably— Reduction of sentence at instance of injured.

Accused was convicted and sentenced to four years' rigorous imprisonment under S. 307, I. P. Code, for making a murderous assault on his brother. In appeal this was reduced to three years. Subsequently the accused and his brother made up their quarrel and began to live in amity and the accused's brother prayed that the sentence might be reduced.

Held, that it would be consistent with the ends of justice, in the circumstances of the case to reduce the sentence to a period of one year. Emperor. 205 I.C. 195=15 R.P. 275=44 Cr.L.J. 336=9 B.R. 208=1944 P.W.N. 52 =25 P.L.T. 43=A.I.R. 1944 Pat. 37.

Sentence—Return of property stolen during a dacoity—If a ground for reduction.

The return of part of the property stolen during a dacoity would not by itself justify a reduction of the sentence. (Allsop and Malk, JJ.):
DARYAO v. EMPEROR. 219 I.C. 24=18 R.A.
40=1944 A.L.W. 646=1945 A.W.R. (H.
C.) 18=1945 A.Cr.C. 56=46 Cr.L.J. 525=
A.I.R. 1945 All. 100.

-Sentence-Sessions Judge crdering prosecution saying that exemplary punishment should

be given-Propriety.

An expression of desire by a high officer like a Sessions Judge that persons ordered by him a sessions Judge that persons ordered by him to be prosecuted for perjury should be given exemplary punishment is undesirable, as it is liable to be misunderstood by the subordinate judiciary. (Abdur Rahman, J.) Acha Ali Ahmad v. Emperor. I.L.R. (1943) Lah. 769 = 211 I.C. 299=45 Cr.L.J. 371=16 R.J. 227=A.I.R. 1944 Lah. 54

-Stages in the commission of an offence-Distinction. See Defence of India Rules, Rr. 34 (6) (K. & P.), 38 (5) and 121. 1941

A.L.J. 687.

Stay of Pendency of civil suit—If suffi-

cient ground-Considerations for Court-Public

interest to be considered.

In dealing with an application for stay of criminal proceedings pending a civil suit between the parties, the Court should consider the interest of the public which is opposed to multiplicity of proceedings. The Court should not regard the matter as a sort of competition between the Civil and Criminal Courts. The Court has to consider where the public interest lies and not merely where the supposed interest of the particular complainant lies. (Beaumont, C.J. and Wassoodew, J.) THAKORLAL VADILAL V. AMBALAL BHIKHABHAI. 203 I.C. 517=44 Bom.L.R. 761=15 R.B. 255=44 Cr.L.J. 100=A.I.R. 1942 Bom. 330.

-----Stay of pending civil suit-Dispute as to right of fishery involved in both-If ground for

Whether criminal proceeding should be stayed when a civil suit is pending is a question which depends upon the facts of each case. Where a question of a right of fishery is involved in a criminal case as well as in a civil suit, it is preeminently a matter which should be dealt with by a Civil Court. In such a case the criminal proceedings should be stayed pending disposal of the civil suit. But the evidence connected with the case should not be lost, and the examination of the witnesses should be continued till the prosecution cases closed and after that proceedings should be stayed. The hearing of the civil suit should also be expedited. (Varma, J.) Chhanno Prasad Singh v. Sakhichand Sahu. 196 I.C. 69=7 B.R. 995=22 Pat.L.T. 718=42 Cr.L.J. 804=14 R.P. 181=1941 P.W.N. 594=A T.R. 1042 Pat. 45 594=A.I.R. 1942 Pat. 45.

Stay of pending civil suit—Grounds for— Principles. See Cr. P. Code, S. 344. I.L.R.

(1944) Kar. 392.

-Summary trial—Judgment—Conviction— Reasons for conviction-Necessity for statement

A Magistrate is not bound in a summary trial to record what the prosecution witness actually said; but it is necessary in convicting the accused to give a brief statement of the reasons. A brief statement of the reasons would necessitate at least a short summary of what the prosecution witnesses had said so as to indicate that the evidence had made out the case with which the accused had been charged and also an indication that the Magistrate believed that evidence. If there was defence evidence, it would further be necessary to say why the prosecution evidence was preferred to that of the defence. Magistrate must also make clear what the accused's case was. (Horwill, J.) GOVINDAN, In re. 203 I.C. 433=15 R.M. 668=44 Cr.L.J. 85=55 L.W. 530=1942 M.W.N. 590=A.I.R. 1942 Mad. 669=(1942) 2 M.L.J. 280.

-Summary trial—Power of Magistrate to resort to, in midst of proceedings.

#### CRIMINAL TRIAL.

It is undesirable for a magistrate trying a case to break off in the middle of the proceedings and begin to act on the summary side. nigs and begin to act on the summary side.

(Almond, J.C. and Mir Ahmad, J.) Khurshid

v. Emperor. 210 I.C. 10=16 R. Pesh. 55=

45 Cr.L.J. 167=A.I.R. 1943 Pesh. 89.

——Sworn statement—Object of. See Contract Act, S. 23—Agreement to Compound

Offences. (1945) 2 M.L.J. 468.

-Taking cognizance-Meaning. HARNARA-YAN Z. GOVINDRAM. [See Q.D., 1936-40, Vol. I, Col. 3034.] I.L.R. (1942) Nag. 193.

—Transfer. See Cr. P. Code, S. 522.

—Transfer—Application for—Report called

for by High Court and sent by Magistrate-Right of applicant for transfer to copy of. See Mys. CRIMINAL RULES OF PRACTICE, VOL. I, CH. XXXVI, R. 2. 46 Mys. H.C.R. 402.

——Trial by jury—Retrial on remand—Jury including foreman of former trial—Proper pro-

cedure.

Where the jury empanelled for the retrial included the foreman of the jury at the former trial the jury must be discharged and an entirely new jury empanelled. It is not sufficient to substitute another juror for the foreman. (Bartley and Lodge, JJ.) SALAMATULLAH v. EMPEROR. 195 I.C. 117=14 R.C. 47=42 Cr.L.J. 674=A.I.R. 1941 Cal. 328.

-Trial by jury-Stolen property found with accused-Accused's explanation-Jury to decide

on truth of.

Upon the prosecution establishing that the accused were in possession of goods recently stolen the jury may in the absence of any explanation by the accused of the way in which the goods came into their possession which might reasonably be true find them guilty, but if an explanation were given which the jury think might reasonably be true, and which is consistent with innocence although they were not convinced of its truth, the prisoners are entitled to be acquitted inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused. (Sir George Rankin.) Otto George Greller v. The King. 210 I.C. 589= 16 R.P.C. 171=45 Cr.L.J. 241=10 B.R. 877=1944 P.W.N. 79=1943 A.L.J. 502=56 L.W. 709=A.I.R. 1943 P.C. 211 (P.C.).

In a warrant case the trial begins when the accused is called upon to plead to a charge. In a summons case the trial may be said to begin

-Trial-When begins.

when the accused is brought before the Magistrate. (Grille, C.J., on difference between Nivogi and Digby, JJ.) SITAO JHOLIA DIHIMAR v. EMPEROR. I.L.R. (1943) Nag. 73=205 I.C. 161=15 R.N. 187=44 Cr.L.J. 237=6 F.L.J. (H.C.) 53=1943 N.L.J. 16=A.I.R. 1943

Nag. 36.

-Trial—When commences—Right to form

of trial-Commencement.

proceedings cannot In police cases judicial necessarily be said to have commenced merely because a person is sent up and remanded to custody. The prosecution does not start until the Magistrate makes up his mind to act upon a charge sheet, and takes some overt action to

implement his decision. Such an order may be an order to produce the accused from custody on a particular date to stand his trial. Such an order is the order corresponding to the order for issue of process where the accused is not in custody; to the order under S. 204, Cr. P. Code, which marks the commencement of judicial proceedings. The point at which the right to any particular form of trial first accrues is the point when the prosecution commences and that is the point when the accused person is first made party to judicial proceedings. (Fast Ali, C.J., Manohar Lall and Meredith, JJ.) GOPAL MARWARI v. EMPEROR. 22 Pat. 433=209 I.C. 482=16 R.P. 114=1944 P.W.N. 420=10 B. R. 193=45 Cr.L.J. 177=A.I.R. 1943 Pat. 245 (S.B.).

-Witnesses-Duty of Court in dealing with -Judge angrily rebuking witness-If ground for inferring bias on part of Judge.

The dignity of a Court is best sustained by the Judge invariably treating the witnesses with courtesy and insisting on counsel doing so. It is not desirable that the Judge should angrily rebuke a witness and tell him to give straight answers. If the Judge feels compelled to deal firmly with the witness, the actual words used, even if somewhat forcible, cannot always be taken to lead to an inference of suspicion of any bias on the part of the Judge in the case generally. (Rowland, J.) BAKHORI GOPE v. ABBUL HALIM. 195 I.C. 107=7 B.R. 875=14 R.P. 84=1941 P.W.N. 255=22 Pat. L. T. 327=A.I.R. 1941 Pat. 362.

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-Witnesses-Examination-Duty of Magistrate-Case adjourned due to non-service of summons—Accused bringing other witnesses on adjourned date—Magistrate, whether can refuse to examine them.

If the case is otherwise complete, the magistrate may refuse to adjourn the case if his orders directing the accused to produce his witness at the next hearing have not been carried out. But where the case is being adjourned in the ordinary course of things, for instance, where some of the summoned witnesses have not been served or for some other reason, it is not open to the magistrate to refuse to examine those witnesses whom the accused chooses to bring with himself and who are actually present in Court. (Nawal Kishore, C.J. and Sukhdeonarain, J.) LACHMANDAS v. ROOPA. 1942 M.L.R. 27 (Cr.).

-Witnesses-Examination of-Right of prosecution to examine in any particular order.

It is open to the prosecution to examine their witnesses in any order they choose and no inference adverse to the prosecution should be drawn from the mere fact that a particular witness was examined last. (Manohar Lall and Meredith, JJ.) GAJADHAR SINGH v. EMPEROR. 210 I.C. 21=16 R.P. 166=45 Cr.L.J. 172=10 B.R. 184=A.I.R. 1943 Pat. 424.

Witnesses—Examination—Right of prose-cution—Witness given up by prosecution before framing of charge—If can be examined after charge—Prosecution when closes—Cr. P. Code, S. 256.

It is a general rule of law and equity that the prosecution is at liberty to examine whomsoever

# CRIMINAL TRIBES ACT (1924), S. 22.

it pleases until the prosecution case is closed. The prosecution does not end with the framing of the charge. Prosecution does not close until the defence begins. The proscution cannot therefore be prevented from examining a witness before the closing of the prosecution even though such witness had been given up before PROSECUTOR, MADRAS v. RAMANUJULU NAIDU.
I.L.R. (1944) Mad. 759=211 I.C. 471=45
Cr.L.J. 401=57 L.W. 175=16 R.M. 552=
1944 M.W.N. 31=A.I.R. 1944 Mad. 169
=(1943) 2 M.L.J. 672.

-Witness-Tendering of for cross-examination—Propriety. See EVIDENCE ACT, S. 133. 44 Bom. L. R. 27 (F.B.).

–Witnesses–Witnesses to prove enmity between them and accused-If to be produced by prosecution.

It is not necessary for the prosecution to produce witnesses to be examined on the question of enmity between themselves and the accused when they are not material witnesses to the facts which the prosecution have to establish for the purpose of bringing home to the accused their guilt on the charge on which they are being v. Bechan Chero. 212 I.C. 186=10 B.R. 464=16 R.P. 276=45 Cr.L.J. 577=A.I.R. 1943 Pat. 413.

-Witness-Witness turning hostile-Procedure to be followed—Merely endorsing below deposition "declared hostile"—Propriety and effect of. See Evidence Act, S. 154. (1945) P.W.N. 241.

CRIMINAL TRIBES ACT (VI OF 1924), S. 10 (2)—Construction and effect of—Member of criminal tribe leaving one Province for another—Conviction under S. 22 (2) (a) for failure to give daily hazuri—Legality—Conditions.

The effect of S. 10 (2) of the Criminal Tribes Act is that where a member of a criminal tribe goes from one district of one Province to another district of another Province, the provisions of the Act and rules apply to him in the new district of the new Province as if he had been registered in pursuance of a direction, made under S. 4 by the Local Government of the new Province, and the notifications issued affecting him, issued by the Government of the Province he has left, are deemed to have been issued under S. 3 and S. 10 (1) of the Act by the Local Government of the new Province to which he has gone. Before such a person can be convicted of the offence of failure to give daily hazuri, it must be proved that the notification issued by the Local Government of his old Province under S. 10 (1) required him to give daily hazuri. If that is not proved, he cannot be convicted of the offence under S. 22 (2) (a) of the Act even if he pleads guilty. His plea of guilty should not be accepted in such a case, and the plea will not render the conviction legal. (Davies, C.J. and Weston, J.) EMPEROR V. BEHOODI RATANJO. I.L.R. (1941) Kar. 551=199 I.C. 126=14 R.S. 171=43 Cr.L.J. 476 

convictions for offences under Penal Code.

### CRIMINAL TRIBES ACT (1924), S. 22.

The previous convictions referred to in S. 22 of the Criminal Tribes Act are convictions for breach of rules made under the Act and hence prior convictions for offences under the Penal Code cannot affect the question of punishment under that Act. (Bennett, J.) Deo Bakhsh Singh v. King-Emperor. 18 Luck. 617=15 R. O. 224=44 Cr.L.J. 90=203 I.C. 499=1942 A. W.R. (C.C.) 353 (2)=1942 A.Cr.C. 206= 1942 O.A. 565=1942 O.W.N. 682=A.I.R. 1943 Oudh 51.

——S. 22 (1) (b)—Applicability—Direction by manager of settlement to settlor to send children to specified school-Failure to obey-Offence.

The failure of a registered member of a criminal tribe to send his children to a specified school as directed by the manager of a settlement does not amount to a contravention of any rule made under Cl. (e), (g) or (h) of S. 20 of the Criminal Tribes Act and is not an offence punishable under S. 22 (1) (h) of the Act. There is nothing in S. 20 of the Act which gives power to the manager of a settlement to make such a direction to a settlor in the settlement. (Kuppuswami Ayyar, J.) Kondiah, In re. 208 I.C. 228=16 R.M. 294=56 L.W. 404=1943 M.W.N. 517 (1)=45 Cr.L.J. 106=A. I.R. 1943 Mad. 649=(1943) 2 M.L.J. 175. -S. 23 (1)—Special reason to the contrary -What amounts to.

Where the appellant, a member of a criminal tribe, had been out of jail for about 7 years after his last conviction, that may very well be considered to be a reason to the contrary under S. 23 (1) of the Criminal Tribes Act. (Burn, J.) NAGADU v. EMPEROR. 197 I.C. 579=14 R.M. 375=43 Cr.L.J. 212=1941 M.W.N. 876 (1)=A.I.R. 1942 Mad. 33.

\_\_\_\_\_S. 23 (1) (b)—"Special reason to the contrary"—What amounts to.

Where there is an interval of about 5 years between the date when a member of a criminal tribe came out of prison after serving a sentence of 7 years' rigorous imprisonment, and the commission of the next offence for which he is being tried; that is a special reason to the contrary within the meaning of S. 23 (1) of the Criminal Tribes Act for awarding a lesser sentence than transportation for life. (Lakshmana Rao, J.) Venkatasubbadu v. Emperor. 198
I.C. 26=14 R.M. 415=43 Cr.L.J. 300=
1941 M.W.N. 875=54 L.W. 562=A.I.R. 1942 Mad. 81 (2).

CROWN-Suit by, on the ground of escheat-Onus.

In a suit by Government for ejectment of defendant on the ground of escheat and for possession, it lies upon the Crown to prove at least prima facie that the deceased died without heirs. (Ghulam Hasan and Agarwal, J.) UNITED PROVINCES v. KANHAIYA LAL. 16 Luck. 551=1941 A.W.R. (C.C.) 37=192 I.C. 131 =1941 O.L.R. 75=13 R.O. 326=1941 O.W.N. 33=1941 O.A. (C.C.) 1=A.I.R. 1941 Oudh 337.

-Grant-Construction-Alienation by one in-

# CROWN GRANTS ACT (1895), S. 2.

cumbent—Right of successors to question—Limitation.

Where a Government grant recited that "all tenures now in the possession of the 'family of R must be declared released in perpetuity to heirs general under Mahomedan Law of descent, with a distinct proviso that no tenure now de-clared released in perpetuity can be alienable by an incumbent for any period longer or beyond his individual life" the grant created a succession of independent life estates, in the sense of an estate which is only enjoyed by the holder thereof during his life and which could not be transferred by him for any period beyond his life and each successive life estate holder derived title, not from or through the previous holder, but directly from the grant. Where one of the incumbents alienated certain property and such alienation remained unquestioned during his lifetime as well as by the incumbents of the next generation and was questioned by the latter's heirs, the claim is not barred, and if any such descendant does not within 12 years of his becoming entitled to possession on the death of the last preceding incumbent attack such a transfer his right to recover the property for himself would be barred, but that would not bar the right of any of those coming after him. (Allsop and Verma, JJ.) Mohammad Waheed Khan.
v. Nabi Ahmad Khan. I.L.R. (1942) All.
871=15 R.A. 294=203 I.C. 664=1942 A.L.
W. 604=1942 A.W.R. (H.C.) 266=1942
A.L.J. 430=A.I.R. 1942 All. 402.

S. 2—Grant of village as shrotriem to be enjoyed by grantee and his heirs subject to dis-charge of rent and remaining obedient to laws-Clause against alienation by gift, sale or otherwise—Usufructuary mortgage—Validity.

A grant of a village to S. S. by the Governorin-Council of Fort St. George on behalf of the East India Company, recited, inter alia. "(a) The Governor-in-Council confirms to you and your heirs the village of E.C. as shrotriem so long as you discharge the rent and are obedient to the laws and regulations established or to be established, under the authority of the Governor-in-Council for the time being; (b) in confirming to you and your heirs as shrotriem the village of E.C., you are to understand that the said village is not assignable by gift, sale or otherwise, but in default of legal heirs, that the said village shall revert to the Hon'ble Company". Some of the successors in interest of S.S. created a usufructuary mortgage over the village.

Held, on a construction of the grant, (1) that the grant was a Crown grant governed by the Crown Grants Act, and the condition in Cl. (b) was perfectly valid, though such a condition would be invalid if the grant were by a private individual; (2) that had the document ended with Cl. (a), the estate created would not be anything other than an absolute estate of fee simple, and the clause against alienation in Cl. (b) did not make the estate created one of a series of life-estates; (3) that reverter to the grantor or his heirs on failure of the heirs of the grantee did not prevent an alienation, and CROWN GRANTS ACT (XV OF 1895) the alienee would be entitled to enjoy the property at any rate, as long as the line of the

# CROWN GRANTS ACT (1895), S. 2.

grantee continued; (4) that the effect of an alienation was not merely to enable the grantor to resume on failure of legal heirs but also to enable the successors of the alienor to avoid the Ali, J.) Sistli Ammal v. Sundararaja Naidu.

58 L.W. 486=1945 M.W.N. 614=A.I.R.

1946 Mad. 52=(1945) 2 M.L.J. 307.

Ticence—Registration—Necessity. See T. P. Act, S. 107. (1945) 2 M.L.J. 400.

-S. 3 and Berar Inam Rules (1859)— Inams—Nature of—Devolution—Law as to. Shriram v. Banya Bai. [See Q.D. 1936-'40, Vol. I, Col. 3042.] 194 I.C. 454=13 R.N. 369.

### CUSTOM.

-Abadi. Sec Custom.

—Adoption by migrating family,
—(Beng.) Garos of Mymensingh,
—(C.P.) Impartible estate.

-Mahesaris.

-(Chota Nagpur) Aboriginal tribe-Kurni Ohdars.

-Conflict with statutory law.

-Customary right.

-Dhardhura.

Enforceability. Essentials of validity.

-Evidence of. —Haqe-e-chaharum.

-Inheritance.

-Jain Kalars.

-Jains U.P.

- Juda Baut.

-Local Custom.

-Nattukottai Chetties.

-Non-transferability of sites in agricultural village.

-(N.W.F.P.) Adoption of daughter's son.

-Alienation of residential right.
-Alienation—Powers.

-Pre-emption.

-Proof. See Custom-Proof.

-Succession.

-Onus.

-Parsis in mofussil. Privacy.

-Proof.

-Reasonableness. -Religious Endowment.

-Re-marriage of widows.

—Validity. —Wajib-ul-arz of Village Ujarion.

-Zar-i-chaharum.

-(Punjab). Abadi. See Custom-Abadi.

-Adoption.

-Alienation. -Ancestral land.

-Applicability.

-Customary law.

-Gift.

-Landlord and tenant.

-Migration of family.

Personal law.

Recitals in manual of customary

### CUSTOM.

Riwaj-i-am. -Succession.

-Abadi-Alienation of of non-proprietors-Burden developing into town-Jhar village.

While the custom prohibi house sites in a village abad cannot be held to have beer on account of the developmen a town and the rights of th cease to exist by that fact proof in case of a town sh tors who allege that a nor dispose of the sites without warian in Shahpur Tahsil ha and no custom is proved pr tion of house sites in the al prietors without the consent (Harrics, C.J. and Abdur K. v. Santokh Singh. 47 P. 1945 Lah. 256.

——Abadi—Right to alien

In U. P. tre zamindar is inch of the village. The ter make a transfer of a house of the zamindar. If the ten something in derogation of zamindar in this respect, it blish affirmatively that the ti prove a presumption of coi having regard to the long s cover and to the value of constitute sufficient evidence constitute stillcient evidence right to transfer. (Iqbal Sinha, J.) Sahu Bisueshal Lal. 1945 A.L.W. 284=1 C.) 263=1945 A.W.R. 1945 A.M.R. have adopted a custom, it d the migrants adopt that customust be proof of the adop by the migrating family. A particular locality cannot ra that a tribal family is gover which governs a great man families in the same locality To make such a presumption stitute conjecture for proof. Puranik, J.) Mohammed Az za Siddioue Ali Beg. I.L 27=204 I.C. 512=15 R.N J. 589=A.I.R. 1943 Nag.

-(Bengal)-Garos of heritance-Exclusion of male According to the customa: ance governing the plain Gar singh District, as distinguish Garos, belonging to the San once in a motherhood canno On the death of a woman, go to her daughters if any, her sons. But if she has no perty would devolve upon and clan appointed by some of i

and Biswas, JJ.) NIRODINI SANGMA V. NANDA SANGMA. I.L.R. (1944) 1 Cal. 552=219 I. C. 458=18 R.C. 104=79 C.L.J. 121=A.I. R. 1945 Cal. 213.

-(C. P.)—Impartible estate—Dalli samindari of tahsil Sakoli, District Bhandara.

The grant of a zamindari by the Bhonsla Raj in the Bandara District did not always carry with it the condition of impartibility and there was no territorial custom making such zamin-daries impartible. But the junior members were not mere maintenance holders but entitled to fractional interests in the ownership. (Sir George Rankin.) Madhorao Narayanrao v. Ramkuvarsha. I.L.R. (1943) Kar. (P.C.) 53=207 I.C. 9=16 R.P.C. 1=9 B.R. 378=A.I. R. 1943 P.C. 48 (P.C.).

-(C.P.)—Mahesaris—Jains and Hindus— Different customs.

There are two kinds of Mahesaris, Jain Ma-saris and Hindu Mahesaris. Mahesaris among themselves have several other distinctions and follow different customs. (Grille, C.J. and Puranik, J.) SHAMLAL KISAN v. Mt. JIYOBAL I.L.R. (1943) Nag. 678=211 I.C. 306=16 R.N. 195=1943 N.L.J. 514=A.I.R. 1944 Nag. 62.

(Chota Nagpur)—Aboriginal tribe-Kurmi ohdars-Law applicable-Custom Hindu Law.

A family belonging to an aboriginal tribe in Chota Nagpur, kurmi ohdars, is, in the absence of other evidence and circumstances, governed by the rules and customs appertaining to the tribe. The members of the tribe must be assumed not to be governed by the Hindu Law.

Quaere.—Whether kurmi ohdars are Hindus. (Harries, C.J. and Manohar Lall, J.) HARAKH-NATH OHDAR v. GANPAT RAI. 198 I.C. 680=14 R.P. 488=8 B.R. 449=22 Pat.L.T. 829=A.I.R. 1941 Pat. 625.

-Conflict with statutory law-Effect. Where a statute prescribes a line of succession in conflict with the personal law of the parties, succession must be governed by the statutory law and any custom recorded regarding the personal law of the parties cannot prevail as against the statute. (Sathe, S. M. and Ross, A. M.) RAM DAS v. SHUKUL BHORE LAL. 1943 A.W.R. (Rev.) 219=1943 R.D. 296.

-Customary right—Proof of antiquity—

Length of user necessary.

An essential attribute of a valid custom is no doubt its remote antiquity. But it is not necessary that its antiquity must in every case be carried back to a period beyond the memory of man. If proof be given of facts from which it can be inferred that user corresponding to the alleged custom in fact existed at some past, the existence of the custom from the remoter era will be inferred. In order to establish a customary right of way, there is no reason why 50 or 60 years' user might not, in the circumstances of a case, be regarded as sufficient to indicate the existence of the right from a much remoter period. (Biswas, J.) Pan-CHANON ROY v. FAZLUR RAHMAN. I. L. R. (1942) 2 Cal. 427=202 I.C. 470=15 R.C. 347

CUSTOM.

=46 C.W.N. 743=76 C.L.J. 479=A.I.R. 1942 Cal. 505.

-Customary right-Proof-Practice begun by permission.

It is by on means conclusive against a claim to customary right that the practice should have begun by permission or agreement, but it must be shown to have continued in such circumstances and for such length of time that it has come to be exercised as of right. (Sir George Rankin.)
BABA NARAYAN v. SABOOSA. I.L.R. (1943) Nag.
705=208 I.C. 560=16 R.P.C. 81=1943 A.L.J.
360=47 C.W.N. 923=10 B.R. 84=1943 N.L.J. 438=A.I.R. 1943 P.C. 111=(1943) 2 M.L.J. 186 (P.C.).

-Customary right—Public land adjoining a mosque—Right to use—Nature of—Mode of acquisition—Value of evidence of long user.

A customary right to use public land adjoining a mosque on certain occasions when the congregation was too big to be confined to the mosque, is not a right which could be acquired by prescription or user. It is a right acquired by custom or, in other words, there must be evidence to show that the existence of the right has been so long generally recognised that its existence has be-come a part of the law applicable to the place in which the right is claimed. Long user may be evidence of the existence of the custom but it does not itself create a custom. A custom which amounts to law is one which has obtained general recognition by those concerned, or, in other words, a customary rule becomes law when it is generally recognised that the rule should be applied to certain sets of circumstances. In the same way a customary right comes into existence when by the custom of the neighbourhood the right is recognised, or, in other words, when over a reasonable period of time an enquiry from any disinterested person in the neighbourhood would elicit that the right existed. (Allsop and Verma, JJ.) DIN NOHAMMAD v. THE SECRETARY OF STATE. 203 I.C. 74=15 R.A. 198=1942 R.D. 854=1942 A.L.W. 616=1942 A.W.R. (H.C.) 287=1942 A.L.J. 422=A.I.R. 1942 All. 353.

-Dhardhura-Reasonableness- Enforceability. Se W. 629. See Alluvion and diluvion. 1942 A.L.

-Enforceability-Customary dues for liberty to graze cattle-Sufficiency of area for grazing-Onus.

Where a wajib-ul-arz of the first settlement recites a custom that the Ahir tenants of the village in question are to pay 4 chhataks of ghee annually to the talugdar in return for the right to graze their cattle on the banjar land, would become unenforceable only if the Ahirs are able to prove that actually they are prevented from using a sufficient amount of grazing land to pasture their cattle or that they had to pay for the grass enjoyed by their cattle apart from the customary dues. (Bennett, J.) LAL JOGENDRA BARSH SINGH v. MANGAL. 18 Luck. 652=204 I.C. 283=15 R.O. 312=1942 O.A. 557=1942 O.W.N. 683=1942 A.W.R. (C.C.) 352 (2)=A. I.R. 1943 Oudh 131.

Essentials of validity.
A custom to be valid must be proved to be ancient, certain and invariable, and it must be established by clear and unambiguous evidence. (Harries, C.J. and Manohar Lall, J.) HARAKH-

NATH OHDAR v. GANPAT RAI. 198 I.C. 680=14 R.P. 488=8 B.R. 449=22 Pat.L.T. 829=A.I. R. 1941 Pat. 625.

-Essentials of validity.

A custom to be valid must be immemorial, reasonable, continuous and certain. A custom which is set up as superseding the ordinary law must be proved by clear and unambiguous evidence. (Nagesvara Iyer and Singaravelu Mudaliar, IJ.) | MAM SAB v. SHAMA JOIS. 46 Mys.H.C.R. 524=19 Mys.L.J. 363.

Evidence of Village note Value of. See C. P. Cope, S. 100. 20 Pat. 870.

-Hage-e-chaharum-Existence of practice of exacting-When can be inferred. KAMAI CHAU-BEY V. RAM DATTA SONAR. [See Q. D. 1930-'40, Vol. I, Col. 3047.] 193 I.C. 824=13 R.A. 457.

-Hage-e-chaharum-Interest on. In the absence of any custom or contract to the contrary, interest cannot be claimed in respect of Hage-e-chaharum. (Bujpai and Dar, JJ.) Abbul Hashim v. Malik Arjun. I.L.R. (1941) All. 777=199 I.C. 458=14 R.A. 376=1941 A.L.J. 740=1944 A.W.R. (Rev.) 963=1941 A.L.W. 962=A.I.R. 1942 All. 96.

-Haqe-e-chabarum-Liability of auction-

purchaser.

In a proper case, no doubt, a liability could be imposed against a decree-holder or against execution-creditor to pay the haqe-e-chaharum to the zamindar. But where the auction-purchaser has purchased the property for a low price with a margin for the payment of haqe-e-chaharumand with full knowledge of the liability for such a payment, there is no reason to exempt him, in payment, there is no leason to exempt him, in the absence of a custom to the contrary, from a liability to pay the haqe-e-chaharum. (Bajpai and Dar, JJ) ABDUL HASHIM v. MALIK ARJUN. I.L R (1941) All. 777=199 I.C. 458=14 R.A. 376=1941 A.L.J. 740=1941 A.L.W. 962=1941 A.W.R. (Rev.) 963=A.I.R. 1942 All. 96.

— Hage-e-i-chaharum—Proof of existence in case of private sales—Custom, if applies to sales

in execution.

The proof of a custom whereby the zamindar of a village is entitled to  $\frac{1}{4}$  of the purchase money when a house in a village is sold privately, is not proof of a similar custom in respect of sales in execution of decrees. The zamindar cannot recover such sum from either the vendees or the ryots in the case of execution sales. (Iqbal Tyols in the case of execution sales. (1901)

Ahmad, C.J. and Collister, J.) BASDEO SINGH v.

SHEO SHANKAR HALWAI I.L.R. (1941) All,

737=197 I.C. 587=14 R.A. 208=1941 O.A.

(Supp.) 778=1941 A.L.W. 932=1941 A.W.R.

(Rev.) 904=1941 R.D. 928=1941 A.L.J. 592 =A.I.R. 1941 All. 396.

Haqe-e-chaharum—Recovery against auction-purchaser alone—If permissible.

A zamindar is not entitled to obtain a decree for the customary dues of haqe-e-chaharum against an auction-purchaser alone when he had failed to implead the decree-holder, who has taken away the 4 of the price paid by the auctionpurchaser, as a party to the suit. (Sulaiman, C.J. and Bennett, J.) VISHWA NATH UPADHVA v. ASHARFI SINGH. 1941 R.D. 835=1941 O.A. (Supp.) 766=1941 A.L.W. 906=1941 A.W.R. (Rev.) 866.

Inheritance—Exclusion of female heirs in presence of male heirs of same degree—

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Mahomedan families of Satpura Plateau Districts in Central Provinces.

It is an established custom among the Mahomedan families of old standing in the Satpura Plateau Districts in Central Provinces that female heirs are excluded from inheritance in the presence of male heirs of the same degree. (Grille, C.J. and Puranik, J.) MAHOMMED AZAM. KHAN v. MIRZA SIDDIQUE ALI BEG, I.L.R. (1943) Nag. 27=204 I.C. 512=15 R.N. 163= 1942 N.L.J. 589=A.I.R. 1943 Nag. 84.

-Inheritance—Exclusion of widow and daughters - Wajib-ul-arz - Construction - Inference.

Where one of the two wajib-ul-arz recorded that a daughter who had a real brother would be excluded from inheritance and the other that in case there was no male issue, the daughter would be entitled to a share, it was a clear record. of custom that daughters were excluded by sons. Where both the documents contained a statement that inheritance was according to wives, that is to say, the sons inherited in the manner mentioned earlier, as it were per stirpes and not per capita, it was similarly an indication of a custom excluding widows in the presence of sons and permitting partial inheritance only to childless widows. (Yorke, J.) MAHOMED JAFAR v. LAL BAHADUR. 192 I.C. 420=1941 A.W.R. (Rev.) 13=1941 R.D. 11=1941 O.L.R. 179=13 R.O. 356=1940 O A. 1284=1940 O W.N. 1352=A. I.R. 1941 Oudh 198.

-Inheritance—Exclusion of women when sons were present-Mohomedan family migrating from Nabha to Saharangur-If affected.

A custom of exclusion of women from inheritance in the presence of sons cannot affect a Mahomedan family which had migrated from Nabha to Saharanpur when that family has acted for sixty years on the assumption that the Mahomedan Law was binding on them. The fact that the women of the family have for the most part given up their shares or sold them to the male relations, while showing the sentiment of the family, cannot affect the rights of the members. under the law which they had always assumed to he binding on them. (Allsop and Hamilton, II).

MASHKUR AHMAD V. ZAHUR-UN-NISSA. 213 I.C.
196=17 R.A. 1=1944 A.L.W. 116=1944 A.W.

R. (H.C.) 62=1944 O.W.N. (H.C.) 34=1944

O.A. (H.C.) 34=1944 O A. (H.C.) 62=1944 A.L.J. 90=A.I.R. 1944 A11. 79.

Jain Kalars — Marriage—Dissolution by abandonment-Custom not opposed to public policy.

The custom among the Jain Kalars that abandonment dissolves the marriage tie is not opposed to public policy nor is it immoral. The abandoned wife can re-marry during the lifetime of the husband who abandoned her. (Bose, BALIRAM JAGOBAJI v. KHAUSALYABAI. 1942 N.L.J. 510.

Jains (U.P.) - Widow-Rights in her husband's property and ancestral property. See HINDU LAW-JAINS. 1942 A L.W. 329.

—— 'Juda Baut'—Applicability to Hindus.

The custom of 'Juda Baut' recorded in the custom of 'Juda Baut' recorded in the families.

wajib-ul-arz applies not only to Muslim families but also to Hindu families where inheritance is by survivorship and not succession. (Sathe, S. M. and Acton, A.M.) JAGMOHAN SINGH v.

KASHI SINGH. 1945 R.D. 95=1945 A.W.R. (Rev.) 31.

-Localcustom-Antiquity-Extent to be

established.

It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law. It must be ancient; but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man-still less that it is ancient in the English technical sense. It will depend upon the circumstance of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district. To require that in every case the antiquity of a custom must be carried back to a period which is beyond the memory of man, would only create beyond the memory of man, would only create great perplexity in the already uncertain character of customary lew. (M. R. Jayakar.) Subhani v. Nawab. 68 I.A. 1=I.L R. (1941) Lah. 154=43 Bcm. L.R. 432=1941 O.A. 347=1941 A.W.R. (Rev.) 374=193 I C. 436=1941 O.L R. 343=7 B.R. 665=43 P.L.R. 318=13 R.P.C. 154=I.L.R. (1941) Kar. (P.C.) 22=1941 A.L. J. 530=A.I.R. 1941 P.C. 21 (P.C.)

- Local custom—Right of way—Validity— Right of people living in a locality to pass along

ridges of paddy fields.

Quaere: Wrether a local custom (under which the residents of a locality are entitled to pass along the ridges of paddy fields which would deprive the occupiers of the land on which paddy is grown, from exercising their right-which they have in law—of putting up fences round their land in order to keep cattle out of it) can be recognised as a good custom in law. (Shearer. J.) FAMACHANIRA BARIK v. DIBAKAR DAS. 216 I C. 174=17 R P. 133=11 B.R. 107=10 Cut. L.T. 13=A I.R. 1944 Pat. 278.

Nattukottai Chetties-Adoption-Adoption to person after his widow's death by his father -Validity-Secular motive. See HINDU LAW-ADDITION. (1943) 1M.L.J. 195.

-Non-transferability of sites in agricultural village-Question of continuity of custom-If a

question of law-Onus.

Where a plaintiff sues for ejectment and possession of a house site on its transfer contrary to an alleged custom of non-transferability, it is his bounden duty to prove not only that there was a custom of non-transferability of the sites in the village but it is further obligatory on him to show that the custom was continuous. Whether the custom was continuous or whether its continuity was broken and the custom was not enforced by the plaintiff for a long period of time is a question which has to be decided from the proved facts of each case. This is no doubt a question of law. Where during a lorg course of years it was found that the occupiers of village sites in a particular area were transferring their rights from time to time involving a change of possession, and no action was taken on behalf of the taluquar to prevent disturbance of, and interfe-

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ability, the essential element of continuity is not established and hence there is no custom of nontransferability of house sites in the village. (Ghulam Hasan and Madeley, JJ) SADHANT v. BARKHANDE MAHFSH PRATAP NARAIN SINGH. 18 Luck. 205=200 I.C. 622=15 R.O. 30=1942 O.A. 276=1942 R.D. 552=1942 O.W.N. 368=1942 A.W.R. (C.C.) 255=A.I.R. 1942 Oudh 401.

(N.W.F.P.)—Adoption of daughter's son

-Validity in Peshawar district.

By custom of Peshwar District a Hindu can adopt the son of a woman in this case caughter

adopt the son of a woman in this case caughter whom be cannot mairy. (Mir Ahmad, I.) ROSHAN. IAL v. ARJAN DEV. 203 I.C. 300=15 R. Pesh. 59=A.I.R. 1942 Pesh. 58.

(N. W. F. P.)—Aienation of residential right—Power of widow of non-troprietor—Village Serai Saleh, Tehail Harifur, District Hazara, Peshawar.

The non-proprietors in Serai Saleh are by custom entitled to transfer their residential right without the permission of the ground lardlords. A widow of each such non-proprietor gets the bundle of rights which he possessed at the time of his death nothing more nor less. If so the logical conclusion is that qua the landlords the widow has the full right of transferring her residential rights to any one she likes without any interference by them. (Almond, J.C. and Mir Ahmad, J.) CHUN: LAL v FAZAL KHAN. 202 I.C. 640=15 R. Pesh. 47=A.I.R. 1942: Pesh. 70.

-(N. W. F. P.)-Alienation-Power of non-

proprietors.

In the N. W. F. Province it is a general custom that non-proprietos could not alienate their rights of residence without permission of proprietors of the sites. (Almond. J.C. and Mir Ahmad, J.) ABDUL GHAFUR KHAN v. JETA MAL. 202 I.C. 627=15 R. Pesh. 45=A.I.R. 1942: Pesh 74.

---- (N. W. F. P.)-Alienation-Power of non-profrietors-Onus-Fazar Ahmadkhan village.

A person who has built superstructure on land belonging to a proprietor in a village cannot alienate his residential rights without the permission of the proprietor. That custom prevails mission of the proprietor. That custom prevails in Bazar Ahmadkhan village in the NW.F.P. unless the tenant or his transferee proves that the custom does not exist in favour of a proprietor in a particular village. (Mir Ahmad, J.) SHFR DIL KHAN v. BAHADUR ALI KHAN. 203 I.C. 137=15 R. Pesh. 55=A.I.R. 1942 Pesh. 76.

-(N, W, F, P,)—Pre-emption—Akora. The custom of pre-emption was not proved to exist in Akora. (Almond, J.C. ard Mir Ahmad, J.) FRITHMI DAS v HARI RAM. 199 I.C. 705=14 R. Pesh. 86=A I.R. 1942 Pesh. 25.

- (N. W. F. P.)-Pre-emption-Kohat city. The custom of pre-en ption proved to exist in the Kotat city as a whole. (Almond, J.C. and Mr Ahmad, J.) Sardar Begum v. Masoom Shah. 218 I.C. 367=18 R. Pesh. 5=A.I.R.

1945 Pesh. 9.

(N. W. F. P.)—Pre-emption—Peshawar

City. The custom of pre-emption proved to be in existence in the Jehangipura Sub-division of Peshawar City. (Almond, J.C. and Mir Ahmad, rence with, the alleged custom of non-transfer- J.) ABDUL HAKIM KHAN v. MAHOMED ALI JAN.

209 I.C. 113=16 R. Pesh, 31=A.I.R. 1943 Pesh. 76.

-(N. W. F. P.)-Pre-emption - Peshawar City.

The custom of pre-emption should be taken to exist in Karimpura which is a sub-division of Peshawar City in all the moballas of the sub-division. (Almond J.C. and Mir Almid, J.) GUL MAHOMED V. IGRAL IAN 204 I, C. 202=15 R. Pesh. 71=A.I.R. 1942 Pesh. 94.

-(N. W.F.P.) -- succession - Female heirs of collateral: Muzaffar Sarfraz v. Rahim Jana. [See Q.D., 1-36 '40, Vol. I Col. 3061.] 13 of collateral: R. Pesh. 25.

-Onus-Custom in derogation of another's

rights.

The burden lies upon one who sets up a custom in derogation of the ordinary rights of another as the owner of immovable property to give clear and positive proof of the user relied upon to substantia e the custom. (Sir George Rankin.) BABA VARAYAN V. SABOOSA. I L R. (1943) Nag. 705=208 I C. 550=I.L.R. (1943) Kar. (P.C.) 152=46 Bom L.R. 312=16 R P.C. 81=1943 A. L. J 360=47 C W.N. 923=10 B.R. 84=1943 N. L. J. 433=A.I.R. 1943 P.C. 111=(1943) 2 M.L. J. 186 (P.C).

Parsis in mofussil—Law applicable—Powers of guardian to mortgage estate of ward-Justice, equity and good conscience—Rule of English law.

The legal position of Parsis in the mofussil is that in the absence of any statutory provision relating to them, they are governed in the first place by usage, and secondly, by the rules of equity and good conscience, and in applying this rule to the facts of any particular case, the Courts would be guided by the general principles of English law. It must therefore be held that a Parsi guardian has no authority to alienate the estate of his ward except with the permission of the Court. This applies to every guardian, no matter how appointed, and whether de facto or de jure. (Broomfield and Macklin, IJ.) KUBERDAS DEV CHAND v. JERKISH NADROJI 198 I.C. 609=14 R B. 326=43 Bom L.R. 981=A.I.R. 1942 Bom. 54.

-Privacy-Limits. See Easements-Pri-VACY. 1945 A.L.J. 213.

-Privacy - Right of - If exists in Kaira district, Gujarat-Injunction to prevent invasion

It has been definitely recognised that the custom of privacy exists not merely in some parts of Gujarat but in the whole of Gujarat including the district of Kaira which has always been an integral part of Gujarat. An injunction to prevent an invasion of the right of privacy can therefore be granted. (Divatia, J.) BHAJGOVIND CHUNGAL v. HARILAU GORDHANDAS 202 I.C. 82=15 RB. 131=44 Bom L.R. 401=A.I.R. 1942 Bom 217.

C stom that is set up should be strictly proved and should not be extended by analogy. (Thomas,

Ann Storing not be extended by allarogy, (1 norms), CJ and Ghulam Hisan, J) Gulas Chand v. Manni Lal 16 Luck. 302=192 I.C. 643=13 RO. 381=1941 A.L.W 319 (1)=1941 O.A. 43=1941 O.W.N 214=1941 A.W.R. (C.C.) 58= 1941 O.L.R. 194=A.I.R. 1941 Oudh 230.

—Proof—Customary rights in the nature of trespass.

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Where it is sought to establish a local custom by which the residents or any section of them of a particular district, city, village or place are entitled to commit on land not belonging to or occupied by them, acts which, if there was no such custom, would be acts of trespass, the Court should not decide that such custom exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which is concern-(Sukhdeonarain, J.) NATHMAL v. ILLAHIBUX. 1942 M L R. 58'(Civ.).

Proof - Custom judicially recognised - Effect of - Allegation or proof - Necessity.

It is the law that if a custom is known and has been judicially recognized, it is not necessary to allege or prove it; it has become part of the local law of which the Court takes judicial notice. (Beaumoni, CJ, Divatia and Sen. Jl.) DASH-RATHLAL CHHAGANLAL & BAI DHONDUBAI I.LR. (1941) Bom 460=195 I.C 464=14 R.B 34=43 Bom L.R. 581 = A.I.R. 1941 Bom 262 (F.B.)

——Proof — Evidentiary value of connected wajib-ul-arz of different village—Question of

escheat of grove on abandonment.

There was a close connection between the wajib-ul-arz of village C and that of village B and the wajib-ul-ars of the latter was the first to he prepared in that ilaga. If the custom in village C was the same as in village B the wajib-ul-orz of the former instead of setting forth the custom in full merely referred to the provisions of the wajib-ul-arz of village B. While the wajib-ul arz of village C referred to the custom recorded in the wajib-ul arz of village B with regard to scattered trees and tenant's rights therein, it is stated that there were no tenant's groves. But it had recorded two cases of escheat of such groves on the ground of abandonment.

Held, the two wajib-ut-arz must be read together and in view of the custom as to scattered trees and the general identity of custom in the two villages; and the fact that there were two instances of escheat on the ground of ahandonment recorded in the waitb-ul-arz of village C the custom of escheat of groves on abandonment by tenants was proved by documentary evidence to exist in the village C. (Bennett and Madeley, JI) SRI THAKURJI v. GAYA KUER. 17 Luck, 567=200 I.C. 561=15 RO. 41=1942 RD. 30=1941 O W.N. 1412=1942 A.W R (C.C.) 19=1942 O A. 7=A I.R. 1942 Outh 213.

-Proof-Impartibility - Evidence - Circumstances to be considered-Raj Deo Estate in Gayo -If impartible.

The circumstances that an estate has been known as a Raj for a long time, that the proprietor thereof has been known as a Raja, that succession to the estate has been by the rule of primogeniture for several generations, and that the party alleging partibility has not produced evi-dence to deny the impartible character and that that party's witness had to admit that he had never heard of the estate ever being divided or partitioned, are certainly pieces of evidence on the

issue as to impartibility, but by themselves would not be sufficient to prove that the estate in question is impartible or to prove a cust m of impartibility. Raj Deo Estate in Gaya District in Bihar is not impartible. (Fazl Ali, C.J. and Beever. J.) Brijraj Kumari v. Rambilas Singh. 1944 P.W N. 137.

-Proof—Instances.

The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence but by the enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private accounts and receipts that the custom has been enforced. No value can therefore be attached to the broad general -tatements made by the witness who assert the alleged custom but do not enumerate instances in support of their assertion. (Sukhdoonarain, J) NATH-MAL v. ILLAHIBUX. 1942 M.L.R 58 (Civ.).

-Proof-Instances of recognition of custom -Necessity for and value-General evidence-

Value of -Judicial decisions.

When a custom has been repeatedly brought to the notice of the Courts and has been recognised by them regularly in a series of cases, it attains the force of law, and it is no longer necessary to assert and prove it by calling evidence in each case. If the evidence is all one way, or if there is a strong preponderance of evidence in favour of a particular custom, the Courts cannot ignore it, although the witnesses do not cite specific cases in support of their statements. But general evidence which is conflicting has obviously very little value. (Broomfield and Sen, Jl.) SUGANCHAND BHIKAMCHAND v. MANGIBAI GULAB-CHAND. ILR (1942) Bom. 467=201 I.C. 759 =15 R B. 111=44 Bom L.R. 358=A I.R. 1942 Bom. 185.

-Proof—Instances — Uncontested cases— Value of.

Uncontested cases are very good proof of any alleged custom, for the greater the strength of the custom, the less probability is there of anybody attempting to controvert it. The fact that the operation of a custom has not been resisted cannot at all be used as an argument that such a custom did not exist. (Mockett and Kunhi Raman, IJ.) MAHOMED HOOSAIN FAROKI V. SYED ABDUL HUQ. 202 I C. 323=15 R M 482=55 L. W. 303=A.I.R. 1942 Mad. 485=(1942) 1 M L. J. 564.

-Proof—Judicial decisions—Certified copies

If necessary.

Judicial decisions can be relied on as furnishing evidence of custom without certified copies of the judgments being placed on the record. (Dalip Singh an l Bhide, JJ) RAMI v. GIAN SINGH. IL.R. (1943) Lah. 65=198 IC. 708=14 R.L. 350=13 P.L R, 655=A.I.R. 1942 Lah. 31

-Proof — Judicial decisions — Evidentiary value.

Judicial decisions are no doubt admissible, and are at times the best available evidence of custom. But in order that a case should be regarded as affording the best available evidence the circumstances of the decided case in which custom was pleaded and held proved must be of a similar nature. It is a well-settled principle of law that the custom set up should be strictly proved and ——Proof—Pre-emption — Instances of case should not be extended by analogy. (Grille, C.J. decided on compromise or admission—Value of.

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and Puranik, J.) SHAMLAL SHRIKISAN v. Mt. JIYABAI. I.L.R. (1943 Nag. 678-211 I C 306 =16 R.N. 195=1943 N.L.J. 514=A.I.R. 1944 Nag. 62.

-Proof-Judicial decision as to custom among jains-Relevancy as evidence of custom

among Jains of another place.

Judicial decisions recognising the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place, unless it is shown that the customs are different. But there is no presumption that such custom applies to all Jains wherever they are in India. (Broomfield and Sen JJ.) SUGANCHAND BHIKAMCHAND V. MANGIBAI (GULABCHAND I.L. R. (1942) Bom. 467=701 I.C. 759=15 R.B. 111 =44 Bom.L.R. 358=A.I.R. 1942 Bom. 185.

-Proof—Mode of—Family and local customs

-Duty of Court.

When a custom is pleaded by a party to a suit, the first thing which the Courts must ascertain is as to what kind of custom is pleaded. A custom set up must be definite so that its application in any given instance may be clear and certain and reasonable. Hindu customs are usually grouped under the heads of Kulachar (family customs) and Desachar (local customs). Where a family custom is set up the evidence is to be confined to the instances relating to the family of the parties but where a local custom is set up instances may be given not only relating to the members of the family but also in tances relating to cases of all people residing within the locality. In the former case unlike in the latter, instances relating to other castes living in the local area would not be admissible in evidence in proof of the custom. (Rachhpal Singh, C. J. and Kazi Masud Hasan, J.) THANEDAR V. MALUKA. 43 P.L.R. J. & K. 130.

-Proof-Necessity-Custom not general but

prevailing in most villages

Where the custom pleaded is not general but is found to exist in most of the villages, its existence has to be proved independently for each village. (Bennet and Madeley, IJ.) SRI THAKURJI v. Gava Kuer. 17 Luck. 567=200 I.C. 561=15 R.O 41=1942 R.D. 30=1942 A.W.R. (C.C.) 19=1941 O.W.N. 1412=1942 O.A. 7=AIR 1942 Oudh 213.

-Proof of existence up to date of suit-Necessity.

Where a claim is based on custom, before it can be entertained it must be proved that the custom still exists and not merely that it existed at some past distance of time. An entry in the wajib-ul arz is evidence of the existence of custom, but it is not conclusive. Nor can it be presu ned that because it existed some long time back it still continues to exist. A custom is not a statutory creation but comes into being of its own accord and in the same manner can disappear of its own accord. Hence before it can be relied. upon it must be shown in every case that it still prevails at the time of the firing of the suit and is a living one. (Harper, S.M. and \athe, J.M.)
Moimuddin v. Jagmohan. 1941 R.D. 598=
1941 A.W.R. (Rev.) 575 (2)=1941 O.A. (Supp.) 533 (2).

-Proof-Pre-emption - Instances of cases

Decisions in cases decided on compromise or admission, cannot be treated as sufficient proof of the existence of the custom of pre-emption. (Almond, J.C. and Mir Ahmad, J.) PRITHMI DASS v. HARI, RAM. 197 I.C. 705=14 R. Pesh. 86= A.I.R. 1942 Pesh. 25.

Proof of — Quantum of evidence. Narain Singh v. Net Ram. [See Q D. 1936. 40, Vol. I, Col. 3348] I.L.R. (1940) All. 726=192 I.C. 570=13 R.A. 335.

Proof of Requisites—Conventional customs and local usages—Applicability of rule requiring the custom to be ancient and immemorial-Claim for Haq-i zamindari by samindar on transfer of house by tenant-Maintainability.

A custom to have the force of law must be immemorial. In India there is no period definitely fixed by authority as in England in regard to 'legal memory'. The rule requiring that a custom must be ancient and immemorial is applicable only to customs which are known as legal customs and it has not been applied to a custom which has been called conventional custom better known as trade or local usages. A legal custom can be divided into local custom and general custom of the realm. General custom is part of the common law while a local custom is an exception to it and has to be strictly proved. A claim for Haq-i-zamindari, (i.e.,) a certain percentage of the sale price in cases of transfer of houses by tenants, is maintainable where the wajib-ul-arz of 1874 records such a custom. The fact that before 1900 the percentage had not been a fixed rate cannot stand in the way of the claim being allowed. (Ismail and Malik. II) RANGJI MAHA-I.C. 463=1944 A.W.R. (H.C.) 259=1944 A.L. W. 574=1944 O.A. (H.C.) 259=1944 A.L.J. 415=A.I.R. 1945 All. 6.

-(N. W. F. P.)—Proof—Statement in custo-

mary law-Sufficiency.

A statement of custom in the customary law is in itself enough to prove a custom. (Mir Ahmad, J.) ROSHAN LAL v. ARJAN DEV. 203 I.C. 300=15 R. Pesh. 59=A.I.R. 1942 Pesh. 68.

-Proof of-Wajib-vl-arz-Value of entries

in-Instances of judicial recognition.

A wajib-ul-arz when properly used affords most valuable evidence of custom. The best evidence to prove a custom besides a wajib-ularz is of instances in which it is recognized by Courts. A record in the wajib-ul-ars of a custom coupled with three instances of its recognition by Courts is enough proof of the existence of the custom. (Agarwal, J.) Kul-SOOM V. CHUTTAN 17 Luck, 494=198 I C. 509 =14 R.O. 409=1941 O.W.N. 1316=1941 A W. R. (Rev.) 1111=1941 O.A. 990=A.I.R. 1942 Oudh 115.

-Proof-Wajib-ul-arz-Requisites.

A wajib-ul-arz in order to prove a tustom must mention it clearly. (Agarwal, J.) Sultan Husain v. Abbul Razao 202 I.C. 734=15 R. O. 141=1942 O.W.N. 592=1942 A.W.R. (C. 200 III) 1942 O.A. 446=A.I.R. 1942 Oudh 496.

-Reasonableness-Loss of rights in groves

on ejectment.

There is nothing unreasonable in a custom recorded in the wajib-ul-ars allowing a tenant custom in favour of the collaterals (i.e.) uncles

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planting a grove upon the land granted to him subject to the condition of forfeiture in the event of his ejectment by the landlord from the tenancy land. (Misra and Madeley, JJ.) RAM Newaz v. Rai Bajrang Bahadur Sing, 215 I.C. 10=20 Luck. 26=17 R. O. 43=1944 O W. N. 79=1944 A.W.R. (C.C.) 79=1944 O.A (H. C.) 79=1944 A.L.W. 141=A.I.R. 1944 Oudh 201.

Reasonableness—Recognition by Courts—

Rejection-If justified.

The reasonableness of a custom is primarily a question of fact and when a custom has been recognized by Courts of law on various occasions and has been followed in practice, it should not be rejected on the mere ground that it is unreasonable, because if questions had been put to witnesses who knew about the custom they might have been in a position to explain its reasonableness. (Sulaiman, C.J. and Bennet, J) VISHWA NATH UPADHYA v. ASHARFI SINGH. 1941 R.D. 835=1941 O A. (Supp.) 766=1941 A L.W. 906 =1941 A.W.R. (Rev.) 866.

-Reasonableness-Right to eject from house site on payment of compensation.

A custom by which an owner claims to have right to eject a ryot from house site on payment of compensation for the materials of the house is not unreasorable. ((Agarwal J) Kuisoom v. Chuttan. 17 Luck 494=1 8 I.C. 509=14 R.O. 409=1941 O.W.N. 1316=1941 A.W.R. (Rev.) 1111=1941 O.A. 990=A.I.R. 1942 Oudh 115.

-Religious endowment - Shebait-Custom of transfer of palas of worship-Validity. See Hindu Law- Religious Endowment.

-Remarriage of widows. See HINDU LAW -Widows-Remarriage.

-Validity—Essentials.

The legal title to recognition of a special custom depends upon its antiquity, certainty and uniformity, and the Court must be assured of these conditions by means of clear and unambiguous evidence. A custom to be valid must be consciously accepted as having the force of law. Even if a custom is established by evidence, such custom, if unreasonable, will not be enforced by Courts. For the purpose of determining whether a custom is against reason or not, we are to judge not by the reason of an unlearned man, but by artificial and legal reason warranted by authority of law. (Mukherjea and Biswas, II.) JOGESH CHANDRA GHOSH v. SRRE DHAKESWAN MATA. IL.R. (1941) 2 Cal 258=198 I C. 837 =14 R.C. 509=73 C.L.J. 544=45 C,W.N. 809 =A.I.R. 1942 Cal. 26.

-Validitv—Reasonableness.

Reasonableness is one of the most essential elements of a valid custom. A custom recognising the use of the roof of the defendant's shop on all ceremonial occasions by a fluctuating body of persons is indefinite and unreasonable (Sukhdeonaram, J.) NATHMAL v. ILLAHIBUX. 1942 M.L R. 58 (Civ).

-Wajib-ul arz of village Ujarion-Succession-Exclusion of mother and sister in favour

of uncles and nephews.

On a construction of the wajib-ul-arz of the village of Ujarion, it was held that the mother and sister of a deceased are not excluded by

Hulam Hasan, J.) Mst. All-HIAR HUSAIN. 1945 A.W.R. O.A. (C.C.) 240=1945 A.L. 945 O.W.N. 367.

rum—If confined to private be enforced against the vendee. of Zar-i-chaharum is establimited to private sales only but cases of auction sales—there e in principle between the two e enforced against the vendee I) RADHEY SHIAM v. NAZIR. W.R. (HC) 40=194 I.C. N 291=1941 R.D 469=1941 68 (2)=1941 OA (Supp.) 194=14 R.A. 6=1941 A.L.J All. 173.

Adoption—Jats of Maland ma district — Adopted son l father's property.

of the Maland pargana in the an a lopted son succeeds to the tural father in the absence of l Rashid, Ram Lall and Beckett, UKHTAR. I.L.R. (1945) Lah. 7=1946 L. (Rul.) 44=47 P.L. 5 Lah. 17 (F.B.).

Adoption-Appointed heir and inction between.

f an appointed heir under the y Law is materially different n of a son adopted under the e former case, only a personal ablished between the appointed intor. There is no transplantad son from his natural family his adoptive father. Moreover, an heir only affects the parties pointed heir does not become the appointor's father and his me the grandson of the appointed heir does not succeed estate of the appointor's relace. Abdul Rashid and Abdur FAINDA v. JAI DEVI. 212 I.C. 1946 P.L.R. 197—A.I.R. 1944

-Adoption — Appointed heir and on same footing as succes-

iab Customary law, there is only etween the appointment of an nd a gift and that is that wherese the property passes immediae, in the former the property ie appointed heir till the death ther. Succession to an appointned by the same principles as rn succession to a donee. Where the appointed heir his widow f his property on the usual life ed the property to her daughter amounts to an acceleration of he agnatic theory cannot be is to lay down that the collaterals ather would be entitled to exer of the adopted son. (Harries, hid and Abdur Rahman, JI) EVI. 212 I.C. 374=16 R L. 270 =A I.R. 1944 Lah. 90 (F.B). -Adoption-Nature and object.

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Amongst agricultural tribes of the Punjab, adoption is in no sense connected with religion and is a purely secular arrangement resorted to by a sonless owner of land in order to nominate a person to succeed him as his heir. The object of such an adoption is not to secure any religious benefit for the soul of the adopter but to obtain a practical and temporal benefit. During his lifetime, the adopter secures the assistance of the appointed heir in cultivation and after his death the appointed heir inherits the estate of his adoptive father to the exclusion of the adoptive father's collaterals. The mere performance of certain rites relating to adoption under Hindu law would not convert the customary appointment of an heir of Hindu Jat of the Ludhiana district into a formal adoption under Hindu law. (Abdul Rashid, Ram Lall and Beckett, JJ.) INDER v. MUKHTAR. I.L.R. (1945) Lah. 343=221 I.C. 187=1946 L. (Rul.) 44=47 P.L.R. 74=A.I.R. 1945 Lah. 17 (F.B.).

——(Punjab)—Adoption—Sister's or daughter's son—Tarkhans of Village Chanian, Jullunder District. Gurbakhsh Ram v Manak Chand [See Q.D. 1936-'40, Vol. I, Col. 3069.] 191 I.C. 724—13 R.L. 328.

-----(Punjab) -- Adoption -- Succession to property of appointee's natural father -- Rajputs of Ambala District.

In Punjab among the Rajputs of Ambala district a person appointed as an heir to a third person does not thereby lose his right to succeed to the property of his natural father. A corrollary to this general rule is that the appointed heir and his lineal descendants have no right to succeed to the property of the appointed heir's natural father against the other sons of the natural father and their descendants. The appointed heir can succeed to the property of his natural father when the only other claimant is the collateral heir of the latter. (Abdul Rashid, Beckett and Khosla, JI.) RAHMAT v. ZIBDAR. 221 I.C. 305=47 P.L.R. 373=A.I.R. 1945 Lah. 229 (F.B.).

——(Punjab)—Alienation—Ancestral property,
—Arains of Mosang.

The Arains of Mozang have not abandoned custom in matters of alienation and adopted the rules of personal law, and the custom of restricted power of alienation regarding ancestral property still prevails amongst them. A sonless proprietor has, therefore, no power to alienate ancestral property in the absence of necessity. The same rule prevails whether it is agricultural land or house and shop property situate in a town. (Ram Lal and Mehr Chand Mahaian, II.) ATA MOHAMMAD v. MAHOMED SHAFI 217 I C. 17=17 R.L. 194=46 P.L.R. 39=A.I.R. 1944 Lah. 121.

——(Punjab)—Alienation—Ancestral property —Restricted power regarding agricultural land— Presumption regarding other property.

If custom of restricted power of alienation regarding ancestral property is held established regarding agricultural land, it would also be held to prevail regarding other kinds of property situate in town if it is ancestral, unless the contrary is established. (Ram Lal and Mehr Chand Mahaian, IJ.) ATA MOHAMMAD v. MAHOMED SHAFI 217 I.C. 17=17 R.L. 194=46 P.L.R. 39 =A.I.R. 1944 Lah, 121.

Punjab) - Alienation - Extinction vendee's line-Property if reverts to vendor's des-

cendants.

The rule of reversion on the extinction of the line of the alience applies only to gifts of ancestral land among persons governed by customary law. But neither under custom nor under any other system of law does land, which has been sold outright, revert to the descendants or collaterals of the vender on the line of the vendee becoming extinct. (Tek Chand and Din Mohomed, JJ.)
JAWALA SINGH v. JAGDISH SINGH. 195 I.C. 244
=14 R.L. 49=43 P.L.R. 41=A.LR. 1941 Lah. 144.

-(Punjab) - Alienation - Necessity - Need for proof-Antecedent creditor being alienee-

Mortgage and sale.

In a suit by a reversioner to have it declared that an alienation of land is invalid as against his reversionary rights, on the ground that it was not for a necessary purpose, when the alience is himself the antecedent creditor in respect of any particular i em of consideration it is not necessary for him to prove that the original debt was incurred for a necessary purpose under customary law and it is sufficient for him to prove that the debt is a just antecedent debt. So long as the previous debt due to the alience forming a part of the consideration for the alienation in his favour is a just debt, it can make no difference at all to the validity of the alienation whether the transaction is one of sale or mortgage. (Abdur Rahman, Mehr Chand and Achhru Ram, JJ) KARNAIL SINGH v. NAUNIHAL SINGH. I.L.R. (1945) Lah. 434=221 I.C. 477=47 P.L.R. 164=A.I.R. 1945 Lah. 188 (F.B.).

(Punjab)-Alienation-Restricted powers

-Scope-Presumption-Onus.

In the case of an alienation by a member of a recognised agricultural tribe, whose power of disposition is generally restricted, the presumption of restriction continues even in respect of urban ·Din Mahomed, Abdur immovable property. Rahman and Marten, II) INDAR PAL SINGH v.
BADRI DAS SOHAN LAL. 209 I.C. 257=16 R.L. 108=45 P.L.R. 345=A.I.R. 1943 Lah. 281 (F,B.)

(Punjab)-Alienation-Powers of-Sayyads of Gurdaspur District.

The Sayyads of Gurdaspur District are governed by what is called the usual customary law in the matter of alienations and ancestral immovable

property cannot be alienated by the holders without necessity. (Dalip Singh and Sale, JJ.) GHULAM RASUL V. KAPIL AHMAD SHAH. 193 I.C. 469=13 R.L. 460=43 P.L.R. 91=A I.R. 1941

Lah. 30.

-(Punjab)-Alienation-Sayyads-Widow-

Restricted powers of.

Widows among Sayyads do not enjoy an unfettered right of alienation of husband's property.
(Rhide and Din Mohammad, JJ.) KHADAM (Bhide and Din Mohammad, JJ.) KHADAM HUSSAIN 2. MOHAMMAD HUSSAIN. ILR. (1941) Lah 872=195 I.C. 873=14 R.L. 106=A.I.R. 1941 Lah 73.

-(Punjab)—Alienation—Right to challenge

-Remote reversioner.

It is well settled that in the case of an alienation by a widow any reversioner, however remote, can challenge it. (Bhide and Din Mohammad, II) KHADAM HUSSAIN v. MOHAMMAD HUSSAIN. I.L.

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R. (1941) Lah. 872=195 I.C. 873=14 R.L. 106 =A.I.R. 1941 Lah 73.

(Punjab)-Alienation-Suit to challenge by remote reversioner-Discretion of Court to allow, It is a maiter of judicial discretion, as to

whether a remoter reversioner should be allowed to sue in the presence of a nearer reversioner to set aside an al enation. (Tek Chand and Dalis Singh, JJ.) Jan Mohammad v. Mohammad Khan. 196 I.C. 130=14 R.L. 132=A I.R. 1941 Lah. 169.

-(Punjab) — Alienation — Setting aside-Conversion of sale into mortgage-Criteria.

In order to determine whether a sale should be set aside or converted into a mortgage, the true question which falls to be answered is whether the sale itself was one which was justified by legal necessity and not the mere projection that the amount found to be for necessity bears to the total consideration for which the sale was effected. (Mahomed Munit J.) SAMUND SINGE V RAKHA RAM. 204 I.C. 464=15 R.L. 262=44 P.L.R. 518=AI.R. 1943 Lah. 22.

(Punjab) - Alienation - Widow - Alienation for husband's debis-Necessity-Income of

estate-If relevant consideration.

The power of alienation of a widow governed by custom is less than that of a widow under the Hindu Law, and the income of the estate left by her husband is a relevant consideration for detern ining whether an allenation made by her of that estate for debts incurred by her husbard is or is not for recessity. (Dalip Singh and Sale, JJ.) GHULAM QADIR 7. ALAF DIN. I.L.R. (1943) Lah. 406=201 I.C. 511=15 R.L. 67=44 P.L.R. 274=A.I.R. 1942 Lah. 200.

- (Punjab)—Alienation—Uidow—Assent of next reversioner-Effect-Remote reversioner's

right to contest.

A remote reversioner has no right to contest an alienation of non-ancestral property by way of gift made by a widow with the assent of the next reversioner. (Beckett, J.) Sundar v. Mr. 1 ABO 194 I.C. 310=13 R.L. 530=42 P.L.R. 819=A.I.R. 1941 Lah. 43.

- (Punjab)-Alienation-Widow-Notice of necessity to reversioners-If obligatory-Riva-

1-jam of Mianwali District.

It is not obligatory on a widow to give notice of her necessity to the reversioners before mortgaging the properties, and failure to give such notice does not render the alienation the factorinvalid. (Tekchand, J.) MAHOMEO IKHTIYARO, KHANA, I.L.R. (1942) Lah. 275=196 I.C. 400=14 R.L. 153=43 P.L.R. 429=A.I.R. 1941 Lah. 310.

—— (Punjab)— Alienation—Widow—Powers of. Tara Singh v. Suraj Kaur. [See Q.B. 1936-40 Vol. I. Col. 3084.] I.L.R. (1941) Lah. 546=191 I.C. 422=13 R.L. 294=44 P.L.R. 192.

- (Punjab) - Alienation - Widow - Suit by some reversioners challenging alienation-Other reversioners impleaded as defendants-Compromise decree-Alienee surrendering immediate possession to plaintiffs on cash payment-Right of defendant reversioners to share in benefit of decree. Jalal Din v. Nawab. [See Q.I). 1936 40, Vol. I, Cor. 3348.] 193 I.C. 186=13 R.L. 437=A.I.R. 1941 Lah. 55.

—— (Punjab)—Ancestral land—Inference from name in pedigree-Propriety.

It is settled law in Funjab that mere mention of the name of a person in the pedigree table as the common ancestor is no proof of the fact that every piece of land held by his descendants (howsoever low) was originally held by and descended from him in succession from generation to generation. (M.R. Janakar) Suthanion to generation. (M.R. (1941) Lah. 154=43 Bom.L.R. 432=1941 O.A. 347=1941 A.W. R. (Rev.) 314=193 I.C. 436=1941 O.L.R. 343=7 B.R. 665=43 P.L.R. 318=13 R.P.C. 154=I.L.R. (1941) Kar. (P.C.) 22=1941 A.L. J. 530=A.I.R. 1941 P.C. 21 (P.C.).

—— (Punjab) — Ancestral property—Test—Presumption—Foundation of village by common ancestor. GHULAM GHAUS 2. MAIANG KHAN. [See Q.D. 1936-40, Vol. I, Col. 3688.] 191 I.C. 892=13 R.L. 356.

-----(Punjab)-Applicability-Brahmans-Presumption-Brahmans of Batura village in Tahsil of Phillaur.

In the case of high caste Hindus-and the Brahmans occupy the topmost place in the Hindu social hierarchy—where nothing else is known, the presumption is that they are governed by their own personal law and not by custom This their own personal law and not by custom presumption is, however, rebuttable and may be rebutted by proof to the contrary. Where the Brahmans of a certain villege were its original founders and they still form a compact section of the village community, depend for their livelihood a most exclusively on agriculture and do not carry on any trade, business or priestly functions or take to service, and further they follow the same customs as are followed by the agricultural tribes of the province, these facts are sufficient to dislodge the initial presumption in favour of the application of personal law to them and to shift the onus of proving that they are not governed by custom on the party which relies on personal law. Where the Brahmans are governed by the general agricultural custom of the province, the burden of proving that in matters of alienation they are not governed by the general custom rests on the party who asserts it. The Brahmans of village Batura in the Tahsil of Phillaur in Jullundur district do not follow their personal law in matters of alienation but the general agricultural custom of the province according to which ancestral property cannot be alienated except for necessity or with the consent of the descendants of the alienor. (Mahomed Munir, J.) SAMUND SINGH v. RAKHA RAM. 204 I.C. 464=15 R.L. 262=44 P.L.R. 518=A.I.R. 1943 Lah. 22,

——(Punjab) — Applicability — Mahomedan Qureshi family residing in Gujrat Town. Sharra Begam v. Court of Wards [See Q D. 1936-'40, Vol. I. Col. 3318.] I.L.R. (1941) Lah. 843=191 I.C. 676=13 R.L. 343.

—— (Punjab) — Applicability — Proof — Instances showing exclusion of female heirs—Value of. SHARIFA BEGAM v. COURT OF WARDS. [See O D. 1936-40 Vol. I, Col. 3749.] I.L.R. (1941) Lah. 843=191 I.C. 676=13 R.L. 343.

———(Punjab)—Applicability—Sarsut Brahmins of mausa Jandola, Tahsil Thanesar, District Karnal—Hindu law or custom applicable.

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In the case of Sarsut Brahmins of mauza Jandola, Tahsil Thanesar, District Karnal the initial presumption is that they are governed by Hindu law. The mere fact that they owned one half of the village raises no presumption that they have given up Hindu law and adopted the custom of agricultural tribes in all matters. (Tek Chand and Beckett, JJ.) Bir Bhan v Jacannath. I. L.R. (1941) Lah. 628=193 I.C. 522=13 R.L. 462=44 P.L.R. 123=A.I.R. 1941 Lah. 25.

—— (Funjab) — Customary low — English manuals relating to district and vernacular rivajiam-Preference.

Per Beckett, J.—The English manuals of customary law should be preferred to the vernacular riwaj-i-am only in case of conflict between the English manual and the vernacular riwaj-i-am. The existence or otherwise of a custom is a question of fact. (Abdul Rashid, Ram Lall and Beckett, JJ) INDER v. MUKHJAR I.L.R. (1945) Lah. 343=221 I.C 187=1946 Lah. (Rul.) 44=47 P.L.R. 74=A.I.R. 1945 Lah. 17 (F.B.).

——— (Punjab) — Gift — Reversion—Death of donee leaving no descendants—Ancestral property, if reverts to donor before death of donee's widow.

Under the Punjab Customary Law, gifted ancestral property does not revert to the donor's line on the death of the donee leaving no descendants, male or female, so long as the donee's widow is alive. Only on the death of the widow the ancestral property goes lack to the reversiorers of the donor. In case there are male or female descendants of the donee, the ancestral property goes back to the doror's line on the extinction of those lires. (M. In Chand Mahajan, J) Mst. CHAMBEIL V. BAM SARAN. 46 P.L.R. 204—A I.R. 1944 Lah. 353 (1).

——— (Punjab) - Landlord and tenant—Chil trees on occupancy tenancy—Right of tenant to extract resin—Hoshiarpur District.

In the Hoshiarpur District, an occupancy tenant has no right to cut the chil trees standing on his tenar cy or to extract resin therefix m. Assessin is contained in the wood of the tree ir is reasonable that the right to the resin in the timber should accrue to the persons entitled to the timber itself, that is to say, to the proprietors of the land rather than to the occupancy tenants. (Mitchell, F.C.) HARSARAN v. DEVI SARAN. 20: Lah.L.T. 61.

The mere fact that a person governed by custom migrates to a town or temporarily ceases to cultivate land would not be enough to justify the conclusion that he has abandoned customary law altogether. Custom unlike a cloak cannot be cast off at one's mere volition. Mere occupation of the parties concerned is not to be taken as a conclusive factor in determining whether the parties were governed by their personal law or customary law. (Harries, C.J. and Din Mohammad, J.) Mohd. Yusuf v. Mohd. Abdullah, 216 I.C. 24=17 R.L. 156=A,I.R. 1944 Lah, 117.

——(Punjab)—Personal law—Applicability—

If there is no custom dealing with the precise facts of a case, the Court must look to the per-

sonal law of the parties to fill up the gap which is not filled by any custom, and once that gap is filled, then only custom which may be applicable must be applied. If, therefore, there is no custom dealing with the devolution of property under particular circumstances the rule of personal law can only be applied to ascertain the nearest heir, and once that heir is ascertained, the rule of custom will govern the further devolution of the property. (Harries, C.J. and Din Mohamurt, J.) Kehar Singh v. Attar Singh. 219 I.C. 130=18 R.L. 42=46 P.L.R. 287=A.I.R. 1944 Lah. 442.

——(Punjah)—Recitals in manual of customary law—Onus is on person who challenges its

If any party urged to the contrary the onus shifts on to that party to establish that what has been recited in the minual of customery liw is incorrect. (Harries, C.J. and Din Mohummad, J.) Mono. Yusuf v. Moho. Abbullah. 216 I.C. 24=17 R.L. 155=A.I.R. 1914 Lah. 117.

——— (Punjab) — Riwaji-i-am — Applicability. Gur Вакнян Кам v. Манак Снано. [See Q. D. 19 6 '40, Vol. 1, Col. 3099.] 191 I.C. 724=13 R.L. 328.

—— (Punjab) — Riwaj-i-am — Applicability— Self-acquired property—Riwaj-i-am of Ludhiana District.

Manuals of Customary law should be taken to relate to ancestral property only unless there is a clear indication in them to show that they do contemplate self-acquired property as well. Question 43 of the Customary law (Rivaj-i-am) of the Ludhiana District relates to ancestral property only and can in no circumstances be so interpreted as to cover self-acquired property as well. (Din Minammad, Abdur Rahman and Marten, IJ.) Mr. HURMATE v. HOSHIARU. 211 I.C. 446=16 R.L. 218=46 P.L.R. 17=A.I.R. 1944 Lah. 21 (F.B.).

——(Punjab)—Riwaji-i-am—Entries in—Presumption—Rebuttal—Compiler's remarks—If

. sufficient.

Whatever weight may be attached to the compiler's remarks, they are not sufficient to rebut the presumption arising from the entries recorded in the riwaji i-am, especially when they are in accord with the earlier riwaj-i-am. A departure from the old Customary law may be · discredited if the compiler thinks that the change was being introduced for a set purpose, but if the replies are in consonance with what had been the custom from time immemorial, the compiler's personal opinion that the rules were not being rigidly observed in practice will neither discredit the replies given nor lighten the burden on those who are required by the law to rebut the entries made in the Manual of Customary Law. A custom to be valid must be ancient, certain and invariable, and if a few violations are made, the violations themselves will not take the place of custom, if for no other reason because of their newness alone. (Bhide and Din Mohammad, newness alone. (Bhide and Din Mohammad, JJ.) KHA'AM HUSSAIN v. MOHAMMAD HUSAIN. I.L.R. (1941) Lah 872=195 I.C. 873=14 R.L.

(Punjab) — Riwaj-i-am — Presumptions raised by—Indicial decisions—Effect and value of.

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A judicial decision though of comparatively recent date, may contain, on its records, evidence of specific instances, which are of sufficient antiquity to be of value in rebutting the presumption raised by a rivaj-i-am. In such a case, the value of the decision arises from the fact not that it is relevant under Ss. 13 and 42 of the Evidence Act as forming in itself a 'transaction by which the custom in question was recognised, etc.,' but that it contains, on its records, a number of specific instances relating to the relevant custom. To ignore such judicial decisions merely on the basis of the riwij-i-am would add greatly to the perplexities and difficulties of proving a custom. (M. R. Jayakar.) Subband v. Nawab. 68 I.A. 1=I.L.R. (1941) Lah. 154=193 I.C. 436=1941 O.L.R. 343=7 B.R. 665=43 P.L.R. 318=13 R.P.C. 154=I.L.R. (1941) Kar. (P.C.) 22=1941 A.J. 530=43 Bom. I. R. 432=1941 O.A. 347=1941 A.W.R. (Rev.) 314=A.I.R. 1941 P.C. 21 (P.C.).

(Punjab)—Riwaj-i-am - Value of -Entry

recording contradictory answers.

A rivaj-i-am which contains contradictory answers to the same question cannot be depended upon and can carry no presumption of truth. (Harries, C.J. and Mehrchand Mahajan, J.) RABMAT ALI V. MUBARAK ALI. 222 I.C. 45=47 P. L.R. 83=A.I.R. 1945 Lah. 199.

———(Punjab) — Shamilat—Partition—Portion in possession of one of co-sharers becoming valuable as building site—Unearned increment—If

accrues to all.

If a portion of Shamilat land in possession of one of the co-sharers becomes valuable by reason of its suitability as a building site and nearness to a big factory, the unearned increment should not accrue to that co-sharer alone but to all the cosharers. If the co-sharers are so numerous that the share of each in it is too small, the site should be excluded from partition, leaving the co-sharer in possession as owner of his own undivited share and tenant-at-will of the rest on behalf of the proprietary body. As regards this remainder, he should pay the customary rent to his cosharers, and provided he fulfils these conditions he should not be disturbed until the time comes when the property is to be sold. The proceeds of such sale should then be divided among the proprietary body. (Garbett, F. C.) Roshan Din v. Манвив Ali Khan. 20 Lah. L.T. 21.

———(Punjab) — Successian — Adopted son-Right to succeed to natural father—Shaikhs in Jullundar district.

An adopted son amongst the tribe of Sheikhs in the Juliandar district, is not entitled to succeed to the estate of his natural father along with his brothers. (Harries, C.J and Mehrchand Mahajan, J) RAHMAT ALI v. MUBARAK ALI. 222 I.C 46—47 PLR. 83—A.I.R. 1945 Lah. 199.

—(Punjab)—Succession—Cognates. Tara SINGH v. SURAJ KAUR. [See Q. D. 1936-'40, VOL. I, COL. 3105.] I.L.R. (1941) Lah. 546= 191 I.C. 422=13 R.L. 294=44 P.L.R. 192.

—— (Punjab) — Succession — Collaterals — Right of representation—Khatris of Rawalpindi. DIWAN CHAND v. BELI RAM. [See Q. D. 1936-40, Vol. I, Col. 3106.] I.L.R (1941) Lah. 620.

———(Punjab)—Succession—Collaterals—Right of representation—Barbers of Karnal District

Though the strict Mitakshara rule of representation in matters of succession is not followed among high caste Hindu tribes of the districts of the Rohtak, Karnal and Gurgaon, where a nephew succeeds along with the uncle to the property of the deceased such right exists among the barbers of Karnal District. (Tek Chand, J.) MANGTA v. MANGAT. 198 I C. 599=14 R L. 347=43 P L.R. 687=A I R. 1942 Lah. 27.

———(Punjab) — Succession — Collaterals — Widow's succession—If as representative of her burkend

When the widow of a collateral is allowed by custom to succeed, she is to be treated as having done so as a representative of her husband when the next heir after her death has to be traced. (Abdul Rashid, Abdur Rahman and Khosla, II.) Chiragh Din v. UJJAGAR SINGH. 47 P.L.R. 344 = A.I.R. 1946 Lah. 16 (F.B.).

———(Punjab) — Succession — Daughters and grand-daughters versus collaterals—Kharal tribe of Montgomery District.

Under the customary law governing the kharal tribe of the Montgomery District, daughters and grand-daughters are preferred to collaterals in the matter of succession to non-ancestral property. (Tek Chand and Din Mahomed, JI) SANATA v. SAHIB BIBL. I.L.R. (1941) Lah. 692 = 193 I.C. 404=13 R.L. 458=43 P.L.R. 7=A.I. R. 1941 Lah. 94.

—— (Punjab)—Succession—Daughters—Arains of Shahara tahsil.

According to the custom followed by the Arains of the village Moranwala in tahsil Shahara in the district of Sheikhupura, daughters succeed to the ancestral property of their father in preference to his brother's sons. (Mahomed Mumir, J.) Hussain Birl v. Hassan Din. 209 I.C. 454=16 R.L. 131=45 P.L.R. 185=A.I.R. 1943 Lah. 154.

Among Biloches of the Bughlani sub-section of the Nutkani tribe, resident of mauza Bughlani in Sanghar tehsil, of Dera Ghazi Khan district, daughters succeed along with brothers to their father's property in accordance with Mahomedan law. They are not governed by custom. (Tek Chand and Beckett, JJ) Allah Diwaya v. BAKHT WADDI. I.L.R. (1942) Lah. 268=202 I. C. 133=15 R.L. 107=44 P.L.R. 460=A.I.R. 1942 Lah. 207.

—— (Punjab) — Succession — Daughter's daughter—Daughter succeeding to father's estate excluding collaterals—Right of her daughter to succeed her.

Although a life-estate holder cannot ordinarily form a fresh stock of descent and a daughter's daughter is not as such an heir to her maternal grandfather and cannot succeed to him either under the customary law or the Hindu law, when a daughter has once succeeded to the estate of her father after excluding his collaterals her daughters should as her lineal descendants be held entitled to succeed for their lives in preference to such collaterals after her death. (Harries, C.J. and Abdur Rahman. I.) Mohindar Kaur v. Hira Singh. 211 I.C 627=16 R.L. 233=45 P.L.R. 311=A.I.R. 1943 Lah. 308.

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——(Punjab)—Succession—Daughters versus collaterals—Bajwa Jats of Sialkot District.

According to the custom governing Bajwa Jats of the Sialkot District, daughters are entitled to succeed to non-ancestral property of a sonless proprietor in preference to his collaterals. (Dalip Singh and Bhide, J.). RAMI v. GIAN SINGH I. L.R. (1943) Lah 66=43 P.L.R. 665=198 I.C. 708=14 R.L 350=A.I.R. 1942 Lah. 31.

—— (Punjab)—Succession—Daughters versus collaterals—Bajwa Jats of Sialkot District.

Daughters have a preferential right to succeed to the non-ancestral property as against collaterals of the tenth degree according to cust m among Bajwa Jats of Sialkot District. (Tek Chand and Din Mohammad, Jl.) KARAM DAD v. MOHAMMAD BIBI. I.L.R. (1942) Lah. 59=198 I.C. 340=14 R.L 324=43° P.L.R. 737=A I.R. 1942 Lah. 1 (F.B.).

— (Punjab) — Succession — Daughters v. Collaterals—Gujjars of Shakargarh Tehsil of District Gurdaspur. LABH v. FATEH BIBI. [See Q.D. 1936-40, Vol. I, Col. 3107.] I.L.R. (1941) Lah. 64—191 I.C. 152—13 R.L 262

——(Punjah)— Succession—Daughters versus Collaterals—Hundal Jats of Amritsar.

Among Hundal Jats of the Amritsar district, a daughter has a right to succeed to the self-acquired property of her father in preference to his collaterals. (Dalip Singh and Din Mahomed, JI.) JAWALI V. LAL SINGH. I L.R. (1943) Lah. 135=201 I C 675=15 R.L. 74=44 P.L.R. 150=A.I. R. 1942 Lah. 164 (2).

---- (Punjab)—Succession—Non-ancestral property—Exclusion of daughters—Onus.

Where the property is non-ancestral, the initial onus lay on the collateral plaintiffs to prove that the general custom in favour of the daughters' succession had been varied by a special custom enabling the collaterals to exclude the daughters. [On the evidence the collaterals had not succeeded in discharging that onus.] (M. R. Jayakar.) SUBHANI v. NAWAB. 68 I.A. 1=I.L.R. (1941) Lah. 154=43 Bom.L.R. 432=1941 O.A. 347=1941 A.W.R. (Rev.) 314=193 I.C. 436=1941 O.L.R. 348=7 B.R. 665=43 P.L.R. 318=13 R. P.C. 154=ILR. (1941) Kar. (P.C.) 22=1941 A.L.J. 530=A.I.R. 1941 P.C. 21 (P.C.)

—— (Punjab)—Succession—Sayyads of Jhang District—Rights of unmarried sisters and daughters.

According to the custom in Jhang District sister and daughter if us married are bracketed with widows and the mother of the deceased. When a daughter marries she may or may not acquire another interest; this will depend on whether there are then collateral male agnates within five degrees; whether her husband is from outside or inside the family; whether she has sisters married outside or inside the family. If she does acquire an interest as a married woman she takes it as full owner. But until she marries she has only that right as owner which is given to the unmarried woman as suitable to her unmarried condition-an interest which comes to its ordinary and natural termination when she marries, and which does not extend in any case beyond her life. The suggestion that the unmarried daughter or sister takes an absolute or heritable interest upon which her marriage works a forfeiture must be rejected. As compared with the right taken by her married

sisters—which is described as the right of a full owner and as including full powers of alienation -the unmarried daughter is given a right more suitable to the general situation of an unmarried woman—a prior right extending to the whole estate; a right by which while she remains unmarried she is the owner but a "limited owner." (Sir George Rankin.) SALEH MAHOMED SHAH v. ZAWAR HUSSAIN SHAH. 71 I.A. 14=212 I.C. 117=16 R.P.C. 191=10 B R. 491=I L.R (1944) Kar. (P.C.) 66 = A.I.R. 1944 P.C. 18 (P.C.).

-(Punjab)—Succession—Soyyads of Ihang District-Sister's preference-Conditions.

The riwaj-i am of Jhang District at question 39 states that daughters and sisters married to male collateral kindred within five or six degrees have preference to those married to remote male collateral relatives or strangers. To question 73 the like proposition is affirmed as regards the sons of daughters; this answer contemplales that the sons of a daughter married in a different caste can succeed if there are no collaterals within the sixth degreee. The word "collaterals" in question 79 is not to be taken as meaning "collaterals however remote" but is to be taken with the previous answers, including the answer to question 39, where it is expressly stated that sisters are not preferred unless they have married a collateral within the fifth or sixth degree. (Sir George Rankin.) Saleh Mahomed Shah v. Zawar Hussain Shah. 71 I.A 14=212 I.C. 117=16 R.P.C. 191=10 B.R. 491=I.L.R. (1944) Kar. (P.C.) 66=A.I.R. 1944 P.C. 18 (P.C.).

-(Punjab)—Succession—Self-acquired property-Daughters v. Collaterals-Onus-Entries in Riwaj-i-am-Value of-Correct method of

approach.

In the case of contests between daughters and collaterals regarding inheritance to self-acquired or non-ancestral property, the initial onus should be laid on the collaterals to prove that they have a right to inherit it as against the daughters, and they should be given an opportunity to discharge that onus. If the collaterals produce an entry in the Riwaj-i-am of the district stating a special custom in their favour, and if the Riwaj-i-am produced is a reliable, and trustworthy document and has been carefully prepared, and does not contain within its own four corners contradictory statements of custom and in the opinion of the settlement officer is not a record of the wishes of the persons appearing before him as to what the custom shouln be, the Riwaj-i-am would be a presumptive piece of evidence in proof of the special custom set up which, if left unrebutted by the daughters, would lead to a result favourable to the collaterals. If, on the other hand, the Riwaj-i-am is not a document of the kind indicated above, then such a Riwaj-i-am would have no value at all as a presumptive piece of evidence. A reliable and trustworthy Riwaj-i-am reciting a special custom against the rights of daughters would, however, only furnish a weak presumptive evidence to the collaterals. A few clear instances of the custom against the statement recorded in the Riwai-i-am would be sufficient to rebut the presumption, and to shift back the onus to the place where it was originally laid. After the initial onus stage, the Court should judge the case by taking into consideration the Riwaj-i-am, and all other materials placed on the record in proof Arr. 116. (1942) 2 M.L.J. 617.

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of the custom alleged or against it, and giving the Riwaj-i-am its full value considering the circumstances of each case the Court should come to the conclusion whether the initial onus has really been discharged. (Harries, C.J. and Mehr Chand Mahajan, J.) QAMAR-UD-DIN v. MST. FATEH BANO. I.L.R. (1945) Lah. 110=214 I.C. 34=17 RL. 63=46 P.L.R. 9=AIR. 1944 Lah. 72.

— (Punjab)—Succession—Sisters, married—Sayyads of Jhang District. Zawar Hussam Shah v. Saleh Mahomed Shah. [See Q. D. 1930-40. Vol. I, Col. 3349.] 192 I.C. 739=13 R.L. 408

-(Punjab)-Succession-Sisters, unmarried-Alienation-Powers of-Sayyads of Jhang District. ZAWAR HUSSAIN SHAH v. SALEH MAHOMED SHAH. [See Q. D., 1936-'40, Vol. I, Col. 3349.] 192 I.C. 739=13 R.L. 408.

CUTCHI MEMONS ACT (X OF 1938), S. 3—Applicability—Wills made before Act—If

saved.

The Cutchi Memons Act of 1938 applies not only to wills made after the passing of the Act. but also to wills made before it was passed. A will speaks only from the death of the testator and a will made in 1933 by a Cutchi Memon who died in 1941, is not saved. The right which is intended to be saved by S. 3 of the Act is a right acquired before the passing of the Act. After the passing of the Act, the will of every Cutchi Memon has to be construed and looked at from the point of view of Mahomedan law. J.) BAYABAI v. BAYABAI. I.L.R. (1942) Bom. 847=15 R.B. 256=203 I.C. 581=44 Bom. L.R. 792=A.I R. 1942 Bom. 328 (2). DAMAGES.

See (i) Contract Act, Chapter VI.
(ii) Tort—Damages.

-Divorce proceedings. See Divorce Act, S. 34. 47 C.W.N. 251.

Measure—Breach of contract—Crucial date. In the case of a breach of contract, where the option as regards time lies with the purchaser and the goods are ready for delivery, the vendor's damages should be based primarily on the market price prevailing at the date when the contract was repudiated. Where the contract is kept alive by the other party and the repudiation is not acted on, it is the agreed date of delivery of the goods according to the contract which will govern the measure of damages. (Digby, 7.) SETH RODA v. ABDUL GAFOOR. I.L.R. (1943) Nag. 772=207 I.C. 167=16 R.N. 22=1943 N, L.J 125=A.I.R. 1943 Nag. 210.

-Measure of-Conversion-Failure to deliver goods

In cases where conversion has occurred, the profits obtained by conversion is usually held to be the best evidence of the measure of damage; but the measure of damage will still be the loss sustained by not having the property delivered at the price agreed on. A party cannot recover greater damages than that to which he would be entitled by merely changing the form of action. (Digby, J.) HAZARIMAL v. CHAMPALAL. I.L.R. (1933) Nag. 272=207 I.C. 145=16 R.N. 19=1943 N.L.J. 86=A.I.R. 1943 Nag. 141.

-Measure of-Sale deed-Covenant for quiet enjoyment-Breach-Measure of damages-Sale price or market value of properties. See LIMITATION ACT.

### DAMDUPAT.

See BENGAL MONEY LENDERS' ACT, S. 31 (a) and (b).

DANGEOUS DRUGS ACT (II OF 1930), Ss. 13 (a) and 32—Scope—Charge of importing opium contrary to Act-Burden of proof-Accused found in possession of opium—No evidence of import from elsewhere—Offence — Conviction — Sustainability elsewhere—Offence — Conviction — Sustainability—Presumption of import—If justified. Raghubara Dayal Missir v. Emperor. [Q.D., 1936-40, Vol. I, Col. 3349.] 191 I.C. 431=13 R.P. 346=7 B. R. 197=42 Cr.L.J. 189=1941 P.W.N. 239=A. I.R. 1941 Pat. 177.

-S 14 (a)—Selling of cocaine—Sentence.

Selling of cocaine is the most objectionable form of disposing of dangerous drugs made punishable by S. 14 (a) of the Dangerous Drugs Act. As persons who take cocaine very rapidly become drug addicts and their reclamation becomes impossible, the more rapidly such a practice is stamped out the better it will prove for the people. The sentence of two months' rigorous imprisonment awarded by the trial Court was enhanced to two years' rigorous imprisonment in revision. (Davies.) Zahoor Ali, In re. 1941 A.M.L. J. 12.

DEBTOR AND CREDITOR—Appropriation of payment-Mortgage bond-Stipulation that no payment to be accepted unless made under registered receipt or endorsed on back of bond—Right of creditor—Mortgagee appro-priating towards debt payment in unregistered receipt though not endorsed on bond—Duty to give credit to such payment.

Where there is a stipulation in a mortgage bond that no payment shall be accepted unless it is made by a registered receipt or unless it is endorsed on the back of the bond, it is of course open to the mortgagee to refuse to appropriate towards the mortgage debt any payment made by the debtor not under a registered receipt and not endorsed on the bond; such a stipulation can, however, be waived, and must be held to be waived when the mortgagee appropriates a payment as a part satisfaction of the mortgage debt. A receipt so appropriating the payment must be accepted and the mortgagee must give credit to the Same. (Manohar Lall, J.) GOPALIEE JHA v. UPENDRA NARAIN JHA. 202 I.C. 495=15 R.P. 122=9 B. R. 8=23 Pat. L.T. 384=A.I.R. 1942 Pat. 408.

Merger—Creditor succeeding to estate of debtor— Effect—Claim by other creditors—Right of retainer of heir Principle—Applicability to Hindu Law—Widow obtaining decree against brother-Death of latter and widow becoming heir-Right to claim rateable distribution as against another

Where a Hindu heir to whom the deceased was indebted succeeds to his property, only the net balance after the deduction of such a debt is taken by the heir. This principle of retainer is not a peculiarity of English law. It is founded on a general principle of jurisprudence, namely, where it is the same hand that has to receive and pay, he cannot sue himself, and the law must infer satisfaction of the debt on the ground that the debt must be deemed to have been paid from and out of the assets in the hands of the representative whether he be the executor or heir, The fact that he is a limited owner, such as a Hindu widow would not make any difference in the application of the principle. There is no reason why it should not be applied to the case of property vesting in an heir. So much of the property as is available in his hands must be deemed to have been appropriated and only the net balance of the estate must be deemed to have vested in him. So that if any other creditor brings a claim for his debt he would be entitled to assert the right of retainer and plead that cannot insist that the money should be paid by him

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the creditor can only claim payment from and out of the balance of the assets in his hands after deduction of his debt. There is nothing in the Hindu Law which precludes the application of this principle. The appellant, a Hindu widow, obtained a decree against R, her brother. She had obtained attachment of his property, before judgment and had also applied for execution. R died and subsequently the respondent obtained a decree against the appellant as the legal representative of R in respect of a debt due by him, the appellant having succeeded to the property of R. Respondent attached R's property in execution of his decree and had it put up for sale. Appellant applied for rateable distribution out of the sale proceeds under S. 73 of the C. P. Code. It was pleaded that there was a total merger of her decree when she became R's heir and there was no decree in respect of which she could claim rateable

Held, (1) that the appellant's claim to rateable distribution was justified and maintainable, although it was open to her under S. 47 to prefer the claim that the amount due to her under her debt should be paid first out of the sale proceeds and the balance only should be available for the respondent's decree: (2) that before rateable distribution could be ordered, an enquiry was necessary for ascertaining whether R had left any other estate besides the property attached and sold, and if it be found that there were assets of R which would cover the value of the appellant's debt to that extent it must be deemed to satisfied and she could claim rateable distribution only for the balance; if there were no other assets of R, the appellant was entitled to participate in the sale proceeds along with the respondent. (Venkata-ramana Rao, J.) THANGATHAMMAL v. VEERAMA REDDIAR. I.L.R. (1942) Mad. 360=54 L.W. 688=199 I.C. 105=14 R.M. 515=A.I.R. 1942 Mad. 260=(1941) 2 M.L.J. 1024.

-Obligations inter se-Mortgage to secure given number of currency notes of another country.

A mortgage in Gibralter to secure a given number of Spanish Peseta notes is a mortgage to secure the repayment of whatever may be legal tender at the time of repayment in Spain where those notes circulate. In a suit in Gibralter on the mortgage, all that the Court has to do is to ascertain what is legal tender in Spain for so many pesetas and then to enquire whether there is a market in Gibralter for the sale and purchase of such Spanish currency and if so what is the market rate. There is no reason why, in preference to the rate obtaining in the Gibralter market, the rate at which Sterling is convertible into pesatas at the Spanish custom house at the frontier should be adopted. For the purpose of the suit, the Spanish prohibition on the import to or export from Spain of the Peseta notes is irrelevant. (Lord Macmillan). ABRAHAM S. MARRACHE v. HER-MINIA ASHTON. 207 I.C. 314=16 R.P.C. 22=A. I.R. 1943 P.C. 69.

Payment to one of several co-creditors—When discharge of liability to others.

A payment made to one of several co-creditors can never operate as a valid discharge in respect of the debtor's liability to the co-creditors if it is not bona fide and is either collusive or fraudulent. (Mulla and Yorke, JJ.) Joti Bhushan Gupta v. B. N. Sarkar. I.L.R. (1945) All. 165—A.I.R. 1945 All. 311.

-Security deposit-Place of repayment Depositee. if can insist on personal attendance of depositor. If a security deposit is to be refunded, the depositee

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only at his place of business where the deposit was made, unless there is a contract between the parties to that effect. If the depositor writes to the depositee and asks the latter to remit the money the latter cannot insist on personal attendance by the depositor or his agent. (Digby, J.) Sheikh Ментав v. Dharma Rao. I.L.R. (1945) Nag 252=1944 N.L.J. 369 =A.I R. 1944 Nag. 330.

DECLARATORY DECREE. See Specific Relief Act, S. 42.

DECLARATORY SUIT-Cause of action -A contemplating instituting suit or complaint against B-Suit by B to declare that A has no cause of action-Maintainbility.

The mere fact that  $\Lambda$  is supposed to contemplate the bringing of an action or launching of a criminal complaint against B; or that A may have stated that he has grounds for such an action or complaint, does not entitle B to institute a suit against A to have it declared that A has not a cause of action against B. That is so whether the result depends merely upon questions of law or upon facts as to which there would or might be a conflict of evidence and a protracted trial. (Blackwell, J.) KANE HARKARANDAS v. MOHANLAL RAMVALLABH. KANHAIYALAL 194 I. C. 814=14 R.B. 9=43 Bom. L.R. 287=A.I.R. 1941 Bom. 219.

DECREE - See C.P. Code, (1908), S. 2 (2). Binding nature—Sufficiency of representation—Bona fide addition of some only of the legal representatives.

Where a suit is brought bona fide without any fraud or collusion against certain persons impleaded as legal representatives of the deceased leaving out others who should or might have been joined, the decree will be binding upon the estate of the deceased on the ground that the estate was sufficiently represented. (Ghulam Hasan, J.) Anant Lat v. Ram Adhar. 198 I.C. 443=14 R.O. 397=1941 O.A. 1071= 1941 O.W.N. 1359=1942 A.W.R. (C.C.) 16= 1942 R.D. 25=A.I.R. 1942 Oudh 216.

Compromise decree—Compromise of suit be lessor against lessee—New condition imposed on lessee —If a penalty—If can be questioned in execution. See Compromise. 210 I.C. 558=16 R.C. 196.

Compromise decree—Default clause—Application for taking possession of immovable property—Execution proceeding-Maintainability.

Under the terms of a compromise decree passed in a suit under O. 21, R. 63, C. P. Code, the plaintiff's title to the suit property was recognised and she was to pay the plaintiff in the prior suit a certain sum of money with subsequent interest. The compromise went on to recite that a mortgage right in the property was thereby created in favour of the decree-holder and that on payment of the amount the mortgage was to stand discharged. The decree further provided that in default of payment of the amount the suit properties were to pass to the decree-holder by right of purchase and he was to be allowed to take possession of the property by means of a warrant obtained in execution proceedings. obtained in execution proceedings. The amount was never paid and eventually the decree-holder applied in execution for possession of the property.

Held, that the decree-holder cannot ask for possession of the property as if he had got a decree for possession. In such a case the parties could not by their agreement provide that what was a simple decree for money should by default of one of the parties auto-

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530=A.I.R. 1945 Mad. 45=(1944) 2 M.L.I.

·Compromise decree—Executability.

If the compromise is mentioned in the operative part of the decree it is embodied in the decree and if it is in the operative part of the decree it is capable of execution. (Thomas, C.J. and Agarwal, J.) LAL BHAGWAT SINGH v. HARI KISHAN DAS. 17 Luck. 249=14 R.O. 268=1941 O.L.R 848=197 I.C. 167=1941 O.A. 865=1941 A.W.R. (Rev.) 949 =1941 O.W N. 1138=A.I.R. 1943 Oudh 1.

-Compromise decree if may be attacked.

Where a decree is passed in consequence of a compromise and is a mere record of the will of the parties, it cannot be regarded to have acquired any greater sanctity than the compromise itself on the ground that it was adopted by the Judge or that the command of the Judge had been added to it. The Judge was not called upon to consider the validity or legality of the compromise and in the absence of any determination of these questions the decree in such cases is liable to the same attack and suffers from the same infirmities which the compromise was open or subject to. (Harries, C.J. Din Mohamed and Abdur Rahman, JJ.) PREM PARKASH v MOHAN LAL. 211 I.C 291=16 R.L. 200=45 P.L.R. 432=A.I.R. 1943 Lah. 268 (F.B.).

-Compromise decree-Nature of-Provision for sale or conveyance of land on terms-Rules applicable -If same

as in the case of a contract.

In the case of a compromise decree which provides for sale or conveyance of immovable property on certain payments being made, the same considerations will apply as would apply to an ordinary contract of sale in the terms of the compromise. The contract of the parties is not the less a contract and subject to the incidents of a contract, because there is superadded the command of a judge. (Davies, C.J. and Weston,  $\mathcal{F}$ .) MADHAVDAS PARMANAND v. JAN MAHOMED I L.R. (1941) Kar. 495=199 I.C. 438=14 R.S. 181=A.I.R 1942 Sind 37.

-Compromise decree—Party withholding knowledge though not making misstatements-Decree obtained by-Vitiated by constructive fraud.

A compromise decree obtained by a party who had made no misstatements but merely withheld knowledge in his possession may, even where there was no moral fraud, under certain circumstances, be nonetheles vitiated by what in the eye of the law amounts to misrepresentation or constructive fraud. (Lobo and Tyabji, 77.) Mouledino v. Parchomal. I.L R. (1944) Kar. 223=219 I.C. 139=18 R.S. 34=A. I.R. 1944 Sind 209.

-Compromise decree—Terms if within scope of suit— Elements for consideration.

The question whether any particular term of a petition of compromise incorporated in a decree relates to the suit or is covered by its subject-matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. The facts undoubtedly have to be looked at as a whole and matter which is not covered by any of the issues in the suit may come within its scope if it constitutes a conmatically become a decree for the possession of immovable property. (Byers, J.) Periyanayakam-formed an integral part of the adjustment of the MAL v. BATCHA SAHB. 221 I.C. 498=57 L.W. claim in relation thereto. (Mukherjea and Blank, JJ.)

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DINDAYAL SHAH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUITA. 46 C.W.N. 713.

-Consent decree—Binding force—Party giving up right-If bound when subsequently it transpires that he had right. CENTRAL CO-OPERATIVE BANK, LTD., BARH v. DASARAT PANDEY. [See Q. D., 1936-40, Vol. I, Col. 2100.] 1940 P.W.N. 1032. Consent decree—Binding nature.

A consent decree raises an estoppel as much as a decree passed in invitum. It is binding as between the consenting parties and their successors-in-interest. (Clarke, J.) GOPAL MADHORAO v. ACHUT SADASHEO. I.L.R. 1942 Nag. 498=196 I.C. 493=14 R.N. 108=1941 N.L.J. 388=A I.R. 1941 Nag. 271.

-Consent decree-Construction-Provision for payment of smaller sum in satisfaction of larger amount on certain conditions—Provision that in case of default larger sum should be paid—If penalty—Forbearance to sue in respect of some instalments—Effect on right in respect of rest.

When there is an agreement, embodied in a compromise decree, to pay a particular sum, followed by a condition allowing to the debtor (defendant) a concession, e.g., the payment of a lesser sum or payment by instalments by a particular date or dates, then the party seeking to take advantage of that concession must carry out strictly the conditions on which it was granted, and there is no power in the Court to relieve him from the obligation of so doing. The stipulation is not in the nature of a penalty. Where the compromise is a contract by which the plaintiff (creditor) undertakes, if a smaller sum is paid in a certain way, to accept that sum in satisfaction of a larger debt, the creditor is entitled to insist on the letter of his bargain. The fact that he shows a little forbearance to his debtor in regard to some instalments is no ground for depriving him of his rights as to the others. (Manohar Lall and Brough, JJ.) KHETRO SWAIN v. PADMANABHA SINGH DEO. 211 I.C. 41=10 B.R. 322=16 R.P. 189=9 Cut. L.T. 61 = A.I.R. 1943 Pat. 403.

-Consent decree— Construction — Suit for Rs. 6,500—Agreement to pay Rs. 3,200 in specified instalments—Provision that on default, Rs. 5,000 should be paid—Meaning and interpretation of if penal provision or concession. See Contract Act.

S. 74. I.L.R. (1943) Kar. 245

Consent decree — Operation as estoppel.

Sahib Nasib Khan v. Qutbunnissa. [See Q. D., 1936-'40, Vol. I, Col. 3313.] I.L.R. (1940) All. 691—192 I.C. 589—13 R.A. 340—A.I.R. 1941

Consent decree—Setting aside as having been fraudulently procured—Remedy—Application for review—Maintainability. See G. P. Code, O. 47, R. 1. 1941 P.W.N. 385.

— Consent decree—Setting aside —Remedy —Separate suit—Inherent power of Court—Party shown not to have consented to compromise-Effect-Power to set aside in

review on ground of fraud.

A court is not competent either to review or in exercise of its inherent powers, to set aside a compromise decree on the ground that the consent of the parties to the compromise was obtained by fraud. The only remedy of the injured party is to institute a suit to set aside the decree on the ground of fraud. Where, however, it is found that the aggrieved party had not in fact consented to the compromise and was not party to it, the Court has inherent power to set aside a decree based on such a compromise. (Rowland and Chatterji, 77.) CHUTUR PRASAD SAH v. BISHUNI KUER. 202 I.C. 666=15 R.P. 137=9 B.R. 43 =1942 P.W.N. 186=A.I.R. 1943 Pat. 13.

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-Consent decree-Setting aside-Right of suit -Consent decree in proceedings under Municipal Act relating to purchase of land-Suit by rate payer to set aside-Competency. See Bombay Municipal Boroughs Act, Ss. 198 AND 204 (2), Froviso. IL.R. (1944) Kar. 53.

-Consent decree-Validity-Undertaking of joint liability by majors and minors-Non-enforceability against minors-Majors-If absolved from liability. Sheonandan Gope v. Shandeo Khatik. [See Q. D., 1936-'40. Vol. I. Col. 3313.] 191 I.C. 597=13 R.P. 332=7 B.R. 235.

-Consent decree-What is-Defendant ex parte-

Decree, if consent decree.

The fact that the defendant in a suit remains ex parte does not mean that the decree passed in such a suit is a consent decree; it can only be a consent decree if the defendant appears and admits the claim. (Horwill, J.) NARASINGA RAO v. RANGAYYA. 205 I.C. 546 - 15 R.M. 891=1942 M.W.N. 685=55 L.W. 808=A.I.R. 1943 Mad. 133=(1942) 2 M.L.J. 610.

-Construction-Charge decree-Maintenance decree creating charge and providing for sale of properties in default of payment-Right of decree-holder to proceed personally

against defendant.

The right of a decree-holder under a decree creating a charge to proceed against the personal property of the judgment-debtor is not extinguished or abandoned merely because the decree directs that the amount is to be realised by sale of the charged properties. The personal remedy can be availed of, however, only after the decree-holder has exhausted his remedy against the charged properties. A decree for maintenance in favour of a Hindu widow directed that the defendants were to pay to the widow maintenance at Rs. 180 per year and that if they failed to pay for any one year at the time fixed, the plaintiff was to recover the same by sale of certain properties which were charged for the payment of maintenance. the defendants committing default, the plaintiff applied to execute the decree by making alternative prayers that certain moneys belonging to the defendants, which were outside the charge properties, should be attached and ordered to be paid to the plaintiff. or on failure of the payment some of the properties charged under the decree should be sold and the decree satisfied out of the sale proceeds.

Held, that the plaintiff was first entitled only to proceed against the charged properties by sale and if the decree could not be satisfied out of the charged properties, the plaintiff would have a right to proceed personally against the defendants. (Divatia, J.). RAMABAI BALKRISHNA v. JANARDAN EKNATH. I.L. R. (1943) Bom. 292=207 I.C. 339=16 R.B. 28

=45 Bom L.R. 244=A.I.R. 1943 Bom. 158 -Construction-Decree for one's brother as well as

for one's self-Creation of trust. There is no legal difficulty in holding that where one obtains a decree for his brother as well as fo himself, he must be regarded as a trustee for ) brother and that he cannot plead that he alone sho benefit because his name alone is entered in it. nett and Madeley, 7.7.) Aparna Bakhsh Sin Chanra Shekhar Singh. 18 Luck. 43/ I.C. 94=15 R.O. 464=1942 O.A. 5266 O.W.N. 639=1942 A.W.R. (C.C.) 345/dos. Construction—Decree passed on comfested as rence to pleadings and agreement—Natural mant being The appellant and respondent was

tenants-in-common in a village, the

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entitled to one-third and the respondent to two-thirds of the nanja and punja lands in the village. In 1908, the respondent brought a suit against the appellant on the allegation that the appellant used the water of a channel marked B in the plan filed along with the plaint, for irrigation of about 14 kulis of his punja land, marked C in the plan and praying for a permanent injunction against such use and against obstruction of the water flowing as mamul to the old nanja lands through the channel C. The suit ended in a compromise decree dated 7-7-1911, which provided that "the defendant shall irrigate only the 14 kulis of land marked C in the plan filed along with the plaint, with the water from the channel marked B in the said plan. In other respects, the defendants should not, in future, convert the punjz lands belonging to him in the village, as nanja lands, and irrigate them with water." description of property and the plan attached to the plaint were subjoined to the decree. On 13-11-1935, the respondent applied for execution of the decree under O. 21, R. 32, C. P. Code, for breach of the decree by the appellant on the ground that the appellant, "for the first time after the compromise decree, had newly brought under nanja cultivation in addition to the extent of 14 Kulis an extent of about 5 Kulis which were bunja and situate adjacent to and around the plot marked C in the plan in or about the last two months, despite the protest of the plaintiff and his men and is attempting to extend the nanja cultivation in the plots marked blue around the land marked C in the plan. The appellant in answer pleaded that the 5 Kulis only received water from the channel B by percolation and drainage from the 14 Kulis and were extensively watered by a well sunk in the five Kulis, and contended that the decree only prevented the direct taking of water from channel B to any new land, and did not prevent him from taking water from another channel marked A in the plan to the 5 Kulis. It appeared that channel A flowed towards the north and into a tank, passing on the way the 14 Rulis, marked C, which lay near to the channel A on its east side. Channel B took off from Channel A, at an earlier point and turned eastwards along the southern edge of the 14 Kulis. The punja lands of the appellant lay round about the 14 Kulis marked C in the west, north and east sides of the 14 Kulis and adjoined channel A on its east side for a certain distance, with a small portion of them on the other side, the western side of channel A.

Held, confirming the order of the High Court, (1) that there was no serious ambiguity in the language of the decree and that there could be no doubt that the 14 Kulis referred to in the first sentence formed part of the punja lands belonging to the defendant in the village, (2) that the opening words of the second sentence taken along with the description of property and plan attached to the plaint which were subjoined to the decree, sufficiently identified the 14 Kulis as such without recourse to the pleading of the compromise agreement, which would equally place the matter beyond doubt; (3) that the words used in the prohibition in the second sentence in their natural meaning referred to all the punja lands belonging to the defendant in the village other than the 14 Kutis and the language used did not limit "water" to water from channel B; (4) that the appellant was, on a proper construction of the decree, prohibited from making use of the water not only of channel B, but also of other existing sources of irrigation in the village for any extra land which he might have converted or might thereafter convert from punja into nanja. (Lord Thankerton). GURUVAPPA NAICKER v. MOUNA GURU-

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SWAMI NAICKER. I.L.R. (1942) Kar. (P.C.) 88 (Supp.)=201 I.C. 298=15 R.P.C. 12=1942 A. W.R. (P.C.) 18=8 B.R. 796=A.I.R. 1942 P.C. 37 (P.C.).

Construction—Direction to defendant to pay amount to plaintiff—Charge created on shares—Provision for instalments—Default clause—Sale of shares on default—Deficiency—Right to proceed against other property of defendant—Fresh personal decree—If necessary. See C. P. Code, O. 34, R. 6, 43 Bom.L.R. 26.

Construction—Executability— Instalment decree— Entire amount becoming due in case of default and property

hypothecated to be taken as foreclosed.

Where an award made a rule of Court provided that in default of payment of the instalments provided the entire balance became immediately due and in lieu thereof, the property hypothecated was to be deemed as foreclosed and the rights of the judgment-debtor were to be deemed extinguished from that date, such decree is not purely declaratory and could be executed. (Bennett, and Ghulam Hasan, JJ.) Tulsa Devi v. Sural Narain. 17 Luck, 121=195 I.C. 610=14 R.O. 100=1941 O.L.R. 601=1941 A.L.W. 815=1941 A.W.R. (C.C.) 275=1941 O.W.N. 965=1941 O.A. 678=A.I.R. 1941 Oudh 587.

— Construction—Mesne profits—De-ree against several defendants holding definite shares—Liability—If joint and several.

Where various sets of people, possessing different interests in land, are held liable for mesne profits, the executing Court will adjust and apportion the respective amounts of such mesne profits to be paid by each. Certain co-sharer maliks who had definite shares in the village and who claimed the right to settle certain diara land settled that land with third persons. The respondents brought a suit against the former on the ground that the co-sharer maliks had no right to settle the land and praying for possession and mesne profits. The suit was decreed and mesne profits were awarded against all the defendants (co-sharer maliks).

Held, that though the decree was in form a joint and several decree, it was in substance not a joint and several decree, but was, on a true construction, a decree against the defendants for their respective shares of mesne profits. Each of them would not therefore be liable for anything more than his proportionate share. (Harries, C.J. and Dhavle, J. Sheo Balak Singh V. Achutanand Singh. 203 I.C. 662=15 R.P. 183=9 B.R. 99=1942 P.W.N. 198 =A.I.R. 1943 Pat. 80.

Construction — Mortgage decree — Decree fixing amount payable and directing mortgagee to remain in possession till payment—Rights of parties—Liability of mortgagee to account. See Mortgage—Accounts. 45 Born, L.R. 87.

——Construction—Mortgage decree in suit on two mortgages—First mortgage on property A—Second mortgage on A and B—Decree directing sale—Amount due on each mortgage mentioned separately and kept apart—Direction for sale of A first and then of B in case of deficiency—Sale of A resulting in deficit—Sale of B—Surplus sale proceed—If can he appropriated towards deficiency.

A suit was filed on two mortgages dated 9-6-1928 and 24-8-1929. The first mortgage was over property A and the second was over A and B. There was a subsequent mortgage in favour of the appellant over B alone. A preliminary decree was passed and it recited separately the amounts due on each mortgage. Subsequently this decree was made final. The preliminary decree, in which the sums due under the two mort-

gages were kept apart, provided that the property A should be sold first and in the event of that property not producing the total amount due to the decreeholder, the property comprised in the second mortgage should be sold to satisfy the decree. In the sale proclamation it was declared that properties would be sold in satisfaction of the amount of the two decrees (the total amount being given.) The sale of property A realised an amount which was not sufficient to satisfy the decree on the first mortgage. Property B was then put up for sale; the decree-holder who was the purchaser under the first sale was also the purchaser in the second sale. The amount realised was sufficient to satisfy the balance due to the decree-holder under the two decrees together, though it was more than the amount due under the second mortgage, i.e., the mortgage over property B. The appellant, the subsequent mortgagee of property B, who had also been implied in the suit as a party defendant applied to the Court to set aside the sale, on the ground inter alia, that the decree-holder-purchaser was bound to deposit into Court the balance of the sale price in excess of the amount due under the seound mortgage, and not having done so, the property must be re-sold.

Held, (1) that the preliminary decree and the final decree based upon it must be construed as a whole, and on such construction, it was never the intention perties comprised in either of the mortgages could be sold to satisfy more than what was due on the mortgage relating to the particular property; (2) that property B could never be made to bear a greater burden than the amount due on the mortgage on that property; (3) that the decree-holder was not entitled under the decree to appropriate the surplus in the 2nd sale towards the deficiency due to him in respect of the first mortgage, i.e., on property A, but had to deposit it into Court under O. 21, R. 16. (Harries, C.J. and Fazl Ali, J.) MAHABIR PRASAD v. JUGAL KISHORE PRASAD. 195 I.C. 837=14 R P. 159=7 B.R. 975=22 Pat. L.T. 313=A.I.R. 1941 Pat.

Construction—Provision for payment by instalments of fixed amounts every month on specific date -Provision for interest on default of payment of instalment on due date—Failure to provide for making whole amount payable in case of default-Decree -If one for single debt or if amounts to decree for separate judgment-debts of instalments. See Limitation Act, S. 20 and Art. 182 (7). 45 Bom.

-Construction—" Suit dismissed with costs"—Meaning of—Separate sets of costs for different defendants.

It is settled that the expression "Suit dismissed with

costs" means that the plaintiff is to pay the costs of all the defendants, i.e., two or more sets, if separate costs have been incurred. It cannot be read as meaning that only one set of pleaders' fees should be taxed in all cases. An order for a single set of costs must be asked for at the time of hearing. Defendants having independent cases and engaging separate pleaders should ordinarily get separate sets of costs. (Broomfield and Sen, JJ.) KASHINATH BALKRISHNAN v. ANANT MURLIDHAR. I.L.R. 1942 Bom. 782=203 I.C. 352=15 R.B. 228=44 Bom. L.R. 629 =A.I.R. 1942 Born 284.
——Construction—"Suit dismissed with costs"—

Meaning-Separate set of costs for defendants-If permissible—Practice in mofussil and appellate side of Bombay High Court. SRIDHAR BALKRISHNA V. POONA CITY MUNICIPALITY. [See Q.D., 1936-'40, Vol. I, Col., 2138.] I.L.R. (1940) Bom. 837=192 I.C. 174=13 R.B. 238=A.I.R. 1941 Bom. 16.

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Construction—Suit on promissory note—Attachment of land before judgment-Compromise decree creating charge onland and directing defendant to pay in instalments-Provision for sale of land through Court in default—Defendant exempted from personal liability—Effect—Decree not registered and hence ineffective for charge—Execution by attachment and sale of land—Permissibility. Chhottibai Daulat-RAM v. Mansukhlal Jasraj. [See Q. D., 1936-'40 Vol. I, Col. 3350.] I.L.R. (1941) Bom. 34=13 R.B. 266=192 I.C. 597=A.I.R 1941 Bom. 1.

-Declaratory or executory—Test—Decree to be taken as a whole-Directions as to rights to be ascertained in future on the happening of uncertain events—Executability.

Where it is clear from the terms of a decree that it seeks to fix over a period of years the rights and duties of the parties, and particularly penalties to be incurred, on the happening of future contingencies, the decree is clearly concerned not so much with the present right of the plaintiff to money or property, but as to his future rights on uncertain happenings in future, and since it is not possible to separate one term from another term of the decree (because the decree has to be taken as a whole), the decree will not be executable but merely declaratory. While the agreement contained therein may be an appropriate matter for a suit, it is not an appropriate matter for execution. An order or decree to be executable must be an absolute direction and not one dependent on any uncertain event in future; only absolute orders in respect of rights ascertained at the date of the decree are enforceable in execution. (Davis, С.7. and Tyabji, Л.). Godhumal v. Mt. Внамвно. I.L.R. (1942) Kar, 326=205 I.C. 256=15 R.S. 118=A.I.R. 1947 Sind 11.

Decree against minor—Guardian not appearing i to ng—If ground for setting aside. defending—If ground for setting aside.

Where a proposed guardian of a minor on recepeaknotice and summons from Court thinks that here is no defence which can be made on behalf of the minor defendant, he is not bound to appear and incur unnecessary expenses which would be debited to the minor's account. The decree cannot be set aside on the ground that the guardian did not appear or defend the suit. (Fazl Ali, C. J. and Manohar Lall, J.) MADHUSUDAN ROY v. JOGENDRA KAR. 23 Pat. 640 =18 R.P. 156=220 I.C. 31=11 B.R. 453=25 P.L.T. 194=10 Cut. L.T. 73=1944 P.W.N. 527 =A.I.R. 1945 Pat. 133.

–Decree against minor—Negligence of guardian ad litem-If ground for setting aside-Absence of fraud

Whether the negligence of a guardian ad Quaere. litem by itself and apart from fraud (actual or constructive) may be a ground for setting aside a decree against a minor. (Lobo and and Tyahii, JJ.) MOULE-DINO v. PARCHOMAL. I.L.R. (1944) Kar. 223= 219 I.C. 139=18 R.S. 34=A.I.R. 1944 Sind

-Decree against minor not properly represented— If nultity—Power of executing Court to refuse execution— Remedy of minor—Separate suit.

A decree passed against a minor who was not properly represented in the suit may be a nullity; but it is not for the executing Court to go into the matter and decide whether or not the decree under execution is a nullity. It must proceed to execute the decree as it stands, when prima facie, the decree is not a nullity and appears capable of execution and leave it to the defendant to institute a separate suit. (Shearer, J.) Gulsari Lal v. Krishna, Chandra Sahu. 10 Cut.L.T. 19.

-Decree of competent Court-Not open to attack in collateral proceedings-Proper procedure to set aside wrong

decree.

If a Court wrongly allows an untenable claim the order may be corrected by resort to one or other of the modes known to law, viz., by review, appeal, revision, or by suit, according to circumstances. They are direct attacks which will succeed if the error of fact or the deviation from the law which is said to vitiate the order is established. But a collateral attack, which is an attempt to avoid, defeat or evade the order or deny its effectiveness by or in a proceeding other than a direct attack with the object of rendering it a dead letter, a nullity to be ignored can only succeed if an absolute lack of jurisdiction over the subject-matter is established. An erroneous decision by a Court of Competent jurisdiction is not open to collateral attack. (Krishnaswami Aiyanga; and Somayya, 37.) NAVANEETHAMMAL V. AMMA KANNAMMAL. I.L.R. (1945) Mad. 216=218 I.C. 58=17 R.M. 312=1944 M.W.N. 480=A.I.R. 1944 Mad. 513=(1944) 2.M.I. I.E. 2 M.L.J. 67.

Effect—If forms root of title—If can operate as assignment of property. JYOTI PRASAD SINGH DEO BAHADUR v. SAMUEL HENRY SEDDON. [See Q. D., 1936—40, Vol. I, Col. 3138.] 192 I.C. 17=13 R.P. 362=7 B.R. 283.

-Executability—Declaratory decree—Decree directing defendant to pay fixed sum every year from date of suit-Nature of-If capable of execution-Res judicata-Construction of decree-Decree executed without objection on prior occasions-Plea in subsequent application that decree

is not executable-If open.

In a suit by a landlord to recover possession of his land from his tenant, or in the alternative for enhancement of rent, the Court held that the defendant was a permanent tenant, but enhanced the rent and directed the exlandant to pay Rs. 304 every year to the plaintiff as enhanced rent. The relevant clause ran as follows: "The defendant do pay the plaintiff an enhanced rent of Rs. 304 per annum in respect of the suit property from the date of suit." The decree was executed by the plaintiff against the defendant thrice and the amounts due recovered without any objection on the part of the defendant. In a subsequent application for execution by the landlord it was contended that the decree was merely a declaratory decree and was not capable of execution.

Held, (1) that the decree directed the defendant to pay Rs. 304 every year and did not merely declare his liability to pay that amount, and the decree which, on the face of it, directed the defendant to pay the amount stated, was capable of execution and should be executed by the executing Court; (2) that the decree having been treated as a decree capable of execution on the previous occasions and having been executed without any objection on the part of the defendant, the question as to whether it was a mere declaratory decree could not be reopened and was res judicata; the decree having been construed in previous darkhasts as a decree capable of execution, an objection to the executability of the decree could not be raised in subsequent proceedings and execution could not be refused on the ground that the decree was merely declaratory and not capable of execution.
(Lokur, J.) Vyasacharya Madhavacharya v. DajiBara. 219 I.C. 375=18 R.B. 116=46 Bom.
L.R. 718=A.I.R. 1945 Bom. 20.

Executability—Husband and wife—Maintenance decree in favour of wife-Agreement that wife should live with husband for a time and execute decree at the end of one Proper or earlier if husband failed to maintain or to mete out

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good treatment-Effect-If destroys right to execute decree on ground of wife living with husband for a while.

A wife obtained a decree for maintenance against her husband, but during the appeal preferred by the husband, the parties entered into a compromise which was embodied in a decree of Court by which the wife was held entitled to recover Rs. 480 for arrears of maintenance, and a sum of Rs. 96 annually as future maintenance, to be paid to her on the 25th August every year, which was made a charge on certain immovable properties of her husband. It was further agreed however, that the husband should take the wife into his house and live with her as husband and wife for a year during which the decree was not to be executed: the decree was to be executed at the end of one year or at any time thereafter, if the husband refused to maintain the wife or otherwise treated her with neglect during the period of one year or thereafter. The wife lived with her husband for a few months in accordance with the compromise decree and then applied to execute the decree as the husband did not mete out to her the good treatment promised by him. The husband pleaded (1) that the compromise was opposed to public policy and therefore void and (2) that the decree was not executable because the conduct of the wife in living with her husband after the decree removed the very basis of the decree,

Held, (1) that the compromise was not opposed to public policy, but far from being so, it was in the interests of family life; (2) that the decree was executable as the wife had no intention of abandoning her rights under it by adopting a fresh relationship with her husband after decree, but was merely prepared to suspend the operation of the decree for a while. wife, by the very contract embodied in the decree, retained her right to execute the decree unless her husband mended his ways. (Horwill, 7.) VENKATA KRISHNAYYA v. LAKSHMAMMA. 214 I.C. 299=17 Krishnayya v. Lakshmamma. 214 I.C. 299=17 R.M. 132=56 L.W. 536=1943 M.W.N. 592= A.I.R. 1944 Mad. 17=(1943) 2 M.L.J. 359.

-Executability—Null and void decree—Proceedings in execution—Validity.

A decree which is a nullity is incapable of execution; and once a decree has been found to be a nullity it follows as a general rule that all proceedings taken in execution of it are also null and void. (Broomfield and Lokur, JJ.) KARASHIDDAYYA SHIDDAYYA V. GAJANAN URBAN CO-OPERATIVE BANK, LTD. I.L.R. (1943) Bom. 400=212 I.C. 205=16 R.B. 332=45 Bom. L.R. 553=A.I.R. 1943 Bom. 288.

-Execution application—Nature of—() bjections how dealt with-If can be allowed without dismissing execution application.

There is no such thing as an application for execution of a decree properly so called. There is an application for the attachment and sale of certain property in execution of a decree or an application for the arrest of the judgment-debtor in execution of a decree or an application asking the Court to take some other steps. If, on objection taken, it is found by the Court that the steps prayed for cannot be taken, it follows that the specification may be dismissed. it follows that the application must be dismissed. An objection cannot be allowed without at the same time dismissing the execution application. To allow an objection without dismissing the execution application so as to allow an amendment for execution by some other means is not possible. (Alsop. J.)
BHANPAL SINGH v. SIYA RAM. 203 I.C. 590=15
R.A. 288=1942 A.L.W. 574=1942 A.L.J. 533
=1942 A.W.R. (H.C.) 296=A.I.R. 1942 All.
442.

-Ex parte decree—Suit to set aside—Maintainability -Allegation of fraudulent suppression of summons—Evidence regarding truth or falsity of claim-If relevant-C.P. Code, S. 47 and O. 21, R. 92.

A suit for setting aside an ex parts decree alleging that the decree had been obtained by fraudulent suppression of summons, is not barred either by S. 47, or O. 21, R. 92, C.P. Code. It is true that the indirect result of the suit will be to set aside the sale held in execution of the decree and therefore the order confirming the sale, but when such indirect result flows from a declaration which can legally be made it cannot operate to prevent the main relief being granted. In such a suit, evidence in regard to the truth or falsity of the claim is relevant for the purpose of determining whether the decree was fraudulently obtained. (Sharpe, J.) Chunnu Mean v. Thanda Mean. 49 C.W.N. 796.

-Finality-Decree not reversed or set aside in appeal, review, revision or by separate suit-If can be superseded by decree in another suit. See Mysore C.P. Code, S. 11. 19 Mys. L.J. 192.

-Form-Mandatory injunction-Need for precision. A decree should always be precise particularly where a mandatory injunction is concerned. a mandatory injunction is concerned. (Bose, J.) KAOSAL MOHAN v. KODU DAJIBA. I.L.R. (1945) Nag. 750=1945 N.L.J. 452=A.I.R. 1946 Nag. 75.

-Interpretation—Reference to judgment.

For the purpose of interpreting a decree no other document is so directly in point as the judgment. To interpret a mortgage decree by a reference to the mortgage-deed and the pleadings and without reference to the judgment, is erroneous. (Sir George Rankin.)
MANARCHAND v. CHAUBE MANOHARLAL. 71 I.A.
65=I.L.R. (1944) Nag. 597=214 I.C. 150=17
R.P.C. 22=11 B.R. 14=57 L.W. 378=1944 M. W.N. 455=I.L.R. (1944) Kar. (P.C.) 185=48 C.W.N. 435=A.I.R. 1944 P.C. 46=(1944) 1 M.L.J. 523 (P.C.).

-Majors sued as minors—Suit to set aside—Maintainability.

A suit to set aside a decree is maintainable on the ground that the plaintiffs who were really majors were sued as minors and a decree obtained. (Mathur, J.) BHANO DEVIV. HARNANDAN LAL. 1944 A.L.W. 481.

A decree of one Court cannot be said to merge in the decree of another Court in another province simply because another Court has chosen to pass another decree on the same cause of action. Both of them would remain executable in different provinces although it is clear that a decree-holder if he happens to be either wholly or partially satisfied in one place, cannot claim the same amount over again in another. (Monroe and Abdur Rahman, 37.) DARBAR PATIALA v. NARAIN DAS GULAB SINOH. I.L.R. (1944) Lah. 79 =A.I.R. 1944 Lah. 302.

sentatives-Validity-Execution against legal representatives -Permissibility.

A preliminary decree in a mortgage suit was passed on 7-11-1932 against a number of defendants. One of the defendants died on 16-3-1934 and a final decree was passed on 3-12-1935 without bringing his legal representatives on record.

Held, that there was no legal or valid final decree against the legal representatives of the deceased sion-Principle underlying.

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defendant and no execution could therefore be allowed against them. (Venkataramana Rao, C.J. and Singaravelu Mudaliar, J.) VENKATASETTY v. THIMMEGOWDA. 49 Mys. H.C.R. 167=22 Mys. L.J. 17.

-Person not party to suit or not properly represented. —If bound—Jurisdiction of Court to sell property of person not party to suit or represented on record—Sale—If nullity.

No decree or order binds a person not a party to the suit or is one who claims under a party to the suit or proceedings. The principle is that nobody can be bound or prejudiced by an order made in a proceeding to which neither he nor the person under whom he claims was a party. If it is alleged that he or his interest was sufficiently represented in the proceedings by another person, 'it must be shown that at the time when the order was passed the representative character was subsisting, and had not been shared by the representative. The Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or were properly represented on the record. As against such persons the decrees and sales purporting to be made would be nullities and might be disregarded without any proceeding to set them aside. (Krishnaswami Ayyangar and Kunhi Raman, 77.) An-JAYYA v. GUNDARAYADU. I.L.R. (1943) Mad. 702=56 L.W. 756=1943 M.W.N. 89=213 I.C. 406=17 R.M. 103=A.I.R. 1943 Mad. 381=(1943) 2 M.L.J. 539.

-Satisfaction-Joint decree owned by several persons -Payment of amount to one decree-holder-Effect-If valid discharge. See Hindu Law—Joint Family—Coparcener. 21 Pat. 322.

Setting aside—Collusive decree obtained by fraud practised by both parties on Court-Suit to set aside by one party on ground of fraud-Competency. See Fraud-Party to Fraud. 42 Bom. L.R. 1185.

——Setting aside—Fraud—Falsity of claim and when a material fact—Domestic and foreign judgments-Distinction between. Kunjabehari Chakrabarti v. Krishnadhone Majumdar. [See Q.D., 1936—1940, Vol. I, Col. 3143.]. I.L.R. (1940) 2 Cal. 477—192 I.C. 563—13 R.C. 323— 72 C.L.J. 447.

——Setting aside—Fraud—Nature of.
Per Mitter, J.—To set aisde a decree on the ground of fraud the fraud alleged must be actual, positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the facts of the case and the decree sought to be set aside must be obtained by that contrivance. (Mitter and Khundkar, JJ.) Mahomed Hashim Ali Khan v. Iff at Ara Hamidi Begum. 200 I.C. 392=15 R. C. 7=46 C.W.N. 561=74 C.L.J. 261=A.I.R. 1942 Cal. 180.

-Setting aside—Fraud—Nature of proof. Durgagati Banerjee v. Taharula Mia. [See Q.D., 1936—'40, Vol. I, Col. 3144]. 195 I.C. 388=14 R. C. 80=A.I.R. 1941 Cal. 215.

-Setting aside-Fraud-Non-service of summons. ROMESH CHANDRA DAS v. NATIONAL TOBACCO CO. OF India, Ltd. [See Q.D., 1936—'40, Vol. I, Col. 3144.] 191 I.C. 535—13 R.C. 251.

——Setting aside—Fraud—Proof required—Sup-pression and non-service of summons—Effect of Kunjabehari Chakrabarti v. Krishnadhone Majum-DAR. [See Q.D., 1936—'40, Vol. I, Col. 3145.] I. L.R. (1940) 2 Cal. 477=192 I.C. 563=13 R.C. 323=72 C.L.J. 447.

-Setting aside—Grounds—Perjury—Finality of deci-

There must be some finality to litigation and the rule that a title once settled by a decision should not be questioned again between the same parties is intended not only to prevent a new decision but also to prevent a new investigation so that the same person cannot be harassed again and again in various proceedings upon the same question. Hence a decree cannot be set aside merely because it is obtained by perjured evidence because, if the contrary were held, it would be necessary to hold new investigations again and again into the same questions, and would allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but that of that which relates to res judicata as well. (Allsop and Verma, 77.) MAHANT BASDEVANAND GIR v. SHANTANAND. 202 I C. 458=15 R.A. 165=1942 A.W.R. (H.C.) 205=1942 A.L.W. 463=1942 A.L.J. 561=A.I. R. 1942 A. 302.

-Setting aside—Right of third party—Collussion-

Proof required.

When it is a question of protecting himself against the effects of a judgment obtained by collusion, it is open to a third party to the judgment to ask that it should be treated as void so far as his interests are concerned, though it may be binding on the parties to the judgment and so has to remain upon the record. His proper remedy is by way of a civil suit. When a question of collusion thus arises, it is not necessary for the plaintiff to have overheard the other parties conspiring together or to have obtained some secret information as to the details of the conspiracy. It is sufficient for him to show in the first instance that the obvious and the necessary effect of the voluntary settlement was to defeat his legitimate interests; and if it cannot be shown on the other side that there was any other motive for the settlement, the Courts are entitled to presume that the intention was to fraud the party injuriously affected. (Tek Chand thd Beckett, JJ.) SHANTI LAL v. HIRA LAL SHEO NARAIN. I.L.R. (1942) Lah. 603=198 I.C. 726 =15 R.L. 351=43 P.L.R. 471=A.I.R. 1941 Lah. 402.

-Setting aside—Suit for —Maintainability—Grounds -Fraud-Nature of fraud to be alleged and proof-Fraud extraneous to suit-What amounts to-Conspiracy and trick

to deceive Court and defendant.

It is established that a decree will not be set aside merely on proof that it was obtained by perjury or that the document upon which it is based was a forged The questions whether there was any document. perjury or forgery are matters which must be taken to have been decided in the suit itself. Where, however, the plaintiff in a suit to set aside a decree on the ground of fraud, alleges that there was a deliberate conspiracy of a number of people not only to hoodwink the Court into passing a wrong decree, but also to deceive the plaintiff (defendant in the former suit) as to the nature of the suit and by a trick to prevent him from resisting the suit, there is a case of fraud much wider than the scope of the matters in the actual suit wherein the wrong decree was obtained and the allegations amount to a case of fraud extrinsic to the matters adjudicated upon in the earlier suit so as to justify the cancellation or setting aside of that decree on the ground that it has been obtained by Traud. (Wadsworth, J.) Konda Boyan v. Palants \*\*Wami Goundan. 54 L.W. 373=200 I.C. 798= 15 R.M. 160=1942 M.W.N. 673=A.I.R. 1942 Mad. 114=(1941) 2 M.L.J. 640.

Transfer for execution, See C. P. Code, S. 39. Validity Decree against wrong legal repre- A.I.R. 1945 Pat. 92.

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sentative of deceased-True legal representative-When bound .- Conditions. See C. P. Code, O. 22 Rr. 4 AND 5. A.I.R. 1941 Pat. 299.

Validity—Decree against wrong legal representative— When bound. See Mys. C. P. Code, O. 22, 20 Mys. L.J. 313.

— Validity—Mortgage suit—Preliminary decree— Modification in appeal—Final decree based on original presiminary decree and not on modified appellate decree-If a nullity-Regularity of decree-If can be questioned in execution.

A final decree passed in a mortgage suit is not a nullity merely because it is based on the original preliminary decree and not on the modified preliminary decree made subsequently by the Court of appeal before the passing of the final decree. The Court passing the final decree has complete seisin of the suit and has jurisdiction to pass a final decree; and if it errs in passing the final decree on the original preliminary decree, though it had been modified in appeal, such error is one curable in appeal but does not make the final decree a nullity. The decree would still be binding on the parties unless it is corrected or set aside in appropriate proceedings. But the regularity of such a decree cannot be questioned in execution proceedings. (Harries, C.J. and Dhavle, J.) Gullan Chand v. Kishore Kuer. 199 I.C. 625=14 R. P. 591=8 B.R. 584=23 Pat. L.T. 162=A.I.R. 1942 Pat. 348.

DECREES AND ORDERS VALIDATING ACT (V OF (1936), S. 2-Scope of-Decrees and Orders in execution of High Court of Bombay-Questioning in Allahabad.

S. 2 of the Decrees and Orders Validating Act makes provision not only for the sanctity of the decrees passed by the Presidency High Court but has declared that orders passed by those Courts will also be sacrosanct. Hence decrees passed by the High Court of Bombay and orders in execution thereof cannot be declared by the High Court of Allahabad to be ultra vires or without jurisdiction. (Bajpai and Dar, 77.)
MURLIDHAR v. GORAKHRAM SADHO RAM. I.L.R. (1941) All. 663=199 I.C. 847=14 R.A. 251= 1941 A.L J. 511=1941 O.A. (Supp.) 682=1941 A.W.R. (H.C.) 252=1941 R.D. 765=1941 A.L. W. 833=A.I.Ŕ. 1941 All. 358.

DEDICATION See (1) TRUSTS; (2) RELIGIOUS Endowments.

-Burning ground-Implied dedication-Inference from user—Test.

The proprietor of land might dedicate the user of it to the Hindu public of the neighbourhood for use as a burning ground. An implied dedication would arise by operation of law from the acts of the owner and is really founded upon the principle of estoppel; it proceeds not upon the principle that a grant has actually been made, but rather on the principle that the owner, having allowed the public to enjoy the user for any particular purpose is estopped from denying the rights of the public to the enjoyment of such user. The test in deciding whether or not there has, in any particular case, been an implied dedication, is to consider what acts have been done by the owner of the land and to see whether they are of such a nature as to prevent or estop him from exercising his full rights as owner of the land. (Shearer, J.)
RANGALAL v. LAKSHMIDHAR MISRA. 219 I.C. 460 RANGALAL v. LAKSHMIDHAR MISRA. 219 I.C. 460 =18 R.P. 132=11 B.R. 428=10 Cut. L.T. 8=

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——Burning ground—Inference from user—Record of rights—Entry of land as smasan or burning ground—If amounts to dedication—Right of landlord to lease out such land with sanction of Collector.

The fact that a landlord or his agent has not prevented the burning of dead bodies on his land by the residents of a locality for a long time may lead to the inference that on every occasion when such a dead body had to be cremated the landlord or his agent granted the relations of the dead man a license to enter on the land and perform the cremation ceremonies. But that cannot lead to any obligation on the landlord or his agent to continue granting similar licenses in future. No dedication can be implied from that fact. Nor would the fact that the land is recorded in the settlement records or khewat as a smasan or burning ground amount to a dedication by the owner as a burning ground. It is impossible and absurd to say that an act on the part of the settlement officer, in making an entry of the kind in the khewat, was or amounted to an act on the part of the landlord, dedicating the user of the land for a certain purpose to the general public or to a certain community. It is quite impossible to suggest that during the settlement operations of 1890-1900, proprietors of land spontaneously dedicated land, in practically every village in their estates, to the general public for using as burning grounds. All they did was to give an undertaking to the Collector that they would permit such land as had been reserved for use as burning grounds to continue to be used in this way. There could be nothing in the undertaking to prevent them from asking the Collector to permit them to resile from it and to use any land, so reserved for some other purpose. Nor is there any reason why in a particular case, the Collector should not grant such permission, if a sufficient cause is made out. The land in suit was part of a large area which was recorded in the record-of-rights as smasan or burning ground. In 1936, the proprietor of the estate in which it was situate, leased out the land in suit to one B for the purpose of constructing a rice-mill on it. Before granting the lease, the manager of the estate intimated to the Collector of the District that the estate was prepared to set apart other land for use as burning ground. The Collector after causing a local inquiry to be made, was satisfied that no hardship would be caused to the villagers, who used it as a burning ground, by the exchange, and sanctioned the lease. The residents of the village brought a suit for declaration that the land in suit belonged to the public of the village and that it was not open to the landlord to lease any portion of it.

Held, (1) that no dedication for user as a burning ground could be implied; (2) that the undertaking given by the proprietor at the settlement, if any was given, was plainly a gratuitous undertaking and it was open to him to resile from it; (3) that as the lease had been sanctioned by the Collector who was consulted before it was granted, it was valid and the suit must therefore be dismissed. (Shearer, J.) RANGALAL v. LAKSHMIDHAR MISRA. 219 I.C. 460=18 R.P. 132=11 B.R. 428=10 Cut. L.T. 8=A.I. R. 1945 Pat, 92.

----Highway. See HIGHWAY.

DEED.

Alteration.
Binding a nature.
Consideration.
Construction.

DEED.

Discharge.
Execution.
Material alteration.
Recitals in.
Rectification.
Third party.
Validity.

———Alteration—Intention of parties carried out thereby —Deed, if vitiated.

An alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument. (Beckett, and Bhandari, JJ.) RAM SUKH DASS. HAFIZ-UL-RAHMAN. 221 I.C. 510=47 P.L. R. 143=A.I.R. 1945 Lah. 177.

-Binding nature—Duty of Courts as to construction of. Where adults put their names to documents they are bound by those documents unless they are able to give convincing proof that truth is otherwise, and it would make, in the long run, for justice if that burden is generally appreciated and generally applied. Courts in India often appear to go out of their way to guess what must have been the truth behind a mass of formal documents. But it is one thing to be, in law, able to go behind the document when there is convincing evidence admissible under the Evidence Act and another thing to arrive at the conclusion, that a document does not mean what it says by a series of brilliant guesses founded on nothing in particular excepting the ingenuity of counsel and the Judge's mind. (Stone, C.J. and Bose, J.) SUNDERLAL v. SITARAM SANTARAM. 1942 N.L.J. 130.

——Consideration—Burden of proof—Admission of consideration by executant of mortgage—Plea of absence or failure of consideration—Onus.

Once consideration for a mortgage deed is found to have been admitted by the executant, the onus of proving its failure would have to be, generally speaking, discharged by him or by those who claim through him. (Abdur Rahman, 7.) SREERAMULU v. THANDAVA KRISHNAYYA. 208 I.C. 156=16 R.M. 182=55 L. W. 594=A.I.R. 1943 Mad. 77=(1942) 2 M.L.J. 452

——Consideration—Burden of proof—Lease registered reciting receipt of advance payment of rent—Denial of payment—Onus—Lessee never in possession—Unus if discharged.

Under ordinary circumstances, a party to a deed, duly executed and registered, who pleads want of consideration therefor is bound to prove his allegation, e.g., when a lessor who has executed a lease deed reciting receipt of advance payment of rent and registered it denies that he has received the advance rent. But when the lessor has not parted with possession to the lessee even after the lease and the lessee has never been in possession and has not attempted to recover possession for a long time that circumstance goes very far to discharge the burden of proof which lies on the lessee to prove absence of consideration. (Davies, G.J. and Iobo, J.) Shivdas v. Mahomed Shah. I.L.R. (1943) Kar. 263=211 I.C. 99=16 R.S. 158=A.I.R. 1943 Sind 192.

——Consideration— Recitals— Plea of want of consideration and incorrectness of recitals—Burden of proof.

The burden of proving that the recitals in a settlement deed are not correct and that the deed is invalid for want of consideration is on the person who alleges the same. (Abdur Rahman, J.) Subbayyan Chettian v. Ponnucham Chettian 200 I.C. 70=14 R.M. 692=1941 M.W.N. 639=A.I.R. 1941 Mad. 727 = (1941) 1 M.L. J. 807.

Construction—Agreement in compromise of disputes. Where an agreement in compromise of disputes provided that one of the parties was to 'remain owner and in possession of the immovable property, taluqdari and non-talugdari for his lifetime without the power of transfer in any form' and that after his death the other party 'shall own and possess the entire movable and immovable property,' the first party is the absolute owner of rents and profits which had been realised in his lifetime and he could transfer them by gift or transfer inter vivos. (Torke, and Agarwal, 77.) HARI SARAN DAS v. HAR KISHAN DAS. 194 I.C. 16=13 R.O. 549=1941 A.L.W. 179=1941 O.L.R. 405 1941 O.W.N. 245=1941 A.W.R. (Rev.) 156=

-Construction—Assignment of rents and profits-If passes property itself-Mining lease-Assignment of income absolutely and for ever-If passes property itself. JYOTI FRASAD SINGH DEO BAHADUR v. Samuel Henry Seddon. [See Q.D., 1936—'40, Vol. I, Col. 3155.] 192 I.C. 17=13 R.P. 362= 7 B.R. 283.

1941 O.A. 208=A.I.R. 1941 Oudh 263.

-Construction-Conflict between description of boundary

and of quantity-Which to prevail.

Where there are two conflicting descriptions of the subject-matter of a transfer or two conflicting parts of the same description, that which is the more certain and stable and the least likely to have been inserted inadvertently must prevail if it sufficiently identifies the subject-matter. Where there is a conflict between the description of the boundaries of the land conveyed and the description of the quantity, the description of the boundaries, if precise and accurate must dominate the description of the quantity. (Nawalkishor, C.J.) DAUD v. NOORA. 1944 M.L. R. 87 (Civ.).

Construction—Deed of guarantee—Surrounding circumstances—If can be looked into for deciding whether there

is a continuing guarantee.

In deciding the question as to whether there is a continuing guarantee, the whole of the surrounding circumstances must be taken into consideration unless the wording of the guarantee is such that the Court is precluded from taking anything else than the deed of guarantee into consideration. (Leach, C.J. and Horwill, J.) NEDUNGADI BANK, LTD. v. DORAIKANNU AMMAL. I.L.R. (1941) Mad. 313=195 I.C. 408 =14 R.M. 185=1941 M.W.N. 17=52 L.W. 951 =A.I.R. 1941 Mad. 282=(1941)1 M.L.J. 281. -Construction—Deed of transfer—General words—Interpretation of so as to give effect to inten-tion of executant. See Mysore T. P. Acr, S. 130. 19 Mys.L.J. 327.

Col. 3351.] 16 Luck. 369=191 I.C. 448=13 R. O. 242=A.I.R. 1941 Oudh 114.

-Construction-Family settlement.

A family settement was executed by three persons B, R and S. Under it B was to remain in possession of the entire property in dispute, but with full proprietary powers over only some property and with powers of transfer in respect of them. In case a son was born to him, he was to get the same rights in the property and R and S were to have no rights in it. After B's death, without leaving any male issue, R was to remain in possession of the entire property without power of transfer and after his death S was to remain in possession of it without power of transfer. After the death of S the oldest descendant of the senior branch of the male descendants of S was to be the

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absolute owner of all the properties. B bequeathed the property by will to R who in his turn bequeathed it to his wife. On a question whether B had the power of testamentary disposition and as to the estate taken

Held, it did not appear that the intention of the parties was that B should have the power to dispose of the property by will. Each executant must be held bound by each part of the deed of family settlement. By declaring that the property should devolve on his death on R, B deprived himself of testamentary power. The estate created in favour of R was only a life estate and as that was the intention of the parties, the property in whatever way it might devolve on R could not confer on him any higher right. B and R were guilty of fraud upon the covenant in the settlement when they attempted to circumvent it so as to secure for R absolute proprietary powers, depriving S and his heirs of their ultimate right to the property under the covenant and it would not be in accordance with justice, equity and good conscience Madeley, J.J. Surendra Vikram Singh v. Munia Kunwar. 19 Luck. 320=212 I.C. 43=16 R.O. 247=1943 O.A. (C.C.) 294=1943 O.W.N. 442=1943 A.W.R. (C.C.) 162=A.I.R. 1944 Oudh

-Construction—Form of transaction—If can be ignored-Rule in income-tax cases. Commissioner of Income-tax, B. & O. v. Kumar Kamaksha Narain SINGH. [See Q.D., 1936-'40, VOL. I, COL. 3351]. 20 Pat. 13=191 I.C. 340=13 R.P. 295=1940 P. W.N. 1040=7 B.R. 172.

-Construction-Gift-Intention of donor-Conduct of parties—Relevancy.

Where the language of a deed of gift is clear and free from ambiguity, any consideration of the conduct of the parties with a view to ascertaining the intention of the grantor or donor is beside the point. (Bennett and Grulam Hasan, J.J.) CHHEDI SINGH v. RAM SINGH. 193 I.C. 611=13 R.O. 474=1941 A.L.W. 307=1941 O.L.R. 306=1941 O.W.N. 412=1941 O. A. 292=1941 A.W.R. (Rev.) 243=A.I.R. 1941 Oudh 369.

Construction—"Government"—Meaning of.
The term "Government" used in an agreement

without any qualification includes both the Central and the Provincial Governments. (Din Mahomed, J.) LAHORE ELECTRIC SUPPLY Co. LID. v. KUNDAN LAL. 42 P.L.R. 798.

-Construction—Grant —Conflict between description by name and description by boundaries—Gaps in description of some boundaries—If ground for rejection—Contemporanea exposito—Application of principle.

It cannot be held that when there is a conflict between the description by name of the property granted under a deed and its description by boundaries; the description by boundaries should be rejected as of no significance or as unreliable on the ground that there are gaps in the description of some boundaries. Decription by boundaries leaving gaps here and there is not uncommon. In such cases the rule of contemporanea exposito can and should be applied to ascertain the true intent of the parties as to whether the disputed property was conveyed under the grant. The application of this principle is not restricted to the conduct of the grantor alone; the acts and conduct of the grantee also are relevant. Nor is there any warrant for holding that this principle can be applied only when the doubts as to the effect

of the deed or instrument remain unsolved by all other rules of interpretation. (Patanjali Sastri, J.) Seela Bodi Naicker v. Zamindar of Bodinaickanur. 217 I.C. 126=17 R.M. 273=56 L.W. 606=(1943) M.W.N. 661=A.I.R. 1944 Mad. 50=(1943) 2 M.L.J. 622.

——Construction—Guarantee or indemnity—Assignment of promissory notes and mortgages by debtor to creditor in discharge of dues—"Receipt" providing for indemnity against loss occasioned in recovery of debts assigned owing to any "Kalan" or dispute arising—Extent of liability—Change in law—Passing of Madras Act IV of 1938 enabling scaling down of debts—Assignee recovering only smaller amount—Right to balance from assignor—"Kalan" meaning of. See Contract Act—Construction. (1944) 2 M.L.J. 371.

— Construction—Indemnity bond—Sale deed by minor's guardian—Indemnity bond by third person to indemnify purchaser against loss if for any reason the purchaser was damnified—Enforcement—Conditions—Liability for costs—Implied term.

On 14-10-1910, 4th defendant on behalf of his minor son executed a sale deed in favour of the father of the plaintiff for a consideration of Rs. 27,302. The minor's maternal grand-father executed an indemnity bond to the purchaser on 25-8-1910, connection with the sale as the purchaser had hesitated to purchase a minor's property under which he agreed that if the minor failed to execute a ratification karamama soon after he became a major, for any reason, and the purchaser was disturbed in his enjoyment and he sustained loss thereby and if he delivered the property to the indemnifier, the latter would pay him (the vendee) Rs. 27,302, which was the sale price. He also agreed, upon receiving a proper account, to indemnify the plaintiff's father against any sum that he might have to pay as a result of any suit for mesne profits that the minor might bring against him. The sale deed was registered on 14-1911, but in addition to the property which was contracted to be sold a small plot of land, which was vacant and of negligible value, was also included in it, in order to get the sale deed registered at a particular Sub-Registrar's office. That item was, however, not intended to be conveyed and all the parties were aware of the same. The indemnifier lived for 4 years after the minor attained his majority and during that time the minor did not dispute the sale made by his father. In 1922, however, he filed a suit against the plaintiff and his brother (their father being then dead) challenging the sale on the ground that it was not binding on him and that in any case it was void as there had been fraud on the registration The indemnifier (the father of the defendants 1 to 3) and the minor's father (4th defendant) were also impleaded in the suit as parties. The suit was ultimately decreed by the Privy Council on 31-1-1936 and the plaintiff was dispossessed in December, 1937 and full satisfaction was recorded on 14-2-1938. On 30—1—1939, the plaintiff to whose share fell the suit debt in a partition with his brother, brought a suit for Rs. 53,737-5-10 being the sale consideration together with the mesne profits and costs paid to the ex-minor (4th defendant's son). The trial Court held that as the plaintiff had failed to restore possession to defendants r to 3 (indemnifier's sons) before the decree was passed, he was not entitled to have a refund of the sale consideration from them, but he gave a decree to the plaintiff against them for Rs. 24,660 in respect of mesne profits and costs. It also

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found that the 4th defendant had received the consideration and was therefore bound under S. 65, Contract Act, to refund to the plaintiff the consideration together with interest from the date of suit. Defendants 1 to 3 appealed against the decree in respect of the mesne profits and costs and the 4th defendant appealed against the decree against him in respect of the sale consideration. The plaintiff preferred a memorandum of cross-objections in the appeal of defendants r to 3, in respect of the balance of his claim, contending that he had fulfilled the terms of the indemnity bond. Held, (1) that the plaintiff was entitled to enforce the indemnity bond and recover the consideration as the executant (father of defendants 1 to 3) had thereby undertaken to Indemnify the plaintiff's father if, for any reason, the minor should raise disputes and cause loss to the purchaser, (2) that the contract was not unenforceable because of the variation that a small plot of land not intended to be conveyed was included in the sale deed for the purpose of obtaining registration in a particular Sub-Registrar's office, especially when the fact was known to the executant of the bond; and there was no reason why the plaintiff should lose his right to be indemnified for any loss resulting from the purchase of the property which was contracted to be sold, though he would not be entitled to be indemnified against any loss that might result from the purchaser of the small item which was not the subject of the contract and which was included in the deed, in order to obtain registration at the particular place; (3) that the purchaser was not in a position to give effective possession after the suit by the minor was decreed, and consequently, the failure to deliver possession to the executant was not a ground for refusing to pass a decree for payment of the sale consideration in terms of the indemnity bond; (4) that the second part of the bond was independent of the covenant in the first part, and therefore the plaintiff was entitled to the amount he had to pay as mesne profits and costs, notwithstanding that the purchaser had not delivered the land to the executant of the bond. The liability to pay costs was, by virtue of S. 125, Contract Act, an implied term in the contract of indemnity, (5) that the 4th defendant was liable to refund the money that he had received from the plaintiff's father in the absence of a finding that the same had been used for the minor's benefit, and it could not be said that the plaintiff was not entitled to relief simply because he was a party to the fraud on the registration law in getting the sale deed registered; (6) that Art. 97, Limitation Act, applied to the suit and the suit was not barred as the cause of action arose only on the disturbance of the purchaser's possession. (Krishnaswami Ayyangar and Horwill, JJ.) RAJAH OF VENRATAGIRI v. SOBHANADRI APPA RAO. I.L.R. (1944) Mad 663 = 216 I.C. 120=17 R.M. 192=1944 M.W.N. 350=A.I.R. 1944 Mad. 211=(1943) 2 M.L.J.

——Construction—Instrument in exucution of power of appointment to take effect on death of executant—Will.

A deed of appointment executed in fulfilment of a power of appointment given in a will and intended to take effect after the death of the executant is a will. The fact that the deed of

appointment was stamped and registered as a deed cannot prevent its operation as a will. (Bennet and Madeley, JJ.) Ali Raza Khan v. Nawazish Ali Khan. 19 Luck. 109=206 I.C. 7=15 R O 443=1943 O.A. (C.C.) 22=1943 O. W.N. 50=A.I.R. 1943 Oudh 243.

Construction-Intention of parties how to be ascertained

A document must be construed as a whole, and it is from the language used therein by the parties and not from any pre-conceived notion of likelihood or unlikelihood, that the intention of the parties is to be ascertained. It is wrong to start with an inspired assumption that it is unlikely that one party could or would have assented to a particular provision and then to hold that because so unlikely a provision is not contained in the document in clear and express terms, it cannot have been intended to apply. (Lord Russell of Killowen.) MAHOMED SAADAT ALI KHAN v. WIQUAR ALI BEG. 208 I.C. 553=16 R.P.C. 75=1943 A.W.R. (P.C.) 23=1943 O.A. (P.C.) 23=48 C.W N. 66=1943 O.W.N. 238=1943 A.L.J. 307=1943 A.W.R. (P.C.) 123=A.I.R. 1943 (P.C.) 115 (P.C.)

Construction—"Khat" or counter-part of lease—Sale by landlord of kudiwaram interest in private land in estate—Terms in khat repugnant to rioti interest—If void or to be given effect to. See Madras Estates Land Act, Ss. 181 and 187 (1) (c). (1941) 1 M L.J. 336 (F.B.)

——Construction—Latent ambiguity—Language plain—Description and name—Inconsistency=Rule of construction—Maxim falsa demonstratio

non nocet-Application of.

Where, in a deed, the two parts of the description of property, namely, the name and the boundaries, do not apply accurately to the same property, though the language used is plain in itself, the deed is one with a latent ambiguity in the description of the subject matter of the grant, and the Court has to arrive at the true meaning and intention of the parties, aided by such established rules of construction as are properly applicable to the case and such extrinsic evidence of surrounding circumstances as may throw light on the issue. All the rules of construction properly applicable should be called in aid to ascertain the true meaning of the deed, and it is found still not possible to reconcile the inconsistent parts of the description that the maxim falsa demonstratio non nocet can be invoked as a last resort to justify the rejection of some part of it. (Patanjuli Sastri, J.) Seela Bodi Naicker v. Zamindar of Bodinaickanur. 217 I.C. 126=17 R.M. 273=56 L.W. 608=1943 M.W.N. 661=A.I.R.: 1944 Mad. 50=(1943) 2 M.L.J. 622.

——Construction—Lease—Extent of property demised—Difference between area and description—Which to prevail—Rule—Document of title—Principles of construction—Prior document

relating to same property—Use of.

In the case of a deed such as a lease, the question as to what has been demised turns upon the true construction of the lease. What the Court has to see is what are the operative provisions of the deed and what is actually granted by those operative portions. The proposition, that where the area goes against the boundaries

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the boundaries should prevail, cannot be accepted as a universal rule. The boundaries given in the schedule to the document cannot control the operative portion in the body of the document when they are merely descriptive. Documents of title are to be construed in accordance with their own terms. When the property dealt with under the deed has been the subject of more than one transaction, the prior transactions cannot be regarded as controlling the construction of the later document, but can be referred to if they lend some independent corroboration of the view which the Court may take on a construction of the document itself. (Rowland, 1.) Equivable Coal Co., Ltd. v. A. N. Mitter. 193 I.C. 737=1941 P.W.N. 643=15 R.P. 620=7 B.R. 633=22 Pat. L.T. 304=A I.R. 1941 Pat. 472.

— Construction—Lease—Land included im—Reference to description of property—If sufficient.

In order to ascertain what land is included in a lease, the who e document must be considered and not merely the so-called "description of the property" at the end thereof. (Lord Russel of Killowen.) Andiappan Ambalam v. Meyappan Serval. I.L.R. (1945) Kar. (P.C.) 4=221 IC. 95=1946 P.C. (Rul.) 43=A.I.R. 1944 P.C. 80.

---- Construction-Lease or sale.

Where a deed was executed by an ex-proprietary tenant purporting to be a lease in perpetuity, the lessee being liable under the deed to pay the superior proprietor rent due to him from the ex-proprietary tenant and also to pay a smaller sum of money as rent to the ex-proprietor, it amounts to a lease and not a sale. The absence of an express reservation of right of re-entry in case of default does not take it away from the category of leases. (Bennett, J.) BHONDU SINGH v. MAHADEO SINGH. 17 Luck. 401=197 I.C. 665=14 R.O. 332=1941 O.W.N. 1320=1941 A.W.R. (Rev.) 1117=1941 O.A. 1002=A.I.R. 1942 Oudh 151.

----Construction—Lease or sale.

Where an under-proprietor transfers to another transferable and heritable rights for a premium reserving for himself a certain rent and malikana dues and continues to be recorded as under-proprietor, the status of the transferee cannot be that of an under-proprietor as the sin ultaneous existence of two under-proprietary rights in the land is inconceivable and the transfer can only be a lease and not a sale; an under-proprietor can only transfer such rights by a sale in which he reserves no interest for himself. He cannot transfer them and at the same time reserve some interest for himself. A distinction must be drawn between deeds of this rature executed by superior proprietors and similar deeds executed by under-proprietors. The position of the parties is in the one case consistent with a sale, in the other it is not. (Bennet, J.) SPI NATH v. RAM NARAIN. 18 Luck. 303=15 R.O. 257=204 I.C. 85=1942 A.W R. (C.C.) 324 (1)=1942 O.A. 432=1942 O.W.N., 504=A.I.R. 1943 O.udh 125.

Construction—Lease or sale—Ccal mining lease and sale of coal land—Distinction. Commissioner of Income-tax, B. & O. v. Kumar Kamakera Narayan Singh. See [Q.D., 1:36-'40, Vol. J, Col. 3351.] 20 Pat, 13=191 I C. 340=13 R.P. 295=1940 P.W.N. 1044=7 B.R. 172.

-Construction-Lease or transfer.

The shebaits of an endowment executed a socalled trust-deed purporting to appoint a trustee on certain terms. It recited the difficulty of the shebaits in managing the endowment and vested the so-called trustee with powers of managing the land, placed on him the duties of repairing the temple conducting litigation, collecting rent and so on. It allowed him half of the net profits as his remuneration, the other half to accumulate for the benefit of the endowment it being provided that the so-called trustee should have the right of remaining in possession for 20 years after his dues were cleared off, with certain consequential provisions.

Held, that the deed was not a transfer of the interest of the shebaits in the debutter property in favour of the grantee, but a lease of that property for the purposes of convenient management. (Blank, J.) JITENDRA NATH CHATTERJEE v. BIRENORA NATH CHAUDHURY. 76 C.L.J. 244.

-Construction-Mortgage or charge-Use of words 'mortgage' and 'redemption'.

When persons are used to recognised legal terms in a form of transaction, it is to be presumed that they intend that those terms should have their ordinary meaning. When a person definitely states in a document that he is mortgaging a property and then refers to its redemption, the document must be treated as creating a mortgage and not merely a charge which does not carry with it an interest in the property. It is immaterial that the document does not state in precise terms that any interest is being transferred. (Tek Chand and Beckett, JJ.) SAMPURAN SINGH v. AHMAD DIN. 198 I.C. 100=14 R.L. 300=43 P.L.R. 277=A.I.R. 1941 Lah. 274.

-Construction—Mortgage or lease.

Where a document purported to grant a lease of a share of certain property for a period of five years to the grantee at a certain rent per annum and the grantee was given a right 'tarradud wa abad karna' and that he might keep the land as his khudkasht but might not let it to relatives or others for cultivation, nor get any one else's name entered in the papers and it also recited that a certain sum was taken by the grantor as 'peshgi' on the security of the snare and that he would redeem it by a particular date, the document is actually a mortgage and in nature and effect a usufructuary mortgage with a minimum period of five years for redemption. (Yorke, J) Mahomed Jafar v. Lal Bahadur. 192 I C. 420=13 R.O. 356=1941 A.W.R (Rev.) 13=1941 R.D. 11=1941 O.L.R. 179=1940 O.A. 1284=1940 O.W.N. 1352=A.I R. 1941 Oudh 198.

-Construction—Mortgage or lease.

Where an instrument does not purport to create a security for the payment of any money and does not provide for redemption expressly or by implication but merely grants land for a fixed term of years free of rent in consideration of a sum already paid, the transaction evidenced by it is not a mortgage but is a lease for a fixed term. (Pal. J) JASHODA KUMAR VAJUMDAR v. KALINATH MAJUMDAR. 76 C.L. J. 475.

-Construction-Mortgage or lease-Kabuliyat-Provision for payment of rent in advance in fixed term-Provision for payment of rent at mortgagor's failure to pay the mortgage money

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fixed rate after term in case lessee wished to

retain premises-Mortgage or lease.

There is no question of property being held in mortgage unless it is held as security for the debt, and to constitute a mortgage there must also be provision, express or implied, for a right of red-mption. A document which is a kabuliyat with a provision for payment of rent in advance in a lump sum, and which provides for the lessee remaining in possession for a fixed period of years in consideration of the advance paid, and for payment of a rent at fixed rate after the period fixed if the lessee wished to retain the premises after the period, can in no sense be described as a mortgage of any sort. It is merely a lease, and the lessee is in possession only as a tenant and not as a mortgagee, there being no provision whereby the property is held as security for debt and no provision at all for redemption. (Chatterji and Meredith, II.). GULAB CHAND PRASAU v. RAM KUMAR. 193 I.C. 533=13 R.P. 601=22 Pat.L.T. 230=7 B.R. 554 =A I.R. 1941 Pat. 296.

-Construction- Mortgage or Lease-Lease

mortgage.

A document in the form of a lease mortgage whereby the executant receives a certain amount. and stipulates that the transferee should remain in possession of a certain land for a definite term and after the expiry of that term the land would come back to him without payment of any money, amounts to a lease and not a mortgage. (Almond, C. J. and Mir Ahmad, J.) Mohd. Akbar Khan v. Fateh Mohd. Khan. 205 I.C. 497=15 R. Pesh. 97=A.I R. (1943) Pesh. 15.

-Construction-Mortgage or pledge-Endorsement of promissory notes by payee to creditor as security for amount due—If pledge or mortgage. See COMPANIES ACT, S. 109 (1) (e). (1943) 1 M.L.J. 142.

——Construction—Mortgage or sale.

A deed recited "The entire fields mentioned" above....have been sold conditionally to you for the above-mentioned amount and have been alsoput into your possession. You should enjoy in every way the above-mentioned fields from this day up till 5 years keeping the same in your possession up till. for 5 years. Your amount shall not carry any interest and my fields will not carry any rent, etc., up till the period of the above mentioned 5 years as agreed. You should pay the land revenue of the ahove-mentioned fields and sow the same and reap the crop or get it reaped by letting out on patta. On the afore-said agreed time, I shall pay you...and shall obtain a receipt and shall redeem my fields. In default of payment of your amount. on the above-mentioned agreed time it is to be understood that this conditional sale is an absolute sale,"

Held, that the deed amounted to a mortgage and not a sale subject to condition of reconveyance. (Stone, C. J. and Niyogi, J.) VITHOBA V. NARAYAN. I.L.R. (1942) Nag. 592=202 I.C. 595=15 R.N. 91=1942 N.L.J. 445=A.I.R.

1942 Nag. 115.

-Construction-Mortgage or sale.

Where there was a specific condition incorporlump sum-Lessee to remain in possession for ated in the document to the effect that on

on a certain occasion the mortgagor would deliver possession of the house and would execute a further stamped document the transaction is only a mortgage by conditional sale and not an absolute transfer of ownership. (Ranjitmal, J.) KESIMAL v. PERTAPMAL, 1942 M.L.R. 66 (Civ.).

-Construction—Mortgage or sale.

In order to determine whether a document is a mortgage or sale, the test is to discover the true, jural relation between the parties arising from the terms of their contract whether it is one of debror and creditor or seller and purchaser. (Grille, C. J., Niyogi and Pollock, JJ) RUKHMABAI v. SHAMLAL. I.L.R. (1944 Nag. 568—1944 N.L.J. 357—A.I.R. (1944 Nag. 289 (F.B.).

-Construction-Mortgage or sale-Conditional mortgage-Clog on redemption. See T. P. (1944) 1 M.L.J. 30. Act, S. 41

-Construction-Mortgage or sale-Option to repurchase within ten years-Sale to become

absolute in default of payment.

Where a transferor un ler a document of apparent sale is allowed by the terms of it to repurchase at any time during the tenth year, the provision is as consistent with a mortgage as with a sale: rather it suggests the former. Further, a provision that if the entire consideration money is not paid by the executant to the vendees before the expiry of the tenth year, the sale shall be deemed to be an absolute sale, in no way operates against the theory of mortgage; on the contrary it supports it. (Bennet and Madeley, JJ) SHAMBHU SINGH v JACDISH BAKHSH SINGH. 17 Luck. 198=195 I.C. 828= 14 R.O. 123=1941 O.L.R. 626=1941 A.L.W 852=1941 O A. 722=1941 A.W.R. (Rev.) 757 =1941 O W.N. 994=A.I.R. 1941 Oudh 582.

-Construction-Nature of transaction-Oral

evidence-If can be considered.

When a document speaks clearly for itself, there can be no question of considering any oral evidence regarding the real nature of the transaction. (Almond, J. C.) FAZAL MAHOMED v. GHULAM HAIDFR. 212 I.C. 306=16 R. Pesh. 79 =A.I.R. 1944 Pesh. 15.

-Construction—Nischaya-patram— Malabar tarwad-Partition or maintenance arrangement-Test. See Malabar Law-Family Arrange-MENT. A.I.R.1944 Mad, 108.

-Construction-Partition-Sons given shares and wife given some lands for maintenance-

Nature of interests taken-Devolution.

Where by a deed of partition equal shares were given to the two sons of the proprietor and an area of 125 bighas was reserved to the wife for maintenance, and there were no words in the deed to show that the grant to the wife was a grant for life, and there was no restriction on alienation on her part and no provision for its ultimate devolution on her death the interest created was not merely a life interest. It could not be con-strued as a transfer of 125 bighas in favour of the sons subject to a charge of maintenance and as the intention was to keep this. Iand as separate and distinct from the proprietary share it did not on the death of the lady merge in the proprietary share and pass to the holder of it but devolved upon her heirs. (Ghulam Hasan, J.) KAMESH-

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WAR DATT v. KESHO DAT RAM. 17 Luck. 238= 196 I C. 350=14 R O. 155=1941 R D. 888= 1941 O.L.R. 677=1941 O.A. 763=1941 A.W.R. (Rev.) 829=1941 O.W.N. 1047=A.I.R. 1942 Oudh 48.

-Construction—Partnership—Agreement between zamindar and money-lender-Zamindar contributing land and money-lender contributing capital-Money-lender to cultivate land and to charge interest on money spent for cultivation-Money-lender to have same interest in land as zamindar-Effect of deed.

A registered deed entitled an instrument of partnership embodied an arrangement between a zamindar and a money-lender, the zamindar owning land and the money-lender owning the capital, and in view of the contribution of each party to the partnership, the land in one case and the capital in the other, the profits of the cultivation of the land was to be shared. The land was to be cultivated by the money-lender who had to incur expenses of cultivation and to charge interest. The deed inter alia provided "From today we are equal partners in the uncultivated lands as well as the survey Nos . . . , to which I, the executant No. 1, am entitled, or in whatever other land we accept from t e Government. That is to say the aforesaid Hindu (money-lender) shall in every respect have as much right as I, the executant No. 1, have to the land ....

Held, on a construction of the deed that the clause must be read in relation to the document as a whole, and that it only meant that the moneylender should have the same rights in the land as partner as had the zamindar, and there was no transfer of title to any share in the land itself. The land was an asset of the partnership and all the land belonged to the partnership which was constituted by the deed. (Davis, C.J. and Weston, RAKHIALKHAN v. CHOITHRAM. I.L.R. (1944) Kar. 14=A.I.R. 1944 Sind 176.

-Construction—Principles.

The cardinal rule of construction of deeds is to ascertain the intention of the executant as disclosed from the language used in the deed. Such intention should be effectuated so far and as nearly as may be consistent with the law to which the executant was subject. (Bennett and Ghulam Hason. JJ.) CHHFDI SINGH V. RAM SINGH. 193 I.C. 611=13 R.O. 474=1944 A.L.W. 307=1941 O.L.R. 306=1941 O.W.N. 412=1941 O.A. 292 =1941 A.W.R. (Rev.) 243=A I.R. 1941 Oudh 369

whole to ascertain intention. Ganpar Das v. HARIVALLABH. [See Q.D., 1936-40, Vot. I, COt. 3352.] I.L.R. (1942) Nag. 126=13 R.N. 265=192 I.C. 513=A.I.R. 1941 Nag. 1.

-Construction — Principles — Existence of ambiguity essential to justify looking beyond the document-Stage when and where to stop.

When it is a matter of a construction of a document the first and the best thing to do is to look at the document and it is only when you find some ambiguity that it is possible to look beyond the document at anything whatsoever. As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it according to the maxim

C.J. and falsa demonstratio non nocet. (Stone, Bose J.) VITHAL v. CHINTAMAN. 1942 N.L.J.

Construction— Principles—Falsa demons-

tratio non nocet—Meaning of.
The first and fundamental principle of construction of deeds is the principle of falsa demonstratio non nocet which may be formulated thus:-If there he a description of the property sufficient to render certain what is intended, the addition of a wrong name, or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars will have no effect. In all cases, the following elements must be ascertained from the document, where the different parts of the descrip ion of the parcel do not agree: -(i) which part of the document adequately defines the subject intended to pass, and (ii) which part thereof contains the erroneous description of the subject. (Mitter and Khundkar, JJ.) PROVINCE OF BENGAL v. MAHOMED YUSUF. I. L.R. (1942) 2 Cal. 378=206 I.C, 118=15 R. C. 667=A.I.R. 1943 Cal. 122.

Construction- Principles- Provisions of Court-Fees Act—Relevancy. See INTERPRETATION OF STATUTES—ANALOGOUS ACTS. A.I.R. 1943 Pat. 433.

Construction- "Purusha Santhathi"- If includes illegitimate sons. See HINDU LAW-IM-PARTIBLE ESTATE-MITAKSHARA-SUDRA FAMILY ILLEGITIMATE SONS OF COPARCENER. (1942) 1 M. L.J. 132 (P.C.).

Construction—Real character—Ascertainment-Test-Description by party, if a guide. RAMMAN LAL V. RAGHUNATH SHANKAR. [See Q] D. 1936-40, Vol. [, Col., 3352.] I.L.R. (1941)
All. 17=194 I.C 347=13 R.A. 495=1941 A.L.
J. 55=1941 O.W.N. 388=1941 R.D. 130=1941 Ã.L.W. 277=A.I.R. 1941 Alì. 56.

-Construction—Receipt or promissory note. An entry in an account book showing the balance due after settling accounts with the thumb impression of the defendant on an one anna stamp and containing particulars as to mode of repayment but not containing any entry anywhere either as to the name of the owner of the account book or any indication as to whom the amount payable therein is due, is a receipt properly stamped and an undertaking enforceable in law concerning the manner in which the amount borrowed is to be repaid and not a promissory (Davies.) GANGA SAHAI v. FATYA. 1941 note. A. M.L.J. 71.

—Construction—Release—General words.
Per Nasim Ali, J.—The general words of a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. (Syed Nasim Ali and Pal, II.) LONDON AND LANCASHIRE INSURANCE CO. LTD v. BENOV KRISHNA MITRA 220 I.C 379=18 R.C. 143=78 C.L.J. 129=A.I.R. 1945 Cal. 218

-Construction—Relinquishment—Gift.

Where a person says that he has relinquished his legal share in favour of another and does not merely withdraw from the scene and leave the property to pass to those who would have inherited it if he had not been alive on the death of the owner of the property and no con ideration is cut down by a general description as to boun-smentioned in the deed, the terms are such that daries and that the lane was included in the con-

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they were intended to transfer the right and share of the executant and it was a deed of gift and was not a deed of relinquishment although it was so described. The nature of the deed depends upon its terms and not upon the name that is given to it by the person who executes it. (Allsop and Bennett, IJ.) MOHAMMAD HUSAIN KHAN v. MUSTAFA HUSA'N KHAN. 1945 A.L.J. 480= 1945 O.W.N. (H.C.) 297=1945 A.W.R. (H.C.) 318=1945 A.L.W. 344=A.I.R. 1946 All. 85.

-Construction-Rules-Intention of executant.

The intention of a person executing a document must be gathered from the language used. The document has to be read as a whole and each clause has to be read in relation to the other parts of the document, and, an attempt should be made to arrive at an interpretation which will harmonise and give effect to the other clauses in the document. The name which an executant gives to the document may give some indication as regards the nature of the transaction, but it is not decisive. The substance of the document must be looked to and not merely the name given v. Madanial. I L.R. (1944) Nag. 788=1944
N.L.J. 502=A.I.R. 1945 Nag. 64.

Construction—Rules as to—Intention of

party. Mahowed Ali v. Dinesh Chandra Ray. [See Q.D. 1936-'40, Vol. I, Col. 3171.] 193 I. C. 540=13 R C. 413.

-Construction-Rules governing-Object. It is a well-recognised rule of construction of deeds that the object of all interpretations is to discover the intention of the parties and that intention must be gathered from the written instrument itself. The Court has to ascertain what the parties meant by the words they have used and to give effect to the intention which is expressed by the words used by the parties themselves. Hence in the first instance endeavour must be made to deduce the intention from the actual words used in the instrument and it is only when the words are ambiguous and do not yield clear meaning that the extraneous evidence of sur-rounding circumstances may be looked into. The sense and the meaning of the parties in any particular part of an instrument may be collected ex ante cedentibus et consequentibus. Every part of it may be brought into action in order to collect from the whole one uniform and consistent sense. (Stone, C.J. and Niyogi, J.) VITHOBA v. NARAYAN. I.L.R. (1942) Nag. 592=201 I C. 595=15 k.N. 91=1942 N L.J. 445=A.I.R. 1942 Nag. 115.

-Construction-Sale-Discrepancy between description and boundaries.

Where a sale deed contained a description of the property as follows: "one tiled house...and there is courtyard beyond .... In this there are a pucca latrine and a water pipe. Length of all is 33 feet south north and breadth 18 feet east west. This land together with the site, superstructure and the land within the boundary limits.... Boundaries of this (are as follows):-On the east there is a lane of 3 feet and a half as also a Savari bungalow.....' and the house was only 14 feet wide.

Held, that the sale deed contained a prior description which was particular and which was not cut down by a general description as to boun-

veyance. (Stone, C.J.) MAHOMED ABDUL KARIM ABDUL SATTAR. 1941 N.L.J. 242=A.I.R. 1941 Nag. 162.

-Construction-Sale of khewat land including "jumla Haquq mutalqa"-Sale, if includes

appurtenant shamilat.
Where in a deed of sale of khewat land, the shamilat is not expressly mentioned as having been sold, but the property sold includes "jumla" Haquq mutalqa" the sale not only relates to the khewat land but also includes the appurtenant (Tekchand, J.) MENGHA RAM v. 198 I.C. 199=14 R.L. 309=43 P.L. shamilat. Makhna. R. 424=A.I.R. 1941 Lah. 416.

——Construction—Settlement deed by Hindu in favour of his wife for maintenance—Unchastity of wife after death of settlor—If entails for-

feiture of estate.

A Hindu by a settlement deed gave certain properties to his wife. The deed inter alsa provided that the wife "shall during her life live in enjoy the under-mentioned properties." After the lifetime of the settlor, his widow became unchaste. The heirs of the settlor thereupon claimed that the widow forfeited the estate on account of her unchastity.

Held, that in the absence of any dum casta clause in the deed of settlement under which the properties had come to vest in the wife for her life, no forfeiture could be held to have been incurred on account of her subsequent unchastity. (Abdur Rahman, J.) Subbayyan Chettiar v. Ponnuchami Chettiar. 200 I.C. 70=14 R.M. 692=1941 M.W.N. 639=A.I.R. 1941 Mad. 727 =(1941) 1 M.L.J. 807.

-Construction-Settlement deed by Hindu woman-Gift of property to two grand-daughters for life and after their lives to their issue in equal shares—Interest taken—Joint tenants or tenants-in-common-Issue of grand-daughters-

Vested interest of.

R, a Hindu woman, executed on 2-11-1916, a deed of settlement in favour of her son-in-law by which she directed that her properties were to be enjoyed by him during his lifetime and after his death "your daughters, viz., (1) T and (2) D shall enjoy during their lifetime and after them, issue of both shall take in equal shares." T died in 1919, leaving a daughter L, who died unmarried in 1931. T's father, R's son-in-law died in 1926. All the properties were in the possession of D. In 1937 T's husband (L's father) brought a suit for a declaration of title and recovery of possession of half of the properties on the footing that Lacquired on her birth a vested and absolute interest in one half of the properties which on her death devolved on him as her heir.

Held, (1) that the daughters T and D took under the deed not as joint tenants but as tenantsn-common absolutely with vested rights in their issue; (2) that it could not have been the intention of the settlor that the issue of T who predeceased D should after the death of their mother, remain unprovided for until the death of the other sister; and (3) that L's heir, her father (plaintiff) was entitled to claim a half-share in the properties from D and her issue. (Happell, 1) DEVARI AMMAL v ADINARAYANA CHETTY.
214 I.C. 295=17 R.M. 129=56 L.W. 553=1943
M.W.N. 770=A.I.R. 1944 Mad. 28=(1943) 2 M.L.J. 579.

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-Construction-Settlement-Gift to unborn person-Gift of income to son and thereafter to grandson - Power of revocation reserved to settlor—Grandson not in existence at date of settlement—Validity of gift to grandson. See T. P. Act, S. 15. 47 Bom.L.R. 287.

Construction - Settlement by Hindu in favour of wife before adoption of son-Wife to have life-estate and after her death property to be enjoyed by adopted son—Death of wife after adoption—Remarriage by father and birth of another son—Right of adopted son.

T, a Hindu, who had no issue, adopted a son (the plaintiff) on 13-7-1930. Two days before the adoption he executed a settlement deed in favour of his wife A under which it was recited that she was put in possession of his property for her food, clothing, etc., for her lifetime and that after her lifetime the boy to be adopted should take possession, hold and enjoy the property with absolute right and titte. She was to have a life-estate in the property for her lifetime and in case she died before the settlor, the latter was to enjoy the property himself. His wife A died in 1931. T thereafter married a seco d wife and had a son by her in 1934 and died in 1941.

Held, that under the settlement deed which was in favour of A, the plaintiff (adopted boy) did not get any rights in praesenti, and that only on the death of T, did the plaintiff become entitled to the property, and as an adopted son, according to Hindu Law, he had to share it along with the after-born son and his stepmother. (Rajamannar, J) PANKAJAMMAL v. PARTHASARATHY AYYANGAR. 58 L.W. 584=1945 M.W.N. 700=(1945) 2 M.

L.J. 453.

Construction-Slavery bond-Advance to agricultural labourer-Advance not to be called in during service-Provision for recovery of same on termination of service with interest from date of cessation of service-Labourer not prohibited from seeking employment elsewhere—Enforceabi-

lity of bond.

The first respondent and his son-in-law, the second respondent, executed to the petitioner on 18-7-1929 a bond, under which the second respondent was to work as a farm labourer for the petitioner. The respondents received in cash, an advance of Rs. 86, which was not to be called in while the second respondent worked for the petitioner but in case he refused to do so, the advance was to be repayable with interest at two per cent, per month from the date when the petitioner ceased to have the use of the second respondent's services. The second respondent was not, under the bond, prohibited from applying for service elsewhere. He left the petitioner's employment on 1-5-1942 and thereupon the petitioner filed a suit to recover the money due under the hond. He, however, claimed interest only at 6 1/4 per cent. per annum. The suit was dismissed on the ground that the bond constituted a slavery bond.

Held, that the bond could not in law be regarded as a slavery bond, there being nothing in it in the nature of a slavery bond. Though the rate of interest stipulated was high, the Court had power to reduce it and further the petitioner had ciaimed interest at 6 1/4 per cei t. and therefore the suit should be decreed. (Leach C. J., Wadsworth and Patanjali Sastri, JJ.) SREENIVASA IYEB

v. GOVINDA KANDIYAR. I L.R. (1945) Mad. 319 =218 I.C. 166=18 R.M. 1=1945 M.W.N. 11= 57 L.W. 613=A.I.R. 1945 Mad. 50=(1944) 2 M.J. 1393 (F.B.).

2 M.L.J. 393 (F.B.).

Construction—Stipulation depriving person

of statutory right.

Any stipulation in a document which is said to have the effect of depriving a person of his statutory right must be construed strictly and if there is any ambiguity in it, a construction in favour of maintaining the statutory right should be adopted. (Sen and Blank, JJ.) HEM CHANDRA NASKAR v. HARENDRA LAL. 49 C.W.N. 634.

----Construction-Surrounding circumstance

-Admissibility of evidence as to.

Evidence of surrounding circumstances is admissible to assist in the construction of a document about the legal effect of which the parties are at issue. Where the real dispute between the parties was whether a transaction was a sale or mortgage such evidence is admissible. (Niyogi, J.) LALCHAND v. RAM SINGH. 1942 N.L.J. 136.

----Construction-Theka or mortgage.

Where the terms of a document were such as are consistent with a theka and in all its terms the document was described as a thekanama and not as a mortgage deed and the only uncommon condition was that the lessee was not liable to be ejected until certain security deposited by him had been paid off, the document is a pure lease and not a mortgage and even the uncommon condition will not turn the document into a mortgage, for a theka lease may contain any conditions which the proprietors might agree to. (Harper, S.M. and Sathe, J.M.) MAKKA LAL v. GANGA SINGH. 1940 O.W.N. 1233=1940 R.D. 582=1941 A.W.R. (Rev.) 80 (2)=1941 O.A. (Supp.)

Construction — Usufructuary mortgage—Rehan deed—Advance of money to executant—Undertaking to deliver possession and authorization to him to retain possession till repayment—Absence of words of hypothecation—Effect of. See T. P. Act, Ss. 58 (d) and 68. 7 B.R. 512.
—Construction—When a question of fact and

when one of law.

What English words together form the equivalent of a given series of words of another language is a question of fact while what in particular circumstances and a given context, a given set of English words connotes is, generally, a question of law. (Blagden. J.) Bhawani Sankar Jaisi v. Ganga Prasad. 198 I.C. 516=14 R.R. 204=A. I.R. 1941 Rang. 244.

Construction—Will or gift or contract—Deed executed jointly by donor and donee. MAHOMED ALI v. DINESH CHANDRA RAY. [See Q.D. 1936-40, Vol. I, Col. 3182.] 193 I.C. 540=13 R.C. 413.

Construction—Will or settlement—Deed by Hindu described as will—Bequest to only daughter of all property after death of testator and his wife—Provision that testator and his wife should be in possession and enjoyment till end of their lives—Effect of. See WILL—CONSTRUCTION. (1943) 2 M.L.J. 332.

time-Effect

C made a bequest of Rs. 1,101 in favour of G with the stipulation that as long as she (C) was living DEED.

she will draw a certain amount per annum and after her death G will receive the whole amount.

Held, that the document amounted to a will and C was entitled to revoke it at any time before her death. (Nawal Kishore, C.J. and Sukhdeonorain, J.) HEERACHAND v. CHANDANI. 1942 M.L.R. 31 (Civ.).

Discharge—Mortgage bond — Stipulation that payment not to be accepted unless made under registered receipt or unless endorsed on back of bond—Payment made otherwise and accepted by creditor in part satisfaction of debt—Effect of—If waiver of stipulation—Payment—If operates as discharge—Duty of creditor to give credit to same. See Debtor and Creditor. 23 Pat. L.T. 384.

Execution—Agreement to sell—Not signed by one of vendors—If can be enforced against others.

The question whether an agreement to sell which is not signed by one of the vendors is operative or not depends upon the intention of the parties. It the intention of the parties in the document was that nobody would agree to sell his share unless all the others also agreed to sell their shares, it cannot be held that where one of them had failed to sign the document, the document was a complete document; on the other hand, if the sales were not interdependent in the sense that each vendor might well have sold his share of the pro erty without reference to the sale by others, and what really should have been a number of separate sale deeds were rolled into one because of convenience, then the fact that in the agreement to sell one of the vendors had not joined would not affect the question of specific performance as between the vendee and the vendors who had signed the agreement to sell. The question of intention has to be settled by a reference to the terms of the document and to the cir-Mahomed, JJ.) UMAR BARHSH v. Mul RAJ. 199 I C. 720=14 R.L. 426=44 P.L.R. 54=A.I.R. 1942 Lah. 86.

— Execution—Document not signed by all by whom it purports to be executed—Effect.

If the intention of the parties to a document is that it shall not be complete till it is signed by all by whom it purports to have been executed then the document cannot be taken into consideration. But if the intention is that the signatures of those who have signed the document shall be enough to perfect it then the document is complete and can be enforced, (Almond, J.C. and Mir Ahmed, J.) KALU RAM v. FEROZ SHAH. 195 I.C. 185=14 R.Pesh. 10=A.I.R. 1941 Pesh. 45.

Execution-Minor-Deed purporting to be by-Execution by guardian but not as such-Effect

of.

Where according to the recital in a deed the minor himself represented by his guardian purports to join in the execution but he does not do so, and the deed is signed by the guardian but not in his capacity as such, it must be deemed to be executed by the guardian in his personal capacity. (Akram and Pal, JJ.) BANKU BEHARI MANDOL v. BANKU BEHARI HAZRA. 206 I.C. 599=15 R.C. 727=47 C.W.N. 288=A.I.R. 1943 Cal. 203.

--- Material alteration-Effect.

Where the date in a sarkhat sued on is altered from Sawan Badi 7 to Sawan Sudi 7, the alterat on is material, the deed is no longer the same deed and the suit based on it could not succeed. The fact that the period of limitation is not affected is not relevant since the hability of the executant is altered by the alteration. (Balbui and Dar. JJ) HARDWAR SINGH v. HARI PRASHAD RAI. I.L.R. (1942) A.I. 938=204 I C 558=15 R.A. 345=1942 A.W.R. (H.C.) 352=1942 A.L.J. 632=1942 A.L.W. 648=A.I.R. 1943 All. 24.

-Material alteration—Effect—Alteration of written contract-Arbitration clause in such contract-If becomes unenforcible.

An alteration in a majerial part of a written contract made by a party thereto without the consent of the other party makes the contract void to this extent, that the party responsible for the alteration cannot enforce the contract against a party not responsible. The avoidance operates as from the time of alteration so as to prevent the person who has made the alteration from putting the contract in suit to enforce against the other party any promise thereby made. An agreement in the contract to submit all disputes to arbitration is such a promise and it is, therefore, not enforcible from the time of the alteration of the contract against the party not re ponsible for it. (Lort Williams, J.) BAHADUR MULL CHAUDHURI v. NAGAR MULL MADAN GOPAL. CHAUDHURI v. NAGAR MULL MADAN GOPAL. ILR. (1941) 1 Cal. 451=197 I.C. 22=14 R.C.

Material alteration - Effect of-Rule of English law as to—Applicability to India. NATHU LAL v. GOMTI KUER [See Q. D. 1936-'40, Vol. I, Col. 3183.] 67 I.A. 318=I.L.R. (1940) Kar. (PC) 287=72 C.L. J. 509=22 P.L.T. 533=1941 P. W.N. 192=(1941) 1 M.L.J. 204 (P.C.)

291=45 C.W.N. 795=A.I.R. 1941 Cal. 534.

—Material alteration—Effect—Suit on basis of deed—Oral evidence inadmissible to prove contents—Plaintiff responsible for alteration— Secondary evidence - Admissibility - Right to decree.

When there is a document and under the law no evidence other than the document itself or secondary evidence of its contents can be used to prove a contract, that document, if available, must be produced before the Court or a case must be made out for admitting secondary evidence. But if the plaintiff who sues on the document has made alterations and interpolations in it, he does not place the Original docu-ment before the Court because it has lost its identity by having been altered in the meantime; and as the plaintiff himself has been responsible for destroying its identity, he cannot in justice and equity be allowed to adduce secondary evidence of its contents. The effect is that the plaintiff is not entitled to succeed in his suit. (Mahomed Noor and Dhavle, 11) IANARDAN PARIDA & PRANDHAN DAS. 190 I.C 377=13 R. P. 193=7 BR 20=5 Cut L.T. 45=22 Pat. L. T. 666=A.IR. 1940 Pat. 245.

-Recitals in-Attesting witnesses. if bound. It is well settled now that recitals in a deed do not bind the attesting witnesses, for, an attesta-

DEFENCE OF INDIA ACT (1939).

BHAN v. ABDUL KHALIQ. 211 I.C. 145=16 R.L. 184=45 P.L R. 325=A.I R. 1944 Lah. 1.

-Recitals-Value of-If prima facie evidence against executant—Execution of deed by guardian on behalf of minor-Effect of. DU V SANYASI NAIDU. [See Q. D. 1936-40, Vol. I, Col. 3184.] A.I.R. 1941 Mad. 97.

-Rectification-Mistake of parties-Burden of proof-Mortgage deed-Mistake in-Decree in suit on-Mistake repeated in decree-Power of Court to rectify or set aside decree and mortgage deed-Limits to-Vorgage-If merged in decree, Nooruddin Esmailji v. Mahomed Umar SU.RATI. [See Q. D. 1936-40, Vol. I, Col. 3185.]
192 I C 109=13 R.B. 223.

Third party—Right to challenge.

When parties to a deed uphold it, no stranger can challenge it on the ground of want of consideration, (Bose, J.) MAROTI BANSI V. RADHA-BAL. I.L R. (1944) Nag. 796=1944 N.L.J. 492. A.I.R. 1945 Nag. 60.

-Third party-Right to challenge-If can

raise question of benami.

A stranger to a deed is competent to challenge it as ficultious and as in reality a b-nami affair. (Mukherjea and Blank, JJ.) SARADINDU MUKHERJEE v KUNJA KAMINI ROV. 202 I.C. 663=15 R.C. 379=46 C.W.N. 798=76 C.L.J. 328= A.I.R. 1942 Cal. 514,

-Validity-Plea of invalidity as being oppos-

ed to public policy-Burden of proof.

A person who wants an agreement or a conveyance to be declared invalid on account of its being opposed to public policy has to prove the grounds which would bring it under S. 23 of the Contract Act. (Abdur Rahman J.) Subbayyan Chettiar v Ponnuchami Chettiar. 200 I.C. 70=14 R.M. 692=1941 M.W.N. 639=A.I.R. 1941 M. 277-1941 J.M. I. 1947 1941 Mad. 727=(1941) 1 M.L.J. 807.

DEFAMATION.

See (1) I. P. Code, S. 499. (ii) Torts-Defamation.

DEFENCE OF BURMA ACT. See BURMA DEFENCE ACT.

DEFENCE OF INDIA ACT (1939)—If ultra vires—Government of India Act, Ss. 102 and 316.

It was within the powers of the Indian Legislature to pass the Defence of India Act S. 316 of the Government of India Act means that the powers conferred by all the provisions of the Act for the time being in force on the Federal Legislature should be exercisable by the Indian Legislature, and it was not necessary in order to confer on the Indian Legislature the powers conferred by S. 102 of the Act to refer specifically to that section. (Bartley and Lodge, II.) NIHARENDU DUTT MAJUMDAR v. EMPEROR. 76 C.L.J. 292.

If ultra vires-Government of India Act Ss. 102 and 316.

Even though S. 316 of the Government of India Act, 1935, which provides that during the transitional period, the powers conferred by the provisions of the Act for the time being in force on the Federal Legislature shall be exercisable by the Indian Legislature does not in terms refer to tion pure, and simple is not enough to fix the attestor with a knowle ige of the contents of the by S. 102 are properly exercisable by the exist-deed. (Din Mahomed and Sale, IJ.) SURAJ sural Indian Legislature. The Defence of India

#### DEFENCE OF INDIA ACT (1939).

Act. 1939, and the rules made under it are not, theretore, ultra vires the present Indian Legi-lature. (Gwyer, C.J., Varadachariar and Zafrul-Intuitie: (Gwyer, C. T., Furdatanaria; and Zajinila Khan, JJ. Niharendu Dutta Majumdar v. Emperor. I.L.R. (1942) Kar. (F.C.) 56=200 I.C. 289=14 R.F.C. 32=55 L.W. 344=8 B.R. 703=43 Cr.L. J. 504=23 P.L. T. 443=1942 P.W. N. 164=1942 M.W.N. 417=46 C.W.N. (F. R.) 9=5 Fed. L.J. 47=A.I.R. 1942 F. C. 22 (F.C.) -If ultra vires-Government of India Act,

S. 102.

The Defence of India Act is not ultra vires the 102 of the Government of India Act so far from showing any intention to restrict the legislative powers for the emergency of war deliberately widens them. (Edgley and Roxburgh, JJ.) SUPFRINTENDENT AND RE-MEMBRANCER OF I EGAL AFFAIRS, BENGAL v. [). B. FUTANANI. 222 I.C. 166-79 C.L.J. 189-A.I. R. 1945 Cal. 402.

-Scope—Speech in connection with trade or industrial dispute-Proceedings under Act-Pro-

priety-Duty of Magistrate.

The Defence of India Act is not intended to be used where the public safety and the defence of British India are not imperilled. Where a speech is made in connection with a trade or industrial dispute which in normal times would not render the speaker liable to punishment, and the speech does not adversely affect the war effort or seriously embarrass the Government, it is ordinarily unfair to invoke the provisions of the Act. Where, however, a speaker is charged under the Act, the Magistrate is bound to convict if the provisions of the Act are infringed, though in determining the appropriate sentence, he can consider whether the speech causes any em-barra-sment to the Government in the prosecu-In re. 200 I.C. 590=15 R.M. 146=55 L.W. 257=1942 M.W.N. 302=43 Cr.L.J. 704=A.I.R. 1942 Mad. 427=(1942) 1 M.L.J. 457. -S. 1 (4) and Government of India Act,

S. 102 (4)—If necessarily conflicting.

The provisions of S. 1 (4) of the Defence of India Act and of S. 102 (4) of the Government of India Act are not necessarily conflicting. (Bartley and Lodge, IJ.) BIMAL PROTIVA DEBI v. EMPEROR. 202 I. C. 150=15 R. C. 309=43 Cr. L. J. 793=1942 F. L. J. (H. C.) 180=75 C. L. J. 202-A. I. P. 1042 C. J. 464.

90=A.I.R. 1942 Cal. 464.

-S. 2 and Rules 34 (vi) (j) and 38 (1) (a) —Defence of India Act if ultra vires the central legislature—R. 34 if within the competence of Central Government—Refusal to accept currency

note-If an offence.

The Defence of India Act is not ultra vires the central legislature. R. 34 of the rules of the Defence of India Act is within the competence of the central government in accordance with the provisions of S. 2 of the Defence of India Act. Any person who refuses to accept a currency note upon the ground that it is worth nothing is doing an act which tends to undermine public confidence in the note and his action comes within the provisions of Rr. 34 and 38 of the Defence of India Rules. (Allsop and Braund, JJ.) MEER SINGH v. EMPFROR. I.L.R. (1941) All. 617=196 I.C. 295=14 R.A. 155=1941 A.L.W. 741=1941 O.A. (Supp.) 566=1941 O.W.N. 898=4 F.L.J. (H.C.) 268=1941

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A. Cr.C. 167=42 Cr.L.J. 839=1941 A.L.J. 352=1941 A.W.R. (H.C.) 240=A.I.R. 1941 All, 321.

S. 2-If ultra vires.

S. 2 of the Defence of India Act which authorises the Central Government to make rules is not ultra vires. (Ameer Ali, A C.J. and Das, J.)
BANWARII AL ROY In re. 48 C.W.N. 766. -S. 2 and Ordinance III of 1944, S. 3—If

ultra vires.

As an emergency has been proclaimed by the Governor-General, there is no force in the contention that S. 2 of the Defence of India Act or S. 3 of Ordinance III of 1944 is ultra vires by reason of the fact that they amount to legislation on matters enumerated in the Provincial List in Sch 7, Government of India Act. The power to make such laws by the Federal Legislature being expressly provided for in S. 102 (2), Government of India Act, it follows that under the plain terms of S. 72 in Sch. 9 of the Government of India Act, the Governor-General has similar power. (Harries, C.J.. Blacker and Munir, JJ.)
BALDFV MITTER v EMPEROR. 213 I C 327=17 R L 55=1944 F.L.J 149=45 Cr.L.J. 711=A.I. R. 1944 Lah. 142 (F.B).

S. 2-If ultra vires—If amends Government of India Act. See Government of India Act (1935), S. 297 (1) (a). 1944 P.W.N 95.

S. 2-R. 84-Notification under-License to

import steel-Grant of-Discretion of steel controller-Interference by Court.

Under the notification issued by the Central Government in pursuance of R. 84 of the Defence of India Rules, an applicant for license to import steel shipped in fulfilment of firm orders placed before 1st January, 1941, is not entitled to the license as of right, although the application is made before 1st April, 1941. It is within the discretion of the steel controller to grant the license or to refuse it, and with that discretion the Court will not interfere. (Ponckridge, J.) S. N. Mukherji v, Russell. I L.R. (1941) 2 Cal. 387=198 I.C. 324=14 R.C. 455=A.I.R. 1942 Cal. 51.

S 2 (as amended by Ordinance (XIV of 1943)—Scope—If ultra vires.

The expression "reasons of State connected

with defence" and the expression reasons connected with the maintenance of public order" in Entry No. 1 of List I and entry No. 1 of List No. II of Sch. VII of the Constitution Act are wide enough to include "public safety or interest," and therefore S. 2 of the Defence of India Act is not ultra vires either in its original or amended not ultra vires either in its original of amended torm. (Spens, C.J., Varadachariar and Zafrulla Khan, JJ) EMPEIOR V. SIBNAIH BANIRJEE. I. L.R. (1943) Kar. (F.C.) 103=211 I C 241=16 R.P.C. 63=10 B.R. 394=45 C.L. J. 341=6 F. L.J. 151=24 P.L.T. 332=1943 M.W.N. 612=48 C.W.N. (F.R.) 1=1943 P.W.N. 275=AI.R. 1943 F.C. 75=(1943) 2 M.L.J. 468 (F.C.).

-S. 2-Scope of discretion under-Exercise of—If can be questioned by Courts. See Cr. P. Code, S. 491 and Defence of India Act, Ss. 2 AND 16 AND DEFENCE OF INDIA RULES, R. 26. A.I.

R, 1943 All. 277.

- S. 2 and 2 (2) (x)—Whether ultra vires—

Delegation of legislative powers to executive.

On a contention that S. 2 and in particular S. 2

(2) (x) of the Defence of India Act were ultra

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vires the Indian Legislature by reason of the fact that it had delegated its powers of legislation on matters of principle and policy and had left it to the executive to make rules on matters which should have been the subject of legisla-

Held, that the impugned provisions were not ultra vires the Indian Legislature on grounds

urged.

Per Harries, C. J.—It is clear that S. 2 (2) (x) states in considerable detail who can be apprehended and detained and in what circumstances. The sub-section does not leave it to the rulemaking authority to apprehend and detain anyone at its discretion or for any reason which it thinks fit. The power to make rules on this matter is circumscribed and strictly limited. In short, the Legislature has laid down principles to guide and direct the rule-making authority and to limit its powers and the scope of the rules which it may make. Though S. 2 of the Act does not state who the rule-making authority is to be, it does make it clear that whatever authority may be appointed to make rules, such authority must act within the strict limits imposed on its power by the section and in accordance with the principles and directions contained therein. The fact that the statute does not itself deal with the details relating to detention cannot of itself make the section ultra vires. (Harries, C.J., Blacker and Munir, JJ.) HARKISHAN DAS v. EMPEROR. 212 I.C. 321=16 R.L. 274=1944 F.L.J. 72=45 Cr.L.J. 580=A.I.R. 1944 Lah. 33 (F.B.).

S. 2 (1) -If ultra vires.

S. 2 (1) of the Defence of India Act is not ultra vires on the ground that the Legislature has delegated extensive powers to the rule-making authority without laying down any principle or policy or giving any directions or providing any guide as to how the powers delegated should be exercised. (Teja Singh and Bhandari, JJ.) RUP LAL MEHRA v. EMPEROR. 221 I.C. 48 =47 P.L.R. 134=A.I.R. 1945 Lah. 158.

-(as amended in 1940), S. 2(1) and (2)-Construction and relative scope of-R. 26, De-

fence of India Rules—If ultra vires.

The function of sub-S. (2) of S. 2, Defence of India Act, 1939, as amended in 1940, is merely an illustrative one; the rule-making power is conferred by sub-S. (1), and the rules which are referred to in the opening sentence of sub-S. (2) are the rules which are authorised by and made under, sub-S. (1), and the provisions of sub-S. (2) are not restrictive of sub-S (1). The language of S. 2 (1) amply justifies the terms of R. 26 of the Defence of India Rules, and the latter rule is mide in conformite with different conformite with the confo latter rule is made in conformity with the powers PEROR V. SIBNATH BANERJI. 221 I.C 243=1946
P.C. (Rul.) 50=1945 F.L.J. 222=50 C.W.N
25=12 BR 142=1945 P.W N 498=48 Bom.
L.R. 1=1945 M W N 546=A I R. 1945 P.C. 156=(1945) 2 M.L J. 325 (P.C.) S. 2 (1) and R. 81 (2) (bb)—Scope—If ultra vires.

S. 2 (1) of the Defence of India Act is not ultra vires or invalid. Nor can it be said that R. 81 (2) (bb) is invalid, R. 81 (2) (bb) is within

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487=218 I.C. 81=17 R B 178=46 Bom.L.R. 877=A.I.R. 1945 Bom. 88 (F B.).

-S. 2 (2) (x) -Am ending Ordinance XIV of 1943-Scope-If ultra vires-Retrospective operation.

Ordinance No. XIV of 1943, amending S. 2 (2) of the Defence of India Act so as to bring it into conformity with R. 26 of the Rules issued under it, is not ultra vires the powers of the Governor-General. The ordinance has also retrospective effect. S. 2 of the Defence of India Act alone would be sufficient to give retrospective effect to the ordinance. (Horwill and Happell, II.) Go. VIND SWAMINATHAN, In re. 210 I.C 403=16 R. M 463=45 Cr.L.J 262=56 L.W 430=1943 M. W N. 501=A.I.R. 1943 Mad. 714.

S. 2(2) (x) (as amended by Ordinance XIV of 1943)-Whether ultra vires-Items mentioned in-If fall in List I of Government of

India Act.

All the items mentioned in S. 2 (2) (x) as amended by Ordinance XIV of 1943 are intimately connected with the defence of British India. All the matters mentioned in S. 2 (2) (x), Defence of India Act, and in the amendment made thereto by the Ordinance fall within List I, being matters connected with defence and none of them comes within List II. Items of List I may overlap items of List II but the pith and substance of the particular legislative enactment must be looked at to see if the subject-matter of that enactment comes within items of List I or List II. (Mitter, Khundkar and Sen, JJ.)
SHIB NATH BANERJEE v. A. E. PORTER. 208 I C.
493=16 R.C. 233=47 C.W.N. 802=A.I.R. 1943 Cal. 377 (S B.).S. 2 (2) (x)—Whether ultra vires.

Defence of India Act, S. 2 (2) (x) is intra vires the Central Legislature in as much as Entry No. 1 of List I of the Seventh Schedule of the Constitution Act, 1935, gives the Central Legislature power to legislate with respect to preventive detention in British India for reasons ventive detention in British India for reasons of State connected with defence and certain other specified matters. (Gwyer, C. J., Varadachariar and Zafrulla Khan JJ.) Keshav Tal-Pade v. Emperor. I.L.R. (1943) Kar. (F.C.) 26 = 207 I.C 1=15 R F C 1=47 C.W.N. (F.R.) 13=1943 O.W. N. 224=1943 A.W. 407=9 B. R. 390=1943 A. Cr.C. 93=44 Cr.L.J. 558=46 Bom.L.R. 22=1943 M.W.N. 327=1943 P.W. N. 122=6 F.L.J. 28=A.I.R. 1943 F.C. 1= (1943) 2 M.L.I. 90 (F.C.) (1943) 2 M.L.J. 90 (F.C).

S. 2 (2) (xx) - Validity - Government of India Act, S. 102, and Sch. VII, List II, Items 27 and 29.

At the date when the Defence of India Act was passed, the Central Legislature had law-making power with regard to all matters in lists I, II and III by virtue of S. 102 of the Government of India Act, consequent upon the emergency pro-clamation of September 3rd, 1939. Consequently S. 2(2) (xx) of the Defence of India Act giving authority to the Central Government to make rules relating to the distribution and sale of essential goods is within the competence of the Central Legislature such matters being covered R. 81 (2) (bb) is invalid, R. 81 (2) (bb) is within S. 2(1) of the Defence of India Act. (Stone, C. J., Kania and Divatia, JJ.) HAVELIRAM SHETTY DAS GIRPHARILAL, In the matter of. 49 C.W.N. WAHARAJA OF MORVI. I.L.R. (1944) Bom.

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-S. 2 (2) (xxiv)—'Movable property'— Meaning.

The expression "movable property" in S. 2 (2) (xxiv) of the Detence of India Act includes a chose in action of a right to sue. (McNair, J.) DEPUTY CUSTODIAN OF ENEMY PROPERTIES v. STAR PAPER MILLS, I TD. 48 C.W.N. 163.

S. 2 (2) (xxiv)—Requisitioning of movable property—Power of Legislature—Government of India Act, S 102 and Sch. VII, List II, Item 1.

The provisions of the Defence of India Act

relating to the requisitioning of movable property contained in S. 2 (2) (xxiv) of that Act are within the powers of the Legislature under the heading "Public order" in Item 1 of List II. The words "public order" have a wide meaning and they authorise the Legislature to do such acts as are necessary for the public safety and defence of the country. The Defence of India Act was passed by the Central Legislature after a proclamation of emergency, pursuant to S. 102 of the Government of India Act, had been made by the Governor-General on 3rd September, 1939. By reason of that proclamation, the Central Legislature had power to legislate on any of the matters set out in any of the Lists in Sch. VII to the Government of India Act. (Derbyshire, C.J. and Conilo I) TASHOPROKASH MITTER v. DEPUTY Gentle, J.) JASHOPROKASH MITTER v. DEPUTY COMMISSIONER OF POLICE. 49 C.W.N. 607=1945 F.L J. 217.

(Et. Note).—This case is referred to by Derbyshire, C.J., in 49 C.W.N. 595.]

-S. 2 (3), Rules 81 and 122-Power to frame rules for punishment—Power of Provincial Government and its officer—Sale of sugar at price exceeding controlled price before amendment of

R. 81 (4)—Conviction—Sustainability

A salesman of a firm was convicted under R. 81 (4) of the Defence of India Rules and sentenced to pay a fine of Rs. 50 in respect of a sale of sugar on 15—7—1942 at a price in excess of that fixed by the Collector of Madras under R. 81 (2) (b) of the Defence of India Rules. At the time of the offence R. 81 (4) in its amended form did not provide any punishment for the contravention of an order made under the rules but only made punishable a contravention of R. 81. No appeal or revision was preferred. But subsequently, the partners of the firm were charged under R. 122 of the Rules.

Held, that the power to frame rules for the punishment of offenders vested exclusively in the Central Government under S. 2 (3) of the Defence of India Act and neither the Provincial Government nor its officers had any power to frame their own penal provisions. The sale of sugar by the salesman on 15-7-1942 was not punishable under R.81 (4) of Rules and therefore there was no contravention in respect of which the partners could be punished under R. 122. Penal provisions or powers must be specifically conferred where they do not already exist and they cannot be deemed to exist merely by inference or analogy. (Byers, J.) ABBUL SALAM SAHIB, In re. 206 I C. 257=15 R.M. 946=44 Cr.L.J. 463=1943 M.W.N. 46=56 L.W. 39= A.I.R. 1943 Mad. 281=(1943) 1 M.L.J. 99.

—S. 2 (3) (iv) (b)—"As respects any matter" —Meaning of—Sale of paper on 8—7—1942 at price in excess of that fixed by Provincial Government by order under R. 81-Offence-Amendment

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of 18-7-1942 making penat contravention of orders-If retrospective.

The accused was alleged to have sold on 8-7-1942, a ream of paper for a price in excess of that fixed by the Provincial Government by an order issued under R. 81 (2) of the Defence of India Rules. He was therefore convicted under R. 81 (4) of the Defence of India Rules. R. 81 (4) as it originally stood only made penal any Contravention of the provisions of the rule but not of any order passed under it. On 18-7-1942, the sub-rule was amended to include contraven-

tions of the order passed under the rule.

Held, that (1) the offending act having been committed prior to the amendment of R. 81 (4), and as the Provincial Government had no power to make penal provisions, no offence was committed by the accused though he contravened the order; (2) the words "as respects any matter" in S. 2 (3) (iv) (b) of the Defence of India Act could not be construed as covering a provision for punishment for the contravention of any provisions of the rules or any order issued under such rules. (Kuppuswami Ayyar, I.) Govinda Prabhu, In re. 211 I.C. 69=45 Cr.L.J. 290=16 R.M. 499=1943 M.W.N. 575=A.I.R. 1943 Mad. 687=(1943) 2 M.L.J. 287.

-S. 2 (4) and (5) and Rule 75-A-'Duty'-Meaning of—Delegation of power to requisition property—Duty of delegatee to form opinion

regarding necessity of requisitioning.

The expression "duty" in sub-sections (4) and (5) of S. 2 of the Defence of India Act refers to any substantive and independent duty that may, by the rules, be imposed on the Government concerned under sub-S. (3) (iv) (a) and (b) of that section. The duty or obligation of the authority concerned to form an opinion as to the necessity or expediency of making a requisition of property under R. 75-A of the Defence of India Rules, is an integral part of the power to make the requisition. This being so, the delegation of the power carries with it the delegation of the duty to form the requisite opinion. Therefore, after the power is delegated the requisite opinion. must be formed by the delegatee himself. (Das, J.) Mackertich John v. H. C. Gufta. 49 C. W.N. 322=80 C.L.J. 136.
—— S. 2 (4)—"Duty"—Meaning of.

Per Gentle, J.—A duty of the Central Government which S. 2 (4) of the Defence of India Act contemplates being delegated, is a substantial or an express duty, such as, a duty which, pursuant to S. 2 (3) (iv), can be imposed upon it, and its duty is to appoint an arbitrator under S. 19 (1) (b). (Derbyshire, C.J. and Gentle, J.) H. C. GUTA v. MACKERTICH JOHN. 222 I.C. 48=1945 F.L.J. 182=49 C.W.N. 583.

-S. 2 (5) and R. 89 (2) (1), Cls. (a), (f)and (i)—Delegation of powers by Provincial Government to Provincial and Regional Transport

Authorities-Legality.

A Provincial Government's Order directing that the powers conferred on the Provincial Government by Cls. (a), (f) and (i) of R.89 (2) (1) of the Defence of India Rules with respect to the use of transport vehicles as defined in the Motor Vehicles Act shall be exercisable also by the Provincial or Regional Transport Authorities constituted under that Act, is a valide delegation under S. 2(5) of the Defence of India Act. There

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is no provision in the Defence of India Act to indicate that such a delegation is prohibit d. The fact that the power may be simultaneously exercised by both the Central and Provincial Governments does not make such a delegation illegal. (Kuppuswami Ayyar, J) VELAYUDHAM PILLAT, In re. I.L.R. (1944) Mad. 434-212 I. C. 108=16 R M. 581=45 Cr.L. J. 530=1943 M W.N. 715=56 L.W 621=A.I.R. 1944 Mad. 135=(1943) 2 M.L. J. 429.

----S. 2 (5)—Delegation of powers under rule -If operates to delegate powers conferred by

subsequent amendment of the rule.

When a Provincial Government, acting under S. 2 (5) of the Defence of India Act, delegates its powers under a rule of the Defence of India Rules to District Magistrate within the province, such delegation covers only the powers conferred by the rule as it stands on the date of the delegation. It does not cover powers conferred by amendments made in the rule subsequent to the date of delegation. A fresh delegation in respect of the powers under the amendment is necessary, if the powers under the amendment are to be exercised. (Macklin and Sen. II.) EMPEROR v RAVANGOUDA LINGANGOUDA. I.L.R. (1945) Bom 103=220 I. C. 486=47 Cr.L.J 23=46 Bom.L.R. 495=A.I.R. 1944 Bom. 259.

-S. 2 (5) and Defence of India Rules, R 26 -Delegation to officer by Provincial Government of power to pass orders under R. 26-Proper person to be satisfied according to terms of R. 26.

It is clearly implied in S. 2 (5) of the Defence of India Act that it is the officer or authority to whom the power is delegated who must be satisfied according to the terms of the rule under which he issues orders. When an order is passed under R. 26 under powers delegated to an officer. it would be unnecessary for the Provincial Government to be satisfied in each case before the order is passed. If it were to be so there would be no object in delegating the power. (Thomas, C.J. and Bennett, J.) SURAJ PRASAD SHUKLA 7. U. P. GOVERNMENT 218 I.C. 19=46 Cr L J. 373 = 1944 A.W R. (C.C.) 274 (2)=1944 O.W.N. 434=1944 O.A. (C.C.) 274 (2).

-S. 2 (5) and R. 26 (f)—If abrogate S 491, Cr. P. Code—Rights of detained person—Juris-diction of Courts to enquire into matters if

excluded by Act.

Per Bose, J.—S. 491, Cr. P. Code, has not been abrogated in any respect either by S. 2 (5) of Defence of India Act or by R. 26 (f) of the Defence of India Rules. Any person aggrieved has a right to apply to the High Court and he has a right to be heard. Though the Provincial Government is entitled to take all proper precautions in the matter of granting interviews, even to legal advisers, it has no power to shut the detained persons off altogether from reasonable and proper legal advice. The Provincial Government has no power to prevent such issues as had faith or abuse of the Act or fraud upon the Act from being tried in the High Court in the ordinary way if they are raised, subject of course to such reasonable safeguards as the Provincial Government may desire to have observed, that is to say, the trial, despite all safeguards, must be according to canons of natural justice, or according to the fundamental rules of practice necessing to the fundamental rules of practice necessary for the due protection of persons and the =18 R.O. 60=46 Cr.L.J. 526=1944 A.W.R. (C.)

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safe administration of criminal justice" or of any justice. If the detained persons are refused access to all legal advice there is an abuse of power. The jurisdiction of the courts is not wholly ousted by the Defence of India Act. (Pollock and Vivian Bose, J.J.) PRABHAKAR KESHIO TARE v. FMPEROR I.L.R. (1943) Nag. 154-205 I.C 5-15 R.N 178-44 Cr L.J. 345-1943 N.L.J.1-A.I.R. 1943 Nag. 26.

-S 2 (5) and Restriction and Detention Ordinance (III of 1944), S. 5-Intra vires.

As S 124 (2) of the Government of India Act expressly permits the Governor-General or the Central Legislature to authorise the Provincial Government to delegate its powers and duties to one of its officers, it follows that S. 2 (5) of the Defence of India Act and S. 5 of Ordinance III of 1944, authorising such delegation cannot be contended to be ultra vires the Governor-General. Hence valid orders of detention could be passed by an officer of the Provincial Government duly authorised. (Harries, C. J., Blacker and Munit, Jl.) Bald-v Mitter v. Emperor. 1944 F.L. J. 149=213 I.C. 327=17 R.L. 55=45 Cr.L.J. 711 =A.I.R. 1944 Lah 142 (F.B).

-S. 2 (5)—Scope—If exhaustive—Delegation of functions-Government of India Act, S. 49 (1) -Responsibility of Governor for acts of Home

Minister.

S. 2 (5) of the Defence of India Act does not provide the only means by which the Governor can relieve himself of a strictly personal function. It provides a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority defined in the subsection, with a corresponding divestiture of the Governor of any responsibility in the matter, whereas under S. 49 (1) of the Government of India Act, 1935, the Governor remains responsible for the action of his subordinate taken in his name. The Home Minister is subordinate to the Governor within the meaning of S. 49 (1), Government of India Act. (Lord Thankerton) Emperor v' Sibnath Banferi. 221 I.C. 243=1946 P.C. (Rul.) 50=1945 F.L. J. 222=50 C.W.N. 25=12 B.R. 142=1945 P.W.N. 498=48 Bom.L.R. 1=1945 M.W.N. 546=A.I.R. 1945 P.C. 156= (1945) 2 M.L.J. 325 (P.C.).

-S. 2 (5)—Scope—If restricts powers of Governor or excludes other modes of carrying on executive Government-S. 49 (5), Government of India Act. See GOVERNMENT OF INDIA ACT (1935), S 49 (2). (1945) 2 M.L. J. 325 (P.C.).

S 2 (5) Validity of—Power to pass orders under R. 26 of the Defence of India Rules delegated to an officer by Provincial Government—Provincial Government if still to be satisfied according to the terms of R. 26.

There is no repugnancy between the provisions of the Constitution Act and the provision in S. Z (5) of the Defence of India Act and it is clearly implied in sub-sec. (5) that it is the officer or authority to whom the power to pass orders under R. 26 of the Defence of India Rules is delegated who must be satisfied according to the terms of R. 26. It would be unnecessary for the Provincial DEFENCE OF INDIA ACT (1939), S. 3.

C.) 279=1944 O.W.N. 428=1944 O.A. (C.C.) 279=A.I.R. 1945 Oudh 126.

-Ss. 3 and 14—Powers of Court under

S. 517, Cr. P. Code—If abrogated.

Obiter.—The powers of the Court under S. 517, Cr. P. Code have not been abrogated by the Defence of India Rules: (Puranik I) BABULAL v. EMPEROR. I.L.R. (1945) Nag. 714=1945 N.L.

s. 3—Scope—Rules not properly made under S. 2—If can have the effect of law.

Per Harries, C.J.-S. 3 of the Defence of India Act contemplates only rules properly made within the limits imposed by S. 2 and any rules which are beyond the powers of the rule-making authority can never have the force of law by reason of S. 3. (Harries, C.J., Blacker and Munir. JJ.) HAR-KISHAN DAS v. EMPEROR. 1944 F.L.J. 72=212 I.C. 321=16 R.L. 274=44 Cr.L.J. 580=A.I.R. 1944 Lah. 33 (F.B.).

-S. 8—If mandatory. Per Fazl Ali, C.J.-S. 8 of the Defence of India

Act is not mandatory, but merely enables the Provincial Government to constitute a Special Tribunal composed of persons possessing the qualifications set out in sub-cl. 2. The use of the word may in this section as well as in S. 9 clearly shows that it is for the Provincial Government to decide whether a Special Tribunal should be constituted and whether any general or special order should be passed directing it to try the offences mentioned in S. 9. (Fazl Ali, C.J., Manohar Lall and Meredith, JJ.) GOPAL MARWARI v. EMPEROR. 22 Pat. 433=209 I C. 482=16 R P. 114=1944 P. W.N. 420=10 B.R. 482=45 Cr.L.J. 177=A.I. R. 1943 Pat. 245 (S.B.).

Ss. 14 and 15-Scope and Effect.

Nothing is to be altered, no rights or liberties to be interfered with, no privileges withdrawn or curtailed, except as expressly provided by or under the Act. The ordinary laws are to continue to function except and in so far as they are expressly altered by or under the Act. More, even when they are altered the special powers conferred are to be u ed sparingly, and the ordinary lives and avocations of those proceeded against under the Act and its rules are to be interfered with as little as possible, and only to the extent consonant with the public safety and interest and the defence of British India. These conditions the defence of British India. are express and restrictive. They are fundamental. (Bose and Sen, JJ.) VIMLABAI DESH-PANDE v. EMPEROR. I.L.R. (1945) Nag. 6=A.I. R. 1945 Nag. 8.

-S. 14—Scope—Bar of jurisdiction of ordinary Courts-Subsequent ordinance setting up

Special Courts.

S 14 of the Defence of India Act, merely preserves the jurisdiction of the ordinary Courts in certain circumstances, so far as the Defence of India Act itself is concerned, not so far as subsequent Acts are concerned. It indicates that the Defence of India Act (and that Act only) does not take away the ordinary Court's jurisdiction, except in the manner specifically indicated. If a subsequent ordinance constitutes Special Courts and in certain respects takes away the jurisdiction of the ordinary Courts, the Defence of India Act obviously cannot prevent it from doing so,

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way inconsistent with those of the Defence of Ind a Act, those of the ordinance, which is equivalent to a subsequent Act, must prevail. (Fast Alt, C.J., Manohar Lall and Meredith, JJ.) GOPAL MARWARI v. EMPEROR. 22 Pat. 433=209 I.C. 482=16 k.P. 114=1944 P.W.N. 420=45 Cr.L.J. 177=10 B.R. 482=A.I.R. 1943 Pat. 245 (S.B.).

-S. 14-Scope - Jurisdiction - Decree for ejectment of tenant by Civil Court—Order by District Magistrate requiring landlord not to interfere with possession of tenant—If ultravires. See Defence of India Rules (1939), R 81 (2) (BB) (II). 47 Bom.L.R. 357.

S. 16-Applicability-Order made under in-

valid rule.

An order made under or by virtue of a rule which is invalid has no force or effect and is a nulity. S. 16 (1) of the Defence of India Act, has no application to such an order. (Gwyer, C.J., Varadachariar and Zafrulla Khan, J.). KEHSAV TALPADE v. EMPEROR. I.L.R. (1943) Kar. (F.C.) 126=207 I C 1=16 R.F.C 1=47 C.W.N. (F.R.) 13=1943 O.W.N. 224=1943 A L.W, 407=9 B.R. 390—1043 A Cr.C. 93—44 Cr.L. I. 558—46 Rom. =1943 A Cr C. 93=44 Cr L J 558=46 Bom. L R. 22=6 F. L J. 28=1943 M. W. N. 327= 1943 P.W. N. 122=A.I.R. 1943 F.C. 1=(1943) 2 M.L.J. 90 (F.C.).

-S. 16-Arrest under R. 129-Bad faith-Power of High Court to consider—Cr. P. Code, S 491.

On an application under S. 491, Cr. P. Code, onbehalf of a person detained under R. 129, Defence of India Kules, the High Court is quite competent to determine whether the arrest had been really made under that rule or whether it had been made in bad faith for a collateral purpose and was hence an abuse of power and fraud upon the statute. If it comes to the conclusion that there had been a misuse or an abuse of the powers given by the rule, it can order his release, in spite of S. 16 of the Defence of India Act. (Din Mahomed and Teia Singh, JJ) BESHESHER DAYAL v. EMPEROR. 221 I.C. 577=47 P.L.R. 416=A.I.R. 1946 Cal. 36.

-S. 16-Conditions of detention prescribed under R.26 (5) and (5-A)—Court's power of scru-

The rules drawn up under sub-rules 5 and 5-A. of R. 26 of the Defence of India Rules are not the "orders" contemplated by Ss 2 and 16 of the Defence of India Act and authorised by R. 26. The Court consequently has power to scrutinise the conditions of detention "determined" under sub-rules 5 and 5-A and to see that they do not contravene any law, and in particular the law laid. down by S.15 of the Defence of India Act. (Bose, J.) SURAJPRASAD V YESHWANTA. I.L.R. (1944) Nag. 629=221 I.C. 26=1946 Nag. (Rul.) 6= 47 Cr.L.J. 33=1944 N.L.J. 38=A.I.R. 1944 Nag. 221.

S. 16—If affects jurisdiction created by S. 491, Cr. P. Code. See Cr. P. Cope, S. 491 AND DEFENCE OF INDIA ACT, SS. 2 AND 16 AND DEFENCE OF INDIA RULES, R. 26. A.I.R. 1943 All. 277.

-S. 16-Scope-Inquiry by Court into ques-

tion of good faith-If barred.

S. 16 of the Defence of India Act is no har toan inquiry whether the order passed under the Defence of India Act or the rules framed thereunder is a valid order made in good faith, and and if the provisions of the ordinance are in any the question of good faith, when raised, has to be DEFENCE OF INDIA ACT (1939), S. 16.

decided by the Court. (Bose and Sen. JJ.) VIMLABAI DESHPANDE v. EMPEROR. I.L.R. (1945) Nag. 6=A.I.R. 1945 Nag. 8.

-S. 16-Scope-Order passed under colour

of power conferred.

S. 16 of the Defence of India Act, requires that the order must be passed in the exercise of the power conferred by the Act and not merely in No power colourable exercise of such power. is conferred to make an order in bad faith, or in abuse of the Act or for the purpose of effecting a fraud on the Act and consequently these issues must be investigated if they are raised. (Pollock and Vivian Bose. JJ.) PRABHAKAR KESHEO TARE v. EMPEROR. I.L.R. (1943) Nag. 154=205 I.C. 5=15 R.N. 178=44 Cr.L.J. 345=1943 N.L.J. 1=A.I.R. 1943 Nag. 26.

-Ss. 16 and 17-Order passed in bad faith-If protected from judicial interference—S. 16 (1), if applies to orders passed under Rules-Nature and scope of presumption under S. 16 (2)-

Defence of India Rules, R. 51-F.

The immunity from judicial interference laid down in S. 16 (1) of the Defence of India Act is not limited to orders made in exercise of the po vers conferred by the Act but extends also to orders made in exercise of powers conferred by the Rules made by the Central Government under S. 2 of the Act. The presumption raised by S. 16 (2) covers both the fact of the making of the order by the particular authority by whom it purports to have been made, and the making of it in exercise of the powers conferred by or under the Act. But the presumption regarding both these matters is rebuttable. To reconcile sub-S. (1) of S. 16 with sub-S. (2) of that section and S. 17 of the Act which protects only acts done or intended to be done "in good faith" it has to be held that the immunity provided for in sub-S. (1) of S. 16 of the Act cannot be claimed for an order made in bad faith. What is protected by S. 16 (1) is an order made in exercise of the power and not one made in abuse of the power. If the power is exercised in bad faith or for a collateral purpose, it is an abuse of the powers and a fraud upon the statute and is not really an exercise of the power at all and the Court can interfere with such colourable exercise of the power. This construction of S. 16 (1) of the Act is consonant with the general principles of law of which it is a statutory recogni-tion and embodiment. When, therefore, an issue is raised that an order superseding a Municipality under R. 51-F of the Defence of India Rules has been made in bad faith or for a collateral purpose, the Court is bound to enquire into the facts. The onus is of course on the party raising the issue to prove his allegation. (Ameer Ali. A.C.J. and Das, J.) BANWARILAL ROY, In re. 48 C.W.N. 766.

-S. 16-Order ultra vires or not made bona fide—Jurisdiction of Court.

S. 16 of the Defence of India Act is no bar to the Court interfering with an order made in the exercie of any power conferred by or under this Act, if it is satisfied either that the order is ultra vires or that it is not made bona fide for the purposes alleged by it but for some collateral object. (Young C.I., Monroe and Muhammad ENUMER, JJ.) CAHORE ELECTRIC SUPPLY Co., LTD. was continued—not merely what existed only was Province of Punjab. I.L.R. (1943) Lah. 617 as valid in law. Rule 26 of the Defence of India

DEFENCE OF INDIA ACT (1939), S. 21.

=205 I.C. 337=15 R.L. 285=6 F.L.J. (H.C.) 40=45 P.L.R. 71=A.I.R. 1943 Lah. 41 (F.B.) S. 16-Order under R. 75-A of Defence of India Rules-Jurisdiction of Court.

An application in Court calling in question an order made under R. 75-A of the Defence of India Rules is barred by S. 16 of the Defence of India Act. (Das, J.) BALDEO DAS BAJORIA v. GOVERNOR OF THE U.P. I.L.R. (1944) 1 Cal. 181 =A.I.R. 1945 Cal. 44.

-S. 16 (1) -Order of detention under R. 26, Defence of India Rules-Jurisdiction of High Court to question validity-Government of India

Act (1935), S. 59 (2).

It cannot be said that the High Courts have no jurisdiction in view of S. 59 (2) of the Constitution Act and S. 16 (1) of the Defence of India Act to investigate the validity of orders of detention made under R. 26 of the Defence of India Rules. S. 59 (2) of the Constitution Act only relates to one specified ground of challenge, namely, that the order or instrument was not made or executed by the Governor; and S. 16 (1) of the Defence of India Act which assumes that the order is made in the exercise of the power clearly leaves it open to challenge on the ground that it was not made in conformity with the power conferred. In either case, no doubt, the burden of proof lies heavily on the challenger to produce admissible evidence sufficient to establish a prima facie case as to the inaccuracy of the recitals in the orders of detention. (Lord Thankerton.) FMPEROR v. SIBNATH BANERJI. 221 I.C. 243=1946 P.C. (Rul.) 50=1945 F.L.J. 222=50 C.W.N. 25=12 B.R. 142=1945 P.W.N. 498=48 Bom.L.R. 1=1945 M.W.N. 546=A.I. R. 1945 P.C. 156=(1945) 2 M.L.J. 325 (P.C.).

to adjudge claim for loss sustained by acts under R. 49.

An arbitrator appointed under S. 19 of the Defence of India Act cannot adjudge a claim for compensation for loss sustained in respect of movable property by acts done under Defence of India Rules, R. 49. (Akram and Blank, II.) KESHAB CHANDRA PAL v. GOVERNOR-GENERAL OF INDIA IN COUNCIL. 49 C.W.N. 218=AI.R. 1945 Cal 294.

-S. 19 (1) (b)—Court-fee—Arbitrator under -If Court-Award-Appeal - Court-fee. See COURT-FEES ACT, S. 8 AND SCH. II, CL. 11. Bom.L.R. 327.

-S. 21—Defence of India Rules—Whether valid.

The Defence of India Act is intra vires the Government and the Defence of India Rules now have valid statutory authority independent of the ordinance under which they were made. (Madely, J.) EMPEROR v. GOPAL NARAIN SAKSENA. 205 I.C. 34=15 R O 387=1943 A.Cr. C. 28=44 Cr. L.J. 318=1943 O.A. (C.C.) 16=1943 O.W N. 37-A I.D. 1042 O.J. 227 37=A.I.R. 1943 Oudh 227.

-S. 21—Scope—R. 26 of Defence of India

Rules—If saved. Per Mitter and Khundkar, JJ .- S. 21 of the Defence of India Act, does not merely continue the rules made in pursuance of the powers given by the Defence of India Ordinance but continues them by re-enactment. What in fact had existed

#### DEF. OF INDIA (AM.) ORD. (1943).

Rules as it then existed may have been ultra vires, but as it had existed at the passing of the Defence of India Act it continued and could later

on be amended from time to time.

Per Sen, J.—S. 21 saves and continues rules made in the exercise of powers conferred by the Defence of India Ordinance and notrules made in the exercise of a power not conferred but believed to have been conferred. As the Central Government had no power to make a rule like R. 26 of the Defence of India Rules under the Ordinance, that rule was not made in the exercise of "any power conferred" and was therefore not saved by S. 21 of the Defence of India Act. (Mitter, Khundkar and Sen, JJ.) SHIB NATH BANERJEE v. A.E. PORTER. 208 I.C. 493=16 R.C. 233=47 C.W.N. 802=A.I.R. 1943 Cal. 377 (S.B.). DEFENCE OF INDIA (AMENDMENT)
ORDINANCE (XIV OF 1943)—Applicability

-Pending proceedings.

The Governor-General by his Ordinance (XIV of 1943) says that no person, detained in the past under orders made under R. 26 of the Defence of India Rules, is to be released on the ground that the rule was bad. That being the plain intend-ment of the Ordinance, its provisions, if otherwise valid, would apply to pending proceedings, as there is no saving of pending proceedings. (Mitter, Khundkar and Sen, JJ.) Shib Nath Banerjee v. A. E. Porter. 208 I.C. 493=16 R.C. 233=47 C.W.N. 802=AI.R. 1943 Cal. 377 (S.B.).

·Scope—Not ultra vires or invalid.

Ordinance (XIV of 1943) does not go beyond the powers of the Governor-General under S. 72 of the 9th schedule to the Government of India Act of 1935. The ordinance is to have the like force of law as an Act passed by the Indian Legislature; such an ordinance may amend an Act of the Indian Legislature and may have retrospective effect given to it. It is therefore not invalid. (Beaumont, C.J., Chagla and Weston, JJ.) EMPEROR v. PRABHAKAR KONDAJI BHAPKAR. 212 I.C. 358—16 R.B. 354—45 Cr L.J. 604—46 Bom, L.R. 50=A.I.R. 1944 Bom, 119 (F.B.).

S. 2—Construction and effect—"The following clause shall be substituted and shall be deemed always to have been substituted "-Meaning

of.
The words "the following clause shall be substituted and shall be deemed always to have been substituted." in S. 2 of Ordinance XIV of 1943, clearly mean that the new clause is substituted, and the old clause from the date of its inception is to be read in the form of the substituted clause. S. 2(2) (x) of the Defence of India Act has therefore to be read as having from its inception been in the form of the substituted clause. (Beaumont, C.J., Chagla and Weston, JJ.) EMPFROR v. PRABHAKAR KONDAJI BHAPKAR. 212 I.C. 358=16 R.B. 354=45 Cr.L.J. 604=46 Bom.L.R. 50=A.I.R. 1944 Bom. 119 (F.B.).

Ss. 2 and 3—If ultra vires.
Per Mitter & Sen, JJ. (Khundkar, J., contra).-The Governor-General has no power to repeal directly and in express terms any Act of the Central Indian Legislature. The power to amend stands on the same principle, for whereas repeal means the destruction of the whole, amendment means the destruction of a part, followed, may

#### DEF. OF INDIA (AM.) ORD. (1943), S. 2.

titute. Therefore S. 2 of Ordinance XIV of 1943 is ultra vires the Governor-General. S. 3 of the Ordinance is also an amendment of the Defence of India Act and ca not have an existence independently of S. 2. (Mutter, Khundkar and Sen, JJ.) SHIB NATH BANERJEE v. A.E. PORTER. 208 I.C. 493=16 R.C. 233=47 C.W. N. 802=A.I.R. 1943 Cal. 377 (S.B.).

-Ss. 2 and 3—If ultra vires.

Importance must be attached to the difference between the provision in S. 2 of the Defence of India (Amendment) Ordinance (XIV of 1943), which makes the substituted provision take effect from the date of the Defence of India Act itself and the provision in S. 3 which prevents any question being raised as to the validity of orders there-fore passed under R. 26 of the Defence of India Rules. Whether S. 2 of the Ordinance was valid or not. S. 3 is not invalid or ultra vires, as it cannot be said directly to amend or repeal any provision of the Defence of India Act and is not so dependent on S. 2, or so connected with it as to be incapable of being given effect to by itself. S. 3 merely deals with the remedies of parties and the power of Court to give redress in respect of a breach of the pre-existing law and might well have been enacted by the legislature or by the Ordinance making authority without any prothe Ordinance making authority without any provision corresponding to S. 2 of the Ordinance. (Spens, C.J., Varadachariar and Zafrulla Khan, JJ.) EMPEROR v. SHENATH BANERJFE. I.L.R. 1943) Kar. (F.C.) 103=6 F.L. J. 151=48 C.W. (N. (F.R.) 1=1943 P.W.N. 275=211 I.C. 241=16 R.F C. 63=10 B.R. 394=45 Cr.L.J. 341=24 P.L.T. 332=(1943) M.W.N. 612=A.I.R. 1943 (F.C.) 75=(1943) 2 M.L.J. 468 (F.C.)

-Ss. 2 and 3 and Government of India Act, S. 72-Power of Governar-General to promulgate Ordinance with retrospective effect-S 2 of Ordinance XIV of 1943 if retrospective in

operation-Scope of S. 3.

The Governor-General is competent to make and promulgate Ordinances giving them retrospective effect. S. 2 of Ordinance XIV of 1943 which substitutes a new clause (x) of S. 2 (2) of the Defence of India Act is retrospective in operation. S. 3 of the Ordinance is mandatory and enjoins that an order under R. 26 of the Defence of India Rules cannot be called in question on the ground that it was in excess of the rule-making power given by the Defence of India Act. (Iqbal Ahmad, C.J.) BALDEO DAS v. EMPEROR. IL.R. (1943) All. 778=209 I.C. 97= EMEROK. 1 L.R. 1943 A.L. W 525=1943 A. Cr.C. 135=1943 O.W.N. (H.C.) 309=45 Cr.L. J. 69=1943 A.W.R. (H.C.) 155=1943 O.A. (H.C.) 155=1943 A.L.J. 344=A.I.R. 1943 All. 331.

——S. 2—Validity.
S. 2 of Ordinance, XIV of 1943 has been validly enacted. (Iqbal Ahmad, C.J., Allsop and Bajpai, II.) BAIJNATH v. SUPERINTENDENT, CENTRAL JAIL, AGRA. I.L.R. (1944) All. 174=1944 F.L. J. 67=212 I C. 210=16 R.A. 270=1944 A Cr. C. 14=1944 A.L.J 59=1944 A.L.W. 46=1944 O.W.N. (H.C.) 17=1944 O.A. (H.C.) 1=1944 A.W.R. (H.C.) 1=46 Cr. L.J. 313=A.I.R. 1944 All, 62.

-S. 3—Applicability and scope—Pending be but not necessarily, by the creation of a subs- | proceedings.

#### DEFENCE OF INDIA RULES (1939).

S. 3 of Ordinance XIV of 1943 applies to pending proceedings and it precludes the Court from allowing an order to be called in question merely because R. 26 of the Defence of India Rules was beyond the powers conferred by the Defence of India Act when the rule was made. (Beaumont, CI., Chagla and Weston, II.) EMPEROR v. PRABHAKAR KONDAJI BHAPKAR. 212 I.C. 358=16 R.B. 354=45 Cr.L.J. 604=46 Bom.L.R. 50=A. I.R. 1944 Bom. 119 (F.B.).

DEFENCE OF INDIA RULES (1939)--Mere possession of seditious literature-Sentence.

Possession simpliciter of seditious literature or manuscripts is liable to draw a heavy sentence under the Defence of India Rules. Where the manuscript found in the possession of the accused is found to be of a particular type, and indicates that it is intended to be disseminated, the fact that the accused did not own the literature is no ground for reducing the sentence. (Horwill, J)
APPALASWAMY. In re (i) 203 I.C. 284=1943
M. W. N. 72 (1)=55 L. W. 569 (1)=15 R. M.
671=44 Cr.L J. 107=A.I.R. 1942 Mad. 664 (2)
=(1942) 2 M.L.J. 354.

Order under that no tenant should be ejected—Scope, nature and time of application of such order Procedure to be followed by courts

in applying such orders.

An order of a District Magistrate under the Defence of India Rules that no tenant should be ejected is one which should be applied at the time of actual ejectment in the course of execution rather than at the time when the decree is to be passed. The obligation not to eject corresponds not with a right in the individual to resist execution in his own interests but with a right in some public officer, not a party to the decree, to resist ejectment in the interests of the state. An order of this nature is irrelevant to a private dispute between the parties. Hence decrees for ejectment should not be refused but Courts executing such decrees should take judicial notice of such orders when brought to their notice and should either dismiss application for execution or stay proceedings-In cases of doubt the matter must he brought to the notice of the authority issuing the order to give him an apportunity of being heard in the interests of the state. (Allsop, J.)

MAKHAN I AL v. SHANKAR LAL. 1944 O W.N.
(H C.) 272=1944 A.L.W. 591=1945 A.Cr.C.
15 1945 A.W.R. (H.C.) 29=1945 R D. 133

R. 2—Applicability—"Enemy"—"Enemy territory"—Singapore after 1941—If enemy territory—British Indian subjects owning businesss firm in Singapore-If alien enemies-Right to sue in British Indian Courts in respect of money paid under contract entered into in British India and becoming impossible of performance by reason of war with Japan. See C. P. Code, S. 83 AND DEFENCE OF INDIA RULES, R. 2. 1944 1 M.L.J 58.

-Rr. 2 and 9-"Enemy" subject-Plaintiff suing by power of attorney holder-Dismissal of suit—Plaintiff's country occupied by enemy pending appeal—Maintainability of appeal.

A Mahomedan debtor executed in April, 1939, will in favour of the plaintiff, who was a Chinese merchant, resident in Penang, by which

# DEFENCE OF INDIA RULES (1939), R. 3.

movable properties in order to discharge the debts subsisting between them. In 1939 the plaintiff, through his power of attorney holder in India sued to recover the amount due under a usufructuary mortgage forming one of the assets included in the will but he was non-suited on the ground that the will was not true and valid. The plaintiff appealed, but at the time of hearing of the appeal in October, 1939 after Penang had become enemy territory, it was pleaded that the plaintiff was an 'enemy subject" under R. 97 of the Defence of India Rules read with R. 2, and was debarred from suing in the Courts with in India.

Held, (1) that the appeal was not maintainable either by the plaintiff because he had, since the dismissal of his suit, become an "enemy subject" within the meaning of the Defence of India Rules, or by his power of attorney agent, because the authority became automatically revoked consequent on the occupation of Penang by the enemy; (2) that the will offended against the Rule of Mahomedan Law that a Mahomedan by will cannot dispose of more than a third of the surplus of his estate after the payment of funeral expenses and debts in that it disinherited all the testator's kindred and disposed of the whole of his property, movable and immovable. (Byers, J.) PACKIRI MAHOMED ROWTHER v. CHOWAH CHOONG. 57 L.W. 554=(1944) 2 M.L.J. 293.

-R. 2 (2) (a) and (b) -Seizure of contraband goods shipped from British India to neutral port since occupied by enemy—Legality—Notification under R. 2 (2) (b) long after-Effect.

A belligerent power has a general right to prevent contraband goods from falling into enemy hands. Where goods are shipped from British India to a neutral port since occupied by enemies, the goods can be siezed to prevent their falling into enemy hands. The fact that a formal notification was issued by the Government of India only afterwards under R. 2 (2) (b) of the Defence of India Rules, is of no importance at all. (Weston, J.) FMPEROR 21. NARAINDAS. ILR. (1943) Kar. 35=207 I.C. 616=16 R.S. 37=A. I.R. 1943 Sind 117.

-R. 2 (9)-Provincial Government-Meaning of-Chief Commissioner's province-General Clouses Act, S. 3.

The meaning to be given to the phrase "Provincial Government," when used with respect to a Chief Commissioner's province, must be the meaning given in R. 2 (9) of the Defence of India India Rules that is, the Chief Commissioner. Although by R. 3, the General Clauses Act applies to the interpretation of the Rules, the provisions of the General Clauses Act cannot be applied to override the express provisions in the rules themselves. (Harries, C.J., Blacker and Munir, J.J.) HARKISHAN DAS v. EMPEROR. 1944 F.L. J. 72=212 1.C. 321=16 R.L. 274=45 Cr.L. J. 580=A.I.R. 1944 Lah. 33 (F.B.).

 R. 3—Construction and scope—Interpretation of order of delegation under rules—Applica-bility—General Clauses Act.

R. 3 of the Defence of India Rules cannot be deemed to provide for the interpretation of orders passed under the rules as distinct from the interpretation of the rules themselves. R. 3 neither compels nor permits the Court to adopt he bequeathed the whole of his movable and im- the artificial provisions of the General Clauses

Act for the purposes of the interpretation of an order of delegation of powers passed under the The Court cannot ignore the obvious distinction between the rules and the orders passed under the rules. (Mackin and Sen. 11.) EMPEROR v. RAYANGOUDA LINGANGOUDA. I.L.R. (1945) Bom. 103 = 220 I.C. 486 = 47 Cr.L. J. 23 =46 Bom. L.R. 495 = A.I R. 1944 Bom. 259.

-Rr. 5 and 81 (2) & (4)-Failure to sell wheat on tender of price fixed-Offence.

Where an Ajmer Merwara Notification set out that no one holding stock of certain articles the price of which has been controlled under Cl. (b) of sub-R. (2) of R. 81 of the Defence of India Rules shall withhold them from sale and that such person shall sell them on tender of the price fixed if a person holding stock of such articles (in this case wheat) refuses to sell on tender of price fixed, he must be "deemed to have contra-yened such provision" of the Defence of India Rules "as authorise the making of such order" within the meaning of R. 5 of the Defence of India Rules and would therefore be liable to the penal effect of R. 81 (4) which provides for punishment in such cases. (Davies.) EMPEROR v. NEMICHAND. 1943 A.M.L.J. 33.

-Rr. 5 and 81 (4)—Order under R. 81 (2) -Contravention prior to amendment of R 5 in January, 1942-Conviction under R. 81 (4)

-Legality.

R. 5 of the Defence of India Rules as it originally stood before it was amended by the notification dated 10-1-1942 provided that breach of an order under any rule should constitute breach of the rule itself. In other words it expressly provided that any one failing to comply with an order made under a rule should be deemed to have contravened the provision of the Rule authorising the making of the order. Therefore up to 10-1-1942, the penalty clause in R. 81 (4) was quite in order in a case of contravention of an order made under R. 81 (2) of the Rules committed before that date. A person who was guility of such a contravention can therefore be lecally convicted under R. 81 (4). It is only after 10-1-1942, when R. 5 was amended that it can be said that any one failing to comply with an order under R. 81 (2) can be said to contravene only the order in question but not the provisions of the rule itself. The guilt and liability to punishment of a person has to be determined in accordance with the state of the law at the time when he commits the acts or makes the omissions for which he is prosecuted. (Manohar Lall and Meredith, JJ.) DAN MALL SHARMA v. EMPEROR. 22 Pat. 602=211 I.C. 4=10 B R. 305 =45 Cr.L.J. 288=16 R.P. 213:=24 Pat. L.T. 211=A.I.R. 1944 Pat. 1.

-R 5-Proof of guilt-Onus-Common

law doctrine, if applicable.

The doctrine of common law as regards the burden of proving guilt in a criminal case, has no application to statutory offences of the type created by R. 5 of the D fence of India Rules read with the other rules. (Edgley and Roxburgh, J.) SUPERINTENDENT AND REMEMBRANCER OF TECAT A TRAINE RENGAL 71. D. B. FUTNANI. 222 LEGAL AFFAIRS, BENGAL V. D. B. FUTNANI. 222 I.C. 165=79 C.L. I. 189=A.I.R. 1945 Cal. 402. —R. 6 (5)—Sentence—Rule as to—Gravity of offence—Relevancy—Imprisonment for first offenders—Propriety.

#### DEFENCE OF INDIA RULES (1939), R. 5. DEFENCE OF INDIA RULES (1939), R. 26

Offences under R. 6 (5) of the Defence of India Rules, may obviously differ very much in their gravity, and they cannot be dealt with by any rule of thumb sentence. If there is any reason for supposing that a man has entered a prohibited area with a view to obtaining information which might be useful to the enemy, he would deserve a severe sentence. Again, if a man has entered a prohibited area knowing full well that it is prohibited having climbed over a fence or eluded a sentry or done something of that sort. he would deserve a more severe sentence than a man who has entered a prohibited area; but a man who enters a prohibited area witho t appreciating that it is a prohibited area inadvertently should be dealt with more leniently. Sentencing first offenders for offences of this type to a term of imprisonment would only be a very good way of manufacturing criminals for the future, though it cannot be laid down as a general rule that sentences of imprisonment shall not be imposed in the case of these offences. (Beaumont. C.J. and Sen, J.) EMPEROR v. JOSEPH ABDUL-LAHI. 197 I.C. 594-43 Cr.L J. 219-14 R B. 234-43 Bom. L.R. 839-A.I.R. 1941 Bom. 355. -R. 15-Scope-British Indian subject in enemy occupied territory—Right to sue in British Indian Court to enforce transfer of shares in Indian Company. See Company—Transfer of Shares. (1943) 2 M.L. J. 201.

-R. 19 (1) (a) and (5)-Applicability-"send"—Article sent by post and intercepted by censor if "sent"—Secret "Code"—Meaning.

The accused was convicted of an offence under rule 19 (1) (a) and (5) of the Defence of India Rules for sending by post to a destination outside British India, (the United States of America) a secret "Code" for being used as a means of secretly conveying information. The letter was intercepted by the censor.

Held that it was correct to say that an article was sent if it started on its way to its destination, and the fact that it did not arrive at its destination could not alter the fact that it was sent.

Held further, that a Code did not cease to be a secret Code because a number of other persons were using it, if it was nor generally known or used by persons engaged in the business for which the Code in question was employed. (Horwill, I.) RAMALINGAYYA, In re. I.L.R. (1943) Mad. 230=15 R.M. 707=44 Cr.L.J. 139=204 I.C. 65=55 L.W. 587=1942 M.W. 592=A.I. R. 1942 Mad. 723=(1942) 2 M L.J. 357.

-R.26-Detention under-Fact of satisfaction-Court, if can enquire into-Government of India Act, S. 59 (2).

The Courts cannot enquire into the grounds of satisfaction or the sufficiency thereof but have certainly the jurisdiction to enquire as to whether the authority or person designated by R. 26 of the Defence of India Rules was satisfied as a matter of fact before he made the order of detention. The effect of S. 59 (2) of the Government of India Act is that it prevents an order of the Governor duly authenticated from being challenged on the one ground specified in that sub-section, and it does not prevent the Court from saying that the Governor was not in fact satisfied, (Mitter, Khundkar and Sen, JJ) •Shib Nath Banerjef v. A E. Porter. 208 I C. 493=16 R.C. 233=47C.W.N. 802=A.I.R. 1943 C. 377 (S.B.).

-R. 26—Detention under—Habeas corpus— Writ for production of detenue—Jurisdiction of High Court. See Cr. P. Code. S. 491. 45 Bom. L R. 316.

R. 26-Detenue, a party to proceeding-Power of High Court to direct his attendance-Cr P. Code, S. 491.

The High Court has power to direct the attendance of a security prisoner detained under R. 26 of the Detence of India Rules when he is a party to a proceeding in Court. But as a matter of discretion it will not make such an order if the detenue can be adequately represented by counsel or otherwise, or if his interests are not likely to suffer by reason of his non-attendance, and never unless it is essential in the interests of justice that he should be produced. If the Government refuses to obey the order of the High Court, the High Court may conclude that such conduct indicates bad faith. Bad faith would attract the provisions of S. 491, Cr. P. Code and the High Court would be entitled to hold that detention "according to law" means such detention as is consistent with S. 15 of the Defence of India Act, that is to say a detention which enables the detenue to safeguard his rights to property in a reasonable manner, rights which are not confiscated or taken away or destroyed by the detention but which might in certain cases be seriously imperilled by the Government's refusal to permit personal attendance in Court. The Court would have power to see that this was put right and to order that the detention be "according to law". If Government were still to be obdurate not only would the Court be entitled to release the detenu altogether on the ground of bad faith but also to bring into olay its coercive processes for contempt. (Bose, J.) Surajprasad v. Yeshwanta. I.L.R. (1944) Nag. 629=221 I.C. 26=1946 Nag. (Rul.) 6=47 Cr.L.J. 33=1944 N.L.J. 38= A.I.R. 1944 Nag. 221.

-R. 26—Detenue—Right to interview legal adviser-Power of High Court to make order allowing interview.

There is no authority which would enable the High Court to direct the authorities responsible for the detention of a person under R. 26 of the Defence of India Rules to allow some third party vis.. his legal adviser to have access to him. That is a matter which is entirely within the discretion of Government, and it is not open to the High Court to make any order in the matter. (Beaumont, C.J. and Weston, J.) MANUBHAI BHIKABHAI, In re. I.L.R. (1943) Bom. 433=207 I.C. 450=16 R.B. 51=44 Cr.L.J. 661=45 Bom.L.R. 316=A.I.R. 1943 Bom, 194.

R. 26—If affects jurisdiction created by S. 491, Cr. P. Code. See Cr. P. Code, S. 491 and Defence of India Act, Ss. 2 and 16 and Defence of India Rules, R. 26. A.I.R. 1943 All. 277.

-Rr. 26 and 129-Investigation into offence Procedure.

If either the police or the Provincial Govern ment desire an investigation into any offence, whether under the Penal Code or under the Defence of India Rules, then they are bound to conduct their enquiry in accordance with the provisions of the Criminal Procedure Code. They cannot call in aid their powers of detention under the Defence of India Rules and under the

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investigation into a crime. If they have information that these detenus have committed crimes. or offences, they are not bound to investigate into them. They can rest content with detaining them under R. 26 or R. 129, provided the matter falls within the ambit of those rules. But if they want an investigation they must proceed in accordance with the provisions of the Criminal Procedure Code. If they do otherwise it is a fraud upon the Act and their action is not taken in good faith. (Bose and Sen, II.) VIMLABAL DESHPANDE V. EMPFROR. I.L.R. (1945) Nag. 6=A.I.R. 1945 Nag. 8.

-R. 26 -Order of detention-Condition pre-

cedent to validity.

The validity of R. 26 of the Defence of India Rules has been put beyond question by S. 3 of the Ordinance XIV of 1943. But before an order under R. 26 for the detention of a person can be made, the "Provincial Government" must be satisfied that such detention was necessary for preventing the person proceeded against from acting in a prejudicial manner. Orders of detention made in pursuance of a general order, that if the police recommended detention of any person the police recommended detention of any person under R. 26 such person may be detained, are bad. (Spens, C.J., Varadachariar and Zafrulla Khan, IJ.) EMPFROR v. SHIBNATH BANERJEE. IL, R. (1943) Kar. (P.C.) 103=211 I.C 241=16 R. F.C 63=45 Cr.L. J. 341=10 B R. 394=6 F.L. J. 151=24 P.L. T. 332=1943 M.W. N. 612=48 C. W.N. (F.R.) 1=1943 P.W.N. 275=A.I.R. 1943 F.C. 75=(1943) 2 M.L. J. 468 (F.C.).

-R. 26—Order of detention—Condition precedent to validity—Absence of circumstances showing that officer or authority making order applied his or its mind—Effect—If renders order nullity.

If on a perusal of an order under R. 26, Defence of India Rules, 1939, it becomes clear that the authority or officer making the order did not apply its or his mind as required by R. 26, the order must be held to be invalid. The obligation to consider reasons or grounds for making the order and to be satisfied upon material held before the authority or officer making it or within his or its cognizance is a condition precedent to the making of an order. If that condition is not satisfied, the order is a nullity, and is, in fact no order at all. In each case the Court has to consider the order of detention in the light of the actual language used and the circumstances surrounding the making of it. If the circumstances do not show that the authority or officer did exercise any executive discretion, or did make a quasi judicial consideration of the facts pertinent to the case of the person ordered to be detained, the order is no order at all and is of no force or Chaple. JJ.) EMPEROR v. Keshav Gokhale. IL. R. (1945) Bom. 317=219 I.C. 392=18 R.B. 128 =46 Cr.L. J. 608=1945 F.L. J. 108=47 Bom.L. R. 42=A.I.R. 1945 Bom. 212 (F. B)

-R. 26—Order of detention—Governor if must himself act.

Per Mitter and Sen, JJ. (Kundkar, J., contra).— The matter of detention in terms of R. 26 of the Defence of India Rules, comes within the special responsibility of the Governor as mentioned in S. 52 (1) (a) of the Government of India Actguise of exercising those powers conduct a secret The Governor is, therefore, required to exercise

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The Ministers can his individual judgment. tender their advice to him but he is not bound to accept their advice. In this view of the matter, the Governor must act himself, unless he had delegated his power and duty to another by an order made under S. 2(5) of the Defence of India Act. Neither S. 49 of the Government of India Act nor the General rule of business made under S. 59 (3) of that Act, could be invoked to sustain an order made under R. 26 either by the Home Minister or a Secretary to the Government, when the Governor himself was not satisfied, but either the Home Minister or the Secretary was, and they made the orders in the name of the Givernor. (Mitter, Khundkar and Sen, JJ.) Shib Nath Banerjee v. A. E. Porter. 208 I.C. 493=16 R.C. 233=47 C.W.N. 802=A.I.R. 1943 Cal. 377 (S.B.).

District -R. 26—Power of Additional Magistrate to direct detention—Such power delegated only to District Magistrate under S. 2 (5) of Defence of India Act. See Cr. P. CODE, S. 10 (2) AND DEFENCE OF INDIA RULES, R. 26. 1944 N. L.J. 44.

-R. 26-"Provincial Government"-Authority to be satisfied under before order of detention can be passed—Delegation—Presumption that official acts are properly made—Applicability to order of detention.

Varadachariar and Zafrulla Khan, JJ.-"Provincial Government" in R. 26 of the Defence of India Rules means the Governor acting with or without the advice of his ministers, and delegation of powers and duties imposed on the Provincial Government by the Defence of India Rules can be made only under the provisions of S. 2 (5) of the Defence of India Act. In the absence of a delegation under S. 2 (5) of that Act, the authority to be satisfied under R. 26 must be the Governor.

Spens, C.J.—The Constitution Act on its true construction does authorise the Provincial Government to deal with the executive business arising out of the administration of the Defence of India Act and its rules not excepting R. 26 in accordance with the rules of business made under S. 59 (3) and the powers conferred by S. 49 of the Constitution Act; and those powers are not controlled and superseded but are supplemented by the express power of delegation, contained in S 2 (5) of the Defence of India Act, to any officer or authority not being an officer or authority subordinate to the Central Government. The presumption omnia esse rite acta applies to an order of detention, and once the order is proved or admitted, the Court should, prima facie, until the contrary is proved by the detinue, assume it to Contrary is proved by the definite, assume it to have been properly made. (Spens, C.J., Varadachariar and Zafrulla Khan, JJ.) EMPEROR V. SIBNATH BANERJFE. I.L.R. (1943) Kar. (F.C.) 103=45 Cr.L. J. 341=211 I.C. 241=16 R.P.C. 63=10 B.R. 394=48 C.W.N. (FR) 1=1943 P. W.N. 275=6 F.L.J. 151=24 P.L.T. 332=1943 M.W.N. 612=A.I.R. 1943 F.C. 75=(1943) 2 MI. J. 468 (FC.) M.L.J. 468 (F.C.).

-R. 26-Scope-Bar of High Court's jurisdictions under S. 491, Cr. P. Code—Conditions to be proved by Crown. See Cr. P. Code, S. 491. 23 Pat. 475.

-R. 26—Scope—If ultra vires or beyond the rule-making powers under S.2 (1), Defence of case this has not been done and the order of

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India Act. See Defence of India Act, S. 2 (1)
AND (2). (1945) 2 M.L J. 325 (P C.).

R. 26—Whether ultra vires—Defence of

India Act, S. 2 (2) (x).

R. 26 of the Defence of India Rules, 1939, goes beyond the rule making powers which the Legislature has thought fit to confer upon the Central Government and is for that reason invalid. The statutory power under S. 2(x) of the Defence of India Act to make a rule for the detention of persons reasonably suspected of having acted, of acting, or of being about to act in a certain specified way, does not justify the making of a rule which merely empowers the Government to detain a person if it is satisfied that it is necessary to do so with a view to preventing him from acting in that way and in certain other ways also. (Gwyer, C. J., Varadachariar and Zafrulla Khan, J.) KESHAV TALPALE v. EMPEROR. I.L.R. (1944) Bom. 183=I.L.R. (1943) Kar. (F.C.) 26=207 I.C 1=16 R.F.C. 1=47 C.W.N. (F.R.) 13=1943 O.W.N. 224=1943 A.L.W. 407=9 B.R. 390=1943 A. Cr C. 93=44 Cr.L.J. 558=46 Bom L.R 22=1943 M.W.N 327=1943 P.W.N. 122=6 Fed.L.J. 28=A.I.R. 1943 F.C. 1=(1943). 2 M.L.J. 90 (F. C.).

-R. 26-Validity of order under-Jurisdiction of High Court to investigate or challenge. See Defence of India Act, S. 16 (1). (1945) 2 M.L.J. 325 (P.C.).

R.26 (1) (b)—Duty of Crown to supply copy of order to person detained—Failure to supply—Interference by High Court—Cr. P. Code, S. 491—Duty to exhibit original order.

It is essential that, when a person is detained under R. 26 (1) (b) of the Defence of India Rules, a copy of the order made against him should be supplied to him immediately. If that is not done and if he makes an application to the High Court under S. 491, Cr. P. Code, the High Court will have no option but to issue a Rule forthwith. It is also incumbent on the Crown, whenever a rule is issued, to exhibit in the High Court the original order. (Varma and Shearer, JJ.) Kamla Kant Azad v. Emperor. 23 Pat. 252=1944 P.W.N. 245=A.I.R. 1944 Pat. 354.

—R. 26 (1) (b)—Order of detention by Governor—Presumption that materials were placed before Governor and that order was made by Governor—Power of Court to require proof of

Same—Government of India Act, S. 59 (2).

Where an order of detention under R. 26 (1).

(b) of the Defence of India Rules if made by the Governor, a presumption arises that in exercising his power the Governor had acted regularly and that before making the order he had satisfied himself on the materials placed before him that it was necessary to detain the individual named with a view to prevent him from acting in a manner prejudicial to the public order. The pre-sumption, however, is a rebuttable one. There is of course an obligation on the Chief Secretary to-Government to submit cases of this kind to the Governor and to obtain his orders. In the absenceof anything to the contrary in the affidavits or proof adduced by the person detained, the High Court is bound to presume that the Chief Secretary did in fact place the materials before the Governor and that the order of detention was in fact made by the Governor. If in a particular

detention was in fact that of some other subordinate official the detention would be illegal. But ordinarily, there is a presumption that the papers were laid before the Governor. Further, it is not open to the Court to require proof that an order which purports to have been made by the Governor which is properly authenticated as such order, was in fact made by him. S. 59 (2) of the Government of India Act is a bar to the Court going into the question as to whether the order was in fact the order of the Governor. (Varma and Shearer, [J.] KAMLA KANT AZAD v. EM-PEROR. 23 Pat. 252=(1944) P.W.N. 245=A.I. R. 1944 Pat. 354.

-R. 26 (1) (b)—Order of detention under-Authority authorised by law-Presumption as to official acts-Applicability-Evidence Act, S. 114,

III. (e).

The detention of certain persons were ordered under an order under R. 26 (1) (b) of the Defence of India Rules which recited that the Governor of the Punjab was satisfied that it was necessary to detain the persons mentioned with a view to preventing them from acting in any manner prejudicial to the defence of British India, the public sifety, the maintenance of public order and the efficient prosecution of the war. The order for their actual desention and the consequential orders all purported to be made by the Governor and they were signed by the Chief Secretary by the order of the Governor of the Punjab. The Governor purported to give detailed instructions as to their place of detention, and various other details. On a contention that the orders of detention in the above cases were made by an authority not authorised by law to make them.

Held, that the satisfaction of the Provincial Government was a condition precedent to the validity of any order made under R. 26 of the Defence of India Rules and by reason of R. 3 of the Defence of India Rules, which applied the provisions of the General Clauses Act to the interpretation of the Defence of India Rules, the satisfaction must be the satisfaction of the Governor personally either acting with or acting without the advice of his ministers. It is not sufficient that the Provincial Government as such is satisfied or that anyone acting on their behalf is so satisfied. The satisfaction must be that of the Governor. The burden of proving such satisfaction lies on the Crown and no presumption can be made. Even in the case of a presumption under S. 114, Evidence Act, Illustration (e), a Court though it can make a presumption need not do so. Whether a presumption should or should not be made must depend upon the particular circumstances of each case. The words "the Governor of the Punjab is satisfied" in the orders may well mean only that the Provincial Government is satisfied and that there is a distinct possibility or even a probability that the Governor personally was never asked to satisfy himself as to the neces-sity for such orders. The words cannot be presumed to mean that the Governor satisfied himself personally. In the absence of such a presumption the onus lay on the Crown to prove the accuracy of the recitals in the order. As no evidence was let in on behalf of the Crown it

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tion precedent to the validity of these orders has not been established and that the orders must therefore be held be invalid. (Harries, C.I., Blacker and Munir, JJ.) HARKISHAN DAS v. EMPEROR. 1944 F.L. J 72=212 I.C. 321=16 R. L. 274=45 Cr.L. J 580=A.I.R. 1944 Lah. 33

-R. 26 (1) (b)—Order of detention-Reasons for order-If to be disclosed or set out in order-Power of High Court to compel disclosure and to examine same.

In making an order of detention under R. 26 (1) (b) of the Defence of India Rules the Governor is not required to communicate to the person detained the grounds on which he makes the order, and the High Court is not entitled to compel their disclosure and examine into them. The Governor is not required to give any indication of the reasons which led to the making of the order still less to set them out in the order itself. (Varma and Shearer, JJ.) KAMLA KANT AZAD v. EMPEROR. 23 Pat. 252=(1944) P.W.N. 245=A.I.R. 1944 Pat. 354.

-R. 26 (1) (b)—Person arrested and brought up for trial on charge—Order of detention against-Propriety-Order after acquittal-

If made in good faith.

When a man is arrested and brought up before a Court on some definite and specific charge, it is very undesirable and quite wrong for an order of detention to be made against him before he has been tried on the charge and his guilt or innocence finally determined. If he is convicted and sentenced the necessity for any order of detention ceases to exist, at least until he has served out the sentence. If, on the other hand, he is acquitted and an order of detention is sought against him, the official, on whom the responsibility of making an order rests, should obtain and study a copy of the judgment of acquittal; and if he neglects to send for and study a copy of the judgment, it may very well be said that he has failed to act with due care and attention in the discharge of that duty. (Varma and Shearer, JJ.) KAMLA KANT AZAD v EMPEROR. 23 Pat. 252=1944 P.W.N. 245= A.I.R 1944 Pat. 354.

-R. 26 (1) (b)—" Satisfied" meaning— Governor ordering detention with ulterior object

to regularise illegal detention or to punish for past acts—Validity of order.

The word "satisfied" in R. 26 (1) (b) of the Defence of India Rules means "reasonably satisfied." It cannot import an arbitrary or irrational state of being satisfied. If it can be shown that the Governor acted under a misapprehension as to the extent of the powers entrusted to him and did not in fact order the detention of a particular individual with a view to prevent him from acting in a monner prejudicial to the public order but with som ulterior object, such as to regularise illegal detention or to punish him for acts already done rather than to prevent him from doing or instigating the doing of similar acts again, he would be entitled to be released. In such a case it cannot be said that the Governor had in law acted in good faith and the order of detention would be practieally a sham order. (Varma and Shearer, II.)
KAMLA KANT AZAD v. EMPEROR. 23 Pat. 252= must be held that the performance of the condi- 1944 P.W.N. 245=A.I.R. 1944 Pat. 354.

- R. 26 (1) (b) - Scope-If ultra vires-Power of Court to inquire into validity of reasons for the order-Power to examine correctness of recitals.

It is well settled that R. 26 (1) (b) of the Defence of India Rules is intra vires, and that it is not open to a Court of law, on an application made by a person detained under that rule for a writ of habeas corpus, or in a suit to recover damages for false imprisonment to inquire into and pronounce on the validity of the reasons which led to the making of the order. It is, however, equally well settled that the High Court may examine the correctness of the recital contained in any such order, and if it comes to the conclusion that the recital is incorrect, may declare the order to be invalid and the detention of the individual concerned illegal. (Varma and Shearer, JJ.) KAMLA KANT AZAD v. EMPEROR. 23 Pat. 252=1944 P.W.N. 245=A.I.R. 1944 Pat. 354.

-R. 26 (1) (e) and (h)—Scope of powers conferred by—Order to report periodically at kotwali—If within the powers—Failure to so

where a person arrested and committed to Jail custody under sub-R. (1) and (2) of R. 129 of the Defence of India Rules was released on some conditions one of which was that he 'shall report his presence in person at police station kotwali once

a week and he failed to so report.

Held, R. 26 did not empower the Government to call upon the suspected person to report his presence periodically, and it would not be possible to interpret sub. R. (e) of R. 26 (1) so as to cover such a direction. The restriction was not covered by sub. R. (h) also which did not confer any independent power. If an order did not come within the scope of sub Rr. (a) to (g), it could not be supported by sub R. (h) alone. (Ismail and Mulla, JJ.) EMPEROR v. IQBAL KRISHNA KAPOOR. 202 I.C. 56=15 R.A 140=43 Cr L. J. 790=1942 A.W.R. (H.C.) 126=1942 A.L.W.315=1942 A. Cr.C. 106=1942 A.L.J. 287=A.I.R. 1942 All. . 253 (2).

R. 34—Prejudicial act—Abduction of soldier's wife during his absence on active service.

Abducting a soldier's wife during his absence or the wife's going away from the house of her husband, while he is on active service, cannot be regarded as a prejudicial act under R. 34 of the Defence of India Rules. Cls. (b) and (c) of subrule (6) of R. 34 should be confined to those acts that directly affect the soldiers and public servan's in the discharge of their official duties, and not their private life. (*Teja Singh and Bhandari, JJ.*) AZIM KHAN v. EMPEROR. 220 I.C. 147=46 Cr. L.J. 719=47 P.L R. 56=A.I.R. 1945 Lah. 154.

-R. 34—'Prejudicial act'—Shouting of anti-. zvar slogans.

The shouting anti-war slogans is a prejudicial act' within the meaning of R. 34 of the Defence of India Rules. (Bhide, I.) HIGH COURT BAR ASSO-CIATION, LAHORE V. EMPEROR. I L R. (1941) Lah. 796=195 I C. 674=14 R.L 90=1941 A Cr.C. 162=42 Cr L.J. 765=43 P.L.R. 396=A.I.R. 1941 Lah 301.

-R, 34(5) (k)—"Information likely to assist : the enemy"—What constitutes—Information as to passage of vessel from one specified place to another-If necessary.

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R. 34 (5) (k) of the Defence of India Rules. 1939, only requires that the "information likely to assist the enemy," whether true or false, must be with respect to the passage of any vessel near any part of India. The passage may be from any place to any other place whether disclosed or not. All that is necessary is that the information must be with respect to the passage of a vessel near any part of India. It is not necessary that there must be evidence of the passage from one specified place to another. The passage may be at anytime, whether at the time when the information or message is sent, or before or even after. (Divatia, and Lokur, JJ.) EMPEROR v. ABDULLA MAHOMED. 47 Bom. L.R. 78=A.I.R. 1945 Bom. 350.

-R 34 (6)—Prejudicial act—Speech by accused-If to be taken as to whole-Portion of

speech-If can be "prejudicial acı."

In a prosecution under R. 34 (6) of the Defence of India Rules in respect of a speech delivered by the accused, it cannot be held that the speech of the accused must be considered as a whole and that he cannot be convicted unless the whole speech be found to be "a prejudicial act." Even a particular portion of a speech can constitute a. prejudicial act. Burn, J) KALYANARAMA AYYAR v. EMPEROR. 199 I.C. 368=14 R.M. 587= KALYANARAMA 43 Cr L J. 538=1941 M.W.N. 1035-A.I.R. 1942 Mad. 199.

-Rr. 34 (6) and 38-"Prejudicial act"-

Tirade against police-Offence.

Petitioner made a speech which consisted of a tirade against the police. He said that although they were poorly paid men of no status, yet they give themselves airs and strut about doing no work. He suggested that they are acting against the workers in the interests of the capitalists. The speech also contained threats of what may be done to the police if they continue as they are at present.

Held, that the speech, read as a whole, could not be said to be a prejudicial act within the meaning of R. 34 (6) of the Defence of India Rules, so as to render the petitioner liable to conviction under R. 38 of the Rules. (Horwill. J.) Somasundaram, In re. 195 I.C. 189=14 R.M. 147=53 L.W. 362=1941 M.W.N. 370=42 Cr.L.J. 702 =A.I.R. 1941 Mad: 597=(1941) 1 M.L.J. 464

-Rr. 34 (6) (d) and (k) and 38 (5)—Speech at public meeting-Exhorting audience to desist from enlisting in the army or assisting in prosecu-

tion of war-Offence.

A person making a speech at a public meeting exhorting the audience to desist from enlisting in. the army or assisting the prosecution of the war in any manner is guilty of "prejudicial acts" as defined by R. 34 (b) (d) and (k) of the Defence of India Rules, and is liable to conviction under R. 38 (5). (Lakshmina Rao. J.) Srinivasa Rao v, Emperor. 196 I.C. 543=14 R.M. 316=53 L.W. 711=42 Cr.L J. 895=(1941) M.W.N. 446=A.I. R. 1941 Mad. 687.

-R. 34 (6) (e) and (k) — Applicability— Pamphlet criticising Government-Offence.

Reasonable criticism of the Government is permissible and does not come within the mischief of R. 34 (6) (e) or (k) of the Defence of India Rules, provided that it does not transgress cetain bounds. It was not the intention of the Defence of India Act to stifle reasonable criticism of the Government intended to bring about by constitutiona

means what the writer or speaker believes to be beneficial. R. 34 (6) should not be strictly con trued. To do so would make any criticism of Government punishable. Where a pamphlet made by the accured is on the whole moderate and more reasonable than much of what is published in the daily papers, he should be given the benefit of doubt and should not be convicted under R. 34 (6) (e) and (k). (Horwill J.) KISSAN SINGH v. EMPEROR. 208 I.C. 257=16 R.M. 247=44 Cr L.J. 760=1943 M.W. N. 313=A.I.R. 1943 Mad. 514=(1943) 1 M.L.J. 416.

R. 34 (6) (e), f) and (g)—Applicability— Speech in respect of trade or industrial dispute— Offence-Several convictions in respect of same

speech—Legality.
Though it is ordinarily unfair to apply the Defence of India Act to a speech made for the purpose of promoting the welfare of the workers in a trade or industrial dispute, where a speech by a person tends to endanger the public safety and hinder the defence of British India and is likely to influence, adversely to the war effort, his listeners and his fellow workers, the Act can properly be applied. An objectionable remark in a speech cannot constitute several prejudicial acts merely because it is a prejud cial act in several ways. Nor can an objectionable remark be deemed a prejudicial act unless taken with the rest of the speech, which forms the back ground against which the remark must be viewed. A person cannot therefore be convicted three times for the same speech on the ground that it offended against the provisions of R. 34 (6) (e), (f) and (g) of the rules under the Act. (Horwill, J.) VARADARAJULU CHETTY, In re. 206 I C. 391 = 15 R.M. 1000=44 Cr. L.J. 517=55 L.W. 316 = 1942 M.W.N. 303=A.I.R. 1942 Mad. 494= 1942 1 M L.J.458.

view. See PENAL CODE, S. 124-A. 5 Fed, L.J. 47.

-R. 34 (6) (e) and (k)—Criticism of Government-Question for consideration.

In determining whether a speech criticing Government falls within R, 34 (6) (e) and (k) of the Defence of India Rules, the question is not whether some of the criticisms have a certain amount of justification or not, but whether they have been over-emphasized in such a way, and such inferences have been drawn from them, that the intention of the speaker to bring the Government into hatred or contempt is manifest. Madeley, J.) EMPEROR v GOPAL NARAIN SAKSENA. 205 I,C 34=15 R.O. 387=1943 A. Cr. C 28=44 Cr. L.J. 318=1943 O A. (C.C.) 16=1943 O.W.N. 37=A I.R. 1943 Oudh 227.

--R. 34 (6) (e) and Penal Code, S, 124-A-

Points of distinction.

R.34 (6) (e) of the Defence of India Rules though analogous to S. 124-A, I P. Code, is wider in scope and includes not only acts which are "intended" but also acts which are "likely to" bring into hatred or contempt or excite disaffection and the explanations attached to S. 124-A are also omitted. The sub-clau e also covers acts bringing into hatred and contempt not only the Government established by law in British India but also the Governments established by law in to promote disorder or to help the enemy or any other part of His Majesty's Dominions. hinder the war-effort; and the speech taken as a

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Bhide. J.) EMPEROR v. KHURSHID AHMAD MINTO, 44 P L R. 167. -R. 34 (6) (e) -Prejudicial acts-Essentials.

of offence.

Incitement to violence is the gist of the offence under R. 34 (6) (e) of the Defence of India Rules, as under S. 1.24 A, I. P. Code. Mere abuse is not enough. (Wadia and Weston, J.) EMPEROR. v. SADASHIV NARAYAN. 1.L.R. (1944) Bom. 452: = 216 I.C. 68=17 R.B. 129=46 Cr. L.J. 113= 46 Bom, L.R. 459=A.I.R. 1944 Bom. 255,

sedition as defined in I. P. Code-If applicable.

Sedition is none the less sedition because it is described by a less offensive name and the law relating to the offence of sedition as defined in the Penal Code is equally applicable to the prejudicial act defined in the Defence of India Rules. The omission in the Rules of the three "Explanati ns" appended to S. 124-A I.P. Code does not affect the matter. These are added to remove any doubt as to the true meaning of the Legislature; they do not add to or subtract from the section itself; and the words used in the rules ought to be Insert, and the words used in the rules ought to be interpreted as if they had been explained in the same way. (Gwyer, CJ., Varadachariar and Zafrulla Khan, JJ.) NIHARENDU DUTTA MAJUMDAR V. EMPEROR. I.L.R. (1942) Kar. (F.C.) 56=200 I.C. 289=14 R.F.C. 32=55 L.W. 344=8 B. R. 703=43 Cr L. J. 504=23 P.L. T. 443=1942 P. W.N. 164=1942 M.W.N 417=46 C.W.N (F.R.) 9=5 F. L. J. 47=A.I.R. 1942 F.C. 22.

Rr. 34 (6) (e) and 38 (5)—"Prejudicial act"—Meaning of—Abuse of Government without object of exciting disaffection or promoting dis-

order-Offence.

The offence under R. 34 (6) (e) read with R. 38 (1) (a) of the Defence of India Rules though described in slightly different language is exactly the same thing as sedition as defined in S. 124-A, I.P. Code. The Court must take into account the particular circumstances under which a speech is delivered, the existing conditions and the nature of the audience in deciding whether a particular speech falls within R. 34 (6) and cannot base its judgment upon general principles. Abusive language, even when used about a Government, is not necessarily seditious or a prejudicial act, if the object of the speaker is not to excite disaffection or to promote disorder, and if his object is not to help the enemy or to hinder the war effort. The accused a member of a Provincial Legislative Assembly in the course of a Congress meeting addressed an audience of rustics, the speech being in the vernacular. The substance of the speech was this: "The British are wicked people, unscrupulous and foolish too. Now they are in trouble, we Indians feel like sitting back and watching the fun. You have every excuse for doing so but do not do it, because the Japs and Hitler are as bad as the British. You do not want to fall out of the trying pan into the fire. Therefore, unite and pursue the only plan left open to younon-violence. Make the villagers self-contained units, follow the teachings of Gandhi and try and live better lives.

Held, that there was plenty of vulgar and ill-informed abuse of British Imperialism, but the accused's object was not to excite disaffection or

whole did not fall within the mischief of R. 34 (6) (e) of the Defence of India Rules and the accused could not therefore be convicted under R. 38 (5). (Meredith, I.) NABA KRISHNA v. EM PEROR. 212 I C. 99=16 R.P 264=10 B.R. 439= 45 Cr. L. J. 487=9 Cut. L. T. 9=1943 P.W.N. 262=A.I.R. 1943 Pat. 418.

Mahomedans and basing arguments on false pre-mises—11 falls under R 34 (6) (e).

The words of Cl. (e) of R. 34 (6) of the Defence of India Rules are tounded on the definition of sedition contained in S. 124-A, Penal Code. The words, deeds or writings must seek to create public disorder or the reasonable anticipation or likelihood of public disorder. Where a person in effect urges the necessity for a union of the Hindus and Mahammadans though basing his argument on a false premises that it was the policy of the Government to keep them divided his speech cannot constitute an offence. (Yorke, J. Krishna Prasad Verma v. Emperor. 1943 A.L. W. 113.

-R. 34 (6) (e)—Speech—Interpretation— Guiding principles.

The recognized position in law in regard to construing speeches is that a Court of Justice must careful y consider the speech as a whole and must not surrender reason to wrath or passion. Where the object of a speaker was to stir up the feelings of the people against the execution of certain prisoners and the most objectionable parts of the speech at the most amounted to an expression of the opinion, on the part of the speaker, it is not possible to spin out from the speech a seditious intention on the part of the speaker within the meaning of 16. 34 (6), Cl. (e) of Defence of India Rules. (Vyas.) KALYAN SINGH v. CROWN. 1945 A.M L J. 63.

R. 34, (6) (f) — Applicability — Attack

against Government or Ministry of Province-Defamatory remarks by Hindu against Muslims in g-ner-1-Offence. See PENAL CODE. S. 153. I.L.R. (1945) Kar. 31.

-R. 34 (6) (f) and (g)-Intention, if a necessary ingredient of a prejudicial act.

Intention is not a necessary ingredient of a prejudicial act as contemplated by  $\mathbb{R}$ . 31 (6), (f) and (g) of the Defence of India Rules. It is enough that the prejudicial act (in this case the slaughter of a cow on Bakrid day) is likely to promote feelings of enmity and hatred between different classes of His Majesty's subjects or is likely to cause fear or alarm to the public or to any section of the public. (Mulla, J.) BUNDOO V FMPROR I.L.R. (1942) All. 919=204 I C. 291=15 R.A. 328=44 Cr.L.J. 178=1942 A.L.J. 530=1942 A.W.R. (H.C.) 302=1942 A.L.W. 577=1942 A. Cr C. 195=A I R. 1943 All. 15.

Rules under Rr. 34 (6) (k. and p.), 38 (5) and 121-Stages in the commission of an offence - Communication to Magistrate of intention to shout anti-war slogan-If an offence.

There are four stages ordinarily in the commission of an offence, namely intention, pre-paration, attempt and the final act constituting the offence. Intention per se is not ordinarily punishable at all. Preparation is punishable in rare cases, as for example, S. 399 of I. P. Code. Attempt is punishable in a large majority of 186.

### DEFENCE OF INDIA RULES(1939), R. 34., DEFENCE OF INDIA RULES(1939), R. 35.

cases while the final act constituting the offence is always punishable. Preparation consists in devising or arranging the means or measure for the commission of an offence. The mere communication of a letter to the District Magistrate containing an intention on the part of the writer to shout anti-war slogans at a particular place on a particular day is not an offence under k. 121 read with Rr. 38 '5) and 34 (6) (k, and p). 1ntention is not to be confused with preparation, The communication of the letter does not come under preparation because it does not in any way devise or arrange any means or measure for the commission of the offence, that is, the shouting of the slogan. The intention to shout the slogan might be given up at any time before the offence is actually committed. Hence mere expression of an intention is not an offence. (Ganga Nath, J.) NURUL HASAN 2. EMPEROR. I.L.R. (1942) All. 141=199 I.C. 181=14 R.A. 366=1941 A. Cr.C, 325=43 Cr.L.J. 527=1941 A.W.R. (H. C.) 375=1941 A.L.W. 1084=1941 O.A. (Supp.) 923=1941 A.L.J. 687=A.I.R. 1942 All. 121.

-R. 34 (6) (k)—Suggestion to withhold support in war effort in case India is not made

free-If constitutes an offence.

Where the speech complained against exhorted people not to give the Government support in this war unless India was made free, the underlying suggestion was clearly an active withholding of support in war effort and such withholding might well be highly prejudicial to the defence of British India or to the efficient prosecution of the war and hence it offended against R. 34 (6) (k) of the Defence of India Rules. (Yorke, J.) Krishna Prasad Verma v. Emperor. 1943 A. L.W. 113.

-R. 35 (1) (a)-Building used for the purposes of Government-Building used for postal

services or for storing of seeds.

The maintenance or postal service is a function . of the Government which it has in fact assumed and a building maintained and used by the Government for the purposes of its postal service is a building used for the purposes of Government within the meaning of R. 35. (1) (a) of the Defence of India Rules. In the same way, the keeping and storage of seeds to be used for public purposes being now a de facto function of the Government the building in which they are kept also falls within the said rule. (Braund, J) RAM DAS v. EMPEROR. I.L.R. (1945) A. 651=222 I.C. 136=1945 A.W.R. (H.C.) 178= A.I.R. 1945 All, 385,

-R. 35 (1) (b)-'Telegraph'-If includes telephone line and posts.

Damage to telephone posts or to its line falls within R. 35 (1) (b) of the Defence of India Rules, as the word "telegraph" in that clause includes telephone line and posts by virtue of its definition in S. 3 of the Telegraph Act. The amendment of cl. (b) by the addition of the words "telegraph line or post" made by a notifi-cation issued on the 14th August, 1942, is cally intended ex abundanti cautela to make the meaning of the original word "telegraph" (Niyogi, J.) GOPILAL v. EMPPROR I L.R. (1945) Nag 395=219 I C. 276=18 R.N. 34=46 Cr L. J 555=1945 N.L.J. 191=A.I.R. 1945 Nag. DEFENCE OF INDIA RULES (1939), R. 35.

Rr. 35 (4) and 38 (5)—Applicability— Bringing about strike of mill-workers for remedying grievance—Offence—Knowledge that strike would impede war effort—If sufficient.

would impede war effort—If sufficient.

A person who brings about a strike by millworkers engaged in a war industry with the object of impeding the war effort would be guilty of an offence under R. 35 (4) read with R. 38 (5) of the Defence of India Rules. But where the notice for calling the strike is to remedy the real or supposed grievances of the workers resulting from an arbitrary exercise of the employers power of dismissal without a fair inquiry or reasonable warning there is a lawful excuse for the strike and the person calling the strike would not be guilty even though he knows that as a result of the strike essential war work would be impeded. (Horwill, J.) Appalaswamy. In re 15 R.M. 717=44 Cr.L.J. 143=204 I.C. 47=55 L.W. 593=1942 M.W.N. 583=A.I.R. 1942 Mad. 735=(1942) 2 M.L.J. 718.

R. 35 (4)—Conviction under read with S. 149, I.P. Code—Legality, See Penal Code, S. 149. 1945 P.W.N. 120.

—R. 38—Burden of proof—Charge against strikers—Onus—Duty of prosecution—Absence of proof that excuse is not lawful—Conviction—Sustainability.

In a charge under R. 38 of the Defence of India Rules the prosecution is bound to prove that the act committed by the accused which is the basis of the charge against the accused was committed without lawful authority or excuse. In the absence of proof that the excuse put forward by the accused (strikers) was not lawful, their conviction cannot be sustained. (Lokur and Rajadhyaksha, JJ.) EMPEROR v. KASHINATH DYARAM. I.L.R. (1944) Bom. 437=217 I.C. 167=17 R.B 155=46 Cr.L.J. 208=46 Bom. L. R. 444=A.I.R. 1944 Bom. 243.

R. 38 (1) (a)—Applicability—"Without lawful authority or excuse"—Meaning and effect
—Strike—Offence

—Strike—Offence.
R. 38 (1) of the Defence of India Rules only prohibits the doing of a prejudicial act without lawful authority or excuse; it does not require that the excuse should be reasonable or just. So long as a strike is not prohibited by law, any excuse which is not unlawful would be sufficient to take it out of the category of the mischief contemplated by R. 38 (1) (a), though it may be a prejudicial act as defined in R. 34 (h). (Lokur and Rajadhyaksha, J.I.) EMPEROR v. KASHINATH DAYARAM. I.L.R. (1944) Bom. 437=217 I.C. 167=17 R.B. 155=46 Cr.L.J. 208=46 Bom. L. R. 444=A.I.R. 1944 Bom. 248.

—R. 38 (1) (a)—Charge of sedition—Cognizance—Complaint by or under the authority of Provincial Government—If necessary. RAMANUJA AYYANGAK, In re. [See Q. D., 1936-40, Vol. I, Col. 3352.] I.L.R (1941) Mad, 169=195 I.C 49=14 R.M. 115=42 Cr.L.J. 652=A.I.R. 1941 Mad, 363.

Facts to be proved by the prosecution.

In order to make a case punishable under R. 38 (a) of the Defence of India Rules the prosecution is bound to prove that the act committed which is the basis of the charge was committed without lawful authority of excuse. (Mulla, I.) BUNDOO v. EMPEROR. I.L.R. (1942) All. 919

DEFENCE OF INDIA RULES (1939), R. 38<sub>i</sub> 204 I.C. 291=15 R.A. 328=44 Cr.L.J 178= 1942 A.L.J. 530=1942 A.W.R. (H.C.) 302= 1942 A.L.W. 577=1942 A.Cr.C. 195=A.I.R. 1943 All. 15.

R. 38-B-Supersession of Municipality—Administrator appointed to exercise powers and duties—Right to continue suit instituted prior to supersession—Government—If necessary party.

Where a Municipality is superseded by Government under R. 38-B of the Defence of India Rules, 1939, the Administrator appointed to exercise the powers and duties of the Municipality has the right to continue a suit instituted by the Municipality prior to its supersession. The Givernment is not a necessary party to a suit filed or continued by the Administrator of a superseded Municipality. (Lokur and Weston, IJ.) Ahmedabad Municipality v. Mulchand, 47 Bom. LR 876.

R. 39 (1) (a) and (b)-Scope-If ultra

R. 39 (1) (a) and (b) of the Defence of India Rules are valid and not ultra vires the rule making power given under S. 2 of the Defence of India Act. (Divatia and Lokur, JJ.) EMPEROR v. ANNAJI BALKRISHAN. I.L.R. (1945) Bom. 507=220 I.C. 193=46 Cr L.J. 723=47 Bom. L.R. 389=1945 F.L.J. 115=A.I.R. 1945 Bom. 329.

—R. 38 (1) (a) (5)—Sedition—What constitutes—Discussion of current politics in language usually used for such purpose—Agreement to advance Pakhistan casting reflection on Govern-

ment-If offence.

The essence of the offence of sedition as defined in the I. P. Code-in this respect there is no difference between offences under the Code and under the Defence of India Rules-consists in the intention with which the language is used. Such intention has to be judged primarily by the language used. To arrive at a conclusion as to the intention, the Court must have regard to the class of audience to which and the circumstance in which the speech was made. It must then decide as to the probable effect of the speech. The speech must be read as a whole in a fair, free and liberal spirit. Ordinarily it should be difficult to found a charge of sedition upon ideas, sentiments and expressions which have become a part and parcel of the normal political life of the country and which do not excite people to disorder. Where the main and accepted object of a speech was to support Pakistan and not to create any anti-British feeling, the fact that certain reflections are cast upon the British Government by certain arguments used would not render the speech seditions even though the argument might be unfounded in the fact and its logic open to doubt and challenge. (Iqbal Ahmad, C.J., and Car, J.) FAKHR UL ISLAM v. EMPEROR. I.L.R. (1943) All. 429=207 I.C. 107 = 16 R.A. 28=1943 A.Cr.C. 57=44 Cr.L.J 609 = 1943 A.W.R. (H.C.) 73=1943 O.W.N (H.C.) 129=1943 A.L. W. 224=1943 O.A. (H.C.) 73=1943 A.L. J. 168=A.I.R. 1943 All. 244.

Notification by Bombay Government dated 5th. October, 1942—If can validate complaint by unauthorised person before that date. See ESSENTIAL SERVICES (MAINTENANCE), ORDINANCE, SS. 5 (a) AND 7. 45 Bom.L.R. 572.

### DEFENCE OF INDIA RULES (1939), R. 39.

R. 39-"Prejudicial"-Duty of Court to decide prejudicial character-Document proscribed by Provincial Government-If frejudicial ipso facto-Kelerancy of fact of proscription.

Under k. 39 of the Defence of India Rules, it is for the Court and rot for the Provincial Government to determine whether or not a document is prejudicial. The fact that the document has been proscribed by a Provincial Government is not a relevant fact in the case of a prosecution under R. 39. (Manchar Loll and Brough, JJ.) Anantanath (Hatterji v. Fmifk(R. 22 Pat. 549=209 I.C. 516=16 R.P. 95=16 B.R. 159=9 Cut.L.T. 72=45 Cr L.J. 159=A.I.R. 1943 Pat.

-R. 39 (1)—"Possession"—Meaning of.

There is no authority or warrent for holding that "possession" in R. 39 (1) of the Deferice of India Rules is to be looked at very much more stringently than under the ordinary law. The word must be given its ordinary meaning; if there are words with a technical legal neaning they must be given their ordinary legal meaning, unless the context or an express definition necessitates their being given some other meaning. The accused was prosecuted under R. 39 for being in possession of a book containing a prejudicial report on the ground that the book in question was found in a trunk which was common to him and to his elder brother in a room occupied ly both of them. There was nothing in the book to identify it as the property of one brother rather than the other.

Held, that the prosecution had failed to prove that the book was in the possession of the accused; and he could not therefore te convicted. (Manohar Lall and Brough, II.) ANANANANA CHATTERJI v. FMPFFOR. 22 Pat. 549=209 I.C. 516=16 R.P. 95=10 R.B. 159=9 Cut.L.T. 72= 45 Cr.L J 159=A.1.R 1943 Pat. 389.

R. 39 1) (b)-Prejudiciol report found in house jointly occupied by several fersons-Offence if committed by all-Burden of proof.

When a decument commining ary prejudicial report is found in a house or premises jointly occupied by several persons, every such occupant will be deemed to have contravered R. 39 (1) (b) of the Defence of Rules, unless he proves that he did not know and had no reason to suspect that the said document contained any prejudicial report, or that it was in such house or such premises without his knowledge or against consent. The Purden is on the accused. (Divatia and Lokur, J.) EMIFFER 7. WASAN WAMAN. IL.R. (1945) Bom. 302-47 Bom.L.R. 79-A.I. R. 1945 Bcm. 333.

F. 39 (1) (b)-Scope-If ultra vires. R. 39 (1) (b) of the Defence of India Rules is not ultra vires the (entral Government. (Divatia and Lokur. JJ) FMIIROR v WASANT WAMAN. I.L.R. (1945 Bcm. 302=47 Bcm.L.R. 79=A.I. R. 1945 Bcm. 333.

R. 39 (2) and (6)-Application-"Possession"-"Occupation" or "control" - Meaning of.

Some documents containing prejudicial reports were found in a hox in the house occupied by the applicant and her husband. When the house was raided by the police, the husband was out and the at plicant (wife) produced the keys with one of which the box could be opened. In addi-

### DEFENCE OF INDIA RULES (1939), R. 47

tion to prejudicial reports, there were some letters in the box addressed to the applicant.

Held, (1) that, prima facie, the box containing the documents would be in the possession of the husband and the mere fact that in his absence he had left the keys with the applicant (wife) would not make her in joint possession with himself; nor did the fact that there were letters in the box addressed to the wife mean that she was in joint possession of all the contents of the tox; (2) that the wife was in the circumstances in possession of the box within the meaning of R. 39 (1) of the Defence of Ind.a Rules; (3) that "occupation" in R. 39 (2) of the Defence of India Rules meant legal occupation, and the applicant could not be held to be in occupation or control of the house so as to render her guilty under R. 39 of the Defence of India Rules. (Beaumont, C. J. and Sen, J.) EMPFROR v. SUMATIBA! WASUDFO. 212 I.C. 74=45 Cr.L.J. 486=16 RB. 326=46 Bom.L.R. 102=A.I.R. 1944 Bom. 125.

- R 39 (2)—"In his occupation or under his

control"- Mean ng of.

The expression "control" in R. 39(2) of the Defence of India Rules is used to represent something different from occupation and is intended to cover the case of a person who is not in physical occupation of premises, but by virtue of his title or other circumstances, is in a position to exercise effective centrol over the pre-mises. "Occupation' must be taken to mean effective occupation, that is to say, such an occupation as gives the alleged occupant effective control over the premises in question. Where nore than one person are together using premises which carnot be subdivided into separate parts each in the exclusive occupation of one person, ro one can be said to be in occupation of the CHATTERJI v. I MPFROR 22 Pat. 549=209 I.C. 516=16 R.P 95=10 B.R. 159=9 Cut.L.T. 72 = 45 C<sub>1</sub>.L.J. 159=A.I.R 1943 Pat. 389.

R. 39 (2)—"Occupation"—Meaning of—

Results of the state of the control of th

Joint occupation- Sufficiency-Burden of proof.
"Occupation" in R. 39 (2) of the Deferce of India Rules contemplates physical occupation rather than occupation in the sense of being the legal terant crother person who may be looked to for payment of taxes, etc. Where on a search of a reem shared by the accused, a Hirdu co-parcener, and his elder brother who was the marager of the joint family a large quantity of highly prejudicial literature is found and the accused is charged with unlawful possession of prejudicial literature, the burden is on the accused to prove his innocerce and it is not necessary for the prosecution to prove that the accused was in sole occupation of the premises where the literature was found. Joint occupation with another is sufficient "occupation" for purwith another is summer in occupation and purposes of R. 39 (2). (Byers, J.) Gurumurthi, In re. I.L R, (1945) Mad. 233=217 I.C. 173=17 R.M. 281=46 Cr.L.J. 214=57 L.W. 466=A.I. R. 1945 Mad. 51=(1944) 2 M.L.J. 150.

- R. 47(2) (b)—Offence under—Mens rea, if

necessary.
R. 47 (2) (b) of the Defence of India Rules does not provide that it shall be an offence knowingly to use or have in one s possession a forged

# DEFENCE OF INDIA RULES (1939), R. 56. DEFENCE OF INDIA RULES (1939), R.55.

or altered official document. It provides that using or having it in one's possession shall be an off-nce. Therefore, guilty knowledge or mens rea is not necessary to the commission of the offence, but absence of it is a matter to be taken into account in deciding upon the sentence to be imposed (Derbyshire, C. J. and Lodge, J.) MONOTOSH KUMAR MITRA v. EMPEROR. 49 C.W. N. 737.

R. 56-Order promulgated under-Construction of-Preamble to rule-Relevancy.

The pream le to R. 56 of the Defence of India Rules is only relevant on the question of the validity of an order issued under it. If it could be proved that the purpose of Government in framing an order was not such as is indicated in the rule, then the order would be bad; but once the order has been promulgated, its construction must depend upon the language in which it is framed, and the preamble to R. 56 has nothing to do with the construction of the order. (Beaumont, C. J. and Sen, J.) EMPEROR V SHANKAR PAPAYYA PADAMSALI. 207 I.C. 116=16 R.B. 31 =44 Cr.L.J. 580=45 Bom.L.R. 310=A.I.R 1943 Bom. 177.

The only important ingredients of a "procession" in R. 56 of the Defence of India Rules, are a common purpose and a formal or demonstrative march. Even two persons can form a pro-Where two persons, one of them carrycession. ing a flag and both shouting slogans, march together in a line along a public road for the purpose of demonstration, they constitute a "procession" and are guilty under R. 56 (1).

Lokur, J.—A procession may be defined as a

formal and organised march of two or more persons, "formal" implying a kind of solemnity or something spectacular so as to attract attention and "organised" implying a common intention or unity of purpose. (Divatia and Lokur, JJ.) EMPEROR v. NANA SHAHU SONAVANE. 208 I.C. 11=16 R.B. 46=44 Cr.L.J. 668=45 Bom. L.R. 303=4 I.R 1943 Bom. 209.

-Rr. 56 (3) and 120 (b)—Scope—Power of police officer to close road whole sale and to clear a whole area of all persons—Failure to comply with direction to move away from area-Offence.

R. 56 (3) of the Defence of India Rules does not give to the police-officers such wide powers as to enable them to close a road whole sale or to clear an entire area of all persons and prevent innocent passers-by from making legitimate use of it. Therefore a person who is not concerned with any meeting or with any procession and who has no intention of holding or participating in any unauthorized meeting cannot be said to contravene any order passed under R. 56 (1), if he fails to comply with a direction of the police to disperse or move away from the area, and he cannot be convicted of an offence under R. 120 (b) of the Rules. (Wadia and Lokur, II.) EMPEROR v. JAYANTILAL JAGJIVAN. 213 I.C. 174=45 Cr. L. J. 691=17 R.B. 47=46 Bom.L.R. 196= A.I.R. 1944 Born. 139.

-R. 56 (4)—Rombay Notification S. D. V/102of 1942, cl. (b) prohibiting taking part in assembly Taking part in private assembly—Offence"Public assembly"—What is.

S.D.V/102 promulgated by the Government of ed by heat of drum before the date of the occur-

Bombay issued on 9-8-1942, applies only to public assemblies and does not apply to private assemblies. An assembly to be a public assembly must be qualified both as to its purpose, and as to its composition. A public assembly is one the object of which is the furtherance of some public purpose, and the constitution of which involves the admission of members of the public, whether conditionally or unconditionally. The public must have access to it, though it may be in limited numbers or on payment. If the assembly is confined to the members of a particular body or association, it would generally not be a public assembly. The question whether any particular assembly or meeting is a public assembly or meeting must be determined on the facts of each case. The place where the assembly meets may have some relevance, since it is obvious that a meeting which takes place in a public halt is more likely to be a public meeting than one which takes place in a private house. The accused, who were members of a society, called the "Rashtriya Seva Dal" the main purpose of which was to indulge in gymnastic exercises, took part in a meeting of the society. The assembly consisted of about 150 persons, all of whom were members of this body, and they sang vandemataram and saluted the congress flag, which might give some political flavour to the meeting.

Held, that it was not established that the public had any access to the assembly or that the object of the assembly was to further some public purpose, and it did not fall within the rule and the accused were not consequently liable to conviction under R. 56 (4) of the Defence of India Rules. (Beaumont, C.J. and Sen, J.) EMPEROR v. SHANKAR PAPAYYA PADAMSALI. 207 I.C. 116=16 R B. 31=44 Cr.L J 580=45 Bom.L R. 310=

A.I.R. 1943 Bom. 177.

R 56 (4)—Duty of prosecution—Controvention of Order—Proof of order—Necessity for. It is the duty of the prosecution in a trial on a charge of violation of an order unler R. 56 of the Defence of India Rules to prove in a legal manner the order on which it relies for proof of the commission of the offence charged, viz., the order which is alleged to have been contravened, (Agarwala and Meredith, JI.) RAM PRASAD MORAL V. EMPEROR 24 Pat. 143=219 I.C. 141=18 R.P. 111=26 P.L.T. 201=46 Cr. L.J. 538=1945 P.W. N. 65=A I R 1945 Pat 210.

-R. 56 (4)—Ingredients of offence-Existence of lawful order under rule by proper authority-Duty of prosecution to prove-Statement of Police Sub-Inspector-If sufficient evidence-Absence of cross-examination by accused and answer by accused to question under S 342, Cr. P. Code-Sufficiency for conviction.

An offence under R. 56 (4) of the Defence of India Rules is committed by a person who contravenes any order made under the rule; and before a Court can convict or uphold a conviction, under the rule, it must first be satisfied that there was an order lawfully issued under that rule by an officer properly empowered thereto. Where the only evidence reating to the existence of such an order is a statement of a Sub-Inspector of Police to the effect that an order of the District Magistrate hanning processions, meetings and assemblies was issued and proclaim-

#### DEFENCE OF INDIA RULES (1939), R. 56.

rence on which the charge is based that is insufficient and it is impossible for any Court to come to a finding and to convict under R. 56 (4). The fact that there is no cross-examination by the defence on the point or that the accused in his statement under S. 342, Cr. P. Code, answers in the affirmative a question, "Did you contravene R. 56 (4) of the Defence of India Rules by taking part in a procession" cannot be interpreted as an admission by the defence of the existence of such a lawful order under R. 56 (4). It is for the prosecution to prove all the essentials necessary to establish the guilt of the accused and if they do not do so, the prosecution must fail. Nor can the prosecution be allowed to fill in gaps in its evidence at a late stage in the appellate Court. (Varma and Reuben, JJ.) KIRTI NARAYAN SINGH TO EMPEROR. 23 Pat. 1=215 I C 268=17 R P. 113=46 Cr.L J. 86=11 B.R. 85=A.I.R. 1944 Pat. 345.

R. 56 (4)—Persons not present within cord on formed by Police Officers—If guilty of offence.

Any person who attempts to interfere with any police officer who may be engaged in enforcing the order of the District Magistrate prohibiting all public processions and meetings unless permission had been obtained from himself or some other proper authority, is guilty of an offence under R. 50 (4) of the Defence of India Rules whether or not he is actually present at the place where preparations are being made for taking out the procession and round which the police officers have formed a cordon with the object of preventing the processionists from passing. (Edgley and Roxburgh, Jl.) Heramba Lal Ghosh v. Empero., 78 C.L. J. 217=18 R.C. 122=220 I.C. 237=46 Cr.L.J. 692=A.I.R. 1945 Cal. 159.

It is difficult to say what "exercise, movement, evolution or drill" is not of a military character-A thing is said to be of a military nature when it resembles something done by or, appertaining to or belonging to soldiers, Where the object of certain exercises made by a body of persons, about 150 in number, 75 of whom are armed with lathis about four to six feet long, is found to be to enable a large body of men to respond immediately to a word of command so that it would be possible for one man in charge of a large body of persons to make them execute his will without the need for any elaborate explanations or directions, it must be held that the exercises are of a military nature, and the organisers as well as the instructor of such exercises are guilty of the offence under R. 58 (1) of the Defence of India Rules. (Horwill J.) PARAMARTH, In re. 200 I.C. 232=15 R.M. 43=43 Cr.L. J 618=55 L W. .214=1942 M.W.N. 222=A.I.R. 1942 Mad. 439 =(1942) 1 M.L.J 383.

It is quite legitimate for the prosecution under S. 236, Cr. P. Code, to charge the accused in the alternative either that they had disposed of the goods in contravention of the freezing order or had falsely informed the authorities that they had done so. (Edgley and Roxburgh, JJ) SUPERINTENTENTE AND REMEMBRANCER OF LEGAL AFFAIRS.

#### DEFENCE OF INDIA RULES(1939), R. 75.

BENGAL v. FUTNANI. 222 I.C. 166=79 C.L.J. 189=A I.R. 1945 Cal. 402.

R. 75-A—Construction—"Purpose for religious worship"—Burden of proof—Charge of breach of order requisitioning produce of dedicated property—Onus.

The expression 'purpose of religious worship' in the proviso to R. 75-A of the Defence of Lidia Rules, must be interpreted as including also ancillary purposes, such as the maintenance of the family of the shebait (in the case of property belonging to an idol) and selling part of the produce of the property for acquiring other articles necessary for the deity, etc. It is not for the accused to prove what part of the produce is required for the religious worship and what part is not so required. It is for the prosecution to prove what part was required and what part was not required for religious worship, before the prosecution can sustain a charge of breach of an order requisitioning the produce of dedicated property (Manohar Lall and Das, JJ.) Narsingh Charan Das v Emperor. 24 Pat. 423=11 Cut. L.T. 31=A.I.R. 1946 Pat. 34.

—R. 75-A, proviso— Applicability — Land entered in Record of Right as belonging to deity—Order requisitioning produce—Legality—Breach—Prosecution.

Where certain lands are entered in the Record of Rights as belonging to a deity, it is a case of complete dedication of the property to the deity and the produce of such property cannot be requisitioned under R. 75-A of the Defence of India Rules. The proviso to the rule applies to such a case and protects the shebait of the deity and no prosecution can be launched against him. For breach of an order under the rule requisitioning the produce of the property dedicated, because such property cannot be requisitioned in view of the proviso to R. 75-A. Even if the trustee or shebait mismanages the property or diverts it to other purposes, the property so as to validate an order under R. 75-A. (Manohar Lall and Das, JJ.) NARSINGH CHARAN DAS v. EMPEROR. 24 Pat. 423=11 Cut L. T. 31=A.I.R. 1946 Pat. 34.

—R.75-A and Defence of India Act, S.2 (4)—Delegation of power to requisition—If includes authority to form opinion as to necessity of requisitioning.

of requisitioning.

The exercise of the power to requisition property under R. 75-A of the Defence of India Rules is subject to and dependent upon the formation of the opinion as to the necessity or expediency of such requisitioning. The formation of the opinion and the making of the order are not separate and distinct and independent attributes but the former is a component or an integral part of the latter. The delegation of the power to requisition; therefore, includes authority to form the opinion conditioned upon which the power can be exercised. When the power has been delegated, it is the responsibility of the person, in whose favour the delegation is made, to form the opinion before he can exercise the power. (Derbyshire, C.J. and Gentle, J.) Gupta V. Mackeptich Iohn. 222 I.C. 48=1945 F.L.J. 182=49 C.W.N. 583.

R. 75-A-If ultra vires.
R. 75-A of the Defence of India Rules, in so far as it relates to the requisitioning of movable.

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property cannot be held to be ultra vires. The Government of India Act, 1935, S. 102 and Sch. VII, List II, Items 27 and 29 confer such a power. Failure to comply with an order of a grains pur-chase officer requisitioning stocks of paddy will be an offence punishable under R. 75-A of Deience of India Rules. (Happel, J.) VENKATASUBBAIER. In re. (1945) M.W.N. 55=A.I.R. 1945 Mad. 104=1945 F.L.J. 59=(1944) 2 M.L.J. 391.

-R 75 A-Necessity of requisitioning proerty-Opinion of authority as to-It and when can

be questioned in Court of law.

The formation of the opinion of the authority concerned as to the necessity or expediency of making a requisition of property under R. 75-A of the Defence of India Rules, is clearly a matter for executive discretion and cannot be questioned in a Court of law. The Court cannot investigate into the grounds or the sufficiency or otherwise of the materials or evidence on which that opinion is formed and substitute its own opinion for that of the authority concerned. But if such power is exercised in bad faith or for a collateral purpose, it is an abuse of the power and not in reality an exercise of the power and the Court can interfere with such colourable exercise of power. Where the issue is raised as to bad faith or collateral purpose, the Court has to investigate the matter and decide the issue. (Pas, J.) MACKERTICH JOHN v. GUPTA. 49 C.W.N. 322=80 C. L, J 136.

-R. 75-A-Necessity or expediency of requi-

sitioning-Court cannot enquire into.

Where the exercise of the requisitioning power under R. 75-A of the Defence of India Rules is not mala fide, no Court can interfere. A Court has no power to inquire into the necessity or expediency of such requisitioning. ((Derbyshire, C.J. and Genile, J.) Gupta v. Mackertich John. 222 I.C. 48=1945 F.L.J. 182=49 C.W. N. 583.

-R. 75-A-Order requisitioning property-Writ of certioral i or mandamus-If hes.

A writ of certiorari does not lie in respect of an order making a requisition of property under R. 75-A of the Defence of India Rules, as it is not a Judicial order. Such an order is an administrative or ministerial one, and if it is illegal a mandatory order under S. 45 of the Specific Relief Act can be granted. (Das J.) Macker-Tich John v. Gupta. 49 C.W.N. 322=80 C.L. J. 136.

-R. 75-A-"Property"-Meaning of-Order requisitioning hotel business-Validity-Govern-

ment of India Act, S. 299 (2).

The words 'any property, movable or immova-ble" in R. 75-A of the Defence of India Rules must of necessarily include all kinds of property except those referred to in the proviso. prima facie cover business and its good will. An order requisitioning a commercial undertaking (e.g.) the business of a hotel, is not therefore, ultra vires of the Rule. The provisions of R. 75-A are not in conflict with but are pursuant to the provisions of S. 299 (2) of the Government of India Act.

Per Gentle, J.- By requisitioning the building of a hotel, the authorities do not requisition the business, although there will be an interruption

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(Derbyshire, C.J. and Gentle, J) GUPTA v. MACKER ICH JOHN. 222 I.C. 48=1945 F.L.J. 182= 49 C.W.N. 583.

R. 75-A-Requisitioning of business or commercial undertaking—If authorised—Order requisitioning building of hotel—Validity—Hotel, if business-Requisitioning of hotel building-If requisitioning hotel business-Goodwill of business-If attached to building and if property-Go. erument of India Act, S. 299 (1),

R. 75-A of the Defence of India Rules is concerned with requisition and acquisition of property. It does not authorise the requisitioning of any business or commercial undertaking. Anhotel is a business and consequently an under-taking. An order requisitioning the building of an hotel indirectly requisitions the hotel business for the goodwill of the business which is attached to the building necessarily goes along with it, and it is, therefore ultra vires of the Rule, Further the good will of a business being property, to deprive a person of it by an order under the Rule, amounts to depriving him of his property otherwise than by authority of law and is opposed to S. 299 (1) of the Government of India Act (Das, J.) Mackertich John v. Gupta. 49 C.W.N. 322=80 C.L.J. 136.

-R. 75-A and 81-Requisitioning of busi-

ness or undertaking—Power of Government. Under R. 75-A of the Defence of India Rules, Government can requisition or acquire only movable and immovable property but not an undertaking like an Electric Supply Company as a going concern. R. 81 is obviously the rule contemplated for dealing with the control of an undertaking. Sub-R. (1) of that rule shows that orders taking control of the supply of electric energy were deliberately contemplated by this rule. But under this rule Government has no power to acquire but can only control an undertaking for the duration of the war and a limited period afterwards. (Young, C.J., Monroe and Muhammad Munir, JJ.) LAHORE ELECTRIC SUPPLY CO. LTD. v. PROVINCE OF PUNJAB. I.L.R. (1943) Lah. 617=205 I.C. 337=15 R.L. 285= 6 F.L.J (H.C) 40=45 P.L.R. 71=A.I.R. 1943 Lah. 41 (F.B).

75-A—Requisitioning of house for residence of Collector of Madras—Power of Collector to order—Delegation of power by Central Government under S. 2 (4) of the Defence of India Act (1939)—Scope—Defence of India Act (1939), Ss. 3, 15 and 16—Applicability—Limits of Court's jurisdiction.

S. 15 of the Defence of India Act stating that an authority or person acting in pursuance of the Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the pur-pose of ensuring the public safety and interest and the defence of British India—is directory and must be read in conjunction with S. 16 which says that no order made in exercise of any power conferred by or under the Act shall be called in question in any Court. Of course this does not preclude the Court from deciding whether a power has been conferred or whether a power which has been conferred has been abused. The Collector of Madras is in charge and an interference in the conducting of it. of supplies which are essential to the lives of the DEFENCE OF INDIA RULES (1939), | DEFENCE OF INDIA RULES R. 75-A.

citizens of Madras and moreover he is the Deputy Civil Defence Commissioner. The Deputy Civil Defence Commissioner. The provision of a house for his residence is something which is necessary for the "maintaining of supplies and services essential to the life of the community", within the meaning of R. 75-A of the Defence of India Rules. There is full power of delegation under S. 2 (4) of the Defence of India Act and when such power has been delegated the person or authority to whom the delegation has been made has all the powers of the Central Government unless the order of delegation contains some restriction on the exercise of the power. The order of delegation by notification dated 25th April, 1942, under which the Collector of Madras acted (in requisitioning a private bungalow for housing the incoming Collector) contained no restriction on his power to requisition houses in Madras. Under subsection (4) of S. 2 of the Defence of India Act the power may be delegated so as to apply only in specified circumstances and under specified conditions but the delegation may be unrestricted. The power delegated by the order was a power to requisition for any of the purposes mentioned in R. 75-A, if the occasion should arise, subject to the property being within the jurisdiction of the Collector issuing the requisition order. The existence of the Land Acquisition Act is no bar to the power of the legislature to provide for requisitioning of property for any of the purposes mentioned in R. 75-A of the Defence of India Rules as the Land Acquisition Act relates to acquisition of absolute ownership when property is required for a public purpose or for a public company and not to requisitioning in an emergency. Moreover S. 3 of the Defence of India Act states that any rule made under S. 2 and any order made under any such rule, shall have effect notwithstanding anything inconsistent therewith, contained in any enactment other than the Defence of India Act itself or any instrument having effect by virtue of any enactment other than the Act. Accordingly the Collector of Madras had authority to issue an order requisitioning a house belonging to a private person for the purpose of housing the incoming Collector of Madras. As there was nothing to show that the requisition order was in any way mala fide the order cannot be questioned in Court. (Leach, C.J. and Lakshmana Rao, J.) KEWALRAM v. COLLECTOR OF MADRAS. I.L.R. (1944) Mad. 826=218 I.C. 271=18 R.M. 21=1944 F.L.J. 96=1944 M.W.N. 216=57 L.W. 206=A.I.R. 1944 Mad. 285=(1944) 1 M.L.J. 263.

R. 75-A (7)—Disposal of goods—Meaning of—Actual delivery, if necessary.
"Disposal" within R. 75-A (7) of the Defence of India Rules, does not mean any actual removal or delivery by actual movement of the goods. The receipt of a delivery order by the purchaser and payment of money by the purchaser to vendor's agent, will certainly amount to a disposal of the goods. If the intention of

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very of the goods by him would be if he allows the purchaser to remove the goods. (Edgley and Roxburgh, JJ.) Superintendent and Remembrancer of Legal Affairs, Bengal v. D. B. Fatnani. 222 I.C. 166=79 C.L.J. 189=A.I.R. 1945 Cal. 402.

R. 81—Applicability—Notification regulating price issued subsequent to sale—Conviction —Sustainability.

A notification regulating the prices of soft coke issued subsequent to the date of sale by the accused for which he has been charged, cannot be used to support his conviction. (Meredith, J.) JUGAL SINGH v. EMPEROR. 208 I.C. 219=16 R.P. 66=10 B.R. 42=44 Cr.L.J. 745 =A.I.R. 1943 Pat. 315.

R. 81—Authority to exercise certain powers delegated subject to the supervision of the delegating authority-Effect.

Where a notification is issued by the Commissioner under an authority delegated to him by the Chief Commissioner to fix rates to be charged for certain commodities subject to the general supervision of the Chief Commissioner, it is quite valid and legal. The reservation of a general power of supervision could not take away the authority conferred on the Commissioner. (Davies.) Emperor v. Chand Mal. 1943 A.M.L.J. 41.

R. 81—Contravention of orders under—

Duty of prosecution.

R. 81 of the Defence of India Rules, deals with a large number of topics and the orders made by the authorities under that rule may be numerous and of diverse nature. It is highly essential therefore that the prosecution should definitely charge the accused with the specific dennitely charge the accused with the specific act which they consider the accused has done and falls within the purview of a prohibition made under the Defence of India Rules. (Mir Ahmad, J.C.) JIWAN DASS v. EMPEROR. 216 I.C. 284=17 R. Pesh. 21=46 Cr.L.J. 160= A.I.R. 1944 Pesh. 46.

——R. 81—Order regulating letting of accommodation—Personal satisfaction of Governor—If required

-If required.

R. 81 of the Defence of India Rules specifically authorises the Central Government or the Provincial Government to make orders for regulating the letting and sub-letting of accommodation. Where such an order is made by the Prowincial Government, the personal satisfaction of the Governor is not required. (*Teja Singh and Bhandari*, *JJ*.) Rup Lal Mehra v. Emperor. 221 I.C. 48=47 P.L.R. 134=A.I.R. 1945 Lah. 158.

R. 81—Order regulating letting of accommodation—Validity—Defence of India Act,

S. 2 (1).
The rules concerning the letting and sub-letting of residential or other accommodation are not in excess of the powers conferred by S. 2 (1) of the Defence of India Act. An order under R. 81 of the Defence of India Rules regulating the parties was that the property in the goods should pass with the delivery order, the subsequent acceptance of the money by the vendor's agent is another act of disposal, as actual deli
LAL MEHRA v. EMPEROR. 221 I.C., 48=47 P. L.R. 134=A.I.R. 1945 Lah. 158.

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-R. 81-Petrol Rationing Order, Rr. 22 and (4) (c)—Breach of rules by servant—Liability

of master—Mens rea, when relevant.
When a servant of an owner of a petrol pump fills up a petrol coupon wrongly there is a contravention of R. 22 read with R. 4 (c) of the Petrol Rationing Order made under R. 81 of the Defence of India Rules. The penal liability under the former rules is an absolute liability and a breach of the rules either by the master or servant would render both of them guilty irrespective of their knowledge of the breach of the rules. The question of mens rea cannot affect the conviction but can only affect the measure of punishment. (Davies.) EMPEROR v. Ambalal. 1943 A.M.L.J. 38.

-R. 81—Powers of Provincial Governments -Delegation to additional District Magistrate-Competency-Order by Additional District Magistrate prohibiting transport of paddy or rice from district-Is intra vires.

A Provincial Government has all the powers conferred by R. 81 of the Defence of India Rules and it has the power of delegation. Where a Provincial Government delegates to all Additional District Magistrates the power of controlling the transport of rice or paddy to places outside the districts concerned, every Additional District Magistrate has power to pass an order prohibiting the export of paddy or rice from his district without a permit issued by a proper authority. The validity of such an order cannot be called in question. A person offends such an order if he removes or takes any steps towards the removal of paddy or rice from the district without a permit and it matters not whether the intended removal is to the adjoining district or to a Native State, so long as the removal is outside the district. Such an order by the Additional District Magistrate is intra vires. (Leach, C.J. and Shahabuddin, J.) CHINNAVAN ROW-THER, In re. I.L.R. (1945) Mad. 76=218 I.C. 7=46 Cr.L.J. 361=1944 F.L.J. 200=1944 M.W.N. 601=A.I.R. 1944 Mad. 479 =(1944) 2 M.L.J. 49.

-R. 81—Rawalpindi and Muree House Rent Control Order, 1941, Cl. (6)-"Charge any

rent"-Meaning of.

Cl. 6 of the Rawalpindi and Murree House Rent Control Order, 1941, provides that when the Controller has determined the fair rent of the house, "the landlord shall not charge any rent in excess of such fair rent". The word "charge" means receive, and does not mean "to impose, claim, demand, or state as the price or sum due for anything". The expression "charge any rent" must be construed as a whole and must not be split up or disjoined for the purposes of construction. Rent can obviously be charged only when it becomes payable for payment of rent before it is due is not a fulfilment of the obligation to pay rent but is in fact an advance to the landlord, with an agreement that on the date when the rent becomes due such advance should be treated as a fulfilment of the obligation to pay rent. (Teja Singh and Bhandari, JJ.) Rup Lal Mehra v. Emperor. 221 I.C. 48=47 P. L.R. 134=A.I.R. 1945 Lah. 158. (1939).

-R. 81—Scope and operation of.

R. 81 of the Defence of India Rules is merely an enabling rule and merely provides that Government may in certain circumstances by order provide for certain things. There is nothing in the rule itself which has to be obeyed by any one. (Manohar Lall and Meredith, JJ.) DAN MALL SHARMA v. EMPEROR. 22 Pat. 602=211 I.C. 4=10 B.R. 305=45 Cr.L.J. 288=16 R.P. 213=24 Pat.L.T. 211=A.I.R. 1944 Pat. 1.

-R. 81-Scope-Taking action by notified

order-If justified.

R. 81 of the Defence of India Rules, 1939,

R. 81 of the Defence of India Rules, 1939, does not provide for taking action by a notified order. (Agarwala and Beevor, II.) Kanta Prasad v. Emperor. (1945) P.W.N. 374.

R. 81—"Undertaking"—Hotel business.

The word "undertaking" in R. 81 of the Defence of India Rules is, broadly speaking, synonymous with the word "business", and includes, therefore, the business of carrying on a botal (Derhyshire C.I. and Gentle II.) Gupta v. Mackerich John. 222 I.C. 48=

1945 F.L.J. 182=49 C.W.N. 583.

R. 81 (a)—"Trade dispute"—If should be with one's own employer.

According to R. 81 (a) of the Defence of India Rules, for the definitions and technical terms used in the rule, regard is to be had to the Trade Disputes Act. A reference to the notification dated 21st August, 1942 and the defi-nition of 'trade dispute' in S. 2 of the Trades Disputes Act, show clearly that there is no warrant for importing into the rule the words 'with his own employer' after the words 'in connection with any trade dispute'. Hence a strike without giving notice would be an offence under the rule even though it was in sympathy with the disputes in another mill. (Davies.) EM-PEROR v. BEHARI LAL. 1944 A.M.L.J. 2.

-R. 81 (2)—Powers of Central Government-Food Grains Control Order (1942)-Is

intra vires.

It must be held that under R. 81 (2) of the Defence of India Rules the Central Government had the power to issue the Food Grains Control Order (1942), and the provisions of Cl. (3) of that order are in all respects intra vires notwithstanding that there is a discretion in the matter of issuing licences. S. 2 (2) of the Defence of India Act expressly empowers the Central Government to make rules for the control of trade, etc., and a power to control includes a power to prohibit, one way of controlling power to prohibit, one way of controlling or regulating a trade by insisting upon those engaged in it taking out licences. (Leach, C.J. and Shahabuddin, J.) PUBLIC PROSECUTOR v. VENKAYYA. I.L.R. (1944) Mad. 448=1944 F.L.J. 191=1944 M.W.N. 603=57 L.W. 363=A.I.R. 1944 Mad. 452 = (1944) 2 M.L.J. 13.

R. 81 (2) (a)—Order in regard to possession of small coins—If within the powers conferred by the Rule—'Articles or things'— Meaning.

Coins cannot be taken to be included in the expression "articles or things" used in R. 81 (2) (a) of the Defence of India Rules. Hanca an

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order by District Magistrate in regard to posses-Side by District Magistrate in regard to possession of small coins is beyond his powers. (Allsop and Malik, JJ.) RAGHUBIR SINGH v. EMPEROR. 1945 A.L.J. 467 (1)=1945 A.W. R. (H.C.) 308 (1)=1945 A.L.W. 380=1945 O.W.N. (H.C.) 333=1945 A.Cr.C. 169=A.I.R. 1946 All. 88.

R. 81 (2) (a)—Scope—Is intra vires. See Non-Ferrous Metals Control Order, Cl. 6. 46 Bom.L.R. 529 (F.B.).

der to regular customers-If offence.

The Court must construe the word "withhold" in R. 81 (2) (a) of the Defence of India Rules in relation to the facts of each particular case. It cannot be read as "unreasonably withhold;" when the word unreasonably is not in the rule, the Court cannot put it there. But it can and ought to be held that a man has not withheld from sale to any person of a thing if he has sold some quantity to anyone demanding it and has not evidenced unwillingness to sell the rest to other persons. In order to bring home the offence, the prosecution has to go much further to show that the accused was over a period withholding his stock from sale. A dealer is not bound to sell his whole stock or a large part of it, to the first customer who demands it. If at the end of a period, it is found that a dealer has not sold his stock, although asked to do so, there may be a case for the prosecution. The accused, who kept a small grocery shop had a stock of sugar consisting of four pounds only. A casual customer hurried up and asked for one pound of sugar at the price fixed. The accused, however, refused to sell him more than one anna worth of sugar, on the ground that he had considerable number of regular customers, and that he was anxious to sell his sugar to them, and in view of the small stock he had he was not prepared to part with one-fourth of his stock to somebody whom he did not know.

Held, that the accused was not guilty of with-holding sugar from sale and was not liable to conviction under R. 81 (2) (a) of the Defence of India Rules. (Beaumont, C.J. and Wassoodev, J.) EMPEROR v. MAHADEV MAHALI. 205 I.C. 240=15 R.B. 357=44 Cr.L.J. 355=44 Bom.L.R. 921=A.I.R. 1943 Bom. 49.

----R. 81 (2) (a) and (4)—"Withholding fram sale"—Offence.

A dealer who with large stocks of matches in his shop flatly refuses to sell even a box to a customer, commits the offence of "withholding" from sale within the meaning of the Notification prohibiting withholding under the Defence of India Rules. (Leach, C.J. and Clark, J.)
PUBLIC PROSECUTOR V. SUBBA RAO. I. L. R. (1945) Mad. 385=221 I.C. 506=58 L.W. 20=1945 M.W. N. 54=A.I.R. 1945 Mad. 331=(1945) 1 M.L.J. 155.

—R. 81 (2) (a) and (b)—Validity.
The provisions of R. 81 (2) (a) and (b) of the Defence of India Rules enabling the maken.

of the Defence of India Rules enabling the making of orders regulating the distribution of articles, requiring them to be sold to specified per- B.).

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sons and for incidental matters, relate to the distribution of goods in Item 29 of List II and is intra vires the Government of India Act. (Derbyshire, C.J. and Gentle, J.) KHETSIDAS GIRDHARILAL, In the matter of. 1945 F. L. J. 205=49 C.W.N. 595.

to rules-Burden of proof.

Any order passed under R. 81 (2) (b) cannot bind the person concerned unless it is published in accordance with R. 119 of the Defence of India Rules. This latter rule lays an obligation on the officer making the order to publish notice of such order. The manner in which such notice is to be published is no doubt left to the discretion of that officer. If he adopts a mode of publication however inadequate or unreasonable it is not liable to be questioned in any Court of law. But the burden of proving publication of the notice of that order in the manner contemplated by the officer making the order lies on the prosecution. In other words it must be shown that the officer making the order himself prescribed the manner of its publication and that the publication was made in that manner. The obligation laid on the officer passing the order is a statutory obligation and it is incumbent on the prosecution to prove that the statu-tory obligation was duly discharged. The prosecution cannot in such a case merely rely on the presumption of S. 114 (e) of the Evidence Act for the only reason that the making of the order and the direction to publish notice of it were official acts. (Niyogi, J.) SHAKOOR HASAN v. EMPEROR. I.L.R. (1944) Nag. 150=211 I.C. 29=45 Cr.L.J. 250=16 R.N. 177=1943 N. L.J. 605=A.I.R. 1944 Nag. 40.

R. 81 (2) (b)—Scope—Notification for-forbidding withholding of article from sale— Validity of.

R. 81 (2) (b) of the Defence of India Rules, does not relate to withholding from sale. The clause has reference only to the controlling of prices. It is therefore not competent to the Collector of a District under cl. (b) of R. 81 (2) to provide by a Notification that a person selling matches commits an offence when he withholds matches from sale notwithstanding that he possesses saleable stock. Such a notification would be valid only if made under cl. (a). A Notification under cl. (b) is therefore not valid. (Leach, C. J. and Clark, J.) Public Proserutor v. Subba Rao. I.L.R. (1945) Mad. 385=221 I.C. 506=1945 M.W.N. 54=58 L.W. 20=A.I.R. 1945 Mad. 331=(1945) 1 M.L.J. 155.

R. 81 (2) (b) and (4)—Validity.

Neither R. 81 (2) (b) nor R. 81 (4) of the Defence of India Rules is invalid. (Derbyshire, C.J. and Lodge, J.) Keshabbeo v. Emperor, 217 I.C. 189=17 R.C. 176=46 Cr.L.J. 230=A. I.R. 1944 Cal. 317.

R. 81 (2) (bb)—Scope—If ultra vires or invalid. See Defence of India Act, S. 2 (1) AND R. 81 (2) (BB). 46 Bom. 2.R. 877 (F.

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R. 81 (2) (bb) (ii)—Jurisdiction— Conditions for making order—Landlord obtaining Civil Court decree for ejectment of tenant— Order requiring landlord not to interfere with hossession of tenant-Legality-If ultra vires.

Before an order can be made on an application by a District Magistrate under R. 81 (2) (bb) (ii) of the Defence of India Rules he has to be satisfied that it is necessary and expedient to make the order in question "for securing the Defence of British India of the efficient prosecution of the war or for maintaining the supplies and services essential to the life of community". An order requiring a landlord who has obtained a decree for eviction of his tenant in a Civil Court, not to interfere with the possession of his tenant cannot ordinarily have any connection with the Defence of British India, etc. An order passed, when none of the conditions are satisfied is without jurisdiction. The order is also ultra vires in view of S. 14 of the Defence of India Act. (Macklin and Sen, JJ.) MOTICHAND BALUBHAI V. DISTRICT MAGISTRATE, SURAT. 47 Bom.L.R. 357=A. I. R. 1945 Bom. 385.

R. 81 (2), (Proviso inserted by Bihar Notification of 1943)—Scope and effect—If affects Food Grains Control Order, 1942.

The effect of the proviso introduced to R. 81 of the Defence of India Rules by Bihar Govern-Notification No. 7261, P.C., 24-5-1943, while it was in force, was to remove restrictions placed by the Local Government on dealings with Food Grains. It did not in any way affect the operation of the Food Grains Way affect the Operation of the Food Grans Control Order (1942) issued by the Central Government. (Rowland, J.) RAGHUBAR LALL v. EMPEROR: 217 I.C. 229=17 R.P. 188=46 Cr.L.J. 264=11 B.R. 185=25 P.L.T. 81=A.I.R. 1944 Pat. 308.

Rr. 81 (2), (Proviso inserted by Bihar Notification of 1943)—Scope—If repeals—Notification, dated 23rd January, 1943—Contravention of latter notification—If punishable.

The proviso inserted at the end of R. 81 (2), Defence of India Rules, on 18th May, 1943 did not repeal the Notification, dated 23rd January 1943. Even if the notification was repealed thereby, a contravention of that notification while it was in force, would continue to be punishable after it has ceased to have effect. (Manohar Lall and Beevor, JJ.) Madho Singh v. Emperor. 23 Pat. 240=215 I.C. 144=17 R.P. 99=11 B.R. 65=25 P.L.T. 181=46 Cr.L. J. 11=1944 P.W.N. 147=A.I.R. 1944 Pat. 217.

-R. 81 (4)—Applicability—Selling article beyond controlled price-Order fixing price not proved—Correction—Sustainability.

A person cannot be convicted under R. 81 (4) of the Defence of India Rules of the offence of having sold a commodity at a price in excess of the controlled price in the absence of proof of an order fixing the price of that commodity. When the order alleged to have been contravened is neither produced nor exhibited in the case, there is no legal evidence of the order in question.

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> (Imam and Ray, II.) PURANMAL v. EMPEROR. 24 Pat. 612=A.I.R. 1946 Pat. 76.

-R. 81 (4)-Breach of order made under R. 81 (2)-Prosecution after cancellation of order—İf maintainable.

The prosecution of a person in respect of a. breach of an order made under R. 81 (2) of the Defence of India Rules is maintainable after the cancellation of that order, provided the breach was committed while it was in force. The only effect of the order is to render certain acts unlawful and that effect is complete. When the acts are done the subsequent prosecution is not the effect of the order but of the Defence of India Rules, R. 81 (4). (Puranik and Hemeon, JJ.) PROVINCIAL GOVERNMENT, C. P. AND BE-RAR v. SAYAD ALI. I.L.R. (1945) Nag. 867= 1945 N.L.J. 505.

-R. 81 (4)—Burden of proof-Fixation of

price by competent authority—Onus.

In a prosecution under R. 81 (4) of the Defence of India Rules for selling an article at a price in excess of that which is authorised, it must be proved by the prosecution that the person authorised under the Rules had fixed the price of the article in question in the absence of vened—Necessity.

It is essential for the prosecution under R. 81 (4) of the Defence of India Rules, to prove that the competent authority had determined the manner in which a notice of the order alleged to have been contravened was to be published and that the order had been so published before the alleged offence was committed by the accused. When there is no evidence to prove that the order had been duly promulgated as required by R. 119 of the Defence of India Rules, no conviction can be sustained under R. 81 (4). (Das, J.) GANESH POTDAR v. EMPEROR. (1945) P. W.N.\_243.

Rr. 81 (4) and 121—Charge for contravention of order—Conviction for attempt—Pro-

A person who is charged with contravention of an order issued under R. 81 (2) of the Defence of India Rules, can be convicted for an attempt to contravene the order. The fact that he has not been charged with attempt does not prejudice him in his defence. Under R. 121, and attempt to contravene a rule or order is deemed to be a contravention of that rule or order and need not therefore be specifically mentioned in the charge. (Muhammad Munir, J.) Dost MAHOMED v. EMPEROR. I.L.R. (1945) Lah. 403=47 P.L.R. 229=A.I.R. 1945 Lah. 334.

——R. 81 (4)—Contravention of order under rule before amendment in 1942—If punishable.

Before the amendment of 18th July, 1942, R. 81 (4) of the Defence of India Rules contained no provision for punishing the contravention of orders framed under R. 81 (2) (b) DEFENCE OF INDIA RULES (1939), DEFENCE OF INDIA RULES

controlling the prices at which articles or things of any description might be sold. The rule which is penal, must be construed strictly and cannot be interpreted so as to make punishable a contravention of an order under R. 81 (2) (b) before the rule was amended. (Byers, J.) Сноккаlingам Снетту, In re. 206 I.C. 314 =15 R.M. 967=1943 M.W.N. 45=56 L.W. 212=44 Cr.L.J. 472=A.I.R. 1943 Mad. 255=(1943) I M.L.J. 20.

R. 81 (4)—Contravention of order under rule before amendment in 1942—If punishable. See Defence of India Act, S. 2 (3) (iv) (b). (1943) 2 M.L.J. 287. R. 81 (4)—Contravention of under rule before amendment in 1942-If punish-

able.

Before a person can be punished under R. 81 of the Defence of India Rules for having contravened the provisions of an order made thereunder, it must be established that the contravention took place after, and not before, the 18th July, 1942, the date on which the amended sub-R. (4) came into force. (Teja Singh and Bhandari, JJ.) Rup LaL Mehra v. Emperor. 221 I.C. 48=47 P.L.R. 134=A.I.R. 1945 Lah. 158.

R. 81 (4)—Contravention of order under rule before amendment in 1942—If punishable.
R. 81 (4) of the Defence of India Rules, as it stood before it was amended in July, 1942, only provided a punishment for contravention of any of the provisions of that rule and not for contravention of an order under the rule. Therefore contravention of an order under the rule before the amendment cannot be punished under R. 81 (4). (Rowland, J.) JAGABANDHU SAHU v. Emperor. 9 Cut.L.T. 18.

R. 81 (4)—Contravention of order under

rule before amendment in 1942-If punishable. Until an amendment was made in July, 1942 by which infringement of an order under R. 81 (4) of the Defence of India Rules was made punishable with the same penalty as breach of the rule itself, it was not an offence to commit a breach of an order made under the rule. (Rowland, J.) KRISHNA CHANDRA SINHA v. EMPEROR. 208 I.C. 639=16 R.P. 87=44 Cr. L.J. 801=10 B.R. 60=A.I.R. 1943 Pat. 313.

-R. 81 (4)—Contravention of order under rule before amendment in 1942-If punishable. Under R. 81 (4) of the Defence of India Rules as it stood before its amendment in July, 1942, it was not an offence to contravene an order made under the rule, and hence a contravention of an order under the rule before July, 1942, is not an offence punishable in law. (Row-land, J.) MAHOMED v. EMPEROR. 209 I.C. 639=13 R.P. 169=45 Cr.L.J. 166=10 B.R. 179=9 Cut.L.T. 19=A.I.R. 1943 Pat. 380.

R. 81 (4)—Food Grains Control Order—Control Punches in wholesels a control. Contravention-Purchase in wholesale quantities -Offence. See Food Grains Control Order, Cl. 3 (1). (1945) 1 M.L.J. 389.

R. 81 (4)—Food Grains Control Order (1942), Cl. 3—Contravention of—Purchase of food grains as buying agent of another without

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licence-Offence. See Food Grains Control ORDER, CL. 3. (1944) 2 M.L.J. 183.

R. 81 (4)—Food Grains Control Order (1942), Cl. 3—License under—Breach of condition in-Offence.

The conditions of a licence issued under the Food Grains Control Order should be regarded as part of that order itself, so that any contra-vention of any one of the conditions would be a contravention of an order made under R. 81 (2) ond punishable under R. 81 (4) of the Defence of India Rules. (Happell, J.) VISWANATHA CHETTI, In re. I.L.R. (1945) Mad. 525= 217 I.C. 144=17 R.M. 279=46 Cr.L.J. 197=1944 M.W.N. 683=57 L.W. 548=A.I.R. 1945 Mad. 24=(1944) 2 M.L.J. 299.

R. 81 (4)—Food Grains Control Order (1942), Cl. (3)—Licence under—Breach of condition—Offence.

A wholesale dealer in rice holding a license under the Food Grains Control Order, sold rice to various persons without showing in the receipts or in the duplicates maintained by him the name, address and licence number of the various purchasers, in contravention of condition No. 6 of the licence granted to him. He was charged under R. 81 (4) of the Defence of India Rules read with Cl. (3) of the Food Grains Control Order.

Held, that the omission on the part of the dealer to mention the particulars in the receipts and counterfoils amounted to an offence under R. 81 (4) of the Defence of India Rules as they contravened the Food Grains Control Order which was an order under the Defence of India Rules, and he was therefore liable to conviction, under R. 81 (4) of the Defence of India Rules. It cannot be said that the omission is merely a breach of a condition in the licence and is not a disobedience of an order issued under the Defence of India Rules. The fact that the accused was a trader with a large business could be no excuse at all. (Kuppuswam Ayyar, J.) Raghavalu Chetty, In re. 210 I.C. 408=16 R.M. 465=45 Cr.L.J. 257=56 L.W. 577=1943 M.W.N. 709=A.I. R. 1944 Mad. 41=(1943) 2 M.L.J. 378.

R. 81 (4)—Food Grains Control Order— License for purchase, sale or storage for sale in wholesale quantities—Condition requiring licensee to pass receipt—Applicability to retail sale.

A condition in a license for the purchase, sale or storage for sale, in wholesale quantities, of food grains issued to the 1st accused, the owner of a rice mill, required the licensee to issue a receipt or invoice giving particulars of any sale and to keep a duplicate for the same. The 1st accused's son, the second accused who was managing the mill, sold a bag of rice for a price which would be the price if sold in retail, but refused to pass a receipt. The accused, who were prosecuted for breach of the condition in the licence pleaded that the condition applied only to wholesale sales.

Held, that the condition applied to retail as well as wholesale sales by the licensee and both the accused were liable to conviction for breach of the condition. (Happell, J.) PADMANABHA DEFENCE OF INDIA RULES (1939), DEFENCE OF INDIA RULES (1939), R. 81.

IYER, In rc. 221 I.C. 469=(1945) M.W.N. 263=A.I.R. 1945 Mad. 379=(1945) 1 M.L. J. 457.

-R. 81 (4)—Food Grains Control Order (1942), Cl. (3)—Storage of paddy in wholesale quantities without licence, for sale at a future

date is an offence.

As the words "in wholesale quantities" occurring in Cl. 3 of the Food Grains Control Order (as it stood in March, 1943), governs the previous words purchase, sale and storage, the storage also "in wholesale quantities" for purposes of sale without a licence is prohibited. It cannot be said "that it was only storage for purposes of fulfilling the terms of a contract" entered into beforehand for sale in wholesale quantities that should be considered to have been constituted an offence. If a person undertakes to trade and if he stores food grains "in wholesale quantities" for sale in future, under contracts to be entered into in the future, he will still be guilty of the offence punishable under Cl. 3. (Kuppuswami Ayyar, J.) UDUMAN TARAGANAR, In re. 216 I.C. 192=17 R.M. 217=46 Cr.L.J. 140=1944 M.W.N. 444=A.I.R. 1944 Mad. 451=(1944) 2 M.L.J. 33.

R. 81 (4)—Food grains released after seizure—Forfeiture, if can be ordered—Food Grains Control Order, Cl. 7-A.

R. 81 (4) of the Defence of India Rules is wide enough to permit forfeiture of stocks of food grains, if a contravention of the Food Grains Control Order is committed in respect thereof, even though they have been released after seizure. (Puranik, J.) BABULAL V. EMPEROR. I.L.R. (1945) Nag. 714=1945 N.L. J. 405.

R. 81 (4) (as amended in 1943)—If limits power of confiscation under S. 517, Cr. P.

Code.

Where an order under R. 81 (2) of the Defence of India Rules, prohibiting the removal of certain articles outside certain limits did not direct that any article in respect of which the order had been contravened should be liable to forfeiture, the Court would have no power under R. 81 (4) as amended later, to direct forfciture; since the language of R. 81 (4) as amended clearly implies that confiscation cannot be orderclearly implies that confiscation cannot be ordered in any other case and the power of confiscation under S. 517, Cr. P. Code, must be regarded as impliedly limited by R. 81 (4), and S. 517, Cr. P. Code, cannot therefore be invoked. (Wadia and Weston, JJ.) EMPEROR v. PURUSHOTTAM DEVIL I.L.R. (1944) Bom. 429=217 I.C. 373=46 Cr.L.J. 354=46 Bom.L.R. 449=A.I.R. 1944 Bom. 247.

—R. 81 (4) (as amended in 1943)—If limits power of confiscation under S. 517, Cr. P. Code.

Rule 81 (4) of the Defence of India Rules as amended in 1943 provides that an order of confiscation may be made if the order so provides. That shows a clear intention on the part of the Legislature that no order for confiscation can be made if the order does not provide for it. The words "if the order so provides" in R. 81 (4) limit the Court's power to order confiscation R. 81.

under the general provisions of S. 517, Cr. P. C. (Divatia, Lokur and Rajadhyaksha, JJ.) EMPEROR v. HANSRAJ ASTAJI. I.L.R. (1944) Bom. 576=218 I.C. 359=18 R.B. 35=46. Cr.L.J. 482=46 Bom.L.R. 529=A.I.R. 1944 Bom. 292 (F.B.).

R. 81 (4)—If limits power of confis-cation under S. 517, Cr. P. Code.

If the order, contravention of which is alleged. provides for confiscation, then the property wrich is the subject-matter of the proceedings can be confiscated. On the other hand, if the order does not so provide then there is no power of confiscation. The words "if the order so provides" in R. 81 (4) limit the Court's power to order confiscation under the general provisions of S. 517, Cr. P. C. (Harries, C.J., Teja Singh and Khosla, JJ.) ABDUL MAJID v. EMPEROR. 221 I. C. 255=1946 Lah. (Rul.) 90=A.I.R. 1945 Lah. 149 (F.B.).

R. 81 (4)—If limits power of confisca-tion under Cr. P. Code, S. 517—Order prohibit-ing transport of chillies—No provision for confiscation-Forfeiture-Propriety.

The clear meaning of R. 81 (4) of the Defence of India Rules, which provides for confiscation, is that the property in respect of which the offence is committed may be forfeited by order of the Court only if the order promulgated under R. 81 (2) so provides, but not otherwise. S. 517, Cr. P. Code, is inconsistent with R. 81 (4) and cannot be invoked by reason of S. 3 of the Defence of India Act so as to enable a Court to exercise powers of forfeiture which R. 81 (4) does not give him. Where an order of the Collector prohibiting export of chillies from a district is contravened, but the order at the time contains no provision for confiscation of the property transported, a Court has no or the property transported, a court has no-jurisdiction to order forfeiture or confiscation of the property under S. 517, Cr. P. Code. (Hap-pell, J.) APPUKUTTI CHETTIAR, In re. 217 I.C. 233=17 R.M. 293=1945 F.L.J. 61=46 Cr. L.J. 256=57 L.W. 475=1944 M.W.N. 558 =A.I.R. 1945 Mad. 23=(1944) 2 M.L.J. 229.

R. 81 (4)—If limits power of confiscation under S. 517, Cr. P. C.

The proviso to R. 81 (4), Defence of India Rules would be redundant if the Courts have the power to act under section 517, Cr. P. Code, in spite of it. The Courts have the power to confiscate goods with report to publish power to confiscate goods with regard to which an accused person is being prosecuted unless such power is conferred on them by the order, the contravention of which forms the subject-matter of the offence. (Mir Ahmad, J.) NAUROZ v. EMPEROR. 222 I.C. 248=1946 Pesh (Rul.) 16=A.I.R. 1945 Pesh. 50.

—R. 81 (4)—Motor Spirit Rationing Order, R. 22—Contravention of—Offence—"Acquire"—Meaning of

Where a person is found at 10 o'clock at night towards the back side window of a garage trying to move away with some tins of petrol, and toescape when caught, and when the explanation given by him is found to be false, that would be sufficient to bring him within the mischief of

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R. 22 of the Motor Spirit Rationing Order, as that would amount to "acquiring" petrol within the meaning of the rule and he would be liable to conviction under R. 81 (4), Defence of India Rules. (Varma and Shearer, JJ.) AHMAD HUSSAIN v. EMPEROR. (1945) P.W.N. 228.

R. 81 (4)—Notification by Collector directing "licensee" in kerosene to issue receipt for sale and to exhibit prices—Applicability to retail dealer—Refusal of retail dealer to issue

receipt-Off cnce.

Where a notification issued by the Collector of a district directs licensees dealing in kerosene to issue receipts in respect of sales and to exhibit lists of maximum prices of kerosene fixed by the Collector. Such notification applies only to wholesale dealers and only wholesale dealers have to take out licenses. A retail merchant vending kerosene cannot be prosecuted or convicted under R. 81 (4) of the Defence of India Rules for not complying with the notification.
(Kuppuswami Ayyar, J.) NAGENDRUDU v. VENKATA RAGHAVAYYA. 217 I.C. 254=17 R.M.
297=46 Cr.L.J. 276=1944 M.W.N. 599= A.I.R. 1944 Mad. 564=(1944) 2 M. L. J. 154.

-R. 81 (4)—Offence under—Bail—Grant

The offence under R. 81 (4) of the Defence of India Rules is not one that has been notified by the Government as non-bailable. It must, therefore, be considered a bailable offence subject to the provisions of R. 130-A (a). The burden lies on the prosecution to make out special circumstances why the accused persons should be denied the advantage of the law in their favour. (Niyogi, J.) INGLEY v. EMPEROR. I. L. R. (1944) Nag. 813=217 I.C. 207=17 R.N. 106=46 Cr.L.J. 247=1944 N.L.J. 75=A.I.R. 1944 Nag. 149.

R. 81 (4)—Offence under—If cognizable and non-bailable—Arrest of offender by private person—Cr. P. Code, S. 59.

An offence under R. 81 (4) of the Defence Cr. P. Code, S. 59.

of India Rules is a cognizable and non-bailable offence. A person in whose view it is committed is competent under S. 59, Cr. P. Code, to aris competent under S. 59, Cr. P. Code, to arrest the offender without any warrant (Muhammad Munir, J.) Dost Mahomed v. Emperor. I.L.R. (1945) Lah. 403=47 P.L.R. 229=A.I.R. 1945 Lah. 334.

—Rr. 81 (4), 130 (4) and Cr. P. Code, S. 262—Offence under R. 81 (4)—Trial—Procedure—Breach of the provisions of S. 262, Cr. P. Code, If a magazing integral arity.

Code-If a mere irregularity.

A case relating to an offence under R. 81 (4) of the Defence of India Rules would be a warrant case—Ordinarily such a case could not be tried summarily though under R. 130 (4) it may be so tried. If it is so tried the provisions of Ss. 262 to 265, Cr. P. Code, must be followed—S. 262 is an imperative provision and a breach of it would be not merely an irregularity but an illegality. (Mulla, I.) Mangi Lal v. Emperor. I.L.R. (1945) A. 131=219 I. v. Emperor. I.L.R. (1945) A. 131=219 I. C. 232=18 R.A. 58=46 Cr.L.J. 539=1945 A.Cr.C. 21=1945 A.L.J. 45=1945 O.W.N. both from the point of view of the public and (H.C.) 1=1945 O.A. (H.C.) 11=1945 A. (Derbyshire, C.J. and Lodge, warrant case-Ordinarily such a case could not

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L.W. 1=1945 A.W.R. (H.C.) 11=A.I.R. 1945 A. 98.

R. 81 (4)—Order of forfeiture—Legality—When order contravened does not provide for forfeiture.

Where the order contravened does not contain any specific provision for forfeiture of property seized, an order of forfeiture is without jurisdiction and illegal. (Shearer, J.) JAGESWAR CHAMAR v. EMPEROR. 1944 P.W.N. 1128.

-R. 81 (4)—Order of forfeiture passed by trial court—Revision—Interference by

Court.

The High Court, while upholding a conviction in revision, has power to interfere with an order of forfeiture passed by the trial Court under R. 81 (4) of the Defence of India Rules. (Roxburgh and Ellis, JJ.) Kominatos v. Emperor. 49 C.W.N. 548=A.I.R. 1946 Cal. 1.

R. 81 (4)—Powers of confiscation— Contravention of Food Grains Control Order— Possession of quantity more than 20 maunds— Conviction—Order confiscating whole quantity—

Legality.

R. 81 (4) of the Defence of India Rules refers to any property with respect to which the Court is satisfied that the order has been contravened and not merely the property which exceeds that allowed by the law. Once a person is found to be storing grain for sale in wholesale quantities, he is committing an offence in respect of the whole quantity which he is storing, and he cannot plead that there is no offence in respect of the grain up to 20 maunds which is the quantity allowed by the Food Grains Control. Order, but only an offence in respect of the quantity in excess of 20 maunds. The whole quantity in excess of 20 maints. The whole quantity can therefore be legally confiscated on conviction. (Happell, I.) DEVARAJA THARAKAN, In re. 58 L.W. 379 (1)=1945 M.W.N. 438 = A.I.R. 1945 Mad. 460=(1945) 2 M.L.J. 172.

R. 81 (4)—Profiteering cases—Proper sentence—Substitution of contribution to police poor box for prosecution—Property.

The fact that the bigger dealers are rarely prosecuted for profiteering and those who sell at the source, never and most of those who are prosecuted are relatively small dealers such as shopkeepers and in some of the instances these shopkeepers had to pay more than the control-led prices for the goods they dealt with, is noreason for not giving sentences which will be an effective deterrent for what is unquestionably a grave and a growing evil, namely, profiteering and breaking the law which prescribes that goods and articles should not be sold at more than the controlled prices. Magistrates should not hesi-

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J.) Emperor v. Joyram Pathak. 212 I. C. 104=16 R.C. 588=45 Cr.L.J. 520=A.I.R. 1944 Cal. 121.

-Rr. 81 (4) and 121—Quoting above controlled price or offering to buy above controlled

price-Whether offence.

Under R. 81 (4) read with R. 121 of the Defence of India Rules, not only is it an offence against the antiprofiteering laws to sell at above the controlled price, but it is an offence to buy at above the controlled price. It is also an offence to quote a price above the controlled price or offer to sell above the controlled price offer to buy at above the controlled price. (Derbyshire, C. J. and Lodge, J.) EMPEROR v. JOYRAM PATHAK. 212 I.C. 104=16 R.C. 588=45 Cr.L.J. 520=A.I.R. 1944 Cal. 121.

-R. 81 (4)—Sale of kerosene oil at rate covering controlled rate and transportation charges-Offence.

A person who sells kerosene oil at a rate sufficient to cover both the controlled price and the transportation charges, does not contravene any provision of R. 81 or any order made thereunder. (Edgley and Lodge, JJ.) TARAK NATH SAHA v. EMPEROR. 211 I.C. 132=45 Cr.L.J. 307=16 R.P.C. 494=A.I. R. 1943 Cal. 643.

R. 81 (4)—Selling article at price exceeding that fixed by Local Prives Advisory Committee—Offence—Con-

viction-Sustainability.

Where the price of an article has not been controlled by the Government under R. 81 (2) (b) of the Defence of India Rules, a conviction for an offence under R. 81 (4) of the Rules for selling that article at a price exceeding that fixed by the Local Prices Advisory Committee is illegal and unsustainable. (Byers, J.)
Seshagupta, In re. 207 I.C. 130=16 R.M. 76
=1943 M.W.N. 63 (2)=56 L.W. 137 (2)=44
Cr.L.J. 623=A.I.R. 1943 Mad. 376=(1943) 1
M.L.J. 22 (1).

Order, 1941, as amended by Central Government Notification.

Although R. 81 (4), Defence of India Rules, prescribes the alternative penalty of fine for the contravention of any orders made under the rule, it is the duty of the Court to determine which punishment is called for by the circumstances of the case and the Court would be failing in its duty if it lost sight of the inclination of dealers to make profit out of irresponsible commerce in commodities which are needed by the nation and sought to be controlled by the Government. A sentence of fine is not enough but a sentence of imprisonment is necessary on conviction of a dealer for deliberately violating the Non-Ferrous Metals ·Control Order, 1941, as amended by Central Government Notification, dated 8th January, 1942, by selling and delivering quantities of tin without a permit. (Khundkar and Sen, JJ.) EMPEROR v. MD. SULAMAN VAWTA. 77 C.L.J. 461=A.I.R. 1944 Cal. 330.

—R. 81-A—Applicability—Military Reserve Base Depot—Cessation of work by employees—If "strike"— Offence.

R. 81-A of the Defence of India Rules does not apply to a strike by the workers employed in a Military Reserve Supply Base Depot. It applies to trade disputes as defined by the Trade Disputes Act. A Reserve Base Depot is not trade or industry, but is only a store-house of certain commodities and the workers there are employed to arrange them and load and unload them when they are to be transported;

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hence the cessation of work of the employees of the depot does not fall within the definition of a "strike." (Lokur and Rajadhyaksha, J.J.) EMPEROR ". KASHINATH, DAYARAM. I.L.R. (1944) Bom. 437=217 I.C. 167=17 R.B. 155=46 C. L. J. 208=46 Bom. L. R. 444=A.I.R. 1944 Bom. 248.

An order under R. 83 (3-a) of the Defence of India Rules can be issued on a firm which is a partnership registered under the Partnership Act. The firm means the partners collectively and an order can certainly be issued on such a body of persons collectively. (Edgley and Roxburgh, 37.) Superinten-DENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL v. D. B. FUTNANI. 222 I.C. 166=79 C.L.J. 189 =A.I.R. 1945 Cal. 402.

-R. 83 (3-a) and (4)—Contravention of order in December, 1941—Prosecution started in September, 1942, accused if can be punished.

A contravention of a freezing order under R. 83 (3-a) of the Desence of India Rules that took place in December, 1941, can be punished under sub-rule (4) as it then stood, although the prosecution in respect thereof is started in September, 1942. The repeal of R. 83 and substitution of R. 75-A on the 25th April, 1942, will not affect a question of contravention that took place prior to that date. (Ed, lev and Roxburgh, JJ.) Superintendent and Remembrancer of Legal Affairs, Bengal v. D. B. Futnani. 222 I. C. 166=79 C.L.J. 189=A.I.R. 1945 Cal. 402.

R. 90 (2), Cl. (a)—Scope and meaning of—

Giring only 13 annas for a rupee amounts to sale.

By R. 90 (2), cl. (a) of the Defence of India Rules, the Legislature intended to prohibit the transfer of current coin for other current coin of an aggregate value which is less than the value on the face of it of the coin transferred. Hence when a person is asked to change a rupee and he gives only 13 annas, the transaction is a sale within the meaning of R. 90 (2) cl. (a) of the Defence of India Rules and he is guilty of a breach of that rule. (Allsop and Malik, 37.)
BEHARI V. EMPEROR. 1945 A.W.R. (H.C.) 305=
1945 A.L.J. 421=1945 A.L.W. (H.C.) 391=
1945 O.W.N. (H.C.) 344=A.I.R. 1946 All. 138.

-R. 90 (2) (a) and (3)—Interpretation—Principles.

The requirements of each individual will vary according to a variety of circumstances. The Court would have to take note of all these and then decide whether the coins recovered is out of proportion to the 'personal or business requirements' of the accused 'for the time being' as necessarily to lead to the inference that he was defying the law. While this aims to protect society it makes a serious inroad upon individual liberty and as such has to be construed Strictly. (Ighat Ahmad, C.J.) PEARE LALP. EMPEROR. I.L.R. (1944) All. 236=214 I.C. 165=45 Cr.L. J. 738=1944 A.W.R. (H.C.) 105=1944 O.A. (H.C.) 105=1944 A.Cr.C. 35=17 R.A. 61=1944 A.L.W. 257=1944 A.L.J. 179=A.I.R. 1944 All, 168,

-R. 90 (2) (c)—Construction.

R. 90 (2) (c) of the Defence of India Rules cannot be interpreted literally. The drafting of the rule leaves much to be desired and if strictly enforced it might become engine of great oppression. (Davies.)

PITAMBER v. EMPEROR. 1944 A.M.L.J. 9.

R. 90 (2) (c)—Construction—'Shall refuse to

R. 90 (2) (c) of the Defence of India Rules is, on the face of it hastily and inappropriately drafted and

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could not under any circumstances be given effect to literally without causing very serious miscarriages of justice. The adverb "unreasonably" must be understood between the words "shall" and "refuse" in the expression "shall refuse to accept" in that rule. (Davie.) MOOL CHAND v. EMPEROR 1943 A.M.L. T. 65.

-R. 90 (2) (c)—Refusal to accept a rupee-note in payment for goods worth three annas and give change-If offence.

Cl. (c) of R. 90 (2) of the Defence of India Rules does not penalise a shop-keeper who refuses to accept a rupee-note in payment for goods worth three annas. He is not obliged to part with his goods unless there is a tender of the price. A tender of a rupee-note for goods worth three annas is not a tender or offer of the price of the goods, and there is no obligation on his part to give change. (Pollock, J.) MADHO VITHAL V. EMPEROR. I.L.R. 1944 Nag. 644=213 I.C. 354 =45 Cr.L.J. 649=17 R.N. 26=1944 N.L.J. 98 =A.I.R. 1944 Nag. 135.

If offence.

R. 90 (2) (c) of the Defence of India Rules makes it an offence for a person to refuse to accept that whole of a rupee or a note or other coin as legal tender. It implies that a person may refuse to accept a legal tender on the ground that he does not consider it as valuable as its face value indicates, and it is to avoid such consequence that the act has been made punish-Where goods of the value of less than a rupee are purchased and the shop-keeper refuses to accept a rupee note on the ground that he has no change, the latter does not commit any offence. law by which a shop-keeper is bound to keep enough change to give to the public in exchange for rupee notes and in the circumstances a shop-keeper would be perfectly within his rights to say to a customer that he should bring small coins if he wishes to buy stuff worth less than Re. I. (Mir. Ahmud, J.C.)
MAHOMED NAIM 7. EMPEROR. 216 I.C. 295=17 MAHOMED NAIM v. EMPEROR. 216 I.C. 295=17 R. Pesh, 23=46 Cr.L.J.166=A.I.R. 1944 Pesh, 41.

-R. 90 (2) (d) and (3)—Acquiring of coins—

Gist of offence.

The acquiring of coins by a merchant by vending his articles is not prohibited, but what is prohibited is the acquiring of coins beyond a particular limit. If a merchant has been acquiring from his customers more coins than what are reasonably required for his purpose and keeps them without giving change to his customers or changing them into notes, that amounts to acquiring more coins than what he can do under the law in force punishable under the Defence of India Rules. It is the duty of every person to see that he does not retain with him more change than what is necessary for his requirements, and if he does it, he does so at his peril. (Kuppusuani Ayyar, 7.)
MANDAYA SERVAI, In re. 209 I.C. 348=16 R.M.
344=56 L.W. 488 (1)=1943 M.W.N. 583=45
(Cr.L. J. 96=A.I.R. 1943 Mad. 683=(1943) 2
M.L.J. 280.

R. 90 (2) (d)—"Acquire"—Meaning—Gist of offence.

Mere hoarding of coins is not an offence under R. 90 (2) (d) of Defence of India Rules. It is only sub-cl. (d) that are liable to punishment. In order to prove a charge under the sub-clause the prosecution must prove by direct or circumstantial evidence what is required for the daily needs of the business. those who acquired coins in contravention of the

that the accused had acquired coins in excess of his personal or business requirements. The word 'acquire' in the sub-clause is obviously intended to The word mean 'to get actively into one's possession' and has not been used in the sense of hoarding. (Ismail, J.)

CHARAN DAS v. EMPEROR. I.L.R. (1943) A. 786

=208 I.C. 490=16 R.A. 84=1943 O.W.N. (H. C.) 291=1943 A.Cr.C. 129=1943 A.W.R. (H. C.) 286 (2)=44 Cr.L.J. 792=1943 O.A. (H.C.) 286 (2)=1943 A.L.W. 491=1943 A.L.J. 397= A.I.R. 1943 All. 329.

Tion from possession—Ingredients of offence—Duty of

prosecution.

The word "acquire" in R. 90 (2) (d) of the Defence of India Rules is not equivalent of "being in possession" but means "to seek." If a person makes an effort to get or obtain anything, he may be said to have acquired it, but if he gets it without any effort, physical or mental on his part, he cannot be said to have acquired that particular thing. There must therefore be a conscious effort to acquire "coins" as such. In order to find a man guilty of an offence under this rule, it is the duty of the prosecution to show not only that the accused was on a particular date in possession of coins but also that he had made an effort to seek or get them as coins. No presumption can be raised against the accused from the fact that they were ound in his possession. The prosecution must further show that the accused had acquired coins to an amount in excess of his personal or business requirements and that he had done so after these rules had come into force. The rules cannot be held to be retrospective in effect. (Abdur Rahman, 7.) CHANDAN LAL v. EMPEROR. 212 I.C. 279=45 Cr.L.J. 571 =16 R.L. 304=A.I.R. 1944 Lah. 113.

R. 90 (2) (d)—Intention of.
The intention of R. 90 (2) (a) of the Defence of India Rules is that the currency officer is entitled to determine how much money he should pay to any person and if the sum is a large one no other person shall thereafter be in a position to say that it was in fact in excess of the need of the person acquiring it. The rule cannot be interpreted to mean that no one can take small change from the Currency Office unless can take small change from the Currency Office unless he had personally obtained the authority of the Currency Officer. (Iqbal Ahmad, C.J. and Alsop, J.) GOPI NATH MEHROTRA P. EMPEROR. I.L.R. (1944) A. 507=217 I.C. 232=17 R.A. 135=46 Cr.L.J. 255=1944 O.A. (H.C.) 180 (2)=1944 A.L.W. 375=1944 A.Cr.C. 68=1944 A.L.J. 320=1944 A.W. R (H.C.) 180 (2) A.W.R. (H.C.) 180 (2).

-R. 90 (2) (d)—Scope—Acquiring of coins before date of rule and keeping same after that date-If offence.

R. 90 (2) (d) of the Defence of India Rules, only forbids acquisitions from the date on which it came What the rule strikes at is the acquisition into force. from and after the date of the rule and not the continuing to keep or retain possession of coins already acquired. (Manohar Lall and Brough, 37.) GADAT SAHU V. EMPEROR. 22 Pat, 423=211 I.C. 115= 16 R.P. 215=10 B.R. 342=45 Cr.LJ. 301=24 P.L.T. 387=9 Cut. L.T. 51=A.I.R. 1943 Pat. 361.

-Rr. 90 (2) (d) and 9 (3)—Stationary shopowner having small change amounting to Rs. 17 and odd

-If offence. It is not the acquisition of small change that is made

Where most of the purchases made at a stationeryshop were by litigants, school boys and sundry persons who may pay in rupee coins and expect to receive small coins as change, the possession in small coins by the shop-keeper amounting to Rs. 17 and odd, cannot be deemed to be in excess of his requirements. (Kuppuswami Ayyar, J.) Public Prosecutor v. Jogiraju. 215 I.C. 16=17 R.M. 154=45 Cr.L.J. 808=57 L.W. 106=1944 M.W.N. 125=A.I.R. 1944 Mad. 317=(1944) 1 M.L.J. 139.

R. 90 (2) (e)—If intra vires.
R. 90 (2) (e) of the Defence of India Rules is fully covered by the rule making power conferred by S. 2 (xxii) of the Defence of India Act, and is not therefore ultra vires. (Niyogi, J.) DHARAM CHAND v. EMPEROR. I.L.R. (1944) Nag. 764=218 I.C. 9=46 C.L. J. 362=1944 N.L.J. 393=A.I.R. 1944 Nag. 364.

R. 90 (2) (e) and Defence of India Act

S. 2—R. 90 (2) (e)—If ultra vires—"Use" in S. 2
of the Defence of India Act, if includes "possession."

The Defence of India Act only permits the Central

Government to make rules controlling the use or disposal of, or dealings in coin. R. 90 (2) (e) of the Defence of India Rules provides for an offence for possession of small coin in excess of one's use. The latter rule cannot be said to be ultra virus because the 'use' of coin was different from the 'possession' The use of current coin includes the posof them. session of it. Possession of current coin is tantamount to the use of such coin. (Davies.) EMPEROR v. GUL MOHAMMAD. 1944 A.M.L.J. 15.

R. 90 (2) (e)—Object and effect of—I osession

of small coins-If prohibited.

R. 90 (2) (e) of the Defence of India Rules (1939), does not impose an absolute prohibition against the possession of small coins, but merely prohibits their hoarding that is to say, keeping them in excess of the normal requirements. In other words, the rule requires every one to "use" the excess for the purpose of circulation and not hoarding. The obvious object of the rule is that small coins in excess of the normal requirements must not be kept out of circulation. It does not prohibit possession of coin, except above the reasonable requirements of individuals; persons are compelled by the rules to put into circulation all coins they do not require for their legitimate purposes. (Lokur and Weston, Jf.) EMPEROR v. NANABHAI NAGIN-DAS. 47 Bom.L.R. 644=A.I.R. 1946 Bom. 36. —R. 90 (2) (e)—Scope—If intra vires—Defence of India Act (1939), S. 2 (2) (xxii)—"Controlling the use."

R. 90 (2) (e) of the Defence of India Rules, is valid and not beyond the rule making powers of the Central Government conferred upon it by S. 2 (2) (xxii) of the Defence of India Act, as it stood before its amendment by Ordinance XXVI of 1944. The power to control the use of current coin includes power to compel their being put into circulation, which obviously means the power to prohibit their hoarding. The expression "controlling the use" has a very wide significance and includes the controlling of the use of extra coins in swelling the cash balanceon hand.

Weston, J.-R. 90 (2) (e) is intra vires under S. 2 (1) of the Act, if it is not covered by S. 2 (2) (xxii). (Lokur and Weston, 37.) EMPEROR v. NANABHAI NAGINDAS.
47 Bom. L.R. 644—A.I.R. 1946 Bom. 36.

R. 90 (3)—If affects power given by S. 517,

Cr. P. Code, to confiscate small coins on conviction for possessioneof them. See CR. P. CODE, S. 517. 47 Bom. L.R. 644.

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-R. 90 (3)—Confiscation—Offence of hoarding small coins—Conviction—Order confiscating coins— Legality. See CR. P. CODE, S. 517. (1943) 2 M L.J. 50ō.

- (as amended), R 90-B (3)—Scope and effect

of.

The effect of the new sub-R. (3) of R. 90-B of the Defence of India Rules is to give those contravening this rule the benefit of being dealt with under the Sea Customs Act. But at the same time the amendment retains the punishment for such offence in cases where the Collector thinks the benefit of that Act ought not to be given to a particular offender or a particular offence. In such cases the punishment of five years' rigorous imprisonment is retained. It cannot be said therefore that the amendment has reduced the sentence awardable or exempted the offender from liability to be sentenced to five years' rigorous imprisonment. (Ruppuswam Ay, ar, J.) Labhat. In re. 222 I.C 358=58 L.W. 429=1945 M.W N. 557=A. I.R. 1946 Mad. 7=(1945) 2 M.L.J. 235.

person on search in excess of limit prescribed—Person not ordered or asked to declare details of money-Conviction -Sustainability.

It is a condition precedent to liability under R. 90-B. (3) (a) of the Desence of India Rules, that the officer of Customs should order a person (such a traveller). to declare with full details the money and gold which he had with him. Where there is no evidence of such an order having been made or even a request to the person concerned to make a declaration, he cannot be convicted under R. 90-B (3) (a) on the mere ground that on a search money in excess of the limit prescribed was found on his person.

(Beaumont, C.J. and Sen, J.) EMPEROR r. GHULAMALLI HUSSAIN. 197 I.C. 585=14 R.B. 236=43

Cr L.J. 213=43 Bom. L.R. 872=A.I.R. 1941 Bom. 412.

-R. 90-B (4) and (6)—Search—Money found in excess of limit allowed—Order as to disposal—Jurisd ction of Court—Cr.P. Code, S. 517—If subject to R. 90-B (6).

Where a person is properly searched by a Customs. Officer under R.90-B(4) of the Defence of India Rules and such person is found to have in his possession money in contravention of R. 90-B (2) read with R. 121, the Customs Officer is entitled to seize the money in excess of that amount which is permitted to be carried. Money up to the limit permitted cannot be seized but must be refunded to the searched person. The excess found has, under R. 90-B (6), to be disposed of in such manner as the Central Government may direct. The money properly seized never becomes subject to the jurisdiction of the Court by which the person searched is tried for his offence, and the Court has no jurisdiction to make any order as to the disposal of such money. R. 90-B (6) prevails over S. 517, Cr. P. Code, in view of S. 3 of the Defence of India Act. The Court has only jurisdiction to determine whether property has been rightly seized under R. 90-B; but if it comes to the conclusion that the property was rightly seized, it has no jurisdiction to make any order as to its disposal. That is entirely a matter for the Central Government. (Beaumont, C.J. and Sen, J.)
EMPEROR D. GULAMMALI HUSSAIN. 197 I.C 584=14: EMPEROR v. GULAMMALI HUSSAIN. 197 I.C 584=14 R.B. 236=43 Cr.L.J. 213=43 Bom.L.R. 872= A,I.R. 1941 Bom. 412.

R 103. proviso—Enemy property—War with Japan—Special vesting order—If necessary.

The proviso to R. 103 of the Defence of India Rules

makes it unnecessary to make any further order

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declaring the state of war with Japan and the inclusion of Japanese property within the meaning of "enemy firm" as defined in R. 103. (McNoir J.) DEPUTY CUSTODIAN OF ENEMY PROPERTIES v. STAR PAPER MILLS LTD. 48 C.W.N. 163.

-R. 114-"Property"-Meaning of-If includes

right to sue for damoges—Rule, if uitra vires.

The word "property" in R. 114 of the Defence of India Rules is wide enough to include not merely debts but every beneficial matter which an enemy is capable of holding, including the right to sue for damages for breach of contract. Although R. 114 vests in the custodian a mere right to sue for damages it is not uitra vires. (McNuir, 7.) DEPUTY CUSTODIAN OF ENEMY PROPERTIES v. STAR PAPER MILLS, LID. 48 C.W N. 163.

-R. 114 1 -Scope-Enemy Property (Custody and Registeration) Order (1939), para. 4-Property of Japanese firms in India-Absence of vesting order after 7-12-1941-

If bar to vesting of property in cusoidian of enemy property.

The order required and contemplated by R. 114 (1) of the Defence of India Rules, vesting the property of an enemy firm in the Custodian of Enemy Property is the Notification of the Government of India, dated 25th June, 1940, by which all property in British India, belonging to or held by or managed on behalf of any body of persons constituted or incorporated in any enemy territory and under the control of an Indian branch of that body for the time being carrying on business in India became vested in the Custodian of enemy property. The powers of the custodian when Enemy Property becomes vested in him are set out and described in the Enemy Property (Custody and Registration) Order, 1930, as corrected subsequently When therefore war broke out between Japan and His Majesty's Dominions on 7—12—1941, this notification and this order automatically came into operation in respect of Ja; anese firms in India. The fact that the orders were made before 7-12-1941, does not matter. No separate order vesting the property of a Japanese firm afer 7—12—1941, is necessary. On the outbreak of war with Japan on 7—12—1941 the property of Japanese firms in India became vested in the Custod an of Enemy Property who would have all the powers to deal with it conferred by the Enemy Property (Custody and Registration) Order, 1939, (Lobo, J.) Toyo Menka Kaisha Ltd. v. Sohansing. HARNAMSING. I.L.R. (1943) Kar. 438=213 I.C. 364=17 R.S. 9=A.I.R. 1944 Sind 51.

R. 114 (3-A)—Notification vesting property in Custodian—Vests property in Deputy Custodian.

By virtue of R. 114 (3-A) of the Defence of India Rules which provides that the expression "Custodian" includes a "Deputy Custodian", property vested in the Custodian by the notification of 25th June, 1940, is equally vested in the Deputy Custodian. (McNair, J.) DEPUTY CUSTODIAN OF ENEMY PROPER-TIES U. STAR PAPER MILLS LTD. 48 C W.N 163.

-R. 116-Bombay Notification dated 5--" Every person in the city of Bembay" - Meaning of -Physical presence in Bombay - Necessity.

The words of the notification issued by the Bombay Government under R. 116 of the Defence of India Rules on 5-2-1943 requiring every person in the City of Bombay to make a declaration of rice stock exceeding 10 maunds are perfectly plain. They appy to "every person in the City of Bombay and Bombay Suburban District." A man who is not in Bombay on the date on which a declaration has to be made is not a person required by the notification to make a declaration. He must be physically present in regard to the publication or notification of the

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in Bombay on the material date. (Beaumont, C.J., and Rajaydhyaksha, J.) EMPEROR v. PANDURANG BHI-KHAJI. 209 I.C. 216=16 R B 115=45 Bom. L.R. 890=45 Cr.L.J. 113=A I R. 1943 Bom. 403.

-R. 117 (2)—Applicability—Omission in making statement rendering it false or untrue-Offence-Liability

If a person who is in possession of several motor cars and is required to give the registered number and horse power of all the motor cars in his possession, gives the registered number and horse power of only one of them he makes a statement which he knows or has reasonable cause to believe is false or not true, within the meaning of R. 117 (2) of the Defence of India Rules, and is liable to conviction under the rule. It makes no difference whether the falsity or untruthfulness of the statement is due to a mis-statement of fact or to an omission. (H. ppell, J.) Crown Prosecutor v. Meyyappa Chettiar. I.L.R (1945) Mad. 590=220 I.C. 441=1946 Mad. (Rul.) 17=46 Cr.L.J. 757= (1944) M.W.N. 709=A.I.R. 1945 Mad. 120= (1945) 1 M.L.J. 6.

-R. 119-Absence of evidence as to decision on manner of publication-Effect-Presumption of notice-If arises.

R. 119 (1) of the Defence of India Rules requires that the authority issuing a notification under the Rules should decide in what manner the notification should be published. Therefore unless the prosecution shows in what manner the publication was decided on, it would not be entitled to rely on the presumption regarding notice to the accused mentioned in last para of R. 119 (1). Mere publication in the Government or Official Gazette is not sufficient to fix a person with knowledge of the rule or notification in the absence of evidence to show that the authority had decided about the manner of publication. Ill. (e) to S. 114, Evidence Act, cannot also be applied to such a case. The burden of proof is on the prosecution. (Wadia and Sen, 37.) EMPEROR v. LESLIE GWILT. 221 I C. 239=1946 Bom (Rul.) 49=47 Bom. L R. 431=A.I.R. 1945 Bom. 368.

-R. 119-"Authority"-If includes central and provincial Governments.

The word "authority" in R. 119 of the Defence of India Rules is not defined, and in the absence of anything delimiting its scope, it must be given its ordinary meaning. That includes both the Central and the Provincial Governments. (Base, J.)
BABULAL v. EMPEROR. I.L.R. 1945 Nag. 762=
222 I.C. 280=1945 N.L.J. 321=A.I.R. 1945 Nag. 218.

-R. 119—Compliance with—Proof of—Requisites -Mere publication in the official gazette-Absence of evidence as to the authority making the order applying its mind in regard to its publication—Effect—Plea of ignorance of control order not properly published—Conniction for contravention-Legality.

The provisions of R. 119 of the Defence of India Rules necessitate proof of two matters; (1) it must be shown that the authority making the order indicated some manner which in its opinion was considered best adapted for informing the persons concerned; and (2) that such direction given by the authority concerned was actually carried out. Mere publication in the official gazette gives no indication whatsoever that the authority making the control order ever even applied its mind to the consideration of R. 119

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order in question. Hence in the absence of evidence to show that the authority did apply its mind to this matter, the control order in question, cannot be said to be 'published' in accordance with the provisions of R. 119 of Defence of In lia Rules. In such a case the presumption, that the person contravening the control order must be deemed to have been duly informed of the order does not arise and on a plea of ignorance of such an order, there can be no conviction for its contravention. (Wilmilath, J.) Arbar J. Emperor. 1945 A.L.W. 275=1945 O.W.N. (H.C.) 230=1945 A.L.J. 499.

---R. 119-Essentials-Inus of proof.

It would appear from the provisions of R. 119 of the Defence of In lia Rules that there are two essential requirements; one is that the authority or person passing the order must determine the manner in which notice of the order shall be given for informing persons whom the order concerns: secondly, a notice of the order shall be published in the manner so determined. Where there is no direct evidence that the Sub-Divisional Officer who passed the order determined the manner in which it should be published and the only evidence is that the rates fixed by him were circulated to merchants and consumers in all markets of the sub-division, the prosecution has not prove I the essential requirements of the rule. (Chatterj: and Drs, 77.) JAGARNATH SAH v. EMPEROR. 24 Pat. 29=1944 Pat. W.N. 571=26 P.L.T. 184 =A.I.R. 1945 Pat. 307.

The intention of R. 119 of the Defence of India Rules was that innocent persons who did not know and who could not reasonably be expected to know about any order that is made should not be rendered liable to punishment until such precautions as the authority making the order considered fair and reasonable had been complied with.

R. 119 assumes that the publication of the order is necessary and leaves the mode of publication to the authority making the order to decide. It is impeperative that the authority should prescribe the mode, and the Crown must prove, both that he prescribed a particular mode and that publication was strictly in accord with what was prescribed; until that is done, the order will not be accepted as law. It will not be enough to say that because the order is published in a Government Gazette therefore it must be presumed that the authority in question thought that that was the best mode of publication. The Crown must show that the authority applied its mind to the matter and prescribed the mode relied on. (Bose, J.) BABULAL v. EMPEROR. I.L.R. (1945) Nag. 762—222 I.C. 280—1945 N.L.J. 321—A. I.R. 1945 Nag. 218.

R. 119 of the Defence of India Rules embodies a legal fiction in that it says that the persons concerned shall be deemed to have been duly informed of the order. This legal fiction can be applied only when it is proved that everything that was required to be done by the authority or officer was actually done. (Nivgi, 7.) Shakoor Hasan v. Emperor. I.L.R. (1944) Nag. 150=211 I.C. 29=45 Cr.L.J. 250=16 R.N. 177=1943 N.L.J. 605=A.I.R. 1944 Nag. 40.

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R. 119 of the Defence of India Rules is mandatory and not directory. When a person is ordered to be detained under R. 26, it is essential that a copy of the order made against him should be served on him. If this is not done, his detention is illegal. (Puranik and Homeon, JJ.) WAKHARE v. EMPEROR. I.L.R. (1945) Nat. 382=1945 N.L.J. 144=A.I.R. 1945 Nag. 159.

— R. 119—Notice of order under rules—Necessity for—Manner of giving notice—Opinion of officer making rule—Fin:lity—Duty and powers of Court.

Before a person can be punished for breach of an order under the Defence of India Rules, notice as required by R. 119 of the Rules should be given of the orders affecting individuals to the individual concerned. The manner in which notice is to be given is to be decided by the authority or officer making the order, and it is the opinion of that authority or officer that counts. The Court cannot substitute its own opinion for that of the officer, but the Court should be satisfied that the officer has decided on the manner in which notice of the order should be given, and that the notice has been given in accordance with the manner the officer has decided on. Where notice is to be given by publication in the Gazette, such publication means publication at the place where the offence is committed by breach of the rules and not publication at the place of issue of the Gazette. (D wiss, C. J. and O'S ullivan, J.) EMPEROR v. MANGHUMAL TERUMAL. I.L.R. (1944) Kar. 107=A.I.R. 1944 Sind 142.

——R. 119—Order under the Rules—Publication— Method—Deciding authority—Infringement of order—Facts to be proved by prosecution.

The most important ingredient of R. 119 of the Defence of India Rules is that it is for the authority passing the order un ler the rules to exercise its mind and to decide upon some method of publication of the order. This power can be exercised only by the authority passing the order and by nobody else. Before a person can be charged with infringement of an order passed under the Defence of India Rules, it is incumbent on the prosecution to establish that the authority passing that order had prescribed a certain method of publishing that order and that method had been carried out. (Mulla, J.) Krishna Chandra, Emperor. I.L.R. (1945) A. 682=221 I.C. 302=1945 A. (Rul.) 75=1945 A. L.W. 196=1945 A. L.J. 357=1945 A. W.R. (H.C.) 182=1945 A. Cr. C. 101=1945 O.W.N. (H.C.) 181=A.I.R. 1945 A. 280.

R. 119—Order—When comes into operation— Publication of notice—Public, when deemed to have been informed.

An order made under the Defence of India Rules comes into operation only when it is made known to the public or the persons whom it concerns. The legal fiction contained in R. 119 that when a notice has been published the persons concerned shall be deemed to have been duly informed of the order, is applicable only when it has been proved that everything that was required to be done by the authorities or officer was actually done. (Agarwala and Imam, JJ.) MADAN LAL DALMIA v. EMPEROR. 214 I.C. 241=17 R.P. 69=45 Cr.L.J. 751=11 B.R. 8=25 P.L.T. 144 =A.I.R. 1945 Pat. 119.

-R. 119-Publication-Adequacy-Power of Court to inquire into.

Under R. 119 of the Defence of India Rules, the authority concerned is to decide the best method of

### DEF. OF INDIA RULES (1939), R. 129.

abuse of the power conferred under that rule. (Bose and Sen, 37.) VIMLABAI DESHPANDE v. EMPEROR. I.L.R. (1945) Nag. 6=A.I.R. 1945 Nag. 8.

-R. 129—Interviews with legal advisers—Right of detenus.

Interviews with legal advisers must be granted to detenus. Any refusal to grant an interview or to afford a detenu reasonable facilities for access to legal advice or any attempt to place obstacles in his way, will amount to an abuse of power and might even justify an order for immediate release. (Bose and Sen  $\widetilde{JJ}$ , Vimlabai Deshpande v. Emperor. I.L.R. (1945) Nag. 6=A.I.R. 1945 Nag. 8.

-R. 129—Object—Arrest 'of newspaper reporter for misreporting remarks of Deputy Commissioner concerning

A.R.P.—Legality.

R. 129 of the Defence of India Rules, was provided to enable police-officers or other officers of Government to detain dangerous men immediately and to hold them in detention until the Provincial Government or the Central Government issued orders of detention under R. 26 of those Rules. Rr. 26 and 129 give power to arrest and detain without specifying any charge and obviously confer powers which should be carefully exercised.

Held, that in the circumstances of the case the misreporting by a reporter of a newspaper of the remarks made by the Deputy Commissioner regarding the A.R.P. organisation at a press conference convened by him, did not afford ground for an arrest under R. 129 of the Defence of India Rules. (Harries, C.J. Munir and Teja Singh, JJ.) Subrama-Banyam, In re. 212 I.C. 17=16 R.L. 238=45

Cr.L.J. 445=A.I.R. 1943 Lah. 329 (F.B.)

If the police uses their powers of detention under R. 129 of the Defence of India Rules not for any purpose connected with the defence of India or the efficient prosecution of the war but merely to enable them to investigate a crime under Indian Penal Code more easily and possibly more efficiently, it is a missuse of the powers given by the rule, and the High Court is competent to release the detenu under S. 491, Cr.P. Code, in spite of S. 16 of the Defence of India Act. (Din Mahomed and Teja Singh, JJ.) BESHESHER DAYAL v. EMPEROR. 221 I.C. 577=47 P.L.R. 416 =A.I.R. 1946 Lah. 36.

-R. 129—Power to arrest and detain—Exercise of—

Duty of executive.

The power to arrest and detain on mere suspicion, which has been conferred on the executive under R. 129 of the Defence of India Rules is not intended to be exercised in an arbitrary or capricious manner. In exercising the power the executive must act reasonably and in good faith, and in such a way that a Court of law cannot say that it was obviously not acting bona fide because it was acting so unreasonably that no honest man could say that it could possibly have so acted. (Varma and Shearer, 33.) KAMLA KANT AZAD v. EMPEROR. 23 Pat. 252=1944 P.W.N. 245=A.I.R. 1944 Pat. 354.

-R. 129—Procedure regulating investigation—Cr.P. Code, Ss. 61 and 167.

R. 129, of the Defence of India Rules, gives the Provincial Government special power to regulate the place of detention and the nature of the custody but not to regulate the manner of an investigation. a Magistrate is justified in taking cognizance of the

### DEF. OF INDIA RULES (1939), R. 130.

Therefore, the procedure regulating the manner of the investigation is the procedure set out in the Criminal Procedure Code. None of the rights under Ss. 61 and 167 of that Code, is taken away or touched by the Defence of India Act. (Bose and Sen, 77.) VIMLABAI DESHPANDE v. EMPEROR. I.L.R. (1945) Nag. 6=A.I.R. 1945 Nag. 8.

-R. 129—Reasonable grounds for suspicion—Duty of police officer to prone.

Under R. 129 of the Defence of India Rules, the power to arrest and detain is conferred on the police and not on the Provincial Government. All that the Provincial Government can do is to specify the place of detention and up to a limit of two months, its duration. It is for the Police officer who made the detention to show that he had reasonable grounds for suspicion. Clearly he cannot discharge that onus by merely asserting that he had reasonoble grounds. The Court is to be the judge of that and not the

Police officer or the Provincial Government. He must therefore tell the Court what those grounds were and leave the Court to decide whether they are reasonable. (Bose and Sen, JJ.) VIMLABAI DESHPANDE v. EMPEROR. I.L.R. (1945) Nag. 6=A.I.R. 1945 Nag. 8.

R. 129—Reasonableness of suspicion—Burden of

proof. Under R. 129 of the Defence of India Rules the burden of proving the reasonableness of the suspicion lies upon the Crown. (Din Mahomed and Teja Singh, 37.) BESHESHER DAYAL L. EMPEROR. 221 I. C. 577=47 P.L.R. 416=A.I.R. 1946 Lah. 36.

-R. 129—Scope—Reasonable susticion—Absence of material-Duty of Court.

If it is shown that there was some material on the strength of which the officer effecting the arrest could base his suspicion and there is no evidence of mala file, the Court would hold that R. 129, Defence of India Rules applies and that the suspicion was reasonable and it would refuse to determine whether the material was or was not sufficient for the suspicion. Where, however, the allegation is that there was no material at all and consequently there was no scope for any kind of suspicion, reasonable or unreasonable, the Court is bound to hold that the case does not come within the a scope of R. 129 and the arrest is made mala fide. (Teja Singh, J.) Teja Singh v. Emperor. 222 I.C. 234=A.I.R. 1945 Lah. 293.

Provincial Government.

R. 129 (2) of the Defence of India Rules gives the Provincial Government the right to determine the place of custody and no other right. It does not give the Provincial Government power to justify an unauthorised arrest or to make legal that which in the beginning was illegal. Nor does it confer any right to control or regulate the mode of any investigation which the police, or anyone else, may wish to make. (Bose and Sen, 37.) VIMIABAI DESHPANDE ". EMPEROR. I.L.R. (1945) Nag. 6=A.I.R. 1945 Nag. 8.

-R. 130-Public servant-Clerk in Government. Collectorate. See PENAL CODE, S. 21. A.I.R. 1943 Pat. 315.

-R. 130-Report-Charge-sheet-Sufficiency.

A charge-sheet signed and sent up up by a police officer, setting out the facts constituting the contravention of the Defence of India Rules committed by the accused can be regarded as a report in writing by a public servant within the meaning of R. 130 of the Defence of India Rules, and on such a report DEF. OF INDIA RULES (1939), R. 130.

offence. (Wadia and Lokur, 37.) FMPEROR v. JAYANTILAL JAGJIVAN. 213 I.C. 174=45 Cr.L.J. 691=17 R.B. 47=46 Bom. L.R. 196=A.I.R. 1944 Bom, 139,

-R. 130—Report—Charge-sheet—Sufficiency.

Where a Sub-Inspector of Police, after completing his investigation submits a regular written chargesheet giving all the details for the prosecution of the accused, there is a report in writing as required by R. 130 of the Desence of India Rules and there is sufficient compliance with that rule. (Sinha, J.) SAGAR-MAL AGARWALA V. EMPEROR. 217 I.C. 102=17 R. P. 166=11 B.R. 169=46 Cr.L.J. 186=26 P.L. T. 75=A.I.R. 1944 Pat. 390.

R. 130—Report—Charge-sheet—Sufficiency of.
A charge-sheet sent by a Sub-Inspector of Police would be a report within the meaning of R. 130 of the Defence of India Rules. But if the charge-sheet makes no reference at all to the specific contravention of a rule which is the offence alleged, there can be no conviction on such charge-sheet. (Wadia and Weston, J.J.) EMPEROR v. PURUSHOTHAM DEVJI. I.L.R. (1944) Bom. 429=217 I.C. 373=46 Cr. L.J. 354=46 Bom. L.R. 449=A.I.R. 1944 Bom. 247.

-R. 130—Report—Complaint with all details appended to report-Reference in report to complaint-Suffi-

ciency.

R. 130 of the Defence of India Rules requires a report by a public servant containing the facts constituting the alleged contravention of the Rules. The main purpose of the rule is to prevent prosecutions by private persons arising from malice and enmity, and to limit prosecutions by public servants. There is no meed on the part of the public servant to state all the necessary facts on one and the same paper; there is nothing to prevent him by reference embodying in the police report details contained in a complaint which is appended to his report. (Davies, CJ. and O'Sullivan, J.) EMPEROR v. MANGHUMAL TEKUMAL. I.L.R. J.) EMPEROR v. MANGHUMAL TEKUMAL. (1944) Kar. 107=A.I.R. 1944 Sind 142. I.L.R.

-R. 130—Report of public officer—If sine qua non

for ralid prosecution.

Under R. 130, of the Defence of India Rules, it is a sine qua non for a valid prosecution that a public officer should make a report in writing of the facts which constitute the contravention of the rules. (Mir Ahmad, J.C.) JAMAN LAU 7. EMPEROR. 218 I.C. 303=18 R. Pesh. 4=46 Cr.L.J. 457=A.I. R. 1945 Pesh. 6.

-R. 130-Report-Nature of report necessary for taking cognizance.

R. 130 of the Defence of India Rules does not require that a charge of contravention must be made by a pubic servant before cognizance can be taken; it merely says that there must be a report in writing of the facts constituting the contravention alleged. It is a report of the acts that the rule makes necessary and not a specific report alleging contravention by any particular person. It is open to the Judge or Magistrate receiving the report to form his own opinion as to whether the facts reported do constitute a contravention by any particular person, and if so, to order prosecution of that person. Cognizance is taken of cases, not of persons. (Meredith, 7.) RAMESH-WAR LAL D. EMPEROR. (1945) P.W.N. 133.

-R. 130—Report of facts—What amounts to. It s clear that in order to comply with R. 130 of the Defence of India Rules, it is necessary that some public servant should make himself responsible for the fring fices existence of the facts which will constitute

DEF. OF INDIA RULES (1939), R. 130-A.

the offence alleged. A mere report of allegation is not a report of facts within the meaning of the rule, (Beevor, J.) GANGADHAR SAHU v. EMPEROR. 222 I.C. 357=(1945) P.W.N. 251.

-R. 130-Scope-Power of Court to proceed against

person not named in report of facts.

Once cognizance has been taken of a case in pursuance of a report under R. 130 of the Defence of India Rules, it is open to the Court to proceed against any person whom the evidence subsequently discloses as. responsible for the act constituting contravention, though there may have been no report against that person in particular. (Meredith, J.) RAMESHWAR LAL J. EMPEROR. (1945) P.W.N. 133.

R. 130 (1)—Scope.

Unless there is a report in writing of the facts constituting the contravention of any of the Defence of India Rules by a public servant, a Court or tribunal cannot take cognizance of such contravention. (Vyas.) JAGDISH PRASAD v. CROWN. 1945 A.M.L.J. 74.

-Rr. 130-A and 38-Bail in case of contravention of R. 38—Considerations.

Where a student is charged with having contravened R. 38 of the Defence of India Rules, he cannot be released on bail unless the Court has reason to suppose that he is not guilty of the offence with which he is charged. Where the fact of making the speech is admitted and in the absence of any evidence to the contrary the contents of the speech as given in the short-hand report tend to show that it was intended to promote feelings of hatred between various subjects of the Crown, bail could not be granted. (Davies, 7.) 1943 A.M. EMPEROR v. RAMA SHANKER KANTH. L.J. 43.

——R. 130-A and 34 (6), (e) and (g)—Offence of committing a prejudicial act under R. 34 (6), Cls. (e) and (g) of the Defence of India Rules—Bail—Considerations.

Where an application for ball is made in respect of an offence of the commission of a president of the commission of the

an offence of the commission of a prejudicial act under R. 34 (6), Cls. (a) and (g) of the Defence of India Rules, the question for consideration is whether prma facie, without prejudging the merits, there are reasonable grounds for believing that the applicant is not guilty of having committed a prejudicial act under R. 34 (6), Cls. (e) and (g) of the Defence of India Rules. (Vyas.) KALYAN SINGH v. CROWN. 1945 A.M.L.J. 63.

R. 130-A—Scope—If repeals S. 496, Cr. P. Code—Discretion of Court—Power of Legislature to repeal penal laws so as to take away privilege of accused or to

introduce stringency of procedure.

The effect of R. 130-A of the Defence of India Rules is to repeal the provisions of S. 496, Cr. P. Code, in so far as it divests the Court of its discretion in the matter of refusing bail in cases of bailable offences. The legislature may impliedly repeal penal laws by a later enactment like any other statute even if the repeal introduces stringency of procedure or takes away a privilege. R. 130-A gives the Court a discretion in the matter, while under the imperative provisions of S. 496, Cr. P. Code, the accused in a bailable case would be entitled to be released on bail. (Broomfield and Wassoodew, JJ.) SURAJLAL HARILAL MAJUMDAR, In re. I.L.R. (1943) Bom. 167=205 I.C. 602=15 R.B. 382=44 Cr.L.J. 399=45 Bom, L.R. 72=A.I.R. 1943 Bom, 82.

-R. 130-A-Scope-Bars inherent powers of High Court to grant bail in appeal and revision.

It is not correct to say that R. 130-A of the Defence of India Rules relates only to applications for bail by DEFENCE [OF INDIA RULES (1939), DEKHAN AGRIC. REL. ACT (1879), S. 2. R. 130-A.

under-trial prisoners and not by convicted persons who have appealed. It cannot be said that since S. 2 (3) (i) of the Defence of India Act, refers only to the trial, it can give no power to make rules governing the appellate stage of the proceedings. But an appeal is only a continuation of the trial and is a part of the trial. The accused is on his trial before the appellate Court just as much as before the Court of first instance. R. 130-A is in very wide terms and imposes a bar "Notwithstanding anything contained in the Code of Criminal Procedure." Therefore R. 130-A would operate to exclude even the inherent powers of the High Court to grant bail as even the inherent powers of the High Court is based upon the Cr. P. Code. (Varma and Meredith, J.7.) Saligram Singh v. Emperor. 23 Pat. 22=218 I.C. 189=18 R.P. 18=46 Cr.L.J. 420=1945 P.W.N. 161=11 B. R. 267=A.I.R. 1945 Pat. 69.

-R. 130-A-Validity.

R. 130-A of the Defence of India Rules is not ultra vires and inoperative, S. 2 (3) of the Defence of India Act does confer powers to make a rule in terms of R. 130-A covering even the revisional stage of the case; and having regard to S. 3 of the Defence of India Act, any provisions of the Cr. P. Code, inconsistent with anything in the Defence of India Act or Rules must be regarded as repealed. (Varma and Merdith, J.J.) Saligram Singh v. Emperor. 23 Pat. 22=218 I.C. 189=18 R.P. 18=46 Cr.L.J. 420=1945 P.W.N. 161=11 B.R. 267=A.I.R. 1945 Pat. 69.

-R. 130-A-Validity.

R. 130-A of the Defence of India Rules embodies a valid and binding provision of law. (Ichal Ahmad, C.J., Allsop and Mathur, JJ.) Nolan v. Emperor. I. L.R. (1944) All. 282=1944 F.L.J. 176=213 I.C. 69=17 R.A. 4=45 Cr.L.J. 655=1944 A.W.R. (H.C.) 104=1944 O.A. (H.C.) 104=1944 A.C.r. C. 31=1944 A.L.W. 259=1944 O.W.N. (H.C.) 64=1944 A.L.J. 150=A.I.R. 1944 All. 118 (F.B.).

-R. 130-A (b)—Notification of Rule—If connotes notification of order made under it-Cotton Cloth and Yarn

(Control) Order, 1943.

The notification of a Rule under R. 130-A (b) of the Defence of India Rules, does not connote the notification of an order made under it. Accordingly the specification by notified order under R. 130-A (b) of certain clauses of R. 81 (2) does not signify that orders made under that rule, (e.g.,) the Cotton Cloth and Yarn (Control) Order, 1943, have at the same time been notified. As the said order has not been duly notified, an offence against the provisions of that order must be dealt with according to the Cr. P. Code subject to the requirement of Cl. (a) of R. 130-A of the D. I. Rules. (Hemeon, J.) MAGAN-1945 N.L.J. 223. MAL v. EMPEROR.

—R. 130-A (h)—Scope—If ultra views—Offences under the Act—Bail—Right of accused to be

released on bail-Cr. P. Code-Applicability.

R. 130-A, Cl. (b), of the rules framed under the Defence of India Act, is intra vires the Central Government. A power given to make rules with regard to arrest and trial by S. 2 (3) (1) of the Act, implies a power to make rules for the custody of persons pending trial even apart from the general power conferred by S. 2 (1). Hence no person accused of

satisfied that there are reasonable grounds for believing that he is innocent. In respect of offences, under the Defence of India Act, that Act governs all other statutory provisions and therefore the provisions of the Cr. P. Code with regard to bail do not apply. The trial of such offences is governed by the special rules under the Act though the offences are now tried in the ordinary Criminal Courts and not by special tribunals. (Leach, C.J., and Happell, J.) BUVARAHA AIYANGAR, In re. I.L.R. (1942) Mad. 414=199 I.C. 128= 14 R.M. 559=43 Cr.L.J. 477=1942 M.W.N. 35 =55 L.W. 77=A.I.R. 1942 Mad. 221 (2)= (1941) 2 M.L.J. 1014.

DEKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879)—Plea of status as agriculturist in execution—When to be raised—Plea on day of

sale—If open.

A plea of status as agriculturist may be raised by the judgment-debtor either on an order of attachment itself or subsequently on an order for sale, when the judgment debtor is served with notice under O. 21, r. 66, C. P. Code. He cannot be permitted to raise such plea after an order for sale has been made on the day of sale or after the sale. (Davies, C.J. and Weston, J.) CHELLARAM v. VISHINDAS, I.L.R. (1942) Kar. 351=205 I.C. 414=15 R.S. 130=A.I.R. 1942 Sind 164.

-Waiver of plea of status of agriculturist in suit—

If bar to plea in execution.

The fact that a defendant waives his right to plead his status of agriculturist in the suit itself would not prevent his raising the same plea in proceedings in execution of the decree passed in such suit. (Davies, C. J and Weston, J.) CHELLARAM v. VISHINDAS. I. L.R. (1942) Kar. 351=205 I.C. 414=15 R.S. 130=A.I.R. 1942 Sind 164.

-S. 2-" Agriculturist"—Hindu joint family owning agricultural lands—Minor members obtaining livelihood from income of such lands—If "agriculturist"—"Earns"

-Meaning of.

The word "earns" in the definition of "agriculturist" in S. 2 of the Dekhan Agriculturists' Relief Act is not used in the narrow sense of earning by personal exertions only, but it includes receiving agri-

cultural income from one's lands.

A minor member of a joint Hindu family who along with the adult members of the family obtains his livelihood from his share in the income of agricultural lands of the family, is to be regarded as an "agriculturist" within the meaning of the definition in S. 2. (Divatia and Weston, JJ.) I AXMAN HARI v. in S. 2. (Divatia and Westor, 77.) I AXMAN HARI v. VISHNU VISHWANATH. 218 I.C. 493=18 R.B. 52 =46 Bom. L.R. 647=AI.R. 1945 Bom. 18.

-S. 2-" Agriculturist"-Meaning of-Privilege if hereditable or acquired by birth.

A person, in order to claim the status of an agricuturist, must prove that he ordinarily engaged personally in agricultural labour, that is, he was regularly and habitually cultivating his fields. Mere initiation into the ways of husbandry is not enough. The privilege of an agriculturist is not hereditable, but personal; nor can that privilege be acquired by birth. (Wassoodew, J.) GANGADHAR KASHINATH D. DATTATRAYA VISHVANATH. 194 I.C. 602=14 R.B. 1=43 Bom.L.R. 341=A.I.R. 1941 Bcm. 209.

-Ss. 2 and 10-A—Applicability—Transaction an offence under the Defence of India Act or the rules before Act was extended to district—Benefis of S. 10-A—thereunder can be released on bail unless the Court is If can be availed of in suit after extension of Act to district. before Act was extended to district-Benefit of S. 10-A-

### DEKHAN AGRIC, REL. ACT (1879), S. 3.

The extension of any section of the Dekhan Agriculturists' Relief Act to a district or any part of a district in the Presidency of Bombay within whose limits the person whose status is to be determined earns his livelihood is sufficient for the purpose of the definition of "agriculturist" in the first clause of S. 2. But the application of Ss. 1, 11, 56, 60, and 62 to the whole of British India by S. 1 of the Act itself, is not such extension as is contemplated by the first clause of S. 2 of the Act. The benefit of S. 10-A of the Act would extend to a transaction entered into before it was enacted in 1907 provided an agriculturist is a party to the suit and he or the person through whom he claims was an agriculturist at the time of the transaction. Where, however, S. 2 or any other section had not been extended to a district when the transaction was entered into, it cannot be held to be a transaction by an "agriculturist" as defined by S. 2 and therefore the benefit of S. 10-A cannot be availed of in respect of that transaction, as no one could then lay claim to the status of an agriculturist within that district, though the Act was extended subsequently and is in force in the district at the time of the proceeding or suit in which the question is raised. (Lokur, 7.) Tulsiram Motiram v. Shankar Nana. 46 Bom. L.R. 621=216 I.C. 257=17 R.B. 140= A.I.R. 1944 Bom. 313.

S. 3 (b) (1) (w) and (x)—Applicability— Suit for dissolution and accounts of partnership—Plaintiff described as agriculturist—Relief valued at Rs. 200—

Accounts-Basis of taking.

The object of the Legislature in enacting Cls. (w) and (x), of S. 3 (b) (1) of the Dekhan Agriculturists Relief Act is to include within Cls. (w) and (x) all claims of a pecuniary character arising out of contracts, whether written or unwritten, and to bring them within the special juris liction created by the Act. A contract of partnership is just as much a contract as is a contract for the payment of money. Where the plaintiffs in a suit for dissolution of partnership and for accounts, instituted in the Court of a First class subordinate Judge, choose to describe themselves as agriculturists, and choose to value the relief in the suit at Rs. 200 the suit falls within S. 3 (b) (1) of the Dekhan Agriculturists' Relief Act and Cl. (w) would apply. Accounts must therefore be taken according to the Act. (Dwies, C. J. and Weston, J.) RAKKIALKHAN v. CHOTHIRAM. I.L.R. (1944) Kar. 14=A.I.R. 1944 Sind 176.

----S. 4 (w)—Suit under—Applicability of S. 20-Limitation Act. See Limitation Act, S. 20. 44

Bom. L.R. 138.

-S. 10-Applicability-Suit by agriculturist in Subordinate Judge's Court—Claim for declaration that sale-deed is really a mortgage and for taking accounts on

that basis—Decree—Appeal—Maintainability.
In applying S. 10 of the Dekhan Agriculturists' Relief Act the Courts must be satisfied that in substance the suit falls within Chap. II of the Act, and the fact that relief of a subsidiary nature which falls within Chap. II is sought would not make the suit one falling under the Chapter within the meaning of S. 10. If it be necessary for a plaintiff to obtain some substantive relief before he can get the account which brings the suit within the Chapter, S. 10 will not apply. A suit by an agriculturist in a Subordinate Judge's Court claiming a declaration that the suit sale-deed is in the nature of a mortgage and that accounts should be taken on that basis, comes under S. 3 (a) in Chap. II of the Act, and hence no appeal lies from the decree in such suit in view of S. 10. (Beaumont, G. Jo and Wadia, J.) CHUNILAL KEWAL-

AGRIC. REL. ACT (1879). DEKHAN Ch.III.

RAM v. RAMCHANDRA YESAJI. I.L.R. (1942) Bom. 337=200 I.C. 849=15 R.B. 38=44 Bom. L.R. 278=A.I.R. 1942 Bom. 178 (1).

-S. 10-A-Applicability - Conditions- Plaintiff seeking benefit—If should be agriculturist or party to transaction himself.

The three essentials required by S. 10-A of the Dek. han Agriculturists' Relief Act, are that the transaction must be entered into by an agriculturist or a person through whom the agriculturist claims, the transaction must be of such a nature that the rights and liabilities of the parties under the transaction are triable under Ch. III of the Act, and that one of the parties to the suit must be an agriculturist. It is not necessary that the plaintiff who wants to take the benefit of the section must himself be an agriculturist or must be a party to the transaction. (Lokur, J.) BHUKHANDAS VALABDAS v. CHHAGANLAL DAYARAM. 45 Bom. L. R. 854=211 I.C. 490=16 R.B. 306=A.I.R.1944 Bom. 32.

-S. 10-A—Applicability—Right to benefit of— Condition precedent-Proof that plaintiff was agriculturist

at date of suit-Necessity.

If a plaintiff in a suit for redemption of a mortgage invokes the Court's jurisdiction under S. 10-A of the Dekhan Agriculturists' Relief Act, he must be an agriculturist within the meaning of S. 2 of the Act at the date when the suit is instituted. S. 10-A requires that there should be an agriculturist plaintiff to a suit for redemption at the time of its institution. It is not sufficient if he requires such status pending the suit. (Wassoodew, J.) GANGADHAR KASHINATH v. DATTATRAYA VISHWANATH. 194 I.C. 602=14 R.B. 1=43 Bom.L.R. 341=A,I.R. 1941 Bom. 209.

-S. 10-A-Applicability-Suit for rent or rent note-Plea that plaintiff is only mortgagee and not owner of property under ostensible sale -Redemption by defendant-Permissibility.

It is open to a defendant-tenant in a suit for rent upon a rent-note to plead without any prayer for possession, that the plaintiff was not an owner of the property in suit but was merely a mortgagee by reason of a transaction of sale which was in reality a mortgage. If it is also found as a fact that the transaction pleaded was a mortgage, the Court can allow redemption by the defendant on payment of the amount found due on taking accounts. (Broomfield and Macklin, JJ.) EKNATH PARSU v. TUKA PANDU. 207 I.C. 236=16 R.B. 19=45 Bom. L. R. 211=A.I.R. 1943 Bom. 146.

-Ch. III—Scope—Suit alleging transaction to be mortgage and not sale-Prayer for declaration that defendant is benamidar for real

mortgagee—Competency.

It is not necessary for a plaintiff in order to get the benefit under Ch. III of the Dekhan Agriculturists' Relief Act that the suit must be for redemption only without further reliefs. It is open to a plaintiff to allege and claim that the transaction in suit amounts to a mortgage and not a sale and that the defendant (the ostensible purchaser) is only a benamidar for the real mortgagee. There is nothing in the Act which would prevent a plaintiff from seeking relief of that kind in a suit under Ch. III. (Divatia, J.) Krishnaji Narayan v. Bhagwan Ganesh. 206 I.C. 421=15 R.S. 408=45 Bom. L. R., 191=A.I.R. 1943 Bom. 113. DEKHAN S. 11.

-S. 11-Applicability-Suit against legal representative of original party to transaction-Plea of agriculturist-If open to legal represen-

A legal representative of a party with whom the plaintiff had transactions on which the suit is based is as much entitled to take up the defence that he is an agriculturist within the meaning of the Act as the party himself would have had. (Chagla, J.) Meghji Hirji & Co. v. Mangilal Gordhandas. 203 I. C. 459=44 Mangilal Gordhandas. 203 I. C. 459=44 Bom.L.R. 752=15 R.B. 241=A.I.R. 1942 Bom. 321.

-S. 13-Power of Court to go behind

decree of the Civil Court.

Although S. 13 of the Dekkhan Agriculturists' Relief Act allows a Court to go behind a private settlement or a private contract it does not empower the Court to go behind a Civil Court's decree in which any preceding contract of the parties was merged. (Broomfield and Macklin, JJ.) DAMODAR VENKATESH v. NARHAR BALWANT. I.L.R. (1943) Bom. 71=205 I. C. 524-15 P. B. 729-45 P. B. 71-205 I. C. 634=15 R.B. 378=45 Bom.L.R. 87=A.I.R. 1943 Bom. 65.

-S. 13 (c)—Reference to S. 257-A of old C. P. Code—Repeal of S. 257-A by the present C. P. Code—Effect on applicability of S. 13 (c) to agreement of 1926.

When the Dekkhan Agriculturists Relief Act was enacted agreements of the kind referred to in S. 257-A of the old C. P. Code without the sanction of the Court were void and it was natural that in prescribing the method of taking accounts under the Dekkhan Agriculturists Relief Act the Legislature should provide that such illegal agreements should be ignored. After S. 257-A was repealed and agreements of the kind ceased to be illegal, S. 13 (c) of the Agriculturists Act could still be construed so as to give the words "in contravention of" their ordinary meaning in respect of transactions which took place prior to the repeal. The repeal of S. 257-A of the C. P. Code did not render valid an agreement in contravention of its terms. But that does not imply that S. 257-A was to be treated as applying to transactions taking place after it had ceased to be law. The amendment of S. 13 (c) of the Agriculturists Act by Bombay Act (XIV of 1932) has made the question more or less academic. Even assuming that S. 257-A is to be treated as applying to a transaction subsequent to its repeal there was no contravention of the section in the agreement concerned. (Broomfield and Sen, JJ.) Govind Narayan v. Bhiku Gopal. 201 I.C. 788=15 R.B. 117=44 Bom.L.R. 409=A. I. R. 1942 Bom. 221.

\_\_\_\_S. 13 (f)—Applicability—Payment by debtor—No evidence to show that debtor was an "agriculturist" at the time of payment—Payment, if can be presumed to be towards interest.

It is true that when an agriculturist debtor makes a payment to his creditor, the money, by reason of S. 13 (f), Dekhan Agriculturists' Relief Act has to be credited first in the account for interest notwithstanding any agreement between the parties as to the appropriation of

AGRIC. REL. ACT (1879), DEKHAN AGRIC. REL. ACT (1879), S. 15-D.

> the payment, so as to save limitation under S. 20, Limitation Act, as a payment of interest "as such," provided that the debtor making the payment is an agriculturist at the time the payment is made. But, when there is nothing to show that the debtor was an agriculturist at the time he made a payment, no such presumption can arise. (Divatia and Macklin, JJ.) HARKUBHAI FAKIRCHAND v. SHANKERBAI ZAVERBHAI. 215 I.C. 12=17 R.B. 117=45 Bom.L.R. 1014= A.I.R. 1944 Bom. 37.

> S. 13 (f)—Scope of—Open payments by agriculturist debtor—If towards "interest as such" and save limitation. See LIMITATION ACT,

S. 20. 45 Bom.L.R. 178.

-S. 15-B-Applicability-Suit on mortgage—Defendant not agriculturist at time of preliminary decree—Subsequent acquisition of status before final decree—Right to claim relief. SIDDAPPA GANGAPPA v. RAMACHANDRA VISHNU. [See Q.D. 1936-'40, Vol. I, Col. 3190.] I.L. R. (1941) Bom. 59=13 R.B. 290=192 I.C. 820=A.I.R. 1941 Bom. 30.

-S. 15-D-Jurisdiction-Suit for accounts —Valuation—Right of plaintiff to put own valuation—Power of Court to revise such valuation—C. P. Code, O. 7, R. 11.

In a suit for accounts a plaintiff can put his

own valuation on the suit and on the relief claimed and the valuation on the relief claimed fixes the valuation for purposes of jurisdiction. The fact that after taking accounts something more is found due does not oust the jurisdiction of the Court with retrospective effect. The valuation on the face of it must not be an untrue or fanciful valuation; and if, reading through the plaint, it appears plain that an amount which is more than the limit of the Court's jurisdiction is claimed, then the court-fee and jurisdiction will be decided accordingly. The court-fee on valuation and the consequent fixing of jurisdiction is dependent on the allegations in the plaint rather than upon the subsequent finding of the Court. But it does not follow that in a suit under S. 15-D of the Dekkhan Agriculturists' Relief Act the plaintiff can put an untrue or fanciful valuation on his claim; O. 7, R. 11, C. P. Code, always allows the Court to revise the valuation. (Davis, C.J. and Weston, J.) MULOMAL JAVHERMAL v. ALI BAKHSH. I.L.R. (1942) Kar. 488=205 I.C. 608=15 R.S. 156=A.I.R. 1943 Sind 73.

S. 15-D-Mortgage-Subsequent sale to mortgagee of equity in property-Suit to declare that sale was really second mortgage and for account—Maintainability.

The plaintiffs and their father executed a mortgage in 1921 and in 1927 they executed another deed purporting to sell the equity of redemption in the property to the mortgagee. In 1939 they brought a suit claiming that the sale-deed of 1927 was really a mortgage and praying to have an account of this mortgage taken under S. 15-D of the Dekkhan Agriculturists' Relief Act.

Held, that the claim of the plaintiffs was not to have the sale set aside but to treat the alleged sale-deed as a second mortgage and that there was no objection to claiming an account on the DEKHAN AGRIC. REL. ACT (1879), S. 15-D.

original mortgage plus the second mortgage which took the form of a sale-deed and the suit was therefore maintainable. (Beaumont, C.J. and Weston, J.) Gajanan Yeshwant v. Gobind Ramchandra. 211 I.C. 75=16 R.B. 268=45 Bom.L.R. 851=A.I.R. 1943 Bom. 446.

The provisions of S. 15-D, Dekkhan Agriculturists' Relief Act are wide and special provisions; and though there is no specific provision in the section which provides for the Court passing as in a mortgage suit a preliminary and a final decree, clearly the relief which the section provides is of the nature of a preliminary and final relief. A suit, is in the first instance, for the principal and unpaid interest and for a decree declaring that amount. That relief, however, may be enlarged by an application made before the decree in the suit is signed into the relief for redemption which follows, and may be said to arise from the suit for an account and on the finding of the Court in that suit; and, if by mistake or inadvertence, the decree for the first relief is signed when an application for the further relief in proper form is pending before the Court, a further decree, granting the further relief upon an application properly made may be passed. Where after an application for redemption under S. 15-D is made and before the decree for redemption is signed, the Judge by mistake and through inadvertence, signs the decree in the suit on the footing of an account, it cannot be said that there are two decrees, one in the suit on accounts, and a second decree allowing redemption and that the second decree is illegal. The two decrees cannot be regarded separately. When the decree on the footing of the application for redemption is signed, it is clear that the first decree, which relates purely to a matter of accounting, must be deemed to have merged in the second decree which follows upon the first and which in fact renders the first of no account. Further the Court has inherent power to vacate its own order when it has been misled. (Davis, C.J. and Weston, J.) MULOMAL JAVHER-MAL v. ALI BAKHSH. I.L.R. (1942) Kar. 488=205 I.C. 608=15 R.S. 156=A.I.R. 1943 Sind 73.

Where in a suit for an account under S. 15-D of the Dekkhan Agriculturists' Relief Act, the amount due is declared and provision is made for 9 per cent. interest and right is reserved to the plaintiff mortgagor to redeem the mortgage, the Court, on the application of the mortgager, to redeemption, has power to fix the terms on which redemption is to be allowed and has power to fix the rate of interest on the principal stum. The Court cannot be said to act wrongly to the plaintiff mortgagor possession of the mortgaged property free of the mortgage and the relevant documents, it cannot be said that the decree is incorrect or contrary to law or that the Court wrongly exercised its discretion in passing a decree for redemption in a usufructuary mortgage which is not ripe for redemption and in which the mortgagor is not prepared to redeem at once. The decree is legal and valid and falls within the provisions of S. 15-D (3) read with S. 15-B (4) of the Act. (Davies, C.J. and Weston, J.) MULOMAL JAVHERMAL v. ALI BAKHSH. I.L.R. (1942) Kar-

DEKHAN AGRIC. REL. ACT (1879), S. 15-D.

BAKHSH. I.L.R. (1942) Kar. 488=205 I.C. 608=15 R.S. 156=A.I.R. 1943 Sind 73

S. 15-D (3)—Limitation—Application for redemption not made on day of judgment in suit for account but made before decree is signed—If out of time.

Under S. 15-D (3) of the Dekkhan Agriculturists' Relief Act, an application for redemption may be made at any time before the decree on the footing of an account is signed by the Court, The section is a special provision and the words used must be given their ordinary grammatical meaning. The Act was passed to protect the rights of the agriculturists, and must not be construed in a narrow and pedantic manner. The sub-section must be construed in a wide liberal manner. Where judgment in the suit for account is given and before the decree in it is signed an application is made for redemption, though more than 2 months after the judgments it cannot be said that the application is out of time on the ground that it should have been made on the date the judgment is given, as the decree is to bear the date of the judgment. If the application is made before the decree is signed in fact, that is in time and is a valid application. (Davis, C.J. and Weston, J.) Mulo-MAL JAVHERMAL v. ALI BAKHSH. I.L.R. (1942) Kar. 488=205 I.C. 608=15 R.S. 156 =A.I.R. 1943 Sind 73.

S. 15-D (3)—Scope—If to be read with S. 15-B—Decree declaring amount due and providing for mortgagee's possession for fixed term and directing redemption at end of term—Legality.

S. 15-D of the Dekkhan Agriculturists' Relief Act must be read with S. 15-B. Under S. 15-B (4) the Court has power, when a mortgagor is in possession, to direct that the mortgagee may continue in possession for such a period as will, in the opinion of the Court, be sufficient to enable him to recover from the profits the amount payable by the mortgagor, together with reasonable interest and that on the expiry of such period, the pro-perty mortgaged shall be restored to the mortgagor. When in a suit for account of a usufructuary mortgage, the Court directs the defendant mortgagor to appropriate so much of the produce towards interest, so much towards expenses, and the balance so much a year in payment of principal, and declares that the mortgage, principal and interst will be fully paid up by a certain date when the defendant is directed to hand over to the plaintiff mortgagor possession of the mortgaged property free of the mortgage and the relevant documents, it cannot be said that the decree is incorrect or contrary to law or that the Court wrongly exercised its discretion in passing a decree for redemption in a usufructuary mortgage which is not ripe for redemption and in which the mortgagor is not prepared to redeem at once. The decree is legal and valid and falls within the provisions of S.

DEKHAN AGRIC. S. 22.

488=205 I.C. 608=15 R.S. 156=A. I. R. 1943 Sind 73.

S. 22—"Belonging to".—Interpretation—

Refers to beneficial title.

The expression "belonging to" in S. 22 of the Dekkhan Agriculturists' Relief Act not being a term of art refers to the beneficial title, and the question which has to be determined is whether at the critical moment the party to whom the property belongs beneficially is an agriculturist: (Beaumont, C.J. and Sen, J.) VISHVANATH VITHALSA v. BALARAM ANANDRAM. I. L. R. (1941) Bom. 431=197 I.C. 72=14 R.B. 191 =43 Bom. L. R. 325=A.I.R. 1941 Bom. 186.

decision-Right to raise plea again at time of

order for sale. S. 22 of the Dekkhan Agriculturists' Relief Act must be read literally, and it must be held that where there is not a single order for attachment and sale, but there is an order for attachment alone intended to be followed by an order for sale, it is open to the judgment-debtor to set up his status of an agriculturist both when an order for attachment is sought and also subsequently on the application for an order for sale. A decision adverse to the judgment-debtor on his plea of being an agriculturist raised at the time of the order for attachment does not preclude him from raising the question again at the time of the order for sale. The matter is not res judicata. (Beaumont, C.J. and Sen, J.) VISHVANATH VITHALSA V. BALARAM ANANDRAM.
I.L.R. (1941) Bom. 431=197 I.C. 72=14
R.B. 191=43 Bom.L.R. 325=A.I.R. 1941
Bom. 186.

S. 22—"Mortgage"—If includes charge. The word "mortgage" in S. 22 of the Dekkhan Agriculturists' Relief Act is used to describe not only what would technically be a mortgage but also a charge for the repayment of a debt created on the property of the debtor. (Davis, C.J. and Weston, J.) AHMED BAKHSH v. KARAM SING. I.L.R. (1943) Kar. 342=209 I.C. 596=16 R.S. 114=A.I.R. 1943 Sind 236.

——S. 22 (2)—Applicability and construction —Person not agriculturist at time of decree but acquiring that status at time of execution proceedings—Power of Court to direct collector to take possession of his property.

S. 22 (2) does not apply when the decree

was passed against a person who was not an agriculturist at the time when it was passed although he might acquire that status at the time of the execution proceedings. The expression "against an agriculturist" in S. 22 (2) must be taken as going with the preceding word "decree" and not with the word "proceedings." S. 22 (2) read as a whole evidently means that the proceeding must be under a decree which is against an agriculturist and which is passed either before or after the Act comes into force. The status of the judgment-debtor at the date of the proceeding cannot be taken into consideration in determining whether S. 22 (2) applies or not (Lokur, J.) Pandurang Vithoba v.

REL. ACT (1879), DISS. OF MUSLIM MARRIAGES ACT (1939).

SHAMRAO BHAN. 219 I.C. 235=18 R.B. 94 =46 Bom.L.R. 618=A.I.R. 1944 Bom. 272.

-S. 71-Applicability-Decree not passed in proceeding under Act-Defendant claiming to have become agriculturist after decree-Right to set up uncertified payment or adjustment.

S. 71 of the Dekkhan Agriculturists' Relief Act enables an adjustment of a decree to be proved in a manner in which it could not be proved apart from that section, but that can only be done in a proceeding under the Act. S. 71 applies only to a decree passed in a proceeding under the Act. It is not open to a defendant to rely on an uncertified adjustment of a decree not passed in a proceeding under the Act, by showing that he has become an agriculturist since the date of the decree. If the defendant was not an agriculturist at the time of the decree, S. 71 will not apply, and he cannot therefore get over the bar imposed by O. 21, R. 2 (3), C. P. Code. (Beaumont, C.J.) BASAPPA MALESAPPA v. SAMEAPPA SHIVLINGAPPA. 199 I. C. 389=14 R.B. 354=44 Bom.L.R. 25= A.I.R. 1942 Bom. 80.

S. 72—Scope and effect of—If excludes application of S. 20, Limitation Act, to suit under

5.3 (w).
The Dekkhan Agriculturists' Relief Act does not provide a separate and self-contained body of provisions with regard to the limitation of suits coming under that Act, S. 72 only provides with regard to suits falling under S. 3 (w) of the Act, that certain periods of limitation shall be substituted in the Schedule of the Limitation Act; it does not make a separate and self-contained provision with regard to the limitation governing such suit. S. 72 clearly indicates that subject to this one modification the Limitation Act, as a whole shall apply to such suits. Hence S. 20 of the Limitation Act would apply to suits under S. 3 (w) of the Dekkhan Agriculturists' Relief Act. (Wadia and Sen, II.) KISHORELAL STORES v. JAGANNATH BAYAJI. I. L.R. (1944) Bom. 71=212 I.C. 531=16 R. B. 379=45 Bom.L.R. 1064=A.I.R. 1944 Bom. 89.

S. 72—Scope—Suit under—Limitation— Limitation Act, S. 19—Application of. Having regard to S. 29 (2) of the Limitation

Act as amended in 1922, the plaintiff in a suit governed by S. 72 of the Dekkhan Agriculturists' Relief Act, is not entitled, for the purpose of limitation, to the benefit of S. 19 of the Limitation Act. (Kania, A.C.J., Chagla and Weston, JJ.)

JANARDAN EKNATH v. GANESH SADASHIV. I.L.R. (1945) Bom. 167=220 I. C. 67=18 R.B. 138=47 Bom.L.R. 27=A.I. R. 1945 Bom. 200 (F. B.).

DISSOLUTION OF MUSLIM MARRIAGES ACT (VIII OF 1939)—Suit for main-

tenance—Proper forum.

In the case of a claim for maintenance under the Dissolution of Muslim Marriages Act, the proper forum is the defendant's place of residence and not that of the plaintiff wife. (Davies.)
MAHMUD HASAN v. NOOR JAHAN. 1942 A.M. L.J. 18.

DISS. OF MUSLIM MARRIAGES ACT DISS. OF MUSLIM MARRIAGES ACT (1939), S. 2.

-S. 2—Dissolution of marriage—Decision by oath of witness or arbitration-Legality.

In a suit for dissolution of marriage under the Dissolution of Muslim Marriages Act, it is the court which has to perform the function of a Qazi and it is the pronouncement of the court made on a consideration of the evidence led in the case which dissolves the marriage, and that function cannot be delegated by the court to anyone else either by arbitration or by accepting the statement of a witness on oath even with the consent of a party at least on an immaterial point in the case. (Abdur Rahman, I.) Abbut.
GHANI V. SARDAR BEGUM. 221 I.C. 610=47
P.L.R. 119=A.I.R. 1945 Lah. 183.
——Ss. 2 and 2 (viii) (f)—Disolution of mar-

riage—Right of wife.

A wife is entitled to a decree for dissolution of marriage, if her husband fails to provide for her maintenance for a period of two years, marries another wife and does not treat her equitably in accordance with the injunctions of the Quran. (Harries, C.J. and Abdul Rashid, J.) ZUBAIDA BEGUM v. SARDAR SHAH. 210 I. C. 587=16 R.L. 168=45 P.L.R. 336=A.I.R. 1943 Lah. 310.

-S. 2-Ground for divorce-Wife hating

husband—Husband contracting debts.

The fact that the wife has begun to hate the husband as he has been leading a shameful life, is not a ground for divorce. Nor is the fact that the husband has been contracting debts or that he has taken any debts from the mother deceitfully a ground. (Abdur Rahman, J.) UMAT-UL-HAFIZ v. TALIB HUSSAIN. 46 P. L.R. 343=A.I.R. 1945 Lah. 56.

-S. 2-Retrospective effect.

The Dissolution of Muslim Marriages Act applies with retrospective effect, and divorce can which happened before the Act came into force. (Beckett, J.) Manak Khan v. Mt. Mulkhan Bano. 194 I.C. 567=14 R.L. 1=A. I. R. 1941 Lah. 167.

S. 2 (ii)—Applicability—Wife not ready

) perform her marital duties.

The failure of the husband to maintain his ife who was living separately and who was not eady and willing to perform her part of marid duties, does not bring him within the ambit f S. 2 (ii) of the Dissolution of Muslim Mariages Act. (Abdur Rahman, J.) Mr. UMAT-ULIAFIZ v. TALIB HUSSAIN. 46 P.L.R. 343=A. .R. 1945 Lah. 56.

-S. 2 (ii)—Failure to maintain—Wife efusing to perform marital obligations—Right

o divorce.

If the wife for no valid reason has refused o live with her husband and to perform her narital obligations, the husband is not liable to naintain her, and the wife has no right to obain divorce under S. 2 (ii) of the Dissolution if Muslim Marriages Act. (Harries, C.J. and Mahajan, J.) ZAFAR HUSSAIN v. AKBARI BE-RUM. 216 I.C. 194=17 R.L. 173=A.I.R. 1944 Lah. 336.

S. 2 (ii)—Failure to maintain—If must

(1939), S. 2.

There is nothing in the wording of S. 2 (ii) of the Dissolution of Muslim Marriages Act, to suggest that the failure to provide for the maintenance of the wife must be wilful. It is: absolutely immaterial whether the failure maintain is due to poverty failing health, loss of work, imprisonment or to any other cause whatsoever. (Beckett, J.) Manak Khan v. Mt. Mulkhan Bano. 194 I.C. 567=14 R.L. 1=A.I.R. 1941 Lah. 167.

——S. 2 (ii)—Failure to provide for wife's maintenance for ten years—Husband paying maintenance under Magistrate's order during two years preceding suit-Wife's right to dissolution

of marriage.

Where during a period of ten years the husband wholly neglected to provide for the wife's maintenance but for a certain time during the period of two years immediately preceding the suit by the wife he has been paying maintenance to her under an order of a Magistrate, the wife is not debarred from relying on S. 2 (ii) of the Dissolution of Muslim Marriages Act in respect of the earlier period as a good ground for the dissolution of her marriage. (Tyabji, J.) ASMABAI v. UMER MAHOMED SIDIK MIRZA. I.L.R. (1941) Kar. 114=193 I.C. 847=13 R.S. 237=A.I.R. 1941 Sind 23.

(ii)—Neglect—Implication—Wife going away to parent's house and not returning at all-Stopping of maintenance-If a ground for

dissolution.

The .word 'neglect' implies wilful default or failure. Hence where a wife through her own conduct in going away to her parent's house and not returning to the husband's house, leads the husband to stop her maintenance, the Court will not allow dissolution of marriage for that would be giving her a benefit—if benefit it can be called—arising from her own wrongful acts. (Collister and Bajpai, JJ.) BADRULNISA BIBI v. MOHAMMAD YUSUF. I.L.R. 1944 All. 27=211 I.C. 884=16 R.A. 223=1943 A.L.J. 540 =1943 A.L.W. 582=1943 O.A. (H.C.) 264 =1943 A.W.R. (H.C.) 264=A.I.R. 1944 All. 23.

s. 2 (ii)—Scope of enquiry—Wife's right to maintenance under Muslim Law or

having property—If relevant.

Act VIII of 1939 does not lay down that its provisions shall be subject to the principles of Mahomedan law. The Act is complete in itself and crystallizes a portion of Mahomedan law which before it came into force was not codified and consisted of principles only. All that has to be decided under cl. (ii) of S. 2 of the Act is whether the husband has maintained his wife for two years preceding the suit, irrespective of the fact whether the woman was entitled to maintenance or not under Muslim law. As the Act does not make any difference between rich and a poor wife, the responsibility of the husband to provide for her will continue even if she has her own personal property of great value. (Almond, J.C. and Mir Ahmad, J.) SAIDAHMAD JAN v. SULTAN BIBL. 209 I.C. 248=: 16 R. Pesh. 34=A.I.R. 1943 Pesh. 73.

gates general Mahomedan Law-Wife's right to dissolution-Grounds-Husband-When deemed to have neglected or failed to provide mainten-

Act VIII of 1939 was never intended to abrogate the general law applicable to Mahomedans. Under S. 2 (ii) of the Act VIII of 1939, a husband cannot be said to have neglected or failed to provide maintenance for his wife so as to entitle the wife to sue for dissolution of marriage, unless the husband under the general Mahomedan Law is under an obligation to maintain his wife. Under the general Mahomedan Law, the husband is bound to maintain his wife (unless she is too young for matrimonial intercourse) so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain his wife who refuses herself to him or is otherwise disobedient, unless the refusal or disobedience is justified by non-payment of prompt dower. (Lobo, J.) Mt. Khatijan v. Abdullah Ditta Sheikh. I.L. R. (1942) Kar. 535=206 I.C. 272=15 R.S.

169=A.I.R. 1943 Sind 65.

S. 2 (ii)—Scope—Wife living separately not willing to perform marital duties—Effect—

Husband's failure to maintain her.

If the wife is not ready and willing to perform her part of martial duties during the period in which she is living separately, the husband is under no obligation to maintain her, and his failure to maintain her in such circumstances does not bring the case within the ambit of S. 2 (ii) of the Dissolution of Muslim Marriages Act. (Abdur Rahman, J.) UMAT-UL-HAFIZ v. TALIB HUSSAIN. 46 P.L.R. 343=A.I.R. 1945 Lah. 56.

-S. 2 (ii)—Wife contributing towards husband's failure to maintain-Effect of.

The wife is entitled to a decree for dissolution of her marriage if the husband fails to maintain her for a period of two years, even though she may have contributed towards the failure of the maintenance by her husband. Simply because the wife refused once to receive a cheque from her husband, the latter is not relieved of all liabilities that attaches to his status by virtue of S. 2 (ii) of the Dissolution of Muslim Marriages Act. (Abdul Rashid, J.) AKBARI BEGAM v. ZAFAR HUSSAIN. 199 I.C. 847=14 R.L. 433=44 P.L.R. 69=A.I.R. 1942 Lah. 92.
——S. 2 (vii)—Scope and effect of—Right

to repudiate marriage. S. 2 (vii) of the Dissolution of Muslim Marriages Aet does not allow a woman who has been given in marriage by her father before she attained the age of puberty to repudiate the marriage in the same way as if she had been given in marriage by her uncle. It provides that if a woman who has been given in marriage by her father before she has attained the age of 15 years repudiates the marriage before she attains the age of 18 years, she is entitled to obtain a decree for dissolution of the marriage. It does not say that until she has obtained such a decree, she has the right of repudiation—that she has the right of dissolving her marriage by

DISS. OF MUSLIM MARRIAGES ACT (1939), S. 2.

S. 2 (ii)—Scope and effect of—If abrove the second of t

repudiation. (Davis, C.J. and Weston, J.) USMAN v. BUDHU. I.L.R. (1942) Kar. 3= 201 I.C. 163=15 R.S. 10=43 Cr.L.J. 647 =A.I.R. 1942 Sind 92.

S. 2 (viii) (a)—Cruelty of conduct—Wife forced to live separately on account of

husband's past ill-treatment.

Where a wife has been forced to live away from her husband on account of his past illtreatment and her life is made miserable by reason of the fact that a return to her husband's house is out of the question as it must meansubmitting to conditions impossible to a selfrespecting woman, it is reasonable in these circumstances to say that the husband is making 

never returned thereafter.

Where certain articles were left by the wife in her husband's house when she went to her parent's house with a view to their being used after her return, and she never came back to her husband's house where they remained, it cannot be said that the husband has prevented her from exercising her legal rights over such property within the meaning of S. 2 (viii) (d) of the Act. (Collister and Bajpai, JJ.) BADRULINISA BIBI V. MOHAMMAD YUSUF. I.L.R. 1944 All. 27=211 I.C. 384=16 R.A. 223= 1943 A.L.I. 540=1943 O.A. (H.C.) 264= 1943 A.L.W. 582=1943 A.W.R. (H.C.) 264=A.I.R. 1944 All. 23.

S. 2 (viii) (d)—"Disposes of her pro-perty"—Interpretation—Husband disposing of wife's ornaments for starting business with her

consent—If ground for divorce.

The disposal by the husband of his wife's ornaments with her consent for the purpose of starting a business, cannot form a ground for divorce under S. 2 (viii) (d) of the Dissolution of Muslim Marriages Act. The word "property" in that clause should be interpreted in the sense of a substantial portion of a wife's property and its disposal in the sense of getting rid of that property not for the wife's benefit but for the selfish ends of the husband not with the object of meeting a pressing need but more in the sense of waste and this also when done with the object of depriving the wife of her property and not with her consent or for things in and from which her consent might have been reasonably or legitimately presumed, implied or reasonably or legitimately presumed, implied or inferred. (Abdur Rahman, I.) Mr. UMAT-UL-HAFIZ v. TALIB HUSSAIN. 46 P.L.R. 343=
A.I.R. 1945 Lah. 56.
S. 2 (viii) (d)—Disposal of wife's property—When ground for divorce.
S. 2 (viii) (d) of the Dissolution of Muslim Marriages Act and as a whole same to convert

Marriages Act read as a whole seems to convey that the property must have been disposed of with the object or intention of preventing the wife from exercising her rights without her

### DISS. OF MUSLIM MARRIAGES ACT, DIVORCE. (1939), S. 2.

sub-clause should be interpreted in the sense of a substantial portion of a wife's property and its disposal in the sense of getting rid of that property not for the wife's benefit but for the selfish ends of the husband not with the object of meeting a pressing need but more in the sense of waste and this also when done with the object of depriving the wife of her property and not with her consent or for things in and from which her consent might have been reasonably and legitimately presumed, implied or inferred. (Abdur Rahman, J.) UMAT-UL-HAFIZ V. TALIB HUSSAIN. 46 P.L.R. 343=A.I.R. 1945 Lah.

-S. 2 (viii) (f)—Applicability—Wife living separately owing to husband's ill-treatment -Husband marrying second wife and not mak-

ing effort to treat wife as wife.

Where a wife has been forced to live away from her husband on account of his past illtreatment and the husband married a second wife and never had any real intention or made any positive effort to treat his wife as a wife at all, much less to treat her equitably in accordance with the injunctions of the Quran, or even on a footing which, having regard to human imperfections and to the circumstances of the husband, could be considered as an honest effort in that direction, the wife has a good ground for dissolution of marriage under S. 2 (viii) (f) of the Act. (Tyabji, J.) ASMABAI v. UMAR MAHOMED SIDIK MIRZA. I.L.R. (1941) Kar. 114=193 I.C. 847=13 R.S. 237=A.I.R. 1941 Sind 23.

failure of wife to live with the husband—If a ground for claiming dissolution of marriage by

first wife.

Under the Dissolution of Muslim Marriages Act a Mahomedan husband has got to treat all his wives equitably in accordance with the injunctions of Qoran. Where a husband marries a second wife when his first wife either of her own accord or because of her parent's fault fails to live with her husband, she cannot claim dissolution of marriage on the ground that she has not been treated equitably. In fact the husband has had no chance of treating her at all equitably or otherwise. (Collister and Bajpai, JJ.) Badrulnisa Bibi v. Mohammad Yusuf. I.L.R. 1944 All. 27=211 I.C. 384=16 R.A. 223= 1943 A.L.J. 540=1943 A.L.W. 582=1943 O.A. (H.C.) 264=1943 A.W.R. (H.C.) 264=A.I.R. 1944 All. 23.

S. 2 (ix)—"Muslim Law"—Meaning of.

The words 'Muslim Law' employed by the
Legislature in S. 2 (ix) of the Dissolution of
Muslim Marriages Act, convey that divorce
could be granted by Courts for reasons for
which it could have been granted under the shariat regardless of the fact whether that reason had been recognized by the British Indian Courts or not. (Harries, C.J. and Abdur Rahman, J.) UMAR BIBI v. MAHOMED DIN. 220 I.C. 9=18 R.L. 65=A.I.R. 1945 Lah. 51.

S. 4—If retrospective. FAZAL KARIM v.

MARKAM. [See Q.D. 1936-'40, Vol. II, Col. 2041.]

194 I.C. 420=13 R.L. 299.

-S. 4—If retrospective—Appeal in suit by

wife pending when Act came into force.
As soon as the Dissolution of Muslim Marriages Act (1939) was passed, it amounted to a declaration that all the interpretations put by the Courts upon the Mahomedan law in regard to the effect of aportasy on a subsisting marriage, were wrong. A declaratory statute has a retrospective effect.

Accordingly although when a suit was instituted by a wife before the Act came into force, she could urge that her marriage had been ipso facto cancelled on account of her change of faith, the plea will not be open to her when after the passing of the Act an appeal against her was being heard. (Din Mahomed, J.Q. Fazal. Begum v. Hakim Ali. 193 I.C. 327=13 R.L. 451 =A.I.R. 1941 Lah. 22.

The Dissolution of Muslim Marriages Act is not retrospective. Before the Act the law was that a marriage between Muslims became null and void, on either party apostatizing. (Monroe, J.) RASHID BIBI v. TUFAIL MAHOMED. 196 I.C. 127=14 R.L. 126=A.I.R. 1941 Lah. 291.

-S. 4—If retrospective.

S. 4 of the Muslim Marriages Dissolution Act is not retrospective in its operation, and it applies only to renunciations or conversions which take place after the Act came into force. If the renunciation took place before the Act came into force, the marriage would be dissolved automatically without any decree of Court. (Beckett, J.) RABIAN BIBI v. GHULAM ALI. 196 I.C. 139=14 R.L. 135=43 P.L.R. 394=A.I.R. 1941 Lah. 292.

### DIVORCE.

See also (1) MAHOMEDAN LAW-DIVORCE.

(b) Dissolution of Muslim Mar-RIAGES ACT (1000)

(2) Indian and Colonial Divorce TURISDICTION ACT.

(3) DIVORCE ACT.

-Costs of wife for defence-Husband, if should pay for-Default in payment-Procedure. YAQUB MASIH v. CHRISTINA MASIH. [See Q.D. 1936-'40, Vol. I, Col. 3352.] I.L.R. (1940) All. 802=192 I.C. 831=13 R.A. 368=A.I. R. 1941 All. 93.

-Decree absolute-Operation of-Death of husband during pendency of intervener's appeal

-Effect.

The death of the husband during the pendency of the intervener's appeal does not prevent the decree absolute operating so as to deprive the wife of her status as the wife of the de-ceased. The decree absolute dissolved the marriage from the moment it was pronounced and at the date when the appeal by the intervener abated it stood unreversed. The fact that neither spouse could remarry until the time for appealing had expired in no way affects the full operation of the decree. It is a judgment in rem and unless and until a Court of Appeal reversed it, the marriage was for all purposes at an end. (Lord Goddard.) MARSH v. MARSH. A.I.R. 1945 P.C. 188 (P.C.).

### DIVORCE.

Order for custody of child—Form—Limitation of period—Practice. Doris Royston v. Frederick Royston. [See Q.D., 1936-'40, Vol. I, Col. 3352.] 191 I.C. 797=13 R.R. 152.

DIVORCE ACT (VI OF 1869), S. 2— Domicile—Change—Declaration under S. 11 of

Succession Act-Whether sufficient.

S. 11, Succession Act, merely provides a means for acquiring an Indian domicile for the purposes of succession under that Act. The making of a declaration under that section will not, therefore, affect the declarant's domicile for purposes of divorce. For the latter purposes, the domicile of origin can only be changed when a person abandons the country of his origin and adopts abandons the country of his choice as his permanent home. (Harries, C.J., Monroe and Abdul Rashid, JJ.) CHARLES REGINALD v. ELIZABETH FINCH. I.L. R. (1943) Lah. 765=209 I.C. 522=16 R.L. 136=45 P.L.R. 313=A.I.R. 1943 Lah. 260 (S.B.).

-S. 2—Domicile—Change—Proof—Onus. A change of domicile from that of origin to one of choice-apart from any statutory declaration-has to be strictly proved and a very heavy onus lies on any person alleging such change. To establish such change the most cogent evidence is necessary and the mere evidence of an expression of intention, supported by nothing else, is not sufficient. To prove a change of domicile it is necessary that the evidence should establish the intention of dence should establish the intention of a person permanently to settle down in the country of his permanently to settle down in the country of his choice and to abandon for ever the country of his origin as his residence. (Harries, C.J., Monroe and Abdul Rashid, JJ.) CHARLES REGINALD v. ELIZ ABETH FINCH. I.L.R. (1943) Lah. 765=209 I.C. 522=16 R.L. 136=45 P. L.R. 313=A.I.R. 1943 Lah. 260 (S.B.).

\_\_\_\_\_S. 2—Domicile — Proof — Declaration under S. 11, Succession Act—Value of as evidence of acquisition of British Indian Domicile.

See Succession Act, S. 11. A.I.R. 1945 Sind 152.

—S. 2—Domicile—Residence in India as member of army-Whether confers Indian domi-

An Englishman or Scotsman serving in His Majesty's Forces in India cannot acquire an Indian domicile by reason of his residence India, as such residence is not voluntary but is due to the terms of his service. (Harries, C.J., Monroe and Abdul Rashid, JJ.) CHARLES REGINALD v. ELIZABETH FINCH. I.L.R. (1943) Lah. 765=209 I.C. 522=16 R.L. 136=45 P. L.R. 313=A.I.R. 1943 Lah. 260 (S.B.). —S. 2—Domicile in India—Absence of— Decree for dissolution of marriage-Effect.

S. 2 of the Divorce Act makes it clear that unless the parties to the marriage are domiciled in India at the time when the petition is pre-sented, there is no jurisdiction in a District Court to dissolve the marriage and a decree, evn if confirmed, would not be effective. If a decree for dissolution of marriage is granted by a Court having no jurisdiction, the marriage would subsist and either of the parties going through a subsequent form of marriage would be guilty living in such a place cannot be filed in the High

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of bigamy and any issue from such subsequent union would be illegitimate. (Harries, C.J., Monroe and Abdul Rashid, JJ.) CHARLES REGINALD v. ELIZABETH FINCH. I. L. R. (1943)
Lah. 765=209 I.C. 522=16 R.L. 136=45 P. L.R. 313=A I.R. 1943 Lah. 260 (S.B.).
——Ss. 2 and 7—Marriage according to Arya

Samaj rites—One of parties Christian at time of petition—Applicability of 1c1

By virtue of S. 2 of the Divorce Act as amended by Act XXX of 1927, the Act is applicable to a case where the parties had been married according to the Arya Samaj rites, if one of them is a Christian at the time when the petition for dissolution of marriage is presented. There is nothing in S. 7 of the Act to bar relief in such a case. The effect of this latter section is that the Indian Courts may be deprived of jurisdiction if and, only if the principles on which the Divorce Court in England acts would exclude relief. (Nasim Ali and Raw, JJ.) Niranjan Das Mohan v. Ena Mohan I.L.R. (1943) 1 Cal. 340=205 I.C. 597=15 R.C. 647=47 C.W.N. 251=A.I.R. 1943 Cal. 146.

-S. 2—Scope—Indian domicile—Domicile acquired under S. 11 of Succession Act-If sufficient.

The domicile acquired under S. 11 of the Succession Act by a residence for one year and a mere declaration of a desire to acquire Indian domicile, is only a limited domicile acquired for the purpose of regulating succession to movable property. It does not necessarily amount to a domicile for the purposes of S. 2 of the Divorce Act. A member of the Armed Forces of the United States, who has not the least intention of residing permanently in India, cannot by a year's enforced residence in India and by a mere declaration of desire to acquire domicile, acquire such a domicile as would give jurisdiction to the Court in India in the dissolution of his marriage. (Davis, C.J., O'Sullivan and Constantine, IJ.) ALLEN v. ALLEN. A. I.R. 1945 Sind 171 (S.B.).

Ss. 3, 22 and 23 and Government of India Act (1915), S. 109 (1)—Notification under Government of India Act, S. 109 (1) unaer Government of Inua AC, S. 109 (1)
—Meaning of the words portions, of G. state
occupied by G. I. P. Ry.—Jurisdiction in respect of petition under S. 22, Divorce Act—Respondent living within the compound of a mill in
G. state 'served' by the G. I. P. Ry.—Forum.
The words the portions of the G. state occupied
by the G. I. P. Ry in the potification issued

by the G.I.P. Ry. in the notification issued under the Government of India Act, S. 109 (1), can only refer to those portions of the soil of the G. state and of any buildings attached thereto which are in the possession or occupation of the G. I. P. Ry. for whatever purpose and upon whatever form of tenure. The word occupy must be given its ordinary grammatical meaning. That cannot include a building in the compound of a mill in G. state which is merely 'served' by the G. I. P. Ry. in the sense that it has a siding running into and through the mill premises. Hence a petition for judicial separa-tion under S. 22, Divorce Act against a person

### DIVORCE ACT (1869), S. 3.

Court of Allahabad. (Braund, J.) Mc. Gowen v. Mc. Gowen. I.L.R. (1942) All. 98=199 I.C. 853=14 R.A. 405=(1942) F.L.J. (H.C.) 163=1941 A.L.J. 710=1941 A.L. W. 1104=1941 A.W.R. (H.C.) 387=A. I. R. 1042 All. 1208 1942 All. 129.
—S. 3 (1)—'Reside'—Meaning.

Where the respondent had resided in Calcutta for the purpose of study for a considerable time previous to the marriage, and after the marriage he went to his home in the Punjab when his college was closed for holidays, and although his whereabouts were unknown on the date of the presentation of the petition for dissolution of marriage, he was seen in Calcutta immediately thereafter,

Held that even if he was absent from Calcutta on the date of the presentation of the petition, his absence was merely temporary and he was still residing within the jurisdiction of the Calcutta High Court within the meaning of S. 3 (1) of the Divorce Act. (Panckridge, J.) Dolly Bathena v. Shaik Fazle Ellahi. 201 I.C. DOLLY 470=15 R.C. 204=A.I.R. 1942 Cal. 42.

-Ss. 3 (2) (b), 3 (3) and 10-Deputy Commissioner vested with powers of District Judge within scheduled district-Jurisdiction

over Indian State.

The Deputy Commissioner of the Khasi and Jaintia Hills who has been vested with the powers and duties of a District Judge under the Indian Divorce Act under S. 6 (c) of the Scheduled District Act, has jurisdiction and power as a District Judge only within the scheduled District of Khasi and jaintia Hills which is within British territory. He is not a District Judge in any area in Mylliam State, which is an Indian State, not being an officer appointed by notification in the Official Gazette under S. 3 (2) (b) of the Divorce Act and his Court cannot be regarded as a District Court within the meaning of S. 3 (3) of that Act. Consequently he has no jurisdiction to entertain a petition under S. 10 of the Divorce Act when the parties do not reside within his jurisdiction and they last resided together in Mylliam State. (McNair and Henderson, JJ.) Sushila Bala Samaddar v. Jitendra Nath. 47 C.W.N. 707.

-S. 3 (3)—Jurisdiction—Parties belonging to and marrying at place within jurisdiction of Court at Mangalore—Last place of residence together—Husband leaving for Rangoon but having no fixed residence there though employed there-Jurisdiction of Mangalore Court to enter-

scope—Application for declaration of nullity of marriage on ground of first spouse being alive— Burden of proof-Evidence Act, S. 107=Application of—If excluded. See DIVORCE ACT, Ss. 4
AND 19 (4). 1945 2 M.L.J. 389.

S. 7—Discretion—Security for costs—

Order for-Grounds.

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which as nearly as may be conform to the principles and rules observed in England under the Matrimonial Causes Act and Rules. The discretion given to the Courts in India is completely unfettered, and the Courts should endeavour to exercise their discretion cautiously and carefully not only with regard to the parties themselves but to the interests of society and public morality in general. The Court will be justified in passing an order for security for costs where there is a claim for damages and the petitioner is out of the jurisdiction of the Court and has no property within its jurisdiction. (Bell, I.) BOTAWALA DE RANDER v. J. P. MITTER 209 I.C. 198=16 R.M. 285=56 L. W. 330=A.I.R. 1943 Mad. 510=(1943) 1 M.L.J. 360.

-Ss. 7 and 45-Matrimonial jurisdiction of High Court-Law and procedure applicable.

The substantive law to be applied by the Calcutta High Court in exercise of its matri-Divorce Act; (2) subject to the provisions of that Act, the principles and rules on which the Court for Divorce and Matrimonial causes in England acts and gives relief for the time being; (3) subject to the provisions of that act and the Matrimonial Causes Acts of England the principles and rules of ecclesiastical law as were used and exercised in the Diocese of London in 1774. The proceedings in matrimonial causes are to be regulated by the provisions of C. P. C. and the Rules made by the High Court in conformity therewith. (Das, J.) Grace Isabel Steedman v. Anneley Eliardo Beresford de Courey Wheeler. I.L.R. (1944) 1 Cal. 258 = 219 I.C. 354=18 R.C. 91=A.I.R. 1945

S. 7—'Principles and Rules'—If includes law of procedure.

The words "Principles and Rules" in S. 7 of the Divorce Act do not include the law of procedure prevailing in England for the time being. (Das, J.) GRACE ISABEL STEEDMAN v. ANNELEY ELIARDO BERESFORD DE COUREY WHEELER. I.L. R. (1944) 1 Cal. 258=219 I.C. 354=18 R.C. 91=A.I.R. 1945 Cal. 75.

-S. 7-Procedure-Petition for judicial separation by wife on ground of adultery and cruelty-Decree-Subsequent petition for dissolution of marriage on same grounds-Sustainability. Manjula Bai v. Janoji Rao. [See Q.D. 1936-'40, Vol. I, Col. 3197.] 191 I.C. 430 =13 R.M. 495.

S. 8—"High Court"—Meaning of—Application under section-To whom to be made.

The expression "High Court" as used in S. 8 of the Divorce Act does not mean either the original or the appellate side of the High Court, but means the High Court as one whole. But the litigant, when he wants to have an order under that section, would have to approach that particular department of the High Court which In the matter of ordering security for costs is empowered to deal with this matter by its rules framed under S. 13 of Act 24 and 25, Vict., India act and give relief on principles and rules Chap. 104, which is substantially reneated in

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S. 108 of the Government of India Act, 1919 and S. 223 of the Government of India Act, 1935. (Mukherjee and Roxburgh, II.) MALATI v. SURENDRA NATH. I.L.R. (1941) 2 Cal. 373 =45 C.W.N. 916=199 I.C. 621=14 R.C. 598=A.I.R. 1942 Cal. 32.

-S. 8—Transfer of suit from one District Court to another—Jurisdiction of Judge on Original Sidc—Power of such Judge to issue writ of commission—Calcutta High Court O. S.

Rules, Chap. 35-A, R. 44—C. P. Code, S. 24. R. 44 of Chap. 35-A of the Original Side Rules of the Calcutta High Court framed under S. 62 of the Divorce Act applies to all applications for transfer made under S. 8 of that Act, whether under the first or second part of that section. Consequently, a Judge sitting singly on the Original Side, duly empowered in this behalf by the Chief Justice, has jurisdiction to transfer a divorce suit from one District Court to another and an application need not be made to a Bench on the appellate side. S. 24, C. P. Code, has no application to the case. The same Judge has also jurisdiction to issue a writ of commission authorising the District Court before which the suit was pending to examine witnesses and his order would be governed by the rules relating to commissions contained in Chap. 22 of the Original Side Rules. (Edgley, Sen and Akram, II.) SURENDRANATH DUTT V.
MALATI DUTT. I.L.R. (1942) 2 Cal. 461=76
C.L.J. 436=201 I.C. 446=15 R.C. 195=46
C.W.N. 790=A.I.R. 1942 Cal. 546.

-S. 9-Domicit of origin-Continuance-

Presumption.

The presumption of law is that the domicil of origin continues and is against a change of. domicil and if the petitioner's domicil of origin is Scottish, it must be held to be so, until he is in a position to discharge the onus of proving that he has acquired an Indian domicil. His bare statement is insufficient to discharge this onus. (Young, C.J., Monroe and Din Muhammad, JJ.) ROBERT ARTHUR v. C. ARTHUR. I.L.R. (1943) Lah. 489=205 I.C. 625=15 R.L. 294=45 P.L.R. 136=A.I.R. 1943 Lah. 62 (S.B.).

S. 10—Dissolution—Release by wife in favour of husband—Effect of See Christian Marriage Act, S. 88. (1945) 2 M.L.J. 80.

S. 10—Ground for divorce—Adultery

committed outside India. A husband praying for the dissolution of his

marriage on the ground that his wife had been guilty of adultery, is entitled to rely upon adultery committed by her outside India. (Henderson and Edgley, JJ.) G. AYNSLEY CLIFFORD v. EVID CLIFFORD. 45 C.W.N. 249.

S. 10—Hindu marrying Christian wife—

Second marriage with Hindu during subsistence of first marriage—If a ground for divorce. Chitnavis v. Chitnavis. [See Q.D. 1936-'40, Vol. I, Col. 3199.] I.L.R. (1941) Nag. 260.

-S. 10—Petition—Contents.

Evidence in divorce proceedings to prove the case of the petitioner must be confined to the pleas set out in the petition. Consequently it is essential, as laid in S. 10 Burma Divorce Act to incident the petition for divorce shall state

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distinctly, as the nature of the case permits, the facts upon which the claim to have the marriage dissolved is founded. (Mya Bu, Dunkley and Shaw, JJ.) Ma Dun May v. Saw James. 193 I.C. 301=13 R.R. 241=A.I.R. 1941 Rang.

10-Petition for divorce-Woman named as adulteress-Right to intervene.

A woman named in the petition for divorce as an adulteress, has no right to intervene in the with notice of such proceedings. (Edgley, J.)

J. H. RAE v. L. C. RAE. 46 C.W.N. 842.

S. 11—Application for divorce on the

ground of adultery-Adding co-respondent as party-Leave to dispense with presence of corespondent-Procedure.

S. 11 of the Divorce Act makes it obligatory on a husband when he petitions for dissolution of marriage on the ground of adultery to make the alleged adulterer a co-respondent, unless he is excused from doing so on one of three grounds. The section excuses him from doing this when his wife is leading the life of a prostitute and also when the alleged adulterer is dead. The third case in which he can be excused is 'when the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it'. A suit without the co-respondent cannot proceed until leave to dispense with his presence has actually been obtained. It is not sufficient merely to apply for leave at the trial. A formal application has to be made before the trial and it has to be supported by proper evidence that the conditions of S. 11 of the Act have been complied with. (Braund, J.) WILLIAM PERCY BOWMAN v. HARRIET DOROTHY
BOWMAN. I.L.R. (1942) All. 395=201 I.C.
670=15 R.A. 70=1942 A.W.R. (H.C.) 130
=1942 A.L.J. 355=1942 A.L.W. 414=A.I.
R. 1942 A. 223.

-Ss. 12 and 14-Duty of Courts to consi-

der matters mentioned in—Undefended case. The obligation of a Court which is entertaining a petition under the Divorce Act to consider all the aspects of the case which are mentioned in Ss. 12 and 14 of the Act is not extinguished by the mere fact that the case is an undefended one. (Roberts, C.J., Dunkley and Sharpe, JJ.)
THOMPSON v. THOMPSON. 195 I.C. 325=14
R.R. 37=A.I.R. 1941 Rang. 193 (S.B.). 14-Delay-Discretion to excuse--S.

When can be exercised.

Before a Court can exercise the discretion to excuse the delay there should be some evidence explaining it, to make clear that there was no connivance or indifference to the adultery. (Mya Bu, Dunkley and Shaw, JJ.)

MAY v. SAW JAMES. 193 I.C. 301=13 R.R.

241=A.I.R. 1941 Rang. 110 (F.B.).

S. 14—Delay in presenting petition—Dis-

cretion of Court.

Under S. 14 of the Divorce Act, delay in presenting a petition for dissolution of marriage is not an absolute bar to relief; the Court has a discretion either to grant or refuse a decree. Having regard to the conditions of Indian society, the statement of the husband that for the sake of the children and the honour of the family he

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wished to avoid publicity and therefore put off seeking redress, is a sufficient explanation of any delay there has been on his part. (Nasim Ali and Rau, JJ.) Niranjan Das Mohan v. Ena Монан. I.L.R. (1943) 1 Cal. 340=205 I. C. 597=15 R.C. 647=47 C.W.N. 251=A.I. R. 1943 Cal. 146.

**-S**. **14—**Delay—Right to relief—Several acts of adultery relied on-Delay regarding some of them—Effect.

A petitioner for dissolution of marriage who has relied on several acts of adultery with regard to some of which there has been delay, is not disentitled to relief merely on that ground, when he has proved the latest adultery of all regarding which there has been no question of delay. (Nasim Ali, and Rau, JJ.) NIRANJAN DAS MOHAN v. ENA MOHAN. I.L.R. (1943) 1 Cal. 340=205 I.C. 597=15 R.C. 647=47 C.W.N. 251=A.I.R. 1943 Cal. 146. -S. 16-Petition under for making decree misi absolute—Court fee payable. See Court-Fees Acr, Sch. 11, Art. 20 (U.P.). 1945 O.

A. (C.C.) 91 (1).

S. 17—Confirmation of decree nisi—No-

tice to respondent and co-respondent-When not necessary.

Notice of confirmation proceedings to the respondent and co-respondent may be dispensed with in an appropriate case, (e.g.,) a case in which they did not before the decree nisi was passed deny the petitioner's allegation regarding adultery and were quite willing for the dissolution of the marriage and there is nothing that they can contest in the High Court. (Teja Singh, Marten and Bhandari, JJ.) Norris v. Norris I.L.R. (1945) Lah. 332=219 I.C. 41=18 R. L. 37=47 P.L.R. 1=A.I.R. 1945 Lah. 67.

S. 17—Decree absolute—Wife not substantiating her allegations of adultery against husband-Decree against her to be made absolute.

The decree against a wife may be made absolute where the wife declines to cite any witnesses to prove the truth of her allegations of adultery against her husband when given an op-Blagden, JJ.) SAW TUN WIN v. MA HNIN BYU. 196 I.C. 412=14 R.R. 88=A. I. R. 1941 Rang. 249 (S.B.).

-S. 17—Power of High Court—Applica-

tion by parties—If necessary.

The High Court has power to act on a reference under S. 17 of the Divorce Act, without any further application by and in the absence of the parties. (Blacker, Beckett and Bhandari, JJ.)
INAYAT MASIH v. Mt. DHANI. 213 I.C. 173=
17 R.L. 20=A.I.R. 1944 Lah. 162 (S.B.). -Ss. 18 to 20 and 45—Decree for nullity of Marriage-Form of-Decree nisi or absolute. The decree to be passed by the Calcutta High Court in exercise of its matrimonial jurisdiction in a suit for nullity of marriage filed under the Divorce Act must be one plain, simple, absolute decree, and it should not be in the form of a decree nisi to be followed by a decree absolute. The modern English practice of passing a decree nisi to be followed by a decree absolute in such a suit is repugnant to the C. P. Code which is expressly directed to be followed by the High

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Court by S. 45 of the Divorce Act. (Das, J.) GRACE ISABEL STEEDMAN v. ANNELEY ELIARDO BERESFORD DE COUREY WHEELER. I.L.R. (1944) 1 Cal. 258=219 I.C. 354=18 R.C. 91=A.I. R. 1945 Cal. 75.

S. 19—Grant of decree—Discretion Court—Admissions of parties—Value of.

Divorce proceedings and proceedings for nullity are not like ordinary civil suits in which the parties are litigating their own rights and seeking decrees to which they are indisputably entitled if the facts they allege are proved. There is no right of divorce. No one is indisputably entitled to a decree of nullity. The Courts have a discretion in every case even when all the necessary facts are clearly proved. The slightest bad faith, any suspicion of collusion, the least want of candour, entitles the Court to stay its hand. The State is vitally concerned in the institution of marriage and insists on strict proof and a close investigation before it will permit the tie to be dissolved. Provision is made for a loosening up of the normal procedure to prevent injustice in extreme cases but such cases must be extreme and should be very rare, and always, adequate reasons for any departure from the normal should be given by the Court. The mere fact that the other side admits the facts, or does not contest, is not in itself enough, though that may be taken into consideration along with other matters. (Pollock, Niyogi, Bose and Digby, JJ.) K. v. S. I. L. R. (1943) Nag. 474=209 I.C. 40=16 R.N. 103=1943 N.L.J. 296=A.I.R. 1943 Nag. 185. 19—Impotence of wife—What amounts to-Husband finding it impossible to

obtain consummation-Corroboration of his testimony-If legally necessary.

If every attempt on the part of the husband to consummate the marriage immediately reduces his wife to a state of hysteria and the conduct of his wife is such that it is impossible to obtain consummation short of using force and being brutal and virtually raping her, the law regards this as impotency on the part of the woman within the meaning of S. 19 of the Divorce Act. It does not enjoin cruelty and brutality on the part of the man. It does not direct him to force the woman to his will. It respects her body and, provided her conduct is not just wil-fulness or spite and is due to true incapacity, it grants release from an impossible situation which should never have arisen. Incapacity in the woman is possible vis a vis a particular man even when the woman is shown to have had previous sexual experience. That the incapacity need not be physical is now well established. It can be due as well to mental and physical causes. All that is required is an invincible repugnance to the act of intercourse either generally or with the particular man. The rules of evidence are not different in these cases and there is no minimum standard of proof necessary. The uncorroborated testimony of the petitioner is sufficient, if it can be believed. testimony cannot be discarded solely because the case is an unusual one. The mere fact that the wife also wants the marriage to be annulled does not necessarily import collusion. (Pollock, **DIVORCE ACT (1869), S. 19.** 

Niyogi, Bose and Digby, JJ.) K. v. S. I.L.R. (1943) Nag. 474=209 I.C. 40=16 R.N. 103 =1943 N.L.J. 296=A.I.R. 1943 Nag. 185.

—S. 19 (4)—Onus of proof.
Where a Hindu who has a Hindu wife marmarriage to his Hindu wife and that therefore

-S. 34—Amount of damages—Basis.

It is now a settled rule that damages in divorce proceedings must be compensatory, not punitive. The amount must depend on (1) the actual value of the wife to the husband, (2) the proper com-pensation to the husband for the injury to his feeling, the blow to his martial honour and the serious hurt to his matrimonial and family life. (Nasim Ali and Rau, JJ.) NIRANJAN DAS MO-HAN V. ENA MOHAN. I.L.R. (1943) 1 Cal. 340=205 I.C. 597=15 R.C. 647=47 C. W. N. 251=A.I.R. 1943 Cal. 146.

S. 37—Alimony—Execution—Exemption under S. 60 (1) C. P. Code if available. See C. P. Code, S. 60 (i) AND DIVORCE ACF, S. 37. 1942 N. L. J. 450.

——Ss. 44 and 3 (5)—Person receiving maintenance ceasing to be 'minor'—Provision for—Discretion of Court under S. 44—Limits of—English law, if can be invoked.

There is no power under the Divorce Act to make any provision for children who are no longer 'minors' under the Act. So when a 'minor' in receipt of maintenance ceases to be a by the Governor. No valid objection can be 'minor', the order in 'favour of such a person taken to the form of the sanction if it is given also ceases to be operative. There is no dising the name of the Provincial Government. cretion under S. 44 of the Divorce Act as re- (Spens, C.J., Varadachariar and Muhammad gards maintenance for children who have ceased to be minors and the English law cannot be invoked to widen the discretion of courts in India. (Collister, J.) HILT v. HILT. I.L.R. (1943)
All. 25=204 I.C. 351=15 R.A. 332=1942
A.L.J. 588=1942 A.W.R. (H.C.) 335=1942
A.L.W. 537=A.I.R. 1943 A. 8.

10, C. P. Code, if applicable.

The provisions of O. 7, R. 10, C. P. Code, are applicable to proceedings under the Divorce Act. (McNair and Henderson, JJ.) Sushila Mala Samaddar v. Jitendra Nath. 47 C.W. N. 707.

far can be acted upon.
Ss. 47 and 51 of the Divorce Act, no doubt, enable facts to be proved by affidavit evidence, and in extreme cases, perhaps even by verified should be commenced ab initio. (Spens, C.J., statements. But the importance of matrimonial Varadachariar and Muhammad Zafrullakhan, J.).

proceedings cannot be minimised by relegating BASDEO AGARWALA v. EMPEROR. I.L.R. (1945)

DRUGS CONTROL ORDER (1943), Cl. 16. them to the class of cases in which alone a Civil Court would act on affidavit evidence in a contested matter. The rule of English law relating to affidavit evidence in matrimonial cases, which is also applied by the Courts in India, is ries a Christian woman representing to her that he that though a party can in theory prove his or has been converted to Christianity and is a bacheher case by affidavit, this can only be done under lor, in a petition for dissolution of marriage, the direction of the Court, and in practice such by the latter, the onus is on him to prove his alle-gation that he was a Christian at the time of his unless good cause is shown. Poverty, the difficulty or expense of procuring witnesses, distance there was no legal marriage with her. If he from the Court, and the like, might be good does not discharge that onus, the petitioner is cause in suitable cases, particularly if the case is entitled to a decree of nullity under S. 19 (4) undefended. But no good cause can be shown of the Divorce Act. Even if this is denied to in a case where both parties are personally preher, she is entitled to a divorce on the ground for fraud. (Young, C.J., Blacker and Muhambar Munir, JJ.) Vermani v. Vermani, 205 gi, Bose and Digby, JJ.) K. v. S. I. L. R. I.C. 290=15 R.L. 283=46 P.L.R. 174=A. (1943) Nag. 474=209 I.C. 40=16 R.N. 103 I.R. 1943 Lah. 51 (S.B.). DOMICILE—Acquisition of foreign domicile—

> The deceased went to Singapore in 1884, married a wife and started a business at that place. He returned to India finally in 1909, but there was no evidence that from 1884 he lived continuously in Singapore. It appeared that by another wife of his in India he had a number of children and apparently he was visiting India a number of times. After 1909, he never went back to Singapore, and he looked after his business at Singapore from India.

> Inference from circumstances—Residence abroad—Sufficiency.

Held, that it could not be said that the deceased, in the circumstances, acquired a foreign (Singapore) domicile. (Somayya and Yahya Ali, JJ.)
JAINA MAHOMED SHERIEF MARACAIR v. OFFICIAL
ASSIGNEE, MADRAS. 1945 M.W.N. 585=58 L.
W. 462=A.I.R. 1946 Mad. 25=(1945) 2 M.L.J. 318.

DRUGS CONTROL ORDER (1943), Cl. 16 -Form of sanction.

Sanction required under Cl. 16 of the Drugs Control Order need not be expressed to be given reases to be operative. There is no disin the name of the Provincial Government.

In under S. 44 of the Divorce Act as rein under S. 44 of the Divorce Act as rein under S. 45 of the Divorce Act as rein under S. 45—Proceedings under Act—O. 7, R.

Peror. I.L.R. (1945) Kar. (F.C.) 21=218

I.C. 449=18 R.F.C. 2=58 L.W. 313=47

I.C. 449=18 R.F.C. 2=58 L.W. 313=47

I.C. 351=15 R.A. 332=1942

I.S. 10=1945 M.W.N. 274=80 C.L.

I.S. 45—Proceedings under Act—O. 7, R.

P. Code, if applicable.

P. Code, if applicable.

P. Code of applicable.

P. Code of applicable. Validity-Sanction subsequently given-Proceedings, if should be commenced ab initio.

Cl. 16 of the Drugs Control Order is plain SAMADDAR v. JITENDRA NATH. 47 C.W. and imperative, and it is essential that the provisions should be observed with complete strictness. 47 and 51—Affidavit evidence—How without the requisite sanction, they should be regarded as completely null and void, and if sanction is subsequently given, new proceedings should be commenced ab initio. (Spens, C.J., DRUGS CONTROL ORDER (1943), Cl. 17.

Kar. (F.C.) 21=218 I.C. 449=18 R.F.C. 2=58 L.W. 313=47 Bom.L.R. 392=1945 P.W.N. 274=80 C.L.J. 8=1945 M.W.N. 428 (2)=46 Cr.L.J. 510=1945 F.C.R. 93=47 P.L.R. 50=49 C.W.N. (F.R.) 59=1945 F.L.J. 45=A.I.R. 1945 F.C. 16=(1945) 1 M.L.J. 369 (F.C.).

—C1. 17—Order of forfeiture by trial Court —Revision—Interference by High Court.

The High Court, while unholding a conviction

The High Court, while upholding a conviction in revision, has powers to interfere with an order of forfeiture passed by the trial Court under cl. 17 of the Drugs Control Order. (Roxburgh and Ellis, JJ.) KOMINATOS v. EMPEROR. 49 C.W.N. 548=A.I.R. 1946 Cal. 1. DURGAH KHWAJA SAHIB ACT (XXIII OF 1936), S. 4 (2)—Competency of Vice-Pre-

sident to prefer appeal in the absence of the

President.

Though according to the Durgah Sahib Act the committee is to sue or be sued through its president, in emergent cases where the President is absent, the Vice-President is justified in law in filing appeal himself. (Davies.) Durgah Committee v. Agrar Ahmad. 1944 A.

M.L.J. 25.
S. 4 (2)—Proceedings in suit, if can be signed by the Vice-President on behalf of the

President.

The filing of written statements by the Vice-President in the absence of the President is not illegal. Though formally the name of the President should appear as a party to the suit, if in fact the committee actually sanctions the filing

DURGAH KH. SAHIB ACT (1936), S. 11.

of or the defence of a suit, the various proceedings in the suit may rightly be signed on behalf of the President by the Vice President. (Davies.) DURGAH COMMITTEE v. KRISHNA. 1944 A.M. L.J. 38.

——S. 11—Hereditary posts—Duty of Durgah Committee in regard to—Women, if can succeed to such posts—Appointment of substitutes.

In the case of the hereditary posts, the Durgah committee should decide once and for all as to who are the proper persons to inherit them. A woman can succeed to such a post and when she or any other legal holder is under a disability, she or he can appoint some person to perform the duties with the concurrence of the committee. (Davies.) NAZIR MOHD. v. RABIA BIBI. 1942 A.M.L.J. 47.

——S. 11 (e)—Emoluments paid under— Nature of—Members of family, if can claim share as of right.

The emoluments paid under S. 11 (e) of Durgah Khwaja Sahib Act, to the hereditary cooks concerned for services rendered were fixed originally in firman rlating thereto. It was fixed in perpetuity and was granted to cooks and menials themselves for performing the labour of cooking. There was no mention of any kind of grant to the families of such cooks. The offices were to be hereditary. In such a case there is no legal authority vested in any Court to compel the cooks to share their emoluments with all the members of their family. (Davies.) YAQUB ALI v. QUTAB ALL 1942 A.M.L.J. 7.